Conflict of Laws Teaching Material

Sponsored By Justice and Legal System Research Institute

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Unit One

General Introduction to Conflicts

Unit Objectives

By the end of this unit, students are expected to explain:

- Why the discipline is commonly known by two names;
- The main elements of the definition used in this material;
- The term 'foreign element';
- The points that characterize the discipline;
- The main parts of Conflict of laws (the scope);
- How conflicts questions do arise;
- Why Ethiopian courts do entertain cases containing foreign element;
- Why Ethiopian courts do apply foreign laws to solve conflicts cases;
- Why Ethiopian courts do recognize and enforce foreign judgments and arbitral awards;
- Briefly the historical development of conflicts/choice of law theories;
- What our judges were doing in the absence of conflicts rules

1.1 Nomenclature

Two names, neither of which are fully descriptive nor wholly accurate and precise but could be interchangeably used to designate the subject, are in common use viz. Private International Law and Conflict of Laws (also shortened Conflicts rules).

The term private international law might connote that the subject somehow in the context of private disputes, partakes the affairs of the general law of nations. As to the other term besides indicating that laws do "conflict", it seems to assume the existence of laws of equal applicability, which is not necessarily the case. Moreover, it suggests that laws

"conflict" and by hypothesis there is a mechanism (e.g. of superior authority or law, while in fact there is no one) for the resolution of the conflict.

One writer has also criticized the name "Conflict of laws" as a misleading one in the sense that the object of the subject is to eliminate any conflict between two or more systems of laws which have competing claims to govern the issue before the court, rather than to provoke such a conflict, as the words may appear to suggest.

Although there are other terms, such as law of multistate problems or transnational problems, which might be technically accurate and more descriptive, the above terminologies are maintained along with their flaws for the sake of their well established usage.

1.2 Definition and Analysis

Due to its nature, varying scope and other factors, it is found to be difficult to come up with a universally agreed upon single definition of the discipline 'Conflict of Laws'. We neither have ours. Until we have our own definition of the subject, what the writers propose is to collect majority of possible elements of the discipline and construct a functional definition (or description).

Accordingly, it can be described as a branch of law which provides procedures and guidelines to assist a judge in private litigation, to select a court and a law to which a case is closely connected, which might appropriately be applied in resolving a legal dispute before the court arising out of a set of fact, events or transactions which have a foreign element. It, traditionally, also comprises rules of recognition and enforcement of foreign judgments and arbitral awards.

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It deals with the questions of *when* and *why* the courts of one jurisdiction take into consideration the elements of foreign law or fact patterns in a case or consider the prior determination of another state in a case pending before them. Although the main focus is

on choice-of-law process, questions of judicial jurisdiction, and recognition and enforcement of judgments of a foreign state are also governed by the rules of conflict of laws. (See the discussion on Scope, below).

The basic concept enshrined in the above definition is the idea of a "foreign element". What do we mean by *foreign element*? And what does it *refer* to? It is better understood by employing an explanation. When a case is said to contain a foreign element, the *reference(s)* may be of three natures ─ personal, local, or material ─ in that, respectively illustrated, if one of the parties of the case is a foreigner (including one from another federating unit) or the transaction of any nature took place, totally or partially, abroad (outside the forum state) or, finally, the object of the dispute (property, esp. immovable property) is situated in another state (including a member of federation); the case is said to contain a foreign element.

For conflict of laws to come to the scene of the court, it is essential that a foreign element should exist in a case. In other word, if the case contains no foreign element, from the outset, this area of law is irrelevant. It functions only to the extent such element exists.

1.3 Nature

There are some features that characterize this discipline. Some of the defining elements could be elaborated as follows. The application of the rules of conflicts law (choice of law) does not by itself decide a case, unlike that of the rules of law of contracts, tort, or family. It does not solve a case in the sense that its rules do not furnish a direct substantive solution to the dispute at hand. It carries the case only half a way until a certain category of law is chosen in order to dispose of the case with a substantive remedy. We cannot talk about conflicts law rules after we choose the applicable system of law. The function of the rules is only up to that stage.

Conflict of laws is one department of law but not one amongst the peer departments such as family, contracts, and tort. It does nothing on its own. It deals with most private cases

of civil and commercial nature so long as they contain a foreign element. To mention a point, this discipline is not concerned with public cases like criminal, revenue, customs, constitutional and administrative cases. Much will be said on this score on the topic – 'Rules of Immediate Application'.

This body of law is an instrument or a technique merely providing a body of rules that prescribe the conditions under which a certain court is examined whether it has adjudicatory jurisdiction to entertain a case; and if it has the required competence, what system of law, the forum's or foreign, will be employed to decide the case or whether a judgment of a foreign court will be recognized and enforced by a state's courts. (See, again, the scope)

Another nature of the discipline is that conflict problems arise at both the international and national level (interstate conflicts). In the latter case the situation arises in countries with a federal constitutional setup such as the present Ethiopia in which powers are divided between the component states of the Federation and the federal government. (See Art.50 Subs-(1) and (2) of the FDRE Const.) To the extent that the constituents of the federation are endowed by the federal constitution with the power to enact their own respective laws, the states are treated as independent for the purpose of conflicts law. Each unit is regarded as separate and sovereign entity having distinct and separate legal system concerning the areas of legislative power entrusted to them. Besides, the states are to consider one another as a foreign nation but in a sisterhood manner. Hence, a case that concerns domiciliaries of at least two states is said to contain a foreign element.

At this juncture, mention of one point is important. Except that the inter-state (state - state) conflicts work under the umbrella of the Federal Constitution —the fundamental law of the country; inter-state conflict of laws' principles are essentially the same as to the international (country - country) conflicts. A case can also arise between a "domiciliary" of a federating state and another state in the international sense (state - foreign country). For example, a case of validity of marriage between a boy from the Gambella Region of the FDRE and his former Sudanese girl friend is said to contain a foreign element. Hence,

there may be a conflict of case. In this case, the family laws of the Gambella Region (and not necessarily of Ethiopia as a whole) and the Sudan will be vying for application — which of them applies to resolve the case?

Not to mention about the independent sovereign states, the laws of the federating units differ one from another in connection to their approaches to the needs of the various communities they serve. This is so because laws usually if not always, reflect the culture, custom or usage, economic status, religion, and other needs of the society which they encompass. It logically follows that different laws will exist due to the abovementioned factors. Again the natural consequence is that it will not be uncommon for transactions to arise or disputes to happen between or among persons or/and entities of those different states.

1.4 Scope

Another area of disagreement in this discipline is regarding the areas it comprises. According to the traditional view, conflicts mainly deal with three major sub-divided but interrelated areas. They are, in the chronological order in which the three subjects are likely to be met in practice, judicial jurisdiction, choice of law, and recognition and enforcement of foreign judgments and foreign arbitral awards. Many civil-law legal system nations regard questions of jurisdiction and recognition and enforcement of foreign judgments and arbitral awards as matters of international procedural law, not issues of private international law. According to these countries, the discipline deals essentially with choice of law problems.

However, these Civil Law Legal System following nations, such as France, have choice of law rules which turn on the connecting factor *nationality* of one or both parties. Hence, the subject in those countries often encompasses the Law of Nationality and Citizenship and some special rules pertaining to the position of aliens. Some countries also add another category to the subject: International Legal Cooperation in civil matters. However, the elements in this very paragraph do not enjoy the acceptance of conflicts

scholars for they involve more of Public International Law than Private International Law. This teaching material is developed in line with traditionally established scope of conflicts - the trio and not the quartet.

In this connection, although it is obvious that Ethiopia does not have a codified and coherent conflicts law, Art.11 (2) (a) and (c) of Proc. 25/1996 and the Civil Procedure Code of Ethiopia (esp. the former) deliberately or not implies that (recognition) and enforcement of foreign judgments is not part of conflicts discipline. On the other hand, Art.3 of the Initial Draft Proclamation to Provide for Federal Rules of Private International Law prepared by the Justice and Legal System Research Institute considers the three elements as parts of the discipline. What do the three elements mainly deal with?

Judicial jurisdiction, dispute-resolving power or competence to hear and determine a case, is about whether a court of a particular state can appropriately entertain a case with a foreign element. As will be expounded in chapter two, there are different categories of theories of judicial jurisdiction.

Choice of law, for which "conflict of laws" is often used as a synonym and to which "conflict of laws" is referring when used in its narrow sense, is the most volatile, difficult and challenging of the three principal conflicts subdivisions. It is concerning the selection of the appropriate rules of a system of law, the forum's or foreign's, which it should apply in deciding a case over which it has jurisdiction. The rules that are employed for the purpose of selection of same are known as "choice of law" rules. The issue arises whenever citizens of different states have a connection to a certain case and a contention arises as to which their respective laws differ, or there is "genuine conflict". This time a choice of the applicable law comes to the stage.

However; first, it could be argued that no choice need be made if an average solution can be distilled from the various conflicting laws; second, it is possible, perhaps, to evade that choice if the laws involved are materially the same. This much suffices for the moment.

The concept's doctrines and its relationship with other fields will be dealt with in subsequent discussions.

The third and last category of the conflicts realm regards the heart of any litigation. It is about the recognition and enforcement of court judgments and arbitration awards rendered by foreign courts and arbitration tribunals, respectively. “Foreign" in this sense does also denote a state in a federation besides a fully politically independent sovereign country. For both cases, in general state means a certain geographic portion of the earth's surface having an independent system of law.

The scope of the discipline can also be seen in its relation with public international law. Private international law and public international law are two different but somehow related areas of laws. While the former, which is part of each state's domestic law, is concerned with the legal relations between private individuals and corporations/partnerships/companies, though also with the relations between states and governments so far as their relationships with other entities are governed by municipal law (an example being a government which contracts with individuals and corporation by raising a loan from them); the latter (public int'l law) is the name for the body of rules and principles which govern states and international organizations in their mutual relations about which "there exist a certain degree of consensus". However, it has to be noted that even private individuals are becoming subjects of public international law esp. in areas of international crimes.

Despite their differences, one can notice that they have a good deal of common grounds. First, in a largely common historical origin; second, in the 17th century basis of the conflict of laws in the territorial theory of sovereignty and comity; thirdly, in exception to the normal application of law created by sovereign and diplomatic immunity; and finally, by overriding considerations applied by the courts to displace the normal operation of rules of the conflicts when they threaten friendly international relations.

1.5 Raison d'être

Why and how could the question arise? Can't we get rid of it? A certain conflicts scholar by the name Arthur Taylor von Mehren wrote that if human society were so organized that all aspects of life moved within economic, social, legal, and political spheres that were unitary and coexistence; the problems dealt with through choice of law would never arise. The reality is not, however, so. There are certain factual and legal realities that necessitate the existence of the choice of law discipline.

There is a fact, which all conflicts thinking is premised at, that some legal transactions are somehow connected with more than one legal community, either because the parties to the transaction are citizens or domiciliaries or residents of different jurisdictions, or because the occurrence that gave rise to their legal relationship took place in another state and/or their own, or because the object of their relationship is situated elsewhere. Moreover different legal communities have different laws. There is no universally established law governing relationships between private parties. In other words, integration and diversity, the two dominant features of modern culture, together give rise to conflicts cases. Different communities' cultures are naturally diverse and since this feature cannot absolutely be done away with, practical necessity calls for harmonization or integration as a sole alternate.

Because of economic, such as commerce; social, such as marriage; political; natural catastrophe; even war, and some other related phenomena: people move or travel from state to state or from jurisdiction to jurisdiction. This is aggravated (or "facilitated"?) by the "constantly improved means of transportation and communication ". This fact necessarily results in the creation of transactions connected with more than one jurisdiction. This inevitably gives rise to disputes, as in any legal transactions. But what is unique about this dispute is for the nature of the issue is inter-provincial or transnational. The transactions as well as the disputes arising therefrom clearly involve more than one state, resulting in the involvement of different systems of laws.

To sum up, it often happens that the transactions entered into in one place have force and effect in a different country or are judicially decided upon in another place. And it is to be immediately underscored that the legal order itself is decentralized among a plurality of sovereign or autonomous authorities. In other words, the laws of many countries even regulating similar categories of social life may not be the same. But this situation cannot stand and continue as it is. It would be against the reality on the ground. It would be against today's interdependent society's behaviour. The contemporary or modern situation of the civilized world — integrated society (e.g., via globalization, to the extent, in an international scene and "to live as one economic and social community" in a federal scene) demands the integration of the diverse laws. As indicated above, therefore, *necessity* is the fundamental motivating force - the need for order so that better life can exist and continue.

1.6 Functions

As a mechanism; if uniform laws cannot be made for all states which is largely unattainable, it will be the concern of the conflict of laws realm to come up with a mode of adjustment to do away with the unfavourable *effects* of the existence of diverse laws.

But, after all, why such a worry? Why don't we simply apply the law of the forum for any case that comes to the attention of the forum, which is the easiest way to the judge no matter whether it involves a foreign element? What are the controlling motives behind allowing the application of foreign laws but in another nation's soil?

The dominant motivating principle is the desire to do justice in cases involving a foreign element. The invariable application of the *lex fori* i.e., the local law of the place where the court is situate, would often lead to gross injustice as in this case: suppose a couple were married abroad many years ago. The marriage ceremony (which is not an essential element in a marriage relationship), though regular according to the law of the place where it was performed, did not perhaps satisfy the formal requirements of the forum law. Nevertheless, to apply the forum's relevant law to test the formal validity of such a

union, and thereby to deny that the couples are husband and wife, would be nothing but a travesty of justice.

Generally, according to the traditional choice of law method, the way this objective should be achieved is through the proper functioning of the carefully formulated choice of the relevant or appropriate legal rules which are also believed to have substantially incorporated sense of justice and are structured based on a sufficient or genuine connection. The rules to this effect are carefully formulated means that not only should the choice-of-law criteria employed be more subtle, more sensitive to actual fact patterns but they should also reflect the law's general concern for substantive justice in order to render, at the final analysis, a just result.

In other words, the local law (*lex fori*) may not always necessarily be the proper law (*lex causae*) that should govern the transaction at hand. Another law other than the *lex fori* might be the appropriate law. In both ways, to apply either the *lex fori* or foreign law; it is through the predetermined choice-of-law rules that one can reach the applicable law. The choice-of-law rules help us settle the problem of choice between possible eligible laws. A judge is required essentially to apply the law found to be applicable through the direction of the choice-of- law rules unless there are strong reasons such as public policy not to do so. Any choice-of-law rule should not express any bias for, or may be against, forum law. It should only put the bases or criteria that would enable us select the appropriate applicable law, which could be the forum's or another country’s.

The other main reason why recognition and thereby application of a foreign law in a case containing a foreign element is necessary is to determine the rights and obligations of the parties in the sense that if the court is to carry out in a rational manner, the policy to which it is committed ─ that of entertaining actions in respect of foreign claims ─ it must be in the normal course of things, take account of the relevant foreign law or laws which the parties' concerned rights and obligations were created (the Vested Rights Approach). In other words; if the parties have selected a foreign law, expressly or impliedly, to govern their rights and liabilities under it, and have regulated their positions on the

assumption that the foreign law would govern, it would in most cases be wholly wrong for the forum court to impose different rights and duties on them by applying the unintended local law. The assumption is that two countries' laws of even the same legal category are different in their substance. Accordingly, the right and duties they create are different in content. This necessarily implies that the legal effects of an act performed in one state differ from those of another state's legal effects of similar act. It is from this situation that the threat of *limping legal relations* emanates – when a legal condition created by one law is not validated by another.

It is the task of the choice-of-law rules to intervene in order to prevent limping legal relationships and protect individuals who acted in careful compliance with the law which is believed to govern their everyday legal conducts. Individuals should be able to know what rule of law to govern them and have reasonable expectation that this rule of law will be the measure of their rights and obligations whenever and wherever the question may eventually arise. In that a right having been created by the appropriate law of a state where some definitive fact occurred, the recognition of its existence should follow everywhere unless public policy reasons of the forum forbid so.

Another objective that conflicts law is destined to achieve is *preventing or reducing forum shopping* which is an impediment to the smooth operation of law in multistate cases caused by the existence of the combination of multistate legal intercourse and legal diversity. Forum shopping is making use of jurisdictional options to affect the outcome of a lawsuit provided that all courts would always apply their own laws. This is again due to the assumption that laws of different states are not the same.

How can we reduce forum shopping?

The two ways this goal could be achieved are: first, to delineate the boundaries of a court's jurisdiction in multistate cases in the sense that there will be only one state where the plaintiff could bring suit and there would be no opportunity for forum shopping. In the presence of the conflicts law applicable to the whole federation, this is attainable in

interstate conflicts problem involving cases. Second; which is also possible to be achieved having a federal choice-of-law rules, is even the plaintiff has a choice between several laws for a given case; a unilateral choice of forum would not make any difference to the outcome of the case. The key point here is to have one choice-of-law rule that directs to a fixed applicable law.

Not only indiscriminately applying the local law, the following illustration can elaborate how injustice can also be made when the forum court assumes jurisdiction over *any* case which is referred to it. A great injustice might be done to a foreigner, who is abroad and who has not agreed to submit to a forum's court a dispute arising from a transaction which is not connected to the forum by summoning him before that court and so placing him in dilemma that either he has to incur the inconvenience and expense of coming to the forum to defend his interests or he has to run the risk of default judgment and so putting in peril assets he may possess here.

Finally, let us wind up our discussion looking at how the third element of conflicts ─ recognition and enforcement of foreign judgments and arbitral awards, can promote justice or, conversely speaking, avoid injustice. The following example can afford a justification for granting recognition and enforcement to a foreign decision. If the rendition forum (the forum that rendered or passed the decision) has exclusive jurisdiction but the judgment can only be enforced in the recognition or enforcing forum (assume the court is where sole enforcement can be effected); or in other words, if the person cannot bring a *de novo* action in the recognition forum for the latter lacks judicial jurisdiction and the person cannot demand enforcement in that forum, he will be left without any remedy ─ which is completely unfair! The only alternative to do away with this gross injustice is to lend a hand i.e., to recognize and/or enforce the judgment.

Generally, it is via the various conflicts rules besides choice of - law rules, the rules concerning judicial jurisdiction, and recognition and enforcement of foreign laws and arbitral awards, acts and decisions that the above ends or goals ─ to do justice and to determine the rights of the parties' ─ could be achieved. How? The conflicts rules, in a

way of protecting states' (or their citizens') legal intercourse from being greatly impeded, *settle* the problem of choice between eligible laws, *delineate* the boundaries of a court's jurisdiction in multi-state cases, and *put a standard to measure* the acceptability of foreign judgments either to recognize or to recognize and then enforce. The same holds good for awards.

1.7 Development of Conflicts Theories: General

Students should note here that the following historical development is essentially, if not all, of choice of law theories. After all the history of Conflict of Laws or Private International Law is history of Choice of law.

But, do we after all need to study the past? The answer is definitely YES! For the past has yielded an astonishingly rich accumulation of ideas, which still guide the present theory and practice, glimpse to that is very important. There was an early working out of necessary principles of international coexistence and intercourse, primarily on the commercial place. In effect, lending a time to its discussion is, the writers think, worthy.

When was the technique of conflicts invented? Next, a chronology of relevant conflicts development follows.

Since centuries one can learn from conflicts literature that devising theories and approaches of conflicts trying to address problems that inevitably arise because of the laws' differences have been evolving. The focus was mainly on choice of law problem-solving and little attention was given to problems of jurisdiction and recognition and enforcement of foreign judgments.

- **The Origin**

Generally, in the ancient world, the treatment of foreigners was different from those of citizens. Outstanding instances of this type mentioned by Prof. Yntema, in addition to arbitration of international disputes, are: special courts for cases involving foreigners in

the Greece cities of the Hellenistic period and the *praetor peregrinus* (judge for foreigners) in the Roman Republic after the archaic *recuperates* ─ a board consisting three or five members, originally only for processes between Romans and *peregrine* (foreigners), but subsequently for cases in general which required a speedy decision, esp. in suits concerning property and *de statu*. Instead of the *jus civile*, the "general principles of law common to all nations" was applied. In a related history, contracts between Greeks and Egyptians, if concluded in Greek form, was to be tried before the Greek courts; if in Egyptian form, before the native courts in accordance with the law of the country. However, these situations can hardly enable us to conclude that there was a choice of law process at that time. Rather the focus seemed on jurisdiction though the jurisdiction's local law was thereby immediately applied.

Showing the influence of this history in later stages, it was said in a summarized manner that the Roman conception of a universal *corpus juris* pushed the problem into the background though it came to the fore again with the resurgence of commerce in the autonomous Italian city states of the Middle Age, and it took a vigorous new turn in the 17th century the Netherlands "envisioned by the jealous separatism of seven individualistic provinces."

- **The Statutory Intent**

In Northern Italy and Southern France, the then scholars in the 11th - 13th C preferred to tackle the problem of choice of law in a conceptualist rather than a teleological fashion, in the sense that instead of looking for substantive solutions, they theorize about the spatial reach of local laws.

It is generally agreed that the conflicts of laws as we know today is claimed to have begun emerging in the early part of the 13th century in Italy when the local rules *statuta*, which differ from city to city and when the need arose to make choices in their application as a transaction or relationship bore a connection to more than one locality. Scholars began to discuss whether local *statuta* could be applied extra-territorially to

citizens abroad, and whether foreign citizens within the forum's territory were bound by its laws. In other words, the statutists attempting to determine which law governs transactions involving residents of other city-states classified the laws in a more formalistic way as "real" and "personal". Real statutes in the main concerned (real) property and were territorial in application; personal statutes concerned such questions as capacity, followed the person and thus had extraterritorial effect.

Despite its immeasurable achievement in progress in that it gained wide acceptance, the theory has suffered a great problem in its application. The results of scholars' attempts to find a basis for distinguishing between personal and territorial (or "real") statutes were disappointing. Its simplicity was belied by the difficulties experienced through out its history in allocating any particular legal transaction to its proper statute.

How can one differentiate whether one statute is real or personal? The great Bartolus took the position that the wording of the "statute" may determine its reach. He employed a very superficial test. To explain more, he tried to make a distinction on the basis of the grammatical construction of the statute and based on that he classified the same as real if the thing is mentioned first and as personal if persons occupy the first place. The famous example is: if a law provides that "the possession of deceased person shall pass to the first born," the *lex rei sitae* would apply. But, if it were to read "the first born shall succeed," there might be difference in their consequence for the statute would then be personal rather than real.

The spatial reach of a statute cannot be told by its wording. After all, the wording of a law statute does not necessarily reflect the policy of same.

Although the criteria propounded by his successors, the statutists, were no better; the latter writers mocked Bartolus' reliance on the mere "shell of words". Similarly, d'Argentrè severely criticized his verbal distinction via his sarcastic statement that "children would blush if they were to think or say such things".

In this connection, the French statutists distinguished statutes mainly between "substance" and "procedure" and focused on the power to create rights and obligations, i.e. legislative jurisdiction, which was said not to exist locally in the case of a foreign citizen.

Before proceeding to other discussions, let us wind up with the Italians work. As Frederick Juenger has put it rightly, the flourishing trade and commerce of upper Italy also promoted the development of a law of merchant - *lex mercatoria*. The *lex mercatoria*, which Mait-land called the "private international law of the middle ages," offered supranational solutions to what have since become choice of law problems.

- **The Party Autonomy**

During the 16th century, the most important development in the statutory doctrine was introduced by the great French jurist Du Moulin just in a modified manner. Without rejecting the Italian division into statutes as real and personal, he rendered a distinct contribution to the discipline by strongly emphasizing on party autonomy.

By distinguishing three principal categories in the subject matter to which statutes may apply; the mere procedure and form of acts, questions affecting the merit that are dependent upon the will of the parties, and substantive questions not dependent on the will of the parties; he declared the intent of the contracting parties, express or tacit, to be a source of law that in its sphere of application transcends the mere authority of a statute as such, limited to its territory.

In other words, Juenger noting that Du Moulin did not invent the idea that those who enter into an agreement may stipulate the law that governs their bargain; emphasized his (Du Moulin's) adding a new imprudent to the discipline by stretching the principle of party autonomy to encompass situations in which the parties had failed to designate the applicable law. By the way, unlike d'Argentrè, Du Moulin favoured the extension of the personal statute to a wider range of legal relations. This is further explained below.

In the same century, for the simple but broad scheme of classification of Italian statautists as real and personal failed to satisfy the intricacies or realities of life, law, and scholarship; the French Judge and Scholar d'Argentrè identified a third class of statutes - "mixed statutes". He identified such to solve "mixed" questions, which require rules, when relationships had contact with different communities even from the beginning (for instance, when a contract was concluded between citizens of different city-states).

Preference was being given to the "real" element in the application of "conflicting" mixed statutes. D'Argentrè's emphasis of the predominance of real statues, reflecting his strong Breton feudal tradition in resisting personal statute extension, favored territorialism. This shows us that statutist theory, envisaging "international" and "universalistic" system, accepted implicitly the premise that one unit, among the territorial governmental units, has the power to legislate with extraterritorial effect subject only to another's ability to block that effect through adoption of an overriding real statute. The major shortcoming of the universalistic system was its failure to explain why one should import the other's law.

Professor David Cavers observed the statute theory's trouble that neither judges nor scholars could agree upon which statute was personal, which was real, and what should be done with those were mixed. Especially, the introduction of the last – mixed statutes- is interesting. Let alone filling any gap it made things worse by complicating matters further. Moreover, when the laws of two states are relevant in the same case, one of them may classify a given issue as personal while the other as real.

- **The Location of Legal Relation**

The death-blow to the surviving schools of statutists appears to have been dealt by Wächter, a German jurist writing in the 1840's. In a lengthy essay, he criticized the uncertainty inherent in the classification of *statuta* and, more importantly, denied that a state's legislative jurisdiction within its own territory could raise an obligation in another state to recognize such legislation extraterritorially.

The criticisms of Wächter were followed by his contemporary in mid-century by the work of the great German Romanist, Karl von Savigny, who achieved the important shift of focus from classification of rules to 'consideration of legal relationships'. As Cavers put it, Savigny did not seek for solutions to choice-of-law problems in the classification of local statutes rather he sought to find a proper seat for each legal relationship in its connection with a given state whose law would thereby be rendered applicable, whatever its terms.

Savigny devised such a mechanism hoping that wide spread international agreement might be achieved as to the localization of these relationships. The idea of universal principles of conflicts law, a reflection of the universal idea of reason reached its highest point in his time. However, for Savigny's daring premise — existence of universally accepted conflicts rules and categories of legal systems — is unattainable due to various reasons. The view is at present subject to modifications.

- **The Vested-rights**

The vested-rights theory was propounded by A.V Dicey in England and by J.H Beale, the reporter of the American Law Institute's First Restatement of the Conflict of Laws, in the U.S. Their formulation was essentially similar. While the former formulated that any right which has been duly acquired under the law of any civilized country is recognized and, in general, enforced by the forum courts, and no right which has not been duly acquired is enforced or, in general, recognized by the forum courts; Beale's formulation runs like this": a right having been created by the appropriate law, the recognition of its existence should follow everywhere, and thus it logically follows that an act valid where done cannot be called in question anywhere. This is not, however, without flaw.

W.W. Cook along with his "Local Law theory" — which denies that the forum accords extraterritorial effect to a foreign created right but grants a local remedy which approximates the result which would have obtained under the foreign law — reacted

against Beale, at least in its underlying premises and orientation. The shortcoming of the doctrine is that it does not put a proviso to the effect that certain values of the forum might not be sacrificed while recognizing a foreign acquired right.

- **The Transition: "Modern" Developments of Choice of Law Theories**

Lex fori approach and governmental-interest or simply 'interest analysis' theory, which both reflect attitudes similar to those of the European statutists of the 14th-16th, resulting from the dissatisfaction with the fixed and thus mechanical (but predictable and certain) rules are recorded in American conflicts law as marking a "revolution". The former, the *lex fori*, theory is of A.A Ehrenzweig's and that of the latter is B. Currie's. Both regarded as neo-statutists for returning to an essentially locally-oriented approach which the European development since Savigny had largely overcome. Besides these, von Mehren and Trautman, in part, proceed from a classification and evaluation of forum and foreign law *qua law*. Both theories resemble in practical results. Let us see them one by one.

- ***Lex fori* and Governmental-interest Approaches**

The *Lex fori* (law of the forum or local law) theory contends that the basic law is the law of the forum and that foreign law should be used only to fill "gaps" in that law. This theory does not deny the application of foreign law in "appropriate" cases. In other words, to soften the strict application of the *lex fori*, some specific conflict rules have been developed as an exception. Foreign law is to be employed only where the defendant would be dealt with unfairly by the application of the *lex fori* or where the superior governmental interest of another state requires the displacement of the *lex fori*. In both cases, however, forum's public policy is to be maintained at any rate.

A central theme in Ehrenzweig's approach is the oft-stated contention that traditional conflicts theory erroneously presupposes the existence of a "super law" which predetermines, through direction or restraint, applicable choice of law rules. His problem lied in insisting on government policy analysis, so far as determining whether the substantive rules of the forum are to be "displaced" in addition to formulating new choice

of law rules ─ if non-existent.

On the view that every state has a governmental interest in effecting the policies underlying its own law having some connection with the transaction, Currie's extreme position (accepting the *lex fori* principle) was: "we would be better off without choice of law rules. Normally, even in cases involving foreign elements, the court should be expected as a matter of course to apply the rules of decision found in the law of the forum". Upon consideration of policy and fairness in determination of the matter, despite the position that the forum must enforce its own interest and apply its law where there is a conflict between the government interest of the forum and that of another state; the law of the forum could be displaced if where another state is shown to have a government interest superior to that of the forum which in this case the law of that state will be used as a model for the rule of decision in the particular case.

It is during the inquiry of the policies expressed in the respective laws that one encounters concepts of "true" and "false" conflicts. Maintaining that there is no conflict upon an examination of government interests (for it is only one state that will have any interest in having its law applied) Currie has come up with the mentioned analytical concepts and another "disinterested" position principle.

While a "false conflict" exists when the potentially applicable laws do not differ or when, upon examination, one law ─ by its own terms or underlying policies ─ is not intended to apply to a situation such as the one in issue; a "true conflict" appears when the relevant laws not only differ, but the underlying policies of each call for its application. In the latter case, the court considers whether a more moderate or restrained interpretation of the policy or interest of one state may avoid the conflict and it is in the case of an unavoidable conflict that the forum's law that is believed to advance governmental-interest is to be applied.

Scoles and Hay noted that for the actual resolution of cases, the distinction between "false" and "true" conflicts is irrelevant for Currie's analysis will always regardless of

whether the case involves "false" or "true" conflict, lead to application of forum law except in those cases in which the policy of the forum does not call for the application of its law, that is where it is "disinterested" in which case (a very rare occurrence) the conflict could be avoided either through the doctrine of dismissal of the local suit — or, still, by application of local law at least if the latter corresponded with the law of one of the interested states. Hence, "All Roads Lead Homeward".

- **Functional Analysis (Policy Weighing Approach)**

By broadening Currie's analysis and approach, many American writers, such as von Mehren and Trautman, share his forum concern to solve true conflicts problems. What is different here is that unlike Currie, they employ a principled weighing of conflicting policies to resolve a problem in case self conflicts analysis or determination of concerned jurisdiction fails. The following are some:

- The choice of the state's law whose polices are most strongly held;
- The choice of the law reflecting an "emerging" policy over one embodying a "regressive" policy;
- The choice of a law expressing the more specific rather than general policy;
- Selection of the rule best designed to effectuate an underlying policy; and
- Avoidance of a choice which would frustrate an underlying policy.

But, what if the method of policy weighing fails to solve the problem? The formation of multi-jurisdictional rules as a solution was urged. Here, the analysis seems to take on a slight local-law orientation, in the sense that the formulation of universally-applicable choice of rules, not based on interest analysis, is seen as exceptional, and when the exception does not obtain, the court is said to be justified, which logic indeed requires, in giving up and applying its own law.

Despite coming with additional of more articulated criteria for choice and being concrete in identifying the relevant criteria, Weintraub's weighing approach may not lead, in practice, to results that differ from the above mentioned four scholars' approaches.

- **The Value-Oriented Approaches**

The quest for a better alternative to the 'rigid' traditional choice of law rules has continued. As will be seen below, some scholars are known for their essentially common character approaches in trying to identify "goals and objectives" that help courts in devising new rules. Such methods, however, are criticized as "result-selective" which are contrary to the intended objectives of traditional conflicts law (decisional harmony or uniformity of result, predictability, and certainty).

Prof. David Cavers suggested the consideration of the following "principles of preference" in case of resolution of conflicts problem with the object that "the choice ... would not be the result of the automatic operation of a rule or principles of selection but of a search for a just decision in the principal case. The principles are:

- Close analysis of the facts of the case;
- Comparison of the "preferred rules of law" with "the rule of the forum (or other competing jurisdiction's) with respect to the results they would entail; and
- Appraisal of the result "from the stand point of justice between the 'litigants' or ... broader considerations of social policy."

In similar fashion to Caver's "look-before-you-leap " type approach, R.A. Leflar offered a list of general "five-choice-influencing considerations", viz. 1) predictability of results; 2) maintenance of inter-state and international order; 3) simplification of the judicial task; 4) advancement of the forum's governmental interest; and, 5) the application of the better rule of law.

Although he failed to put the criteria in hierarchy or order of priority, Leflar advised courts to replace the "mechanical rules" (traditional method) and "circuitously devised approach" which have appeared as cover-ups for the real reason that underlay the decisions with "statements of real reason". One can observe that some of the criteria lie opposite to each other. For example, while simplification of the judicial task promotes societal interests, the "better law" suggestion, which has become the focal point of the

criticisms of his approach, in contrast tilted towards results keyed of the given case.

In summation of this approach, it is commented that while Leflar's is largely undifferentiated and open-ended, Cavers' is mindful both of the need for certainty provided by rules and the need for an adjustment mechanism.

The Second Restatement of Conflict of law (American's) reported by Prof. W. Reese, containing three main elements ─ general policy consideration, the concept of the "most significant relationship", and lists of particularized connecting factors ─ attempting to provide as much of the "right line between excess of rigidity (the Bealian dogma) ... and excess of flexibility", which most approaches and analyses since the First Restatement were trying to attain besides seeking a formula for the application of foreign law in appropriate cases is worth mentioning here.

In choosing the applicable law, the general policy consideration section of the Restatement Second provides set of factors which lack, like Leflar's list of choice influencing-considerations, "order of priority" and with a possibility of rules pointing to different directions in a given case ─ that the court considers in the absence of a statutory directive of the forum, which the court is required, first and foremost, to follow to the extent that it is constitutional.

It is to be appreciated of the conflicts scholars' intellects that have contributed to the prolific literature devoted to solve the problems of the discipline; what is the ultimate solution found at present? Unfortunately enough, today there exists extreme disagreement among both judges and commentators not simply over the details of choice of law policy but even over the most fundamental principles of the subject. These, esp. the latter, allegations are opposed by others who assert that the subject now enjoys the status of a "normal science" in which scholarly consensus on the fundamentals prevails.

1.8 Conflict of Laws in Ethiopia

Till this moment, the Ethiopian legal system has been working without rules of conflicts. There is no law to guide judges to the effect. Ethiopian courts have been in trouble if they

were confronted with a case containing a foreign element for they could not avail themselves of any provision of law. It was not, however, because there was no any effort to have same. A number of attempts have been made to draft the Private International law rules.

The first attempt to codify conflicts law was made during the time a civil code was drafted for Ethiopia. However, the Civil Code, promulgated in 1960, was at the end of the day, without a section relating to the conflicts law. The then Codification Commission, it is said, have rejected the section prepared for the discipline. Prof. Renè David, the drafter of the Civil Code, has expressed his regret for the reason that "the matter of conflict of laws, which was included in the preparatory plan has, for different reasons, been excluded from the Civil Code. Although Renè David seemed to have known the reasons, as his statement tends to imply, he did not mention one for the rejection. (Document annexed)

Still another attempt to draft and proclaim a private international law was made in July 1976 E.C. The Short-Term Law Revision Committee of the then Ministry of Law and Justice had prepared a document on a draft along with its commentary of private international law. (Document annexed)

The document provides that the Committee on the preparation of draft of private international law has referred to the Rene' David's unsuccessful draft, R.A. Sedler's personal draft (by the way R.A Sedler, has "attempted to propose" a code of the conflict of laws draft), and mainly the draft prepared by the (Imperial Regimes') Ministry of Justice, as the committee thinks. Furthermore, the committee had consulted other countries' private international laws such as those of France and Poland and had considered the then contemporary situation of the country ─ Ethiopia.

What could be the reason for non-promulgation? Could it be due to the reason that the then parliament turned down such a proposal? The writers could not get any recorded document telling to the effect. Any way, whatever the reason may be, the draft was not, again, put into effect.

However, it is a general norm or practice that any court is not expected to reject a case for lack of law to resolve same. It is the responsibility of any court (of course, with established jurisdiction) to dispense justice. To refuse to entertain a case for lack of law, *inter alia*, while one has the power to entertain the case is to deny justice ─unfair! At any rate, a judge is required to resolve any issue of a certain case brought before him.

As member of the international community and considering Ethiopian citizens are making transactions and other connections with foreigners, problems of conflict of laws do inevitably arise. What, then, was the mechanism being employed by Ethiopian courts in resolving cases containing an extra-state element without a corresponding law to the dispute? What was the practice? On what grounds did they claim judicial jurisdiction? What standards or criteria were utilized for the choice of law problems?

We have said above that Ethiopia does not have defined rules of private international law. Nor does it have a well developed precedent to enable courts assume judicial jurisdiction. Despite this fact, whenever Ethiopian courts were confronted with a case containing a foreign element, they, in practice, have been resorting to different methods for the purpose of determination of whether they have power of adjudication of a certain case. We will discuss them later. For now let us assess our Codes if they, by a dint of chance, have something to say about judicial jurisdiction.

There are some insufficient provisions of judicial jurisdiction scattered in different codes designed for *specific* purposes. These provisions are Arts. 208 and 237 of the Maritime Code that lay rules of judicial jurisdiction in respect of carriage of goods and for action of damages incidental to collision, respectively. Moreover, Art. 647 of the Commercial Code captioned "Jurisdiction" concerning contracts of exclusively internal carrier by air. All these provisions employ domicile to establish jurisdiction.

In addition to the abovementioned provisions, it was claimed that the Civil Code

provisions of domicile (i.e., Arts. 183-191) were destined to serve private international law. Jacquious Vanderlinden, in his Commentary on the [Ethiopian] Law of Physical Persons, in confirmation to this argument amplified saying "domicile is indeed reserved for private international law because nowhere in the [Ethiopian] Codes it is (but residence) used for purely internal disputes."

In other words, since no effect of domicile seems to exist anywhere in the Ethiopian civil law, but residence alone is taken into consideration; the inclusion of the concept of domicile in the civil code "seems to be that a definition of domicile was necessary in Ethiopian civil law, given the demands of international private (or conflicts) transactions."

As mentioned above the draft of the 1960 Civil Code included a title on private international law although that part was omitted for unknown reasons when the code was promulgated. Jacques Vanderlinden argues that while the title on conflicts was omitted in the promulgated text; the provisions on domicile, "which can be fully understood only with reference to that omitted title" were forgotten.

However, in sofar as the judicial practice is concerned, it is generalized that Ethiopian courts seem to have adopted three different approaches to solve the issue of judicial jurisdiction. They are: silence regarding judicial jurisdiction, recourse to the Civil Procedure Code, and recourse to general jurisprudence. Corpus of decided cases is cited as an authority to buttress the argument.

In this connection, although still, there are no rules to guide, it is to be mentioned that matters of private international law and enforcement of foreign judgments are entrusted to the first instance jurisdiction of the Federal High Court. (Art. 11 (2) (a) and (c) of Proc. No. 25/1996). Incidentally, the power of deciding on the application for the enforcement of foreign judgments and arbitral awards was entrusted, before the present federal arrangement was introduced, to the then High Court pursuant to Art. 15 (3) of the Civil Procedure Code.

Regarding the choice of law problems, as there is no statute to the effect, looking to practice of courts as to the "approaches" employed, is the only alternative. One can observe from the decided cases of Ethiopian courts that about four "approaches", (if after all some of them are to be considered as approaches) were practiced; viz. general jurisprudence, precedent, ignoring the foreign element and simply applying the *lex fori*, and looking towards the spatial conditioning of the internal rules.

The following examples most of which are substantially family cases are of help to support the above statements.

1. In the *Verginella V. Antoniani Case*, the only case to which foreign law is applied and a foreign expert, Dr. Vitarelli, is called; a certain Italian Benedetto Verginella who has lived for 23 years and domiciled in Ethiopian petitioned for judicial separation from his Italian wife, Antoniani (who was then in Italy) on the ground of desertion. Although the petitioner prayed his case to be adjudged according to the law of Ethiopia; the court, first questioning on which law to be applied and reasoning that the institution of judicial separation is not known to the Ethiopian legal system, ruled that the principles of Italian law on matters of same should apply based on the following grounds.

   a) the petitioner is an Italian subject; b) the respondent is also an Italian subject; c) the marriage between the petitioner and the respondent was celebrated according to Italian law; d) there is no provision in the Ethiopian law governing judicial separation, and e) it has been the practice of the courts of Ethiopia to apply principles of foreign law in matters between foreigners where Ethiopian law makes no provision on such matters.

2. The case *in the matters of Giuseppe Calderone* asked whether the rights of succession are to be governed by the law of domicile of the deceased or by the law of nationality. It cited cases of the Supreme Imperial Court which decided in favor of the law of

domicile and using them as a precedent decided that the law of domicile was more adequate to govern jurisdictional situations and relationships giving rise to by a person who has established his domicile in a particular country without giving up his original nationality. By the way, Ethiopian courts were not consistent in applying the governing personal law of the cases brought before them. For example, while two High Court decisions have held that nationality was the governing personal law, two other Supreme Imperial Court decisions have tilted towards domicile. (Sedler, Conflict of Laws in Ethiopia, pp. 41-43)

3. a) In *Zevi V. Zevi*, although the couple concluded marriage solemnizing in the Catholic Church of Addis Ababa and lived in Ethiopia for many years, they were Italians holding Foreigners' Identity cards as Foreign Residents in Ethiopia. When the wife petitioned for divorce, the minority of the Family Arbitrators, which the Supreme Imperial court, as appealed to, agreed with, disregarded the foreign element of the case or question of nationality (both being foreigners) and just simply declare divorce based on the "sufficiently reasonable grounds according to the Ethiopian Civil Code." The following case has got similar effect.

b) In the marriage case *Zeyleka Gonji V. Rolbero Joseph*, although the husband argued that he is Saudi Arabian (foreigner) and knows nothing about the Ethiopian law and both (he and his Ethiopian wife) were Muslims; the court refused to apply that law but simply referred the case to family arbitrators to be decided according to the Ethiopian law.

4. The *Peter Case* is an example of determination of the spatial conditioning of the internal law. In this case, the couple (Ethiopian wife and British husband) concluded a religions marriage in the Anglical Church in UAE. The court framed an issue "whether the Ethiopian Law could be applied to a religious marriage case or not". For this case is a multistate one, the very framing of the issue was not correct. What if the answer was "no"? It would result in another issue – what other law, then, would apply? The issue should have been framed like this: "Which law should apply?"

To make the discussion on the Ethiopian Private International Law full, the Ethiopian Civil Procedure Code has taken up the responsibility of dealing with the third major ingredient of the discipline ─ enforcement of foreign judgments though partially. (Note that the "recognition part is not dealt with for unknown reasons). But for the enforcement part, Ethiopian courts were employing the provisions of the Code. What is more, at this time there is a move towards drafting a Federal Conflicts Rules by the Ministry of Justice. In fact Mekelle University Law Faculty was also involved in drafting this law.

The drafting work is being done at the right time as, besides the international conflicts which have existed till now, the federal structure of the present Ethiopia has come up with other problems ─ interstate conflicts problems. It is to be noted that the constituents of the FDRE are empowered to enact some areas of laws, (for example, family law) which inevitably will come up with some differences that call for the application of choice of law rules to avoid forum shopping due to their differences.

1.9. Summary

This field of study is known by many names. The most used ones are Private International Law and Conflict of Laws. It is known as Private International Law in many Civil Law Legal System following countries mainly because it regulates private cases of citizens, domiciliaries or residents of two or more politically independent territories.

In the definition of this discipline, the main element is 'foreign element'. A case is said to contain a foreign element if one of the following three situations exist: a person is from another jurisdiction, a transaction is concluded in another jurisdiction or an event which is a cause to the case happened in other jurisdiction and thirdly an immovable or movable is situated abroad.

Conflicts cases could arise at both international and national arena (for the latter, as between federating units). This is because transactions do occur in both situations. We

cannot avoid it. The cases arise as of necessity. In this connection, states or regions of a given federation are, for conflict of laws purpose, considered as independent states.

Traditionally, the scope of conflict of laws is divided into three: judicial jurisdiction, choice of law and recognition and enforcement of foreign judgments. However, there are some countries that limit the scope into the first two. On the contrary, some other states add more elements.

This field does not have a settled and universally acceptable theory. Legal systems do have their own justification why they entertain cases containing foreign elements, why they apply a foreign law, and why they do recognize or enforce a judgment rendered abroad. To this effect, so many theories were developed. These theories are, according to the chronology they happen in this world, discussed in this material. The case of Ethiopia is also touched. Even though there were attempts, Ethiopia does not have a full-fledged law on the score. The only law we have is those of few rules on enforcement (excluding recognition) of foreign judgments and arbitral awards. Despite this problem, Ethiopian judges were deciding cases containing foreign elements following various approaches in both judicial jurisdiction and choice of laws.

1.10. Discussion Questions

1. What is conflict of laws?
2. How do you differentiate cases containing foreign elements from those of cases fully domestic?
3. What is special about conflicts cases?
4. What are the distinguishing features of Private International law?
5. In our normal course of life, conflicts issues do unavoidably arise. Discuss
6. Why should we apply a foreign law? What is wrong if we indiscriminately apply the local law for those cases that contain and do not contain a foreign element?
7. Can you tell us the justifications behind opening our doors to foreign cases?

Unit Two

Adjudicatory/Judicial Jurisdiction

Unit Objectives

By the end of this unit, students are expected to explain:

- The meaning of adjudicatory/judicial jurisdiction
- The possible bases of assuming judicial jurisdiction
- Why a court's jurisdiction is limited despite fulfilling a legal requirement to entertain a case containing a foreign element
- The concepts of general, special and exclusive jurisdiction
- The nature of division of federal and state jurisdictions
- How the Federal Constitution affects interstate judicial jurisdiction
- How choice of judicial jurisdiction rules are related to choice of law rules
- The approaches used by Ethiopian courts in the absence of jurisdiction rules

2.1 Meaning

Jurisdiction, in its judicial context, broadly refers to the power of a court to entertain a case. It has got other meanings depending on the context it is used. According to the well cited Black's Law Dictionary, jurisdiction is a term of comprehensive importance embracing every kind of judicial action. It is the power of the court to decide a matter in controversy, and presupposes the existence of a duly constituted court with control over the subject matter and the parties. Jurisdiction defines the powers of a court to inquire into facts, apply the law, make decisions and declare judgments.

Generally, there are three elements of jurisdiction: local jurisdiction, material jurisdiction, and judicial jurisdiction. Material jurisdiction rules basically resolves the question which level or hierarchy of court (such as Federal Supreme Court, Federal High Court or Federal First Instance Court) should exercise jurisdiction over certain specific matters.

On the other hand, local jurisdiction refers to the specific area, within a state, in which a case is to be tried.

The other element of jurisdiction, which is the subject of extensive discussion under the present course, is judicial jurisdiction. It refers to the power of the court of a particular state to render a judgment binding an individual or his property. Obviously, a state's power to assert jurisdiction may not be challenged if a case is entirely between and amongst its residents or domiciliaries, and for a claim or controversy that arose locally. No other state other than the forum can claim to have an interest in resolving such cases which are exclusively domestic matter to one state. As it is clearly stated in chapter one, the issue of judicial jurisdiction is, however, bound to arise when a case involves non-domestic elements that one of the parties, at least, is a resident/domiciliary/national of another state or that the cause of action has arisen else where.

In most countries, the problem of judicial jurisdiction is treated as a question of conflict of laws. Under our country, however, there are no specific rules which govern the problem of judicial jurisdiction. Of course, there are some provisions, under the Federal Courts Proclamation No. 25/1996, which deals with the issue of judicial jurisdiction, but they are far from being comprehensive. There is, however, an attempt to fully address the problem of judicial jurisdiction through uniform federal rules of private international law. One such advance worth noticing is the Initial Draft on Federal Rules of Private International Law.

Judicial jurisdiction is one of the major subdivisions of conflict of laws. It is the initial issue concerned with the question whether a forum has a power to hear and adjudicate cases of conflict of laws character. A case is deemed to be of conflict of law character when it contains a foreign element which may pertain to personal nature that one of the parties, at least, is domiciliary or a resident or a citizen of a state other than the local forum; or that the action arose elsewhere or that the subject matter of the dispute is situated in a place other than the forum state.

The fact that the defendant is a domiciliary of a state other than the forum means that the forum is no longer the only state interested in the outcome of the case. However, we may ask why should a forum worry about the involvement of foreign element, what if it asserts jurisdiction as it does on a case devoid of foreign element - purely domestic cases?

Of course, there is no specific rule under international law which puts limitation on a state's right to assert jurisdiction over civil cases involving non-domestic element. However, the non-existence of legal restraint could not yet free a state to ignore the issue of involvement of foreign element and the resulting competing interest that may ensue from. The question of recognizability of judgment by the recognition forum; the fear of retaliation (i.e. citizen or domiciliary of such forum state); and the need to promote free flow of commerce may compel a state to consider various interests implicated in a case. Thus, the involvement of foreign elements in a case is likely to make determination on jurisdiction more complex than one may otherwise expect.,It should be noted once again that the problem of judicial jurisdiction may arise both at international and in the interstate level.

2.2. Theories or Bases of Judicial Jurisdiction

Under this section, only the major theories of judicial jurisdiction are discussed. The bases for the assertion of judicial jurisdiction are different in both Civil law and Common Law Legal System. Generally speaking, the Civil Law emphasizes the defendant's domicile as a primary basis of jurisdiction, both at the international and within a given nation. Whereas in the Common Law the physical presence of the defendant within the territorial jurisdiction of a forum suffices in order to assert jurisdiction against him. However, this does not mean that the theories of jurisdiction are expressible only in terms of domicile or physical presence (power). There are other developments in both legal systems, such as, consent and fairness theories of jurisdiction. The following paragraphs would, therefore, discuss the various theories of jurisdiction.

2.2.1 The Territorial Power or Power or Territorial Theory

The power theory has its root in the historical Common Law theory of jurisdiction which began with the concept of physical power exercised by arresting and physically bringing the defendant before the court. The physical seizure of the defendant in civil proceeding is, of course, long abandoned, but its residuum is that if the defendant physically appears in the territorial area of the court, that court can assert jurisdiction merely by serving him a summon. Power theory, thus, explains jurisdiction *vis à vis* the relationship of the person or a thing to the forum. It disregards the relationships of the parties that the defendant or both parties could be non-domiciliaries, and the relationship between the underlying controversy and the forum - that the claim may have arisen elsewhere.

The anomaly of this theory is that a person in transient or who inadvertently enters into the territorial jurisdiction of a court would be subject to its jurisdiction. An extended version of the power theory is reflected in the famous case (Grace V. McArthur) in which the court pronounced "… a defendant served on an air plane flying over the state was reached jurisdictionally even though the plane trip started and was to end elsewhere, and did not even include local landing."

Despite its harshness in compelling a defendant to defend a case suited against him in the territorial area of the court in which he casually appears, the power theory is regarded, under the majority of common law countries as a viable basis of judicial jurisdiction.

The power theory is defended mainly from the viewpoint of enforcement of judgments. The assumption, in the international sense, is that since the world is not yet cooperative, comity and readiness to accept foreign judgments merely for the sake of fairness do not as such drive international relations. The forum state should therefore, pass a judgment against those defendants who are amenable to the sovereign force of the state. But, this logic works only when the defendant has enough resources in the rendition forum to satisfy the claims of the plaintiff. Other wise if the resources of the defendant are found in another state other than the forum state, the latter cannot ensure execution of its

judgment without reliance on the recognition of the other state which is highly unlikely, since jurisdiction founded on the notion of power theory is likely to be regarded (especially by civil law countries) as an exorbitant jurisdiction.

The limitation of power theory discernible in the international sense may not, however, breathe the same way in the interstate context. This is because federal states are likely to adopt a mechanism which avoids the problem of enforcement of court judgments within a federation. A notable example of such arrangement is the 'Full Faith and Credit Clause' under the US Constitution.

2.2.2. The Minimum Contact Theory

Under power notion, the only prerequisite for assertion of jurisdiction over unwilling defendant is to have him served a summons or a claim form while he is physically present or doing business in the forum state. This theory is, however, deficient at least for two reasons: (1) jurisdiction cannot be extended so as to reach a defendant who leaves the forum state before he is actually served with a summon, and (2) a forum state which possesses a lesser financial hardship (in terms of cost of litigation) to a corporation is precluded from asserting jurisdiction for the mere reason that the activity of the corporation in that state does not satisfy the *doing business' test* which usually requires something more than mere solicitation.

With a view to addressing the deficiencies of the power theory, the American jurisprudence has developed in due course a new theory called "Minimum Contact Theory". There are a number of cases in the US which can be cited for the operation of the minimum contact theory, but the leading one is that of *International Shoe Co.* V. *Washington*. In this case, the court holds that "… *due process* requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, we have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice". (Emphasis supplied)

In one way, it seems that the minimum contact theory serves as a complimentary to 'power' theory and operating only where assertion of jurisdiction through the vehicle of the latter notion is impossible. On the other hand, it has deviated from the notion of power for it injects a new concept of "traditional notions of fair play and substantial justice". Besides its vagueness, it seems quite a paradox to maintain the view that 'a traditional notions of fair play and substantial justice' would be sustained where default proceeding is more likely than not. The next issue is whether the minimum contact theory supports for jurisdiction of any claim against the defendant or only for a claim arising out of the local act.

The minimum contact theory does not as a rule provide a single solution. However, the preponderance of court decisions in US, both by state and federal courts, shows that a court, under the notion of minimum contact theory, asserts jurisdiction only over claims arising out of the local act, or over cause of actions outside the state resulting in consequences within the state.

2.2.3 The Fairness Theory

The fairness theory approaches the problem of judicial jurisdiction from various perspectives. In a simple parlance, a theory of jurisdiction based on fairness requires the forum state to try a case when it is convenient, fair and just to the parties. The major justification which its proponents expound rests on the assumption that resolution of a dispute based on fairness guarantees recognition elsewhere because the world shares fairness as a common value, and that a judgment which reflects a measure of fairness has high normative value in compelling a state to extend recognition.

Proponents of the fairness theory admit that the term 'fairness' is vague and inherently imprecise. Nevertheless, they maintained the view that fairness can be established by consideration of three relational circumstances viz. 1) The relationship between the litigants and the forum; 2) the relationship between the underlying controversy and the forum; and 3) the controversies' substantive relation to the forum.

The first assumption is that close and strong link between the litigants and the forum may establish the fairness of an assertion of jurisdiction. Usually, domicile and habitual residence as opposed to temporary and casual presence are regarded as the closest and strong ties. This theory does not, however, provide a single solution to the question whose connection, the defendant or the plaintiff, with the forum is significant.

Under power theory the plaintiff is required to go to the state where the defendant physically appears. And, under the theory of jurisdiction based on domicile (discussed below) the plaintiffs as a class has to go to the domicile class of defendant, i.e. a defendant is to be sued only in the forum where he is domiciled, at least for the majority of cases.

However, the fairness theory approaches the issue from the perspective of the comparative litigational capacity of the litigants. The test, thus, is which party, in the general cases, is better able to litigate in the other's forum. For example, if a dispute involves an ordinary consumer, and a manufacturer which engages in a multistate activity, the latter's better litigation capcity in the former's forum may be assumed. And if the claim of a plaintiff is so small that the cost of transportation to the forum of the latter exceeds the claim, the defendant may be forced to go to the plaintiff.

The second point of consideration is the controversies over litigation concern to the forum. This relational circumstance concerns to the question of whether the cause of action arises from the activities of the defendant within the boundary of the forum state or elsewhere. This issue does not arise in theories of jurisdiction based on 'power' and 'domicile' because the assertion of jurisdiction over a defendant cannot be qualified or limited by resort to the nexus between the forum and the underlying controversy. However, under a system where the theory of fairness holds way, the forum state has to consider the accessibility of material evidence besides the close and strong ties of the litigants with the forum. Evidences not within the immediate control of the parties may be difficult and expensive to produce if the cause of action arose or its consequences

were felt abroad. In such situations, the cost of litigation increases with a resulting burden on the parties and sever inconvenience to a witness asked to travel long distance. The theory of fairness, thus, requires a forum state to decline jurisdiction in favor of the state where crucial evidences are available.

Unlike the power theory, fairness takes into account the substantive relation of the underlying controversy to the forum. The issue arises when the choice of law rules of the forum state would for one or more reason be inoperative for the resolution of the underlying controversy; and even if it operates successfully, whether the forum should undergo risk of misinterpretation of foreign laws.

To the extent the forum's choice of law rules operates satisfactorily, considerations of the controversies substantive relation with the forum may at first sight be of marginal importance. But, when the choice of law rules of the forum state refers to a foreign law, the forum must normally assume both additional burden and run a greater risk of misinterpretation. Thus, the difficulties and burdens of application of a foreign law may conduce, at least, in slight measure to a refusal of jurisdiction to adjudicate. And where the subject matter of the dispute is one for which choice of the forum cannot operate in the sense that if the forum asserts jurisdiction, it can apply only its domestic rules, fairness may demand that the forum should decline jurisdiction unless it considers that these rules can in the circumstance of the case be appropriately applied.

2.2.4 Domicile, Residence, Nationality as a basis of Judicial Jurisdiction

Domicile is a legal concept whose definition is no where or rarely found in legislations. Mention of the exceptions such as Ethiopia is necessary here. Judges and jurists have, however, attempted to address the concept of domicile. Accordingly, domicile is generally understood as the cumulative value of two elements: the fact of residence, and the intention of remaining at a certain place (or the non existence of any intention to make a domicile elsewhere). Proof of residence is solely a question of conceivable facts, i.e. the fact of physical presence with some continuity but without any requirement of indefinite intention to remain, proof of intention, however, is a painstaking exercise, and not usually capable of

being governed by law. Of course, there are developed maxims in relation to the concept of domicile, such as: 'a person cannot at the same time acquire more than one domicile'; and, 'every person has a domicile'. Yet, it is difficult to govern the issues how a person acquires a domicile, how he changes it, and what factors should be considered for ascertaining the intention of a person to gain a domicile or lose it.

The other problem which the requirement of indefinite intention poses is concerning the domicile of a corporate or business organization. A corporation registered in one state may run its substantial business in another state. From this, we are bound to raise the questions like: Which state, the place of registration or the place where the corporation normally does its business, should be regarded as a place of domicile? Is it necessary that a business organization should acquire only one place of domicile?

Problems relating to the concept of jurisdiction over corporations have a historical background. In the early times the position of legislations and judicial practice was that a corporation is the creature of the state under the laws of which it is incorporated, and hence, has no legal existence outside that state. Such assertion is believed to have been driven by the assumption that extra territorial business was a rarity. However, such conception is no more present in the modern times. The expansion of Multinational Corporation in the international scene and in the interstate commerce within a single state has proven that a corporation may run its substantial business outside its home state. Complacency with the traditional position, therefore, would not pay because it is bound to severely impair business (which nowadays allow no boundary), and the interest of the persons who could be in transaction with the corporation.

In order to avoid the vices and impracticability of a single domicile in the realm of corporations, a number of states have expanded the concept of domicile so that a corporation acquires an extra domicile if it satisfies certain criteria imposed by the host state. In Switzerland, for example, the establishment of independent and permanent branch entitles the corporation to acquire an extra domicile.

Domicile as a basis of jurisdiction is usually defended on the ground that a person is unlikely to be inconvenienced when sued in his domicile forum in which he is most connected. This may hold sound when we see the convenience of a forum from the view point of the familiarity of the defendant with the laws of his domicile state. And that he may not be prejudiced by his domicile state. But convenience of a forum to a defendant may depend on other important factors like the accessibility of witnesses, and the connection of the underlying controversy to the forum.

The other policy reason which is regarded as traditional justification rests on benefit burden rationale. A famous dictum goes "…the state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties"

The malady with this justification is that it disregards the significance of a convenient forum in the administration of justice. It seems to tell us that a state is not better off if its domiciliary is sued in another state which provides a convenient forum. However, the reality is not like this; the defendant by being sued in a convenient forum may be saved from unnecessary cost of litigation, and his domicile state may benefit because another state has born its duty to provide a forum which could be against its human and financial resource.

Some European countries party to the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commecrial Matters have coined a new term“Habitual Residence" to replace domicile.

2.2.5. Jurisdiction based on consent/submission

When we think of place of trial, we are likely to raise certain issues concerning the convenience of a forum, such as the cost of litigation, the convenience of requiring witnesses to travel to the forum, the availability of evidence and other economic factors. In the early days, the power to determine the place of trial was considered as prerogative

power of a state. The parties did not have had any control; i.e. if parties sought to end their dispute through the machinery of justice, they had to go but only to the statutory place of trial. In the modern times, however, the state's stubbornness to control the place of trial for any legal suit is substantially relaxed.

In various states, in our modern times, the parties' consent or choice as to the place of trial is regarded as a major basis for the assertion of judicial jurisdiction. The important advantage that such arrangement offers is that it enables parties to escape the harshness or the inconvenience of statutory place of trial. To put it differently, allowing parties to determine the place of trial through consent minimizes, at least potentially, the cost of litigation, and other related factors. But every choice of place of trial (or forum selection clauses) may not be enforced. A state may place formal and non-formal requirements for the enforcement of parties consent as to place of trial. However, before one further determines the issues whether consent by the defendant is a sufficient basis of jurisdiction; it is indispensable to distinguish between two uses of the term consent: an agreement before a dispute arises (prior consent) and submission after the action has been commenced.

No body questions that a plaintiff who brings an action to a particular court consents to the exercise of jurisdiction by that particular court. He is also deemed to have consented to a *related* counter-claim which could be barred if not raised. A difficulty, however, arises as to the determination of consent of a defendant who would not at all go to a court unless dragged by the order of a court. A general jurisprudence seems to take the position that the defendant's consent should be construed very restrictively. The most common instance where a defendant's consent is held as sufficient is when he participates in the merits of the case. The assumption is that a defendant who participates in litigation can hardly claim to be disadvantaged by the choice of forum.

A pre-litigation contract to submit to the jurisdiction of a particular forum, where the consenting defendant is neither present nor domiciled or a national, is usually regarded as a sufficient basis of jurisdiction. This basis of jurisdiction has been important in

commercial matters, and has also led to the development of jurisdiction in arbitration. Although this is a well recognized basis of jurisdiction, it involves two opposed and competing forces. The first is the need to enforce parties' agreement through efficient and effective procedures, provided it is valid and fulfills all formal requirements. The second and opposing force is the public concern for protecting persons in inferior bargaining position from economic coercion. In an employment contract, the 'employee', and in consumer contract the consumer are usually regarded as a weaker party. Hence, whether states should sacrifice the one and respect the other or vice versa would invariably depend on national policy. The next issue which needs to be addressed is whether parties are free to confer jurisdiction to any court, or whether forum-selection clause should indicate a particular forum.

There seems to be no problem as regards to forum-selection clause which indicates a particular court because the defendant can be ready because he knows where his opponent (the plaintiff) could bring an action against him. But when the choice of forum clause allows any forum to exercise jurisdiction over disputes arising from the contract, the defendant would be put in a vexatious position. Since he does not know where the plaintiff could sue him, he cannot make an effective preparation, and, even worst, he may have to risk default judgment. In some states, forum-selection clauses which indicate to any forum are regarded as violative of the *procedural due process of law* i.e. the requirement of notice and the opportunity to defend.

Just to have a glimpse on the Federal Draft on Conflicts, according to Art 35 sub Art 1, a forum chosen by parties agreement either during the creation of the legal relationship or after a dispute arose have an exclusive jurisdiction to settle the dispute between them. The phrase 'exclusive jurisdiction' needs to be explained more. The question is, does the forum-selection clause oust any other court which otherwise could have asserted jurisdiction by virtue of the basis of jurisdiction discussed earlier? Or where is the contour at which the reach of agreement conferring jurisdiction is halted?

Generally, forum-selection clause has the effect of ousting of any other court which otherwise could have asserted jurisdiction, unless the court chosen has declined jurisdiction. However, this is not without limitation.

The first limitation pertains to the nature of the agreement. That is, if the forum-selection clause is only for the benefit of one of the parties, that party retains the right to sue the other party in any other court which has jurisdiction by virtue of the basis of jurisdiction provided in the Draft.

The other restriction concerns the substance of the subject matter of the dispute. Under this limitation fall matters relating to consumer contract, insurance and individual contract of employment, and matters which other courts have exclusive jurisdiction by virtue of Art 34. According to Art 35, a forum-selection clause that purports to oust a court which has an exclusive jurisdiction is of no effect. As regards to matters relating to insurance, consumer contracts and individual contracts of employment, it is helpful to distinguish between an agreement entered in advance and that after a dispute has arisen. There is no restriction as to forum-selection clause that is made after a dispute has arisen.

The justification for this seems to lie on the assumption that parties in dispute would not be submissive to accept coercive terms prepared by one, that the forum they confer jurisdiction could not be unreasonably inconvenient to either of the parties. Of course, forum-selection clauses entered in advance are not totally denied of legal force. But, in order to be valid, the agreement shall meet the strict conditions laid down under Arts 29 sub Arts. (3, 4 and 5), Art 33 sub Arts 2 and 3, and Art 35 sub Art 6. The common condition in all is that the agreement conferring jurisdiction should enable the consumer, the employee and the insured to bring suits in courts other than those indicated in Art 32 sub Art. 1, Art 18 sub art 1 and Arts 26 cum Art 27, respectively. The next issue is whether the forum-selection clause should indicate to a particular court?

Some states require that for an agreement conferring jurisdiction to be valid, a reference to a particular court must be made. According to such states, a forum-selection clause that indicates to *any* court is regarded as violative of due process requirements. However, this limitation is not expressly provided under the Draft. Hence, we may argue that parties are free to confer jurisdiction to a particular or several courts, or to 'any court' without mention of one. But, the due process guarantee, as per Art 38 sub Art 2, is still operative that a plaintiff cannot drag a defendant to a distant forum that inhibit the right and opportunity to be heard of the defendant, even if the parties have conferred jurisdiction to that court.

Not all agreements produce the same effect. There are certain formality requirements which need to be satisfied before an agreement conferring jurisdiction obtains legal force. According to Art 35 sub Art.1, an agreement conferring jurisdiction must be either in writing or evidenced in writing; or in a form which accords with practices which the parties have established between themselves. No other requirements are envisaged under the Draft, but it seems to be obvious that the agreement must be lawful and free of defects in consent, in accordance to the general provisions of contract.

We have discussed it above that appearing in a proceeding before a court, which does not initially have jurisdiction at all may be deemed a sufficient ground of jurisdiction. "Whether this basis of jurisdiction is considered to be consent or waiver, voluntary participation in the litigation with a view to a resolution of the dispute binds the parties so participating". However, it should be noted that not all appearances serve as grounds of jurisdiction; appearance to object jurisdiction is usually excepted. The concept of jurisdiction by appearance is adopted under the Draft. Art 36 states "apart from jurisdiction derived from other provisions of this proclamation, a court of a state before which a defendant enters an appearance shall have jurisdiction". This provision shall not apply where appearance was entered solely to contest the jurisdiction or where another court has exclusive jurisdiction by virtue of Art 34 of the Draft proclamation.

In the operation of Art 38 which requires a court, that lacks jurisdiction, to declare of its own motion that it has no jurisdiction, the significance of the right to limited appearance

seems minimal because the defendant can preserve his immunity by nonappearance. Nevertheless it is still advantageous, since defendants are likely to enter appearance in a court that does not have jurisdiction either because of ignorance of their immunity not to be sued there or because of the fear that such court may fail to decline jurisdiction, and hence a hasty execution may result.

2.3. General and Special Jurisdiction

The use of the term 'general jurisdiction' is better understood by contrast to the concept of limited or special jurisdiction. A court of limited jurisdiction is one which is restricted only to those classes of cases specifically listed under legislations, constitution or other legal sources of the sovereign establishing the court. However, a court of general jurisdiction is one that is conferred with jurisdiction over any cases except those which supply exclusive jurisdiction of another court or that given to the court of limited jurisdiction. The question which court is conferred with general jurisdiction as opposed to limited jurisdiction is a matter of domestic law which is not bound to be identical in all states. In USA, for example, state courts are courts of general jurisdiction whereas federal courts are regarded as courts of limited jurisdiction, empowered to hear only such cases that are listed under the USA constitution, and have been entrusted to them by a jurisdictional grant of Congress.

In some other states, neither federal nor state courts are identified by general or limited jurisdiction. A typical example of such tradition is found in Switzerland, and the Federal Democratic Republic of Germany. In Switzerland, general jurisdiction, both internationally and in the interstate matter, lies in the court in which the defendant is domiciled, be it a federal or state court.

In Germany, the confinement to the domicile is a bit relaxed. Accordingly, a defendant may be sued, in matters relating to contract at the place of performance, in a tort cases at the place of commission, in addition to the defendant's domiciles. In both states, matters

concerning immovable are left to the exclusive jurisdiction of the place where the property situates, and they have also agreement conferring jurisdiction provisions.

The position of the Draft as to the issue of general jurisdiction is a bit confusing. Under the section dealing with general jurisdiction, Art 17 sub Art 3 provides that "in interstate dispute jurisdiction shall lie with federal high court." From this provision one may argue that state courts are destined to be courts of limited jurisdiction. But, this assertion does not seem to be reflected in the subsequent jurisdictional provisions (Arts. 18-41). The provisions dealing with jurisdiction excepting that of Art 17 sub Art 3 shows either departures from the principle "… legal suits be instituted in the domicile of the defendant", or provide alternative forums in addition to the forum where the defendant is domiciled. Exclusive jurisdiction [by] agreement, and jurisdiction by appearance are good examples of such departures. It is also provided that a defendant may be sued in matters relating to contract, in the place of performance, in tort cases, in the place of commission, in addition to the place where he is domiciled. There seems, thus, no basis for identifying federal courts as courts of general jurisdiction, and state courts as courts of limited jurisdiction. Thus, although the issue of general jurisdiction in the interstate matter is not succinctly addressed under the Draft, the use of the phrases 'regardless of domicile...', 'a person domiciled in one state may be sued, in another state:…' ' strongly suggests that general jurisdiction lies in the court where the defendant is domiciled.

2.4. Exclusive Jurisdiction

Matters which fall under exclusive jurisdiction are normally those which by their nature posses insurmountable difficulties of enforcement procedure mainly due to the involvement of third parties interest in the local forum, or that certain crucial evidences are accessible only in one state, or because of the need of the local forum to handle certain cases which it thinks require strict surveillance by itself. These factors seem to be reflected under Art 34 of the Draft. The matters that are listed down under Art 34, which do not merit explanation, pertains to: 1. proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, where the courts of the place where in which the property is situated exercises exclusive jurisdiction; 2. in

matters concerning the validity of the constitution, the nullity or the dissolution of business organizations or other legal persons or associations of natural persons, or the decisions of their organs, the courts of the place in which the business organization, legal person or association has its seat; 3. concerning the validity of entries in public registers, the courts of the place in which the register is kept 4. in proceedings concerned with the registration or validity of trade marks or patents, designs or other similar rights required to be deposited or registered, the courts of the place in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention deemed to have taken place, and 5. In proceedings concerned with the enforcement of judgment, the courts of the place in which the judgment has been or is to be enforced.

The Draft is too strict as regards to the effects of exclusive jurisdiction. It prohibits any departure from Art 34. The parties cannot confer jurisdiction by consent to a court other than those which are clearly listed down under Art 34. And courts which are seized of matters over which the courts of another state have exclusive jurisdiction by virtue of Art 34 are required to decline jurisdiction.

2.5. State and Federal Courts' Jurisdictions

The division of jurisdiction in a federal system is an aspect of the distribution of power between state and federal governments. Obviously, the nature of the division varies from one country to another, although there could be considerable resemblance among them. But, one thing seems to be certain that the nature of the division of jurisdiction between state and federal courts in one state may not reflect the form of government in that state. A federation of dual polity may adopt a unitary judicial system. Jurisprudentially, the literature has so far identified two kinds of federal court system: unitary and dual court structure.

The unitary court structure assumes, in many respects, though not in exactum, the nature and form of judicial system established under unitary form of government. In federal states which have adopted a unified scheme of administration of justice, there is one national Supreme Court at the apex, and high courts in the constituent states, constituting

the superior courts, having original and, appellate jurisdiction over subordinate state court decisions. Here, the Supreme Court is basically a court of highest appellate jurisdiction over decisions rendered by superior state and federal courts. However, in some states the jurisdiction of the Federal Supreme Court extends to concurrent and exclusive jurisdiction over certain specified cases. Good examples of the unitary scheme of administration of justice can be found in India, Canada and the Australian Commonwealth.

In Canada, the Federal Supreme Court is a court of general appellate jurisdiction. Apart from the Supreme Court, there is only one Federal Court, the Court of Exchequer and Admiralty which exercises exclusive jurisdiction in matters relating to patent, trade marks, and admiralty cases. The states (or provinces) courts are left to supply the general jurisdiction subject to review by the Federal Supreme Court. The other ever peculiar arrangement provided under the Canadian constitution is the power vested on the governor general to appoint judges of the province courts. From this arrangement it seems sound to argue that the division of jurisdiction between the federal (dominion) courts and the province, under the Canadian Federal Court system, is based on administrative easeness than on question of sovereignty.

The Indian and Australian federal court system is essentially similar to that of Canada, but, there are considerable arrangements in both India and Australia, that are not present in Canada. Unlike in Canada, the Federal Supreme Court in India exercises original jurisdiction over certain federal matters. And state courts, under the federal court system of India, are empowered to exercise jurisdiction over any matters other than those cases which the Federal Supreme Court has assumed exclusive jurisdiction. Similarly, the Australian Federal Constitution confers the Federal High Court (the superior court in federal court tiers) with original jurisdiction over specific federal matters. However, the power of state courts to exercise jurisdiction over federal matters is left at the discretion of the federal parliament.

The Dual Judicial system is a completely different arrangement. According to this system, each government, state and federal, establishes its own hierarchy of courts which is autonomous and self contained. In each federal and state court there exist courts of first instance and at the apex a Supreme Court of last resort. The Dual Court character, however, does not imply the total demise of the relationship of the federal and state courts. The state and federal courts may constitutionally be empowered to exercise concurrent jurisdiction over certain federal matters. And, to the extent state courts assert jurisdiction over federal matters, their final decisions may be taken on appeal to federal supreme courts. The US Federal Court system is often cited as a good representative of the dual court system.

Under the US constitution, the judicial powers to which the jurisdictions of federal courts extend are expressly enumerated. Out of such cases the Federal Supreme Court exercises original jurisdiction over matters affecting Ambassadors, other public ministers/ and consuls, and those in which a state shall be a party. In all other cases to which the jurisdictions of federal courts extend, the Supreme Court exercises appellate jurisdiction with such exceptions and regulations as the Congress may make. The state courts are regarded as courts of general jurisdiction. They exercise exclusive jurisdiction on state matters; and they also enjoys concurrent jurisdiction over federal matters, subject to congressional limitation. Until recently, the US Congress has excluded state courts over matters concerning copyright, patent, and disputes between different residents. And to the extent, the state courts exercise federal jurisdiction, their final decision would be subject to review by the federal supreme court.

The Federal Court system envisaged under our Constitution does not seem to be capable of being identified as fully dual or unified court character. The FDRE Constitution provides that the Federal Supreme Court shall have the highest and final judicial power over federal matters, and State Supreme Courts shall have the highest and final judicial power over state matters. This is one aspect of the dual court system. However, the duality feature does not seem to be consistently applied.

According to Art 80 sub Art 3(a) of the FDRE Constitution, the Federal Supreme Court is empowered to exercise a power of cassation over any final court decisions containing a basic error of law. [Emphasis added]. The clause '… over any final court decisions….' is susceptible to a wider interpretation. It may be construed as one which subjects final decisions of State Supreme Courts, be it over state or federal matter, to the cassation power of the Federal Supreme Court. This interpretation is entertained by the legislative act of the House of Peoples Representative. Accordingly, Art 10 sub Art 3 of the Federal Courts Proclamation states that: "In cases where they contain fundamental error of law, the Federal Supreme Court shall have the power of cassation over: final decisions of the Regional Supreme Court rendered as a regular division or in its appellate jurisdiction.

At this juncture, at least, the duality feature of our federal court system loses its color for requiring state supreme courts to yield to the Federal Supreme Court. This is one feature of the unified scheme of administrator of justice. The only difference is on the scope of the judicial power of the Federal Supreme Court that in some federal states, which have established unitary court character, the appellate jurisdiction of the Federal Supreme Court extends to any final court decisions, without distinction between fundamental and non-fundament errors of law and between question of fact and questions of law.

Thus, we can conclude that the federal court system envisaged under the FDRE Constitution is of a unique arrangement in the sense that it inherits features of both federal court systems, dual and unified, and hence not capable of being characterized as fully dual or unified. As regards to questions of predominance, we may, perhaps, advance the view that the Duality feature takes the largest posture in our federal court system, for the Constitution has empowered state councils to establish State Supreme Court, High Court (Zonal level), and first Instance Courts (Woreda level) which are not subject to interference by the Federal House of Peoples Representatives.

The cases to which the jurisdictions of federal courts extend are usually constitutionally defined. Some federal constitutions are too strict that they put restrictions against any expansion of the federal court jurisdiction beyond the enumerations provided under the

constitution (examples include, the Constitution of the USA, and the Constitution of the Federal Democratic Republic of Australia.) In some other federal constitutions, the parliament is empowered to go beyond the lists of federal jurisdiction expressed under the constitution. As, for example, Art 114 of the Switzerland Federal Constitution states, that "in addition to the matters mentioned under this Constitution, other matters may be placed by federal legislation with in the competence of the federal tribunal; in particular, powers may be conferred on the tribunal for the purpose of ensuring the uniform application of the laws of the dominion (the federal government)".

The contents of the cases which supply the federal judicial power varies form state to state. In India, for example, the Federal Supreme Court exercises original jurisdiction over disputes between the government of India, and one or more states, or between the government of India and any state or between two or more states. Under the USA constitution, the scope of the judicial power of federal courts is wider than that of India. Thus, according to Art 3 of the USA Constitution "the judicial power of Federal Courts extends to all cases in law and equity, arising under the USA Constitution, the laws of the USA, and treaties made or which shall be made, under their authority; to all cases affecting Ambassadors, other Public Ministers, Councils; to all cases of Admiralty and Maritime jurisdiction, to controversies between two or more states; between a state and citizens of another state; between citizens of different states and between same state claiming lands under grants of different states; and between a state or the citizens there of and foreign states, citizens or subjects."

Quite contrary to the tradition of several federal constitutions, our Constitution makes no enumeration of matters of federal courts jurisdiction. Art 80 sub Art.1 states that the Federal Supreme Court shall have the highest and final judicial power over federal matters. Obviously, this provision, without further explanation, could not help us in defining the scope of federal courts jurisdiction. Thus, we could be bound to raise questions: What consists of federal matter? Can the House of Peoples' Representative define it? And, if so, under what standards?

In the absence of explicit provision under our Constitution, it would be difficult to ascertain the scope of federal courts jurisdiction. Perhaps, we may say that the jurisdiction of federal courts extends to those cases arising under the federal laws. And, hence, since the House of Peoples' Representatives (HPR) is empowered to regulate interstate commerce, enact Labor Laws, Environmental Laws, and other civil matters, federal courts shall exercise jurisdiction when such federal laws are raised in specific cases. However, this interpretation may deprive the power of federal courts to assert jurisdiction over state created rights. Moreover, it may pose unnecessary confusions, when a case arises under both state and federal laws.

Looking the issue from a different perspective, one may hold the view that since the HPR is authorized to establish federal courts, it can, short of clarity of the Constitution, determine the scope of the jurisdiction of federal courts. However, there are possible challenges against such assertion "the authority to establish federal courts imply the power to determine the scope of federal judicial power": Firstly, the Federal Supreme Court is the creation of the Constitution, not one to be established by the HPR, hence, the argument "the authority to establish implies the power to determine scope" could not be validly entertained. Secondly there is a possibility that matters which are determined by federal legislation as federal matters may, by state legislation, be regarded as one which constitutes state matters. Thus, since federal laws are not constitutionally conferred an overriding effect over state laws, the attempts of the HPR to determine the scope of federal judicial power may face serious problems of enforcement.

However, it would be erroneous to conclude that the Constitution has authorized no one for the determination of the scope and contents of federal judicial power. Had there been developed indigenous jurisprudence as to the concept of federal matters, we could have ascertained the intention of the framers of the constitution. Absence of this, however, it seems natural and logical to hold the view that the HPR is the only authority which can determine the scope of federal judicial power. So far, the HPR has enacted a Federal Courts Proclamation which establishes the contour or scope of federal courts jurisdiction. According to the Federal Courts Proclamation, the federal judicial power extends to cases

arising under the Federal Constitution, federal laws, or treaties, disputes between permanent residents of different states, and cases involving parties specified under federal law. But, these subject matter jurisdictions of federal courts are no more maintained under the draft proclamation on Federal Rules of Private International Law. Here, one thing worth noticing is that since the power of states to determine and elaborate the concept of 'state matters' has to be equally respected, the contentions on the scope of federal jurisdiction may not be fully addressed by federal legislation.

The second area of worry is regarding jurisdiction of state courts. It is usually uncommon in federal legislation to provide lists of matters to which state judicial power extends. The tradition followed under several federal constitutions is to empower state courts to exercise jurisdiction over any matters other than those which are expressly given to the exclusive jurisdiction of federal courts.

In Switzerland, for instance, the Constitution enumerates the jurisdiction of federal courts, but as to the jurisdiction of state courts, it provides residual clause which states" the cantons (states) are sovereign so far as their sovereignty is not limited by the Federal Constitution, and as such they exercise all the rights which are not delegated to the federal power. A similar residual clause, under the USA Constitution, reads" the powers not delegated to the USA by the Constitution nor prohibited by it to the states, are reserved to the states.

Under our Constitution, too, residual power is reserved to states. Accordingly, Art 52, sub Art.1 of the FDRE constitution provides that "all powers not given expressly to the federal government alone, or concurrently to the federal government and the states are reserved to the states". However, before one invokes the residual clause, it is necessary that the scope of the federal judicial power be ascertained first. According to Art 80 sub Art 1 *cum* Art 78 sub Art 2 of the FDRE Constitution, the federal judicial power extends to federal matters. Thus, although the Constitution has quite unnecessarily provided that state courts have jurisdiction over state matters, it is obvious from the 'residual clause' that the federal judicial power, does not in any way reach state matters. The question

what consists of federal matters so that the rest, by virtue of the residual clause, supplies the bundle of state judicial power is a lingering problem. The next issue that we need to address is whether the jurisdiction of federal courts over federal matter is exclusive of state courts?

Since the residual clause is relevant only in the absence of any express provision conferring power to the federal government, it is indispensable to ascertain whether or not the federal judicial power envisaged under the FDRE Constitution is exclusive of state courts. Art 78 sub Art 2 provides that "… the HPR may, by two thirds majority vote, establish nationwide, or in some parts of the country only, the Federal High Court (FHC) and Federal First Instance Court (FFIC), it deems necessary. Unless decided in this manner, the jurisdiction of the FHC and FFIC are here by delegated to states. Before the establishment of FHC and FFIC in states, there seems to be no way for the federal government to control the exercise of FHC and FFIC by the states, it cannot, for instance, deprive partially or totally the jurisdiction of state courts over federal matters. The use of the words "… are hereby delegated to the state courts", and not that 'the HPR may delegate, if it wishes' sheerly envisages delegation by virtue of the Constitution, where the HPR is bound to respect it.

But, what if the HPR, by two thirds majority, establishes FHC and FFIC in states? Does such establishment bring an end to the power of state courts to exercise concurrent jurisdiction over federal matters. The clause "… unless decided in this manner…" seems to put the concurrent jurisdiction of state courts at the grace of the HPR. Thus, it may be argued that upon establishment of FHC and FFIC in states, the HPR is free to divest partially or totally the jurisdiction of state courts over federal matters. Contrary to this, however, Art. 78 sub Art. 2 of the FDRE Constitution may be construed as one which does not provide any special purpose other than placing sanctions against establishment of FHC and FFIC in a state or states, by simple majority. Moreover, it is nowhere, under the Constitution, expressly provided that the federal judicial power is or could be made by a legislative act, exclusive of state courts.

However, the exercise of concurrent jurisdiction by state courts may not suffice. The issue which court among state's courts should assert jurisdiction over federal matters is not left to the discretion of state council. According to Art 80 sub Arts 2 and 4 of the FDRE Constitution, the jurisdiction of FHC and FFICs are given to the State Supreme Court and State High Courts, respectively. Thus, since the competence of FHC and FFIC is governed by the federal rules of allocation of jurisdiction, the states power to exercise concurrent jurisdiction over federal matters may not be absolute. If, for example, a federal legislation confers certain federal matters on the FHC, the only state court which can exercise concurrent jurisdiction would be that of State Supreme Court. The next issue which one may raise is whether the federal government can systematically or otherwise divest the concurrent jurisdiction of state courts by conferring original jurisdiction to the Federal Supreme Court.

Under several federal constitutions, the Federal Supreme Court is empowered to exercise original jurisdiction over federal matters, in addition to its highest appellate power in federal matters. The most common cases which Federal Supreme Court exercise first instance jurisdiction includes: Disputes between the federal government and one or more states, between two or more states, matters affecting consuls and other representatives of other countries, cases in which an injection is sought against an officer of the federal government or a sister state, and the like. However, the same arrangement does not seem to be envisaged under the FDRE Constitution. Art. 80 sub Art.1 of the FDRE Constitution provides that "the Federal Supreme Court shall have the highest and final judicial power over federal matters. No other explicit stipulation is provided under the FDRE Constitution for the original jurisdiction of the Federal Supreme Court. Thus, however necessary it may be to confer the Federal Supreme Court with original jurisdiction over certain federal matters, the House of Peoples Representative cannot progress with it, for its legislative power is confined only to those matters which are expressly provided under the FDRE Constitution.

2.6. Interstate Choice of Jurisdiction

Choice of jurisdiction rules (or some times, bases of judicial jurisdiction) is one of the three major subdivisions of conflicts of law. It deals with the initial question of which forum should assert judicial jurisdiction when a case involves a non-resident, or that the cause of action has arisen elsewhere than in the forum or that the subject matter of the dispute situates in states other than the forum state. The choice of jurisdiction rule, therefore, advances far beyond the issue of whether a certain case consists of a federal matter or state matter. Over a specific federal matter, for instance, the choice of jurisdiction rules resolves the question which state, provided states are empowered to exercise concurrent jurisdiction over federal matters, or which federal court among those established in various parts of the federation, should assert judicial jurisdiction.

Under several federal states, the choice of jurisdiction rules is governed by Civil Procedure Codes or Conflicts of Law Rules. The only departure from such tradition is found under the Switzerland Constitution which provides that suits for personal claim against a solvent debtor domiciled on Switzerland must be brought before the judge of his place of domicile; consequently, the property of such a person may not be seized or sequestrated outside the canton in which he is domiciled by reason of personal claims.

Our Federal Constitution, like other federal constitutions except that of Switzerland, is silent as to the concept of choice of jurisdiction rules. Thus, we would be forced to raise the issue whether each government, state and federal, is free to determine the bases of judicial jurisdiction by its own procedural rules or conflicts of law rules, or whether state courts, at least in exercising concurrent jurisdiction over federal matters, are bound to respect the bases of judicial jurisdiction that are followed by federal courts.

The FDRE Constitution is not much clear as to whether the HPR is authorized to enact the bases of judicial jurisdiction for the assertion of jurisdiction over federal matters. One may hold the view that since the HPR is the only authority which can define the content and scope of 'federal matters', no one else can determine the choice of jurisdiction rules

over federal matters. However strong such postulation may be, the authority to define the 'federal matter' implies the power to determine choice of jurisdiction rules; it may be defeated by states. States may find the federal choice of jurisdiction rules as an inhibition to their power or sovereignty to determine their own bases of jurisdiction, irrespective of the nature of the matter, federal or state. These opposing arguments are so strong that it may be difficult to support the former and marginalize the other or vice versa. But, considerations of pragmatic factors, risks of parallel litigation, distance litigation, and the like, seems to support for a uniform enactment of choice of jurisdiction.

To the extent we confine the scope of 'state matters' to cases which involve residents of the same state, and over a cause of action that has arisen locally, conflicts of law problems would be of remote significance. But, such contemplation is likely to be regarded as one which is superfluously generous assertion. Jurisprudentially, it is well settled that a state may jurisdictionally reach its resident for a cause of action that arose elsewhere, and even over a right created by a sister state. Thus, it seems to be obvious that more than one state, under our federation, may regard the same matter as one which falls within their state judicial power. From this we would, therefore, be bound to raise questions: Should the defendant be subjected to the jurisdiction of every state which claims that the matter where the defendant is sued is potentially within its state judicial power? Could we be better off if the power to determine choice of jurisdiction rules is left to state legislative powers?

Plurality of choice of jurisdiction rules has less pragmatic support, for it poses the risk of parallel litigation with a possibility of resulting in irreconcilable judgments; and encourages forum shoppers, who may engage into blending of justice by taking the defendant into a distance and inconvenient forum. Yet, the question that lingers is how we restrict the plaintiff into an appropriate and convenient forum. A state is congenitally impotent to enact choice of jurisdiction rules that binds every state, in the federation; such job, if any, can only be taken by the HPR. The HPR cannot, however, enact uniform choice of jurisdiction rules because a state is unable to do the same; to put it differently; the HPR cannot deal with any matter unless it is expressly authorized to do so.

The authority of the HPR to enact choice of jurisdiction rules is difficult to ascertain. Art. 55 sub Art. 2 of the FDRE Constitution provides "the HPR shall enact civil laws which the House of Federation deems necessary to establish and sustain one economic community". This provision may be invoked to justify the attempt of the HPR to enact uniform choice of jurisdiction rules. But, in order to do so, one needs to create strong nexus between choice of jurisdiction rules and their indispensability for the '… necessity to establish one economic community'.

2.7. Jurisdiction Related Basic Constitutional Guarantees

In order to measure the propriety of assertion or declining of jurisdiction, by state or federal courts, jurisdiction related constitutional guarantees are of enormous practical importance. The most common constitutional guarantees that are contemplated in several federal constitutions pertain to: Equal treatment of non-residents in regards to legislation and judicial proceedings**.** The Switzerland Federal Constitution, for instance, provides that "every canton is bound to accord to citizens of the other confederated states the same treatment as to its own citizens in regard to legislation and all that concerns judicial proceedings." ; and, protection against subsequent relitigation of a matter which is already determined in prior litigation by a sister state. It should, however, be noticed that there is no uniformity as to the question whether there should be mutuality of parties and cause of action for a subsequent litigation to be barred by prior litigation.

In furtherance to the principle of equal treatment and protection against multiplicity of litigation, the US Constitution provides for the requirement of notice and the opportunity to defend or appear. However, the fact that the requirement of notice and the opportunity to defend is not accorded constitutional significance in other federal sates may not necessarily mean that such states are free to disregard it. It is well founded that any deprivation of property, liberty or life be preceded by appropriate notice and opportunity to defend as would be required in the circumstances of the case.

The FDRE Constitution seems to provide no essential difference from the contemplations made under other federal constitutions. It has retained the virtue of the principle of equal treatment as regards to the right of access to justice of citizens, and all that concerns judicial proceeding. It also envisages, under the mutual respect clause, for protections against multiplicity of litigation. It is, however, silent as to the requirement of notice and opportunity to appear in civil cases. However, it may be argued that since the requirement of notice, and opportunity to appear and defend is a fundamental notion of fair trial, and that it is already in practice in our administration of justice (i.e. it is provided under the 1960 Civil Procedure Code of Ethiopia and international instrument that are ratified by Ethiopia), the risk of derogation by legislative acts seems remote possible.

2.8. Suits Between Permanent Residents of Different States

The scope of federal judicial power is not defined under the FDRE constitution, except that it provides that 'federal courts have jurisdiction over federal matters'. Thus, with a view to avoid problems of content and scope of federal judicial power, the Federal Court Establishment Proclamation has provided lists of matters which the federal judicial power extends.

Among the federal matters envisaged under the Federal Courts Establishment Proclamation, the obvious matter which is of interstate, or private international law character pertains to suits between permanent residents of different states. According to Art 5 sub Art 2 cum Art 11 sub Art 2, the Federal High Court is empowered to exercise first instance jurisdiction, without requirement of amount, over disputes between permanent residents of different states. In the absence of clear and developed standard as to the concept of 'federal matters', it is difficult to contest or support the position of the Federal Courts Establishment Proclamation. Thus, it is necessary that we should examine whether there exist strong pragmatic factors for the exercise of jurisdiction by federal courts (or Federal High Court, as in our case) in suits between permanent residents of different states' of a federal matter.

The propriety of assertion of jurisdiction by federal courts in disputes between permanent residents of different states is defended by several factors. The stronger ones which have been the subject of scholarly writings are:

1. Protection of non-resident litigants against prejudices by state courts - "…the constitution has presumed, in diversity cases that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct and control, the regular administration of justice…."

2. A somehow related justification assumes that assertion of jurisdiction in diversity cases by federal courts serves: (A) As a means of encouraging out-of-state individuals and enterprises to engage in local investment, and other activities, by providing an assurance of impartial decision of disputes growing out of those activities. (B) As a means of avoiding potential hostilities between and amongst states. "A state may engage in a reprisals where its residents are prejudiced by a sister state, and eventually the peace and order of the union would be endangered."

However stronger the above justifications might be, our federal court system does not seem to be conducive for their enforcement. Under the FDRE Constitution state courts are empowered to exercise concurrent jurisdiction over federal matters. And, although, the House of Peoples' Representatives is authorized to establish, by two thirds majority, Federal High Court and Federal First Instance Court, it has not done so, yet. Thus, since the only fora which can exercise federal jurisdiction, in states, are state fora, the risk of local prejudices, if any, could not be avoided.

It may be argued that since final decisions of State Supreme Court over federal matters are appellable to the Federal Supreme Court, the explanations for the exercise of jurisdiction by federal courts, in diversity cases, would be achieved. There are, however, some pragmatic problems that such assertions could not be addressed. Since the Federal Supreme Court is stationed in Addis Ababa, the cost of transportation, the expense of staying there for litigation, etc are likely to discourage an aggrieved litigant from lodging an appeal to the Federal Supreme Court. Thus, the appellate control of the Federal

Supreme Court cannot be a strong explanation for the exercise of jurisdiction by the Federal High Court over suits between permanent residents of different states.

2.9. Limitations on the Exercise of Judicial Jurisdiction

A court, legally speaking, can be with competence of judicial jurisdiction. However, bearing in mind of other extra-legal considerations, it may not be the appropriate one. In other words, there are some restrictions on the exercise of same.

Restraints on the exercise of jurisdiction are of enormous practical importance in conflict of laws. The restraints (stay of proceedings and/or declining of jurisdiction) refer to the situation where a court which has jurisdiction refuses to exercise it. However, it must be distinguished from the situation where the rules on jurisdiction are not satisfied and a court, hence, dismisses the action on the ground that it has no jurisdiction. Of course, in both situations, the result is the same: the court refuses to try the action. The major grounds for a declining of jurisdiction that are subject of discussion under this section includes: 1) Forum non convenience, 2) Pendency and 3) austere clauses

2.9.1 Forum Non-convenience

Forum Non-convenience **(**FNC) can be defined as a general discretionary power for a court to decline to exercise a possessed jurisdiction on the basis that the appropriate forum for trial is abroad or that the local forum is inappropriate. In all cases in which the doctrine of FNC applies, it presupposes at least two forums in which the defendant is amenable to processes, the doctrine then establishes certain factors for choice between them. The criteria which a court may employ in exercising its discretion are dependent upon the courts' view. For example, English and Scottish courts have emphasized the *convenience* of the parties. In the leading case, Spiliada Maritime Corp. V. Cansulex ltd, the British House of Lords adopted the basic principle that a stay will only be granted on the ground of FNC where the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

The USA version of the doctrine of FNC is too wide in the sense that the courts consider public and private interest factors to weigh in determining whether a motion to dismiss on the ground of FNC is appropriate. The private interest factors include relative ease of access to sources of proof, availability of compulsory processes for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; all other practical problems that make trial of a case easy, expeditious and inexpensive. On the other hand, the public interest factors include administrative difficulties from court congestion; local interest in having localized controversies decided at home, avoidance of unnecessary problems in conflict of laws or in the application of foreign law and the unfairness of burdening citizens in an unrelated forum.

Once a case is dismissed on grounds of FNC either to the avail of one or both, the plaintiff will be forced to pursue his action in the more convenient forum. This may, however, create serious problem to the plaintiff. Since the defendant can not be compelled to submit himself to the jurisdiction of the convenient forum, he may out of fraud resist to go to that forum (when his physical presence is required). Here, the question is what would be the remedy of the plaintiff, can he reinstitute an action in the forum state (which had dismissed his action on grounds of FNC) where the defendant is amenable to its jurisdiction.

Generally, one of the important questions which a court should resolve before dismissing an action through FNC is whether there exists a convenient alternative forum to which the defendant is amenable. If the court doubts this, it may not dismiss the action, or alternatively, it may determine for stay until assured that the defendant will not resist attempts to be sued in the more convenient forum.

As a matter of doctrine, FNC neither entails a *res judicata* effect nor does exclude it. Courts may at their own discretion allow reinstitution of the same action when, for instance, the defendant cannot be subjected to the jurisdiction of the convenient forum, or that the period of limitation for the action has lapsed in the calculation of that forum. On the other hand, they may refuse to entertain the same action which they dismissed it on

FNC groundless. But such courts could not be expected to be lenient in dismissing an action. All that can be said about the doctrine of FNC is that it is not capable of single version both as regards to its contents and effect. Having said that, let us discuss the major explanations behind the doctrine of FNC; and the critiques forwarded against it.

The doctrine of FNC is not explicitly adopted by the non-Common Law countries; it is the Common Law tradition which is responsible for its development. According to the Common Law jurists, the doctrine of FNC is regarded as fulfilling the following roles:

- **As an Antidote to Excessively Wide Bases of Jurisdiction**

In a theory of jurisdiction based on 'power', a forum state can assert jurisdiction in personal cases on the basis of the transient or causal presence of the defendant in the forum. There is, thus, an obvious risk of injustice. At its worst, the plaintiff may commence an action in a state which has been deliberately chosen because of its inconvenience to the defendant. What FNC does in this case is that it in a way lessens the harshness of transient rule of jurisdiction or, in other words, it serves as an antidote to an excessively wide basis of jurisdiction.

- **Providing Flexibility**

Bases of jurisdiction in common law are not only wide; they can also be crude, sometimes being based on a single, perhaps fortuitous connection with the forum. Contrary to such a linear approach, FNC provides flexibility by enabling a court to consider a wider range of factors which come within the tenets of convenience.

- **Preventing Forum Shopping**

The incidence of forum shopping occurs where a plaintiff is provided with more than one forum to be chosen by his own calculus of interest. Such system is likely to expose the defendant into a vexatious position because his opponent may with a view to weakening him institute an action in an inconvenient forum. The problem of forum shopping is acute

particularly in US and England, where their forum awards a higher damages including in many cases punitive damages; possibility of extensive pretrial discovery, and a very wide jurisdiction rules which allow trial. Perhaps the major role of FNC is to restrict the plaintiff into a convenient forum. Thus, in a system where it operates, forum shopping would no more be an issue because the plaintiff would be forced to go into the appropriate forum.

2.9.1.1. Critiques against FNC

The major criticism against FNC is that it poses a greater potentiality for abuse by courts exercising their discretion. A judge may attach much weight to some factors with intent to affect the interest of one of the parties.

The doctrine permits an additional and lengthy hearing before the final trial.The plaintiff's problem is further complicated by uncertainty as to what makes a forum appropriate. A doctrine phrased in terms of "vexatious ness, and inconvenience" makes accurate prediction difficult.

And a judge might be persuaded of his courts unsuitability less by the circumstance of the case than by his own overcrowded calendar.

2.9.2 Pendency

Pendency refers to a situation where parallel proceeding involving the same parties and cause of action are continuing in two different states at the same time. There is an obvious risk that if the proceedings continue, the courts of different states may hold an irreconcilable judgment. In order to avoid this problem, many states have adopted pendency rules as a ground for a discretionary or mandatory declining or suspending of jurisdiction. However, there is no uniformity as to the basis for pendency rule. It may be based on FNC grounds; or mechanical first seized approach, or a recognition prognosis. Let us see them one by one.

*** Forum Non Convenience**

In some states, such as, Britain, Australia and Canada, pendency is not a doctrine in its own right; it is regarded as being overall a facet, albeit, an important one of the doctrine of FNC. In such cases, then the risk of irreconcilable judgments may not alone suffice for the courts to decline jurisdiction. Be that as it may, considerable weight may be given to the pendency factors because of the well recognized unsuitability of allowing the two sets of proceedings to continue. Under English law, a considerable weight is given to pendency factors if the foreign forum has made substantial progress in the proceeding, which action started first being irrelevant. However, pendency rules based on the FNC approach faces the same limitations that are inherent to the doctrine of FNC itself, as discussed above.

*** The First Seized Approach**

This approach requires the courts of the forum to defer to the courts of a foreign state if the latter are first seized of the proceedings. It is a very simplistic approach because courts will not engage into a painstaking exercise of weighing various factors, as is the case in the doctrine of FNC. This approach is dominant in the Western Europe. Perhaps the well-known example of this approach can be found in the Brussels and Lugano Conventions on Civil and Commercial Matters, which provide that where proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting state's any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. Where the jurisdiction of the court first is established, any court other than the court first seized shall decline jurisdiction in favor of that court.

This provision, however, does not answer the question: when is a court deemed to be seized of proceedings? Normally, the choice is between the moment when the document instituting the proceeding is filed with a local court and the latter moment when this document is served on the defendant. In a number of countries the procedural rules do not give a clear answer. Some states lean on the position that courts are seized of jurisdiction when the proceedings are served on the defendant. Other states, however, emphasize on

the filing of an application of summons with the court, or if summon is not necessary, when a claim is presented to the court.

The mechanical first seized approach is usually opted for its virtue of simplicity. But there are considerable disadvantages which ensue from its operation. The following are the oft-quoted criticisms against the mechanical first seized approach. Firstly, if you have a definition in terms of 'same parties and cause of actions', there is an obvious temptation for a party to evade the pendency provision by adding another party of another cause of action; secondly, which court is first seized may be an accident of timing. Moreover, actions may be started contemporaneously. Thirdly, the first seized rule, far from acting as a disincentive to parallel proceedings, acts as a positive incentive to this. It leads to an unseemly race by the parties to be the first to commence proceedings. And, fourthly, the lack of uniformity over the question when a court is seized of proceedings poses a difficult to a forum state in working out when a foreign court, under its procedural rules, is so seized, and there is always the risk of getting this wrong.

*** Recognition Prognosis**

According to this approach a court declines jurisdiction if the action abroad is likely to lead to a judgment which is recognizable in that court. This method of dealing with the problem of pendency is prevalent in Western European states, i.e., in non-convention cases. There is a disparity on the issue whether the foreign forum must have been earlier seized of the proceedings. Under the Hague Convention on Recognition and Enforcement of Foreign Judgments, the only question that a forum should resolve is whether the action pending abroad is recognizable under its law, it is not necessary that the foreign forum was first seized of the proceedings. In contrast to this, the French and German position is that for the recognition prognosis to apply, the foreign forum must have been earlier seized of the proceedings. The Swiss position seems a different arrangement in the sense that it does not as a rule require the satisfaction of the first-seized rule, but in furtherance to the condition of 'recognizibility' it puts that the foreign forum must be expected to resolve the case within a reasonable time.

2.9.2.1 Critiques against Pendency

* If the foreign judgment is not recognizable, the parallel proceedings will be allowed to continue. But this will create additional expense and inconvenience to the parties.
* It is not easy to predict whether a foreign judgment will be recognized in the forum. There is a particular difficulty with certain defenses, such as public policy, which can only properly be considered after the foreign judgment has been granted.
* What happens if subsequently it turns out that the foreign judgment cannot be recognized? German law, somehow, avoids this problem by adopting a procedure of initially suspending rather than dismissing local proceedings. Dismissal will only take place once it is apparent that the plaintiff no longer has a need for domestic legal protection. Swiss courts also have adopted a procedure of only suspending proceedings and do not decline jurisdiction.

2.9.3 Ousting Jurisdiction by Agreement

The negative implication of forum selection clause in an agreement is exclusion of forums which could have exercised jurisdiction had it not been for the parties' agreement to opt otherwise. To put it in other way, if parties to a contract confer jurisdiction to a forum state, say X, other states are, at least theoretically, precluded from asserting jurisdiction over the parties for a dispute arising from the contract, no matter whether one or both of the parties are domiciliary or not.

As far as the effect of ousting clause (i.e. negative implication of forum selection clause) is concerned, the Common Law and Civil Law countries stand in different positions. In the former, there is a power to decline jurisdiction but this is discretionary, and a court can nonetheless, allow the local proceedings to continue despite the parties agreement on trial abroad. In exercising this discretion the court will take into account a number of considerations which are essentially the same to those factors under FNC. But, since the Common Law has no intention of eroding the sanctity of contract, a local forum needs to be furnished with stronger reasons for asserting jurisdiction over parties who have ousted

it by agreement. For example, the Israeli court would assert jurisdiction if it is shown that the plaintiff is unable to bring his action abroad or would be faced with clearly demonstrable discrimination.

In Civil Law jurisdictions, a local court cannot try a case where there is a foreign choice of jurisdiction. The declining of jurisdiction is compulsory. Under German law, for instance, the effect of a foreign choice of jurisdiction agreement is the *ex officio* dismissal of the local claims as inadmissible. But this does not mean that every forum selection clause produces the same effect. In order to be enforced by the recognition forum, the agreement has to satisfy certain requirements provided under the laws of the forum state.

*** Declining of Jurisdiction/ stay of Proceeding**

The grounds for restraints on judicial action may vary form state to state. According to Art 38 sub Art.1 of the Draft, a court that lacks jurisdiction is required to decline jurisdiction of its own motion. This is a basic restraint because it preserves the basis of judicial jurisdiction provided under the Draft. But, this is not only the case. A court which has jurisdiction may nevertheless be required to decline jurisdiction or stay proceedings. Some of the bases for declining of jurisdiction or stay of proceedings are already discussed, although incidentally. Hence, our subsequent focus will be on those grounds which are not discussed so far: pendency, related actions and the requirement of full faith and credit.

Pendency (why putting it again as a sub-title?) Reconsider!

In the previous discussion we have seen that more than one state may assert jurisdiction over the same matter. Thus, there is a possibility that a plaintiff may sue the defendant in different states over the same cause of action, unless he is restricted to one of the available forum. It is widely accepted that it is undesirable to have a situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different states at the same time. There is an obvious risk that, if the proceedings continue, it would be sheer vexatious to the defendant to be required to appear and defend in different courts at the same time, and for the same cause of action.

In many countries, pendency serves as a ground for declining of jurisdiction or stay of proceedings. But, there is no uniformity as to the basis for this, the question as to which court should decline jurisdiction or stay proceeding is differently addressed.

Under the Draft, the problem of pendency is addressed on the basis of mechanical first seized approach. This approach gives priority to the court first seized. Art 39 sub Arts 1 and 2 states that where proceedings involving the same cause of action and between the same parties are brought in the courts of different states, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favor of that court.

Although the Draft prefers to the court first seized, in case of pendency, it has never ascertained the question as to the precise moment when a court is deemed first seized. Normally the choice is between the filing date of the action, and the moment when a defendant is served with process. Different forums may give varying and opposed meaning to the concept - when a court is seized of proceedings. The terrible consequence of the lack of uniformity in relation to the first seized rule is that parallel proceedings (over the same matter and the same parties) may continue in different courts which may result in irreconcilable judgments. Thus, the mechanical first seized approach, without uniform first seized rule, may finally be of no help in avoiding the problem of pendency.

Related Actions

Related actions are defined, as per Art 40 sub Art 3, as those actions which are closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. In some states, especially those which use the doctrine of forum-non-convenience to deal with the problem of pendency, there is no separate rule on related actions. The doctrine of forum-non-convenience is flexible enough to deal with situations where there are parallel proceedings but the parties or cause of action are not the same. But in states which have

adopted the mechanical first seized approach and having adopted a strict definition of pendency (as parallel proceedings involving the same cause of action and the same party), related actions thus, falls outside such provision because the cause of action or parties are not the same in each action. Hence, the obvious solution is to have a separate rule dealing with related actions.

Related actions are separately dealt with under the Draft. Accordingly, Art 40 sub Art 1 states: where related actions are brought in the courts of different states, any court other than the court first seized, may while the actions are pending at first instance, stay its proceedings. This provision is qualified under sub Art 2 of the same provision which allows for a declining of jurisdiction upon the application of one of the parties provided that the law of the court first seized permits for the consolidation of related actions and that it has jurisdiction over both actions. The preference to the court first seized is still retained, as in the case of pendency provision under Art 39. However, it is different in that the power to stay proceedings or decline jurisdiction is a discretionary one. Despite the occurrence of related actions, the second seized court can decide for the continuity of the local action.

The Requirement of Full Faith and Credit

In almost every legal system, there is a well settled guarantee against relitigation of matters which are already determined by a competent court in prior litigation. Prior litigation, thus, furnishes an obvious and basic ground for declining of jurisdiction by a second forum. The question as to which matters are deemed to be determined in prior litigation, and whether the parties and the cause of action in both forums should be identical is addressed by the *res judicata* rules of the respective state. But, the underlying policies are everywhere the same: to minimize the judicial energy devoted to individual cases, establish certainty and respect for court judgments, and protection of the defendant from being vexed by multiple litigation.

However, the above virtues do not seem to be easily availed of or maintained in a federal arrangement. Most federal states do not vest power on a state to determine for the

extraterritorial recognition of its judgments. A good exemplary of this limitation is found in a federal system which has established dual court system, where each state and federal courts have their own hierarchy, and not subject to control and influence of one another. Thus, since a state may not ensure that a judgment it rendered would be granted the same *res judicata* value in the sister states, there is a danger of multiplicity of litigation. Yet, it is wrong to assume that federalism is unable to curb such undesirable risk. Many states have adopted the requirement of "Full Faith and Credit" as a mechanism to avoid the risk of multiplicity of litigation.

The Full Faith and Credit Clause establishes through out the federal system the principle that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgments was rendered. For there is a Full Faith and Credit Clause, a defendant may not challenge the validity of the plaintiffs' right which has ripened into a judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery.

Although the requirement of Full Faith and Credit places national sanction against relitigation over the same cause of action, it may be subjected to certain exceptions. The exceptions may vary form state to state, but the most common ones are similar to those defenses available for the recognition of foreign judgments (see chapter four), such as, fraud, duress, evasion of the parties, violation of due process requirements, lack of jurisdiction and repugnance of the sister state judgment to the local policy of the recognition state. It may also be affected by the scope of the local *res judicata* rules. In some states, the *res judicata* rule requires that for a subsequent suit to be barred by prior litigation, the parties and the cause of action in both suits must be identical. This is commonly called claim preclusion. In some other states, the requirement of mutuality of parties and cause of action in both prior and subsequent litigation is relaxed. An issue necessarily determined in an earlier litigation may be given a preclusive effect as against subsequent litigation, even if the second suit involves a different cause of action or parties: issue preclusion.

In a number of Federal states, the requirement of Full Faith and Credit is a constitutional clause (examples include USA and Australia). However, it is not clear whether the requirement of Full Faith and Credit is envisaged under the FDRE Constitution. Art 50 sub Art. 8 of the FDRE Constitution provides "… the state shall respect the powers of the federal government. The federal government shall like wise respect the powers of the states". It could be argued that since judicial power is one of the major powers vested on each state and federal government, a judgment rendered, a right created and the like in one state shall be respected else where in the federation. But, this mutual respect clause may be of no help when recognition of sister state judgment involves an improper infringement of policies of the second state. This is because the mutual respect clause does not require a state to subordinate its interest so as to respect the judicial power of a sister state. Thus, to the extent there exists conflict of interest between the rendition state and the recognition state, it would be wrong to transcend the mutual respect clause to the level of the requirement of Full Faith and Credit. Of course, the purpose of the clause is not to throw the fundamental policies of the recognition state, but it involves some kinds of compromise of the interest of the second state. It usually gives priority for ending of litigation than respect to the interest of the second state to adjudicate an action anew which has ripened into judgment in a sister state. Thus, the mutual respect clause envisaged under the Constitution, as per Art. 50 sub Art 8, is far from being sufficient to take the job that the requirement of Full Faith and Credit runs. Thus, it seems safer to say that the scope of the requirement of the clause is limited to the standard of the mutual respect clause.

However, the above assertion does not seem to be maintained under the Draft. Art 7 of the Draft states that in interstate matters, excluding penal matters, Full Faith and Credit shall be given to the laws, judicial proceedings and judgments of the competent court of a state by all other states. Exceptions to this rule are no where provided. Such excessive silence as to any exception may, however, make it vulnerable to several questions: should prior litigation in one state always bar subsequent litigation in a sister state, even if the prior litigation involves a clear infringement of the policies of the second state? Would it not be contradictory to the mutual respect clause if the requirement of Full Faith and

Credit has to flourish without limitation? How could the jurisdictional rules be respected if a state which violates the jurisdictional rules is nevertheless entitled to Full Faith and Credit? It is likely that different state courts may take different positions as to the issues raised here. And, since states are usually unwilling to subordinate their own interests with respect to a specific judgment rendered by a sister state, it may craft excessive exceptions which in a way promotes multiplicity of litigation. Thus, unless the requirement of the Full Faith and Credit envisaged under the draft is reconsidered and well studied, it may produce absurd consequences or lose its practical significance.

2.10. Choice of Jurisdiction *vis á vis* Choice of Law

Generally speaking, Choice of Law and Choice of Jurisdiction are interrelated. They are mutually interdependent. The tests they use are many times similar. Traditionally the jurisprudence of jurisdiction dictates that a court asserts jurisdiction because of the relationship of the parties or the thing to the forum or the underlying transactions and the forum. The merits of the case in which the fate of the parties is to be decided in pursuant to the applicable rules of the forum is conceived as irrelevant in determination of jurisdiction. Consequently the interrelations between the choice of law rules and choice of jurisdiction are often times overlooked. However, the influence of the one on the other is evident. Determination on jurisdiction sometimes suggests the applicable law (esp. when the choice of law rules is forum oriented). On the other hand, consideration of the choice of law rule of the forum may cause a court to decline jurisdiction, though rarely. It is, therefore, necessary to discuss the instances which show the possible interrelations between choice of laws and choice of jurisdiction.

The first instance is when the forum serves as a place of trial. This instance occurs when the forum state does not as of right resort to its own domestic laws for the adjudication of the case which involves foreign elements. To put it differently, the choice of the applicable rule of the forum state would operate upon satisfaction of some mechanical rules. As, for example, in contract cases, the law of the place of performance or conclusion of the contract governs; in tort cases, the commission of the wrong; in succession, the last domiciliary of the deceased. Thus, if the operation of the choice of

law rule refers to a foreign law and the forum has accordingly applied it, such forum state would be deemed to have served as a place of trial. The assumption under such mechanical choice of law rules is that another state whose laws the forum state deemed appropriate could have applied the same rule if it has been given the opportunity to hear the case. In such situations, therefore, the forum state may rush to decline jurisdiction on grounds of case congestion or reduction of cost of litigation of the parties and the like, for which forum handles the case is indifferent at least as to the application of the appropriate law.

However, it should be noted that public policy of the forum state may oust or render the choice of law rules inoperative. An example of this could be found in litigations respecting divorce, adoption, work's compensation in which cases the forum state would assert jurisdiction without regard to other litigation and enforcement considerations.

The second instance is when the choice of law rule becomes forum-oriented. Forum-oriented choice of law rule, unlike the mechanical approach, regards foreign laws as subsidiary and only does a gap filling role which bears when the forum state is disinterested with the outcome of the case, which is less likely. A good example of this is found in Currie's 'government analysis' choice of law rules method which makes distinctions between true conflict in which the forum state enjoys the privilege of priority and false conflict where the forum state's interest is unaffected. Such choice of law rule, thus, would encourage a forum to assert jurisdiction without regard to other analytically significant relationships in all case in which the forum's relation to the underlying transaction ground a concern.

The third and last instance is when the application of the foreign law involves risk of wrong interpretation. An arbitrary result is likely to ensue if judges assume jurisdiction over a controversy which raises a legal issue that is alien to the domestic law of the forum state. As for example, the concept of trust is not familiar to the Civil Law judges. Since the judicial expertise of the forum state in such cases is not potent in resolving the controversy, the forum state would, therefore, opt to decline jurisdiction than it

complicates its judges who may invariably be bound to run risk of wrong interpretation of foreign laws.

2.11. Judicial Jurisdiction in Ethiopia

Ethiopia does not have the law of judicial jurisdiction. The 1965 decree on Civil Procedure, while declaring some provisions on local and material jurisdiction, has failed to incorporate provisions on this point. However, one can learn that there are some provisions scattered in our laws. Despite their existence, they are far from comprehensive and systematic. What do the laws look like?

We do not have law does not mean that we did not encounter cases requiring solution regarding judicial jurisdiction. What were our judges doing in cases they were faced with a problem?

The following article by Samuel Teshale tries to answer the above two and other questions.

Towards Rationalizing Judicial Jurisdiction in Ethiopia

(Foot notes are omitted.)

Introduction

No one can be jealous of the Ethiopian judge presiding over a case of Private International Law. The absence of codified or precedent system on this field breeds a concatenation of inextricable difficulties. Left totally to his own devices, the Ethiopian judge is simply at sea in the face of the avalanche of problems that he should tackle. Without any exaggeration, it is flatly unfair to demand from him: marshalling analysis, and adaptation of the myriad theories and innovations of most prolific foreign academics. Devoid of certainty, predictability and uniformity, Ethiopian private international "Law" presents no nice face to anyone who comes into contact with it.

The major ingredients of this branch of law include judicial jurisdiction, choice of law and recognition and enforcement of foreign judgments. (The latter is already place in the Civil Procedure Code of 1965). Out of this Pandora's books, we will, in this article, deal with one of the threshold problems namely: judicial jurisdiction.

What can an Ethiopian court fall back onto determine whether it has jurisdiction to settle the Private International Law dispute it is seized of?
Hence, after defining and outlining the theoretical parameters of judicial jurisdiction in section II and III, we will briefly discuss, in section IV the practice in foreign legal systems. Section V probes the Ethiopian scenario regarding judicial jurisdiction. Finally, the foregoing alternatives will be evaluated and recommendations forwarded toward rationalizing judicial jurisdiction in Ethiopia.

1. Definition of Terms

"Judicial Jurisdiction" is the authority or power of the courts of a particular state to try a case of Private International Law. Private International Law shall be understood, for our purpose here, as a branch of law dealing with cases containing a foreign element. Where one of the parties to the case is a foreign national or domiciliary, or the act or event in issue took place in a foreign country or the property in dispute is located abroad, then the case contains a foreign element. Conflict of laws may arise in a federal context as well. In this article, however, we refer only to the international "conflict of laws".

2. Theories of Judicial Jurisdiction

Conflicts scholars recognize different categorization of theories of judicial jurisdiction. The author prefers the division into:

1) *Power theory, and*
2) *Fairness theory.*

Inadequacy and forum convenience should be considered merely as factors that have to be absorbed to mitigate the extremes of the two theories. They must not be regarded as theories in their own right.

Power theory explains judicial jurisdiction in terms of the ability of a court (sovereign) to force the defendant in a proceeding to submit to its process. (The plaintiff is induced to appear before the court by his own calculus of interests.) The typical example of such assumption of jurisdiction is the common law practice of subjection of a transient foreign defendant to the power of a court. The common law holds that if a defendant is present with in the territories of a state, the sovereign can force him "to await the outcome of the proceedings" and "to obey the resulting judgment". Hence, in such case the court clearly has jurisdiction. Only in exceptional circumstances may the judge at his discretion grant leave to such a defendant to litigate his case in another state at his convenience.

Power theory determines judicial jurisdiction from the court's vanta point. The logic is that if a judgment rendered by a court cannot be enforced, what use is passing a judgment? The underlying assumption is that the world is not yet co-operative; comity and readiness to accept foreign judgments merely for the sake of fairness do not as such drive international relation. Therefore, a court should pass a judgment that it has power to enforce.

In fairness theory, a court should try a case where it is convenient fair and just to the parties. "Fairness" and "justice" are, of course, vague terms, subject to elaboration by a court seized of an issue of judicial jurisdiction. This theory approaches the question from the perspective of the parties. In fact, it assesses whether it will be convenient for the court entertain the case. Thus, are witnesses accessible? Can defendants obtain legal advice? Do the procedure and the language of the court present insurmountable obstacle to the defendant? Etc. are weighed on the scale before assuming judicial jurisdiction under fairness theory. The argument of this theory is that a fair decision receives recognition elsewhere. The world share fairness as a common value and thus facilitates enforcement of a judgment in the state other than the rendition forum.

3. Judicial Jurisdiction: An Overview of Foreign Laws

In this section, we will glance through the European Litigation Handbook to see how judicial jurisdiction is addressed in European countries that belong to continental or the common law systems.

Natural Persons

Except France and Netherlands which consider plaintiff's nationality as sufficient ground to justify jurisdiction, in general, it is defendant's connection with the forum state that is germane to the issue. Accordingly, England, Wales, Austria, Belgium, Denmark, Germany, Italy and Switzerland assume jurisdiction where defendant is their domiciliary. Most of these countries consider residence also as another ground of exercising jurisdiction.

Juridical Persons

There are two criteria for fixing domicile/residence of juridical persons: siege reel (effective or actual seat), and statutory seat. The first approach bases at the place of principal activities, whereas the latter bases itself on the place of formal registration or incorporation to fix domicile or residence of juridical person. Hence, Belgium, France, Luxemburg and Germany, for instance, follow the siege reel approach, where as Netherlands, Austria, and Sweden are in favor of the statutory seat criterion.

Contract

Courts establish jurisdiction to entertain contractual disputes if either the contract is created or is to be performed or both with in the forum state. England and Wales follow the first approach; Austria, France, Germany, Norway and Switzerland follow the second approach while Belgium and - both grounds as appropriate to establish jurisdiction.

Tort/Unlawful Enrichment

With respect of tort, the pertinent criteria are place of tortuous act or place of injury or both. Thus, Austria, Germany, and Denmark assume jurisdiction in relation to tort if the wrongful act occurred with in their territory. England, Wales, Norway, Sweden and Switzerland establish jurisdiction if either tortuous act or the consequent injury occurred with in their territories.

Property

In all states the situs of the object in dispute determines jurisdiction over - of property. Apart from the grounds listed above, parties can, by agreement, choose a court to settle their dispute. In fact, this freedom is subject to certain limitations such as an obligation to show a modicum of nexus between the - in dispute and the forum chosen(Germany), and such other mandatory requirements (e.g. Norway, Sweden and Belgium).

European states have signed the Brussels convention (1968) and the Lugano Convention (1988) on Jurisdiction and Enforcement of the Judgments in Civil and Commercial Matters. These conventions prescribe uniform rules of judicial jurisdiction. Therefore, the abovementioned rules apply to relationships between those states and non-convention states. The conventions' rules of judicial jurisdiction, however, must be seen against the peculiar relationship among EC member states. Any project of emulation of this system of judicial jurisdiction must be cautious for this reason.

4. THE ETHIIOPIA LAW AND PRACTICE OF JUDICAIL JURISDICTION

Apart from the jurisprudential question that may be raised as to existence of "Law" on Private International Matters, in the absence of enactment or precedent system; and whether it is constitutional to have inconsistent, unpredictable practice is a serious problem, which, however, is beyond the scope of this article.

By Ethiopian law on judicial jurisdiction, therefore, we mean the provision scattered in the different codes and the corpus of the decided cases The Federal Courts Proclamation No. 25/1996 stipulates under Article 11(2) (a) that cases of Private International Law fall under the First Instance Jurisdiction of the Federal High Court. Yet, there are no rules to guide this court in exercising judicial jurisdiction. The court, therefore, is faced with the task of carving rules and principles to determine when and why Ethiopia shall have a power of rendering binding judgment over cases containing foreign elements what avenues are then open to this court burdened with such a Herculean task?

4.1 Relevant code provisions

4.1.1 The Civil Code

An interesting one was once made by High Court of Addis Ababa in Forti V. Forti. The court implied that the Civil Code provisions on domicile (i.e., Arts. 183 - 191) were destined to serve Private International Law. This passing remark of the court could be amplified. It seems that domicile is indeed reserved for Private International Law because no where in the codes is it (but residence) used for purely internal disputes. On the Other hand, we find domicile in used to establish jurisdiction in relation to carriage by air, under Art. 647 Comm.C., and under Maritime Law (Arts. 208,237). The reason seems that in those situations foreign elements are normally present in the dispute.

Are we justified, therefore, in holding that it is not nationality but domicile of the defendant (or of the plaintiff, at times) that should be considered to establish judicial jurisdiction at least in personam actions? The above arguments suggest this conclusion.
The draft Private International Law chapter was however based on the nationality principle. Thus, it might as well have been predicated on domicile- based establishment of jurisdiction. At any rate, it was not enacted.

4.1.2 The Civil Procedure Code

The Civil Procedure Code provisions most relevant to cases of Private International Law are Arts. 8 and 20. Art. 8 (2) provides that Ethiopian courts are not precluded from

trying civil suits already pending in a foreign court. It must be underscored immediately that this is not a jurisdiction – granting provision. The Ethiopian court must in the very beginning have judicial jurisdiction like the foreign court trying the suit. In that case, the pendency abroad won't preclude it from trying the suit as it does when the suit was pending in another court within Ethiopia.

Art. 20, captioned, "Defendants Residing Abroad", is part of chapter three – Local Jurisdiction. It is stated under sub. Art. (1) that where the defendant is non-resident (though Ethiopian by Nationality),suit shall be instituted in any court in Ethiopia at plaintiff's choice. (If the suit relates to immovable property, the plaintiff shall sue at the situs of the immovable). If defendant is non-resident foreigner, owning property in Ethiopia, suit shall be instituted in the court of the place where such properties situate (Art. 20 (2)). These provisions, like all those under chapter three of the Civil Procedure code, are venue provisions. They apply with the assumption that Ethiopia has judicial jurisdiction. They do not provide rules of judicial jurisdiction.

4.1.3 The Commercial Code

Art. 647 of the Commercial Code, captioned "Jurisdiction", is part of Title – Carriage by Air. Thus, concerning contracts of carriage by air, claim for damage may be brought, as plaintiff chooses, in "the court of place where the carrier is domiciled, has his principal, place of business has an agent who made the contract or before the court of the place destination".

This provision shall not be cited in relation to international carriage by air as that is governed by the Warsaw Convention to which Ethiopia is a party. Nevertheless, for "Carriage exclusively performed within Ethiopia" Art. 647 is the relevant provision.[15] *Thus, for domestic flight, if either carrier or the passenger is a foreign national or domiciliary, that is to mean when the cases is one of Private International Law, judicial jurisdiction is to be determined based on art. 647Comm.Code. (Note the reference domicile rather than residence as under chapter three of the Civil Pro. Code).*

4.1.4 The Maritime Code

The Maritime Code also lays down rules of judicial jurisdiction under Art. 208 in respect of carriage of goods, and under Art. 237 for action for damages incidental to collision. The former establishes a unilateral rule applies only for carriage of goods where port of arrival is in Ethiopia. It doesn't apply when port of arrival is elsewhere. Art. 237, on the other hand, is a multilateral provision covering all the situations of collision inside and outside Ethiopia. (Again, note the reference to domicile.)

4.2 Judicial Practice

Ethiopian courts seem to have adopted three different approaches to issue of judicial jurisdiction. They are:

Approach 1: silence regarding judicial jurisdiction
Approach 2: recourse to Civil Procedure Code
Approach 3: recourse to general jurisprudence

4.2.1 Approach 1: Silence Regarding Judicial Jurisdiction

Court seized of a case of Private International Law should first establish Judicial jurisdiction before settling the choice of law issue. Indeed, it must do so if its judgment is to have any practical value. However, in a number of decisions, we see that judicial jurisdiction is not mentioned at all.

Verginella V. Antoniani, the couple was married in Dessie and resided in Addis Ababa until the wife later left the conjugal home and went to Italy. The husband petitioned for judicial separation on the ground of desertion.(the Civil Code was not enacted yet).
The court started: "The first question to be determined in this case is which law is applicable to the present circumstances". Then, it went into the choice of law process. Judicial jurisdiction was not established.

Abebech Wolde V. Estate of Signor Konstantinov Escrapino is another example. The couple was married in Addis Ababa and Escrapino lived with his wife for more than five years. Following his death, the wife claimed to succeed to his property on the basis of Italian law. The court reasoned that the marriage was concluded according to Ethiopian law, and any issue arising there from shall be resolved in accordance with Ethiopian law. Even though this choice of law decision itself is questionable, we will focus here on the omission of the court to mention proclamation 25/1996, the Federal High Court has jurisdiction over Private International Law matters.

Similarly, in Nediya Chartes V. Estate of Antonio Chartes, the court failed to raise the issue of judicial jurisdiction. Antonio Chartes was a Kenyan national. The spouses lived in Ethiopia till the husband traveled to Italy where he died. The wife claims a succession right over the property of the deceased. The suit was filed at the First Instance Court, which declined to entertain it on the ground of absence of subject matter jurisdiction. The Federal High Court recognized the case as one of Private International Law. It directly passed to the choice of law process. Since the spouses resided in Ethiopia, succession to the property of one spouse by the other shall be governed by Ethiopian law. The merit of this decision aside, it must be underlined that the issue of judicial jurisdiction was not raised at all;

One may interpolate in all these decisions that the court assumed judicial jurisdiction on the ground of implied consent of the defendant. Though, the record shows that no preliminary objection was invoked by the parties, the author doesn't suppose that the court consciously took this ground for its jurisdiction. If that was the case it would (and should) have been stated. Secondly, consent of defendant is subject to limitations. The resources of the court and public policy of the forum state may outweigh the decision to assume judicial jurisdiction.

All the same, we are not implying that the court lacked judicial jurisdiction in the cases mentioned above. Bit if it had, it was not consciously and rationally established.

4.2.2 Approach 2: Recourse to the Civil Procedure Code

Courts or parties to a Private International Law dispute have often enough made recourse to the Civil Procedure Code a) by applying then provisions referring to cases containing foreign elements directly to establish judicial jurisdiction, and b) by applying the rule for local jurisdiction to determine judicial jurisdiction.

In Dr. Henry Colombo V. Andrel Lewis Herald, we find the most explicit advocacy of the latter of these modalities. In a contract made in Paris, the defendant acknowledged a debt amounting to 100, 000 francs, of which only 30, 000 francs was paid. The contract didn't specify place of payment. Creditor's (plaintiff's) address was stated to be Senegal, and defendant's Ethiopia. The plaintiff filed suit claiming payment of the outstanding amount.
The court framed the first issue as whether Ethiopian Courts have jurisdiction. It then observed:

There is no proclamation regulating (harmonizing) a situation of this nature… Although our laws are silent on this score, we must examine whether the suit, according to the Civil Procedure Code, could be entertained by the court or not.

The allegation of the plaintiff based on Art. 19 Civ. Pro. Code, was to the effect that Ethiopia has jurisdiction. This provision states that a suit shall be instituted at defendant's residence or place of business.

The defendant, on his part, cited Art. 24 which provides that suits regarding contracts may be instituted either at the place of conclusion or of performance of the contract. Hence, it is Paris (France) which is the appropriate forum.

The court reasoned that, the plaintiff is not forbidden to file suit at defendant's residence or place of business. The provision didn't impose on plaintiffs to file suit at place of

conclusion of the contract only. The purpose of these provisions is to facilitate a spotting of the debtor at a likely place by the creditor to effect payment.

The assumption of the court seems that the rules on local jurisdiction can replace rules of judicial jurisdiction. It was not applying the former mutatis mutandis. We will probe the validity of such assumption in the final section.

In W/ro Astraid Debahian Jerahian V. Estate of Mr. George Jerahian, the Federal First instance court, whose judgment was latter reversed by the High Court, also followed the first modality. Mr. George Jerahian, Ethiopian by nationality, guide in Canada. In his will, the deceased bequeathed his property, located in Addis Ababa to his wife, W/ro Astraid Debahian Jerahian. Consequently, W/ro Astraid Debahian, who is also an Ethiopian national, applied for a certificate of heir as per Art.996 (1) Civ. C. The first instance court rejected the application on the ground inter alia, that according to Art. 18 of the Civil {Procedure Code, the suit should have been instituted at the Awraja Guezat Court having local jurisdiction. It, therefore, referred the case to the Awraja Guezat Court of Canada! In short, the court applied the Civil Procedure provision to recognize the jurisdiction of Canadian courts.

The reversal of this judgment by the High Court was based on Art.11(2) (a) of the federal Court proclamation no.25/1996. since the case involves Private International Law, the first instance court should not have made the above decision. It should have simply rejected the case for lack of jurisdiction. The appellant had also cited Art.4 of the Civil Procedure Code which reads:

> *Without prejudice to the following Articles, the courts shall have jurisdiction to try all civil suits other than those of which their cognizance is expressly or impliedly barred.*

Hence, argued the appellant, the first instance court had jurisdiction to decide on her application. However, the appellate court didn't take a notice of this argument.On the

other hand, the case of Brigadier General Tafesse Ayalew V.Clarville A.J Co. and Mr. Robert William illustrates the first kind recourse to the Civil Procedure Code. First defendant is a Company incorporated in Liechtenstein and seated in Switzerland. Second defendant manager of this Company. The plaintiff and the defendants had conclude contract by the terms of which:

a) *Plaintiff was to broker purchases of goods, by the Ethiopian government and other clients in Ethiopia, from first defendant, and*
b) *Plaintiff was to receive half of the net profit payable in US dollars.*

The plaintiff alleged that he had secured the purchase of two air crafts the Ethiopian Airlines, and two more by the Relief and Rehabilitation Commission. Thus, he was entitled to 291,639, 92 US dollars of which payment was made only of 17,500.00 dollars.
The defendants raised a preliminary objection under Art. 244(2) (a) Civil Pro. Code, contesting the judicial jurisdiction of the court. Article 12 of contract expressly provided that any dispute between the parties shall referred to courts in England, and the law governing the contract is law of the United Kingdom. They also pointed out that that plaintiff already begun proceeding in England.
The plaintiff admitted both allegations, but argued that:

a) *The suit instituted in England substantially differs from this suit and*
b) *Pursuant to Arts. 20(1) and (2) of the Civil Procedure Code, the defendant reside and carryon business outside Ethiopia, plaintiff can institute suit in Ethiopia.*
c) *As per Art. 8(2) of the Civ. Pro. Code, even if the suit is pending abroad, the Ethiopian court is not precluded from trying it.*

The court reasoned as follows: Art. 8(2) would indeed have been relevant if the parties hadn't inserted the choice of court clause under Art.12 of their contract. But by this clause, they have rendered inapplicable all the provisions, including Art. 8(2), "that grant jurisdiction to Ethiopian courts". If the parties hadn't already granted, by their choice, jurisdiction to English courts, then the pendency of a suit abroad wouldn't have barred the Addis Ababa High Court from trying the suit.

4.2.3 Approach 3: Recourse to General Jurisprudence

Hallock V. Hallock is perhaps the best example of this approach. The spouses were Americans who had been residing in the state of Alabama before coming to Ethiopia. The husband applied for dissolution of the marriage on the ground that his wife deserted him. The wife had also filed divorce suit in Alabama.

The suit was first brought before the High Court. The court commented: as there is no codified law on Private International Law in Ethiopia, the question of jurisdiction has to be decided by having recourse to the system "most common in the European continent". After its assessment of the European countries regarding judicial jurisdiction in cases of dissolution of marriage, it observed that courts assume jurisdiction if defendant resides in the foreign state. Therefore, as defendant was not resident in Ethiopia, there was no jurisdiction over the divorce suit.

The plaintiff appealed to the Supreme Court stating that under the law of Alabama, "which both parties have accepted as applicable to them, residence in a state for at least one year, of the plaintiff is sufficient to establish jurisdiction when divoprce is sought on the ground of voluntary abandonment.

The Supreme Court reiterated the absence of rules on the problems and endorsed the resort to "general principles of jurisprudence accepted in other countries". Its exploration of foreign practice was not thorough. It identified nationality or domicile or residence of the parties or of one of them as basis of judicial jurisdiction in relation to matters of divorce in other legal systems. It then focused on the applicant's ground of appeal and dismissed it as relevant only to residents of Alabama. the rule mentioned by the appellant was binding on Alabaman courts, not on courts of Ethiopian empire!

As regards the relative value of domicile and residence, the court preferred the former. No reasons were given for this preference, nevertheless, a plaintiff was not domiciled in Ethiopia, and the court wouldn't assume jurisdiction over the suit.

Though, the conclusions of the two courts were the same, they had relied different theories. The High Court selected rules based on the power theory as it took into consideration residence only of the defendant. On the other hand, the Supreme Court was ready to consider domicile of the plaintiff, hence, if he was Ethiopian domiciliary, it was prone to entertain the divorce suit. This argument in its sympathy for petitioners of divorce whose spouse have deserted the conjugal home smacks of Fairness theory.

In Brigadier General Tafesse Ayalew V.Clarville A.J Co. and Mr. Robert William and W/ro Aynalem Demoz V. Peter Beckensil, the court made reference to |Sedler's "The Conflict Laws in Ethiopia." In the first case, the court extensively quoted Sedler on freedom of choice of court by parties to a contract. This is treated by the latter as derogation from the Power theory with provision that public policy of a state shouldn't be compromised by such choice.

In the second case, the couple were marries in United Arab Emirates according to religious ceremony of the Anglican Church. As the husband soon got employment in Ethiopia, the spouses moved to Addis Ababa. The wife complained of ill treatment by the husband and petitioned for divorce at the Federal High Court on the basis of Art. 11(2)(a) of the Federal Courts proclamation No. 25/1996.

The defendant contested the jurisdiction of the court. He claimed that the prevalent practice elsewhere is the judicial jurisdiction over divorce suit is reserved to the courts, of the place of conclusion of marriage. The defendant cited a passage from Sedler's "The Conflict Laws in Ethiopia".

No wonder that as the only influential scholar who wrote on the Private International Law problem of Ethiopia, a number of courts quote Sedler in their decisions.

6 EVALUATION AND RECOMMENDATIONS

A. *Domicile is singled out as the ground for judicial jurisdiction in the majority of court decisions in Ethiopian. Such decisions have inferred that the Civil Code*

provisions are there to serve Private International Law purposes (e.g. Marry Shatto V.Theodore Shatto). The author regarded such inference plausible enough. Nowadays, however, Private International Law instruments are shifting towards habitual residence as a substitute for domicile. For instance, the Rome Convention on Contractual Obligations, and the Hague Convention on International Sales of Goods, employs habitual residence in the place of domicile. Habitual residence is preferred because it avoids the difficulty of discovering intention (animus revertendi) that it central to definition of domicile. the painstaking arguments made by the court in Shatto V. Shatto testify to difficulty. On the other hand, it still retains the advantages of domicile such as: reflection of the close relationship between the party and the forum states; and suitability to inter-state conflict of laws in a federal system.

Thus, we recommend the same shift to be made in Ethiopia in the Maritime and Commercial Code provisions on judicial jurisdiction and in the judicial practice on other areas of Private International Law as well.

B. *We have also noted that a not so few judgments on Private International Law were made with total disregards of the issue of judicial jurisdiction. Lack of judicial jurisdiction over a case result at least in a) denial of recognition and enforcement (loss of practical value) of the judgment in other states, and b) failure to safeguard the forum's public policy. Therefore, Ethiopian courts should invariably ascertain judicial jurisdiction before going into the choice of law process.*

C. *Regarding the relevance and suitability of the Civil Procedures Code to determination of judicial jurisdiction, we can make the following observations:*

> *The author of the view that any assumption of judicial jurisdiction based on Art.4 is wrong. The purport of this privation is that courts do not need any special*

> *authorization to try civil suits. The reading of the Amharic version shows the emphasis even more clearly. Trial of civil suits is not the power of any institution, but of the courts unless otherwise provided.*

In respect of cases of Private International Law, it can only mean that whether or not Ethiopia has judicial jurisdiction shall be determined by courts. Suits of Private International Law are civil suits. However, this cannot and does not mean that the Ethiopia shall always assume jurisdiction over all cases of Private International Law presented to its courts.

- *Art.8(2), on non-preclusion of court to try suits by reason of the suit's pendency abroad, and*
- *Art.20 (1) and (2), empowering the court to try suits against defendants residing abroad, are considered, by our courts to be jurisdiction-granting provisions.*

But thus provisions as well as those under chapter three of the civil .pro.c.are all applicable in cases containing foreign elements only if Ethiopia has judicial jurisdiction over the case in question. The more substantive argument is – why don't we still apply these provisions to established judicial jurisdiction? The reasoning and modality of the decision of the court in Dr.Colombo V. Andrei Herald indicate this approach. One may reinforce this argument by pointing to the laws of European states on judicial jurisdiction mapped out in section IV. The author disapproved of such enterprise for the following reasons:

(1) The local jurisdiction provisions are tailored for domestic disputes. They are a result of division of adjudicatory power by the legislative organ of a state among the different branches of the judiciary. So, local jurisdiction doesn't take in to its calculation such vital factors for judicial jurisdiction like harmony, with international practice, recognition and enforcement of the judgment by another state, etc.

(2) Instead, as adjudicative to the substantive law such as the Constitution and the Civil Code, their content is predicted on the policy, rules and principles of the substantive law. They are meant to facilitate the process of obtaining the remedies provided in the substantive laws. Since the substantive laws are enacted to govern domestic legal relationships under the umbrella of the constitution, they are generally alien to demands of conflict justice, which is another "brand" of justice, so to say.

(3) Even though venue provisions, such as those of the Civil Pro. Code, take into account factors that would be considered by rules of judicial jurisdiction, the weight of the factors that might be different for the two purposes. For example, Art, 19, which prescribes suit to be made at defendant' residence is based on the traditional norm of protecting the challenged against the challenger, in terms of travel expenses and the like. In primitive international law cases, such factors may be equally, if not more, vital to the interest of the plaintiff. Travel expenses for instance, of the plaintiff cannot be so lightly overshadowed in Art.19, because the plaintiff might be coming from the other end of the world. The expenses may be so exorbitant to effectively bar proceedings by him. Therefore, in the case of primitive international law, the rules like Art. 19 must be expanded to take plaintiff's side of the problems equally into account.

(4) The venue provisions are oblivious of the possible exposure of the foreign party to strange institutions, attitudes and values, because they were meant for citizens of a country subject to one legal system. In primitive international law such diversity is so un limited that is have became a source of " forum shopping" by plaintiffs thus, rules of judicial jurisdiction, unlike those of venue provisions, must be designed to ward of plaintiffs who engage in forum shopping to take advantage of defendants by dragging the latter to inconvenient courts.

(5) One must be warned against taking at face value of judicial jurisdiction obtaining in European countries. For example, French rulers which regards plaintiff's French nationality as sufficient ground for assumption of jurisdiction are held in disfavor by other states. That is so much so that Italy, Belgium and Netherlands that enacted retaliatory measure against those rules. The lesson we learn from this is that those rules of jurisdiction may be results of the states' unique historical context, or reaction to each other's policies.

Many other provisions are also under a barrage of criticism .one can cite for example the ones that are founded on "sheer physical force over parties''. Such are considered to be relics of the medieval, feudal thinking not belonging to contemporary currents of thought that additionally recognize convenience, fairness and justice.

In short, the argument that advocates application, for judicial jurisdiction, of provisions of Civil Procedure Code because of their resemblance to European rules is rather shallow.

D. The right venue to follow for Ethiopian court in establishing judicial jurisdiction, in the absence of legislation proposed thereof remains to be a resort to general jurisprudence. In this connection, our courts seem to have leaned heavily on Sedler's prescription for judicial jurisdiction in Ethiopia. The number of cases in which he was extensively quoted testifies to his influence.

According to Sedler, Ethiopian courts shall have judicial jurisdiction if:

(a) The defendant is Ethiopian national or domiciliary,

(b) The act or event in dispute occurred in Ethiopia or has significant contacts with Ethiopia,

(c) defendant has consented to submit him self to Ethiopian courts,

(d) The action is in rem, when the property in question is located in Ethiopia.

The author fined the proposal of Sedler unsuitable on the following grounds:

(1) *Jurisdiction based on mere nationality of the defendant is unacceptable. Nationality indicates political allegiance and it may be artificial. Hence, where defendant has established family and business and resides abroad, it will be unfair to demand his submission to the court of his national state. It could cause him much expense; he may be unfamiliar with the legal system; and more importantly, enforcing the judgment against would be impractical. That is way in most countries, and more notably in the Brussels Convention, nationality of defendant to found jurisdiction is pronounced exorbitant.*

(2) *Sedler is an exponent of power theory. He states "…when ever the defendant is an Ethiopian national or domiciliary, there is judicial jurisdiction in Ethiopia irrespective of where the act which is the subject mater of the suit occurred".*[40] *this is the extreme version of power theory. This doesn't envisage even the forum non convenience caveat characteristic of power theory.*

As a result, the defendant has no means of pleading acceptation difficulties involved bringing witness and other evidences, and request a transfer of the suit to another state

(3) *For legal persons, Sedler asserts that if such is established pursuant to Civil or Commercial Code, it is subjected to the judicial jurisdiction of Ethiopia, "even thought the transaction in which suit is brought occurred elsewhere. Foreign legal persons, on the contrary, shall be subject to Ethiopia judicial jurisdiction with respect to suit arising out of their activities conducted here" But from the view point, of the Ethiopia legal person, it is rather unfair. If the transaction out of which suit arose occurred abroad, then litigating the case in Ethiopia will cause difficulty of bringing evidence, possibly misinterpretation by Ethiopian courts of the law of the state in which transaction occurred and so many other incontinence. Paradoxically, while*

the Ethiopian legal person transacting abroad suffers such, the foreign legal person transacting in Ethiopia is saved from this trouble.

(4) *Over contracts, Sedler's prescription is that where made or to be performed in Ethiopia, judicial jurisdiction is validly assumed. We can agree with the letter. But qualifications are need for the first. Place of the conclusion 'of a contact may be fortuitous. For example, the contract could be made between transit parties how dropped in Ethiopia (as tourists, for one) by chance. More dramatically, the parties might sign the contract in an airplane on a flight across Ethiopia and while it was in Ethiopia air territory. As regarded in rem action, Sedler points out that situs of the property should be basis of jurisdiction. "The only state that can exercise in rem jurisdiction is the state where the property is situate..." But how does this rule apply over intangible property. The general understanding concerning such property is that they have no location in space. As power theory relies on physical presence of the property, it is at loss in relation to intangibles. Thus, switch to considerations outside physical presence is needed to solve the problem.*

(5) *Finally, consent is laid down as a ground of judicial jurisdiction. Though, this is correct, in the author's view, but not the extent advocated by Sedler in the following excerpt.*

Suppose that two foreign business men, who have offices in Ethiopia, entered in to a contract in Aden, where they also have offices. The contract is to be performed entirely in Aden, and does not involve their Ethiopian offices at all. However, the parties agree that all disputes arising under the foreign business men and the subject mater of the suit has on connection with Ethiopia, there is judicial jurisdiction.

The defendant is, obviously bound by his words. But why should Ethiopian courts spend any resource and judicial time on this dispute that has no value at all for Ethiopia?

To the extent that Selder's proposals are direct reflection of the theory he subscribed to, the criticism show the shortcomings of the power theory. But, a discussion of the relative merit of fairness and the power theories more directly would be in order her

Fairness' theory is quite attractive in its empathy for the individual parties and for the co-operative world it envisage and inspires. Unfortunately, however, the states in the present world are not yet cooperative in granting recognition and enforcement to judgment of one another. Even in European states which display a not so disperate array of laws, such the state of affairs that among the earliest measures of harmonization the EC took powers the Brussels Convention uniform zing rules of judicial jurisdiction and recognition and enforcement of foreign judgments.

Judgments are meant to be enforced, and hence power theory, which is bent on ensuring enforcement, is the sound choice. Its shortcomings, nevertheless, must not be lost sight of, foremost being its dependence on physical (territorial) contact. This renders it out of tune with suits arising in respect of intangible property. In such cases, therefore, a reliance on "personal" links is needed.

More significantly still, power theory cannot be taken all the way to the end not to mention in the form drawn out by Sedler.

For one thing, the exercise of this theory to its extreme may instigate reprisal measures. E.g. If Ethiopia exercises jurisdiction pursuant to this theory, while another state has also jurisdiction by this theory but with substantial ground of fairness as well, that and other states may take reprisal measures on Ethiopian defendants litigating in those states.

Besides, despite its "autarchy" the world has always paid tribute fairness in its rules of judicial jurisdiction. Under forum conveniences clauses, for example, the system founded on power theory gratifies the fairness demands of the defendant. As much as adoption of this theory is wise, therefore, it needs replenishment with forum conveniences provisions. Ethiopia:

- *being a poor country, marginalized from global economy' and at receiving end of the commercial dominion of powerful states;*
- *eager to attract foreign investment;*
- *exhibiting a blank in conflict of laws policy and legislation that could rationally condition and guide judicial jurisdiction, a notable room must be mode for application of forum convenient provisions.*

These same circumstances, furthermore, qualify arguments earlier made to the effect that the question of judicial jurisdiction in Ethiopia, in the absence of Private International Law, has to be decided "by having a resource to the system most common in the European continent." (Emphasis added) Instead, close scrutiny of the circumstances and the factors warns us against banking on a foreign "model" law.

Therefore, until such time that the legislator is awakened to his responsibility of coming up with a Private International Law legislation; we venture to recommend only the following. Our courts had better adopt- in a consistent, uniform and predictable manner- the power theory, in determining jurisdiction over cases of Private International Law. It is also recommended that the forum conveniences provisions be a foot having references to such factors as:

- *convenience of attendance before the court for the defendant;*
- *cost and convenience of calling witness and bringing evidence before the court;*
- *availability of the legal advice to the defendant;*
- *resources of the court and its familiarity with the laws relied on by the parties.*

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2.12. Summary

So many points regarding judicial jurisdiction are discussed in this chapter. The main ones are theories or possible bases of judicial jurisdiction. There are some five theories of adjudicatory jurisdiction developed in this field. While the first one is territorial power theory, the second one is that of minimum contact. Territorial power theory rests on the thinking that a country has got jurisdiction on any person and property happened to exist in its territory. That means a country will not have power out side its territory. As per the contact theory a state will entertain a case containing a foreign element if in one way or another it is connected with the case. The test is if either parties of the case or the subject matter of the case is related with the state.

The others are fairness theory, domicile theory and theory of submission. Fairness theory cannot stand on its own. It works if used together with the contact theory. Fairness element will be considered in order to decide which state amongst those related with the case should entertain the case. The fairness one also tries to find out a middle ground between the litigants rather than favoring the defendant. In the domicile case, it is normally the domicile of the defendant that has jurisdiction. Some countries also use the theory of nationality. That means the state where the defendant is a national will see the case. Finally, although a state may not have adjudicatory jurisdiction, the parties of the case can empower a court through various possibilities.

2.13. Discussion Questions

1. What are the justifications behind local, material and judicial jurisdiction?
2. Discuss the five possible ways of establishing jurisdiction.
3. The theory of Territorial Power is criticized for its inability of responding to today's life style. Do you agree? Justify.
4. It is argued that we would be better off if the Minimum contact and Fairness Theories together establish judicial jurisdiction. How is it possible?
5. Although from the legal track point of view a court of a given country can entertain a case containing a foreign element, there are other non-legal practical considerations that deny a court of its power of entertaining same. Discuss.
6. Discuss the concepts of general, special and exclusive jurisdiction.
7. Do you think that the rules judicial jurisdiction in interstate cases and international cases are the same? Justify.
8. Discuss the nature of division of state and federal courts powers.
9. Is there any relation between choice of jurisdiction rules and choice of law rules?
10. What were the approaches, according to Samuel Teshale's Article, followed by Ethiopian judges to solve jurisdictional issues of conflicts cases in the absence of laws? Discuss.

Unit Three

Choice of Law

Unit Objectives

By the end of this unit, students are expected to explain:

- The three methods of approaching choice of law problems;
- The general process, steps, of choosing an applicable law;
- What characterization and the related concepts mean;
- How the problem of renvoi is created and how can it be solved;
- The 'application' a foreign law ;
- What is meant by a foreign law is a 'fact';
- How a foreign law can be proved and what the possible solutions are in cases of failure to prove one;
- The concepts of public policy and 'Rules of Immediate Application;
- What incidental issue means and how conflicts addresses it;
- How evasion or fraud affects the normal functioning of choice of law process; and
- How constitutional principles can affect/facilitate choice of law.

The main choice of law theories are discussed in chapter one: historical development of choice of law theories. Conflicts students can have a glimpse of those theories before proceeding to the following reading.

3.1. Methods

Choice-of law is the core element of the conflicts discipline. It is very muddy, controversial, and unsettled field. Many conflicts scholars' minds and many materials have been invested for the development of a number of theories and assumptions and for the elaboration of the characteristics of the various proposed choice -of -law solutions.

From the point of view of the ways they approached the choice-of-law problems, in the discipline of conflicts, the so far invented methods can be crudely categorized into unilateralism, multilateralism, and substantive law approaches. They were introduced at

different times with different goals requiring different types of analyses.

A unilateralist approach is premised on the idea that a state can only determine when its own law could be applied to a case. In other words, this approach deals with the determination of the personal and territorial reach of the potentially applicable local rules of decision. It determines the spatial reach of a certain state's substantive laws.

The interposition of choice-of-law rules between multistate transactions and legal systems is called the multilateral approach. According to this approach, if there are many laws to be applied and an issue to be solved, then you determine whether the issue or legal relationship has a strong relationship with one or the other law; and finally decide the case in accordance with the legal system with which the law has strong relationship or has most close connection.

The third and a bit different from the above two approaches is the substantive law approach which is a policy -oriented approach in which substantive policies directly determine the outcome of the choice-of- law process. This approach is characterized by the creation of rules of decision that directly govern multistate transactions. In this theory, one has a certain purpose to achieve and one will apply the law that promotes the result. Hence, result-selective or result-oriented approach. This method is also known as the teleological approach.

Based on their chronological development, while the substantive law approach is designated as "new" choice-of-law method; the other two, on the other hand, are grouped together for their common features into the classical or traditional choice- of-law method. They are also known by the collective name orthodoxy approach.

The traditional method, born mainly to the German scholar von Savigny (*Sitz* theory) in 1849, which has got two important and main components or categories of laws such as family, contract, tort; and connecting factors such as place of celebration of the marriage, common domicile of the parties, place of wrong or injury, and place of performance — is engaged principally in the furtherance of decisional harmony or uniformity of judgments (to avoid or reduce forum shopping), ensuring predictability, and certainty.

This approach is based on the premise that choice of the applicable law is determined by

the "center of gravity" of the legal relationship at issue. But how can the center of gravity itself be established? The center of gravity or closest connection can be set up in the abstract or on the basis of the actual facts or circumstance of a given case.

Under this approach a multistate case is seen as a legal relationship that is drifting about and that must be allocated to the appropriate place where it belongs using certain criteria called connecting factors that can help one determine the existence of factual most close connection of the specified legal relationship with a certain jurisdiction. As a result, this choice -of-law process is called the allocation method. Choice-of-law systems in which the allocation method is employed depend on a set of choice-of-law rules each of which covers a specific category of legal relationships, for which it contains an appropriate connecting factor. The choice of jurisdiction to which the connecting factor refers entails the choice of the law of that jurisdiction, and that is invariably expressed in the third component of this type of rule, next to the choice -of-law category and the connection factor.

Under the allocation method, besides the factual allocation, there are choice-of-law rules that advance different interests or values. These are: first, functional allocation in which the connecting factors do not necessarily establish the strongest factual connection but refer to the jurisdiction that may be deemed to have the strongest interest in the application of its law. These connecting factors are based on the idea that certain areas of law under the favor principle promote certain important social values, esp. protecting some vulnerable groups such as children. Second, party autonomy principle in which the connecting factor does not necessarily aim to establish the closest factual connection but refers to the jurisdiction whose law the parties themselves have chosen. This principle mainly functions in "those areas in which the parties enjoy a large measure of freedom to shape their legal relationship as they see fit. The parties are not allowed to set aside compulsory rules. Beyond that they are at freedom to agree as they like. The notable instance is the contract by the parties to a marriage concerning their pecuniary relationships.

The other category of choice-of-law method is known as interest analysis. While considering a multistate case, the proponents of the " new " or rule-selective as opposed

to the "old" or traditional approach propounded that instead of employing the "jurisdiction or state-selective" approach which effects choice by a process of finding a legal category qualified to supply the rule of decision because of a significant connection with the case; the decision maker should choose directly between the specific substantive rules of the legal systems variously connected with the case by an evaluation of the rules with a view to finding the solution which best fits the situation, in light of the circumstances, of the comparative merits of the potentially conflicting substantive rules available. "Demand of justice" is the underlying principle in this value -oriented approach.

While the question "what should be the proper result in a given case?" pertains to the "new" system, the question of that of the "old" method is "what rule is the proper one to select a jurisdiction whose law should govern it?"

The nature of the "new" method is more plastic for it permits individual *ad hoc* solutions making the discipline responsive to the demands of substantive policies. The views of the substantive justice held by the different possible applicable substantive laws are taken into account. This means, in Lorenzen's uncompromising depiction, the country's worry in a choice -of -law case should be "what are the demands of justice in the particular situation? What is the controlling policy?" In other words, the dominant determinants of problems in the field are consideration of values of justice and social expediency. This method has the tendency of testing all the substantive rules of the relevant laws involved.

3.2. The "General Part" of Choice of Law Process

One can ask what a court is required to do if a case with an extra-state element is brought before it. As in any ordinary fully domestic case, the court has to identify the facts and find out the appropriate law to resolve the issues of the facts. In conflicts cases, it is a bit complex. It involves transaction or parties that have a certain connection with a jurisdiction outside the forum. A different mechanism is called to resolve the matter. The court has to pass through a number of processes in order to dispense justice to a conflicts issue. Let us begin with the first stage of the process of choice of law: characterization.

3.2.1. Characterization

The nature of choice of law rules places large emphasis upon the process of characterization. Characterization can also be termed as categorization, qualification or interpretation. Conventionally this stage i.e., characterization has got three sub-stages within itself which are taking place in the determination of any conflict of laws questions. They are: first, determining the juridical nature of the problem presented to the court; second, selection of the appropriate connective factor, and third, delimitation of the proper law or to determine the extent of the application of the chosen law. In other words, it involves the characterization or classification of the subject matter or the issues in the case (for example, family, contract, etc) and of the nature of each issue and whether it raises a problem of procedure or of substantive law.

The first sub-stage presumes that the domestic laws of each state are classified and grouped into different established categories. The court at this sub-stage assigns the facts of the situation or the disputed question to the appropriate legal category settled beforehand. Classifying into one legal category or "operative fact" is important for the forum's law may regard a case as falling into one legal category but the relevant foreign law believes it to belong in a different one. A case can be solved only if a law devised to resolve such type exists. Moreover, the facts of the case should be distinct enough to be matched with a given law – legal category. Still more, an issue of the facts of the case should be able to be categorized into only one legal category to be resolved thereof. An issue should be either of family or contract and not both at the same time. Which legal category is to control a given issue if more than one of the latter is applicable to the issue of the case? Therefore, subject matter characterization continues to be the natural and necessary starting point for the analysis of any conflicts case. As far as rules of choice of law are maintained: the problem area must be identified in order to see whether a conflict indeed exists; and the applicable rule of decision must still be chosen on the basis of a characterization of the subject matter even if the case should present a false conflict but a oreign law is applicable to the issue.

Characterization of facts, in order to relate it to an already formulated legal category is not unique to conflict of laws. Applying the legal categories to particular instances is commonly encountered in legal thinking and analysis, whether or not the case contains any factual elements that relate it to more than one jurisdiction. It is the regular and

ordinary activity of the concerned practitioners, esp. judges, to classify facts to fit predetermined legal categories in the problem solving process.

Conflict of laws situations, however, often encounter classification problems of "greater than-normal complexity" for most of the choice of law situations involve two or more different bodies of laws, each of which may use identical or nearly identical abstraction but in a bit different manner. Usually, the same term may be used differently in different rules in one system and because conflict of laws problems involves more than one system of rules, the difficulty of characterization or classification is multiplied. Thus, the same word may have different meanings in the different systems involved depending upon the doctrinal context in which the term is found. This is so because the doctrinal context of any legal term includes the policy complex it is designed to implement in the system in which it is used.

After dealing with the determination of the general legal nature of the issue, the choice of law rules appropriate to the legal category selected will be available for the solution of general legal nature of the issue. Here lies the second sub-stage — selection of the appropriate connecting factor. Specific connecting factor will be employed for the determination of the applicable law once the subject matter of the case is classified. An example is the determination of whether the court has before it a family or contract question so that it may know whether to apply family or contract choice of law rules. In other words, this part concerns the definition and use of "connecting factors" — a term employed to describe the word or words in a rule of reference which indicates the place whose law may be used to decide the issue, such as "place of celebration of marriage", "domicile or nationality:" the connecting factors, which are relatively few in number as are the legal categories of great breadth, are drawn from domestic law situations. They include the personal law (domicile, habitual residence and nationality), the place where the transaction takes place (as place of celebration of a marriage or the place of contract), the place of performance (as in contracts), the intention of the parties, the situs (the place where the court is sitting), and others. Another name parallel to "connecting factor" is *situs.*

The third sub-stage relates to the extent of application of a law when the forum's choice of law rule refers to the law of another jurisdiction: delimitation of the proper law. In

other words, it is a matter of an extent of the application of the law to which a reference is made: does it include both the foreign substantive and procedural laws? Does it also include the foreign choice of law rules? This aspect of characterization distinguishes between issues of "substantive" law and of "procedure": the forum will apply only the foreign substantive law but use its own procedural law for domestic and foreign claims indifferently. The *main* reason employed is that procedural rules are concerned with only methods and mechanics that do not virtually carry important policies or values sufficient enough to affect the basic outcome of the case.

At this sub-stage, facts are not involved. It is about determination of whether a rule of law is substantive or procedural. Hence, legal aspect characterization. *The first two sub-stages involve facts. When a judge "qualifies" at sub-stage I, he characterizes the whole factual situation, at sub-stage II he characterizes certain (particular) facts, and at sub-stage III, he delimits rules of law.* These inquires of the court are also called characterization, selection, and application respectively.

Despite the solution it provides for choice of law issue, characterization has some inherent problems. The approach as a whole, geared as it is to the classification of legal rules, can achieve the targeted goal ─ decisional harmony or uniformity of decisions ─ only if all legal systems classify their private laws in the same manner. However, it is not uncommon to see a right or an obligation to be classified in one legal category while the same is put in another category in a different state. F. Juenger stated that this is unavoidable for "historical happenstances and other factors rather than logic determines the manner in which a particular state or nation organizes its law". There is "lack of consensus on how to arrange the legal rules" amongst many states.

If decisional harmony is to be realized, there should be a superior authority or a universal (or national for interstate relationship) agreement amongst states that force the latter to classify their private laws in a similar fashion. The targeted goal may not always be attained if states remain free to classify their legal rules as they see fit. Some instances of the problem are: while limitation periods are qualified as procedural in some legal systems, others take it as substantive. This being a typical example, air crash defective

products injuries involving cases can either be categorized as tort or contract. Still another example is that in order to protect the property rights of surviving spouses some legal system may rely on family law others on property or succession rules.

In this connection, there is another extended problem during, esp. procedure-substantive classification: the problem of *cumulation or gap*. Suppose the forum is in Afar. The case is of a family nature between a Kenyan man and an Ethiopian, Afar girl. The judge sitting in a court in the Afar Region, while characterizing the applicable law found it to be substantive according to the Kenyan legal system but of procedure as per the Afar family law. Here, since the connecting factor pointed out the Kenyan law, the latter law should be applicable. But the Ethiopian court found it procedural and the forum's procedural law is always applicable. Then both laws are found to struggle to be applied. Here is the problem of cumulation to be encountered.

Let us reverse the situation. The forum is, again in Afar Region. While characterizing, the law has happened to be procedural according to Kenyan law which, however, is not to be given effect; but as to the Afar law, the particular rule was found to be substantive, which, however, according to the process of the traditional method the Kenyan law should be applied. But the Kenyan law as interpreted to be procedural cannot be applicable. Here the two laws are not to be applied. There will be a problem of gap and the case will remain without solution.

Another problem is that some states' legal systems lack certain institutions like betrothal in the Revised Family Code and Tigrai Family Law. The Law of Separation (not necessarily divorce) is not known in virtually all the regional family laws. The same holds true in the international arena. For example, the law of Trusts, which is unknown in France, is well known in the USA. It is difficult to devise conflicts categories for which there is no counter part in a municipal or internal law. It will not be possible for Ethiopia's conflicts law to deal satisfactorily with the institutions of Judicial Separation, Trust, Space Law, etc which are not known.

Another problem is that various legal systems employ different legal institutions to solve a given case. F. Juenger has delivered a hypothetical but possible to happen family case. A married couple moves from an American state, say Michigan, which protects the

surviving spouse's interest by giving the indefeasible inheritance rights to a community property state such as California. In Michigan the husband had accumulated property, while the wife looked after the household. When he now dies domiciled in California without leaving a will in her favor, to what is she entitled? According to the traditional American conflicts rules the spouses' property interests are governed by the law of their domicile at the time of acquisition, whereas the law of the decedent's last domicile controls the distribution of movables. The wife therefore acquired no California community property rights, for the husband's wealth was produced in Michigan, the couple's former domicile. Nor can she inherit under Michigan law, for the husband was domiciled in California at the time of his death.

Still another problem is the manner in which characterization is to be approached. The approaches have varied as to whether all or any the sub-stages of characterization are to be determined by the doctrinal context of the forum or of the other legal systems involved. Some argue that the *lex fori* should control the characterization process, others the *lex causae.* Yet others advocate supranational concepts derived from the comparative method.

The subject matter characterization is controlled, for pragmatic or practical necessity, and not logic, by the forum's legal system including its conflict of laws. However , the *lex fori* cannot be applied in case of unknown areas of law to the forum's legal system and when the forum is serving as a mere place of trial without any connection with the transaction enough to establish an interest.

While there is no agreement as to the other sub-stages of characterization, some take policies of the concerned states into consideration. For identifying the significant connecting factor is an integral portion of the conflict of laws' doctrinal context to which the courts of the forum look for guidance, their significance is subject to the policy of the forum reflected in its (conflict of) laws doctrines. Finally, since one purpose of the conflict of laws doctrine is to achieve some measure of uniformity of results without regard to the choice of forum, the law of the state under consideration in the third sub-stage should be viewed in its own policy context.

3.2.2. Renvoi

Renvoi is a French word literally meaning 'to send back.'

Let us put a conventional and readily understood typical example as a framework for the discussion of the concept. An Englishman dies domiciled in France and a question arises in an English court as to the distribution of tangible movable property which he leaves in England. It is a well established English law that a decedent's property is distributed on death according to "the law of the country of his domicile". Let us say, however, that the conflict of laws rule applicable in France is that an alien decedent's property is to be distributed according to "the law of the county of his nationality", which in our case is English. While characterizing, the choice of law rules of the forum might call for the law of another state to be applied. Unless there is clear indication otherwise, a question might arise whether the reference to the concerned *foreign law* encompasses the choice of law rule of that jurisdiction," the whole law" or to the "internal law" only; that is to mean, the law which a court would apply to a situation all of whose elements were domestic, to the exclusion of choice of law rules. Here, in the above example the question obviously arises: when the English conflicts rule directs the case to "the law of France", is the reference to, (a) simply to the "internal law" of France, that is, the law which a French court would apply to a situation all of whose elements were French, or is it, (b) to what may be called the "whole law" of France, including not only the French internal law but also the French rules of conflict of laws?

The renvoi issue arises if the reference made is to the inclusion of the foreign choice of law rules. The connecting factors employed by the forum and the foreign choice of law rules that refer to the applicable law (or legal category) for the resolution of the cases with an extra-state element must be different. If the connecting factor, for the same legal category, of the jurisdiction referred to is similar to the forum's, there will not be any question of renvoi; since the relevant choice of law rule of that state orders for the application of the internal law to the issue at hand. For a renvoi (esp. true "renvoi") to arise, the relevant choice of law rule of the foreign state (state X), to which we have been referred by the relevant choice of law rules of the forum (state F), sends us back to the choice of law rule of the state F: since the state F choice of law rule is the one that

originally sent us to the state X choice of law rule, a return to the state F's choice of law will only send us back to the state X rule, which will send us back to the F rule, etc., in a kind of circular perpetual motion that will never give us an internal substantive rule. In the above example, if the reference made by the English law is to the "whole law" of France, the French law (its choice of law rules) refers back to "the law of" England and the same question arises again. If in each case we refer to all the laws, including the conflicts rules, we are apparently on a merry-go-round round about or indirect or not to use the shortest way.

The renvoi situation has been designated by many conflicts scholars to whom the doctrine is anathema to, by their colourful, but unfavorable expressions like a "game of lawn tennis" (international lawn tennis or "ping pong"), a "logical cabinet of mirrors" and as a "circulus inextrabilis" or "endless circle".

The true renvoi doctrine is sometimes called the "double " or "total" or "English" (since it appears to be peculiar to English law) renvoi. Here, the reference to the foreign law is including to its choice of law rules and renvoi if they include it. In actual practice, the reference in the foreign choice of law rules may not, however, be always be "back", but to the law of some other third state. This is not a true renvoi. A typical example is where the decedent whom the English court regarded as domiciled in France was a German rather than an Englishman. If the court, following its rule of domicile, refers to the law of France, and understands this to mean "all French law including its choice law rules", it may be referred by the French law to the German law – as Germany the nationality of the decedent. This reference "across" rather than "back" is sometimes designated as "transmission" while the case of true renvoi is said to be a case of "remission".

Renvoi as a problem

Renvoi is considered as a problem and sometimes even as a necessary evil for it causes many intricacies. Many countries wanted to do away with it. How is it possible? As Griswold has examined it, the extensive literature on the doctrine has found out about four possible ways of dealing with the question.

I. Rejecting the renvoi. The reference to the foreign law does not include to the choice of

law rules of the latter. (We will elaborate this below.)

II. Accepting the renvoi. If state X's choice of law rules refer to state Y's "whole law" and state Y's choice of law rule refers back to state X's law then the second reference towards state X's law will be taken only to the internal law of state X taking Y as refusing to apply her law.

III. De'sistement theory. The reference by state X's law to state Y's law has produced no state Y's law applicable to the situation, there is nothing else for the state Y's court to do but apply state X's law.

IV. Here, state X's judge is referred by his choice of law rule to the law of Y. what is the law of Y? It is the law which state Y's court would have applied to the same case. Then if state Y's court would have applying Y's "internal law" (either because it "accepts the renvoi" or for any other reason), then state X's court should apply state Y's "internal law". If state Y's court would apply state X's "internal law" (either because it "rejects the renvoi" or for any other reason), then state X's court would apply state X's "internal law". And, if state Y's court would apply state Z's "internal law", and then state X's court would do the same. This is sometimes called the "single" or "partial" renvoi, or, renvoi simpliciter. Here, the law of state Y means including its choice of law rules but minus its choice of rules applying renvoi, if it has any.

There are some, but one less persuasive, arguments forwarded against renvoi as an objection to its application. The one that seems sensible objection is: there is no logical reason why the process should ever stop. A reference back to the forum "would trigger the process anew". The double renvoi would not operate at all had it not been for the rejection of the same by other countries. The problem of *ad infinitum* could exist if, and only if, a case happened to be in between two states that adopt double renvoi. The case will be suspended eternally. Despite all these, the problem is, at least for the moment, theoretical as double renvoi is peculiar to the English law. But if some other states' conflicts law also employed the double renvoi method and the "horrendous consequences" were about to ensue, one cannot help thinking that courts would put a stop to it somehow. It would be better not to plead in favor of renvoi at all. Other objections,

but feeble, are: first, the forum's conflicts rules should not be displaced by those of other jurisdictions by applying renvoi. A court is yielding to a foreign court instead of applying the forum's choice of law rule; it is applying foreign state's choice of law rules.

Collier responding to this objection wrote "it is not an abdication in favor of foreign state's choice of laws and the process is undertaken only because the forum's courts wish to undertake it. It only occurs because the forum's choice of law rule leads to the application of foreign choice of law." Moreover, Scoles and Hay responding to the above immediate objection along with the objective that renvoi is a manipulative device to explain the application of a different law, states that these objections overlook one of the important objective of conflicts law: to minimize the effect that litigation was commenced in this rather than in another forum and to achieve, to the greatest extent possible, uniformity of decisions." While one misguided or 'exaggerated' objection to a so-called problem which is not peculiar to renvoi is its difficulty to ascertain whether the foreign system of law does or does not apply it. Another problem is that a difficulty arises if the foreign court, should it be seized of the case, would apply the law of a person's nationality. While being a country of a federal structure and there is no what is called "national law" but different laws respective to the constituents. To which of the several laws is the reference made? To the law of the unit the person belongs? To his residence or domicile law?

Two arguments furthered in favor of renvoi by Juenger are: the one concerns the construing of the reference to foreign "law " in the forum's choice of law rule to mean that rules of decision which the court in the foreign country can be expected to apply. This approach, though not logical, certainly makes sense. This solution, by which a judge puts himself into the shoes of his foreign counter parts ("foreign court theory"), has the incontestable merit of guaranteeing a modicum of decisional harmony. The other argument concerns the partial renvoi approach –although it does not produce uniform results, this approach at least permits judges to apply the law with which they are most familiar. However, the latter "solution" encourages forum shopping which the logic of renvoi is aimed at avoiding by ensuring the realization of uniformity of judgment: the goal of the tradition method. In this partial renvoi doctrine, determination of rights is

more likely to depend on where the action is brought.

3.2.3. Public Policy and Rules of Immediate Application

When one selects the applicable foreign law, after exhausting all the relevant techniques of conflicts rules, one encounters a serious question ─ test of public policy. It is not every foreign law chosen to be applicable that deserves a hearty welcome by the forum court. The vague and many elements encompassing concept i.e., public policy, is there to limit the normal operation of the choice of law rules. As we will see it below, for its undefined nature it is said "untrained horse let into the international pasture".

The forum's territorially-oriented rule might refer to a law the enforcement of which could be offensive to the public policy of the forum. The effect is then to refuse to dispose of the case to the cause of action using the pointed out foreign law. The focus is in the content of the law. To reject the application of foreign law on public policy grounds is to assert that the content of the foreign law, when tested by notions at the forum is seriously deficient in quality. Local public policy is used to determine over the "wisdom and fairness" of the foreign law!

Beyond collecting points that may be included in it, no one has so far successfully, to the satisfaction of all states, defined the "vague and slippery conception". It is emphatically explained as one "knows it when one sees it" as apparently has been "observed of pornography". No attempt to define its limits has ever been successful. To systematize the doctrine and reduce it into certain principles is hardly possible. Its generality is inescapable. A certain Dutch Jurist by the name J. Kosters has criticized the efforts spoiled to systematize the problem. He noted that it is impossible to give an enumeration of the legal rules of public policy: to classify them is difficult and not worthwhile. Every case must be considered separately as a practical necessity.

However, many conflicts scholars and practitioners have said much about what it comprises. Urging courts to limit the use of the public policy exception when applying a foreign law, Mr. Justice Cardozo, in *Locks V. Standard Oil Co.*, employed his effective language to put the ever quoted and classic statement: courts should not close their doors unless application of the foreign law "would violate some fundamental principles of

justice, some prevalent conception of good morals, and some deep-rooted tradition of the common weal".

The public policy exception to the enforcement of rights based on foreign law is to be construed narrowly. In order to reject a foreign law, fundamental policies of the forum must be offended. One should always bear in mind that it is an exception. And the exception should not swallow the rule that "a foreign law applies". It should be interpreted strictly, esp. in civil cases unless otherwise, we are going to change the color of the discipline. We should not defend parochialism. It should be known that conflicts law starts with the conception of cosmopolitan situation. One should not reject a foreign law for it is sub-standard. If one does so, they are acting as a supermoralist.

Moreover, it has to be emphasized that a mere difference between the laws of the two states will not render the enforcement of a cause of action created in one state contrary to the public policy of the other. Nor is wise to deny access to the local courts which discriminate against a foreign cause of action that would be entertained if it has arisen locally. Generally, unjustified discrimination is not warranted.

Rather, a stronger test could be employed. The concept should serve as a mechanism of bouncer that throws out only the most objectionable of those that enter to prevent miscarriages of justice. Although still weighed based on subjective criteria, the foreign element must appear "pernicious and detestable" to the common sense of the forum judge in the eye of a reasonable local person. In other words, the forum court should refuse to entertain the foreign law if it is repugnant to good morals, or if it leads to disturbance and disorganization to the municipal law, or if it is of such evil example as to corrupt the public.

Some common examples believed to be representatives of many societies' including the Ethiopian one's that are contrary to public policy are slavery, cannibalism, apartheid, homosexual marriages, incest, etc.

Another reason for the rejection of foreign law is based on the consequences of enforcement such as on the image of the court when it seems to affect its reputation, injuring the friendship of another state though the subject focuses on individual acts.

Courts should deny effect to an agreement to subvert the integrity of the governmental process of friendly foreign government. For example, a contract to bribe or corruptly influence officers of a foreign government, or a contract to topple the government of a friendly state should not be enforced.

Still another reason is if the act or law is contrary to the interest of the country. For example, if a millionaire of Ethiopian citizen is to trade (buy) a product from a citizen of a foreign enemy state and a dispute ensues in between as to the performance, the Ethiopian court may not allow the Ethiopian trader to pay for the exchange of the product for the payment contributes to the increment of the foreign state's treasury, thereby strengthening, *inter alia*, its defense force. This seems a pragmatic solution for otherwise Ethiopia's interest will be jeopardized. As to the private interest of the contracting party, a mechanism might be devised to refund him, if he has already effected the payment or performed the contract.

The public policy exception is said to have its own defect that contributes to the traditional method's failure to attain its main goal i.e., decisional harmony. F. Juenger, who strongly opposes the traditional method, is afraid of the doctrine's reservations expansive application so that almost any foreign rule that is dissimilar from forum law qualifies for rejection, at which point the "exception" swallows the rule. He said so for judges differ in their preference of appreciation for one or the other of the unattractive alternatives of the public policy of the forum and the undesirable foreign rules referred to. He added the key concept they employ is far too vague to furnish guidance in particular cases. In effect, critics of the public-policy exception advocate its abolition or restriction largely on the basis that free-wheeling discretion not to enforce foreign law destroys the uniformity of the system.

Other exceptions related to pubic policy to the traditional rule requiring enforcement of foreign cause of action are both foreign penal and revenue laws. They are termed as *rules of immediate application*. These laws are not susceptible to the multilateral methodology. While a forum state would usually request to entertain a claim by another state’s tax authority to collect the latter’s taxes from persons found in the forum; a sate will not hand

its courts to the projection of crimes committed elsewhere and governed by the penal laws of the other state. The same applies as to the direct application of the foreign penal or other provision which is intended to have a punitive effect and tax laws by the forum court. No state will safeguard and thereon punish the violation of another state's criminal law. Similarly, no state will enforce the laws of any other state which the latter uses it as a method of furthering its own governmental financial interests. Some argue that these rules are not only of penal and revenue laws. There are many more others. But it is not easy to tell what the rules of immediate application or self-limiting rules comprise. No one has been able to state criteria that would tell us, with a reasonable precision, what rules qualify for the special treatment of the class at hand. Generally, "strictly positive statues" designed to promote the common weal or regulatory law those deal-with matters of serious societal concern which express important substantive polices as opposed to run-of-the will private law rules are classified therein. Therefore, beyond penal and revenue laws, there is possible category of other public laws. The area goes so far as punitive provisions of foreign private laws. Constitutional laws and Administrative laws are two more examples.

Finally, it must be strongly emphasized that it is not normally the foreign law itself which is obnoxious, nor, usually, the recognition of its effects, but its enforcement by the forum courts. The hated and rejected law is respected at its own sweet home.

3.2.4 The Incidental Question

In the course of deciding a case containing a foreign element, the problem of the incidental issue or incidental question is said to arise when another issue as a result of the first issue arises.

For the incidental issue arises if, and only if, a principal issue arises, the former is called secondary or subsidiary issue. However, it does not mean that the incidental issue cannot arise by itself. It can stand on its own even as primary issue at a time. Moreover, the name given to the incidental question does not necessarily imply that it is less important

to a given case. It should not be underestimated. It has got a big impact on the resolution of the main issue. The latter cannot be settled without finding a solution to the secondary or incidental one. For the principal issue to be decided, resolving the incidental issue is essential. Generally, for example, in many cases the issue of the validity of marriage arises incidentally as a secondary question while the principal claim concerns like divorce, property or pecuniary rights, succession, support and alimony, etc.

In addition to the incidental question itself another additional issue might arise but in very rare circumstances. Solving the incidental question may, in turn, entail another incidental question sometimes called incidental question of the second degree. Suppose in a family case the main issue being concerning pecuniary interest of the wife against the property of her deceased husband, the incidental question will be the determination of whether she was his wife or not. On top of this, another question might appear to determine whether the widow is indeed a widow that requires an examination of the validity of a prior divorce of the deceased person. It is the issue as to the validity or otherwise of the divorce that we call an incidental question of the second degree.

The problem of selection of choice of law rules of the forum or that of another state whose law (the whole law) is selected to dispose the main issue, for the purpose of resolution of the incidental question will not be an issue in our interstate cases due to the fact that we will not, hopefully, have choice of law rules for each state but one Federal Conflicts Rules. As a result, all issues, whether they are main, incidental or incidental of second degree are going to be resolved by the federal choice of law rules. There will always be consistency as the decisions of interstate cases that are brought to the attention of a forum court. Moreover, so far as there is one conflicts law, there will not be a problem of forum shopping since all courts in the federation employ the same conflicts rules and in effect apply the same law for a case. It does not make a difference whether a case is brought in Region two or Region three, for example. The problem, however, persists in a truly private international case.

Do all the issues of validity of marriage involve the same choice of law rules? No! The nature of the particular issue involved matters in our selection of the choice of law rules that govern the validity or necessarily the invalidity (sometimes nullity) of the marriage.

All the issues concerning marriage and its effects may not be governed by the same rules of choice of family law. There are several choice of law rules for the purpose of determination of different aspects of validity of marriage. The formal requirements and essential/substantive requirements of a certain marriage may not be subjected to the same jurisdiction's family law.

In many countries, while the formal requirements of a given marriage are tested by the place of celebration of the marriage, its essential requirements are supposed to be in accord with the relevant law of the matrimonial domicile of the spouses. The parties might not celebrate their marriage in their matrimonial domicile. In other words, the place of celebration may be in a state other than the state the spouses are going to consume their marriage. Hence, there is a possibility that two different family laws regulate the formal and basic/essential requirements of the marriage.

3.2.5 Foreign Law: status, Notice and Proof

Through characterization of case of multistate problem, the forum's choice of law rules might entail the application of a foreign law for its resolution. If so, how can its content be ascertained? Moreover, what is its status when the relevant foreign law is to be applied by the forum court?

Regarding its status, there are two approaches. While the Common Law Legal System considers a foreign law as a mere "fact", most Continental Legal system following countries take judicial notice of the rule of foreign law and regard it as binding law thereof. These approaches have got important implications. In some instances taking a foreign law by a forum court as a binding law results in the rule that the court must ascertain the foreign law *ex officio* even without the help of the parties in accordance with the Roman law maxim '*iura novit curra*'. The parties may not plead and not prove it. Although parties may have the obligation to give assistance to the court, to a larger extent the court applies the law on its own motion like any internal/domestic law.

There are some general implications of treating a foreign law as a question of fact. Cramton *et al* listed four consequences:

1. Foreign law must be pleaded like other facts;
2. Foreign law must be proved in conformity with the law of evidence;
3. The issue as to foreign law is decided by the trier of fact; and
4. The finding of the trier of fact is not reviewable by a court empowered to review questions of law only.

The Common Law position these days is being changed. The prevailing situations is that; while American courts are generally authorized to take judicial notice of the law of sister states (and not obligatory for foreign country law), in England rules of foreign law are not taken as plain facts rather as "unusual" facts that need only be proved to the satisfaction of the judge, not that of the trier of facts or jury. To a greater extent, sister state law (in the U.S) has become a question determinable by the judge, rather than the jury; and appellate courts are usually given power to notice and to review sister state law.

As to notice, the law in the U.S. for the determination of foreign law is that a party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. Distinction is not made between sister state and foreign country law.

In this connection, leaving it up to the parties to raise the issue is criticized for it undercuts the classical approach as naturally litigants who shun the expense of proving foreign law and taking the risk of its potential misapplication can circumvent the choice of law system.

*** Method of Proof**

Especially in common law legal system, foreign law is proved by expert testimony who may give his evidence orally or by an affidavit. In the U.S., a court is permitted to "consider any relevant material or source including testimony, whether or not submitted by a party" or admissible under their rules of evidence. In England, a foreign statute or law cannot be put before the court without an expert to explain it, nor can books of authority or decisions of courts once the law might require interpretation to enable the court understand it correctly. The question is who can testify about a foreign state's law.

Determining "who an expert is" is not easy. In England, the rule is broad. In all civil proceedings with a foreign element, a "person who is suitably qualified to do so on account of his knowledge or experience is competent to give expert advice to foreign law irrespective of whether he has acted or is entitled to act as a legal practitioner there." Although not exclusive, ideally it should be a judge or a lawyer qualified to practice in the relevant foreign state. The English experience seems pragmatic because to call a foreign practitioner is quite expensive. It has got its own demerits, however. What if conflict in testimony arises? There is no clear standard put to solve the problem. It is said that without employing an independent research; unlike the U.S. experience where the court may itself question expert witnesses and consider other materials *ex officio*, if the experts disagree, the court must make its own mind on the evidence brought before him by the experts. Despite this restriction, the court can demand the experts concerning the question of interpretation of the foreign statute at hand - to state and explain the relevant foreign rules of statutory interpretation. Incidentally, the explanation employed for prohibiting independent research is for the judge would be a party to the case at hand otherwise.

What if the parties of a case with an extra state element fail to raise an issue of a foreign law? The question is not about failure of proof but of raising from the every beginning. Under the presumption that the parties have agreed that the foreign law should not be considered (acquiescence in-forum-law ⁻ a form of choice of law by the parties), the general rule developed in the U.S. is that the court will apply the *lex fori*.

*** Failure of Proof**

Sometimes, the party responsible for the proof of the relevant foreign law issue might hardly sustain the burden of proof. What are the possible consequences? One alternative applied in one American - Walton case is dismissal of the plaintiff's action for inability to establish a cause of action. In a fact-approach of a foreign law, this is logical though not necessarily sensible solution. The failure to sustain the burden of proof necessarily results in a non-suit, directed verdict or summary judgment, as the case may be. This is a very

harsh and outrageous decision.

To temper the above severe results, there are other possibilities. First, the forum may indulge a presumption that foreign law is identical to that of the forum, unless the contrary is shown. Although this rule avoids the harsh result like in the above case, it shifts the burden of proof to the other party who relies on the provisions of the foreign law. Another alternative which begs for judicial flexibility is based on the presumption that the foreign law is based on generally recognized principles of law common to civilized nations.

3.2.6. Evasion/Fraud

Either to avoid the forum law's effect on their acts or to gain better but undue advantage of a foreign law, parties to a given juridical act might deliberately create a foreign element to their case. In other words, there might be a case involving the creation of a relationship between a person and a legal system other than the forum's (or another to which one is closely related) in an artificial manner whose main purpose is to avoid the application of the forum (proper) law.

A law should be issued to the effect that the artificially created juridical act would not be given any recognition. As Art 3360 of the draft Private International Law by René David tries to point out, the creation of a tie from which the multistate character of a legal relationship results shall not affect the law to be applied where such tie was created with the sole object of avoiding the application of such law. If a state under its laws makes it clear that such and such acts are regarded as prohibited arising, expressly or impliedly, out of its "strong public policy"; any act which contravenes such protected values by persons domiciled or intending to domicile there shall be given no recognition and shall, in effect, be invalidated.

A couple may travel to another state solely to obtain a license and a marriage ceremony in order to evade one or another restriction of the marriage law of their domicile. A state entertaining a policy of forbidding marriages should not allow its restrictions to be evaded by anyone who willingly steps across the state line and come back. In other

words, seizing upon a spurious foreign contact in order to circumvent a domestic policy which the forum does not like is discouraged.

It is not, for example, uncommon to encounter would-be-couples to celebrate marriage where the jurisdiction of one or both of them does not allow them to do so by leaving their own jurisdiction and going to another jurisdiction which does allow or at least does not prohibit them to exercise same, to avoid the applications of the law of the jurisdiction they are rushing from. The same holds true for divorce situations. In all cases, the parties' acts are considered as disturbing the social values of the society they belong to. They are getting undue "advantage" at the expense of common values, which are protected, through the law applicable in the jurisdiction.

By the way, the locality which has given its name to marriage law evasion is Gretna Green, a Scottish village near the England boundary, which once became a haven for English couples after common law marriage (which does not require stringent requirements), was abolished in England in 1758. As a result, the name Gretna Green is synonymously used in place of "marriage evasion".

Almost half a century ago, in 1958, certain constituents of the U.S. have adopted a certain uniform marriage evasion act that has a section relevant to the point at hand. According to this act, if any person residing and intending to continue to reside in a state who is disabled or prohibited from contracting marriage under the laws of this state goes into another jurisdiction and there contracts a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entitled into in this state.

The problem in this area is difficulty of proof of the parties' intent. To prove that the main purpose of the parties' juridical act, such as marriage, is intentionally to avoid the application of a certain law is very difficult. What standard is to be employed? It is not an easy task. What if, for example in the above mentioned R. David's draft with the phrase

"...with the sole object of avoiding the application of such law", the parties say that their aim is not solely to avoid the application of the otherwise applicable law? How can one prove whether they have defrauded or not?

For the circumstances that may exist in each case may be different in that it is certainly not possible for one to foresee all situations and combinations of facts so as to utilize objective standards to test the intention of the parties defrauding act, employing subjective criteria seems pragmatic, fair and reasonable.

In another perspective, is there any way out for the parties to uphold their declared fraudulent marriage relationship? Yes. The notion of evasion apparently is not extended to the case of parties effectively changing their domicile, i.e., abandoning their former place of principal residence or domicile and establishing themselves for the time being at the foreign place where they have their wedding if after all they can succeed to the effect. Incidentally, this shows that the personal affairs of the parties seem not the business or worry of the law, rather the law protects the common value of the society where the couple belongs to.

Another issue pertains to the duration for the parties' relationship to be considered as fraudulent. The parties might have evaded a certain provision that has the effect of making only to the extent voidable until certain requirements are fulfilled. It is only until the requirements are fulfilled that the parties are said to have evaded the law. Afterwards, their act will be legalized and be given effect in their former domicile.

On the other hand, the situation for void marriages is different. If the legal provision evaded is strong enough that permanently invalidates the couple's relationship, they cannot come back to their former domicile and be granted acceptance by the law unless they undo their marriage. As a rule, unless the provision that held the marriage void is revoked, the apparent marriage persists to be of no effect. There are no conditions to be fulfilled to remedy the defects of the void marriage.

3.3. Choice of Law Process and Interstate Relations: US v. Ethiopia

Professor Cavers, who holds the opinion that the methodologies to be employed for the purpose of resolving the questions to be posed in both interstate and international realms are virtually the same, has pointed out four distinguishing factors the interstate choice of law process possesses which are but inexistent or less existent in the conflicts between national laws.

One point is the existence of the Federal Constitution along with its potentially relevant elements to the choice of law ruling by a court or legislature. All the Full Faith and Credit, Due Process, Equal Protection, and Privileges and Immunities Clauses are in one way or another related to the conflicts law in general and, esp. the last three, to the choice of law in particular. The constituents of the union of the U.S, which have been able to exercise judicial jurisdiction within the expanding bounds permitted by the Due Process clause are armed by the Full Faith and Credit Clause with the authority to compel the giving effect either recognition or /and enforcement of their judgments by another sister state. This is so without giving regards to how unpalatable to the sister state the purpose of the law that the judgment enduring state has chosen to apply.

The second factor is an extension of the above point in that unlike the independent sovereign nations, by the constitution (the clauses) the pressure exerted the ever-growing cultural homogeneity of the nation keeps the potential conflict laws of the several states and their exercise of legal power within generally accepted fairness and reasonableness circles.

In other words, the situation of homogeneity reduces the occasions for one state to reject the laws and claims of a sister state on the grounds of public policy. This seems completely opposite in our case. Although it might not be possible to clear all possibilities, the rejection, as a consequence of the harmony between the cultures of the interstates, is likely to be less frequent when it is viewed in comparison to the corresponding occasions for a country to reject on similar grounds of another country's laws of a claim arising in another nation. The reason is that the "social and economic

institution" of a certain country may be different from that of the forum. The Federal Constitution is there to protect against unreasonable and outrageous discriminatory state actions. The clauses are said to have operated to deter the sister states from indulgence in inequitable, and self-regarding measures which a "country free from much restraints might not hesitate to adopt" if it likes although a state cannot do so esp. in contemporary times for the present situation demands for the interdependent and harmonious existence of states.

The other factor emanates from the otherwise observation of the immediately above factor. Despite the existence of the second factor, the federal system nature of the country obviously manifests differences amongst the states legal systems. Nonetheless; due to the overwhelming cultural homogeneity amongst the constitutes, there arises a legal hazard that the people act most of the time as if they live in a single state governed by a single legal system. People of the federal system following country, most of the time; hardly observe the legal significance of their action or transaction with others crossing the boarder lines of their own states. This failure of the people to take account of difference in state laws, in effect, forces that any method of choice of law be prepared either first, to protect people against the hazard of their " heedless behavior "or second, to impose harsh consequence upon them in the sense that one of "the parties to a transaction may be fully aware of the differences in the laws of the states involved and may be trading to exploit his superior knowledge unfairly".

The last factor of Cavers' observation is in touch with the very purpose of the federal system of the country. Optimistically, in a closely-knit federation of states in which a common legal tradition coexists, though with some different legal systems, with innumerable common "economic, social and political needs, goals, and values, the courts will strive to accommodate the conflicting laws of the several states in a way that will optimize the working of the federation." This is an attainable goal but to be designed as a national policy for the better success.

This last point, viewed as a distinguishing element, is in the sense of degree of possibility to be achieved in a federal country. Explained, the existence of a federation gives rise at

once to a "special opportunity and to a special need for accommodation." Although it seems difficult, this as a goal is possible to be achieved. However, in the international arena "both the opportunity and the need exist but within looser combination and cooperation's of nations." And due to the growing sense of globalization thereby bringing the community of the nation's closer and closer, more than any time ever, "one may hope that a growing sense of world community will encourage a....concern for accommodation between nations having no special ties to each other'' .

However self-governing entities and to be most of the cases, on their own, the constituents of a federation should not be viewed as fully independent sovereign states to act without restriction from the above. Always, it should be born in mind that the entire federation should be seen as a single unit but a composition of "independent" states. The fact that all the states are under one umbrella, the Federal Constitution, shows us that all the states acts may not be free from some reasonable restrictions. There are, in positive terms, few supervening restrictions which mainly emanate from the Federal Constitution. Hence; some restriction either on the choice of law rules of the state, if it has any, or on the substantive law itself to be applied in a multi-state problem.

In the U.S., the potent overseen superintendent, or watchful of choice of law, as it is said is the Due Process Clause of the Federal Constitution. (Members of the federal union of the U.S. have their own choice law rules). Although the states are at liberty to devise whatever choice of law rules they deem it necessary for the purpose of applying it in whatever situation they designate, it is provided that the law chosen be that of place having sufficient and reasonable connection to the multistate transaction in question or occurrence involved to permit its application.

This is the negative proscription of the due process clause in the sense that the federal constitution does not command a state to apply a given law (which is a positive proscription) but prohibits a state to apply its law or the law of another state (and thereby further the policies therein) to affect rights and duties of the parties if that state has no significant contact with the concerned parties or the occurrence. With in a federal context in the circumstances that interests of two or more states are affected in a multistate

transaction; if the forum applies its law which is not similar with the law of the situs of the events or the domicile of the parties of the case; the interests or policies of the other state or states may be frustrated. Hence, due process is affected.

The underlying justification revolving around is that one will be aware of the law of the state he is a domiciliary or citizen to and then his acts are going to be governed accordingly. It is unfair (or not in accord with due process) to expect one to anticipate that his rights and duties will be governed by the law of the place lacking a connection with his case.

In other words, one should look to the interests of the states concerned and apply the relevant law of the state with a significant contact to the transaction. It is not, however, easy to determine what constitutes significant or sufficient connection with a given transaction. Nevertheless, the problem can only be construed in relative terms since to put an objective criterion is humanly difficult or categorization of facts of different possible future occurrences is impossible. If two or more states are involved in one transaction, the court should look to the present circumstances and determine case-by-case to identify the state that has more interest than the others. There is no quantitative method of assessment of interests involved. Fairness or due process is obviously a flexible concept, but essentially it is to be measured by the facts and the parties' activities in relation to the states concerned.

What if several states have sufficiently substantial contact with the activities involved in the case? Siegel wrote that if two or more states have interests in a case, and even strong policies underlying, and it is a must for one of them to surrender, the decision of the choice of which one of the laws will be applied to govern the consequence of the activity is, the forum's govern just for pragmatic reasons. However, if the case involves only two states the solution is simple as the want of contacts on the part of one of them eliminates its law's application under the due process clause and the other becomes winner by default or by process of elimination. The same holds true even when the other state has little contact with the case for otherwise it will be suspended for want of another law to dispose of the case to the effect – unfair! In any way, due process is watchful that one state does right by the individual litigant.

To sum up, the core point is that fairness to the defendant is a major factor in the formulation of criteria for limitations on choice of law. A defendant is said to have been denied due process if a state applies its law against him while that state has no (significant) contact.

Although, as we have seen it above, the due process clause has the leading choice of law role, other clauses of the U.S Federal Constitution like Privileges and Immunities, Full Faith and Credit, the Equal Protection in one way or another are said to have some degree of relevance with the choice of law process - if two or more states have relationships through one set of contacts or another. But neither of them, even including the due process one, aims exclusively at a multi-state situation.

3.4. Summary

Choice of law problem is the main part of the discipline. Conflicts scholars have devised some theories/approaches of choosing an applicable law. We can crudely group them into traditional or classical and 'modern' or new approaches. Generally, while the former chooses an applicable law according to prescribed rules, the latter's aim is to come up with a law that can satisfy the implementation of a certain value/policy.

According to the classical approach, the first task of a judge is to characterize the nature of the case so as to categorize into predetermined legal categories. Then, the judge will follow suit that he will try to find the applicable law through the rules. At this stage, while trying the appropriate law, the choice of law rules may refer the judge to a 'foreign law'. The issue of renvoi arises if the reference is including to the choice of law rules of the foreign law.

In this connection, a foreign law though appropriate may not be applicable if doing so could violate some pre established values or the public policy of the forum. A foreign law will also not be applicable if the law is of a public nature – from the group of “Rules of Immediate Application”.

Finally, although the choice of law rules governing the issues of interstate and international are virtually the same, the latter are some how affected due to the presence of a Feral Constitution. States are not as free as their relationship with the truly external world. They have to bear in mind the fact that they are still under one umbrella. They are sister states.

3.5. Discussion Questions

1. Please explain to your friend the three methods of approaching choice of law problems.
3. Aside subsidiary issues, put the linear process of choosing an applicable law.
4. When and what do you characterize?
5. What are the three steps of characterization? Do they always appear in a case?
6. Clarify and write in your own words the proposed solutions of renvoi.
7. When do we consider a foreign law as a 'fact'? When do we take judicial notice of foreign laws?
8. What happens in case a person fails to prove a foreign applicable law?
9. If the applicable law found through the process of choice of law happened to be amongst the Rules of Immediate Application, a country simply applies its own law just disregarding the applicable law? Why. Explain also why a court does not apply a foreign procedural law.
10. Discuss how evasion incapacitates local laws.

Unit Four

Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Unit Objectives

By the end of this unit, students are expected to explain:

- Why Ethiopian courts do recognize and /or enforce a foreign judgment;
- The sufficiency or otherwise of Ethiopian Law of Foreign Judgment Execution in the light of other countries' experience ;
- Each of the conditions put in Art. 458 CPC to be fulfilled in order a foreign judgment to be executed in Ethiopia ;
- If there are more conditions to be fulfilled and an arbitral award is to be executed in Ethiopia; what should be considered? and
- How reciprocity should be understood in the light of Ethiopian laws

4.1 Introduction

According to the traditional scope of this subject, the third and the last division is this of Recognition and Enforcement of Foreign Judgments and arbitral awards. Unlike those of choice of juridical jurisdiction and choice of law rules, Ethiopia has got some rules of execution of foreign judgments ad arbitral awards. Note that there is no single provision dealing with the recognition of judgments.

Just for the purpose of easy reference, the legal provisions of this score are reproduced herein below. (Arts.456-461 Civil Procedure Code, herein after written as CPC).

RULES OF EXECUTION OF FOREIGN JUDGMENTS AND AWARDS

Art. 456. — Principle

(1) Unless otherwise expressly provided for by international conventions, foreign judgments may not be executed in Ethiopia except in accordance with the provisions of this Chapter.

(2) No foreign judgment shall be executed in Ethiopia unless an application to this effect is made.

(3) An application under sub-art. (2) shall be made to the division of the High Court on circuit in the Teklay Guezat (See Federal Courts Proc. No. 25/1996) where execution is to take place.

Art. 457. — Form of Application

An application for the execution of a foreign judgment shall be in writing and shall be accompanied by:

(a) a certified copy of the judgment to be executed; and

(b) a certificate signed by the President or the registrar of the court having given judgment to the effect that such judgment is final and enforceable.

Art. 458. — Conditions for Allowing Application [sic: execution]

Permission to execute a foreign judgment shall not be granted unless

(a) the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed was given;

(b) the judgment was given by a court duly established and constituted ;

(c) the judgment-debtor was given the opportunity to appear and present his defence;

(d) the judgment to be executed is final and enforceable; and

(e) execution is not contrary to public order or morals.

Art. 459. — Procedure

(1) The court to which the application is made shall enable the party against whom the judgment is to be executed to present his observations within such time as it shall fix.

(2) The court shall decide whether pleadings may be submitted.

(3) In cases of doubt the court may suspend its decision doubtful points have been clarified.

Art. 460. — Decision

(1) The decision shall be made on the basis of the application unless the court for some special reason to be recorded to hear the parties at a hearing which it shall fix.

(2) The court shall at the same time decide on costs.

(3) Where the application is allowed and permission to execute is granted, the foreign judgment shall be executed in Ethiopia as though it had been given by an Ethiopian court.

Art. 461. — Enforcement of Foreign Awards

(1) Foreign arbitral awards may not be enforced in Ethiopia unless:

(a) reciprocity is ensured as provided for by Art. **458** (a);

(b) the award has been made following a regular arbitration agreement or other legal act in the country where it was made.

(c) the parties have had equal rights in appointing the arbitrators and they have been summoned to attend the proceedings;

(d) the arbitration tribunal was regularly constituted;

(e) the award does not relate to matters which under the provisions of Ethiopian laws could not be submitted to arbitration or is not contrary to public order or morals; and

(f) the award is of such nature as to be enforceable on the condition laid down in Ethiopian laws.

(2) The provisions of the preceding Articles shall apply by analogy when the enforcement of a foreign award is sought.

4.2 Analyses of the Law

We have to acknowledge from the outset that, the structure and some content of the article by Ibrahim Idris Ibrahim (Journal of Ethiopian Laws, JEL, Vol. 19) is heavily used. (The full article is reproduced as part of this teaching material at the end of this section.)

One can observe from the above provisions that the rules or principles dealing only with execution of foreign judgments are broadly formulated that they cannot accommodate as many legal situations as are required of any law governing the execution of foreign judgments. They cannot be easily understood and applied. Despite their old age, they are not amended so as to make them pertinent for the present days' inevitable and complex problems relating to foreign judgments. In what follows, we will be basing our discussion on the aforementioned legal provisions. For the purpose of substantiating the analyses, foreign literatures are heavily relied.

For a case decided in domestic courts, normally, no conditions are expected of such judgment to full fill or to pass for its execution. On the contrary, no country will simply welcome a judgment rendered abroad and execute without any condition. That, definitely, has to be checked for, for example, its due process and whether it affects any national value or not.

Depending on the value they want to protect, countries do provide for different lists. However, there are some grounds or conditions common to many nations. It is important to note here that, there were several attempts made to come up with universal rules of recognition and execution of foreign judgments. There is, however, a convention binding on many signatory European countries focusing on the subject at hand.

4.3 Modes of Execution of Foreign Judgments

According to Ibrahim Idris' article (JEL, V.19), under international law there are two widely accepted modes concerning the execution of foreign judgments. The first is exemplified by the laws of the Continental Europe and Latin American countries. According to the laws of these countries, foreign judgments are accorded enforcement only after the satisfaction of prescribed conditions and after an *exequatur* (a form of proceeding which means a retrial of the foreign judgment) is written and authorized recognition has been granted. In the laws of these countries, or foreign judgment, until supported by a formal decision of enforcement passed by a tribunal of the country in

which it is desired to be enforced, will have no effect in that country. In the laws of such country, a foreign judgment is, therefore, not regarded as conclusive.

The other mode is characteristic of the laws of the Anglo-American countries. Pursuant to the laws of these countries, foreign judgments are not executed as such but, are endorsed by domestic judgments, i.e. judgment by judgment. Foreign judgments are accepted as conclusive provided that certain conditions provided in the laws of the country in which the judgment is sought to be enforced are satisfied.

Before addressing the legal conditions that a foreign judgment seeking execution in Ethiopia has to fulfill, let us exemplify the above discussion on modes of execution.

Note. After studying the following lists and bearing in mind the above discussion, students are expected to evaluate the sufficiency and appropriateness of the Ethiopian Civil Procedure Conditions for execution of foreign judgment.

There are about seven conditions the US stipulated for the purpose of recognition and execution of foreign judgments .These are the results of judge-made law. (Hilton V. Guyot, 159 U.S. 113 (1895)) The general theory being comity that means the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

The following requirements are tests that a given decision needs to pass. The (US) forum court should check whether:

1. There was a full and fair trial conducted by the foreign court;
2. The foreign court was of a competent jurisdiction;
3. The foreign court had conducted the trial upon regular proceedings;
4. The defendant has been given due service or voluntary appeared before the court;

5. There is a system in the country of the foreign courts likely to secure an impartial administration of justice between the citizens of its own country and those of other countries;

6. There is nothing to show either a prejudice in the court, in the system of the laws under which it was sitting or fraud in procuring the judgment, or any other special reason why the comity of the United State should not allow its full effect ,and
7. The requirement of reciprocity is met.

As can be observed from Art.458 of the CPC, there are some common prerequisites set by the Ethiopian and American laws on execution of foreign judgment. Pursuant to Art.456 (1) of the CPC, primacy is to be given over the conditions laid down in Art.458 in case there is one. Ethiopia has only signed a treaty with Djibouti. Therefore, if a certain judgment-creditor applies to an Ethiopian court (the court with a jurisdiction is the Federal High Court - Proc.25/96), the test currently to be employed is that of Art.458 CPC.

Before studying the following comments on the conditions, conflicts students are strongly advised to read and understand the words of the law as they stand. To begin with the discussion, permissions to execute a foreign judgment shall be granted provided the execution of Ethiopian judgment is allowed in the country in which the judgment to be executed was given/rendered. In other words, a judge in charge of such case is required to check whether the country follows the doctrine of reciprocity or not.

There are some arguments forwarded pro and against the doctrine which enjoyed acceptance by many parts of the US. Some countries and states like Brazil, New York, California, Argentina do not favor the principle believing that it has got a retaliatory effect against a state and unnecessarily victimizes innocent individuals. It makes private individuals without control as the play is between countries. In effect, it is forwarded that the practice of reciprocity be eliminated.

An Ethiopian Scholar by the name Samuel Teshale has written an excellent article on the score. The article tries to show us how the concept of reciprocity is viewed in many countries. He also discusses the principle from a certain Ethiopian Court's decision view. We have reproduced the article as follows.

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RECIPROCITY WITH RESPECT TO ENFORCEMENT OF FOREIGN JUDGMENTS IN ETHIOPIA: A CRITIQUE OF THE SUPREME COURT'S DECISION IN THE PAULOS PAPASSINOUS CASE

SAMUEL TESHALE

(Footnotes are omitted.)

I. INTRODUCTION

The legal instruments specifically dealing with enforcement of foreign judgments in Ethiopia are the Ethiopian Civil Procedure Code of 1965 and the Federal Courts Proclamation of 1996. The latter provides that the Federal High Court of Ethiopia shall have first instance jurisdiction over cases of enforcement of foreign judgments. The Civil Procedure Code, on the other hand, lays down the requirements for execution of foreign judgments in Ethiopia.

Among the various requirements laid down for granting execution to foreign judgments, the focus, in this article, will be on the reciprocity rule stipulated under Art. 458(a) of the Civil Procedure Code which provides as follows:

> *Permission to execute a foreign judgment shall not be granted unless the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed was given; …*

In particular, the author will attempt to scrutinize how the Ethiopian Supreme Court applied this provision in the Paulos Papassinous case.

II. CONTENTS OF THE CASE

A court in Greece declared Mr. Paulos Papassinous testamentary successor to the property, which was located in Ethiopia, of this deceased mother. The Ethiopian Consular Office in Greece duly authenticated this judgment. Then, Mr. Papassinous made an application to the Federal High Court of Ethiopia for execution. He claimed that execution of the Greek judgment in Ethiopia would not affect the latter's public order and morals, and that as the property was within the reach of the court the execution was practicable.

The Court had to determine whether Greece allows execution of Ethiopian judgments as required by Art. 458 (a) of the Ethiopian Civil Procedure Code (i.e. the reciprocity requirement). In order to examine this, it ordered the Ministry of Foreign Affairs to supply information. The latter responded that no "treaty of judicial assistance" had been signed between Ethiopia and Greece. The Court also noted that the applicant submitted no other evidence to show that Greece enforces judgments rendered in Ethiopia.

The Court thus concluded in its judgment:

Since there is no treaty that enables Ethiopian Courts to execute judgment rendered in Greece, we hereby reject the application of the judgment – creditor.
Thus, in his appeal to the Supreme Court, the judgment – creditor argued that Art. 458(a) merely requires proof of the fact that judgments rendered in Ethiopia are executed in Greece. It does not rule that there should be treaty between the two states in order to execute judgment rendered in each other's courts. Hence, the Federal High Court had erred in its interpretation of the provision.

After examining the two alternatives interpretations, the Supreme Court held that Ethiopian judgments can be executed in a foreign state if there a treaty of judicial assistance between Ethiopia and that state. As it was ascertained by the lower court that no such treaty had been signed between Ethiopia and Greece, it was not therefore proved

that Greece executes judgments rendered in Ethiopia. Consequently, the judgment rendered in Greece should not be allowed execution in Ethiopia pursuant to Art.458(a).

III. A CRIQUE OF THE SUPREME COURT'S DECISION

The reasoning of the High Court appears to be less consistent than that of the Supreme Court. It seems to allow submission of evidence other than a treaty of judicial assistance to establish reciprocity. In its conclusion, however, it ignores such alternative and states that the nonexistence of a treaty between Ethiopia and Greece is the sole proof requisite to establish the fact that Greece does not allow execution of judgment rendered in Ethiopia.

The Supreme Court is unequivocal: The only way to prove that another state allows execution of Ethiopian judgments is by showing a treaty of judicial assistance sighed between Ethiopia and that state. If such a treaty does not exist, then the requirement of reciprocity is not satisfied.

Let us examine the holding of the Supreme Court in light of:

A. *the objectives of the reciprocity principle in relation to execution of foreign judgments;*
B. *its practical consequences; and*
C. *the impact on the other pertinent provisions of the Ethiopian law of execution of foreign judgments.*

A. *Is the interpretation of Art. 458(a) upheld by the Supreme court harmonious with the objectives of reciprocity?*

The reciprocity rule is necessitated by the absence of international sanction against states `that refuse to enforce foreign judgments. It is a self-help measure designed to ensure respect for a state's judgment by another state. Pursuant to this principle, a state that has adopted reciprocity shall refuse to enforce judgments of those states that do not enforce its judgments.

The problem with reciprocity as applied by the Ethiopian Supreme Court, however, is that it results in refusal of enforcement of judgments originating from a state that normally respects Ethiopian judgments. According to the law of Quebec, for instance, a foreign judgment is enforceable if it fulfills the requirements of jurisdiction, finality, conformity with natural justice and principles of lispendens and public order These criteria are largely the same as the ones adopted by the Ethiopian law of execution of foreign judgments. Yet, the law of Quebec does not condition enforcement of foreign judgments on reciprocity. Therefore, if a judgment rendered in Ethiopia fulfills the abovementioned criteria, then it will normally executed in Quebec. If we follow the interpretation of reciprocity adopted by the Supreme Court of Ethiopia in the Papassinous case, however, judgments rendered in Quebec will not be executed in Ethiopia. No treaty of judicial assistance has ever been signed between Ethiopia and Canada.

According to the law of Greece too, foreign judgments that are rendered by a competent court complying with principles of natural justice, res judicata and public order are freely enforceable. Besides, reciprocity is not a requirement. Thus, Greece will normally execute judgments rendered in Ethiopia. Yet, it has not signed a treaty to that effect with the latter.

In short the very assumption of the Ethiopian court that any foreign state would not execute Ethiopian judgment in the absence a treaty flies in the face of practice and law obtained in a number if states. To be precise, there are states which have not signed a treaty of judicial assistance with Ethiopia but which will normally enforce Ethiopian judgments.

Now that the Supreme Court rejects judgments originating from these states, the consequence can be a retaliatory rejection of Ethiopian judgments. Therefore, reciprocity, as currently applied by the Ethiopian Supreme Court, is not serving to induce other states to execute Ethiopian judgments. Rather, it is doing exactly the opposite.

Moreover, the current mode of application of reciprocity by the judiciary in Ethiopia coupled with the fact that the country has not signed a treaty of judicial assistance with any state leads to a dangerous outcome across the board rejection of foreign judgments in Ethiopia. It should be noted, on the other hand, that the reciprocity principle, as embraced by the majority of states in the world demands a respect for judgments of states that give due respect to the judgments of other states.

The other goal of reciprocity is protection of nationals. It was for this purpose that the US Supreme Court in Hilton V. Guyot invoked reciprocity. According to that court, a judgment obtained in a state that does not honor American judgments would be denied of enforcement when the judgment debtor (or the loser) is an American national. If the judgment is in favor of an American citizen, or if both litigants are not American citizens enforcement would not be barred.

The interpretation of the reciprocity principle preferred by the Ethiopian Supreme Court has no room for such distinctions. Therefore, it cannot serve this other goal of reciprocity either –i.e. protection of nationals.

B. *Can the interpretation of reciprocity upheld by the Supreme Court bring about desirable practical consequences?*

The only remedy left to judgment-creditors such as Mr. Papassinous is an action de novo since the foreign judgment is denied a res judicata effect. This entails:

1. *Miscarriage of justice and,*
2. *Negative impact on the Ethiopian economy.*

1. *Miscarriage of justice*

i. *By action de novo, the person who has obtained a judgment abroad at considerable expense and inconvenience is subjected to another piece of litigation in Ethiopia on the same facts and issue. Indeed, such mishap may result even when the reciprocity principle is correctly applied. However, under the current mode of application of the principle by Ethiopian Courts, the mishap is bound to recur almost in every case. This makes the country a safe haven to judgment-debtors against successful litigants.*

ii. *The unfortunate judgment-creditor, who nevertheless is persistent enough to bring action an action de novo in Ethiopia, could face still other difficulties. Firstly, what if the Ethiopian court, seized of this action de novo, rules, on a reasonable ground, that Ethiopia does not have judicial jurisdiction over the case? Then, the person would be left without any remedy at all, for example, in Tafesse Ayalew V. Clarville A.J.Co., the Addis Ababa High Court held that it lacked jurisdiction over the case presented to it since the parties has agreed in their contract to submit their dispute to English Courts. This is a fairly reasonable decision. But it seems that according to the current mode of application of reciprocity rule by the Ethiopian Courts, since Ethiopia and England had not signed a treaty of judicial assistance, even if one of the parties could succeed in winning a judgment in England, such judgment would not be "worth the paper on which it is written" when it comes to enforcement of it n Ethiopia.*

To make it worse, Ethiopia has neither a statute nor precedent system pertaining to Private International Law. Hence, this area of law is devoid of certainty, uniformity and predictability. If the reciprocity rule is correctly applied, only judgment-creditors from a state that does not execute Ethiopian judgments will be subjected to this chaotic situation. According to the Supreme Court's interpretation of the rule, however, this problem is going to be the lot of all judgment-creditor seeking execution in Ethiopia.

2. Negative impact on the economy

i. *The law on the execution of foreign judgments is a notable signpost of the investment climate in a given country. Hence, it is bound to be seriously regarded by foreign businessmen. As Gutteridge points out:*

> *Nothing can be imagined more galling to a man of business who has obtained a judgment in his own courts, that to discover that his debtor sought refuge, in company with all his assets, in some foreign country and that the judgment which is obtained at such*

> *great trouble and expense is, not worth the paper on which it is written.*

In other states, when parties are warned against such barriers, they resort to arbitration. In most legal systems, the reciprocity requirement does not apply in respect of foreign arbitral awards. One can readily agree with Juenger who capitalizes on the paradox of giving less credit to decisions of courts than those of arbitral panels. At any rate, that fact would serve as an outlet to the businessman galled by the risks of relitigation. The Ethiopian Law, however, does not give such an outlet because it requires the application of the reciprocity requirement to foreign arbitral awards too!

If the current mode of application of reciprocity by the Supreme Court persists, therefore, foreign businessmen may avoid entering into transactions with their Ethiopian counterparts or they will simply increase "the transaction cost of doing business" in Ethiopia by demanding advance payment, guarantee and so on. In both cases, the business initiatives of Ethiopians would be damaged.

The other area to be negatively affected is the judiciary itself. That Ethiopian courts deny res judicata effect to foreign judgments means that they will retry the case all over again. This surely entails an unnecessary waste of the scarce resources and judicial time on foreign disputes of succession, divorce or child custody which usually have no or little significance to Ethiopia. Therefore, the Supreme Court's decision is oblivious of fundamental tenets of judicial economy.

C. *Is the Supreme Court's holding Justified by a close textual interpretation of the governing law?*

The author submits that foreign judgments calling for a treaty of judicial assistance are separately addressed under Art. 456(1) of the Civil Procedure Code which provides:

> *Unless otherwise expressly provided for international conventions [to which Ethiopia is a party], foreign judgments may not be*

executed in Ethiopia except in accordance with the provisions of this chapter.

The law laid down two grounds for execution of foreign judgments in Ethiopia, namely, on the basis of treaty and on the basis of statutory requirements. Hence, an inquiry for a treaty of judicial assistance would be appropriate only in relation to foreign judgments that rely, for their execution in Ethiopia, on Art. 456(1), i.e. on a treaty provision. Art. 458(a) governs the rest of foreign judgments i.e. those that do not invoke a treaty for their execution. To demand a showing of a treaty under the latter, thus, makes the two disparate provisions redundant, contrary to the canon of positive interpretation.

As the foregoing discussion clearly reveals, therefore, the Supreme Court's holding that only a treaty of judicial assistance shall prove the existence of reciprocity is erroneous both as a teleological and a textual interpretation of Art. 458(a). Worse, still, that interpretation can result in jeopardy to the interest of Ethiopia and its citizens.

IV. RECOMMENDATIONS

How, then, should the reciprocity rule be applied?

A. In order to achieve the main objective of reciprocity, it must suffice to prove that execution of Ethiopian judgments is in effect allowed in the state in question. An applicant should never be require to adduce a treaty of judicial assistance to establish reciprocity. Prof. Juenger, following his assessment of the laws and practice of numerous countries, reported as to the practical application of the reciprocity, as follows:

To be sure, an official declaration by the foreign state on a showing that it does in fact honor foreign judgments is usually not required; "de facto recognition"- i.e. some assurance that the rendition state can be expected to recognize foreign judgments will suffice.

As to how this "de facto recognition" is to be proved, the following models are instructive. In Germany, which has the same rule of reciprocity as that of Ethiopia, what

is required is a proof that under its statute or case law the rendition state recognizes Germany judgments. This is done by consulting "standard commentaries and reference books" or on the basis of the testimony submitted by German institutions for Comparative Law.

The Spanish law has a very interesting lesson to offer Ethiopian judicial practice. According to Hemanz, there are two "tiers" in the Spanish law of enforcement of foreign judgments. The first 'tier' is the enforcement of judgments originating from a foreign state that has signed a treaty with Spain. If there is no such treaty, then the foreign judgment will be enforced on the basis of reciprocity. It seems that the first 'tier' correspondents to Art. 456 (1) of Ethiopian Civil procedure Code while the second 'tier' corresponds to Art. 458 (a).

As to the modalities of proof of reciprocity, a variety of alternatives have been considered in Spanish jurisprudence. Some jurists suggested that whether the rendition state executes Spanish judgment should be established by looking into its statutory law. Others argue that it is actual practice of the foreign state that must be adduced. Still others propose submission of both statute and factual data. There is also another opinion according to which positive reciprocity should be established by statute and negative reciprocity by factual data.

The Venezuelan Supreme Court, on the other hand, simply required a certificate signed by two attorneys practicing in the rendition state confirming that the latter executes Venezuelan judgments.

A cursory glance at the abovementioned example indicates that the alternative being recommended by the author presents a problem of evidence. Yet, this problem is a necessary evil to be grappled with by a legal system that has opted to benefit from the reciprocity principle. Execution of foreign judgments on the basis of reciprocity necessarily hinders speedy and inexpensive dispute settlement. What must be sought, hence, short of repeal of the reciprocity rule, is a mitigation of the rigours of proof.

It may be argued that the jurisprudence of a certain state is reflected in both its statutes and judicial practice. Therefore both must be adduced to establish whether or not that state allows execution of foreign judgments. The author is of the view that though conceptually correct, this approach would present a formidable problem of evidence against any execution of foreign judgments in Ethiopia. Thus, it should be sufficient to show o the basis of either the statute or case law of the rendition state that such state can be expected ton allow execution of foreign judgments.

B. It needs to be underlined incidentally that the reciprocity requirement has qualification. Some of the significant exceptions, as can be gathered from the general practice of states adhering to the reciprocity principle are:

1. *Reciprocity does not usually apply to non-monetary judgments such as those for child custody. Refusal to enforce child custody judgments, for instance, on the ground of reciprocity may conflict with Ethiopia's commitment to the UN Convention on the Rights of the Child.*
2. *The reciprocity requirement should not be applied to deny execution of a foreign judgment granted in favor of an Ethiopian national. That amounts to punishing one's own citizens for the defects of a foreign state.*
3. *The reciprocity requirement should not result in denial of justice to the parties. It should not, for instance, be applied when exclusive jurisdiction over the case belongs to the rendition state. In that situation, since Ethiopian courts would not entertain the action de novo for lack of judicial jurisdiction, the judgment-creditor will be unable to obtain any remedy anywhere.*

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The second requirement is a question of due establishment and constitution of the court that rendered the decision. Virtually all nations agree on the necessity of such a prerequisite. The question is, however, whose standards are to be employed? Are we going to test the due establishment and constitution of the foreign court using the recognizing/executing country's laws? Or that of the rendition forum? Or can we have internationally devised factors? Ibrahim commented that since no guidance is given by the Ethiopia laws, such gap rendered the application of the criteria very difficult.

Similarly, our law is silent regarding the issue of measuring the jurisdictional competence or capacity of the foreign court that rendered the decision. By what standards or bases are we employing to determine the judicial power of the rendition court? Should we use the local standards which were in place for the establishment of that court? Or recognizing/executing forum's standards in that looking for some equivalent level/type of courts? Or possibly, some internationally agreed factors?

Regarding the above two issues, the literature provides for proposed possible solutions. Ibrahim's article summarized the position of some countries and legal systems on the score. Accordingly, there are some countries that adhere to the three proposed possible solutions. In the Anglo-American legal systems and in the law of many Latin American countries, judicial jurisdiction is measured or defined by the law of the rendition forum .i.e., the law of country whose court has pronounced the judgment. On the other hand, the jurisdiction of a court is ascertained on the basis of the laws of the recognition forum i.e., the law of the country in which execution of the foreign judgment is sought in civil law countries. There are even some other countries that follow the third method. What is a little bit different is that of the French system – doubled barreled principle. According to this principle, the foreign court must have had:

a. International requirement determined by the private international law of the rendition forum, and
b. Domestic jurisdiction to be determined in accordance with the law of the rendition forum.

Ethiopia, as a recognizing/executing forum should check whether the losing party or the judgment debtor had enough opportunity to present and defend his case. That is all about procedural due process requirement. The judgment debtor must have been served with a summon in due time, which enables him defend his case. The foreign judgment cannot be implemented if the losing party has not received a legally sufficient notice if ineffective means were used when more effective means were readily available. It goes without saying that the foreign court, which we are saying is duty bound to ensure that the defendant is informed in sufficient time of the suit instituted against him, must have

jurisdiction on the case in order to consider the service it rendered acceptance. Students are advised to read the requirements to be fulfilled to assume jurisdiction.

Still another condition is the finality and enforceability of a foreign judgment. According to Art.458 (d) of the CPC, the foreign judgment should be final and capable of being enforced. What do we mean by such prerequisite? As Ethiopian law did not provide for, we can help ourselves by resorting to foreign jurisprudence or literature. According to S. Johnson, the concept of finality and enforceability implies that the foreign judgment sought to be executed should not be subjected to review, modification, or be set aside by another judgment. Moreover, Lord Herschel of the British House of Lords, in *Nouvion V. Freeman*, declared that the judgment pronounced as conclusive, final and forever established the existence of right of which it is made to be conclusive evidence in a country.

Regarding the effect of finality and enforceability of foreign judgment, J.H.C Morris pronounces that a judgment deemed so is said to obtain a status of *res judicata*, and is, therefore, binding upon the parties to the case. As is reiterated by Ibrahim Idris, it is maintained that the issue of finality and judgment should be considered in the light of specific circumstances, which include judgments on appeal, *ex parte* judgment, a judgment the execution of which has been suspended by the court rendering the judgment, a judgment in which no definite amount or form of remedy for restitution is provided, an interlocutory order, a maintenance decree and a custody decree. These will be explained below.

By way of illustration, for a foreign judgment may be executed only where it is final and enforceable, an application submitted for the execution of a foreign judgment on appeal or under review would undoubtedly not be accepted under Ethiopian law. A judgment in default of appearance of the defendant is also considered as final and enforceable provided, however, that the court rendering the judgment has jurisdiction, that the defaulting party was given the opportunity to appear in court and present his defense but failed, or that he had not lodged an opposition to such a judgment within the period fixed

by the law of the rendition forum, before the same court has pronounced the judgment. This analysis, incidentally, and impliedly answered the question whether the foreign law or forum law is going to control the issue of finality and enforceability.

Moreover, the following paragraphs that explain the above instances are found to be relevant for this material. They are reproduced from Ibrahim Idris' article on the score.

Concerning a foreign judgment from which no appeal is pending but the execution of which has been suspended by the court of *rendition* forum, the general practice is that the action on the judgment is maintainable, despite the views expressed by some courts that the plaintiff should be denied of the right of action on the judgment. But until the outcome of the rendition forum is known, execution may be suspended by the recognition forum as well. However, its execution would be liable to suspension, until the suspended judgment is rendered definite by a subsequent judgment of the rendition forum.

Other particular examples in reference to which the problem of finality and enforceability may appear are interlocutory orders, maintenance decrees and custody decrees. As regards a foreign interlocutory orders, the accepted practice is to view the problem in the light of whether the order has been pronounced prior to, or together with the final judgment. An interlocutory order rendered before the final judgment is given, obviously not considered to be final, and is therefore unenforceable. Where, however, the order is rendered as part of the final judgment. It undoubtedly obtains finality and enforceability.

As a matter of general practice, a foreign maintenance decree is deemed final and enforceable, if the decree is not capable of variation. Concerning those decrees for variable maintenance, some holdings pertaining to arrears and installments which have fallen due have been agreed upon to be final and enforceable. Whether or not the status of finality and enforceability might also be attributed to a judgment involving the custody of a child, the usual practice is to tackle the issue by taking the best interests of the child into account.

With regard to the appropriate law of country by which the issue of finality and enforceability of a foreign judgment might be tested, two practices are recognized world-wide. According to the first practice, to determined whether or not a certain judgment final and enforceable, it is necessary to refer to the law of the country whose court pronounces the judgment or the rendition forum. The second practice argues in favor of the law of the country whose jurisdiction the judgment has been referred for execution or the recognition forum. Even though no express provision is available to this effect in Ethiopian law, the requirement embodied in the CPC that the foreign judgment must be accompanied by a certificate signed by the president or the registrar of the rendition forum to the effect that such judgment is final and enforceable, may imply that Ethiopian law has favored the former practice.

The last group of conditions is public order or public policy and morality. The writers think that students better refer to the section dealing with "public policy" in chapter three for an elaborated understanding of this fluid concept. Note that our law has no list of same. ?

4.4 The Case of Arbitral Awards

Regarding the enforcement of arbitral awards, Art 461 of the Ethiopian CPC provides for the following rules. Without affecting the primacy of the provisions in sub-article 1 of the same article, sub-article 2 declares that the provisions dealing with enforcement of foreign judgment shall apply by analogy when the enforcement of foreign award is sought.

The first requirement is reciprocity. This is the same with what is discussed in Art. 458 (a) of the CPC. For students can refer back in order to know what is it all about, the developers believe that it is not necessary to analyze it here. Let us proceed to the second prerequisite.

If a foreign award is to be enforced, it has to be made following a regular arbitration agreement or other legal act in the country where it was made. There is no commentary provided. According to a similar provision in the English legal system, enforcement may

be refused if the arbitral tribunal did not follow the applicable procedure rules. The ground for refusing enforcement may be invoked if 'the composition of tribunal or the arbitration procedure was not in accordance with the agreement of the parties and the mandatory arbitration rules of the place of arbitration or, failing such agreement, with the law of the country in which the arbitration took place. On the face of it, the arbitrator is placed in an impossible situation in a case where the procedure agreed by the parties is in conflict with the mandatory requirement of the law of the seat: if the arbitrator complies with the parties' agreement, the award may be set aside by the courts of the country in which the seat is located; if the arbitrator complies with the law of the seat, enforcement may be refused for failure to act in accordance with the parties' agreement. It should be stressed, however, that the act sets out grounds on which an award may be refused. The court should not exercise its discretion to refuse enforcement in a case where an arbitrator, in order to adhere to the mandatory rules of the law of the seat, fails to respect the terms of the parties' agreement. The condition of regular constitution of the arbitration tribunal, Art 461(1) (d) - third ground - could be subsumed under this analysis.

The fourth condition, Art 461(1)(c) CPC, is read as 'a foreign arbitral award may not be enforced in Ethiopia unless the parties have had equal rights in appointing the arbitrators and they have been summoned to attend the proceedings. Jaffey (on Conflict of Laws) as edited by Clarson and Hill supplies an analysis of this legal statement. Accordingly, enforcement may be refused in case of procedural unfairness – where the person against whom the award is invoked was not given proper notice of appointment of the arbitrator or of arbitration proceedings or was otherwise unable to present his case. This provision is designed to deal with the situation where the inability to present his case results from matters outside the defendant's control; it does not provide a defense to enforcement where the defendant fails to take advantage of the opportunity provided by the arbitration procedure. As a general rule the arbitrator is given a broad discretion to fix the procedure which is most appropriate for the particular dispute which has been referred to arbitration. For example, it may be decided to conduct 'documents-only' arbitration. The fact that the arbitrator has chosen one procedural model rather than another will not normally, in itself, provide a ground for resisting the award. The mere fact that the defendant was not

permitted to present oral evidence, for example, does not without more constitute a ground for refusing to enforce the award. Even where the arbitrator failed to follow the agreed procedure, the defendant is not able to rely on the natural justice defenses if the procedural irregularity has been waived.

The fifth condition is related to the arbitrability of the subject matter. (Art 461(1)(e)) An award may not be enforced if it does not relate to matters which under the provisions of Ethiopian laws could not be submitted to arbitration. This article does not expressly indicate by which law arbitrability is to be tested. However, two examples can help illustrate the situation: administrative contracts (Art 3131ff Civ .C.) and rendering final decision on divorce which is exclusively given to the court (under the Revised Family Code – Art 117).

The same article of the CPC states that an award should not be contrary to public order or morals. Otherwise, it will not be enforced. As per the English legal system, this notion has been interpreted restrictively. Enforcement should not be refused under this head unless there is some element of illegality, or unless the enforcement would be clearly contrary to the public order or, possibly, unless enforcement would be wholly offensive to the ordinary reasonable and fully informed members of the public on whose behalf the powers of the state are exercised.

The seventh rule is of general nature. As per Art 461(1) (f) a foreign arbitral award may not be enforced in Ethiopia unless the award is of such nature as to be enforceable on the condition laid down in Ethiopian laws.

From the perspective of the developed English legal system, ours seem not comprehensive. For example, the following paragraphs indicate the presence of some other potential grounds which, however, are not expressly put in our legal system. To begin with, enforcement may be refused if the person against whom the award is invoked proves that ‘a party to the arbitration agreement was (under the law applicable to him)

under some incapacity'. Secondly, enforcement may be refused if 'the arbitration agreement was not valid under the law of the country where the award was made'.

If the award deals with matters which are not within the arbitrator's jurisdiction, enforcement may be refused. If it is possible to sever the matters which were within the terms of the submission to arbitration from the matters which were not, the court may order enforcement of the award in relation to the matters which were with in the arbitrator's jurisdiction.

Finally, an award may be refused enforcement if it has not yet become binding on the parties (because, for example, the parties have a right to appeal to a second arbitral tribunal or court) or the award has been set aside by a competent authority of the country in which, or under the law of which, it was made. It has been seen that the courts of the seat of arbitration have the primary role of supervising the arbitral process. If the French courts set aside an award made in France, the award is a nullity. Notwithstanding the fact that the court has discretion to order enforcement in cases where one of the defenses is made out, it is not thought that an English court would exercise its discretion to enforce an award which has been set aside in the country of origin. However, there have been exceptional cases in which the courts of some other countries have done so.

One can argue that through the provision that creates the possibility of applying articles of enforcement of foreign judgments to cases of foreign arbitral awards (Art 461(2)), Art 458(d) could be relevant in this case.

A prominent Ethiopian Conflicts lecturer, Ibrahim Idris Ibrahim, has written a commentary-article on the Ethiopian law of Foreign Judgment Execution. As the article is comprehensive and assesses various countries and legal systems experience on the point; believing that law students and lecturers could find it helpful on their studies, we have preferred to incorporate the article as it is. For convenience purpose, the notes of the writing are omitted. Here follows the article.

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Ethiopian Law of Execution of Foreign Judgment

By Ibrahim Idris Ibrahim

(Foot notes not included.)

Introduction

The world today presents a picture of diverse states the interactions of which in different spheres of life often results in conflicting international legal situations. These conflicting legal international situations have immensely been enhanced as result of highly developed transportation and telecommunication system the world has witnessed over the last several decades. The interactions of nationals and domicilaries of different states in such areas as family relations, trade, commerce, investment and etc. have become the cause for the creation of contracts between the laws of such states which eventually compete to dominate the resulting conflict in legal situations. In the desire to address those conflicting legal situations created, states have adopted 'Private International Law' or 'Conflict Laws Rules'. 'Private International Law' helps these states to get answers concerning the determination of the court having jurisdiction over a case involving foreign elements, i.e., matters involving the laws of two or more countries, the selection of appropriate governing law or the conditions under which a foreign judgment could be recognized and/or executed.

The execution of foreign judgment, the topic with this short article purports to address, is an important aspect of private international law. In order to assist their courts resolve problems associated with execution of judgments rendered by other states, quite several states have adopted legislation which also include provisions on the execution of foreign judgments. Many states have also entered into a treaty or convention, bilateral or multi lateral, involving the execution of foreign judgments.

Like several other states, Ethiopia, desiring to address conflict of laws situations under which foreign judgment could be executed, has adopted its own law. This law which

includes only a few provisions incorporated in the Ethiopian Civil Procedure Code of 1965 under the section the 'Execution of Foreign Judgments and Arbitral Awards'. Needless to mention, the draft rules of Private International Law prepared by Professor Rene David which was supposed to appear as part of Ethiopian Civil Code of the 1960 did not include any provision of the execution of foreign judgments.

As a close look into the Civil Procedure Code's provisions on the Execution of Foreign Judgments and Arbitral Awards will evidence, and as would be shown later, apart from the fact that principles embodied therein are difficult to understand and apply, they are so broadly formulated that they cannot accommodate as many legal situations as are required of any law governing the execution of foreign judgments. The absence of judicial practice and developed legal literature pertaining to the execution of foreign judgments in Ethiopia has also frustrated the application of the codes provisions by the courts. Of those few Private International Law cases so far decided by Ethiopian courts, only two cases relating to execution of foreign judgments and cited in this article have been identified by the author. It is also unfortunate that the issue pertaining to execution of foreign judgments in Ethiopia has for many years been given little attention in academic cycle. For instance, Professors Sedler and Singer, former members of faculty of law of Addis Ababa University, did not give any coverage to the issue in their respective materials (i.e. Conflict of Law Rule for Ethiopia and Materials for the Teaching of Private International Law in Ethiopia) they prepared for the study of Private International Law in Ethiopia.

In the post Ethio-Italian War of 1935-1940 periods, it is true that Ethiopia and Ethiopians have established many contacts with the outside world. Large number of Ethiopians has, for one reason or another, started to live in neighboring and far away countries and quite many foreigners are permanently or temporarily residing in Ethiopia. During the seventeen years rule of Derg and after, Ethiopians left the country to live in other countries, in an unprecedented scale. Over the last few years, following the countries decision to adhere to principles of market economy, the contacts the country is making with outside world is on the increase compared to, for instance, the Derg era.

The country has been open to foreign investors. The volume of international with which the country is involved appears to be on the rise.

Undoubtedly, political, economic, social and cultural relations would give rise to the proliferation of contacts, which in turn would result in conflicts between Ethiopian laws and the law of other countries. Consequently, there will be a likelihood of high rise in conflict of laws situations that need to be addressed. It would therefore become essential for Ethiopia to revise, among many other things, its Civil Procedure Code's Provisions on the execution of foreign judgments with a view to making them pertinent for the inevitable and complex problems relating to foreign judgments.

In this article, therefore, an attempt is made to examine the application of code's provisions on the execution of foreign judgments, and to suggest possible solutions to legal situations in relation to which the code has failed to render assistance. In doing so, the article, it is hoped, may contribute towards the giving some insights into the need for the revision of the provisions of Civil Procedure Code and in the meantime the easing the difficulty confronted by the Ethiopian courts in the application of the code's provisions.

As the practices of the Ethiopian courts reflected in the decisions they rendered on cases involving Private International Law situations would show, in those circumstances in which the courts couldn't get relevant provisions to guide them solve the legal problems with which they were confronted, they had the tradition of resorting to foreign laws and accepted practices. In view of the absence of legislated rules directing as to whether to follow the principle of nationality or domicile on the basis of which problems of personal status in Private International Law could be determined, the Supreme Court was known to have resorted to the jurisprudence of foreign countries. Similarly, the author hopes that, in understanding the principle pertaining to the execution of foreign judgments, Ethiopian courts might find this paper helpful in their endeavor to seek internationally accepted principles on the basis of which to address significant issues of Private International Law.

Ethiopian Principle of Execution of Foreign Judgment

It is evidently true that, however internationally minded a state may be, foreign judgments cannot command unconditional execution by the courts of that state. In the absence of international treaties or conventions providing otherwise, a state to whose court a foreign judgment has been submitted for execution usually insists that the foreign judgment should meet the requirements laid down in its national laws.

Under international law, there are now two widely accepted modes concerning the execution of foreign judgments. The first is exemplified by the law of continental Europe and Latin American countries. According to the laws of these countries, foreign judgments are accorded enforcement only after the satisfaction of prescribed conditions, and after an exequatur is written and authorized recognition has been granted. In the law of these countries, a foreign judgment, until supported by a formal decision of enforcement / exequatur/ passed by a tribunal of the country in which it is desired to be enforced will have no effect in that country. In the laws of such country, a foreign judgment is, therefore, not regarded as conclusive.

The other mode is characteristics of the laws of the Anglo-American countries. In accordance with the laws of these countries; foreign judgments are not executed as such, but are endorsed by a domestic judgment, i.e. judgment by judgment. Foreign judgments are accepted as conclusive provided that certain conditions provided in the law of the country in which the judgment is sought to be enforced are satisfied. For instance, in English law, foreign judgments are accepted as conclusive if the following conditions are met:

"1.The foreign judgment must be final and conclusive in the country in which it was pronounced;
2. The foreign courts in question must have been competent to adjudicate upon the matter in question;
3. The judgment must not have been obtained by fraud;

4. The judgment must not have been obtained by proceedings contrary to natural justice;
5. The Judgment must not have been based upon a cause of action contrary to English public policy;"

In the United States, foreign judgments are also recognized and executed as a matter of comity as conclusive judgments, provided, however, certain requirements are met. These requirements which were established in Hilton V Guyot case are: one, there has been a full and fair trial conducted by the foreign court; two, the foreign court has a competent jurisdiction; three, the foreign court has conducted the trial upon regular proceedings; four, the defendant has been given due service or voluntarily appeared before the court; five, there is a system in the country of the foreign court likely to secure an impartial administration of justice between the citizens of its own country and those of other countries; sixth, there is nothing to show either the prejudice in the court in the system of the laws under which it was sitting or fraud in procuring the judgment or any other special reason why the comity of United States should not allow its full effect; and seventh, the requirement of reciprocity is met.

As close examination of the Ethiopian law of the execution of foreign judgment would suggest, of the aforementioned two internationally accepted requirements for executing foreign judgments, Ethiopian law seems to have adhere to the second. As would be discussed later, under Ethiopian law, before a foreign judgment effect, it is necessary that a domestic judgment must be pronounced in order to render a domestic judgment which confirms the foreign judgment; the court is bound to ascertain if the conditions stated in the Civil Procedure Code are met.[11] *Comparison of Ethiopian law with the English and United States laws shows that the conditions enumerated in the Ethiopian civil law are by and large similar to those outlined in the laws of these two countries. The conditions laid down in the Code (Article 458) as prerequisites for the execution of foreign judgments in Ethiopia are:*

"a) the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed was given;

b) The judgment was given by a court duly established and constituted;

c) The judgment-debtor was given the opportunity to appear and present his defense;

d) The judgment to be executed is final and enforceable; and

e) Execution is not contrary to public order or morals."

Ethiopian law allows the execution of foreign judgment on the basis of fulfillment of the aforementioned conditions. This is true where there is no binding international convention on the execution of foreign judgments. As far as the knowledge of the author goes, Ethiopia has as yet not become a party to any treaty or convention on the execution of foreign judgments. In view of the absence of any international treaty or convention on the execution of foreign judgments binding Ethiopia, the fulfillment of the conditions provided in the code has, therefore, become the prerequisite for a foreign judgment to be executed in Ethiopia.

The conditions set by Ethiopian Civil Procedure Code are discussed below. Prior to proceeding to that, however, the author has found it appropriate to introduce the procedures followed in regard to the execution of foreign judgments.

Procedures for the Execution of Foreign Judgment

Under Ethiopian law, no foreign judgment may be executed with out the filing of an application to a court to that effect. The appropriate court to which an application should be made is the Federal High Court of Ethiopia. Any application for the execution of a foreign judgment must be made in writing and accompanied by certified copy the judgment to be executed and a certificate signed by the president of the registrar of the foreign court rendering the judgment which states that judgment is final and enforceable.

Regarding the copy of the judgment, two questions may be asked. Should the copy of the foreign judgment be translated into Amharic which is the working language of the federal High Court from whatever language it was pronounced in? For instance, in many Latin

American countries, including Chili and Colombia, and also in the former Soviet Union, there has been a rule providing for the translation of a foreign judgment into an official language as a requirement for the execution of that judgment The Venezuelan law also requires a certified and legalized copy of the foreign judgment.

According to the Chilean law, the foreign judgment rendered in a foreign language must be translated by the party seeking recognition and/or execution, and if the other party challenges the translation, it should be revised by an official translator in the brazil, it is requirement that the foreign judgment must be accompanied by a translation into Portuguese, and that this translation must be one made by an official Brazilian translator.

Should not the foreign judgment also be authenticated by an Ethiopian consulate in the jurisdiction in which the foreign judgment was rendered? According to the law of many countries and also in certain international legislations, this form of authentication of a

foreign judgment is a requirement. For example, under the law of Brazil, the legislation of a foreign judgment by a Brazilian consulate is mandatory.

When turning our attention towards Ethiopian law, we find that no express provision in the code requires the translation of foreign judgment desired to be executed in Ethiopia into Amharic, nor is there one requiring an authentication of that judgment by the appropriate Ethiopian consulate. According to Article 457 of the Civil Procedure Code, a foreign judgment brought before an Ethiopian court for execution need to be certified by the president or registrar of the concerned foreign court, and submitted to the Ethiopian Federal High Court accompanied by the application for execution. That is what the law says. On the other hand, one cannot ignore the judicial practice that has started to develop over the years, and according to which a foreign judgment submitted to an Ethiopian court for execution is required to be translated into Amharic and be authenticated by the Ethiopian consulate in the country in which the judgment was pronounced.

An Ethiopian court to which an application for execution of a foreign judgment is filed is required to enable the party against whom the judgment is liable to be executed to present his observation within such time as the court shall fix. The court is empowered to decide whether or not pleadings may be submitted. Where it believes that there are doubts as to certain points, the court may suspend its decision, pending the certification of the doubtful points. In principle, the court decided on the basis of the application submitted to it. However, in case of special reasons which the court records, as, for example, when a judgment debtor objects to the execution of foreign judgments in Ethiopia, the court may order that a hearing attended by both parties be held. Where the application is allowed and the application to have it executed is granted, the foreign judgment is executed as though it were given by the Ethiopian court, and a decision on costs in Ethiopia may also be rendered.

Reciprocity

Reciprocity is one of the requirements recognized in Ethiopian law for the execution of foreign judgments. The Code provides that the execution of a foreign judgment cannot be granted in Ethiopia unless 'the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed is given' In upholding this principle, Ethiopian law follows the course chosen by many other legal systems, which incorporate in their laws the requirement of reciprocity in order to ensure, inter alia, that the foreign state recognizes the judgments rendered by their courts. In this connection, Robert A. Sedler maintains:

> *If the courts of the country (a foreign country) refuse to execute Ethiopian judgments, the Ethiopian court must in turn refuse to execute theirs. In as much as most countries will execute the judgment of other countries, it should be presumed that any country will execute an Ethiopian judgment unless the contrary is provided.*

A defendant who intends to attack the execution of a foreign judgment among others, would be expected to plead and prove that the foreign court rendering the judgment in

question would refuse to execute a judgment pronounced by an Ethiopian court. Where the Ethiopian court is satisfied by the proof presented by the defendant, the application to have the foreign judgment to be executed in Ethiopia will not be granted. In relation to the need of proving that the foreign court would grant execution to a judgment f the Ethiopian forum, the experiences of states might be different. In the United States, it is customary to show reciprocity by an affidavit of two American lawyers, and that these lawyers must be those practicing in the state before whose court the foreign judgment is submitted for execution. In the law of Venezuela, the courts must be satisfied in each case that reciprocity exists.

The doctrine of reciprocity which has relation against a state as its basis, but which may simultaneously victimize innocent individuals, has been a controversial issue since 1895, when the case of Hilton V. Guyot was decided by the Supreme Court of the United States. Since then, criticism has grown against refusing to execute a foreign judgment for reasons of lack of reciprocity. It is argued that reciprocity might cause injustice to an individual foreign litigant because of the policy of the country whose court has rendered the judgment. There are arguments that the practice of reciprocity should be eliminated.

Interestingly, many states do not include reciprocity as a prerequisite for the execution of foreign judgment. As Argentina is one of those Latin American countries which do not require reciprocity as a precondition for the enforcement of foreign judgments.

In Brazil, as well, recognition and execution of foreign judgment is not based on reciprocity. In the United States, despite the Supreme Court's decision in the case of Hilton V. Guyot, many states, including New York and California, have rejected the doctrine of reciprocity Despite such criticism, however, the requirement of reciprocity still plays a significant role in many states, including, of course, Ethiopia.

A Court Duly Established and Constituted

The Code sets forth two issues affecting the court which rendered the foreign judgment: due establishment and due constitution In discussing these requirements, it become necessary to ascertain the appropriate law by which the foreign court is deemed duly established and constituted. Should such matters be determined on the basis of Ethiopian law? Or the foreign law? Or international law? No guidance is given by the Code, thus rendering the application of the criteria very difficult.

States establish institutions which they think appropriate to resolve various kinds of dispute. These may include institutions such as an admiralty court, a family counsel, an ecclesiastical court, an Islamic court. Let us assume, for example, that certain type of court that rendered the judgment the execution of which is sought is known in the Ethiopian legal system. Should an Ethiopian court consider such foreign court as duly established, and consequently execute its judgment? If so, on the basis of what law?

A certain type of tribunal established in one state may be known in other state. In view of this fact, it would, therefore, be absurd to test the status of a court of one state by the law of another state which may not have an identical or even a similar court in its territory. In the opinion of this writer, it suffice for the Ethiopian court to resort to the law of foreign country concerned to determine whether or not the tribunal rendering the judgment sought to be executed is on duly established.

Similarly, the determination of the jurisdiction of a foreign court is another difficult issue. Let us examine a hypothetical problem. A person obtaining a judgment against another person in France files an application to a court in Ethiopia for execution of the judgment. In assuming jurisdiction over the defendant, the French court may have acted in accordance with Article 14 of the French Civil Code, which empowers a French court to entertain a claim against a person whether or not he has French nationality or residence. On the other hand, because under Ethiopian law, residence of a defendant is a requirement for location of jurisdiction, should the Ethiopian court refuse to execute the

French judgment, for the simple reason that the assumption of jurisdiction on the part of French Code is inconsistent with Ethiopian concept of jurisdiction? Which country's law should be taken as a basis to determine the jurisdictional competence of the French court? The Ethiopian Law? Internationally accepted rules? Again, on this question, the Code is silent and there has not evolved an Ethiopian judicial practice applicable to this situation.

In determining jurisdiction, a number of different methods may be observed in the world today. In the Anglo-American legal systems and also in the laws of many Latin American countries, jurisdiction is defined by the law of the rendition forum. I.e. the law of the country whose court has pronounced the judgment.

In the legal system of such continental law countries as Greece, Turkey and Austria, on the other hand, the jurisdiction of a court is ascertained on the basis of the law of the recognition forum, i.e. the law of the country in which execution of foreign judgment is sought. For example, in Swedish Law, foreign judgments are recognized [and executed], if they are rendered by a court which had jurisdiction according to Swedish concepts and if that court has applied the substantive rules acceptable to the Swedish private international law.

In other legal systems such as that of Venezuela, jurisdiction is understood in an international sense. In French law, whether or not the foreign court has jurisdiction on the matters, is examined in the light of what is called a double-barrelled principle. According to this principle, the foreign court must have had: a) international requirement determined by Private International Law of the rendition forum and b) domestic jurisdiction to be determined in accordance with the law of rendition forum.

Indubitably, each of the aforementioned standards has its own weaknesses, rendering none of the worthy of being recommended for Ethiopia. If jurisdiction is to be defined by the law of rendition forum, the following situation could be encountered: a judgment in

personam (against an individual) may be rendered by a French court upon assuming jurisdiction over a non-resident defendant. Since, in the law of Ethiopia, it is residence of the defendant that serves as a ground for jurisdiction for purposes of judgment in personam, the execution of the judgment of the court of France contradicts with Ethiopian law. if, on the other hand, the jurisdictional grounds of recognition forum are chosen, this choice would evidently be adverse to the general notion that a court should have jurisdictional competence based upon its domestic law, and not on any other law, and that the existence of domestic law evidences the existence of adequate proof of jurisdiction.

To define jurisdiction, as it is understood in the international sense, is not acceptable either, from the simple reason that, no international definition of jurisdiction commanding universal acceptance has evolved. The only attempt so far known to this author made to form an international definition of jurisdiction was that by the Bustamante Code of 1929, which unfortunately has not recorded a success in meaning the acceptance of even those Latin American countries which took part in its drafting.

In so far as the Ethiopian choice is concerned, it would be advisable to adhere to a method of definition of jurisdiction in which a compromise solution is attained: Ethiopian law may accept the law of rendition forum in appropriate circumstances. Consequently, care must be taken so that Ethiopian courts in matters pertaining for instance, to land situated in Ethiopia or to a patent recognized and registered by the government of Ethiopia are not outside of the jurisdiction they acquire under Ethiopian law. The assumption of jurisdiction by a foreign court must also not be incompatible with the general principles of international law. In cases where the jurisdiction assumed\by the foreign court rendering the judgment is found to be repugnant to the Ethiopian interests, or that the jurisdiction is considered to be of Ethiopian courts exclusively the foreign judgments should not be executed in Ethiopia.

In this connection, it is worthwhile to cite a very early decision of the High Court of Ethiopia in which a request for compliance with a foreign judgment was, in the absence

of local jurisdiction, rejected. This foreign judgment was pronounced by the court of Bombay, India, and the subject matter was a piece of land situated in Ethiopia and possessed by a foreign national. The high court of Ethiopia treated the case afresh, and decided that land situated in Ethiopia should be disposed of in accordance with the law of Ethiopia, and, of necessity, by an Ethiopian court.

Opportunity by the Judgment-Debtor to Present and Defend his Case

Under Ethiopian law, the requirement that a judgment-debtor should be given an opportunity to appear and present his defense is another condition necessary for the execution of a foreign judgment. The judgment-debtor must have been served with a summons in due time, so that he could avail himself of the opportunity to defend the case. If the debtor of a foreign judgment has not received a legally sufficient notice, because ineffective means were used when effective means were readily available, so that in consequence the debtor failed to appear in court, the foreign judgment cannot be executed.

Under international law practice, a foreign judgment passed against a defendant who was not duly served in sufficient time with the document instituting the proceedings led to a refusal of execution. The foreign court is duty bound to ensure that the defendant is informed in sufficient time of the suit instituted against him so that he can defend himself or his interests as the case may be. Here it is worthwhile to take note that the court rendering the foreign judgment must be one having jurisdiction on the parties for the service it ordered to be regarded as acceptable. A personal foreign judgment rendered without jurisdiction on the parties is internationally invalid.

In common law, except in the event of a voluntary acceptance, voluntary submission by agreements or becoming share holder in a company, an actual service of proceeding within the territory of the court is an essential prerequisite for a court to exercise jurisdiction in a personal action. In English law, courts do not recognize the power of a foreign sovereignty to extend its jurisdiction to a person beyond its territory unless they

were subject thereto by virtue of either domicile or citizenship. On the other hand, if a judgment-debtor has been given an opportunity to plead his case but failed to do so, a foreign judgment rendered ex parte may not be dismissed for lack of jurisdiction.

In international law, the law of rendition forum is the law on the basis of which summons may be served on defendants. Where a foreign judgment is filed for recognition and/or execution, the fact that the standards employed as regards the issuance of services to the defendants must be found acceptable to the recognition forum. The nature of services given should be adequate to suggest basic fairness. The foreign judgment may not be executed if the recognition forum is convinced that the party was not given proper service of summons.

Finality and Enforceability of a Foreign Judgment

The fourth prerequisite for the execution of foreign judgments refers to the fact that the judgment must be final and capable of being enforced. In considering this prerequisite, an attempt should be made to answer the following questions. What do finality and enforceability mean? What sort of foreign judgments are deemed to be final and enforceable? Which country's law should be consulted to determine the finality and enforceability of a foreign judgment?

As is true of a number of other legal situations considered above, Ethiopian law does not include provisions which could help find solutions to these questions. The situation is exacerbated by the absence of judicial practice in the area due to this reason, in order to be able to address these questions from an Ethiopian point of view, resort to foreign laws and judicial practices may be helpful.

The concept of finality and enforceability implies that the foreign judgment sought to be executed is not liable to review, modification or to be set aside by another judgment. The concept of finality, according to a British judge named Lord Herchell, implies that the

judgments pronounced is conclusive, final and for ever established the existence of rights of which it is made to be conclusive evidence in a country.

A judgment deemed final and enforceable is said to obtain a status of res judicata, and is, therefore, binding upon the parties to the suit. It is maintained that the issue of finality of a foreign judgment (a judgment as defined by Ethiopian procedural law includes an order and a decree) should be considered in the light of specific circumstances, which includes: judgments on appeal, ex parte judgments, a judgment the execution of which has been suspended by the court rendering the judgment, a judgment in which no definite amount or form of remedy for restitution is provided, an interlocutory order, a maintenance decree and a custody decree.

Because of a foreign judgment may be executed only where it is final and enforceable, an application submitted for the execution of foreign judgment on appeal or under review would undoubtedly not to be accepted under Ethiopian law. a judgment in default of appearance of the defendant is also considered as final and acceptable, provided, however, that the court rendering the judgment had jurisdiction, that the defaulting party was given opportunity to appear in court and present his defense but failed, or that he had not lodged an opposition to such a judgment with in the period fixed by the law of rendition forum, before the same court has pronounced the judgment.

Concerning a foreign judgment from which no appeal is pending but the execution of which has been suspended by the court of rendition forum, the general practice is that the action on the judgment is maintainable, despite the views expressed by some courts that the plaintiff should be denied of the right of action on the judgment. But until the outcome of rendition forum is known, execution may be suspended by the recognition forum as well.[66] *However; its execution would be liable to suspensions, until the suspended judgment is rendered definite by a subsequent judgment of the rendition forum.*

The particular examples in reference to which the problem of finality and enforceability may appear are interlocutory orders, maintenance decrees and custody decrees. As

regards a foreign interlocutory order, the accepted practice is to view the problem in the light of whether the order has been pronounced prior to, or together with the final judgment. An interlocutory order rendered before the final judgment is given is obviously not considered to be final, and is therefore unenforceable. Where, however, the order is rendered as part of the final judgment. It undoubtedly obtains finality and enforceability.

As a matter of general practice, a foreign maintenance decree is deemed final and enforceable, if the decree is not capable of variation. Concerning those decrees for variable maintenance, some holdings pertaining to arrears and installments which have fallen due have been agreed upon to be final and enforceable. Whether or not the status of finality and enforceability might also be attributed to a judgment involving the custody of a child, the usual practice is to tackle the issue by taking the best interests of the child into account.

With regard to the appropriate law of country by which the issue of finality and enforceability of a foreign judgment might be tested, two practices are recognized world wide.[73] *According to the first practice, to determine whether or not a certain judgment is final and enforceable, it is necessary to refer to the law of the country whose court pronounces the judgment or the rendition forum. The second practice argues in favor of the law of the court to whose jurisdiction the judgment has been referred for execution or the recognition forum. Though no express provision is available to this effect in Ethiopian law, the requirement embodied in the Civil Procedure Code that the foreign judgment must be accompanied by a certificate signed by the president or the registrar of the rendition forum to the effect that such judgment is final and enforceable, may imply that Ethiopian law has favored the former practice.*

Public Order and Morality

Under Ethiopian law, as is also true of the laws of many other countries, meeting the requirement of public order and morality is also a prerequisite for the execution of a foreign judgment. Public order is a doctrine which serves as a safety valve for a country

to enable its courts to deny effect to foreign [laws and] judgments which, for one reason or another, should not be enforced. The concept of morality also refers to the fact that those foreign judgments appearing repugnant to the conduct, customs or accepted practices of the society of the recognition forum would not be carried out. Since a foreign judgment contrary to the morals of a society also implies violation of the public order, the writer of this article concentrated his discussion upon the latter term.

The term, public order is a difficult term to define, and several attempts to define it have proved to be a failure. The most that can be said of the term is that it is a developed concept and that it finds its expression in various state's basic moral, ideological, social, economic and cultural ideas, and in constitutions, statutes, and practice of courts. The execution of the foreign judgment which jeopardizes such basic ideas, laws and court practices therefore, cannot be granted for the reason that the public order of the country is endangered. Undoubtedly, this also implies for Ethiopia.

The concept 'public order' which is also referred to as public policy indeed plays a restrictive role against the execution of foreign judgments. Dicey and Morris wrote:

> *"The court will not enforce or recognize a right, power, capacity, disability, or legal relationship arising under the law of foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental policy in English law.*

The employment of the principle of 'public order' does prevent the execution of foreign judgments, and this is the case with the law of every country. It is an essential requirement in the execution of foreign judgments. It helps prevent the application of foreign law on the basis of which the foreign judgment is rendered as being repugnant to the recognition forum. It also helps prevent injustice in the circumstance of the particular case before the court such as the harsh affliction of the foreign law in rendering the judgment.

Under Ethiopian law, the ground on which foreign judgments could be denied execution for violating public order are not enumerated in the Code, nor has there been any attempt on the part of the courts to enumerate them. However, in the opinion of this writer, there are a serious of internationally recognized grounds that may be employed by Ethiopian courts to deny execution of foreign judgments for 'public order' reasons. These include:

First, a foreign judgment obtained by fraudulent means, whether the consequence of an act of the party in whose favor the judgment was given or that of the foreign court is denied execution. For example, the doctrine of public order may be invoked when foreign judgment is proved to have been procured by false evidence: as a result of the expression of material facts which, if cited or discovered would have affected the outcome of the case; or where the foreign judges were themselves interested in the outcome of the action.

In English Private International Law, the condition that a foreign judgment sought to be executed in a country must have not been obtained by fraud is included in the law as an independent requirement. A defendant in the foreign judgment is empowered to appeal against the execution of such judgment on the ground of fraud. Consequently, the court can hear and determine the very same evidence and defense tendered in the proceeding s of a foreign court. Where it is established that, for instance, the plaintiff had mislead the foreign court to reach the judgment by way of perjury or the judges of the foreign court were interested in the subject matter of the case itself, English courts cannot enforce the foreign judgment. In the Ethiopian case, it could be argued the same way, for such requirement is covered by the public order requirement.

Second, a foreign judgment rendered by a court of a state the government of which Ethiopia opposes, for instance, a judgment from a state whose government is outlawed by the International Community for its grave violations of fundamental rights and human freedoms, is unlikely to be executed in Ethiopia. Further, a foreign judgment will not be enforced in Ethiopia if it pertains to the recovery of proceeds of prostitution, though the

contract may be held valid by the law of the foreign court, or debts from gambling, usury, sale of drugs or breach of any other contract considered unlawful under Ethiopian law.

Third, a foreign judgment which precludes an opposing judgment of an Ethiopian court rendered on the same cause of action, even if the Ethiopian judgment is given later is not executed. As is expressly provided in its Civil Procedure Code, Ethiopia never attributes effect to a foreign judgment contradicting an Ethiopian judgment, even if the later is not yet finalized.

And fourth, foreign judgments which are of a public nature, such as administrative, tax and criminal judgments are denied execution. Under the general principles of international law, the doctrine on the execution of foreign judgment applies only to civil and commercial matters. Public law judgments are considered to be promoting the Governmental interests of a foreign state for which Ethiopia, a sovereign and independent state, will not become an agent.

In the light of the principle of territoriality which no doubt has universal acceptance and respectable judicial support, countries are not willing to execute foreign penal laws. In connection with the English courts, Cheshire has said that English courts would not lend its aid to the enforcement, either directly or indirectly, of a foreign penal law.

In this connection, a problem that deserves our concern is the determination of the status of civil aspect of criminal judgments, as, for example, a grant of damages pronounced by a foreign criminal court to a victim of a crime. Should an Ethiopian court enforce that aspect of the judgment pertaining to the damages? As courts in many other countries execute such a judgment rendered by a foreign criminal court, there seems to be no reason why Ethiopian courts should not follow this accepted practice. Moreover, under Ethiopian law, a suit for damages sustained as a result of a criminal act may be lodged separately inn a civil division or tried together with the criminal aspect, in the criminal division. Consequently, it appears immaterial whether the civil aspect of the judgment is

rendered a civil or a criminal court; and the judgment should be executed by an Ethiopian court.

Concerning foreign tax judgments, the "revenue rule", which is a rule of international practice, denies recognition and execution of them. For instance, courts in the United States do apply the paragraph "revenue rule" to refuse enforcement of foreign tax judgments. In Ethiopia, certainly as a matter of public order, foreign judgments based on tax law could not be executed.

Conclusion

As is true of every member of the community of nations, increasing international intercourse will undoubtedly cause Ethiopia to have to deal with such problems as the execution of foreign judgments. As Ethiopia would like its judgments to be executed by foreign courts, so it is required to render similar treatment to judgments pronounced by foreign courts. In the desire to enable its courts to discharge their functions, pertaining to the execution of foreign judgments, it is, therefore, necessary as well as timely for Ethiopia to consider revising the Civil Procedure Code's Provisions on the execution of foreign judgments.

The author insists that special attention should, inter alia, be given to improving the requirements for the execution of foreign judgments provided for under the code's Article 458. The requirements should be revised in such a way that courts could apply them with no or minimum difficulty. In other words, Ethiopia ought to clarify and elaborate the Code's provisions so that they could easily be understood and applied. As they stand now they are not sufficient to accommodate as many legal situations as similar provisions of the laws of other countries do. By revising the code's provisions on the execution of foreign judgments, Ethiopia must get itself prepared for the inevitable Private International Law problems it encounters.

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4.5. Summary

The third part of private international law is the case of foreign judgments. If a party wants a foreign judgment to be enforced in Ethiopia, one should apply to the Federal High Court. Generally, it will be recognized or enforced if the conditions spelt out by the Ethiopian Civil Procedure Code are fulfilled. The conditions, as listed in Art. 458 of the CPC, should be cumulatively fulfilled. The conditions are: the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed was given; the judgment was given by a court duly established and constituted; the judgment-debtor was given the opportunity to appear and present his defense; the judgment to be executed is final and enforceable; and, execution is not contrary to public order or morals.

The same holds good for the case of an arbitral award.

4.6. Discussion Questions

1. What is your personal view on reciprocity?
2. Discuss the conditions decreed in article 458 of the Civil Procedure Code.
3. Do you think that the Ethiopian Law of Foreign Judgment Execution is sufficient?
4. What cases are not arbitrable in the light of the Ethiopian legal system?
5. How do you understand the phrase ‘final and enforceable’?

Part II

Application of Conflict of Laws in Specific Areas of Law

Dear learner, welcome to the second part of the course material. In this part we will be dealing with rules and principles of conflict of laws as applied on specific area of laws. This part deals mainly with conflict of law rules and principles governing transactions in Contracts, non contractual obligations, property including succession, status including marriage and children, and finally we will be dealing with rules governing Agency ,Companies and Partnerships. In this part, we will be making cross reference to the general principles you learned in part one. Therefore, you should try to relate what you learned in the general part to each of the topics under discussion here under.

Unit Five: Contractual Obligations

Unit Objectives

At the end of this chapter, students should be able to:

- Discuss the main issues involved in choice of law in contract cases;
- Describe the concept and role of party autonomy in choice of laws governing contracts;
- Discuss the doctrine of proper law of contact;
- Analyze the elements of the doctrine of proper law of contract;
- Distinguish between the general rules of choice of laws governing contracts and the rules applicable to specific types of contracts(protected contracts);
- Analyze the content of the proposed draft federal conflict of law rules and discuss their limitation;
- Describe the practice of Ethiopian courts with regard to choice of governing law in contracts;
- Discuss the position taken by foreign jurisdiction regarding the issue of choice of law in contract and;
- Suggest solutions to the current gap created by the absence of binding conflict of law rule in Ethiopia.

5.1. Introduction

Dear learner, well come to the fifth chapter of the course material. In this chapter, we will focus on rules and principles governing contractual obligations. First, we will deal with the general theory and rules governing choice of law in contract, and then we will shade some light on specific topics like requirements for the formation of the contract, Interpretation and discharge of the obligation. For purpose of broader understanding of the subject rules governing two of the common type of contracts, i.e. consumer contracts and contracts of employment will be discussed. This will be done by comparative

presentation of the position taken in United States of America under the Second Restatement, Britain and European Union under the Rome Convention. We have also provided some interactive questions in between the discussion summery and review questions at the end of the chapter.

5.2. Choice of Applicable Law in Contract

A contract in which foreign elements are involved is one of the most complicated areas in private international law. This complexity results in part from the wide uses of contracts, the lawyer's universal tool in business and personal affairs. This complexity is increased by the many different kinds of contracts and of issues involving contracts and by the many relationships a single contract may have to two or more states. Since it is that area of law in which the laws of two or more states frequently come in to contact as the business transaction among people in these countries intensified due to globalization and modernization in communication systems. The contractual interactions of people through trade and investment have resulted in the creation of legal problems which in turn have drawn a closer attention concerning the determination of the court having jurisdiction to adjudicate the issues and the selection of the appropriate governing law.

It seems by realizing the seriousness of the barriers which unduly hamper the smooth development of sale of goods and services between cross border partners that different attempts are made to harmonize the governing laws in contract on international level. Earlier attempts include the effort made by the council for Mutual Economic Assistance (the COMECON) in adopting the general condition for delivery of goods in 1958. Another organization, the International Institute for the Unification of Private law (UNIDROIT),or better known as the Rome Institute ,has worked out the uniform law on International Sale of Goods (ULIS) and Uniform Law on Formation of Contracts for international Sale of Goods (ULF), which aimed at providing guide lines in the conclusion of sale contracts. The United Nations Commission on International Trade Law (UNCITRAL) made a revision on the ULIS and ULF and these were adopted by a diplomatic conference in Rome in 1980. The European Union seems to have taken a

significant stapes in this regard since it was able to harmonize the law applicable on contracts by enabling its member states adopt the 1980 Rome convention on Law applicable to Contractual obligations which has mandatory application in EU member states.

Despite this effort by the international community to harmonize the laws governing trade activities, there is still a problem as to what law should govern contracts in which the laws of two or more states are involved. This is because the international instruments do not have legal force except in the countries that have adopted them. And most of the countries follow their own domestic rules of conflict of laws to resolve problems which naturally shows variation from place to place.

In light of this fact i.e., absence of internationally accepted rules governing contractual relations containing a foreign element judges face difficulties in answering the question the law of which state is appropriate to govern contractual obligations.

Coming to the situation in Ethiopia, the problem seems to be far worse than any country mainly because the courts of Ethiopia do not have any formally adopted conflict of law rules to resolve such disputes.

With this in mind, in the following sub sections, we will try to explore the generally accepted principles in choice of law in contractual disputes and the position of the Federal draft conflict of Law of Ethiopia will be discussed.

5.2.1. Doctrine of the proper law of Contract

The proper law of the contract is a convenient and succinct expression to describe the law that governs many of the matters affecting a contract. It has been defined as “that law which … a court is to apply in determining the obligations under the contract”. The proper law of contract in principle is a single system of law. However it should be born in mind that not all the matters affecting the contract are governed by one system of law. It

is possible that different particular aspects of the contract could be governed different laws. For instance it may happen that capacity of the parties to enter in to contract could be governed by one law and the formal requirements for validity of the contract may fall under another law. Nevertheless it always be remembered that in all cases there is a primary system of law called the 'proper law' which usually governs most matters affecting the formation and substance of the contract.

The problem of ascertaining the *lex causae* is more complicated in the case of contract than in almost any other legal topic .In most of the cases the decisive connecting factor up on which the ascertainment depends is fairly clear. For instance it is generally accepted that it is the *locus celebrationis,* which indicates the law that governs the formal validity of a marriage. Concerning succession to immovable property the law of the *situs* governs the case. But in the case of contract there may be multiplicity of connecting factors: the place where it is made; the place of performance; the domicile; nationality or business center of the parties; the situation of the subject matter and so on. So which one is determinant of the proper law?

In an attempt to answer this question several different solutions have been forwarded by the practice of different countries. In the United States for instance, a preference was formerly shown in the first restatement for a rigid and inflexible test of the place of contracting in some and place of performance in others. But the tendency under the second restatement is to reach solution on more general lines. Most of the countries in the European Union disdain anything in the way of a rigid test and, instead, adopt the doctrine of party autonomy, under which the parties are free to choose the governing law with certain limitations.

A) Ascertainment of the Proper Law: The US Approach Under Second Restatement

In the United States, the second restatement of the law on this issue has a different approach than the first restatement which tries to determine the applicable law based on the rigid criteria of either the place of contracting or the place of performance of the

contract. To the contrary, the law under the second restatement of conflict of law uses diverse grounds to determine the applicable law.

Here, it is stated that contractual obligations in principle shall be governed by the law of the state chosen by the parties to govern their contractual relations unless this law is contrary to the public policy of the forum court. The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue. The expression '*if the particular issue is one which the parties could have resolved by an explicit provision in their agreement*' refers to most issues in contract law that are included in permissive provisions in exclusion of mandatory provisions which cannot be agreed otherwise by the parties. For instance the parties are free to determine the place time and mode of performance. More over, the law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either : (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, would be the state of the applicable law in the absence of an effective choice of law by the parties. The expression 'particular issue is one which the parties could not have resolved by an explicit provision in their agreement' refers to mandatory provisions of contract law up on which the parties are not free to agree in a way they want. Examples of such questions are those involving capacity, formalities and substantial validity. A person cannot vest himself with contractual capacity by stating in the contract that he has such capacity. He cannot dispense with formal requirements, such as that of writing, by agreeing with the other party that the contract shall be binding without them. Nor can he by a similar device avoid issues of substantial validity, such as whether the contract is illegal. Usually, however, the local law of the state chosen by the parties will be applied to regulate matters of this sort. And it will usually be applied even when to do so would require

disregard of some local provision of the state which would otherwise be the state of the applicable law.

The rule of this Section is applicable only in situations where it is established to the satisfaction of the forum that the parties have chosen the state of the applicable law. When the parties have made such a choice, they will usually refer expressly to the state of the chosen law in their contract, and this is the best way of insuring that their desires will be given effect. But even when the contract does not refer to any state, the forum may nevertheless be able to conclude from its provisions that the parties did wish to have the law of a particular state applied. So the fact that the contract contains legal expressions, or makes reference to legal doctrines, that are peculiar to the local law of a particular state may provide persuasive evidence that the parties wished to have this law applied. On the other hand, the rule of this Section is inapplicable unless it can be established that the parties have chosen the state of the applicable law. It does not suffice to demonstrate that the parties, if they had thought about the matter, would have wished to have the law of a particular state applied.

Permitting the parties in the usual case to choose the applicable law is not, of course, tantamount to giving them complete freedom to contract as they will. Their power to choose the applicable law is subject to the two qualifications. The parties cannot arbitrarily choose the law of a state they like. They must have a reasonable basis to select the law of a certain state. The forum will not apply the chosen law to determine issues the parties could not have determined by explicit agreement directed to the particular issue if the parties had no reasonable basis for choosing this law. The forum will not, for example, apply a foreign law which has been chosen by the parties in the spirit of adventure or to provide mental exercise for the judge. Situations of this sort do not arise in practice. Contracts are entered into for serious purposes and rarely, if ever, will the parties choose a law without good reason for doing so.

When the state of the chosen law has some substantial relationship to the parties or the contract, the parties will be held to have had a reasonable basis for their choice. This will

be the case, for example, when this state is that where performance by one of the parties is to take place or where one of the parties is domiciled or has his principal place of business. The same will also be the case when this state is the place of contracting except, perhaps, in the unusual situation where this place is wholly fortuitous and bears no real relation either to the contract or to the parties. These situations are mentioned only for purposes of example. There are undoubtedly still other situations where the state of the chosen law will have a sufficiently close relationship to the parties and the contract to make the parties' choice reasonable.

But in the absence of effectively chosen law by the parties the governing law shall be the law which has the most significant relationship to the transaction and the parties taking in to consideration various points of contact like: place of contracting, place of negotiation of the contract, place of performance, the location of the subject matter of the contract and the domicile, nationality, place of incorporation and place of business of the parties.

The place of contracting : As used in the Restatement of this Subject, is the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect, assuming, hypothetically, that the local law of the state where the act occurred rendered the contract binding. Standing alone, the place of contracting is a relatively insignificant contact. To be sure, in the absence of an effective choice of law by the parties, issues involving the validity of a contract will, in perhaps the majority of situations, be determined in accordance with the local law of the state of contracting. In such situations, however, this state will be the state of the applicable law for reasons additional to the fact that it happens to be the place where occurred the last act necessary to give the contract binding effect. The place of contracting, in other words, rarely stands alone and, almost invariably, is but one of several contacts in the state. Usually, this state will be the state where the parties conducted the negotiations which preceded the making of the contract. Likewise, this state will often be the state of the parties' common domicile as well. By way of contrast, the place of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and

the contract, such as when a letter of acceptance is mailed in a railroad station in the course of an interstate trip.

The place of negotiation: The place where the parties negotiate and agree on the terms of their contract is a significant contact. Such a state has an obvious interest in the conduct of the negotiations and in the agreement reached. This contact is of less importance when there is no one single place of negotiation and agreement, as, for example, when the parties do not meet but rather conduct their negotiations from separate states by mail or telephone.

The place of performance: The state where performance is to occur under a contract has an obvious interest in the nature of the performance and in the party who is to perform. So the state where performance is to occur has an obvious interest in the question whether this performance would be illegal. When both parties are to perform in the state, this state will have so close a relationship to the transaction and the parties that it will often be the state of the applicable law even with respect to issues that do not relate strictly to performance. And this is even more likely to be so if, in addition, both parties are domiciled in the state. On the other hand, the place of performance can bear little weight in the choice of the applicable law when (1) at the time of contracting it is either uncertain or unknown, or when (2) performance by a party is to be divided more or less equally among two or more states with different local law rules on the particular issue. It is clear that the local law of the place of performance will be applied to govern all questions relating to details of performance.

Situs of the subject matter of the contract: When the contract deals with a specific physical thing, such as land or a chattel, or affords protection against a localized risk, such as the dishonesty of an employee in a fixed place of employment, the location of the thing or of the risk is significant. The state where the thing or the risk is located will have a natural interest in transactions affecting it. Also the parties will regard the location of the thing or of the risk as important. Indeed, when the thing or the risk is the principal subject of the contract, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the

thing or risk was located would be applied to determine many of the issues arising under the contract.

Dmicile, residence, nationality, place of incorporation, and place of business of the parties: These are all places of enduring relationship to the parties. Their significance depends largely upon the issue involved and upon the extent to which they are grouped with other contacts. So, for example, when a person has capacity to bind himself to the particular contract under the local law of the state of his domicile, there may be little reason to strike down the contract because that person lacked capacity under the local law of the state of contracting or of performance. The fact that one of the parties is domiciled or does business in a particular state assumes greater importance when combined with other contacts, such as that this state is the place of contracting or of performance or the place where the other party to the contract is domiciled or does business. As stated in section 192, the domicile of the insured is a contact of particular importance in the case of life insurance contracts. At least with respect to most issues, a corporation's principal place of business is a more important contact than the place of incorporation, and this is particularly true in situations where the corporation does little, or no, business in the latter state.

B) Determination of the Proper Law: The English Approach

Under modern English law determination of the proper law of contract depends up on whether the parties have expressly chosen the proper law or not. The following discussion tries to elaborate on the principle followed by English courts in determining the proper law.

i. Where There is Express Choice of the Proper Law

It has been recognized in England since at least 1796 that at the time of making the contract the parties may expressly select the law by which it is to be governed. The parties may declare their common intention either by simple statement that the contract

shall be governed by the law of country X, or by a provision that any question arising between them shall be settled by a judge or an arbitration in that country. This latter method is a common feature of international commerce. Such arbitration clause may merely refer possible disputes to the tribunals of the chosen country or may go further and add that the tribunal shall apply the law of its own country. This addition, though convenient as a clear identification of the proper law ,is not of vital significance ,since for better or for worse, English law is committed to the view that *qui elegit judicem elegit jus,* which means 'an express choice of a tribunal is an implied choice of the proper law'.

An important question in regard to the autonomy of the parties to choose the proper law is the parties choose any law they like? To be more precise – may they choose any law in the world however alien it may be to the factual character of the contract? Or must their choice be restricted to the law of some country with which the contract is already factually connected?

Complete freedom of the parties to choose the proper law has got its own merits and demerits. In this regard judged by personal standard of convenience, it may be said that for the parties to have this unrestricted freedom is all to the good, since it produces certainty where otherwise every thing might be uncertain. It puts the proper law beyond a peradventure and thus saves the cost and delay of a disputed trial. Judged by the standard of commonsense, however, it is not so attractive, since it may, if capriciously exercised; subject the parties to a law that is unrealistic to the point of absurdity. Noting but embarrassment seems to be gained by allowing the parties to convert their Italian contact in to a Peruvian contract by calling it so. Nevertheless, there are judicial dicta of great weight which would admit this unbounded license. For instance in Rex v. International trustee, [1937], '*their intention'*, said Lord Atkin, '*will be ascertained by the intention expressed in the contract, if any, which will be conclusive.*' Moreover, the prevailing opinion in the profession and among merchants engaged in international trade is that these statements accurately represent the law. On the other hand, at least judicial pronouncement on the matter is that the court will necessarily regard the intention expressed by the parties 'as being the governing consideration where a system of law is

chosen which has no real or substantial connection with the contract looked up on as a whole.'

On principle, there is clearly no justification for the view that the parties are free to submit every aspect of their contract to any law they may see fit to choose, unless, of course, it is also the proper law according to the objective standard.

As precaution, it is necessary to distinguish carefully the express selection of the proper law from the quite different process of the incorporation in the contract of certain domestic provisions of a foreign law. There are two different courses open to the parties. They may within the limits already discussed , select a given law as a whole to govern a contract ,or having already created a contract that is valid according the law to which it naturally belongs ,they may incorporate therein the domestic and relevant rules of some other legal system. This incorporation may be effected either by a verbatim transcription of the relevant provisions or by general statement the rights and liabilities shall on certain respect be subject to the chosen law. Thus the parties to English contract for the sale of goods may be expressly provide that their duties with regard to performance shall be governed by the rules contained in the Swiss code. Where a particular term incorporated in this is valid and effective is, of course, a matter for the proper law to determine.

It is well established that this right of incorporation may be freely exercised. Whether the foreign provisions are transcribed verbatim or adopted by a general reference to the foreign code, they become English terms of the contract and must be construed as such. Moreover, they remain constant in the sense that they are unaffected by any change in the relevant Swiss law occurring after the date of the contract. On the other hand, a proper law intended as a whole to govern a contract is administered as 'a living and changing body of law', and effect is given to any changes occurring in it before performance falls due.

ii. Where There is no Express Choice of the Proper Law

Although the rule here, as laid down in a multitude of cases, it is that the intention of the parties prevails, the difficulty to discover the exact sense that intention is supposed to bear in this context. Its analysis by the judges in their numerous affirmations of the principle has not been uniform. Some emphasize the presumed intention of the parties and declare that the task of the court is to infer from the terms and circumstances of the contract what their common intention *would have been* had they considered the matter at the time when the contract was made. Others say that the court must determine for the parties what they *ought to have* intended had they considered the matter.

There is a clear difference between these two views upon the function of intention. According to the first, the court in effect reads an implied term into the contract which purports to represent the common intention of the parties; according to the second, it conjectures no probabilities, but ruthlessly applies the external standard of the reasonable man.

All doubts as to the correct approach to the matter were, however, virtually dispelled by the decision of the court of appeal in *The Assunzione*, where, despite certain references to the criterion of presumed intention, the more realistic and objective test of the reasonable man was clearly adopted. The modern criterion is thus what ought to have been intended. Thus Singleton L.J., in *The Assunzione*, after considering several of the leading authorities, stated the rule in the following words:

> *'Then the court has to determine for the parties what is the proper law which, as just and reasonable persons they ought to have intended if they had thought about the question when they made the contract. That I believe, is the duty upon us ,and in seeking to determine the question we must have regard to the terms of the contract ,the situation of the parties ,and generally all the surrounding facts.'*

In other words, where it has not been expressly chosen, the proper law depends upon the localization of the contract. The court imputes to the parties an intention to stand by the legal system which, having regard to the incidence of the connecting factors and of the circumstances generally, the contract appears most properly belong. In short the proper law is the legal system with which the contract has the most substantial connection. This principle has now been finally and unanimously endorsed by the house of Lords.

On this view of the matter, every term of the contract, every detail affecting its formation and performance , every fact that points to its natural seat is relevant. No one fact is conclusive.It is doubtful ,even ,whether ,any useful purpose is served by the traditional practice of regarding certain facts ,such as the *locus contractus* , the *locus solutionis* ,as presumptive evidence of the governing law. To enter upon the search with a presumption only is too often to set out upon a false trail. It may tend to divert attention from the necessity to consider every pointer. More over, where there are several circumstances pointing to different directions, 'a presumption or inference arising from one alone becomes of less importance. In such a case an inference which might be properly drawn may cancel another inference which would be drawn if it stood by itself.' The contract requires to be regarded as a whole. The proper course is not to begin with a presumption and then enquire whether there are rebutting circumstances ,but to fall back on a presumption only when the circumstances ,viewed as a whole ,fail to reveal with reasonable certainty the law to which the contract naturally belongs.

Coming to the circumstances which the court should take in to account to determine the existence of substantial connection between a certain law and the contract, the following are relevant: the domicile and even the residence of the parties; the national character of the corporation and the place where its principal place of business is situated; the placed where the contract is made and the place where it is to be performed; the style in which the contract is drafted, as for instance ,whether, the language is appropriate to one system of law ,but inappropriate to another; the fact that a certain stipulation is valid under one law but void under another; the matrimonial domicile in case of marriage settlement contract ;the nationality of the ship in maritime contract ; the economic connection of the

contract with other transaction; the fact that one of the parties is a sovereign state; the nature of the subject natter ,or its *situs*; the head office of an insurance company, whose activities range over many countries; and in short , any other fact which serves to localize the contract.

C) Determination of the Proper Law : The Approach in The Rome Convention of 1980 (The following material is transcribed from Peter Stone, EU Private International Law: Harmonization of Laws,2006,p263-287)

The main principle adopted by the Rome Convention of 1980 is that most issues relating to a contract are governed by a single law, which the Convention refers to as the law governing or applicable to the contract, but which may more conveniently be referred to by the traditional English term, *the proper law of the contract*. The proper law is determined in accordance with the rules laid down by Articles 3 and 4. These refer, primarily, to a choice of law expressly agreed on by the parties to the contract; secondarily, to a choice of law impliedly, but clearly, agreed on by the parties; and finally, in default of any such choice, to the law of the country which is most closely connected with the contract, with in most cases a rebuttable presumption in favor of the residence of the characteristic performer.

These rules on the proper law are designed to respect and support the expectations of the contracting parties, in accordance with the primary objective of contract law; to promote certainty, predictability, commercial convenience, and uniformity of results, regardless of forum; and thus to facilitate the conduct and promote the growth of international trade and commerce.

We will look at each of the circumstances hereunder.

i. The Proper Law : Express Choice

Under the Rome Convention, as under the traditional English law, the proper law of a contract is determined primarily by reference to any express agreement on the point concluded by the parties to the contract. Only in the absence of any, or any valid, express choice is reference made, secondarily, to implied choice or closest connection. Thus Article 3(1) of the Rome Convention specifies that a contract is governed by the law chosen by the parties, and that the choice may be expressed by the terms of the contract. Since no requirement of writing or other formality is required for an express choice of law, an oral agreement on the applicable law, concluded in the negotiations leading to the conclusion of a substantive contract in writing, will be effective.

Usually any express choice of law is made by a clause contained in the contract as concluded, but Article 3(2) permits an express choice to be agreed on after the conclusion of the contract (so as to replace the proper law resulting from a previous express or implied choice or from the closest connection). It specifies, however, that such a subsequent choice cannot prejudice the formal validity of the contract, nor adversely affect the rights of third parties (such as guarantors or beneficiaries). Probably a subsequent choice has retroactive effect, unless it specifies otherwise.

It also seems consistent with the policy of the Convention to accept an express choice agreed on before the contract, so that, for example, a long-term distribution agreement could effectively provide that particular contracts of sale subsequently concluded between the same parties pursuant to the agreement should be governed by a specified law, unless the particular contract should otherwise provide.

A very minor restriction on the effect of an express choice is imposed by Article 3(3), which specifies that the fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of mandatory rules of the law of that country. Mandatory rules

are defined as rules which cannot be derogated from by contract. Thus where parties resident in France negotiate and contract in France for performance exclusively in France, but include a clause providing for English jurisdiction and English law, the English court will have to give effect to all the mandatory rules contained in French internal law; but, subject to that, the choice of English law will be effective. It is noteworthy that Article 3(3) applies however minimal the policy underlying the relevant mandatory rule may be; as in the case of the English doctrine of consideration. But it may be doubted whether a case caught by Article 3(3) will arise more often than a solar eclipse visible in London. The narrow scope of Article 3(3) was confirmed by the decision of Cooke J in *Caterpillar Financial Services v SNC Passion*, which involved a contract of loan between an American lender and a French borrower, whereby finance was provided for the construction of a vessel in Singapore, and which contained a clause choosing English law as the proper law. In holding that Article 3(3) did not make French mandatory rules applicable to this contract, he emphasized that Article 3(1) gives parties freedom to choose the law applicable to the agreement which they are making. Article 3(3) provides an exception to this in cases where the agreement is entirely domestic in content, so that the choice of a foreign law is designed to circumvent the mandatory rules of the country which alone is concerned with the transaction. If however there are other elements, apart from the choice of law and jurisdiction clause, which are relevant to the situation at the time of concluding the agreement and which are connected with other countries, the agreement is not a domestic agreement of concern only to one country, and Article 3(3) does not apply. Moreover Article 3(3) refers to elements which are relevant to the *situation*, which is a wider concept than elements which are relevant to the *contract*, and a much wider concept than elements which are relevant to the mandatory rules of the law of any one country.

The very limited scope of the exception specified by Article 3(3) reinforces the clear intention evinced by Article 3(1) that in all other cases an express choice of law should be effective. Thus the Convention requires an express choice to be respected even if the chosen law has no other connection with the contract, and even if the choice was made for the purpose of avoiding mandatory rules contained in the law of the country which is

most closely connected with the contract, and which would in the absence of express or implied choice have been the proper law under Article 4. The rationale for the freedom to choose an unconnected law is commercial convenience. The substantive rules contained in the chosen law may be well developed and familiar to the parties, while those of all the connected laws may be obscure or a matter for speculation. Parties may find it convenient to use the same law for associated transactions (such as a chain of sales of the same goods), and the connection with the other transactions may not be immediately apparent from the contract. Moreover it would have been senseless to introduce the French doctrine of evasion of law in a context where the primary choice of law rule is based on intention, and the test of closest connection has only a supplementary role, to provide a default solution where no intention is apparent.

Thus the rule laid down by s. 27(2) (a) of the (British) Unfair Contract Terms Act 1977, whereby the controls imposed by the Act on the validity of exemption clauses remain applicable despite a contractual term choosing a foreign law, where the term was imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the Act, seems incompatible with the Rome Convention. On the other hand an expressly chosen law will apply even where its effect is to invalidate the contract.

It is clear from Articles 1(1), 4 and 19 of the Convention, and was accepted by the Court of Appeal in *Shamil Bank of Bahrain v Beximco Pharmaceuticals*, that the proper law, whether chosen by the parties or determined by reference to closest connection, must be the law of a country, in the sense of a territory having its own legal rules on contracts. Thus it cannot be the general principles of law recognized by civilized nations, or the UNIDROIT Principles of International Commercial Contracts, or European Community law, or public international law, or Islamic law (as a generic religious law, independent of its adoption and interpretation in any particular territory). It must be borne in mind, however, that the conflict rules laid down by the Rome Convention are not necessarily applicable in arbitration proceedings, for it is open to the law of the country in which an arbitration is seated to enable the parties to empower the arbitrator to decide disputes in

accordance with nonlegal considerations, and such a permission is indeed accorded by s. 46 of the (English) Arbitration Act 1996.

Similarly, it seems clear that parties are limited, in choosing the proper law, to the laws of countries which exist at the time of the choice. On the other hand they cannot limit their choice to the content of a law as it exists at the time of contracting or on some other specified date, but must accept subsequent changes in its substantive rules which the chosen law makes applicable to existing contracts, except insofar as such retroactive effects may infringe a stringent public policy of the forum. Thus parties cannot validly choose ancient Roman law, as disclosed in Justinian's Digest. Nor can they effectively choose French law as it stands at the date of contracting. Probably in the last mentioned case the reference to the date will be disregarded, and the clause will then operate as a normal choice of French law.

Moreover, since Article 3 refers to a choice *by the parties*, it seems probable that the parties cannot confer on one of them a unilateral power subsequently to designate the proper law. But otherwise an express choice by the parties of alternative systems of law, applicable in different circumstances, should be effective. For example, an agreement that a contract of loan should be governed by Swiss law, but that if Swiss law should be altered so as to impose restrictions on the chargeable rate of interest, then German law should apply instead. Perhaps the greatest practical problem in connection with express choice concerns clauses whose meaning is less than clear. Like any contractual term, a choice-of-law clause may be void for uncertainty. This result will arise if the forum finds itself unable to ascribe to the clause any definite meaning identifying a particular law as the proper law. In such a case the clause will probably have the effect under the Convention of eliminating the possibility of an implied choice, and making operative the test of closest connection under Article 4. It is now clear from the decision of the English Court of Appeal in *Centrax v Citibank* that under the Convention the forum applies the principles of contractual interpretation contained in its own internal law in determining the meaning (or lack of any discernible meaning) of an ambiguous choice of law clause.

The problem of ambiguity and possible uncertainty is illustrated by the decision of the House of Lords under the traditional English law in *Co Tunisienne de Navigation v Co d'Armement Maritime*, which involved a tonnage contract between a French carrier and a Tunisian shipper for the carriage of a quantity of oil between two Tunisian ports by several voyages over a period of months in ships owned, controlled or chartered by the carrier. The contract was expressed on a standard form designed for a voyage charter party, and contained a clause choosing the law of the flag of the vessel carrying the goods. In the House of Lords, the majority (which included Lord Dip lock), relying on a finding that the parties contemplated that the carrier would, at least primarily, use its own ships, which all flew the French flag, managed to construe the choice of law clause as referring to the law of the flag of the vessels owned by the carrier, and thus to French law. The minority (which included Lord Wilberforce) felt unable to interpret or rewrite the clause in this way, and concluded that it was void for uncertainty.

The last phrase of Article 3(1) specifies that by their choice the parties can select the law applicable to the whole or a part only of the contract. Thus, perhaps regrettably, the Convention permits the parties to choose different proper laws for different parts of a contract. But the parts must be logically severable, as where the contract provides both for a sale of goods and for the supply of technical assistance, and probably there must be a single law which governs issues such as frustration which affect the contract as a whole.

That severance is usually inadvisable is apparent from the decision of the English Court of Appeal in *Centrax v Citibank*, which involved a contract for electronic payment services. The clause read: 'This Agreement and all documents, agreements and instruments related to this Agreement shall be governed by and interpreted according to the laws of the State of New York, United States of America, provided that any action or dispute between the parties regarding any Payment Instrument shall be governed by and interpreted according to the laws of the country or state in which the Drawee of such Payment Instrument is located.' The customer sued the bank, complaining that the bank had wrongfully debited the customer's account in respect of cheques forged by an employee of the customer. The bank was based in New York, but the cheques were

drawn on its London branch, and the customer sought to invoke the (English) Unfair Contract Terms Act 1977, so as to invalidate terms of the contract on which the bank was relying in defense. The Court of Appeal applied English principles of construction to the choice of law clause, and by a majority concluded that where, as in the present action, the dispute raised the interpretation or effect of the contract and went beyond the validity and effect of the payment instrument, the law of New York was to be applied.

Moreover, as the English Court of Appeal recognized in *Shamil Bank of Bahrain v Beximco Pharmaceuticals*, it is not open to parties to designate two different laws as simultaneously governing the whole contract. Thus where a financing agreement specified that 'subject to the principles of Glorious Sharia'a, this agreement shall be governed by and construed in accordance with the laws of England', the reference to Islamic law was construed as merely decorative and therefore ignored.

By Article 3(4), the existence and validity of the consent of the parties to a choice of law clause must be determined in accordance with the same provisions, contained in Articles 8, 9 and 11, as apply to their consent to other contractual terms. This applies to such issues as offer and acceptance; misrepresentation or undue pressure; formal validity; and individual capacity.

ii. The Proper Law : Implied Choice

In the absence of an express choice, Article 3 of the Rome Convention directs the court to consider next whether an implied choice of law by the parties can be discovered. It is sufficient under Article 3(1) that the parties' choice, though not expressed in the contract, is 'demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.' The Convention agrees with the traditional English law in its post-war phase in adopting a fairly restrictive approach to the discovery of an implied choice. Some factor which supplies a clear indication in favour of a particular law, as being evidently much more suitable to achieve the purposes of the parties in entering into the contract, is necessary. Otherwise the court should accept that no choice, express or

implied, has been made by the parties, and should proceed to apply the default rules laid down by Article 4.

The factors which may amount to a clear indication, warranting the recognition of an implied choice, cannot be definitively listed, but it is in principle unlikely that a sufficiently strong indication will have escaped attention up to the present date. English case-law prior to the Convention indicates that the clearest possible indication arises where, as matters stand at the time of contracting, one connected law upholds the validity of the contract and all its terms, while another connected law would have total or partial invalidating effect. In such circumstances a choice of the validating law is necessary to give effect to the contract as concluded.

A similar situation arises where one connected law is familiar with the relevant type of contract, and contains well-established detailed rules for interpreting and supplementing its express terms, while the content of another connected law in relation to such contracts, as matters stand at the time of contracting, is a matter for the broadest speculation. In such circumstances a choice of the adequately developed law is necessary to give sufficient certainty to the contract.

Although these factors of validation or adequate supplementary content have not been considered by English courts since the entry into force of the Rome Convention, there is no reason to suppose that the Convention has altered the position in these respects. Another factor which usually amounts to a clear indication of an implied choice of law by the parties is the inclusion in the contract of a jurisdiction clause, specifying the court which will be competent to hear disputes relating to the contract. A jurisdiction clause will normally imply a choice of the substantive law of the country whose court is chosen. The same will apply to an arbitration clause if the arbitral tribunal designated is one which, as is generally known, will usually apply a particular substantive law. The rationale is that dispute resolution is simplified if the chosen forum applies the law with which it is most familiar and (where relevant) that a choice of a neutral forum (in a country where neither party is resident) is designed also to render applicable a neutral

law. But a forum clause will be outweighed by the factor of validity, where the law of the chosen forum would invalidate a contract which would be valid under another connected law. In some circumstances the use of a standard form not containing a forum clause may be an important indication in favour of an implied choice of the law of the country of origin of the form, at least if one of the parties is resident in that country and the other contracts through a broker there.

Another factor capable of amounting to a clear indication of an implied choice may arise from the connection between several related contracts. Where, as a matter of commercial reality, related contracts need to be governed by the same law if their purpose is to be achieved, an implied choice to that effect may be discovered. This is most obviously the case with regard to a guarantee in the strictest sense, involving an intention that the guarantor should assume a secondary obligation identical to the primary obligation of the main debtor. Thus the guarantee obligation will be governed by the law which governs the obligation guaranteed. Somewhat similarly, all obligations arising from a letter of credit (between the beneficiary and the issuing bank; between the beneficiary and the correspondent bank; and between the two banks) will normally be governed by a single law, that of the country in which is situated the banking establishment at which the documents are to be presented and through which the letter is payable. On the same basis, a counter undertaking given by one bank will be governed by the law which governs the performance bond given by another bank at the former's request.81 Moreover weight may be sometimes attached to the fact that a contract is one of a group of similar contracts between one party (for example, as employer or principal) and numerous others (for example, as employees or agents), with the result that all such contracts may be governed by the law of the residence of the party common to all the similar contracts.

The relation between connected contracts must not, however, be given a weight beyond the needs of the commercial situation. Thus a letter of credit or a performance bond will not be affected by the law governing the underlying supply contract. Similarly in the case of re-insurance, although the risk covered will usually be the same as that covered by the

primary insurance contract, the law governing the re-insurance contract will not be influenced by that chosen in or otherwise governing the primary insurance contract.

In any event, as the Court of Appeal recognized in *Samcrete v Land Rover*, a choice otherwise implied may be negated by the negotiations leading to the contract, as where a guarantor deletes from the form proffered by the other party a clause expressly choosing the same law as governs the main contract under which the obligation guaranteed arises.

iii. The Proper Law: Closest Connection

In the absence of any valid express or implied choice by the parties, the proper law is determined in accordance with the default rules laid down by Article 4, which provides:

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

The Main Presumption

The main effect of Article 4 is to provide in most cases for a rebuttable presumption in favour of the law of the characteristic performer's residence, which may be displaced by establishing a closer connection with another country. Thus in *Samcrete v Land Rover*88 Potter LJ explained that, while the structure of Article 4 might suggest a three-stage exercise by the court in approaching the problem of determining the applicable law in the absence of choice, in reality Article 4(1) merely introduces the concept of closest connection before indicating the process of reasoning to be applied in determining it.

Accordingly the application of Article 4 involves essentially a two-stage process: first, under Article 4(2), to identify the characteristic performance of the contract and the

country of the party who is to effect it, and then to ascertain what factors, if any, might lead the court to disregard the presumption under Article 4(5). Moreover in the latter respect the burden of proof lies on the party who asserts that the presumption in Article 4(2) should be disregarded.

It is clear from the Giuliano and Lagarde Report (though not from the text of the Convention itself) that it is the supply of goods or services, rather than the receipt of or payment for them, which constitutes the characteristic performance referred to by Article 4(2). Thus the presumption amounts to a preference for the law of the seller or other supplier's country. A narrow doctrine of implied choice, provided by Article 3, takes care of situations where one of the connected laws is clearly more suitable for use in interpreting and supplementing the terms of the contract. Thus Article 4 deals with cases where there is no strong reason of justice or convenience for applying any given law rather than another. In such cases there is merit in the certainty which can arise from a strong presumption in favour of the law of the supplier's residence. In many cases the presumption produces results which accord with common sense and commercial reality. It leads to the conclusion that a bank account is normally governed by the law of the country in which the branch at which the account is kept is situated, since the characteristic performance, repayment of the sum deposited, is to be effected through that branch.

Somewhat similarly, in the case of an agreement between banks whereby, in order to enable one bank to provide additional finance for a shipbuilding project, the other bank undertakes to divert to the bank providing the additional finance the stage payments which it was already bound to make to the building purchaser, the obligation to divert the payments constitutes the characteristic obligation, so that Article 4(2) points to the law of the residence of the bank which undertook to divert.

Similarly a contract whereby an insurance broker is instructed to arrange insurance is usually governed by the law of the country in which the broker carries on business, and a contract under which an architect is to design a building is usually governed by the law of

the architect's residence. Again a re-insurance contract will usually be governed by the law of the re-insurer's residence. Similarly, in the case of a contract whereby money is invested in a company, whether by the issue of shares or by way of loan, the characteristic performance will be the issue of the shares or the repayment of the loan.

No doubt the reference in Article 4(2) to a place of business, other than the principal place of business, through which the characteristic performance is to be effected must be construed as equivalent to a secondary establishment under Article 5(5) of the Brussels I Regulation,97 and as not including a merely electronic presence in the form of a web-server.98 In any event, for the proviso to apply, the contract must expressly or impliedly require that the characteristic performance should be effected through the secondary establishment. It is not enough that the parties expected the contract to be performed through the secondary establishment, if there was no contractual requirement to that effect.

Article 4(2) specifies that it is at the time of the conclusion of the contract that the relevant residence must be ascertained. This accords with the traditional English rule that connections which come into existence after the conclusion of the contract are irrelevant except in support of a (rarely successful) argument that there was a subsequent implied agreement to vary the proper law. It also indicates that a puzzling suggestion in the Giuliano and Lagarde Report that, in determining the country of the closest connection, account may be taken of factors which supervened after the conclusion of the contract, should be regarded as ill-considered and erroneous. Article 4(5) recognizes that there are cases where the characteristic performance cannot be determined, and thus there is no applicable presumption. These clearly include a contract to exchange guns for butter, or hotel accommodation for advertising; or, as Mann J held in *Apple Corps v Apple Computer*, an agreement for the world-wide division of the use of a trade mark in terms of fields of use (computers and sound recordings). They probably also include a contract for the sale and lease-back of equipment. Other cases in which the characteristic performance may be unclear are contracts between authors and publishers, and contracts for corporate acquisitions.

Another source of difficulty concerns distribution agreements, where (to the present writer) it seems natural to regard the marketing activities of the distributor as characteristic of the contract. But in *Print Concept v GEW* the Court of Appeal ruled that, in the case of a distribution agreement, it is the manufacturer's obligation to supply the goods, rather than the distributor's obligation to promote them, which constitutes the characteristic performance, so that Article 4(2) points to the law of the manufacturer's residence.

Rebutting the Presumption

Perhaps the most problematic issue in determining the proper law under the Rome Convention concerns the strength of the presumption laid down by Article 4(2) in favour of the law of the characteristic performer's residence. On this some clarification has emerged from English and Scottish decisions.

First, the reference in Article 4(5) to a closer connection must be understood in terms of geographical location only, rather than party intention. Thus the relevant factors are the residences of the parties and the places of performance of the various obligations under the contract.108 Secondly, the presumption in Article 4(2) may be most easily rebutted in cases where the place of performance differs from the place of business of the party whose performance is characteristic of the contract. Thirdly, after some confusion, a consensus has now emerged that for the presumption in favour of the characteristic performer's residence to be displaced, it must be *clearly* shown that the contract has a closer connection with some other country.110 But, despite such clarification, some uncertainty remains as to what combination of factors will clearly establish a closer connection.

Since it is obvious that the place of the characteristic performance may differ from the residence of the characteristic performer, and evident that Article 4(2) deliberately prefers the residence to the place of performance, some further factor must be necessary to displace the presumption. As regards a contract for the sale of goods, in *Grant v Brizard*

Lord Hamilton held that the fact that the contract was concluded in the context of a long-term agreement for the exclusive distribution of such goods in the buyer's country was not enough to displace the presumption in favour of the law of the seller's country. On the other hand, in *Ferguson Shipbuilders v Voith Hydro* Lord Penrose found it sufficient that the sale was of a component, to be delivered and then incorporated into a larger machine in the buyer's country. In that case a German company had manufactured in Germany and delivered in Scotland propeller systems for incorporation in ships under construction by a Scottish shipbuilding company in Scotland.

In the context of services, preference was ultimately accorded to the place of performance in *Definitely Maybe v Marek Lieberberg*, where an English company had contracted to provide a band to perform at concerts in Germany organized by a German company. In concluding that overall the contract had a closer connection with Germany than with England, Morison J emphasized that Germany was the place of performance by both parties, where the band were to perform and the organizer was to make arrangements and provide facilities for the performance (such as marketing, promotion, security and equipment).

On the other hand, the presumption was ultimately adhered to in *Caledonia Subsea v Micoperi*, which involved a contract for diving services to be provided by a Scottish company to an Italian company in connection with the'post trenching' of a pipeline in Egyptian waters. The place of the characteristic performance was substantially, but not exclusively, in Egypt, where the actual diving operations took place, but preparatory and supervisory activities took place elsewhere, including in Scotland. Lord Hamilton, whose decision was subsequently affirmed by the Inner House, explained that the effecting of the characteristic performance was significantly related to the country where the performer had its principal place of business, and the multinational character of the operations tended to favour the certainty of the presumptive country, not least where the alternative was the country of neither contracting party. The presumption was also adhered to in *Latchin v General Mediterranean Holidays*, where the contract was negotiated in England between parties resident in England, although it was for the design of a building to be erected in Morocco; and in *Ennstone Building Products v Stanger*,

where the contract was between English companies for advice on a problem concerning a building in Scotland, and the advice was to be received in England.

The place of performance may be preferred where, as in *Kenburn Waste Management v Bergmann*, the characteristic obligation is a negative obligation to achieve a result in a given country. Thus the Court of Appeal (affirming Pumfrey J) applied Article 4(5) so as to hold that an agreement by the German owner of a European patent not to make threats of infringement actions against the English customers of an English manufacturer of competing products was governed by English law. As Pumfrey J had noted, the contract had no objective connection with the patentee's German residence as such at all.

In *Samcrete v Land Rover*, an Egyptian parent company had guaranteed the liability of its subsidiary to pay for products supplied by an English company under a distribution contract expressly governed by English law, but the negotiations leading to the guarantee negated any implied choice of the law governing it. The Court of Appeal accepted that, for the purpose of Article 4(2), the characteristic obligation in the case of a guarantee is the guarantor's obligation to pay as promised. But ultimately they found that a closer connection with England was clearly demonstrated, so that English law applied under Article 4(5). England was not only the residence of the supplier/payee, but also the place of payment and the place of delivery of the products supplied.

Comparison Between the Restatement Provisions and the Rome Convention Provisions when Parties Stipulate a Choice of Law

Based on the Restatement's requirements of a substantial relationship and reasonable basis for the chosen law to be upheld, the main difference between United States choice of laws and English choice of laws is that United States law requires some connection between the chosen law and the contract, but English law does not require such a connection. While this required connection may make sense, it impinges on the freedom and autonomy of the parties. Judicial interpretation may also be required before parties can be assured that their connection is substantial or reasonable enough to be upheld. Even when parties do have a reasonable basis for choosing a governing law, courts sometimes disregard such choices in favor of applying a law that has more substantial

connections to the contract. Although such cases where United States courts did not honor parties' choices of laws constitute a minority, they raise the potential that parties' intentions will not be upheld and add uncertainty to the contracting process. The retreat from party autonomy under the Restatement seems to be much greater than under the Rome Convention since under the Restatement, the parties' choice can be defeated even if there is some connection with the law of another state. Unlike the choice of law rules in the United States, there is no overriding prohibition on arbitrariness applicable to the choice of law rules in England. n268 For example, if *Southern International Sales* had been decided under the Rome Convention instead of the Restatement, substituting foreign law for Indiana and Puerto Rico law, the parties' choice of law stipulated in the contract would likely have been upheld. Thus, parties' choice of law in the United States appears to operate only as a contributing factor, rather than as the single deciding feature, for courts to consider in determining the contract's governing law. For these reasons, the choice of law rules contained in the Rome Convention and applied by Contracting States' courts provide parties with greater freedom, flexibility, and predictability in contracting than choice of law rules contained in the Restatement and applied by United States courts.

An additional feature relating to party autonomy and flexibility in contracting that is expressly found in the Rome Convention, but not necessarily in the Restatement, is the concept of *depecage*, or the application of different governing laws to severable parts of a contract. While this concept is not mentioned at all in the body of the Restatement, it is referred to in the Comments to section 187. The Comments to section 187 of the Restatement provide that the "extent to which the parties may choose to have the local law of two or more states govern matters . . . is uncertain." In contrast, the Rome Convention provides that "by their choice the parties can select the law applicable to the whole or a part only of a contract." In doing so, the Rome Convention allows parties greater freedoms and choices in their contracts than the Restatement does.

The Rome Convention and the Restatement have comparable limitations on public policy and mandatory rules. Under both the Rome Convention and the Restatement, the mandatory rules of a country/state will most likely be considered to be part of the

fundamental policy of that country/state. Consequently, whenever the parties' choice of law is unenforceable under article 3(3) of the Rome Convention because it conflicts with the country's mandatory rules, it is also unenforceable as a violation of fundamental policy under section 187(2)(b) of the Restatement. Thus, courts consider comparable policy concepts when deciding cases under the Rome Convention and under the Restatement. However, because United States courts tend to invalidate express provisions for reasons of public policy under Restatement section 187, this fundamental policy exception of the Restatement may "become 'an escape valve out of which all the predictability and certainty of the autonomy rule [honoring contractual choices of law] flows'" and may "threaten to swallow the rule".

5.2.2. The Proper Law of the Contract in the Ethiopian Conflict of Law

In the previous section we have tried to see the rules governing the proper law of contract in the approach followed in US, English and the Rome Convention with the view of having some general understanding about the subject in other jurisdictions. Notwithstanding the absence of a governing law on conflict of laws in Ethiopia, our courts cannot avoid coming across cases containing a foreign element that calls for determination of the applicable law. Especially, contract being at the essence of modern commercial transaction, it is really interesting to know what methods the Ethiopian judges would use to resolve cases of contract containing a foreign element. Thus, under this section we will deal with the rules governing choice of law in contracts containing foreign elements. In the absence of any official law governing this subject, we cannot escape dealing with the draft proclamations suggested to govern conflict of laws in Ethiopia. Among the official drafts we have, the Federal Draft Conflict of Laws proclamation is the most recent and the most complete one which is in line with the current federal set up of the Ethiopian legal frame work. Therefore, we will try to discuss provisions of this draft proclamation on the subject of contract. As any one could understand we cannot rely on draft proclamation to appropriately describe the governing law in Ethiopia. Thus we should also look at the court practice to shade some light on the official position in Ethiopia.

5.2.2.1. The governing law by the choice of the parties

The general rules governing choice of laws in contract cases in the Federal Draft conflict of laws Proclamation are stated in Art.73-75. As it is stated under Art.73 (1) where the contract involves a foreign element, the parties are given the right to choose the law applicable to their contract. That means if the contract is such that contains a connection with foreign jurisdiction either under the circumstances stated in Atr.4 of the draft proclamation. According to this provision a case may be said to contain a foreign element either because the parties to the contract are foreign nationals or they are domiciled or residents of a foreign country other than Ethiopia ,or the contract is made at a place out side the Ethiopian territory. A case may also said to contain a foreign element if the subject matter of the transaction, for instance, the property to be sold is situated outside Ethiopia.

The rule under Art.73 seems to reflect the ancient principle of party autonomy as applied to choice of law which is recognized as one of the fundamental principles in conflict of laws since the 16th century. Party autonomy as a choice of law doctrine is not new. The doctrine is said to originate from the writings of Charles Dumoulin (1500-1566), a French scholar of the sixteenth century who was acclaimed as "the father of party autonomy."It was Dumoulin's belief that with respect to contracts, "the will of the parties is sovereign." The will of the parties is, therefore, the leading factor in the determination of the law governing contracts. Thus, when the intention of the parties is the decisive factor, the circumstances indicating such an intention should determine which law shall prevail.

As is the case with other countries, the Ethiopian draft proclamation upholds the freedom of the parties to choose the law governing their relationship. This is the way by which the legitimate expectation of the contracting parties is going to be respected. However, the freedom of the parties is not with out bound. The parties are not free to choose arbitrarily any law of their liking. It is an established principle of conflict of laws that the contracting parties must have a reason to choose a law of a certain jurisdiction. It is like a

choice among a specific list of laws beyond which the parties cannot go. Accordingly the draft proclamation Art.73 provides list of connections that justify choice of the parties directed toward the law of one or the other country. The specific laws of the places indicated in the provision are generally presumed to laws which have significant and justifiable relation ship with the contract.

The provision lists primarily nationality as point of contact. Therefore, the parties may choose the law of one country if it is also the law to which at least one of the parties is a national. The provision does not clearly require the law should be the law to which both parties are national. In the absence of such express term, it is safe to conclude that it sufficient if the law selected by the parties the law of a country to which one of them is a national. Secondly the provision puts the law of domicile of the parties among the relevant laws that could be agreed by the parties to be the governing law. Thus, it is okay if the parties indicated in their contract a law of a country or state to which one of them is a domiciliary as the governing law. Interestingly, the draft does not use residence as a point of contact, even if under Article 4 residence is one ground upon which a case may be said to have a foreign element.

The law of the place where the transaction is made is also a relevant law to be chosen by the parties as the governing law. However, we should be cautious when using place of contract as a law that should provide the rules to decide the dispute between the contracting parties. This is because more often than not, entering in to contract in a certain place may merely be a mater of chance. The parties are also free to choose the law of the palace where the performance of the contract as the law that governs any dispute in relation to their contract. This ground is also, as we have seen in the previous section, an important ground put forward by other legal systems to be the governing law.

How can we ascertain whether the parties have made a choice of law for their contract? The draft law under Art.73(2) requires the intention of the parties to choose a certain law to be the governing law to be expressly stated in the contract or clearly evident from the agreement or from the circumstances. The parties may express their clear intention

explicitly on one of the two ways. They may do it by including the so called dispute resolution clauses indicating '*the law of state X shall be the governing law*' in the event of dispute. It is also possible that the parties do not directly state the law of state X as the applicable law, however they may state in their dispute resolution clause that '*the dispute shall be resolved by courts of state X*.' This later expression selecting a specific tribunal is interpreted in many countries to mean the selection of the law applied by that tribunal i.e., the law of the country in which that tribunal is situated. This proposition is based on the view that '*qui elegit judicem elegit jus'*. An express choice of a tribunal is an implied choice of the proper law.

It may happen that the parties have not stated their intentions in such clear terms, but it may also be possible to ascertain their intention to be subject to the law of a certain state from the terms of the contract by interpretation. More over the court may use circumstances surrounding the contract as indications to the intention of the parties to subject their dispute to the law of a certain country. The draft does not clearly indicate what circumstance may count to deduce the intention of the parties. However, it may be useful to refer to the provisions of contract law stated in Ethiopian Civil Code dealing with interpretation of contract. (See Art.1731-1739 of the 1960 Civil Code)

An interesting issue in relation to choice of the governing law by the parties is, what if the parties choose a law which is not the law mentioned by art 73? The provision does not clearly state the solution to this question. How ever under the other jurisdictions, the courts will declare the agreement invalid and it will be the default rules that would be applicable. The default rules are the rules that the court would apply if the parties did not any choice.

5.2.2.2. The governing law in default of choice by the parties

If the parties made a choice, the law will respect their choice. But if they fail to make a choice the law has provided default rules to resolve the dispute. Art.74 states that "*where the parties have not clearly expressed their intention contracts are governed by the law of the place with which the contract is most closely connected.*" The import of this

provision is that, when the party's intention is not clearly stated in the contract, the court will apply the law with which the contract is most closely connected. However the law does not clearly state what maters should be taken in to account in determining the law of the place to which the contract is most closely connected.

The expression "*most closely connected*" in the provision is closer in meaning to the American Second Restatement expression, "*most significant relationship"* in section 188.(See the discussion under section 5.1.1 (A) above) Under the Second Restatement, the points to consider in order determining the place of most significant relationship are listed. These are: place of contracting, place of negotiation of the contract, place of performance, the location of the subject matter of the contract and the domicile, nationality, place of incorporation and place of business of the parties. The expression under Art 74 seems to be direct replica of the rule on the same issue under the Rome convention Art.4 (2). Under this convention the phrase "*most closely connected*" is intended to mean the law of the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration. We may make use of the explanations given in the two foreign laws to get some general idea about the issue subject to the court practice. Generally however, it is wise to list down some guidelines to assist courts in determining the applicable law, in the absence of choice by the parties.

The above stated default rule does not work in every situations where the parties are silent about the applicable law. It is provided that if the contract relates to the establishment or transfer of right in *rem* in immovable or movable property the law that has the closest connection is the law of the place where the property is situated. Thus, we do not need to hover around and guess the applicable law. This is an exception to the default rule of closest connection. This principle of relating the property rights to the place of *situs* is a well known principle of conflict of laws accepted by most countries. The rational behind this exception lies in the sovereignty of the state in whose territory

the property is situated and the practical convenience of readily obtaining evidence concerning.

This overriding power of the law of the *citus* of the property is more vividly reflected in Art.75 of the draft which is dealing with contracts relating to immovable properties. All contracts relating to immovable property as regards their substance shall be governed by the law of the place where the property is situated. Moreover, with the intention to protect the sanctity of this rule, the law makes any contract to the contrary void. This means when it comes to dealing with immovable properties, the parties autonomy to choose the applicable law is restricted. Even the question of classification concerning whether the property is movable or immovable is going to be determined by the standard provided by law of the place where the property is situated. [1](Art 75(2) of the Federal Draft Conflict of Laws Proclamation)

5.2.3. Particular Aspects of the Contract

Apart from the general principles guiding the ascertainment of the proper law of the contract there are other particular aspects of the contract that need consideration. To establish a valid contract in any legal system, there are certain preconditions that must be fulfilled. Among these Capacity of the contracting parties, Consent, Object and Form of the Contract. More over it will be also necessary to consider issues related to interpretation of the terms of the contract, performance and extinction of contractual obligation.

5.2.3.1. Capacity to contract

Under the Restatement of Conflict of law in United States the question whether the parties have legal capacity to enter in to contract in principle is governed by the law chosen by the parties, if they have made an effective choice. Otherwise, this question is determined by the law that has the most significant relation ship as indicated by: place of contracting, place of negotiation of the contract, place of performance, the location of the

subject matter of the contract and the domicile, nationality, place of incorporation and place of business of the parties.

Under the English jurisprudence, what law governs capacity to make a valid contract is a mater of controversy among authorities. Some argue that capacity shall be governed by *lex domicile.* Another Authority submits that it is not by *lex domicile* but by *lex loci contractus* that capacity should be governed. In modern understanding however, it seems both grounds are found to be wanting.

It seems now generally conceded that in modern conditions of trade domicile is not a satisfactory test. It is considered incompatible with justice and with the trust that lies at the basis of mercantile dealings, for instance, that a person over twenty one years of age should be able to escape liability for the price of goods sold and delivered to him in a London shop on the ground that he is still an infant by his *lex domicili.* More over it has frequently been advocated that the *lex loci contractus* governs the question of capacity. This view, if it is intended to imply that the *lex loci* exclusively governs the matter, is clearly found to be untenable, for it would enable a party to evade an incapacity imposed up on him by the law that governs the contract in other respects by the law that governs the contract in a country where the law is more favorable. More over, the *lex loci* is ill fitted to govern the matter if, as may well happen, the parties conclude the contract in a place where they are only transiently present.

It is, however, now generally agreed that capacity is regulated by proper law of the contract, provided that this expression is taken to mean the law of the country with which the contract is most substantially connected. Intention cannot here be allowed free play. A person cannot confer capacity up on himself by deliberately submitting himself to a law which factually the contract is unrelated.

The capacity of both individuals and companies to contract is excluded from the scope of the Rome Convention by Article 1(2)(a) and (e),158 and thus continues to be governed by the conflict rules of the forum country. But an exception specified by Article 11 insists that, in the case of a contract concluded between persons who are in the same country, an

individual who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of such incapacity at the time of the conclusion of the contract, or was not aware of it as a result of negligence.

Concerning capacity the Federal Draft Conflict of Laws provides a general rule governing capacity of physical persons. Under Art.45 it states that the general capacity of a natural person of exercising rights shall be governed by the law applicable to the matter to which such matter relates. The idea here is that, if the subject under discussion for instance, is contract, the law governing other substantive matters of the contract shall also govern the issue of capacity. How ever this general rule has got an exception. As stated under Art.46 (1), an act performed by a person who would not have had the capacity to perform that act under his personal law shall be valid if he has capacity under the law of the country in which the act is performed. The personal law being the law of domicile of a person , the message of Art.46 is that even if a person is incapable under his personal law to inter in to a certain juridical act, like contract, if he is capable under the law of the country in which he entered in to the contract. This provision seems to imply also that, the parties may get a chance to enter into contract for which they are not capable under their personal law. This may give persons a chance to artificially create a connection with a certain foreign law in order to escape restrictions under their personal law. For instance a person who is minor under the law of Ethiopia may be bound by a valid contract by merely entering in to the contract in a country which uses an age limit much lower than that of Ethiopia.

The exceptional situation under which a juridical act performed by a person incapable under his personal law may become valid if he has capacity under law where he acted has got its own exception. Art.46 (3) states that the provisions of this article may not apply to matters relating to family law, succession and donation inter vivo. It seems that maters relating to family law, succession and donation intervivos are areas of law where capacity is not negotiable. Unlike entering to contract, these are areas of law where the parties are not free to create a capacity for themselves by acting under different law other than their personal law.

5.2.3.2. Consent and its vices

The first essential to the creation of a valid contract is that the parties should have reached agreement- that there should be *consensus ad idem*. They should express their consent. But the question is what law governs whether a valid consent is given or not. The English Judges prefer the theory of the *lex loci contractus*. Therefore, the law of the place where the last act constituting acceptance of the offer is made will be the governing law.

Agreement in fact is not necessarily agreement in law. The consent given by the parties should be free of any defects. The consent of the parties could be defective either because it is given by mistake, fraud, duress or undue influence or misrepresentation. What law then governs these vices of consent?

Under the second restatement of conflict of laws in the US section 201, questions involving the effect of misrepresentation, duress, undue influence and mistake upon a contract are determined by the law chosen by the parties, if they have made an effective choice. Otherwise, these questions are determined by the law which has the closest connection to the contract as determined by application of the rule of section 188.

On the question of consent and its vices there is no English authority, but tow propositions seem clear as the governing principles. The First proposition is that, the law which determines whether an apparent agreement has been made must also determine whether the agreement is real. The two constituents of a legal agreement i.e. consent in fact or in the eyes of the law, and consent free from what the law regards as defects of consent. Logically, these two elements should not be separate and assigned to different laws. It is believed that the formation of agreement constitutes a single question submersible to one and the same law. The second proposition is that, the question whether agreement has been prevented by defect in consent should be left to the putative proper law- the law to which the contract naturally belongs – and not to the *lex loci*

contractus as such, for the mere place of contracting is an insubstantial ground up on which to determine what law shall govern a matter so vitally affecting the creation of the obligation.

The Rome convention seems to take similar position on the issue of consent and defects that affects its validity. Article 8(1) of the Rome Convention provides that the existence and validity of a contract, or of any term of a contract, must be determined by the putative proper law of the contract (the law which would govern the contract under the Convention if the contract or term were valid). This applies both to questions of essential validity and to questions of formation.

5.2.3.3. Formal validity of the contract

The query under the rule governing formal validity of the contract is concerned with such questions as whether a contract must be in writing, or evidenced by a writing, in order to be valid and enforceable, and, if so, what the form of the writing must be, whether it must be signed by the parties to be charged, and whether it must be executed before witnesses and acknowledged before a notary public or other official. Likewise, within the scope of the present issue is the question whether an instrument must be under seal to be legally effective and, if so, whether it is properly sealed. As to the law which determines whether a sealed instrument is valid without consideration.

The Second Restatement of conflict of laws in US tries to answer this question under section 199. Under the rule of this Section, the question whether a contract was executed with the necessary formalities is determined by the law chosen by the parties, if they have made an effective choice. Otherwise, the question is determined by the law selected by application of the rule of section 188, i.e. the law that has the most significant relation ship to the contract. In US usually, a contract will be upheld with respect to formalities if it complies with the requirements of the state where it was executed. To the extent that they thought about the matter at all, the parties would undoubtedly try to comply with the requirements of this state and would expect that the contract would be held valid with

respect to formalities if the requirements of this state had been complied with. Upholding the contract with respect to formalities under such circumstances is supported by the choice-of-law policy favoring protection of the justified expectations of the parties.

As regards formalities, Article 9 of the Rome Convention lays down a rule of alternative reference, reflecting a policy of validation, designed to facilitate the conclusion of transactions. By Article 9(1), a contract concluded between persons who are in the same country is formally valid if it satisfies either the formal requirements of its proper law, or those of the law of the country where it is concluded. By Article 9(2), a contract concluded between persons who are in different countries is formally valid if it satisfies either the formal requirements of its proper law, or those of the law of one of those countries.

Coming to the question how this issue of form is treated under the Draft Federal Conflict of Laws proclamation, after having provided the governing rule for substantive aspects of the contract the draft also states the rule to govern the issue of form. Art 80(1) states that a contract shall be considered valid as to its form if it confirms to the law governing the contractor to the law at the place where it is concluded. With these words the law seems to imply that, in case of choice by the parties as to the governing law on substantial maters, the same law the formal requirements. In the absence of choice of the governing law by the parties, the law of the place where the contract is concluded will be the best candidate when it comes to formal requirements.

Art.80 (2) on its part seems to entertain the possibility of the contracting parties to be in different places at the time of the conclusion of the contract. This is what we call contract between absent parties under the 1960 civil code. In such cases the offer may be sent by the ofereor from one country and the acceptance may be made by the offeree in another country. There are lot of complex legal questions that may arise the discussion of which now is outside the scope of this material. However as to which law governs formal validity of the contract, the draft proclamation seems to have taken an easy solution. The contract will be valid if it conforms to the law of any one of the countries involved. By

taking this position the draft seems to have been able to thwart the simmering battle over forms.

The above discussed being the general rule, the draft proclamation provides an exceptional rule under Art.80 (3) which seems to have been inspired by the policy of protecting vulnerable section of the society with a weaker bargaining power. Such type of contract may include consumer contracts, employment contracts. The proper law of the contract, which ever it may be, might have provided a special form to be conformed to with the intention of protecting the weaker party in the contract. In such cases, therefore, the special form has to be respected unless the same law provides for the application of a different law to govern the formal requirements. Otherwise the contract will not be valid.

5.2.3.4. Illegality of the Object of the Contract

Any contract to be valid it should pass the test of legality. No contract which in effect is illegal be enforced by a court. This subject covers all situations where the question involves the effect of illegality upon the validity of a contract and the rights created thereby. It also concerns illegality existing when the contract was made or arising thereafter, to illegality known to one or to both or to neither of the contracting parties and to permanent or temporary illegality. It also concerns whether the illegality involves the making of the contract, such as the performance of the contract, or whether or not it can be concluded from the terms of the contract or from other circumstances that the risk of illegality was intended to be borne by one of the parties.

The second Restatement of conflict of laws in US section 202 states that, the effect of illegality upon a contract is determined by the law selected by application of the rules of section 187-188.This means, effect of illegality shall be governed by the law chosen by the parties if they have made one. But in the absence of effective choice by the parties the law that has the most significant relation ship with the contract). On the other hand, when performance is illegal in the place of performance, the contract will usually be denied enforcement. A distinction must here be drawn between the effect of illegality

upon the validity of the contract and the existence of illegality as such. The effect of illegality upon the validity of the contract depends upon the law selected by application of the rules of section 187-188. On the other hand, whether there is any illegality will usually depend upon the local law of each state where an act related to the contract was, or is to be, done. So the local law of the state where a promise was made will usually be applied to determine the legality of its making. Similarly, the legality or illegality of performance under a contract is usually determined by the local law of the state where this performance either has taken, or is to take, place. On occasion, however, an act that is legal where done may be illegal in a state where it has, or will have, important consequences. An agreement made in one state to monopolize the shipment into another state of a certain commodity may be an example of the latter sort.

In the particular matter of illegality under the English conflict of laws, it is not possible exclusively to refer to the proper law. It is believed to be necessary to take account of other legal systems. It is obvious, for example, that no foreign contract will be enforced which, though valid by its proper law, is regarded as morally reprehensible by the *lex fori*. Again ,it has been said that a court ought not to enforce a contract ,what ever its proper law may be ,if its performance is illegal by the *lex loci solutions*. When we consider the different systems of law to which an issue of illegality must be referred, the answer in England seems to lie in five propositions.

First, it is axiomatic that the contract which is illegal by its proper law cannot be enforced in England. Secondly, no action lies in England upon a contract which infringes the distinctive public policy of English law. Thirdly, a contract which is valid by its proper law does not become unenforceable in England merely because it is illegal according to the *lex loci contractus*. The fourth proposition relates to illegality by the *lex loci solutions*. By an English domestic law an agreement to perform an illegal act is unenforceable. In accordance with the domestic doctrine of frustration an agreement to perform what it later becomes illegal to perform is equally unenforceable. The last and rather obvious proposition a contract is not unenforceable in England merely because performance is illegal by the law of the country in which the promissory carries on his

business or to which he belongs by nationality or domicile, provided that the contract is not subject in other respects to the law of that country.

5.3. Protected Contracts

Even if contractual relation is a juridical act that would be created between equal parties playing under equal bargaining power, there are some contracts in which the law identifies the contracting parties are not of equal bargaining power due to difference in their economic power and the negative impact it has on the social interest if we left such persons on their own. Such contracts are contracts like consumer contracts and individual contracts of employment. With a view to protecting weaker parties, special choices of law rules are laid down for consumer and employment contracts. Under this section we will be dealing with these special contracts.

5.3.1. Consumer Contracts

Article 5 of the Rome Convention lays down special conflict rules for certain consumer contracts which satisfy an elaborate definition containing both substantive and territorial elements. The definition in many respects resembles that used in Article 13 of the Brussels Convention (now replaced by Article 15 of the Brussels I Regulation), and the European Court has indicated in *Gabriel* that concepts used in both definitions will be given the same interpretation. The contracts which fall within the scope of Article 5 may conveniently be referred to as protected consumer contracts.

As regards substantive elements, Article 5(1) requires that the contract must be one whose object is the supply of goods or services to a person for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object. This implies that the supplier must be, or at least appear to the consumer to be, acting in the course of his trade or profession. Moreover the purchaser must not be acting for business purposes; or, where he is acting partly for business purposes and partly for non-business purposes, his business purpose must be of negligible importance

in relation to the transaction; and in any event he must not have so conducted himself as to create the impression in the supplier that he was acting for business purposes. In view of the reference to goods or services, a sale of land or of securities is excluded.

Further exclusions are made by Article 5(4) and (5) in respect of a contract of carriage, and of a contract for the supply of services which are to be supplied to the consumer exclusively in a country other than that of his habitual residence. But these exclusions do not extend to a contract which, for an inclusive price, provides for a combination of travel and accommodation; in other words, a package tour.

As regards territorial elements, the contract must be connected with the country of the consumer's habitual residence in one of the three ways envisaged by Article 5(2). The first alternative is that its conclusion was preceded by a specific invitation addressed to him in that country or by advertising there, and he had taken in that country all the steps necessary on his part for the conclusion of the contract. The second is that the supplier or his agent received the consumer's order in that country. The third is that the contract is for the sale of goods and the consumer travelled from that country to another country and gave his order there, his journey having been arranged by the seller for the purpose of inducing the consumer to buy.

As regards the first alternative, the European Court indicated in *Gabriel* that the concepts of advertising and specific invitation have a wide scope. It explained that they cover all forms of advertising carried out in the consumer's country, whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that State. They also cover commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman. Further, the reference to the steps necessary for the conclusion of the contract extends to any document written or other step taken by the consumer in his country which expresses his wish to take up the invitation made by the supplier.

As regards advertising, it is thought that the advertising need not have been aimed specifically at the consumer's country. It should be sufficient for this purpose that the advertisement came to the attention of the consumer in his country through normal commercial channels there, that it induced him to enter into the negotiations which led to the conclusion of the contract, and that nothing done by the consumer caused the supplier reasonably to suppose that such was not the case. In any event it seems necessary that the advertisement should have been a factor actually inducing the consumer to enter into the contract.

As regards the second alternative, the reference to an agent of the supplier includes anyone acting on his behalf, including staff manning a stand at a short-term exhibition.

In any event it seems proper to regard Article 5 as inapplicable in any case where the consumer's conduct (however honest his intentions) misleads the supplier as to the country of the consumer's habitual residence, at least if the error affected the supplier's decision to enter into the contract. Such may be the case where the consumer, when placing an order, gives as his address for delivery that of a relative or friend resident in a different country.

It is reasonably clear that the requirements of Article 5 will normally be satisfied in the case of consumer contracts which are concluded by electronic means. For, in the ordinary case of a consumer ordering goods or services electronically from a website maintained by the supplier, the webpage amounts both to a specific invitation to anyone who downloads it in the country where he does so, and also to advertising in that country, and the consumer is usually in the country of his habitual residence when he downloads the page and fills in and uploads the order form. The risk of unfair surprise to the trader is largely eliminated if it is recognized that the Convention should be construed as respecting the principles of predictability and good faith.

Accordingly a consumer who misleads the supplier as to the location of the consumer's habitual residence, as by entering on the electronic order form an address (perhaps of a

relative or friend) in a different country, will be stopped from relying on his actual habitual residence so as to satisfy the definition if the trader would have rejected the order (probably by setting his software in advance to do so) if he had known the consumer's true habitual residence.

It seems likely that, when the Rome Convention is eventually replaced by an EC regulation, the territorial aspects of the definition will be aligned with Article 15(1)(c) of the Brussels I Regulation, which refers to a contract which has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several countries including that Member State, and which falls within the scope of such activities.

In the case of a protected consumer contract (within the scope of Article 5), three special choice-of-law rules apply. Firstly, by Article 5(3), in the absence of an express or implied choice of law by the parties in accordance with Article 3, the law of the consumer's habitual residence becomes the proper law. The tests of the closest connection and the characteristic performer's residence, laid down for other cases by Article 4, are wholly excluded in the case of protected consumer contracts.

Secondly, by Article 5(2), if there is an express or implied choice of law by the parties in accordance with Article 3, the choice remains effective to designate the proper law, but the proper law operates subject to the mandatory rules for the protection of the consumer as a weaker party contained in the law of his habitual residence. The effect is to give the consumer the cumulative benefit of the protective rules of the chosen law and those of the law of his habitual residence. On any given point, the protective rule which is more favorable to the consumer prevails. Moreover, in contrast with Article 7, there is no need for the law of the habitual residence to have asserted an overriding interest in the application of its protective rule.

Thirdly, by Article 9(5), the formal validity of a protected consumer contract is governed exclusively by the law of the consumer's habitual residence.

In view of the particular and detailed provisions of Article 5, which seem designed to deal exhaustively with the protection of consumers as weaker parties, it is thought that Article 7 cannot be invoked for the purpose of consumer protection. On the other hand, there is no reason why Article 7 should not be invoked for the purpose of applying to a consumer contract mandatory rules whose aim is to protect the supplier (as by imposing a penal rate of interest where payment is delayed) or the general public interest (as by insisting on a minimum deposit, with a view to restricting credit in the interests of currency stability).

Admittedly the unavailability of Article 7 for purposes of consumer protection means that a 'mobile' consumer (who contracts while visiting the supplier's country) can be deprived of all protection by a clause choosing the law of a non-member country. It is therefore hoped that, when the Rome Convention is revised and replaced by an EC regulation, a provision will be added dealing with consumer contracts which are not sufficiently connected with the country of the consumer's habitual residence to justify the application of its law. In such cases, the consumer should be given the protection of the mandatory rules of the supplier's country, despite a choice by the parties of some other law.

It seems probable that Article 5 of the Rome Convention has the effect of overriding self-limiting rules, such as those specified in the United Kingdom by ss. 26 and 27(1) of the Unfair Contract Terms Act 1977, which prevent the controls on exemption clauses imposed by the 1977 Act from operating in the case of an international supply contract (as defined by s. 26), or in cases where the proper law of the contract is the law of a part of the United Kingdom by choice of the parties but the closest connection is with a country outside the United Kingdom. For Article 5 is designed to establish a definitive solution to the protection of a consumer as a weaker party, overriding any national legislation dealing with choice of law or with the transnational operation of protective

rules; and the continued operation of ss. 26 or 27(1) in relation to a protected consumer contract could have the effect of denying the application of British mandatory rules designed to protect weaker parties in a manner inconsistent with the objectives of Article

5.3.2. Individual Contracts of Employment

With a view to protecting employees as weaker parties, Article 6 of the Rome Convention makes special provision for individual contracts of employment. No explicit definition of such contracts is offered, but it is clear that (in contrast to protected consumer contracts) the concept of an individual contract of employment must be understood solely in substantive (rather than territorial) terms.

It is thought that the concept of an individual contract of employment must be given an autonomous Community meaning, similar to that adopted by the European Court for the purpose of the Brussels I Regulation. Thus the contract must create a lasting bond which brings the worker to some extent within the organizational framework of the employer's business, so that the concept does not extend to a contract for professional services, such as those of an architect or lawyer, engaged as an independent contractor to carry out a particular task.

The Protective Regime

Article 6(2) determines the proper law of an employment contract in the absence of a choice of law made by the parties in accordance with Article 3. The primary rule, laid down by Article 6(2)(a), is that the proper law is that of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country. But if the employee does not habitually carry out his work in any one country, Article 6(2)(b) refers instead to the law of the country in which the place of business through which he was engaged is situated. Ultimately both of these rules are reduced to rebuttable presumptions by the final sub-paragraph of Article 6(2), which specifies that, where it appears from the circumstances as a whole that

the contract is more closely connected with another country, the contract is governed by the law of that country.

The place of habitual work under the contract, referred to in Article 6(2)(a), must no doubt be understood in the same sense as in the Brussels I Regulation. Thus, as the European Court ruled in *Mulox v Geels* and *Rutten v Cross Medical*, in cases where the employee carries out his work in more than one country, reference must be made to the place where the employee has established the effective centre of his working activities, at or from which he performs the essential part of his duties towards his employer. For example, a sales manager will habitually work at the office where he organizes his work, even though he makes frequent business trips to other countries. But where, as in *Weber v Universal Ogden Services*, there is no such permanent centre of activities (for example because the man worked for the employer as a cook, first on mining vessels or installations in the Dutch continental shelf area, and later on a floating crane in Danish territorial waters), the whole of the duration of the employment relationship must be taken into account. The relevant place will normally be the place where the employee has worked the longest; but, by way of exception, weight will be given to the most recent period of work where the employee, having worked for a certain time in one place, then takes up his work activities on a permanent basis in a different place.

The reference in Article 6(2) (b) to a place of business no doubt has a similar meaning to the reference to an establishment in Article 5(5) of the Brussels I Regulation.

The rationale for the final reference in Article 6(2) to the closest connection is less than clear. Possibly the purpose is concealed discrimination, the intention being that, where the employee habitually works in an EC country, the presumption will prevail; but that, where an employee who is habitually resident in an EC country is recruited to work outside the Community for an employer who is resident in an EC country, the law of the EC country to which both parties belong, or, where they belong to different EC countries, that of the EC country to which the employer belongs, will prevail. In any event, for the applicable presumption to be rebutted, a closer connection elsewhere must be clearly

demonstrated, and rebuttal is very unlikely if the place of habitual work and the location of the engaging establishment are in the same country.

By Article 6(1), an express or implied choice of law by the parties remains possible, but it operates subject to the mandatory rules for the protection of the employee as a weaker party of the law which would be applicable under Article 6(2) in the absence of choice. As under the similar provision applicable to consumer contracts, the Convention gives overriding effect to such mandatory rules, regardless of whether or not the law containing them has asserted an overriding interest in their application. But the mandatory rules referred to by Article 6(1) are confined to ones whose purpose is to protect employees as weaker parties. The reference does not extend to mandatory rules which are designed to protect employers (for example, by ensuring that they have a right to dismiss, or make deductions from pay, in certain circumstances); nor to ones which pursue a general public interest (for example, by prohibiting, or subjecting to a licensing scheme, the carrying out of certain economic activities thought likely to endanger the environment).

In view of the specific and apparently exhaustive character of Article 6, it is thought that Article 7 cannot be used for the purpose of providing further protection to an employee as a weaker party. On the other hand, in view of the failure of Article 9 (on formal validity) to make special provision for contracts of employment, it is permissible to utilize Article 7 for the purpose of applying mandatory formal requirements (especially those imposed by the law of the country in which the employee habitually works) to such contracts. It also seems permissible to invoke Article 7 for the purpose of applying to an employment contract mandatory rule designed to protect the employer, or to serve a general public interest.

The Giuliano and Lagarde Report indicates that the mandatory rules envisaged by Article 6 are not confined to provisions relating to the contract of employment itself, but extend to provisions concerning industrial safety and hygiene; and that Article 6 extends to void contracts and de facto employment relationships. Despite this, in *Base Metal Trading Ltd v Shamurin* the English Court of Appeal firmly rejected the argument that Article 6

extends to claims in tort between an employer and an employee arising from things done in the performance of the contract of employment. It was accepted, however, that in such circumstances the fact that under Article 6 the contract of employment is governed by the law of a given country is an important connection with that country for the purpose of determining the country with which the tort has the most significant connection, and whose law may thus be applicable to the tort, by displacement of the general rule in favour of the law of the country in which the events constituting the tort occurred, under the exception specified by s. 12 of the (UK) Private International Law (Miscellaneous Provisions) Act 1995.

In any event it seems clear that, in view of its purpose, Article 6 extends to claims for unfair dismissal or in respect of unlawful discrimination in relation to employment, despite the statutory character of such rights, and that it overrides any self-limiting territorial rule contained in legislation which creates such claims, such as a restriction to cases where the employee's work is performed in the country in question. Thus the Convention requires that the country whose law governs, or whose mandatory rules for the protection of employees have overriding effect in respect of, a contract of employment under Article 6 should admit any claim for unfair dismissal, or in respect of unlawful discrimination in relation to employment, which it would (apart from the Convention) have admitted if the case had been connected exclusively with its own territory. Unfortunately this obvious point has not yet been accepted in England.

An important exception to the rules laid down by Article 6 of the Rome Convention is made by Directive 96/71, on the posting of workers in the framework of the provision of services. The Directive applies where an undertaking, in the framework of the transnational provision of services, posts a worker for a limited period to a Member State other than the State in which he normally works. Three kinds of posting are covered. The first is where the undertaking posts workers to the territory of a Member State on its own account and under its own direction, under a contract concluded between the undertaking and a service recipient operating in the receiving State. The second is where the

undertaking posts workers to an establishment or an undertaking owned by the same group in the receiving State. The third is where the undertaking is a temporary employment undertaking or placement agency, and it hires out a worker to a user undertaking established or operating in the receiving State. In any event there must be an employment relationship between the undertaking making the posting and the worker during the period of posting.

Where it applies, the Directive requires the Member States to ensure that, regardless of the law otherwise applicable to the employment relationship, a posting undertaking guarantees to workers posted to their territory the minimum terms and conditions of employment relating to certain matters (such as minimum rates of pay) which are mandatorily applicable in the Member State where the work is carried out. Thus, insofar as the Directive applies, the worker receives the benefit of protective rules contained in the law of the country where he temporarily, but not habitually, works.

5.4. Rules Under the Federal Draft Conflict of Laws

Under the Federal Draft Conflict of laws proclamation rules governing consumer contracts are provided under Art.76. This provision starts first by defining what consumer contracts. According to it consumer contracts are contracts for goods and service which are for the current personal or family consumption or use of a consumer and which are not connected with the professional or business activity of the consumer. By this definition consumer contracts are contracts for the purchase of goods or services which are meant for consumption (that are to be used and be finished) and which not connected with the profession of the person. Therefore, if an owner of a petrol station buys gasoline for his petrol station, even if the product is a consumer good since he is buying it in relation to his profession this transaction would not count as consumer contract.

Coming to the substantial question of what law governs disputes related to consumer contracts, the draft seems to reflect the policy of giving protection to the weaker party in the relationship. Obviously, in consumer contracts the party with a weaker bargaining

power is the consumer compared to the mighty producer or a whole seller. With the view to protecting the interest of the consumer the draft law particularly points the law of the domicile as the law that governs the dispute. It is no doubt that the law of domicile is the closest and best law to protect the interest of the consumer mainly because he is familiar with the law. The draft law provides three different connections to determine whether the governing law should be the law of the consumer's domicile, depending on how and where the contract was entered in to.

In the first place if the supplier received the order (i.e., the offer for purchase from the consumer) in the country of the consumer's domicile. Secondly, if an offer or advertisement in that country (the domicile of the consumer) preceded the making of the contract and the consumer in that country performed the legal actions required to make the contract. The legal actions required to make the contract refers to the issue of offer and acceptance and all other issues related to formation of the contact. Therefore, if an advertisement or an offer is made by the seller to the consumer at the domicile of the consumer, and then after, the consumer performed all other requirements for the making of the contract, the governing law will be the law of the domicile. Thirdly, the supplier may not have come to the consumer but it may have prompted the consumer to go abroad and make his order there. In such case also the law of the domicile extends its hand and governs the matter.

With the view of strengthening the protection extended by the law of his domicile in consumer contracts, the draft proclamation prohibits any agreement that makes a governing law other than the law of domicile. This is what is provided under Art.76 (2) of the draft conflict of law proclamation.

Under the Federal Draft conflict of Laws of Ethiopia, the rules governing choice of law in employment contracts are provided under Art.77. In similar way the Rome Convention, the draft law gives priority to the habitual place of work of the employee. This provision seems to have been inspired by the policy of protection to the weaker party in the contract, i.e, and the employee. The place where the employee habitually carries on his

work is presumed to be the law which he is most aware of and which is more convenient. In situations where the employee habitually performs his work in more than one country, the employment contract shall be governed by the law of the country of the employer's business establishment or if there is none, of the employer's domicile or residence. Here we can see that in the absence of a habitual place of work of the employee at one place, there is a shift to preference to the place of the employer's business, domicile or residence. More over, the parties are free to subject their relationship to these laws of the country of the employee's residence or of the employer's business establishment, domicile, or residence.

Conflict of laws and Employment of Foreign Nationals in Ethiopia (by Ibrahim Idris)

(This Material is adapted from Material for the study of private International Law, 1993. Foot notes omitted)

As could be true with many other legal relations, problems of conflict of law may occur in respect of employment contract. One of those cases in which such problems occur, and to which this paper is directed, is where an employment contract is concluded with a foreign national for work to be performed in Ethiopia.

It happens that, under Ethiopian law, a foreign national may come to work in Ethiopia, up on obtaining a work permit. He may be employed by either an undertaking or a public administrative agency for a defined period of time or to do some specific work, such as the installation of machinery, supervision of work, or to study a projector to train workers. Undoubtedly, in these and other analogous legal situations in which the laws two or more countries are involved, a serious of questions concerning the choice of governing employment laws may be asked.

On the basis of what country's law, Ethiopian or foreign law dealing with employment relations, should an employment contract made a foreign national be governed? Are the general principles of private international law governing contracts in general also

applicable to employment contracts made with foreign nationals? If so could parties to such a contract stipulate a governing employment law? Assuming the failure of the patties to designate a governing law, does the Ethiopian law allow the selection of one among those choices recognized in private international law? Assuming also that the Ethiopian law rejects the application of the general principles of private international law; should there not be a certain exceptional employment relations to which laws other than that of Ethiopia could be applied? Prior to attempting to examine Ethiopia's position concerning the aforementioned questions, the author considers it appropriate to inquire briefly in to the current international practice on whether or not the general principles recognized in private international law are also applicable to the employment contract of an international nature. In connection with this issue, two positions can be observed.

According to the first position, which, on the whole, has commanded wide acceptance in the private international law, judicial practice and legal literature of western European countries, those principles of private international law applicable to contracts in general are also applicable to employment contracts involving foreign employees. Thus, just as parties to contracts in general can act ,so parties to employment contracts of private international nature are at liberty to exercise their right to stipulate a governing law .The Federal republic of Germany, Switzerland, France, Belgium and Greece are for instance, countries in whose legal systems the right of parties to the choice of law in a conflict of law is recognized. ….

The recognition of the party's right to a choice of a governing employment law nevertheless entails a controversial situation where parties to the contract have failed to provide the governing law in their agreement. In such a case an attempt is made to resort to either of the following two principles: the "subjective theory" and "theory of close connections with the contract".

The subjective theory, also called theory of hypothetical intention helps to ascertain a governing employment law with the aid of circumstances inherent in the employment contract. For instance, an agreement of the parties to submit to the jurisdiction of a

certain country may be taken as a method indicating the intention of the parties in favour of the law of the country to whose jurisdiction they have agreed to submit their case. Second theory, the law considered applicable may be that of the country with which the employment contract is believed to have with such contract. Of those laws of places regarded as having closest connections, the *lex loci laboris*, i.e., the law of the place in which the work is performed is alternative in general, preferred by many legal systems.

The second position, also commanding wide international acceptance is that which rejects the application of principle of private international law to employment contracts of an international nature. Unlike that exercised in respect of contracts in general, and special contracts such as sales contracts, this choice disproves of the autonomy of the parties to the choice of law in employment contract .According to this position, the law to which reference is always the *lex loci laborite.* Austria Sweden, Denmark and Argentina are some of the countries adhering to this custom….

When truing our attention to Ethiopia, we see that it is a country which ahs not yet formulated its own conflict of law rules. Because of this ,therefore , Ethiopian courts might find it hard to determine the governing law when conflict of law occur .More over because Ethiopia lacks a developed judicial practice and also a literature in respect of this particular are of law, the courts task is made difficult in their endeavor in determining the governing law.

Ethiopia is a country of codified laws. Judges are not permitted to make laws as those in countries with common law do. They are expected only to apply the law to factual situations. In the absence of rules legislatively drawn up ,however, judges are duty bound to make decisions insuring that justice is properly administered in each case. As Ethiopian law is not under the influence of the Anglo- American Legal system judicial decisions rendered by a superior court is not maintained as authoritative on an inferior court. This proposition of Ibrahim should be seen in light of the current power of the Federal Supreme Court of Ethiopia, to give binding interpretation of laws in its decision by the cassation division. Thus, in view of the absence of “Conflict of Law Rules”, and of

any rule provided on whether or not parties to employment contracts are entitled the right of the choice of law in conflict of laws , the very decision of a court in favor of or against the exercise of such right need not be subjected to criticism ,provided of course, it gives rational for adhering to one or the other position.

The courts liberty to uphold one certain principle or another in such situation ,may be substantiated by the several attempts made in the past, in ascertainment of the law governing personal status involving a foreign elements ,in the late 1940's and early 1950's.For instance ,in few decisions rendered by the Addis Ababa High court , it was the principle of nationality to which the court adhered as a criterion of designating a law of the country governing personal status. In other decisions rendered by this same court, and by the Supreme court, there was indeed a switch towards favoring domicile as criterion.

In assessing whether Ethiopian courts tend towards recognizing the right of parties to a choice of law in employment contracts made with a foreign national, one may undertake a venture in light of epochs in the Ethiopian legal system: the pre- 1974 period, and the post -1974 Revolutionary periods.

It is to be noted that ,prior to the revolution of 1974,Ethiopian employment law as embodied in the 1960 Civil code developed in line with the continental legal system in general ,an that of France in particular. The Civil Code's provisions on employment contracts which of course were initially intended to regulate all employment relations of a civil nature recognize the right of parties to formulate employment contracts departing from terms of standard contracts that may be drawn up by public authorities. As far as employment is concerned, even those foreign nationals employed by State Administrative Agencies would not have the status of public servants. It is in fact the provisions of the Civil Code that are meant to govern the employment relations with such foreign nationals.

In view of this fact, and consistent with the general practice prevailing in the continental legal system, as for instance in France ,in the pre 1974 period ,there was no doubt that courts were likely to favor the right of parties to a choice of law in an employment contract in case of conflict of laws. In support of this assertion, a number of judgments could be cited in which Ethiopian courts turned to relevant foreign practices with a view to retrieving principles capable of filling gaps left by pertinent domestic laws.

For instance, in Hallock Vs. Hallock, the Supreme court gave the following reason to justify its resort to foreign jurisprudence in order to accept the principle of domicile as a connecting factor:

> *There is no codified law at present in Ethiopia with regard to rules of private international law, nor with regard to jurisdiction of courts in such matters…. In default of an express provision of law on the subject, it is necessary to turn to general principles of jurisprudence accepted in other countries.*

The practice of Ethiopian courts to resort to foreign legal principles was also observed by Norman Bentwich. For instance, in connection with the influential role of English law in Ethiopian law, he wrote;

> *"… English principles of private international law have been applied in case where the court has had to deal with problems and situations in which the customary law of Ethiopia was unsuitable."*

Further more, Art. 1731(1) of the civil code sets forth that the provisions of a contract lawfully formed shall be binding on the parties as though they were law. Coupled with the absence of an express legal provision, rejecting the right of a choice of law in an employment contract in which two or more states are involved, Art.1731 (1) gives the impression that parties to such a contract would not be precluded from stipulating a governing employment law.

In the post-1974 Revolution period, proclamation No.1, 1974, which ushered the coming in to power of the Provisional Military Government, announced the repeal of all pre-1974 laws and regulations considered with this new proclamation and the subsequent legislations of the country. Ethiopia's shift in favor of socialism as a guiding principle of the socio-economic and political developments has brought about significant change in the attitude of the society towards law. As regards the employment law, the Labor Proclamation No. 64/75, promulgated to regulate employment relations between an undertaking and workers, has had a tremendous effect.

Apart from recognizing work as being the source of all production, this Proclamation assures the workers freedom from exploitation, and pledges proper protection of health and safety. It also pledges legal arrangements. The arrangement made by the constitution of 1987 of the Peoples Democratic Republic of Ethiopia to give full protection to labor must not be underestimated.

In view of this development in Ethiopia, and despite the fact that no conflict of law rules has yet been introduced, at least in so far as the labor contracts capable of being covered by the labor proclamation, are concerned,it s unlikely that courts would now a days recognize the right of parties to a choice of law in conflict of laws. In respect of this point, Istvan Szaszy has maintained:

> *"The right of a choice of law by the parties in the sense of conflict of law theory should be recognized only for contract law transactions (and submittedely not even there). A labor with the scope of a labor contract is not a civil law contract. So that, right of a choice of law by the parties, cannot be recognized in any circumstances.*

There is one more point worth mentioning. As far as the knowledge of the writer is concerned , whether in the pre 1974 period or post 1974 revolution period, no dispute about what law governs a given employment contract has in fact been brought to the

attention of courts; neither has it been a practice for parties to employment contracts to negotiate about a governing employment law. These facts do not however, that no such problem could occur at any time in the future. What ever happens, Ethiopian law needs to prepare for any contingency by arming itself with a pertinent guiding principle.

In addition to those countries where the legal application of the general principles of private international law to an employment contract with a foreign element is rejected, those countries which uphold the right of individual parties to determine the law governing their employment contract also recognize resort to the *lex loci laboris*, where no other applicable law is stipulated.
Lex loci laboris is viewed as a legal system having the closest and most real connection with the employment contract.

Indeed, in the event of being confronted with a choice of law in conflict of laws, the writer feels strongly that Ethiopian courts ought to refer to the *lex loci laboris* as the governing employment law. In support of this choice, legal scholars have put forward numerous convincing reasons, of which examples follow.

There is no doubt that employment laws involve the interest of a large number of workers to whom every government pledges to give close attention. Every government also desires employment relations to be in conformity with its national policies and the maximum realization of such policies can be attained by application of the *lex loci laboris* . In the words of Szaszy the *lex loci laboris,* "… guarantees the determination of the labor law in conformity with the principles and rules of social and legal system to which the legal relation is socially and economically most related".

Employment relations are also relations different from other contractual relations in their character. There are a number of rules concerning rights to which parties to employment contract cannot divert from in their agreements. Indeed all governments have an interest in the uniform observation of such rules for which reason it would be undesirable to recognize the right of the parties to stipulate a law other than the *lex loci laboris*.

The application of the *lex loci laboris* discriminatory treatment among employees working for the same employers, or in the same area, or in the same country. For instance, to subject employment relations of employees with identical skills, capacity or position to deferent employment laws engendering different benefits, might well serve as a basis for labor disagreements.

To apply the *lex loci laboris* as a governing law gives a territorial character to the laws of the country in which the work is performed. For this reason, the *lex loci laboris* ma be considered as having the closest and most authentic connection with employment relations. In comnnection with this question, Moregenstren and kanapp wrote:

> *While rules of conflict of laws in labor maters has developed only in recent years and national courts still shows considerable hesitancy in the matter, doctrine has evolved sufficient to make it possible to affirm that , as regards the terms and conditions of employment, key importance is attached to the law of country in which the work is performed. This is true regardless of the nationality of the parties. Territoriality is thus the basis in matters of labor law.*

Lastly, since the court to which the employment dispute may be submitted is usually found at the place of work, the *lex loci laboris* is considered to be most likely understood by the parties, as well as by the court, as compared with laws dealing with other places. The courts can also such a law more effectively than can a court of another country.

For the reasons mentioned above and also many others, we feel that Ethiopia, like many other countries should adhere to the principle of *lex loci laboris*. Consistent with the practice of international law , the *lex loci laboris* needs nevertheless to be subject to adjustment in certain exceptional circumstances in which employment laws other than the *lex loci laboris* may be called in to operation. Employment relations with special characteristics deserve special consideration regarding the parties' right to a choice of law, in a case of conflict of laws.

Under Ethiopian law, it appears possible to ascertain a governing law to ascertain special type of employment contracts. In dealing with other contracts , difficulties arise urging the necessity of looking in to the law , judicial practice and legal literature of other countries in order to come to equitable decision.

The first special employment relations that come immediately to mind are those concerning members of diplomatic missions and consulates in Ethiopia and those persons employed as a result of bilateral or multilateral agreements entered in to by the government of Ethiopia. Obviously the employment relations of such persons are not governed by Ethiopian employment laws, since they are not subject to Ethiopian law.

Other special employment contracts, in which the laws other than the *lex loci laboris* pertains to those crew members of carriers, both water and air vehicles. Though no express provision to this effect are available in Ethiopian law , the authoritative governing employment laws can easily be ascertained.

In matter of employment relations of seamen Ethiopians or foreign nationals, Ethiopian law adheres to the internationally accepted principle in which the law of the state of the flag is deemed authoritative. This principle is based on the fact that employment contracts between seamen and ships flying the flag of a certain country must comply with the maritime law of the country concerned, wherever the ships may be, including foreign territorial waters.

I accordance with the Ethiopian Civil aviations Decree, the law of registration serves to govern a serious of matters relating to aircraft, navigation of air craft, and the suspension and revocation of such license.

The Chicago convention on International Civil Aviation , opened for signature on 7 December 1944, has also been incorporated in the Ethiopian Civil Aviation law. Art.32 (b) of this convention provides that pilots and other members of the operating crew of every aircraft engaged in international navigation shall be issued with certificates of competency and license by the state in which the air craft is registered. Thus the

employment of pilots and other operating crew members of air craft is the subject of the law of registration of the air craft ,regardless of the nationality of each crew-member.

There are number of other special employment relations which should be subject of laws other than *lex loci laboris*. For instance, let us take note of those foreign nationals who come to work in Ethiopia by assignment or election or who come to Ethiopia to work only for a temporary period, or to do a specific job. Also as there are subsidiaries of multinational companies in Ethiopia , a member of the managerial staff of such company may come to serve in Ethiopia for a limited period, and then move to another subsidiaries, in other countries, at other times.

In each of the above situations, the problem is to decide what law among those in conflict which should be applied to determine the employment relations concerned. As far as the Ethiopian legal system is concerned, it is in fact a hard task to suggest a solution to this problem. It is therefore incumbent upon those concerned to examine how similar problems are observed by other countries. Indeed, it behooves law makers to give careful consideration to the particularity of each and every special relationship in employment, with a view to ascertaining the most appropriate governing law in case of conflict of laws.

In summary, because of the absence of "Conflict of Laws Rules", it is difficult to determine in Ethiopian law which of the laws dealing with employment contract should be resorted to as governing law. The fact that judicial precedent in Ethiopia lacks binding force adds to the perplexity of ascertaining the law.

On the other hand, where a court is confronted with legal situations in respect of which no pertinent domestic rules are available, Ethiopian court practice reveals that it seems to be the court's discretion to uphold the appropriate position. With regard to the governing law of an employment contract the right of parties to choice of law may be recognized by one court and rejected by another.

However, as argued above, since the law of the country in which an employment contract is performed is evidently the most appropriate governing law , it could be in Ethiopia's advantage to up hold this principle , unless of course, an individual employment contract is found to have special characteristics

5.5.Summary

Due to wide application of contract as means of transaction between individuals on global level, choice of law in contract is one of the most complicated and most frequent cases of conflict of laws. There is a system of law that governs choice of law in contacts that involve two or more countries. This law, which is called the proper law of the contact, is that law which a court is to apply in determining the obligations under the contract. However, meaning and identification of this proper law of contact is very different from county to country.

As contract is of law where freedom of the parties is given higher value than any other area of law, the appropriate system of law to govern the formation and outcome of contacts containing foreign elements in principle is left for the parties to choose. Therefore primarily, proper law of contract is the law expressly or impliedly chosen by the parties to govern their case. However, the parties are not free to choose any law they like. They have to have substantial relationship with the parties and the chosen law should not be contrary to the public policy of the forum. But, if the parties fail to make a valid choice, the practice of different countries shows that the court of the forum applies the law of the state that has the most significant relationship or the closest connection with the contract.

In order to determine the law that has the most significant relationship or connection countries use indictors like the place of contracting , place of performance, place where the subject matter of the contract is situated or the place where the parties have their address particularly - domicile residence, or place of incorporation or place of business of the parties.

The federal draft conflict of law also included the main principles discussed above. As is the case with other countries, the Ethiopian draft proclamation upholds the freedom of the parties to choose the law governing their relationship. This is the way by which the legitimate expectation of the contracting parties is going to be respected. However, the freedom of the parties is not with out bound. The parties are not free to choose arbitrarily any law of their liking. Accordingly, Art 73 of the draft proclamation provides the laws that can be chosen by the parties since it has a strong connection with the case. These are laws of the nationality, the law of domicile, the law of the place where the transaction was made, the law of the place where the subject matter is situated or the law of the place where transaction is to be performed. If the parties fail to make valid choice of law, in the same way with the practice of other countries the draft proclamation dictates courts to apply the law that is most closely connected.

Apart from the general principles guiding the ascertainment of the proper law of the contract, there are other particular aspects of the contract that need consideration. Among these Capacity of the contracting parties, Consent, Object and Form of the Contract are very essential. As we have seen capacity to enter in to contract shall be governed by the law chosen by the parties if any. In the absence of valid choice capacity shall be governed by the law that has the strongest relationship. The proper law that would govern the terms of the contract if it was valid also governs the existence and validity of consent and its vices. As regards formal validity, in the countries under discussion, the law of the place of contract is given a governing status. As to illegality of object of the contact, the position taken by most countries is that whatever the proper law may be legality or illegality of the terms of the contract shall be governed by the law of the place where the contract is to be performed. A more or less similar solution is reached by the federal Draft Conflict of Laws proclamation on these subjects.

The governing law concerning protected contracts like consumer contracts and individual employment contracts it can be seen that the law upholds the policy of choosing the law which is more advantageous to the weaker party in these contracts - i.e. consumers and

employees. These are the law of the consumer's habitual residence in the former and the law of the place of work in the latter.

5.6. Review Questions

After thoroughly reading the material, answer the following questions and problems.

Part I: Questions

1. What is meant by proper law of contract? Discuss its meaning and implications in the US, English, EU legal systems and Ethiopian Federal Draft Conflict of laws.
2. What position should Ethiopian courts should take to determine choice of law issues in light of the practice of other countries?
3. What factors should courts consider in determining whether a law of a certain country is proper law of the contract?
4. What do you think is the reason behind allowing parties to choose the governing law to their contract?
5. Discus the rules governing choice of law concerning form, capacity, consent, and legality of the contract.
6. Discuss the rules guiding principle in choice of law in specific contracts of consumers and employment.
7. Why consumer and employment contracts are are considered special?

Part II: Problems

Problem One

Read closely the following Article of the Ethiopian Civil Code and answer the questions provided below.

Art. 1692 Contract between absent parties

(1) A contract made between absent parties shall be deemed to be made at the place where and time when the acceptance was sent to the offeror.

(2) A contract made by telephone shall be deemed to be made at the place where the party was called.

(3) Nothing in this Article shall affect contrary stipulation made by the parties.

Questions

a) Doesn't this article initially intended to govern domestic matters have any significance in maters regarding contractual relations of Private International law nature?

b) Assume a contract has been made between two absent parties ,say by telephone one living in Ethiopia and the other in Kenya. In view of absence of PIL rule in Ethiopia, can one argue the article renders assistance in determination of the place of the conclusion of the contract?

Problem Two

An Ethiopian national and a French man entered in to a contract involving a sale of immovable property situated in Paris. The Ethiopian national paid the price .But the French failed to ownership title to the Ethiopian, consequently the Ethiopian national demanded for the return of his money. In the mean time both come to live in Ethiopia. The Ethiopian instituted a claim against the French in the Ethiopian Federal High court.

a) What sort of a right does the Ethiopian intend to enforce against the French man? Does the Ethiopian right refer to contractual matter or proprietary matter?

b) Does the Ethiopian court have jurisdiction?

c) Assuming that the court has jurisdiction what is the applicable law?

d) How far are foreign laws and practices relevant to help us solve such problems?

Problem Three

In any contractual relation, legal situation may arise relating to the following three facts: Capacity of parties, formal validity of contracts, and the essential validity of contracts.

a) What does each of these three concepts imply? Closely study three of them.

b) Are three of them subjected to same or different laws?

Problem Four

Regarding the law governing the capacity of parties to contract, the case Bank of Africa V. Cohen, 1909 2.ch.129 is worth considering. According to this case, a married woman domiciled in England mortgaged a land in South Africa to the Bank of Africa .It is known that the securing of debts for her husband was the object of the mortgage. In the law of South Africa, which is of Roman - Dutch law group, the woman had the legal capacity to make such a contract. Which of the laws do you argue should be applied to determine the legal capacity of the woman?

Problem Five

Tom an English child came to Ethiopia on a tourist passport .Tom while in Ethiopia bought a second hand car from certain Ethiopian called Abebe. Abebe knew that Tom was a minor under English law, but a major under Ethiopian law. Now Tom failed to pay the price.

a) Which law governs the contract?
b) On the basis of which law, Ethiopian or the English, should the capacity of Tom be determined?

Problem Six

Consider the following hypothetical problems and ascertain the appropriate law governing formal validity.

1) Ato Kebede gave Amare unstamped receipt in Kenya. According to the law of Kenya, unstamped receipt cannot be relied upon in Kenyan courts. Amare instituted a claim in the Federal high court of Ethiopia against Kebede who has now returned to Ethiopia.

    a. What is the status of the unstamped receipt in the Ethiopian court?

    b. Could one maintain that the Kenyan law is evidential and need not affect the formal validity of the receipt which could be relies up on in an Ethiopian court?

2) An oral contract of guarantee was made in Djibouti. And let us assume that this contract is valid and enforceable in accordance with the law of Djibouti. A case is instituted in a court in Ethiopia .What law governs the formal validity of the contract? What is the Ethiopian law position regarding a guarantee contract made orally?

3) An Ethiopian woman domiciled in Egypt made a voluntary assignment of her rights under Ethiopian trust in a form which satisfied the Ethiopian domestic law, but violating the Egyptian law.

    a. Is the non compliance a mater of defect of form or procedure?

Supposing it is maintained that the non compliance refers to defect of form, what is the governing law? What would have been the governing law if the non-compliance relates to procedural matters?

Unit Six

Non-Contractual Obligations

Unit Objectives

Upon completion of this unit, students will be able to:

- Discuss the main issues involved in choice of law in tort cases;
- Describe the doctrine of *lex loci delicti* as a major rule guiding choice of laws in tort;
- Discuss the doctrine of state of most significant relationship;
- Analyze the elements of the doctrine of *lex loci delicti* and state of most significant relationship;
- Distinguish between the general rules of choice of laws governing torts and the rules applicable to specific types of wrongs;
- Analyze the content of the proposed draft federal conflict of law rules on tort issues and discuss their limitation;
- Describe the practice of Ethiopian courts with regard to choice of governing law in torts;
- Discuss the position taken by foreign jurisdiction regarding the issue of choice of law in tort and;
- Suggest solutions to the current gap created by the absence of binding conflict of law rule in Ethiopia.

6.1 Introduction

Dear learner, well come to the six unit of the course material. Under this unit, the main focus is on rules governing tort liabilities in conflict of laws. As usual, we will try to discuss the general rules governing tort in conflict of laws through comparative presentation of the practice in Europe, United States and English system. Some light will be shed on the Federal Draft conflict of laws of Ethiopia and specific areas of interest in

tort including Personal Injuries and Damage to property, Unfair Competition, Product liability and Defamation. More over discussion will be had on related issues of restitutions and equitable wrongs. Finally, as the only living authority, the practice of Ethiopian courts will be given space.

6.2The Main Rules Governing Choice of Law in Tort

The traditional rule for choice of law in multi state tort cases have always been the *lex loci delicti* .i.e., the law of the place of wrong. It will not be very difficult to ascertain the governing law if both the wrongful act and the consequential harmful result is suffered at the same place. Since all necessary issues arise within one territory, this will be the place of wrong.

This being the usual situation, sometimes however, it may happen that, the fact giving rise to the wrongful event may occur in one country and the resultant harm will be suffered in another. For instance, Mr. Armanda a Kenyan resident in Ethiopia sends to Mrs. Selena in Zimbabwe a package of poisoned chocolate. Mrs. Selena receives the package and boards the Saudi Arabian Air ways .In the plane, she ate the chocolate and got sick and died in a hospital in Dubai. In such cases the important facts of the case occurred in different places and we may have difficulty identifying the place of wrong. Is the place of wrong the last place where Mrs. Selena died or the place where she ate the chocolate or where Mr. Armando sent the package? Countries differ in their response to such question, i.e. in the meaning they attach to the phrase “place of wrong”. Some legal systems defined it as the place where the wrong full act necessary to make the tortfeasore liable took place. Some others define it as the place where the damage occurred. Still others hold *lex loci delicti* to mean the place of the act or the place of injury and, in case of conflict ,the plaintiff is given the right to choose the one more favorable to him.

Even if the traditional practice in choice of law in tort in continental Europe has always placed a great emphasis on the control of the *lex loci delicti*, recent developments indicate, however, that while the influence of the *lex loci* lingers on , it does so with

varying degree of tenacity. As we shall see in the following sections the importance of the *lex loci* is whining down. Countries are looking for more flexible connections.

6.2.1 Choice of law in Tort: The US Approach Under the Second Restatement

The original Restatement stated that, with minor exceptions, all substantive questions relating to the existence of a tort claim are governed by the local law of the "place of wrong," *the lex loci delicti*. This was described as "the state where the last event necessary to make an actor liable for an alleged tort takes place." Since a tort is the product of wrongful conduct and of resulting injury and since the injury follows the conduct, the state of the "last event" is the state where the injury occurred. This rule of the original Restatement was derived from the vested rights doctrine which called for the enforcement everywhere of rights that had been lawfully created under the local law of a state. In effect, the doctrine provided for the application of the local law of the state in which had occurred the last act necessary to bring a legal obligation into existence. In the case of torts, the state of the last act, for reasons stated above, was the state where the injury had occurred. In the case of contracts, it was the state where the contract was made.

The general rules governing choice of law in tort are stated under the Second Restatement section 145. This section provides that the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the *most significant relationship* to the occurrence and the parties. The rule of this Section states a principle applicable to all torts and to all issues in tort and, as a result, is cast in terms of great generality. This is made necessary by the great variety of torts and of issues in tort and by the present fluidity of the decisions and scholarly writings on choice of law in torts under the principles stated in section 6. On its part, section 6, as was the case with contracts provides some important issues to determine the existence of the most significant relationship with a certain state.

In applying the principles of section 6 to determine the state of most significant relationship, the forum should give consideration to the relevant policies of all potentially interested states and the relevant interests of those states in the decision of the particular issue. Those states which are most likely to be interested are those which have one or more of the following contacts with the occurrence and the parties. Some of these contacts also figure prominently in the formulation of the applicable rules of choice of law. The contacts are:

The place where injury occurred: In the case of personal injuries or of injuries to tangible things, the place where the injury occurred is a contact that, as to most issues, plays an important role in the selection of the state of the applicable law. This contact likewise plays an important role in the selection of the state of the applicable law in the case of other kinds of torts, provided that the injury occurred in a single, clearly ascertainable, state. This is so for the reason among others that persons who cause injury in a state should not ordinarily escape liabilities imposed by the local law of that state on account of the injury. So in the case of false imprisonment, the local law of the state where the plaintiff was imprisoned will usually be applied. Likewise, when a person in state X writes a letter about the plaintiff which is received by a person in state Y, the local law of Y, the state where the publication occurred, will govern most issues involving the tort, unless the contacts which some other state has with the occurrence and the parties are sufficient to make that other state the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties.

Situations do arise, however, where the place of injury will not play an important role in the selection of the state of the applicable law. This will be so, for example, when the place of injury can be said to be fortuitous or when for other reasons it bears little relation to the occurrence and the parties with respect to the particular issue. This will also be so when, such as in the case of fraud and misrepresentation, there may be little reason in logic or persuasiveness to say that one state rather than another is the place of injury, or when, such as in the case of multistate defamation, injury has occurred in two or more

states. Situations may also arise where the defendant had little, or no, reason to foresee that his act would result in injury in the particular state. Such lack of foreseeability on the part of the defendant is a factor that will militate against selection of the state of injury as the state of the applicable law. Indeed, application of the local law of the state of injury in such circumstances might on occasion raise jurisdictional questions.

The place where conduct occurred: When the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, that state will usually be the state of the applicable law with respect to most issues involving the tort. This is particularly likely to be so with respect to issues involving standards of conduct, since the state of conduct and injury will have a natural concern in the determination of such issues.

Choice of the applicable law becomes more difficult in situations where the defendant's conduct and the resulting injury occurred in different states. When the injury occurred in two or more states, or when the place of injury cannot be ascertained or is fortuitous and, with respect to the particular issue, bears little relation to the occurrence and the parties, the place where the defendant's conduct occurred will usually be given particular weight in determining the state of the applicable law. For example, the place where the conduct occurred is given particular weight in the case of torts involving interference with a marriage relationship or unfair competition , since in the case of such torts there is often no one clearly demonstrable place of injury. Likewise, when the primary purpose of the tort rule involved is to deter or punish misconduct, the place where the conduct occurred has peculiar significance. And the same is true when the conduct was required or privileged by the local law of the state where it took place.

The place where the defendant's conduct occurred is of less significance in situations where, such as in the case of multistate defamation, a potential defendant might choose to conduct his activities in a state whose tort rules are favorable to him.

The domicile, residence, nationality, place of incorporation and place of business of the parties: These are all places of enduring relationship to the parties. Their relative importance varies with the nature of the interest affected. When the interest affected is a personal one such as a person's interest in his reputation, or in his right of privacy or in the affections of his wife, domicil, residence and nationality are of greater importance than if the interest is a business or financial one, such as in the case of unfair competition, interference with contractual relations or trade disparagement. In these latter instances, the place of business is the more important contact. At least with respect to most issues, a corporation's principal place of business is a more important contact than the place of incorporation, and this is particularly true in situations where the corporation does little, or no, business in the latter place.

These contacts are of importance in situations where injury occurs in two or more states. So the place of the plaintiff's domicile, or on occasion his principal place of business, is the single most important contact for determining the state of the applicable law as to most issues in situations involving the multistate publication of matter that injures plaintiff's reputation or causes him financial injury or invades his right of privacy.

In the case of other torts, the importance of these contacts depends largely upon the extent to which they are grouped with other contacts. The fact, for example, that one of the parties is domiciled or does business in a given state will usually carry little weight of itself. On the other hand, the fact that the domicile and place of business of all parties are grouped in a single state is an important factor to be considered in determining the state of the applicable law. The state where these contacts are grouped is particularly likely to be the state of the applicable law if either the defendant's conduct or the plaintiff's injury occurred there. This state may also be the state of the applicable law when conduct and injury occurred in a place that is fortuitous and bears little relation to the occurrence and the parties. The importance of those contacts will frequently depend upon the particular issue involved.

The place where the relationship, if any, between the parties is centered: When there is a relationship between the plaintiff and the defendant and when the injury was caused by an act done in the course of the relationship, the place where the relationship is centered is another contact to be considered. So when the plaintiff is injured while traveling on a train or while riding as a guest passenger in an automobile, the state where his relationship to the railroad or to the driver of the automobile is centered may be the state of the applicable law. This is particularly likely to be the case if other important contacts, such as the place of injury or the place of conduct or the domicil or place of business of the parties, are also located in the state. On rare occasions, the place where the relationship is centered may be the most important contact of all with respect to most issues. A possible example is where the plaintiff in state X purchases a train ticket from the defendant to travel from one city in X to another city in X, but is injured while the train is passing for a short distance through state Y. Here X local law, rather than the local law of Y, may be held to govern the rights and liabilities of the parties.

6.2.2 The Approach Under the Rome II Proposal

On July 11, 2007, the European Parliament and the Council of the European Union adopted "Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations" known as "Rome II." n1 In European Union parlance, a regulation is "binding ... and directly applicable" in all member countries without the need for implementing national legislation in each individual country. The Regulation is scheduled to go into effect on January 11, 2009. It will preempt the national choice-of-law rules of the European Union's Member States on non-contractual obligations arising from torts or delicts and from other acts or facts. Unlike some other regulations which apply only within the European Union, Rome II will have "universal application," in the sense that it will cover torts occurring both within and outside the Union, and it may lead to the application of the law of a non-Member State. Rome II is a dramatic step in the federalization or "Europeanization" of private international law (PIL) in the E.U. Member States, a step that has been aptly characterized as the European conflicts revolution.

6.2.2.1 The Main Rule Under the Proposal

Rome II's central provision is Article 4, which contains the general and residual rules. Paragraph 1 of Article 4 provides that the applicable law shall be the law of the country in which "the damage occurs" (*lex loci damni*). This law governs "irrespective of the country in which the event giving rise to the damage occurred" and "irrespective of the country or countries in which the indirect consequences of that event occur."

The operation of this rule can be illustrated by the following hypothetical scenario, which is used throughout this discussion blasting operations by a Swiss mining company in the Swiss Alps cause a snow avalanche in the French Alps injuring a group of English tourists. Although there is some room for contrary argument, it seems that Article 4(1) views Switzerland as the country of the "event giving rise to the damage," France as the country in which "the damage occurs," and England as the country in which "the indirect consequences of that event occur." Translated into simpler English, Article 4(1) provides that the applicable law is the law of the country in which the injury occurs, and more precisely the harmful physical impact (France), irrespective of the country in which the injurious conduct occurred (Switzerland), and irrespective of the country in which the indirect consequences of the injury are felt (England).

Thus, the general rule of Rome II is nothing but a restatement of the traditional lex loci delicti rule, with its "last event" sub-rule. It purports to be as categorical as the corresponding rule of the American First Restatement. In its penchant to avoid any ambiguity, the Restatement provided numerous minute localization sub-rules that, for example, defined the place of injury as the place where "the harmful force takes effect upon the body" in personal injury cases, and the place where "the deleterious substance takes effect" in cases of poisoning. The fact that the Restatement never attained certainty, despite having attained clarity, is a lesson that subsequent codifiers ignore at their peril.

The Rome II codifiers note that "the principle of the *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the Member States," which of course is true, except for the fact that in many countries this solution is subject to several exceptions. The drafters also correctly note that many countries disagree in defining the *locus delicti*. Indeed, some countries opt for the place of conduct, others opt for the place of injury, others apply the law of the place of conduct in some specified cases and the law of the place of injury in other cases, others leave the question unanswered, while others allow the victim or the court to choose between the two laws. The Rome II drafters decided to resolve these differences by unequivocally choosing the law of the place of injury, because such a solution "strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability." Neither of these two reasons are self-explanatory, and the second reason regarding strict liability is certainly debatable. As for the first reason, the only balance the lex loci damni rule strikes between the parties is that it can be equally unfair to the plaintiff in some cases as to the defendant in others.

This is not to say that, just because the lex loci damni is an old rule, or just because it produces unfair results in some cases, the rule is bad in all cases. Despite the recent tendency, especially among American academics, to summarily reject this rule as an outmoded remnant of the past, a dispassionate examination of actual cases indicates that this rule produces good or defensible results in several fact-law patterns, although by no means all. To properly evaluate this rule one should first evaluate the exceptions to which it is subject, and, second, examine the results the rule produces in several typical patterns formed by the aggregation or disbursement of the pertinent contacts (conduct, injury, and parties' domiciles n) and the content of the laws of each contact state.

For reasons explained in detail elsewhere, as well as later in discussing the exceptions to the lex loci damni rule, the view of this author is that this rule produces functionally defensible results in the following patterns of cases:

(1) intrastate torts involving conflicting conduct-regulation rules, regardless of where the parties are domiciled;

(2) intrastate torts in which the issue is one of loss distribution and either the tortfeasor or the victim is domiciled in the state of conduct and injury; and

(3) cross-border torts involving either conduct-regulation or loss distribution conflicts, in which: (a) the state of injury prescribes a higher standard of conduct for the tortfeasor or of financial protection for the victim than the state of conduct; and (b) in which the occurrence of the injury in the former state was objectively foreseeable.

The lex loci damni rule does not produce good results in cases of the converse pattern, namely cross-border torts in which the state of conduct prescribes higher standards of conduct for the tortfeasor than the state of injury. n95 Suppose for example that, in the above snow avalanche hypothetical, Switzerland imposes a negligence per se rule on mining operators who engage in blasting activities in certain areas or time periods, while France, in order to protect its mining industry, follows an ordinary negligence standard. In such a case, Article 4(1) calls for the application of French law and specifically excludes Swiss law. In contrast, if this were an environmental tort, Article 7 would allow the victim to opt for Swiss law. The drafters decided not to extend this option (which the Report characterizes as "the principle of favouring the victim") to other torts, because "this solution would go beyond the victim's legitimate expectations".

This, however, is the wrong dilemma. The dilemma is not whether one should favor victims over defendants, but rather whether - in a subject called "conflict of laws" - one should seek to first determine whether the involved laws actually conflict. As in the case of environmental torts, the reason for giving victims a choice is not to benefit victims as such, but rather out of deference to the policies of the state of conduct, which is the only state that has something to lose from the non-application of its law. In this case, Switzerland's negligence per se rule is intended to deter people from engaging in inherently dangerous operations like blasting. Because the defendant acted within Swiss territory, Switzerland has every reason to insist in determining the legal consequences of

that activity, even if in this case, the injury occurred across the border. The effectiveness of this policy of deterrence would be seriously impaired if exceptions to it were made for out-of-state injuries. Moreover, in terms of fairness and party expectations, there is nothing unfair in subjecting a tortfeasor to the law of the state in which he acted. Having violated the standards of that state, the tortfeasor should bear the consequences of such violation and not be allowed to invoke the lower standards of another state. Conversely, there is little reason to apply French law. Its ordinary negligence rule was intended to protect mining defendants who operate within French territory, not foreign operators operating elsewhere. In conclusion, there is a good deal of wisdom in the rules that allow the victim or the court to choose between the laws of the state of conduct and the laws of the state of injury in cases of cross-border torts. It is regrettable that the drafters of Rome II have chosen not to adopt a similar rule as they did with regard to environmental torts.

6.2.2.2 The Exceptions

A. The List of Exceptions

As noted earlier, one cannot properly evaluate Rome II without also analyzing the exceptions to its basic rule of lex loci damni. A careful perusal of the whole document reveals that this rule is subject to many more exceptions than are readily apparent. They can be divided into general exceptions, namely those that apply to all cases, and specific exceptions that apply to particular torts. The general exceptions include the following:

(1) the application of the law of the parties' common habitual residence, under Article 4(2);

(2) the application of the law of a state that has a "manifestly closer connection," under the escape clause of Article 4(3);

(3) the application of the mandatory rules of the forum state, under Article 16;

(4) the "taking into account" (and possible application) of the "safety and conduct" rules of the state of conduct, under Article 17;

(5) the application of the law chosen by the parties before or after the occurrence of the tort, under Article 14;

(6) the non-application of the lex loci (or any other law) when it is manifestly incompatible with the ordre public of the forum, under Article 26.

The specific exceptions include the following:

(7) in product liability cases, the application of the law of the common domicile of the tortfeasor and the victim, the domicile of the victim, the state of the product's acquisition, or the state of the "manifestly closer connection," under Article 5;

(8) the application of the law of the forum in certain cases involving restrictions to competition under Article 6(3)(b);

(9) the application of the law of the state of conduct at the victim's behest in environmental torts, under Article 7; and

(10) the possible application of the law of the victim's habitual residence for quantifying recoverable damages in traffic accident cases, under recital 33.

Because of space limitations, this material discuses only some of the exceptions.

B. The Common Habitual-Residence Rule

The first "official" exception to the *lex loci* rule is found in paragraph 2 of Article 4, which provides that, if at the time of the injury, the tortfeasor and the victim have their habitual residence in the same country (hereafter "common domicile"), then the law of that country applies to the exclusion of the lex loci. This exception is repeated in Article 5 on product liability, Article 6 on unfair competition cases in which the competition affects "exclusively" the interests of a specific competitor, and Article 9 on industrial action. In contrast, this exception does not apply to other unfair competition cases, cases falling within Article 7 on environmental torts, or Article 8 on infringement of intellectual property rights. One can infer that the reason for this exclusion is an implicit recognition that cases involving the latter categories of cases implicate broader societal interests that go beyond the interests of the litigants.

In adopting the common-domicile exception, Rome II joins the majority of recent PIL codifications and international conventions in accepting the premise that when both the tortfeasor and the victim are affiliated with the same state (through nationality, domicile, or habitual residence) that state has the best claim to determine their respective rights and obligations, even if the tort occurred entirely in another state. This notion is implemented either through a common-domicile rule (as in the codifications of Louisiana, Puerto Rico, Switzerland, Quebec, Belgium, and the Hague Convention on Products Liability), or through an exception from the lex loci rule. The exception is phrased either in common-domicile or common-habitual residence language (as in the Dutch, German, and Hungarian codifications), or in common-nationality language (as in the Italian, Polish, and Portuguese codifications).

From a different perspective, the common-domicile rule of Rome II is too narrow in that it applies only when the parties are domiciled in the same state but not when they are domiciled in different countries that have the same laws. Suppose, for example, that while hunting in Kenya, a French hunter injures a Belgian hunter with whom he has no pre-existing relationship. Suppose that French and Belgian law provide the same amount of compensation, which is much higher than that provided by Kenya. This is the classic false conflict in which Kenya has no interest in applying its low recovery law. In such a case, there is no reason to apply Kenyan law and every good reason to apply either Belgian or French law. Yet, Article 4(1) of Rome II mandates the application of Kenyan law, and, unfortunately, none of Rome II's exceptions to the lex loci rule would be operable in this case.

C. The General Escape

Paragraph 3 of Article 4 provides an escape from both the lex loci rule of paragraph 1 and the common-residence rule of paragraph 2. Echoing similar escapes found in recent European codifications and international conventions, the escape authorizes the court to apply the law of another country if "it is clear from all the circumstances of the case that

the tort/delict is manifestly more closely connected with [that other] country." Paragraph 3 provides an example by stating that a manifestly closer connection "might" be based on "a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question." In contrast to the preliminary draft, which limited the scope of the escape to cases covered by the general rule, the final text repeats the escape in the articles dealing with products liability (Art. 5(2)), unfair competition cases in which the competition affects "exclusively" the interests of a specific competitor (Art. 6(2)), and choice-of-law agreements (Art. 14(2)).

Despite serious reservations about the scope and wording of this particular escape, this author applauds the drafters for including an escape in the final version of Rome II. Indeed, escape clauses are necessary in any less than perfect statutory scheme. Because perfection is not for this world and more and more modern legislatures have begun to recognize their fallibility, escapes have become a common feature of almost all recent codifications. As Aristotle recognized many centuries ago, any pre-formulated rule, no matter how carefully or wisely drafted, may, "due to its generality," or because of its specificity, produce results that are contrary to the purpose for which it was designed. This "is a natural consequence of the difference between law making and law application." The question here is to what extent this escape will help cure the deficiencies of the general rules of Rome II.

1. The Closer Connection Exception

The final phrasing of the escape clause is a significant improvement over that of the Commission's preliminary draft proposal, which was based on the failed EEC draft convention of 1972 and later emulated by several national codifications. That escape was very problematic because it consisted of two independent prongs, both of which had to be satisfied for the escape to apply. One had to show (a) that there was "no significant" connection to the country whose law governed under the draft's rules; and (b) that there was a substantially "closer" connection with another country. The problem with this scheme was that, if taken literally, the first prong would rarely be satisfied, thus making

the second prong nothing more than cosmetic. The problem was confounded by the fact that the escape did not contemplate a comparison of the two connections, but rather an independent determination that the first connection was not significant. Only when that determination confirmed the insignificance of the first connection did the escape allow examination of the closeness of the other connection. The final text resolved much of the problem by eliminating the first prong and by encouraging a comparison between the two connections. Under the final text, a party that invokes the escape need not show that the connection of the country whose law governs under the rule is "insignificant." All one needs to show is that the connection with another country is "manifestly closer" and this of course can only be determined after comparing the two connections. This is a significant improvement for which the drafters deserve praise.

Even with these changes, however, the escape remains problematic because, like its European counterparts: (a) it is phrased in exclusively geographical or quantitative terms that are not correlated to an overarching principle; and (b) it does not permit an issue-by-issue evaluation.

2. The Pre-existing Relationship Exception

As noted earlier, the second sentence of Paragraph 3 of Article 4, attempts to provide an example of a manifestly closer connection by stating that such a connection might be based on a "pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question." As with the general escape, this exception is also conceived of in all-or-nothing terms rather than in terms of specific issues. Once again, the drafters' excessive concern with avoiding the possibility of depecage renders this exception far less useful than it might have been. In fact, rather than allowing a splitting of the various tort issues, this exception contemplates grouping them together with the issues arising from the pre-existing relationship.

However, this is only one of the problems with this provision. The major problem is determining which of two equally plausible objectives the drafters intended, namely: (a)

to apply the same law as that which governs the pre-existing relationship, or (b) to apply the law of the same state in which the pre-existing relationship is primarily centered. The Explanatory Report suggests that the drafters intended the first objective. However, unlike some European codifications which expressly provide to that effect, Article 4(3) of Rome II does not do so. This makes viable the other possibility, namely, applying the law of the state in which the pre-existing relationship is centered.

To be sure, in some cases, the two objectives will lead to the same law. For example, if the pre-existing relationship is a family relationship centered in state X, then the law of that state will govern that relationship and, under the above quoted provision, the court may apply the same law to a related delictual obligation. If, however, the relationship is contractual, then there is no guarantee that the state in which the relationship is centered will also be the state whose law will govern the contract. For example, the contract may contain a choice-of-law clause stipulating for the law of state Z, even if that state has a relatively tenuous but otherwise sufficient connection with the relationship. n141 In such a case, the question is which, if any, of the two states, X or Z, will be the candidate for the closer connection exception? Z cannot be because, in this scenario, it does not have a close enough factual connection. On the other hand, X has the factual connection, but the application of its law will defeat the apparent purpose of this exception, which is to apply the same law to both the tort and contract aspects of the case.

Finally, the main advantages of applying the same law to both the tort and contract aspects of a dispute are practicality and simplicity. Obviously, these advantages are not present when the particular dispute involves only tort issues. In such a case, the rationale for this exception must be sought elsewhere, such as in the ostensible expectations of the parties.

D. Party Autonomy

Under the heading "freedom of choice," Article 14 of Rome II introduces the notion that the parties to a tort may agree on which law will govern their rights and obligations resulting from the tort. The article properly distinguishes between choice-of-law agreements made before and after the tort. It allows post-tort agreements between all parties and allows pre-tort agreements only if all the parties are "pursuing a commercial activity." In the latter case, the agreement must be "freely negotiated." For the remainder, Article 14 treats both pre-tort and post-tort agreements alike: (1) both must be "expressed or demonstrated with reasonable certainty by the circumstances of the case;" and (2) neither may prejudice the rights of third parties, or derogate from the mandatory rules of a state in which "all the elements relevant to the situation ... are located," or, in certain cases, from the mandatory rules of Community law.

In most cases, post-tort agreements are far less problematical because, after the occurrence of the tort, the parties are in a position to know of their rights and obligations and have the opportunity to weigh the pros and cons of a choice-of-law agreement. For this reason, these agreements need little policing by the legal system. In fact, the system benefits from these agreements insofar as they promote judicial economy. Precisely the opposite is true of pre-tort agreements. The parties do not (and should not) contemplate a future tort, they do not know who will injure whom, or what will be the nature or severity of the injury. Moreover, a weak or unsophisticated party may uncritically sign such an agreement, even when the odds of him being the victim are much higher than the odds of him being the tortfeasor. For these and other reasons, pre-tort agreements should either be prohibited or, if permitted, they should be closely policed.

Regrettably, Article 14 requires only minimal scrutiny. The only restriction it imposes on pre-tort agreements (that it does not impose on post-tort agreements) is that it must be "freely negotiated" and that the parties must be "pursuing a commercial activity." This is neither sufficient nor free of problems. Even if the term "commercial activity" was

clearly defined or uniformly understood throughout the E.U., it would still include within its scope relationships that are one-sided, such as those arising from franchise, licensing, or insurance contracts. For example, a franchise contract is clearly commercial, yet the franchisee is usually in a very weak bargaining position (which is why so many states have enacted consumer-protection type statutes to protect franchisees). By allowing pre-tort choice-of-law agreements in these contracts, Article 14 does not live up to the statement in recital 32 that "protection should be given to weaker parties by imposing certain conditions on the choice." As with some other freedom-laden ideas, Article 14 may well become the vehicle for taking advantage of weak parties, many of whom are parties to "commercial" relationships. The argument that the "mandatory rules" of paragraphs 2 and 3 of Article 14, or the *ordre public* exception of Article 26 will protect the weak parties is overly optimistic because of the high threshold these provisions require before they become operable.

6.3 Rules Governing Choice of Law in Tort Under the Federal Draft Conflict of Laws

The main rules governing choice of law in tort issues under the Federal Draft Conflict of laws Proclamation is provided under Art.82 and 83. These two provisions crudely state a general principle guiding choice of law in two distinct areas of non contractual obligation. The first is tort issues that arise in fault or non fault liabilities and the second part governs liabilities arising from unlawful enrichment, unauthorized agency, and undue payment.

Concerning the first category the provision of Art.82 states that extra- contractual liability is governed by the law of the place where the damaging act occurred. This seems to follow the traditional European approach to choice of law in tort which gives outmost importance to lex loci delicti. Taking in to account the generality of the provision we can presume that it governs all issues arising in relation to tort liabilities. Particularly mention could be made of all the specific areas of tort like Defamation, Personal injury , Unfair Competition, Strict liabilities. It seems also the generality of the same provision covers

the regulation of issues like determination of the existence of wrong, liability, damage and its amount, subrogation and all relevant related matters. As we are going to see in the following sections, unlike the current Federal Draft of Ethiopia, the laws of US and European jurisprudence provides specific rules for the specific types of torts and all other issues related to tort liability. More over this provision does not provide for the exceptions like common domicile of the parties which are usual in the European and the US approaches.

It could be presumed that even if the rule under Art.82 is general the rules concerning specific torts and other important particular issues deserving special attention may be developed through interpretation by the courts though time. However, it is submitted the draft proclamation needs to provide specific rules concerning specific areas of tort.

Coming to the content of the provision, the lex loci delicti is said to be the governing law. However, this provision does not clearly indicate the position taken when the place of the happening o f the facts and the place of harm fall under different jurisdictions. The wording of the provision seems to indicate however, that the '*law of the place where the damaging act occurred*' refers to the law of the place where the final wrong (harm) occurred or suffered by the victim. An indication supporting this assertion may also be found in the provisions of Art. 83, governing other types of torts. It states that "…. *shall be governed by law of the place where the fact giving rise to the obligation occurred*." This expression compared to the expression under Art.82 is indicative of the fact that the latter seems to refer to the place of final harm.

Coming to the content of Art.82, it seems to prefer the law of the place where the decisive facts that gave rise to the final harm occurred is given priority than the final place of harm to govern choice of law in liabilities arising from unlawful enrichment , unauthorized agency , and the payment of that which was not due. The logic behind using different expressions to indicate the laws governing these two areas of tort stated under Art.82&83 is not clear.

6.4 Particular Torts

Under this section, we will discuss the rules governing choice of laws in particular areas of tort. Even if the Federal draft Conflict of Laws proclamation does not provide specific rules governing these issues, it is very relevant to deal with particular issues including Unfair Competition, Personal injury, Defamation, and product liability.

6.4.1 Personal Injuries and Damage to Property

Before dealing with rules governing personal injury and damage to property it is imperative to know what these subjects cover. Personal injury as here used , may involve either physical harm or mental disturbance, such as fright and shock, resulting from physical harm or from threatened physical harm or other injury to oneself or to another. On the other hand, injuries to a person's reputation or the violation of a person's right of privacy are not "personal injuries" in the sense here used. They have their own specific titles and fall under defamation and invasion of privacy which are actionable by their own merit. On the other hand damage to property as here used means, physical injury to the thing and all other sorts of physical interference with the thing, including trespass and conversion.

6.4.1.1 Rules Governing Choice of Law in Personal Injuries

The basic rule in this regard calls for application of the local law of the state where the injury occurred (*lex loci delicti*) unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties. Therefore in principle the law of the place of injury provides the rules to resolve the disputes unless exceptionally it is proved that another state has a stronger connection than the state of the happening of the wrong. Whether another state has a strong connection in large part will depend upon whether such other state has a greater interest in the determination of the particular issue than the state where the injury occurred. The extent of the interest of each of the potentially interested states should be determined on the basis, among other things, of the purpose sought to be achieved by their relevant local law rules and of the

particular issue. The likelihood that some state other than that where the injury occurred is the state of most significant relationship is greater in those relatively rare situations where, with respect to the particular issue, the state of injury bears little relation to the occurrence and the parties.

In the majority of instances, the actor's conduct, which may consist either of action or non-action, and the personal injury, will occur in the same state. In such instances, the local law of this state will usually be applied to determine most issues involving the tort. This state will usually be the state of dominant interest, since the two principal elements of the tort, namely, conduct and injury, occurred within its territory. The state where the defendant's conduct occurs has the dominant interest in regulating it and in determining whether it is tortious in character. Similarly, the state where the injury occurs will, usually at least, have the dominant interest in determining whether the interest affected is entitled to legal protection.

Situations will, however, arise where, although conduct and injury occur in the same state, some other state is that of most significant relationship and therefore the state of the applicable law . A possible example is where the plaintiff, who is domiciled in state X, purchases a ticket in X from the defendant airline, which is incorporated and has its principal place of business in X, for transportation from one point in state X to another point in state X. A straight line between these two points runs for a short distance over the territory of state Y. While over state Y, the pilot commits an act of negligence which causes the plane to lose an engine and the plaintiff suffers severe fright and shock as a result. The plane does not crash and continues safely to its destination. Here the relationship between the parties is centered in X and both are far more closely related to X than to Y. Even though Y is the state of conduct and injury, its relationship to the occurrence and the parties is insubstantial. X may therefore be the state of most significant relationship and, if so, it will be the state of the applicable law with respect to issues that would usually be determined by the local law of the state of conduct and injury.

On occasion, conduct and personal injury will occur in different states. In such instances, the local law of the state of injury will usually be applied to determine most issues involving the tort. One reason for the rule is that persons who cause injury in a state should not ordinarily escape liability imposed by the local law of that state on account of the injury. Moreover, the place of injury is readily ascertainable. Hence, the rule is easy to apply and leads to certainty of result.

The local law of the state where the personal injury occurred is most likely to be applied when the injured person has a settled relationship to that state, either because he is domiciled or resides there or because he does business there. When, however, the injured person is domiciled or resides or does business in the state where the conduct occurred, there is a greater likelihood that this state is to be the state of most significant relationship and therefore the state of the applicable law with respect to issues that would usually be determined by the local law of the state of injury. The same may be true when the injury occurred in the course of an activity or of a relationship which is centered in the state where the conduct occurred and when the injured person has no settled relationship to the state where the injury occurred.

The state where the conduct occurred is even more likely to be the state of most significant relationship when these two elements are combined, that is to say, when, in addition to the injured person's being domiciled or residing or doing business in the state, the injury occurred in the course of an activity or of a relationship which was centered there. One example is where the injury occurred in the course of an employment which is centered in the state where the conduct took place and where the injured person is domiciled.

An important factor in determining which is the state of most significant relationship is the purpose sought to be achieved by the rule of tort law involved. If this purpose is to

punish the tortfeasor and thus to deter others from following his example, there is better reason to say that the state where the conduct occurred is the state of dominant interest and that its local law should control than if the tort rule is designed primarily to compensate the victim for his injuries . In the latter situation, the state where the injury occurred would seem to have a greater interest than the state of conduct. This factor must not be over-emphasized. To some extent, at least, every tort rule is designed both to deter other wrongdoers and to compensate the injured person. Undoubtedly, the relative weight of these two objectives varies somewhat from rule to rule, but in the case of a given rule it will frequently be difficult to determine which of these objectives is the more important.

By way of further example, if the relevant local law rule of the state where the injury occurred would impose absolute liability upon the defendant, it is probable that this state is seeking by means of this rule to insure compensation for the injured person. If so, the interests of this state would be furthered by having its rule applied. If, on the other hand, the defendant would enjoy a special immunity for his conduct under the local law of the state of injury, it is not clear that the interests of this state would be furthered by application of its rule. The purpose of such a rule is presumably to encourage persons to engage in the particular conduct within the state. But in the situation here considered the defendant's conduct took place in another state and hence might be thought not to come within the purpose of the rule of the state of injury. If, however, the relevant local law rule of the state of conduct gave the defendant a special immunity, the interest of this state in having its rule applied would be clear.

On rare occasions when conduct and injury occur in different states, a state which is neither the state of conduct nor of injury may nevertheless be that of most significant relationship and therefore the state of the applicable law. A possible example is where the plaintiff, who is domiciled in state X, purchases a ticket in X from the defendant airline, which is incorporated and has its principal place of business in X, for transportation from one point in state X to another point in state X. A straight line

between these two points runs for a short distance over the territory of states Y and Z. While over state Y, the pilot commits an act of negligence which causes the plane to lose an engine while over state Z and the plaintiff suffers severe fright and shock as a result. The plane does not crash and continues to its destination. Here the relationship between the parties is centered in X and both are far more closely related to X than to Y or Z. The relationship of both Y and Z to the occurrence and the parties is insubstantial. X may therefore be the state of most significant relationship, and, if so, it will be the state of the applicable law, at least as to most issues.

As opposed to this specific rules governing choice of law in particular torts in other jurisdictions, the draft conflict of law in Ethiopia is silent and it seems to leave everything subject to the general rules stated under Art.82&8. This approach is not advisable in view of the basic difference that exists in different kinds of specific torts which deserve attention to their own special nature.

6.4.1.2 Damage To Property

The rule of this Section calls for application of the local law of the state where the injury occurred unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties. In large part, the answer to this question will depend upon whether some other state has a greater interest in the determination of the particular issue than the state where the injury occurred. The extent of the interest of each of the potentially interested states should be determined on the basis, among other things, of the purpose sought to be achieved by their relevant local law rules and of the particular issue involved. The likelihood that some state other than that where the injury occurred is the state of most significant relationship is greater in those relatively rare situations where, with respect to the particular issue, the state of injury bears little relation to the occurrence, the thing and the parties.

In the majority of instances, the actor's conduct, which may consist either of action or non-action, and the injury to the tangible thing, will occur in the same state. In such instances, the local law of this state will usually be applied to determine most issues involving the tort. Situations will, however, arise where, although conduct and injury occur in the same state, some other state is that of most significant relationship and therefore the state of the applicable law.

When conduct and injury occur in different states, the local law of the state where the injury occurred to the tangible thing will usually be applied to determine most issues involving the tort on the rare occasions when conduct and the resulting injury to the thing occur in different states.

The local law of the state where the injury occurred is most likely to be applied when the injury is done to land or to a chattel that has a settled connection with the state, which means that it is located in the state for other than a temporary purpose. The same law will usually be applied even though the chattel has no settled connection with the state, if the person seeking recovery and who has a beneficial interest in the chattel at the time of the injury has a settled relationship to the state, either because he is domiciled or resides there or because he does business there.

On the other hand, the state where the conduct occurred is more likely to be the state of most significant relationship and therefore the state of the applicable law with respect to issues that would usually be determined by the local law of the state of injury when both the person seeking recovery and the chattel have a settled relationship to that state. The same may be true when the injury occurred in the course of an activity or of a relationship which is centered in the state where the conduct occurred and when neither the person seeking recovery nor the chattel have a settled relationship to the state where the injury occurred.

The state where the conduct occurred is even more likely to be the state of most significant relationship when all of these elements are combined and when in addition to the person seeking recovery and the chattel having a settled relationship to that state, the injury occurred in the course of an activity or of a relationship which is centered there.

The purpose sought to be achieved by the rule of tort law involved is an important factor in determining whether the state of conduct or of injury should be the state of most significant relationship with respect to the particular issue.

On rare occasions when conduct and injury occur in different states, a state which is neither the state of conduct nor of injury may nevertheless be the state of most significant relationship and therefore the state of the applicable law.

6.4.2 Unfair Competition

Article 5 of the Rome II Proposal deals with torts 'arising out of an act of unfair competition' According to the Explanatory Memorandum, Article 5 covers rules prohibiting acts calculated to influence demand (such as misleading advertising or forced sales), acts which impede competing supplies (such as disruption of deliveries by competitors, enticing away a competitor's staff, or boycotts), and acts which exploit a competitor's value (such as passing off). But Article 5 does not apply to claims for infringement of an intellectual property right, since this matter is definitively regulated by Article 8. By Article 5(1), the law applicable to a tort arising out of an act of unfair competition is that of the country where competitive relations or the collective interests of consumers are, or are likely to be, directly and substantially affected. Then Article 5(2) makes an exception where an act of unfair competition affects exclusively the interests of a specific competitor. In such a case Article 3(2), in favour of a common habitual residence, and Article 3(3), in favour of a manifestly closer connection, apply.

The reference by Article 5(1) is to the law of the location of the market which is directly and substantially affected. This law will also govern liability for consequential losses

sustained elsewhere. But, as the Memorandum recognizes, there may be direct and substantial effects in more than one market, resulting in the distributive application of the laws involved.

In substance Article 5(1) replaces the test of direct injury, applicable under Article 3(1) to torts in general, by a test of direct effect on the market, regarded as better suited to torts involving unfair competition. Recital 11 explains that in matters of unfair competition, the conflict rule must protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the relevant market generally satisfies these objectives, though in specific circumstances other rules might be appropriate.

The Explanatory Memorandum adds that the purpose of rules against unfair competition is to protect fair competition by obliging all participants to play the game by the same rules. Modern competition law seeks to protect not only competitors (the horizontal dimension) but also consumers and the public in general (vertical relations). This three-dimensional function of competition law must be reflected in a modern conflict-of-laws instrument. Article 5(1) is designed to apply the law of the country in which the market where competitors are seeking to gain the customer's favour is located. This solution corresponds to the victims' expectations, since the rule generally designates the law governing their economic environment. It also secures equal treatment for all operators on the same market, thus respecting the macro-economic purpose of competition law, to protect a market.

Moreover Article 5(2) limits the role of a common residence, as envisaged by Article 3(2), or a manifestly closer connection, as envisaged by Article 3(3), to cases where the act of unfair competition affects exclusively the interests of a specific competitor. According to the Explanatory Memorandum, this applies to cases of enticing away a competitor's staff, corruption, industrial espionage, disclosure of business secrets, or inducing a breach of contract. In such cases the bilateral nature of the situation is

regarded as justifying the normal departures from the law of the place of the direct injury or effect.

The EP version would delete Article 5, on the ground that unfair competition can be satisfactorily dealt with under its amended Article 3, and because of the lack of clarity as to what is covered by acts of unfair competition. The Wallis Report explains that if it is decided that 'acts of unfair competition' should be expressly provided for, such acts should be explicitly defined.

6.4.3 Product Liability

Article 5 provides a special rule for non-contractual obligations arising from an injury caused by a product. Paragraph 1 of the article designates, in successive order, three countries whose law may govern: (a) the country of the victim's habitual residence; (b) the country in which the product was acquired; and (c) the country in which the injury occurred. The application of each country's law depends on whether the product was "marketed in that country." For example, if a German plaintiff is injured in India by a product acquired in Egypt, the applicable law will be that of Germany, if the product was marketed there; or, if not, Egypt, if the product was marketed there; or, if not, India, if the product was marketed there.

It appears that the burden of proving that the product was marketed in the particular country would rest with the plaintiff, although the defendant may also have an incentive, and should be allowed to either disprove or prove that fact. Moreover, the last sentence of paragraph 1 expressly gives defendants a defense - they can avoid the application of the law of each of the above three countries by demonstrating that they "could not reasonably foresee the marketing of the product, or a product of the same type" in that country. If taken literally, this could mean that, even if the plaintiff proves (and the defendant does not disprove) that the product was actually marketed in the particular country, the defendant can still get a second line of defense by showing that, despite the actual

marketing, "he or she could not reasonably foresee the marketing." This provision is unduly generous to the defendant. Fortunately, as noted below, contemporary marketing patterns suggest that in most cases this defense is unlikely to succeed. In any event, if the defense does succeed, the applicable law will not be that of the country next in line under paragraph 1 (e.g., Egypt after Germany, or India after Egypt), but rather the law of the defendant's habitual residence. Thus, if the product was manufactured by a Japanese defendant, Japanese law will govern the case, unless of course Japanese law is more favorable to the plaintiff than, say, Egyptian or Indian law, in which case the defendant will not invoke this defense to begin with.

Paragraph 1 of Article 5 applies "without prejudice to Article 4(2)," which contains the common-residence rule. This means that, if the parties have their habitual residence in the same country, its law applies to the exclusion of all others, even if the product was not marketed in that country. Thus, if in the above scenario the product was manufactured by a German defendant, German law would govern, even if the product was not marketed in Germany.

Finally, all of paragraph 1 (including the cross-reference to the common-residence rule) is subject to the "manifestly closer connection" escape contained in paragraph 2 of Article 5. This escape authorizes a court to either: (a) deviate from the order established in paragraph 1 and apply the law of one of the countries listed there; or (b) apply the law of a country not listed in paragraph 1, such as the country of the product's manufacture, upon showing that the country has a manifestly closer connection than the country whose law would normally govern under paragraph 1.

Although Article 5 appears complex in its wording, its actual operation in practice may be much simpler, depending on how easy it will be to satisfy the basic condition of a product's marketing in a particular country. One could surmise that, in today's global market, this condition will be more and more easily satisfied in the great majority of cases without much further inquiry or counter-proof. At least this is what the American experience suggests. A recent study of products liability cases decided in the United

States between 1990 and 2005 shows that in none of these cases did the foreign defendant invoke a similar defense. Although most of these cases involved American manufacturers, several cases involved foreign manufacturers. Thus, unless marketing patterns are much different in Europe, the marketing defense will probably be unsuccessful in all but the rarest instances. In turn, this suggests that Article 5 will lead to the application of the law of: (a) the parties' common habitual residence, in the few cases when such common residence exists; and (b) the victim's habitual residence in most of the remaining instances. Few cases would trickle down to the law of the country of acquisition, and even fewer, if any, to the law of the country of injury.

If these assumptions are correct, the next question is whether these results are acceptable. In answering that question, it helps to remember that actual cases are often far less complex than classroom hypotheticals. For example, although in the abstract there may be good reasons to criticize the application of the law of the country of the victim's residence as such, it is helpful to know that, in the majority of cases that country is likely to have at least one or more additional pertinent contacts. This was so in seventy-two percent of the disputes in the aforementioned American study. Nevertheless, although the presence of these additional contacts make the application of the law of the victim's domicile more defensible in practice, Article 5 itself must also be defensible in those cases in which these other contacts are lacking. Moreover, the fact that Article 5 does not differentiate between cases in which the law of the victim's domicile favors and those in which it disfavors the victim raises additional questions. One such question is whether Article 5 favors residents of developed countries and disfavors residents of lesser developed countries. In the above hypothetical, the German plaintiff who was injured in India by a Japanese product acquired in Egypt will get the benefit of German law. However, an Indian plaintiff who is injured in Austria by a German product acquired in Germany will be confined to the remedies provided by Indian law. Was this deliberate? If yes, it is one more example of a territorialist choice-of-law rule which, though seemingly value-neutral, disguises specific policy choices.

If the only objective of products liability law is to ensure the "right" amount of compensation for victims, then the application of German law to the German plaintiff and Indian law to the Indian plaintiff may be defensible. However, to the extent that product liability law is also designed to serve other objectives, such as deterring the manufacture and proliferation of unsafe products, there are good reasons to disagree with the application of Indian law in the Indian plaintiff's case. One can only hope that a court would avoid such a result by invoking the closer connection escape of Article 5.

In fairness to the Rome II drafters, it should be noted that product liability conflicts are inherently complex and thus far no one has the perfect formula for resolving them. This includes the present author who has drafted two statutory rules for such conflicts and has proposed two other rules for the same purpose. The fact that each of those rules differs from the others is this author's admission that the search for the perfect formula must continue. Article 5 of Rome II is far from the perfect formula, but the real question is whether it is good enough.

6.4.4 Defamation

The criticism of the Commission's Proposal and drafts of the EP Resolution illustrates that a general *lex loci* rule for defamation is not specific enough. The Commission's Proposal specifically favors the place of harm but also provides courts with limited discretion to apply the law of the place of conduct when appropriate. The EP Resolution favors the country to which the publication was primarily directed - presumptively also the place of harm. The EP Resolution also provides courts with the alternative choice of applying the law of the place of conduct when the place of direction is not clear. Nonetheless, neither version of Rome II clearly articulates a guiding principle sounding in a particular choice-of-law theory. This part steps back from the practical arguments in favor of each rule to determine if a logical overarching conflicts principle dictates a particular solution.

A. Defamation as a Conflicts Problem

"Law-based reasoning" has dominated American conflicts law for many years and the Restatement (Second) of Conflict of Laws manifests this trend. The hallmark of this policy-oriented approach is "to urge greater attention not only to a multiplicity of factual contacts but also to the underlying policies and purposes of the laws in question." American conflicts theories focus more on devising an appropriate "approach" for courts rather than creating an unyielding "rule." The "better rule of law" method, advocated by Robert Leflar, embodies a flexible approach in the extreme. However, a conflict of laws analysis does not necessarily involve examining the nature of the law at issue. In Europe, a "jurisdiction selecting" bent or territorial rules approach has traditionally ruled conflict of laws theory. England, Germany, and other European countries have slowly adopted more flexible approaches. The Commission's territorial approach is suited to achieve its objective of certainty. However, because law-based theories have recently gained import in Europe, this Comment considers whether Rome II could meet its objectives - as articulated by the Commission and the EP - by fashioning a conflicts rule for defamation with a law-based approach that weighs the policies of the states involved.

In a law-based scheme, choosing the appropriate conflicts law for defamation should begin with an examination of the theoretical underpinnings of tort law itself. However, a general conflicts rule for all torts (e.g., the lex loci) leaves ambiguity in the case of defamation: did the harm occur where the defendant acted or where the victim's reputation was injured? To derive the most appropriate specific conflicts rule for defamation, it is necessary to determine the purpose underlying defamation and any unique characteristics of the tort. The next step is to determine the broader goals and methodology of conflicts rules generally. Juxtaposing the nature and purpose of defamation with the prevailing conflict of laws theories and their respective rationales leads to a balancing of interests that ultimately informs the most appropriate conflicts rule for defamation.

B. **Nature and Purpose of the Tort of Defamation**

Defamation implicates a careful balance between the right to personality and freedom of expression. Both personality rights and free speech are issues of high significance in Western European countries and in the United States. There is no consensus in the United States about the precise goal or theoretical underpinning of defamation law. Some scholars assert that the focus of defamation should be on the defendant's fault. Other scholars suggest focusing on the plaintiff's injury. Views also diverge in Europe, but a defamation law's general objective is to protect a person's dignity from "insult and scurrilous attacks" and "[punish] and [deter] reckless news reporting." Each country approaches this task differently. In England, damages compensate the victim for both the emotional distress and pecuniary damages that flow from an injured reputation. These large damages awards demonstrate England's strong emphasis on deterrence. In Continental Europe, damages play a smaller role. These countries' laws emphasize vindicating the victim's reputation through a right to reply, forced retraction, or publication of a conviction. The focus is on rehabilitating the victim.

Countries also characterize the basis of the tort's liability differently. Most European countries require that the plaintiff show fault, which suggests that defamation is not a mere negligence tort. Defamation can resemble an intentional tort, and American courts have required scienter in some cases. With defamation's kinship to intentional torts remains a vestige of the "moral blame" that historically accompanied tort law generally. However, one scholar noted that defamation "resembles enterprise liabilities without fault without more than other intentional torts... ." Furthermore, in America the legal requirement of intent traditionally does not mean moral fault, but rather the intent to publish. In many countries libel is a strict liability tort, for which even truth is not an absolute defense. Similarly, defamation is a tort per se in some countries, while in others actual damages are necessary. Because understandings of defamation vary so dramatically, the tort's nature alone does not compel a particular conflicts principle. It is, therefore, important to further examine conflicts methodology.

C. **Conflict Approaches to Tort Law and Defamation**

In Europe, a multilateral approach to conflicts currently prevails, greatly influenced by the work of the German, Friedrich Carl von Savigny. A multilateral approach to conflicts requires a court to simultaneously evaluate the contacts and national interest of each state. Multilateralism seeks uniformity by advocating that conflicts rules should lead to one "correct" law that any court engaging in the proper analysis would identify. A unilateral approach, by contrast, focuses on the law of the forum to see if there is a reason to displace forum law. Despite its name, the unilateral approach focuses more on the content of the several laws, while the multilateral approach is more territorial - it seeks to apply the one "correct law in a jurisdictional sense." The law-based approach to conflicts in the United States is an amalgam of both the unilateral and multilateral methods. In Europe, the prevailing conflicts theory is a multilateral approach that is a combination of the law-based and territorial approaches. As the law-based approach slowly gains favor in Europe, conflicts theory in Europe will likely grow more unilateral.

Courts that adhere to a unilateral approach traditionally employ a state interest analysis. The emergence of the interest analysis was the crux of the conflicts "revolution" in the United States in the middle of the twentieth century. A traditional interest analysis compares the quality and quantity of an event's contacts with a foreign state and the forum and evaluates the nature and purpose of the domestic and foreign laws. The court determines whether the foreign law should displace forum law or if the foreign state policy was not designed to cover the matter. Some schemes attempt to identify the state whose interests would be most severely compromised if its law did not apply.

In a state interest analysis, a court weighs the policy objectives of the states to determine which state has the greatest interest in applying its law. The nature and purpose of the specific tort at issue is, therefore, important in the interest analysis. The European Commission pointed out that "nowadays, it is the compensation function that dominates" tort law in Europe, and the Commission asserted that its Proposal adheres to this trend.

Many academics also claim that tort law is no longer concerned with "retributive justice." Tort law in the United States also assumes a primarily compensatory function, but as the New York Court of Appeals noted in Schultz v. Boy Scouts of America, Inc., certain tort laws have an additional and significant conduct-regulating purpose. Thus, for conflicts purposes, most tort laws fall into one of two categories: conduct-regulating or loss-allocating. Many European countries' domestic laws and the Commission's Proposal also recognize a similar distinction. A temporal framework best illustrates this dichotomy: conduct-regulating rules are meant to attach liability to conduct before it occurs, whereas loss-allocating rules are post facto rules that distribute reparations after a court has established the defendant's liability. In Schultz, the Court held that the two categories of tort law entail unique state policy objectives and compel distinct conflicts results.

The Court in Schultz tied the conduct-regulating versus loss-allocating state interest dichotomy to the place of tort. The law of the place of the tort has a strong state interest in applying its conduct-regulating rules because of the parties' expectations and the "admonitory effect" of its rules on deterring tortious conduct. Conversely, a state has a diminished interest in applying its loss-allocating rules when no conduct occurred in the state.

In a multi-state defamation case, the laws in each state may be difficult to categorize. To classify the competing laws, a court conducting a traditional interest analysis should examine "at the outset whether or not the liability claimed would, under the forum's notion, be one primarily aimed at the wrongdoer's admonition." If the forum's defamation law is primarily aimed at admonishing the wrongdoer, then it is conduct-regulating and the forum has a strong interest in applying its own law. But what if the court determines that the purpose of its defamation law is to allocate loss? The forum should not have to disavow all interest in a claim if its governing law is loss-allocating because the very purpose of modern tort law is loss-allocation. Defamation laws are often aimed at both providing the victim with a remedy and deterring misconduct in the state. Thus, the loss-allocating versus conduct-regulating distinction differs slightly in the conflicts analysis from the general tort law concept. The conflicts dichotomy focuses primarily on a remedy

for the victim and the forum's interest in applying its remedy. Tort law, on the other hand, binds the right with the remedy, and many loss-allocating policies in the "torts sense" are not meant to stop at the state's borders. Similarly, some conduct-regulating policies are not meant to stop at the state's borders. Thus, a lacuna exists such that some tort laws fall into neither the conduct-regulating nor loss-allocating category for tort purposes, yet are characterized as such for the conflicts analysis, thus affecting the state interest analysis. Therefore, a court should not disavow all state interest when it determines that the forum law's objective is to allocate loss. The court should continue and expand the interest analysis, considering the event's contacts with each state.

Where the tort occurred in a physical or metaphysical sense usually determines where the legal right was infringed. In the United States, the Restatement (First) of Conflict of Laws considered the tort complete where the last necessary element of the tort transpired. Many have criticized this approach because it is especially difficult to determine where the last element of a defamation claim happened. European conceptions diverge as to whether certain torts have been committed when there is no actual harm. Defamation is a tort per se in some countries but not in others. In Germany, a plaintiff must show damages to show the tort. In systems that require damages for defamation, the tort "occurs" where the victim's reputation suffers, and, therefore, the conflicts analysis should focus on the victim. Many scholars advocate applying the law of the place of injury because that is where the legal right was infringed. In cases where a wrong occurs in several states but injury occurs only in one state, the place of injury rule for defamation is advantageous because it focuses the court's interest analysis; if damages are necessary in both states, the plaintiff will only have a claim in the latter. Current American law focuses on the plaintiff's place of domicile as the most likely place of injury.

In some countries, certain torts are committed per se, meaning that infringement of the legally protected interest constitutes the tort, and harm is not a distinct element. England considers libel a tort per se, and most commissions of slander are also torts per se. The defendant's conduct automatically infringes the legal right, and, therefore, it would be

logical to apply the law where the defendant acted because a state has an interest in regulating the tortious conduct of its residents. However, states that consider defamation a tort per se overlook the unique nature of defamation - harm to the victim's reputation should be a necessary element of the tort. It makes sense to bifurcate the harm from the act because an untrue statement, no matter how outrageous, inflammatory, or derogatory, causes no reputational harm unless the public perceives it as such. Also, in contrast to a defendant held liable under a "market share" theory in a pregnancy drug case, for example, the causation is direct - either the defendant published the material or did not. Thus, courts should conclude that defamation "happened" where the victim's reputation suffered. As a practical matter, a person would not likely sue where he is unsure that he has a claim for damages; thus, most plaintiffs will sue where their reputation suffered the greatest harm.

The court should also consider in its conflicts analysis whether defamation is a strict liability tort. Part IV.B noted that states characterize defamation differently. Where defamation is akin to an intentional tort and can result in criminal charges, a court may logically focus on the defendant's conduct in the conflicts analysis. If the place of the defendant's conduct would hold the defendant liable for an intentional tort or strictly liable, while the place of harm would not hold the defendant liable, then a court should apply the law where the defendant acted. If, however, the place of injury would also hold the defendant liable under a substantially similar law, it makes sense to focus on the place the victim incurred damages as a necessary part of the tort. Furthermore, such a situation presents a false conflict because the respective laws, even if founded on different principles, both provide the victim with a remedy. If both states' laws provide the victim with a remedy, but the place of conduct would provide the victim with much greater damages or has a significantly stricter liability standard, the law of the place of conduct may best comport with the parties' expectations. It is also important that the law applied accords with the reasonable expectations of the parties.

Finally, the conflicts analysis should not focus exclusively on the purpose and nature of the underlying laws - a court may also consider "conflicts justice." Conflicts justice is a focus on the needs of the international system and the need for certainty and predictability in an international context. When a claim would arise in one country but not another for the same act, it is sometimes difficult for a defendant to foresee liability. Thus, some argue that if the defendant acts within the law at home but is subject to liability abroad, foreseeability is nearly impossible. This is the crux of the media's opposition to the place of injury rule. On the other hand, if a claim would arise in both countries for the same act, even if the extent of the liability differs a court could favor the place of injury because defendants cannot claim that they did not foresee any liability.

6.5Summary

Choice of law in tort issues are areas of conflict of law where, as opposed to contract, the parties are not free to chose the governing law. This seems to be based on policy consideration to give the victim a chance to be compensated since he is the party with a weak bargaining power and needs protection. The basic traditional rule governing choice of law in tort is the *lex loci delicti* which literally means *'the law of the place of the wrong'*. It would not be difficult to ascertain that law if all the relevant facts related to the tort occurred in one county. However, if the operative facts of the case happened at different places the law of the place of the wrong would be difficult to ascertain since it could mean different things in different legal systems. Countries differ in their response to such question, i.e. In the meaning they attach to the phrase "place of wrong". Some legal systems defined it as the place where the wrongful act necessary to make the tortfeasore liable took place. Some others define it as the place where the damage occurred. Still others hold *lex loci delicti* to mean the place of the act or the place of injury and, in case of conflict ,the plaintiff is given the right to choose the one more favorable to him.

In US the original Restatement stated that, with minor exceptions, all substantive questions relating to the existence of a tort claim are governed by the local law of the "place of wrong," *the lex loci delicti*. This was described as "the state where the last event necessary to make an actor liable for an alleged tort takes place." Under the second restatement however a more flexible position is taken where section 145 provides that the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the *most significant relationship* to the occurrence and the parties. The rule of this Section states a principle applicable to all torts and to all issues in tort and, as a result, is cast in terms of great generality. To determine the state that has most significant relationship the restatement provides different indicators. These are: *the place where injury occurred, the place where conduct occurred, the domicile, residence, nationality, place of incorporation and place of business of the parties, the place where the relationship, if any, between the parties is centered.*

The approach in EU under the Rome II proposal seems to stick to the traditional *lex loci damni* approach with substantial exceptions. As stated under Art. 4 of the Rome II treaty, the applicable law shall be the law of the country in which "the damage occurs" (*lex loci damni*). This law governs "irrespective of the country in which the event giving rise to the damage occurred" and "irrespective of the country or countries in which the indirect consequences of that event occur." In spite of the generality of the rule, countries in their domestic conflict rules provide for exceptions. They are divided in to general exceptions that that apply to all cases and specific exceptions that apply to specific type of torts.

The general exceptions include matters related to giving priority to law of the common habitual residence of the parties, the law of the country that has a "manifestly closer connection", the application of the mandatory rules of the forum state, application of the "safety and conduct" rules of the state of conduct, the application of the law chosen by the parties before or after the occurrence of the tort and the non application of the *lex loci delicti* if it is manifestly incompatible with the public order of the forum. There are also specific exceptions relate to the rules applicable to special type of tort.

The main rules governing choice of law in tort issues under the Federal Draft Conflict of laws Proclamation is provided under Art.82 and 83. These two provisions crudely state a general principle guiding choice of law in two distinct areas of non contractual obligation. The first is tort issues that arise in fault or non fault liabilities and the second part governs liabilities arising from unlawful enrichment, unauthorized agency, and undue payment. In similar way with the European approach, the draft rule seems to follow the lexloci delicti principle to determine the applicable law. The limitation in the draft proclamation however is that it does not provide for the specific rules applicable to special kinds of torts and it fails to proved for appropriate exceptions known in other jurisdictions under discussion.

Even if the Federal draft Conflict of Laws proclamation does not provide specific rules governing these issues, the jurisprudence of other countries provide rules governing choice of law in particular issues including Unfair Competition, Personal injury, Defamation, and product liability. The basic rule in cases of personal injury and damage to property calls for application of the local law of the state where the injury occurred (*lex loci delicti*) unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties. The law applicable to a tort arising out of an act of unfair competition is that of the country where competitive relations or the collective interests of consumers are, or are likely to be, directly and substantially affected. In relation to product liability the law of (a) the country of the victim's habitual residence; (b) the country in which the product was acquired; and (c) the country in which the injury occurred could be chosen. The application of each country's law depends on whether the product was "marketed in that country." In relation to defamation the governing law is the law of the place of wrong which in case of defamation means the law of the place where the defamatory act was publicized or had its effect on the victim. However scholars argue that this rule is not specific enough to adequately govern all issues related to defamation in its different versions and hence suggest that it needs refinement.

As opposed to these specific rules governing choice of law in particular torts in other jurisdictions, the draft conflict of law in Ethiopia is silent and it seems to leave everything subject to the general rules stated under Art.82&8. This approach is not advisable in view of the basic difference that exists in different kinds of specific torts which deserve attention to their own special nature.

6.6Review Questions

After reading the material thoroughly, answer the following questions and problems.

Part I: Questions

1. What is the traditional choice of law rule in tort cases recognised in most jurisdictions?
2. Describe the basic difference between the approach on choice of laws in tort between the US First restatement and second restatement. Identify the reasons that necessitated the shift to the approaches in the second restatement.
3. What factors should be considered to determine the state of most significant relationship in the US Second Restatement of conflict of laws?
4. What is the guiding rule in choice of law in tort in Europe generally?
5. Can you identify differences in approach between the Rome II proposal and the American Second Restatement?
6. What exceptions are available to the general choice of law in tort under the Rome II proposal? Do they have some relevance to Ethiopian conflict of laws?
7. What is the approach guiding choice of law in tort under the federal draft conflict of laws?

8. What is the practice of courts in Ethiopia in the selection of the applicable law governing tortuous acts?

9. Which of the above discussed approach to choice of law in tort cases is suitable for Ethiopia to follow? Why?

10. What do you suggest to improve the provisions of the proposed Federal draft conflict of laws provisions dealing with choice of law in tort? Give some general Comments.

11. Has Ethiopia ratified the Hague Convention of My 1971 on the law applicable to road traffic accidents?

Part II: Problems

Problem One

Assume that Ato Asmare sustained injury in car accident caused by the inherent defect in the car. He bought the car from a certain company in Ethiopia .He comes to you to seek a legal advice. The car is manufactured by company C in Japan.

a. What law governs the compensation claim of Ato Asmare for injury sustained due to the defect in the car?
b. Can Ato Asmare sue the company C which manufactured the car ? If so under what law , the law of Ethiopia or Japan?
c. Assume that the car was put to the marke in Saudi Arabia from where Ato kebede bought it . Ato Asmare had bought the car from Ato Kebede in Ethiopia. What law governs the claim for damage caused by the car discovered to be inherently defective? Would, if Ethiopian tort law is applied ,the claim is sustainable against the company? Ato Kebede?

Problem Two

Ato Abebe entered in to an act of unfair competition in Ethiopia against a certain company producing shirts in Kenya .Because of the act of Ato Abebe the company's business is greately affected. The manager of the company decided to institute a claim in

the Federal High court of Addis Ababa against Ato Abebe and comes to you to seek legal advice. The company is registered in Ethiopia. What country's law do you think is applicable to govern the case?

Unit Seven

Property (Interstate and International)

Unit Objectives

Up on completion of the unit, students will be able to:

- Discuss the main issues involved in choice of law involving creation, and transfer of property rights in movables and immovable;
- Describe the doctrine of *law of the situs* as a major rule guiding choice of laws in property;
- Discuss the doctrine of state of most significant relationship;
- Analyze the elements of the doctrine of *law of the situs* and state of most significant relationship;
- Distinguish between the general rules of choice of laws governing movables and immovable;
- Distinguish between the general rules of choice of laws governing property and the rules applicable to specific types of dealings with property rights, in particular: rules governing transfer of movable and immovable (conveyances), succession and encumbrances on properties;
- Analyze the content of the proposed draft federal conflict of law rules on property issues and discuss their limitation;
- Describe the practice of Ethiopian courts with regard to choice of governing law in property;
- Discuss the position taken by foreign jurisdiction regarding the issue of choice of law in property; and
- Suggest solutions to the current gap created by the absence of binding conflict of law rule in Ethiopia.

Introduction

Dear learner, well come to the seventh unit of this material. Under this unit, the main concern will be exploring the main rules governing choice of law rules concerning movable and immovable properties. Property rights are areas of law where the sovereignty of the state in which the property situated is most jealously guarded. Thus, we will see how the law of the place of situs affects the status of the property and the different types of transactions on properties that call for choice of law. Particularly, we will deal with conveyances and encumbrances. Moreover, one of the most significant transactions applicable to property, i.e. transfer by succession will be discussed in detail. Finally we will deal with the relevant provisions of the draft conflict of law rules to see the possible approach that could be taken by the Ethiopian legislature and the court practice as far as possible. At the end of the chapter you will be provided with summary and questions to make sure that you grasped the concepts in the material.

General Rules Governing Choice of Law In Property

People belonging to different jurisdictions may involve in transactions with property rights. And it has been said that the object of the law of property is to provide a secure foundation so far as the law can do it, for the acquisition, enjoyment and disposal of wealth and that property of all type should be considered as value. In the area of property rights then, as in the area of contract, the emphasis of the law must be on protecting justifiable expectation of the parties. As long as the state recognizes private property it must try to guarantee the security of property transactions.

Property situations in conflict of law group themselves around ownership, procession, and right of special creditors such as security or privilege. Thus, the appropriate questions that should be addressed in conflict of laws rules dealing with property are: what law governs the creation, transfer and effect of property right? Which law should

determine whether the property should be considered as movable or immovable? Are immovables and movables subject to the same law? And the like.

The problem of creation, transfer, and effect of property rights in conflict of laws arise where a property interest involves more than one state. Different scholars at different times have suggested different solutions for this problem. According to the *statutists*, immovables and movables were governed by the law of the *situs* and personal law of the owner respectively. This doctrine has, however, not acquired importance in the modern times. Nowadays, the tendency is such that both immovables and movables are governed by the *lex rei sitate, i.e., the law of the state in which the properties are situated.*

Before we proceed further, it is advisable to note that the definition of what properties are movable or immovable is different from country to country. For instance the 1960 civil code of Ethiopia deals with distinction of things as movable and immovable providing some criteria. Accordingly, where the property can move by itself or be moved by an external force without losing its essential nature it will be termed as movable property, otherwise it falls under the category of an immovable property. We should not forget that there are categories what the civil code calls Movable by anticipation and immovables by destination which makes things a little complicated. Other countries may also have their own criteria to distinguish between movable and immovable properties. Accordingly what falls under immovable in one may be termed as movable under the laws of other countries and this difference is very critical in conflict of laws because the rules governing movables and immovables are not exactly alike.

The relevant question that seeks answer is thus, in cases containing foreign element in accordance to which law should we determine whether the property involved is movable or immovable. Authorities and the jurisprudence of many countries hold that the *lex situs* decides whether the property is movable or immovable. Thus even if under Ethiopian law the property may be termed as immovable but movable under the law of the country where the property is situated ,the Ethiopian court should accept this classification apply rules governing movable properties.

It is true that this problem of determining the governing law may arise in relation to both movable and immovable properties. However, this problem almost always involve movable property, since an immovable obviously cannot be carried away from one state to another and the general rule for immovables is that all questions relating to immovables ,such as the validity of the contract, must be determined according to the law of the *situs*.

To see how the problem concerning movable properties may be complicated let us consider the following example. In state Z, the owner of a certain movable property entrusts them to another. The person to whom the property is entrusted brings it to Ethiopia where he sells it. The purchaser enters to the contract in good faith, believing that the other contracting party was entitled to transfer the property to him. Under the law of Ethiopia the purchaser is entitled to prevail against the rightful owner unless the goods were stolen (Art.1160&ff of the 1960 Civil Code), which was not the case here. Under the laws of state Z assume that the rightful owner will prevail against the innocent purchaser in such cases. Now the issue is whether the rightful owner can recover the property from the innocent purchaser. If the law of the situs of the property at the time of the transaction governs, then Ethiopian law will apply, and the transfer will be valid. If the law of the state from which the property is taken applies, the rightful owner will prevail. So which law should the courts apply?

The jurisprudence of most states upholds that in such cases the law of the situs has a controlling power. The rationale behind this assertion is, the *sius* has the greatest interest in deciding who shall own a property situated in its territory. Parties dealing with the property would be likely to look to the law of the situs of they looked at any law at all. More over the situs has an interest in regulating the security of transaction of property situated there. Thus the French civil code holds that tangible property shall be governed by the law of the situs. Similar solution is provided under the most countries in continental Europe including Italian, Greece, Belgium, Netherlands and Luxembourg. In

the United States some cases have held that in the situation stated above, the law of the state where the transaction was originally made controls but the modern view holds that all such questions are governed by the law of the situs. The same modern approach is taken under the Second Restatement of Conflict of Laws. English Private international law also arrives at the same conclusion of giving priority for the law of the situs as governing law with some particular exceptions.

The general rule that makes the law of the situs the governing law for the creation, transfer and effects of property rights both in movables and immovables is wider in its scope of application. It is submitted that this rule should be quite broad and should include all questions related to capacity and formal requirements for the transaction. That means the law of the situs of the property also governs whether the person has got capacity to transfer property rights and what formal requirements should be mete to make an effective transaction.

Apart from the above general consideration, it is necessary for students of conflict of laws to know the specific rules governing different transactions that could be made on movables and immovables. For purpose of convenience we will discuss the issue under two big categories of conveyances and encumbrances as follows in the section below.

Particular Rules Governing Dealings With Movable and Immovable

Under this section we will look at the particular rules governing choice of law in dealings with movables and immovables. We will particularly focus on conveyances where an interest in property is transferred by contract, including the capacity and formal requirement of the transfer. Moreover property rights may not necessarily be transferred but may be used to secure liabilities or the right of the owner may be encumbered by the right of other persons created on the property either by law or contract. Thus we will try to explore the rules governing the legal relationship that arise from these transactions occurring in multistate situations.

Conveyances

Rules Governing Conveyance of Rights in Immovables

Transfer of rights in immovable property may occur by a contract interred between the parties in which case it is called conveyance or by operation of the law where the transfer comes about by other means than conveyance by the owner of the property. In the United States of America and in European countries, the general rule is that the *lex situs* is the governing law for all questions that arise with regard to immovable property.

Issues falling within the scope of this rule are the capacity of the party who conveys to make an effective conveyance, the capacity of the party to whom the conveyance is made to acquire the interest involved, the formal validity of the conveyance, the validity of the conveyance in other respects, and the nature of the interest transferred. These issues are discussed below.

A. *Applicable Law*

Issues falling within the scope of the rule of this Section will be determined by the law that would be applied by the courts of the situs. If these courts would have looked to their own local law for the decision of the case, that law will be applied by the forum. If, however, these courts would have decided the question by reference to the local law of some other state, the forum will do likewise.

Whether the courts of the situs would decide the case in accordance with their own local law may depend upon the precise issue involved. These courts would apply their own local law to determine issues in which the situs has the dominant interest. Examples of such issues are who may own the land, the conditions under which land may be held and the uses to which land may be put. So these courts would apply their own local law to determine what restrictions, if any, are imposed upon the ownership of land by a corporation or by an alien and the period during which the power to alienate interests in land may be suspended. These courts would also apply their local law rule to determine

such issues as whether the land must be used for residential purposes only or whether it can be put to a commercial use.

The courts of the situs would also frequently apply their local law to determine issues in which it might be thought that the situs does not have the dominant interest. In the normal course of events, transactions involving land are not entered into until considerable thought has been given by the parties and their lawyers to the possible consequences. This is an area where it is peculiarly important that there be certainty, predictability and uniformity of result and ease in the determination and application of the law to be applied. For these reasons, the courts of the situs would apply their local law in situations where it is likely that a person relied on the record title before entering into a transaction involving interests in local land. Likewise, considerations of convenience make it desirable that a prospective purchaser and his agents, such as draftsmen and title searchers, need consult only a single law and that the one with which they are most familiar. This latter point may be illustrated by an example. Suppose that in state X, where both A and B are domiciled, A gives B a deed to land in state Y and that thereafter the question arises before a Y court whether A had the requisite capacity to do so. It could be argued in support of application by the Y courts of X local law to determine this question of capacity that X is the state which has the dominant interest in the determination of this issue. But such a decision would complicate the task of title searchers and of other persons concerned with Y land. Thereafter, they could not always safely restrict their attention to Y local law in determining the capacity of a transferor of Y land. There would be situations, perhaps uncertain both in their nature and extent, where the local law of one or more other states would have to be consulted.

For all of these reasons, the courts of the situs would usually apply their own local law to determine questions involving the conveyance of an interest in the land.

On the other hand, situations will arise where the courts of the situs would not apply their own local law to the decision of a particular issue. So, as stated above, these courts might hold that a statutory rule of incapacity applies only to local domiciliaries or to domestic

corporations and is not applicable to foreign transferors or transferees. Thus, these courts might hold that a statute which restricts testamentary gifts to charities in order to protect the members of the testator's family applies only to local testators and does not restrict a foreign testator's power to devise local land. Likewise, these courts might feel that local interests were not involved in a disposition to be made outside the state of the proceeds of the sale of local land. Hence, when by the terms of a conveyance the transferee is directed to sell local land and to dispose of the proceeds in a particular way outside the state, the courts of the situs might not apply their own local law to determine the validity of the particular disposition.

There may also be occasions when the courts of the situs would apply the local law of another state on the ground that the concern of that other state in the decision of the particular issue is so great as to outweigh the values of certainty and convenience which would be served by application of the local law of the situs. So the situs courts might apply the local law of the state of the spouses' domicil to determine certain issues involving the conveyance of interests in local land from one spouse to the other, and this is particularly likely to be so when the land is one item in an aggregate of things, both movable and immovable, which are situated in a number of states and which it is desirable to deal with as a unit.

Whichever law would have been applied by the courts of the situs in the decision of the particular issue will likewise so be applied by the forum. To date, the courts of the situs have usually applied their own local law to determine the validity of a conveyance of an interest in land. On occasion, however, these courts have applied the local law of another state, particularly in the case of certain questions involving testamentary transfers and transfers in trust.

B. *Capacity to Transfer*

Concerning the capacity of transferor, for reasons stated above, particularly the interest of certainty predictability and uniformity, the courts of the situs would usually apply their own local law to determine the capacity of the transferor to make a valid conveyance of an interest in the land. These courts might hold, however, that some rule of incapacity is applicable only to local domiciliaries or to local corporations and hence does not affect a foreign transferor. These courts might also apply the local law of another state on the ground that the concern of that other state in the decision of the particular issue is so great as to outweigh the values of certainty and convenience which would be served by application of their own local law. So the courts of the state where the land is might on occasion apply the local law of the state of the spouses' domicile or of the domicile of parent and child to determine the capacity of one of these parties to convey an interest in the land to the other.

Concerning capacity of transferee, the situs has an obvious interest in the question who may hold title to interests in local land. For this reason, and for the other reasons stated in Comment *b*, the courts of the situs would usually apply their own local law to determine the capacity of the transferee to take and hold an interest in local land. These courts might hold, however, that a local statutory rule of incapacity applies only to domestic corporations and is not applicable to foreign corporations. These courts might also apply the local law of another state because of the greater concern of that state in the determination of the particular issue. So, these courts might hold that a conveyance to a foreign corporation is invalid if the corporation lacked capacity under the local law of the state of its incorporation to take and hold an interest in the land.

C. *Formalities*

As here used, the term "formalities" applies to such requirements as those of a writing, of a seal, of witnesses and of acknowledgment. In the absence of statute, the courts of the situs would usually apply their own local law to determine questions involving the formalities necessary for the validity of a conveyance of an interest in land. In the case of

testamentary transfers, however, statutes in many states provide that a will devising an interest in local land shall be held valid with respect to formalities if it complies with the requirements of the state where the will was executed or of some other state. These statutes represent a legislative determination that the reasons stated in Comment *b* for application of the local law of the situs are outweighed on this occasion by the desirability of upholding the validity of a conveyance with respect to issues of form. Even in the absence of statute, the courts of the situs might on occasion uphold the validity of a conveyance with respect to issues of form by application of the local law of some other state in situations where the requirements of form of the situs have been satisfied in substance.

D. *Other Questions of Validity*

Frequent questions, involving aspects of validity other than capacity and formalities, relate to illegality, the rule against perpetuities, fraud as between parties to the conveyance and fraud as against third persons, such as in the case of a conveyance in fraud of creditors. Usually, the courts of the situs would apply their own local law to determine such questions.

The situs has a substantial interest in determining the uses to which the land may be put and the conditions under which the land may be held. Hence the courts of the situs would almost invariably apply their own local law to determine whether a contemplated use of the land was, or was not, illegal. On the other hand, these courts, unless prohibited by a strong public policy, might apply the local law of another state to determine certain questions of illegality in a situation where the land is to be sold and the proceeds transmitted to the other state. Similarly, the courts of the situs would almost invariably apply their own local rule against perpetuities to determine whether an interest sought to be created in the land by the conveyance cannot take effect because the power of alienation is suspended for too long a period. On the other hand, again, these courts might apply the rule against perpetuities of another state in a situation where the land is to be sold and the proceeds transmitted to the other state and the conveyance is valid under the rule against perpetuities of the other state but not under the rule of the situs.

E. *Effect of Conveyance*

The courts of the situs would usually apply their local law to determine the nature of the interest in land transferred by the conveyance. So these courts would usually apply their local law to determine such questions as whether equities and unrecorded titles are cut off by a conveyance, whether a conveyance without the use of words of inheritance passes a fee simple or a life estate and whether a conveyance has created a legal or an equitable estate.

F. *Non-possessory Iinterests in Land*

The courts of the situs would usually apply their local law to determine questions relating to the creation, transfer or termination of non-possessory interests in land, such as easements, profits and licenses. These courts might hold, however, that some statutory rule, such as one relating to capacity, is applicable only to local domiciliaries and to domestic corporations and does not affect other persons. These courts might apply the local law of another state in still other circumstances on the ground that the concern of this state in the decision of the particular issue is so great as to outweigh the values of certainty and convenience which would be served by application of their local law.

Whether a covenant runs with the land, and what effect its running may have on other interests in the land, will be determined by the law that would be applied by the courts of the situs. On the other hand, a covenant may create purely contractual obligations between the parties to the instrument.

Rules Governing Conveyance of Rights in Movables

Movable properties are classified in to corporeal and incorporeal categories based on whether the property has a physical manifestation or not. In conflict of laws corporeal movable properties are also known as choses in procession, while incorporeal movables identified by the name choses in action. In this connection, it seems different rules apply to these categories of movable property. First we will discuss rules governing conveyance of choses in procession and then conveyance of choses in action follows.

A. Rules Governing Transfer of Choses in Possession

Our task here is to ascertain the governing law according to which various questions that may arise from assignment of corporeal movable properties must be determined. In particular our enquiry is confined to assignment of particular properties intervivos of which the commonest example are sales and gifts as opposed to general assignments the example of which is succession. We will deal with succession under a separate section. In this connection it has to be noted that there are various theories. In this regard mention should be made of the doctrines of *lex domicili, the lex citus , the lex loci actus* and the doctrine of *the proper law of the transfer*.

The doctrine of *lex domicili* the starting point of which is the Latin maxim *mobilia sequuntur personam* is a doctrine which asserts that rights over movable property were governed by the law of the owner's domicile. Supporters of this view, prominent of which are Dumoulin and Story, argue that since movables can be moved from place to place, they should be considered in law as being situated in the place of the domicile of the owner. However , it now generally agreed that to allow either party to invoke his lex domicili in a case of transaction dealing with corporeal chattels would be commercially impracticable and contrary to both natural justice and to the justified expectation of the parties themselves. It might more over be prejudicial to innocent third parties. Because of this the doctrine of lex domicili is no longer popular.

To make things clear how difficult it would be in modern times to apply lex domicili, let us consider the following hypothetical case. Mr. Sarkar and Ato Jemal concluded a contract of sale of a movable in England which is situated in Ethiopia. Consider also that the contract is valid according to the law of England while void under the laws of Ethiopia. Moreover Mr. Sarkar is domiciled in US while that of Ato Jemal is in Djibouti. Thus according to the doctrine the applicable law is the law of domicile of the owner that is US. But practically speaking the law of US has no stronger relation with the property

than the others. Especially, if the question of who the owner is to be raised, the problem will be complicated further.

An alternative choice to lex domicili is *lex situs*. This doctrine advocates that the governing law should be the law of the place where the property is situated. This doctrine has some obvious advantages. Where the disputing parties have different domicile or where the transaction occurred in different countries, the lex situs has the greatest advantage of being the single and exclusive system that can act as an independent arbiter of conflicting claims. Moreover it satisfies the reasonable expectation of the parties since a party to a transaction naturally concludes that the relationship will be subject to the control of the law of the country in which the subject matter of the transaction is currently situated.

However it is unreasonable to think that every type of question must be determined by the law of the situs and it alone. If for instance,tow persons Mr. A an Ethiopianand Mr.B a Kenyan,concluded a sales contract involving movables temporarily stored in a where house in Djibouti . In accordance to the doctrine of lex situs, the governing law will be the law of Djibouti. In fact it is unreasonable to make the transaction subject to the law of Djibouti merely because the property is temporarily stored there while their final destination may be someplace else. What if the destination of the property is shifted to Ethiopia at the time of the litigation? Which law is the law of the situs? Ethiopian law or Djibouti law? These kinds of unreasonable solutions led some scholars to conclude that in some cases the doctrine should have exception.

The third doctrine is the lex loci actus. According to this doctrine , the applicable law is the law of the place where the transaction is completed. For instance Mr. Hamadu ,an English man pledged his movable situated in Ethiopia to an Ethiopian while both were in Kenya on business trip. The applicable law here is the law of Kenya. But it appears that the application of the Kenyan law is unreasonable for the making of the contract there is a fortuitous event and has no justifiable relationship with Kenya.

The fourth doctrine is the so called the proper law of the transfer. This doctrine is said to be the law of the country with which the transfer has the most real connection. The proper law of the transfer seems to work in the same way as the proper law of the contract considered in the previous chapter.

Among the above four alternative doctrines, the modern approach of choice seems to be between the lex situs and the proper law of the transfer. Nevertheless, it cannot be said that either of them governs to the exclusion of the other or that where they clash one of them must be applicable than the other. Which should prevail depends up on the nature of the issues at hand i.e., whether the issue is contractual or proprietary. Accordingly, where the issue involved is characterized as contractual then the governing doctrine will be the proper law of the transaction. And where the issues in the transaction cannot purely considered as contractual but contain elements of possessory or termed as proprietary rights in the movable itself then the governing doctrine will be the lex situs.

B. Rules Governing Transfer of Choses in Action

Intangible movables or choses in action or as known under the Ethiopian law incorporeal properties may manifest different nature than the corporeal properties deserving separate treatment. These intangible properties may be divided in to two depending on whether they are represented by a document or not. The first group is those rights which are mere rights of action entitling their owner the right to claim payment. The second category is those rights which are represented by some document or writing that is not only capable of delivery but in the modern commercial world negotiated as a separate physical entity. A debt arising from loan or an ordinary mercantile contract is an example of the first category, while the second category is commonly exemplified by negotiable instruments and shares. Because of their nature it is advisable to treat the two categories separately.

a. *Debts*

There have been propounded a number of theories which help in the designation of the appropriate governing laws relating to debts. As is the case with corporeal properties, here also we have four theories (doctrines) trying to indicate the governing law concerning debts. We will discuss the below.

The first doctrine is lex loci domicili of the creditor. This theory argues that debts must be governed by the law of the place in which the creditor is domiciled. The proponent of this theory is Chief Justice Story. In explaining his idea Story (as quoted in Chesire,P.487) says:

> *This head ,respecting contracts in general may be concluded by remarking that contracts respecting personal property and debts are now universally treated as having no situs or locality ;and they follow the person of the owner in point of the right (mobilia inhaerent ossibus domini)…*

The weakness of this theory is that no reason is given as to why it is preferred, and that the proponents have failed cite court decisions showing that there is the practice of applying the law of the domicile of the creditor to determine the debt.

The second theory is the lex situs. In this regard Westlake, asserts that assignment of corporeal movables are governed by the lex situs, maintains that the forum for recovery of a debt presents a close analogy to the situs of a corporeal movable, and sates that the assignee who has acquired a good title by the law of the forum for the recovery of the debt must prevail. This theory is also subject to criticism. For instance where as will occur in the case of corporation, the residence extends to two or more countries. Situation of debt, for certain purposes would not necessarily imply that its assignment should be governed by the lex situs.

Another theory is that advocates the governing law to be the *lex loci actus*, i.e. the law of the country with which the assignment is made to determine the debt. If supposing A

assigns in Ethiopia a sum of money deposited in a bank in Paris first to a person called Band then to another person called C, the question whether B or C is entitled to the money is determined in accordance with the law of Ethiopia which is the *lex loci actus*.

Finally, we have the doctrine of the *proper law of transaction*. This theory favored by Foote argues that the assignment of debt arising out of a contract should be governed by the proper law of the original transaction out of which the debt arose.

According to this theory, for instance, if the transaction in which A assigns money to C is solely connected with Ethiopia, the right which C acquires should be governed by the law of Ethiopia . it is in the light of the Ethiopian law that such questions as relating to validity of assignment and priorities are determined.

In an instance where A makes an assignment to B in Ethiopia ,and later in fraud of B , makes another assignment to C in Paris ,it becomes difficult to select the governing law,for there is neither common lex loci actus nox lex actus.?

If the Ethiopian and French laws on priority differ, a court, instead of referring to either of these laws could apply the most appropriate law of the transaction by which the subject matter of the various assignments was made.

b. *Negotiable Instruments*

As regards negotiable instruments, the problem of choice of the law arises if the transfer of such instruments is made in a foreign country. According to the generally accepted practice, the transfer of foreign negotiable instruments is determined by the law of the place where the transfer is affected, i.e., the law of the place in which the contact is made. This principle equally apples to a promissory note and a cheque.

c. *Shares*

Just like with such matters as debts and negotiable instruments, a question of choice of law may arise in relation to a transfer of shares. It is a common phenomenon that foreign companies issue share.

The share may be transferred either in the country of the incorporation of the company where the register is kept or in some other country. In an instance in which shares are transferred in the country in which the register is kept, the ascertainment of the law governing the validity and effect of the transfer is an easy task. Indeed, in this respect it is the law of the incorporation of the company that commands control.

The problems become serious and very complex when the shares are transferred in a country other than that in which the transfer of the shares is kept. In such a situation, the whole issue should be viewed from different aspects; the effect of transfer as against the company, and its effects as regards the parties to the transfer and persons claiming under them. In relation to the first situation, the determining law is the *lex situs of the shares*, and the second type of the situations is determined by the proper law of the transaction, which in practically all cases will be the law of the place where the shares have been delivered.

Encumbrances

As it is stated in the beginning of this section property may be used to secure liabilities or the right of the owner may be encumbered by the right of other persons created on the property either by law or contract. Under this sub section we will deal with the rules governing the creation and effects of the different forms of encumbrances that could attach both movables and immovable properties.

Choice of law rules governing encumbrances on movable properties

A. Validity and Effect of Security Interest in Chattel

The validity and effect of a security interest in a chattel as between the immediate parties are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties. In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel at the time that the security interest attached than to any other contact in determining the state of the applicable law.

As used in the Restatement of this Subject, the term "security interest" means "an interest in personal property or fixtures which secures payment or performance of an obligation". Included within the scope of the term are such interests as those represented by conditional sales and pledges.

The same rule is applicable to issues arising between the immediate parties and their privies to a security interest in a chattel. The law selected by application of the above rule determines such questions as the capacity of the parties to create a valid security interest, the requisite formalities for doing so and the nature and extent of the rights acquired thereby. Thus, this law determines whether a secured creditor has a legal or an equitable interest in a chattel which is in the possession of the debtor. This law also determines the secured creditor's power to foreclose or to repossess, and the right of the debtor to redeem.

The creation of a security interest in a chattel is likely to involve both property and contractual questions. Therefore, the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the security interest under the principles stated in section 6 of the second restatement will be applied to determine both the property and contractual aspects of the security interest as between the parties and their privies. There is no clear line of distinction in these cases between property and contractual rights. The law selected by application of the present rule will be applied to determine such issues as what interests in the chattel are transferred by reason of the security interest from one party to the other and whether

following a foreclosure or repossession the secured creditor can obtain a deficiency judgment against the debtor.

In determining the state of the applicable law in the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel, or group of chattels, at the time the security interest attached than to any other contact. The values of certainty and predictability of result are furthered as a consequence, since the place where a chattel is situated at a given time will either be known to the parties or else, except in rare instances, will be readily ascertainable. Likewise since interests in the chattel, or group of chattels, form the subject-matter of the security interest, the place where the chattel, or group of chattels, was located at the time the security interest attached can be considered the latter's focal point. And this is particularly true in the case of a pledge, an essential element of which is the delivery of the pledged chattel by the pledgor to the pledgee. The importance of a chattel's location at the time the security interest attached in the choice of the applicable law depends somewhat upon the intended permanence of this location. If the parties intended that the chattel should remain in this location more or less permanently, the state of the chattel's location will in all probability be the state of most significant relationship and thus the state of the applicable law. The situation is different when it is understood that the chattel will be kept only temporarily in the state where it was located at the time the security interest attached. Here it is more likely that, with respect to the particular issue, some other state will have the most significant relationship to the parties, the chattel and the security interest and be the state of the applicable law. Thus, if a chattel is delivered in state X for the temporary use of the debtor and if both the debtor and the secured creditor are domiciled in state Y and it is understood that in due course the debtor will bring the chattel into Y, it is likely that Y, rather than X, will be the state of the applicable law.

The problem is different when a group of chattels is involved and when not all of the chattels belonging in the group are located in a single state. If the great bulk of the chattels is located in a single state, this state will be given nearly the same weight in the choice of the applicable law as would have been given it if only a single chattel had been

involved and if this chattel had been located in the state. If, however, the chattels composing the group are scattered more or less evenly throughout a number of states, the forum will give predominant weight to other contacts in determining the state of the applicable law.

In determining the state of most significant relationship, and thus of the applicable law, the forum will consider other contacts in addition to the location of the chattel, or group of chattels, at the time the security interest attached. So the forum will consider the domicil, nationality, place of incorporation and place of business of the parties. Also where it is understood that a chattel will be moved to a more or less permanent location following the creation of the security interest, the forum will give consideration to the place of its intended destination.

B. Securities Created by Operation of the LOaw (Non-consensual liens)

The rule of this Section applies to liens that arise by operation of law and are not dependent upon the intentions of the parties. The rule applies, for example, to a vendor's lien, a lien acquired by levy of execution, a lien for labor or supplies, and an attorney's lien. A person who deals with a chattel should have a definite and precise basis for determining whether he will acquire a non-consensual lien on the chattel by reason of such dealing. Such a person would usually expect that the local law of the state where he dealt with the chattel would be applied to determine whether he had acquired a non-consensual lien thereon.

When local law of state where chattel was situated at time security interest attached will not be applied. On occasion, a state which was not the state where the chattel was situated at the time the security interest attached will nevertheless, with respect to the particular issue, be the state of most significant relationship to the parties, the chattel and the transaction and hence the state of the applicable law. This may be so, for example, when the security interest would be invalid under the local law of the state where the chattel was situated at the time the security interest is claimed to have attached but would

be valid under the local law of another state with a close relation to the parties, the chattel and the transaction. In such a situation, the local law of the other state should be applied unless the value of protecting the expectations of the parties is outweighed in the particular case by the interest of another state with an invalidating rule in having this rule applied. There will also be occasions when the local law of some state other than that where the chattel was situated at the time the security interest attached should be applied because of the intensity of the interest of that state in having its local law applied to determine the particular issue . As to some issues it would seem that, on certain rare occasions, the state of the applicable law may be one which had no relationship to either the parties or the chattel at the time that the security interest attached. Suppose, for example, that in state X, where both A and B are domiciled at the time, A gives B a security interest on his automobile, which is situated in X, as security for a loan. On these facts, it is clear that X local law governs the rights and obligations of the parties. But suppose that thereafter A changes his domicil to state Y and with B's consent takes the automobile to that state. Later still A defaults on his payments and B seizes the automobile in state Y and has it sold in that state in partial satisfaction of A's debt to him. Under these circumstances, it would seem that Y local law should be applied to determine, for example, whether B gave A adequate notice of the seizure of the automobile and waited a sufficient time before selling it.

Illustrations:

1. Pursuant to a conditional sale contract made in state X, A delivers a steam shovel to B in state Y. A is domiciled in X. B is domiciled and has his only place of business in Y. B falls behind in his payments and A repossesses the shovel in Y and then takes it back to X where he sells it to a third person. B sues A for conversion in a court of state Z claiming that his rights of redemption have been violated. This would not be true under X local law but would be true under Y local law, since A had not kept the shovel in Y after the repossession for the period required by Y local law. Among the questions for the Z court to determine is whether the interests of both X and Y would be furthered by application of their respective local law rules. This is a question that can only be

determined in the light of the respective purposes of these rules. The purpose of the Y rule is obviously to protect Y debtors. Hence the interests of Y would be furthered by application of its rule. On the other hand, X's interests would be furthered by application of its rule if, as is probably the case, the rule was intended to assist X secured creditors in realizing on their security. Since the interests of X and Y would each be furthered by application of their respective rules, the Z court must choose between them. Factors that should induce the Z court to apply the Y rule and find for B are that (a) the parties, to the extent that they thought about the question, would presumably have expected that Y local law would be applied since they undoubtedly contemplated that the shovel would be kept in Y during the life of the security interest and (b) Y has a greater interest in the determination of the issue than has X for the reason, if for no other, that the shovel was to be kept in Y.

2. Same facts as in Illustration 1 except that the contract provided that A was to deliver the shovel to B in state C to assist B in completing a construction job in that state. The parties understood that B would remove the shovel to Y, the state of his domicil, as soon as the job had been completed, and B in fact does so. B's claim for conversion would not be good under the local law of either X or C but, for reasons stated in Illustration 1, would be good in Y. The Z court should pay little regard to the fact that the contract called for delivery of the shovel in C since this was done only for a temporary purpose. The Z court should find for B by application of Y local law for the reasons stated in Illustration 1.

Choice of law rules governing encumbrances on immovables

Whether a mortgage creates an interest in an immovable property and the nature of the interest created are determined by the law that would be applied by the courts of the situs. These courts would usually apply their own local law in determining such questions. The same rule applies to such questions as the capacity to give a mortgage, the requisite formalities for doing so and the nature of the interest acquired by the mortgagee. Thus, the law selected by application of the rule of will be applied to determine whether the creation of a valid mortgage requires a written document, a seal, witnesses,

acknowledgment, or recording of the conveyance; whether the consideration is sufficient; and whether the transaction gives the mortgagee a legal title, an equitable title or only a lien.

The courts of the situs would usually apply their own local law in deciding questions falling within the scope of the present rule. If, however, these courts would have decided the question by reference to the local law of some other state, the forum will do likewise. For example, these courts might hold that some statutory rule denying capacity to a certain category of persons is applicable only to local domiciliaries or to local corporations and does not affect other persons.

The law selected by application of this rule determines whether the enforceability of the mortgage depends upon the validity of the debt for which the mortgage was given. The rules for ascertaining the state whose local law governs the validity of the underlying debt are stated in Chapter dealing with contracts.

The law selected by application of the rule of this Section determines whether the mortgagee is entitled to possession of the mortgaged land before or after default by the mortgagor. The law selected by application of the rule of this Section determines such questions as whether a mortgage on land is subject to assignment and, if so, whether it has been validly assigned, the capacity to make a valid assignment, the requisite formalities for doing so, the validity of the assignment in other respects and the nature of the interest created in the assignee. Usually, the courts of the situs would apply their own local law in deciding such questions.

A distinction must here be drawn between an assignment of the mortgage on the property and an assignment of the underlying debt. The courts of the situs would apply their own local law to determine whether the mortgage follows the underlying debt by operation of law.

What is the effect of discharge of mortgage on the immovable property? The law selected by application of the rule of this Section determines such questions as whether

the mortgage can be discharged by an attaching creditor of the mortgagor or by the payment of the mortgage debt after its maturity and whether the discharge of the underlying debt by the local law of a state which is not that of the land's situs will discharge the mortgage. Usually, the courts of the situs would apply their own local law in deciding such questions.

Choice of Law Rules Governing Succession on Death

This Title is devoted to problems of succession on death. Succession on death involves the division among the members of the decedent's family and other beneficiaries of what remains after the administration of his estate. Legal provisions are generally made for the support of the widow and minor children during the time the estate is being administered. This section deals with choice of rules governing succession of both movables and immovable and testate and intestate successions.

Succession to Movables

Intestate Succession

The rule has been established for some two centuries that movable property in the case of intestacy is to be distributed according to the law of the domicile of the deceased person at the time of his death. Thus the devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death.

This law determines the classes of persons to take ,the relative portions to which the distributes are entitled ,the right of representation, the rights of surviving spouses ,the liability of a beneficiary for unpaid debts ,and all related questions. This rule also applies to a decedent's interests in chattels, in rights embodied in a document and in rights that are not embodied in a document.

It is desirable that insofar as possible an estate should be treated as a unit and, to this end, that questions of intestate succession to movables should be governed by a single law. This is the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death. This state would usually have the dominant interest in the decedent at the time.

Provided that they apply the common law rules of choice of law, the courts of the state where the decedent was domiciled at the time of his death would look to their own local law to determine what categories of persons are entitled to inherit upon intestacy. Application of this law to determine such questions would presumably be in accord with the reasonable expectations of the decedent and his family. On the other hand, these courts might look to the local law of some other state to determine whether a particular person claiming a share in the movables of an intestate belonged to such a category. So whether a person is a "widow" within the meaning of the statute of succession of the state where the decedent was domiciled at the time of his death would usually be determined in accordance with the law governing validity of the marriage. Similarly, these courts might determine the effect of an agreement releasing all rights to inherit from the decedent in accordance with the law governing the agreement. Whichever law would have been applied in the ultimate decision of the case by the courts of the state where the decedent was domiciled at the time of his death will likewise be so applied by the forum.

The courts of the state where the decedent was domiciled at the time of his death would usually determine questions of intestate succession in accordance with their local law as it was at the time of his death and not as it may have been changed thereafter. That means if the law of succession changed after the person died the applicable law is the previous law and not the new law that come in to effect after the death.

Testate Succession

The general principle established concerning testamentary succession of movables both in England and U.S.A is that it is governed exclusively by the law of the domicile of the

deceased as it existed at the time of his death. When a testator dies domiciled in a foreign country, leaving assets in another country, it is necessary to note that the action for succession should be made at the court of the country where the property is situated. Moreover it is true that assets must be administered in the same country according to the law of the situs. But nevertheless all questions concerning the beneficial succession must be decided in accordance with the law of the domicile. The duty of the executor is to ascertain who, by the law of the domicile, are entitled under the will, and that being ascertained to distribute the property accordingly. It is necessary, however, to deal separately with the various questions that arise in testamentary succession.

The rule is applicable to questions relating to testamentary dispositions of interests in movables. Thus, the law selected by application of the present rule determines the capacity of a person to make a will or to accept a legacy, the validity of a particular provision in the will, such as whether it violates the rule against perpetuities or constitutes a forbidden gift to a charity, and the nature of the estate created. Questions concerning the required form of the will and the manner of its execution also fall within the scope of the present rule. The rule applies to a decedent's interests in chattels, in rights embodied in a document and in rights that are not embodied in a document.

Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death. These courts would usually apply their own local law in determining such questions.

A. ***Validity and Effect of Will of Movables***

Questions relating to the validity of a will of movables and the rights created thereby are determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death.

These courts would usually apply their own local law to determine such questions as the

testator's capacity to make a will, the nature of the estates that can validly be created and the categories of legatees to whom the testator may leave his movables. These courts would also usually apply their own local law in determining whether a legacy for charitable purposes is invalid, in whole or in part, because of statutory restrictions on the power of a testator to make charitable dispositions by will.

On the other hand, these courts might look to the local law of some other state to determine a legatee's capacity to take a legacy. Whether a corporation, for example, has the requisite capacity might be determined in accordance with the local law of the state of incorporation, and whether an individual legatee has attained his majority might be determined in accordance with the local law of the state of his domicil.

Illustration:

1. A, a national of state X, dies domiciled in state Y. The validity of A's will, insofar as it concerns movables, will everywhere be determined in the same way as would have been determined by the courts of Y. If the Y courts would determine such questions in accordance with their own local law, the courts of other states will do likewise. If, on the other hand, the Y courts would apply the local law of X, the courts of other states will do likewise.

Similarly, the courts of the state where the testator was domiciled at the time of his death might determine the effect of an agreement by the testator to dispose of his property in a certain way in accordance with the law governing the agreement. Whichever law would have been applied in the ultimate decision of the case by the courts of the state where the testator was domiciled at the time of his death will likewise be so applied by the forum .

B. ***Formal Requirements of the testament***

As here used, the term "formalities" applies to such requirements as those of a writing, of witnesses and of acknowledgment. Statutes in many states provide that the wills of local domiciliaries shall be held valid as to form if they comply either with the state's own requirements or with those of one or more other states, such as the state where the will

was executed or where the testator was domiciled at the time of execution. If, by reason of such a statute, a will would be held valid in the state where the testator was domiciled at the time of his death, it will also be held valid in other states.

Would Change of domicile after making will make a difference? If, after making his will, a person changes his domicile, the validity and effect of his will are determined under the rule of this Section by the law that would be applied by the courts of the state of his domicile at the time of his death, and not by the law that would be applied by the courts of the state of his domicile at the time of executing the will.

Will disposing of both land and movables. In case a will disposes of both land and movables, the validity of devises of land is determined by the law that would be applied by the courts of the situs ; the validity of bequests of movables is determined by the law selected by application of the rule of this Section.

Situations will arise where a will although invalid under the local law of the state where the decedent was domiciled at the time of his death, is valid under the local law of some other state having a close relationship to the case such as the state where the testator was domiciled at the time the will was executed. If in such a situation the courts of the state of the last domicil would uphold the validity of the will by application of the local law of the other state, the forum will do likewise. The courts of the last domicil would be particularly likely to reach such a result in a situation where the difference between their own local law and that of the other state is relatively slight and does not stem from a significant divergence in policy. In such a situation, the courts of the last domicil might feel it more important to give effect to the intentions of the testator by upholding the will than to insist upon a rigid application of their local law.

C. ***Revocation of will***

The effect upon a will, insofar as it concerns movables, of an intentional act of revocation by the testator, such as the physical destruction of the will, is determined by the law that

would be applied by the courts of the state where the testator was domiciled at the time of his death. The same law will be applied to determine whether the will has been entirely or partially revoked by operation of law, such as by marriage or by the birth of a child subsequent to the will's execution.

The courts of the state where the testator was domiciled at the time of his death would usually apply their own local law in deciding such questions. Sometimes, however, these courts would apply the local law of another state. So these courts might interpret a local statute, providing, that a will shall be held valid as to matters of form if it complies with the requirements of the state where it was executed, to mean that a revocation likewise shall be held valid as to matters of form if it complies with the requirements of the state where the act of revocation was done. Likewise, the courts of the state where the testator was domiciled at the time of his death would usually refrain from applying their own local law, or would apply the local law of another state, in situations where to do otherwise would defeat the expectations of the testator. An example might be a situation where, while domiciled in state X, the testator does an act which would not revoke the will under X local law but would do so under the local law of Y, where he died domiciled. In such a situation, the Y courts would probably not apply their local law and hold the will revoked if, in their opinion, such action would defeat the expectations of the testator**.**

D. Construction of Will of Movables

The general rule is that a will insofar as it bequeaths an interest in movables is construed in accordance with the local law of the state designated for this purpose in the will. In the absence of such a designation, the will is construed in accordance with the rules of construction that would be applied by the courts of the state where the testator was domiciled at the time of his death.

The meaning and effect of words used in a will may be determined in any one of three ways . On extremely rare occasions, these words may be given a particular legal effect

irrespective of the intentions of the testator. In the second place, the words may be given a meaning which it is believed, on the basis of the available evidence, was the meaning the testator intended the words to bear. This process, which is here referred to as interpretation, is employed in the great majority of situations. Thirdly, situations do arise where the court is not presented with a satisfactory basis for determining the testator's intentions and where a rule of law is employed to fill the resulting gap in the will. This third process is here referred to as construction.

Legal effect. The use of certain words in a will insofar as it devised an interest in land was followed at common law on rare occasions by definite legal consequences that were quite independent of the intentions of the testator . On still rarer occasions, similar legal consequences were given at common law to words used in a will insofar as it bequeathed an interest in movables. Such rules of legal effect are extremely unlikely to be encountered today. If, however, such a rule exists in the local law of the state where the decedent was domiciled at the time of his death and if this rule would be applied by the courts of that state to determine the effect of certain words used in the will under consideration, this rule will also be applied by the forum.

Interpretation. The meaning of words used in a will depends upon the intentions of the testator except in those rare situations where the words are given a prescribed legal effect. In ascertaining the intentions of the testator, the forum will consider the ordinary meaning of the words used, the context in which they appear in the will, and the circumstances under which the will was drafted. The forum will consider whether the draftsman was probably using the language of the state where the testator was domiciled at the time when the will was executed. The forum will also consider any other properly admissible evidence that casts light on the actual intentions of the testator. The question to be determined is one of fact rather than one of law. The forum will apply its own rules in determining the admissibility of evidence, and it will use its own judgment in drawing conclusions from the evidence.

Construction. If it is found impossible to ascertain the testator's intentions from the evidence, a rule of law is employed to fill what would otherwise be a gap in the will. This is done in order to carry out what was probably the testator's intention, or what probably would have been his intention, if he had foreseen the matter in dispute.

When testator designates a law. The forum will give effect to a provision in the will that it should be construed in accordance with the rules of construction of a particular state. It is not necessary that this state have a substantial relationship to the testator or his estate. This is because construction is a process for giving meaning to a will in areas where the intentions of the testator would have been followed if these intentions had been made clear.

When the testator designates the law of a state as the applicable law in matters of construction, it is to be inferred that he intends the local law of that state to govern. The forum will therefore apply the rules of construction of the designated state. Despite the absence of an express designation, it may be apparent from the language of the will or from other circumstances that the testator wished to have the local law of a particular state govern the construction of the will. In such a case, the rules of construction of this state will be applied.

When there is no designated law. When the testator has not provided that his will should be construed in accordance with the rules of construction of a particular state and when his desires in this regard are not otherwise apparent, the forum will construe the will in accordance with the rules of construction that would be applied by the courts of the state where the testator was domiciled at the time of his death. These courts, in the absence of controlling circumstances to the contrary, would usually construe a given word or phrase in accordance with the usage prevailing in the state where the testator was domiciled at the time the will was executed. This would presumably be in accord with the expectations of the testator.

Illustrations:

1. T dies domiciled in state X leaving a will, also executed in X, which bequeaths interests in certain movables to B's heirs. B has an adopted son, A. In the absence

of satisfactory evidence as to what T meant by "heirs," the question whether A belongs to the class comprehended by the term will be decided in accordance with X usage.

2. Same facts as in Illustration 1 except that T executes his will while domiciled in state Z. In the absence of satisfactory evidence as to what T meant by "heirs," the courts of state X would probably decide whether A belongs to the class comprehended by the term in accordance with Z usage.

Judicial interpretation in state of applicable law. An perpetration placed upon a will, insofar as the will bequeaths interests in movables, by a court of the state where the testator was domiciled at the time of his death, will be followed in other states.

Illustration:

3. Same facts as in Illustration 1 except that (a) A is claiming before a court in state Y that T's will gave him an interest in certain movables located in state Y at the time of T's death, and (b) the X courts have already held that A is an "heir" of B within the meaning of T's will. The Y courts will likewise hold that A is such an heir.

Succession to Immovables

The devolution of interests in land upon the death of the owner intestate is determined by the law that would be applied by the courts of the situs. These courts would usually apply their own local law in determining such questions.

Questions relating to intestate succession to interests in land will be determined by the law that would be applied by the courts of the situs. These courts would usually apply their own local law in deciding such questions. They would do so for reasons that are in part historical and sentimental and in part pragmatic. The state of the situs has an obvious interest in having interests in local land decided upon intestacy in a manner that complies with its notions of what is reasonable and just. This point, however, should not be overemphasized. There may in the given case be other states which have an even greater interest in this question, such as would probably be true of a state where the

decedent and all of his heirs were domiciled. Also undoubtedly all States of the United States provide for a method of distribution upon intestacy that is reasonable and just, and the differences between the laws of the several States as to the manner of division may be said to lie more in the area of detail than of principle. Hence it is unlikely that any policy of the state of the situs would be seriously infringed if the distribution upon intestacy of interests in local land were to be decided in accordance with the local law of another state.

The convenience of title searchers and of other persons concerned with land at the situs is another factor to be considered. In the normal course of events, parties and their lawyers do not take action with respect to interests in land without having given considerable thought to the possible consequences. This is an area where it is peculiarly important that there be certainty, predictability and uniformity of result and ease in the determination and application of the law to be applied. If, under the practice of the situs, the persons who are entitled to succeed upon intestacy to interests in local land are conclusively determined as against all others by a court decree in the administration proceedings or otherwise, there is no reason so far as title searchers and other third persons are concerned why intestate succession should not on occasion follow the local law of another state. For such title searchers and other third persons would only have to consult the local decree to determine the person or persons who had succeeded to interests in the land. The situation is different in those states where the matter of heirship is not conclusively determined in the course of the administration proceedings or by other court decree. In such states, a greater burden would be imposed upon title searchers and upon other persons concerned with local land if they could not always assume that the local law of the situs would be applied to determine the distribution upon intestacy of interests in local land.

There will be situations in any event where the courts of the situs would look to the local law of some other state to determine questions involving intestate succession to local land. For example, although these courts would usually look to their own local law to determine what categories of persons will inherit upon intestacy, they might look to the

local law of some other state to determine whether a given person belongs to one of these categories. So these courts would usually determine whether a person was a "wife" within the meaning of their local succession statute in accordance with the local law of the state selected by the law governing the validity of the marriage. Similarly, these courts might determine the validity of an agreement waiving rights to inherit from the decedent in accordance with the local law of the state selected by application of the rules governing contracts. The courts of the situs might also determine questions of intestate succession to an interest in local land that they consider to be personal property for local law purposes in accordance with the law that would be applied by the courts of the state of the decedent's domicile at death on the ground that, since the particular interest is characterized as personal property for local law purposes, it should be governed for succession purposes by the law applicable to movables. So if these courts characterize a leasehold or mortgage interest in local land as personal property, they might hold that questions of intestate succession to such an interest should be determined in accordance with the law of the state of the decedent's domicile at death. Whichever law would have been applied by the courts of the situs in the decision of the particular issue will likewise be so applied by the forum.

A. ***Validity and Effect of Will of an Immovable***

Whether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs. These courts would usually apply their own local law in determining such questions.

The rule of this Section is applicable to questions relating to testamentary dispositions of interests in land. Thus, the law selected by the present rule determines the capacity of a person to make a will or to accept a devise, the formal validity of the will and the validity of the will in other respects, such as whether it violates the rule against perpetuities or constitutes a forbidden gift to a charity, the nature of the estate created, and whether land acquired after the execution of the will passes under its terms. Questions concerning the required from of the will and the manner of its execution also fall within the scope of the present rule.

Questions relating to a testamentary disposition of an interest in land are determined by the law that would be applied by the courts of the situs. These courts would usually apply their local law in deciding questions relating to a testamentary disposition of an interest in local land. They would do so in the case of issues in which the situs has the dominant interest, such as what categories of persons may own land, the conditions under which land may be held and the uses to which land may be put. These courts would also frequently apply their local law to issues in which it might be thought that the situs does not have the dominant interest.

Capacity of Testator

The courts of the situs would usually apply their own local law to determine the capacity of the testator to make a valid will insofar as it devises an interest in local land. These courts might hold, however, that some rule of incapacity is applicable only to local domiciliaries and hence does not affect a testator who dies domiciled in another state. These courts might also apply the local law of another state on the ground that the concern of that other state in the decision of the particular issue is so great as to outweigh the values of certainty and predictability which would be served by application of their own local law.

The order admitting a will to probate in the state of the situs will determine, among other things, that the testator had the requisite capacity to make a valid will. For this reason, application by the courts of the situs of the local law of another state to determine issues relating to the testator's capacity should not lead to inconvenience or result in the insecurity of land titles. Since the testator's capacity will have been conclusively established by the order, it will not be necessary for title searchers and others to consult the local law of another state with respect to this issue.

Capacity of the Beneficiary

The situs has an obvious interest in the question who may hold title to interests in local land. For this reason, the courts of the situs, would usually apply their own local law to determine the capacity of the devisee to take and hold an interest in local land. These courts might hold, however, that some local rule of incapacity is applicable only to local domiciliaries or to local corporations. So these courts might look to the local law of the state of incorporation to determine whether a corporation has the requisite capacity to receive a particular devise.

Formal Requirements for Validity

As here used, the term "formalities" applies to such requirements as those of a writing, of witnesses and of acknowledgment. Statutes in many states provide that a will of interests in local land shall be upheld as to formalities if it complies either with the state's own requirements or with the requirements of one or more other states, such as the state where the will was executed or where the testator was domiciled at the time that the will was executed or where the testator was domiciled at the time of his death. If the state of the situs has such a statute, its provisions will be applied by the courts of other states.

The order admitting a will to probate in the state of the situs will determine, among other things, that the will was executed with the proper formalities. For this reason, a statute at the situs which provides for application of the local law of another state to determine issues of formalities will not lead to inconvenience or result in the insecurity of land titles. Since the order will have conclusively established that the will is valid as to formalities, it will not be necessary for title searchers and others to consult the local law of another state with respect to this issue

Other problems of validity

Frequent questions, involving aspects of validity other than capacity and formalities, relate to the rule against perpetuities, restrictions on testamentary gifts to charity and restrictions on testamentary trusts.

The situs has a substantial interest in determining the uses to which the land may be put and the conditions under which the land may be held. Hence the situs courts would almost invariably apply their own local law to determine the validity of a testamentary provision which directs that the land shall be put to a certain use. On the other hand, these courts, unless prohibited by a strong public policy, might apply the local law of another state in a situation where the will directs that the land should be sold and the proceeds transmitted to the other state on the ground that under the circumstances the state of the situs has no substantial interest in the disposition of the proceeds of the sale. Similarly, the courts of the situs would almost invariably apply their own local rule against perpetuities to determine whether an interest sought to be created in the land by the will cannot take effect because the power of alienation is suspended for too long a period. On the other hand, again, these courts might apply the rule against perpetuities of another state in a situation where the will directs that the land be sold and the proceeds transmitted to the other state.

With respect to testamentary gifts to charity, the courts of the situs would almost certainly hold that a statute intended to regulate the ownership of local land by charitable corporations is applicable to the will of a foreign testator, since the question of what categories of persons can own local land is of primary concern to the state of the situs. The question is more difficult if, as would usually be the case, the purpose of the statute is to protect the testator's family against overly generous gifts to charity. To date, the courts of the situs have usually applied a local statute of this sort to invalidate a charitable devise in the will of a foreign testator even though he died domiciled in a state whose law did not give his family any similar protection. Similarly, the courts of the situs have to date usually refused to invalidate a charitable devise which was not invalid under their own local law by application of the statute of the state where the testator was domiciled at

the time of his death. It may be, however, that in the future situs courts will, at least on occasion, determine the validity of a charitable devise of an interest in local land by application of the local law of the state where the testator was domiciled at the time of his death on the ground that this state has the dominant concern in the protection of the testator's family.

In many states, the order admitting a will to probate does not determine the validity of a particular devise. In such states, application by the situs courts of their own local law to determine questions of substantial validity would favor the convenience of title searchers and the security of land titles. Application on occasion by the situs courts of the local law of another state to determine the substantial validity of a devise of an interest in local land would to some extent at least complicate the task of title searchers and of other persons interested in land at the situs. Such persons could no longer safely restrict their attention to the local law of the situs in determining the substantial validity of a particular devise. There would be situations, perhaps uncertain both in their nature and number, where the local law of one or more other states would have to be consulted.

In any event, whichever law would have been applied by the courts of the situs in the decision of the particular issue will likewise be so applied by the forum.***Validation***

Situations will arise where a will, although invalid under the local law of the situs, is valid under the local law of some other state having a close contact with the case, such as the state where the testator was domiciled at the time of his death. If in such a case the courts of the situs would uphold the validity of the will by application of the local law of the other state, the forum will do likewise. The courts of the situs might be particularly likely to reach such a result in a situation where the difference between their own local law and that of the other state is relatively slight and does not stem from a significant divergence in policy. In such a case, the courts of the situs might feel it more important to give effect to the intentions of the testator by upholding the will than to insist upon a rigid application of their local law.

B. Revocation of will

The effect upon a will, insofar as it concerns immovables, of an intentional act of revocation by the testator, such as the physical destruction of the will, is determined by the law that would be applied by the courts of the situs. The same law will be applied to determine whether the will has been entirely or partially revoked by operation of law, such as by marriage or by the birth of a child subsequent to the will's execution.

The courts of the situs would usually apply their own local law in deciding such questions. Sometimes, however, these courts would apply the local law of another state. So these courts might interpret a local statute, providing that a will shall be held valid as to matters of form if it complies with the requirements of the state where it was executed, to mean that a revocation likewise shall be held valid as to matters of form if it complies with the requirements of the state where the act of revocation was done. These courts might also apply the local law of another state in still other circumstances on the ground that the concern of that state in the decision of the particular issue is so great as to outweigh the values of certainty and convenience which application of their own law would achieve. An example might be a situation where a testator, domiciled in state X, owns land in state Y and where under X local law a will is revoked by subsequent marriage or divorce. Here the Y courts might feel that X has the primary concern in determining whether a will has been revoked under such circumstances and that consequently X local law should be applied.

Likewise, the courts of the situs would usually refrain from applying their own local law, or would apply the local law of another state, in situations where to do otherwise would defeat the expectations of the testator. An example might be a situation where the testator does an act which would not revoke the will under the local law of the state of his domicil but would do so under the local law of the situs. In such a situation, the situs courts would probably not apply their local law and hold the will revoked if, in their opinion, such action would defeat the expectations of the testator.

C. Construction of a Will Transferring an Immovable Property

A will insofar as it transfers an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the will. In the absence of such a designation, the will is construed in accordance with the rules of construction that would be applied by the courts of the situs.

The effect of words used in a will may be determined in any one of three ways. On rare occasions, the words may be given a particular legal effect irrespective of the intentions of the testator. In the second place, the words may be given a meaning which it is believed, on the basis of the available evidence, was the meaning the testator intended the words to bear. This process, which is referred to as interpretation is employed in the great majority of situations. Thirdly, situations do arise where the court is not presented with a satisfactory basis for determining the testator's intentions and where a rule of law is employed to fill the resulting gap in the will. This third process is here referred to as construction.

Legal effect.-The use of certain words in a will was followed at common law on rare occasions by definite legal consequences that were quite independent of the intentions of the testator. If such a rule exists in the local law of the state of the situs, it would usually be applied by the situs courts even in the case of a testator who died domiciled in another state. If so, the forum will do likewise.

Interpretation.-The meaning of words used in a will depends upon the intentions of the testator except in those rare situations where the words are given a prescribed legal effect. In ascertaining the intentions of the testator, the forum will consider the ordinary meaning of the words used, the context in which they appear in the will and the circumstances under which the will was drafted. The forum will consider whether the draftsman was probably using the language of the state where the testator was domiciled at the time when the will was executed or of the situs of the land. The forum will also consider any

other properly admissible evidence that casts light upon the intentions of the testator. The question to be determined is one of fact rather than one of law. The forum will apply its own rules in determining the admissibility of evidence , and it will use its own judgment in drawing conclusions from the evidence.

Construction.-If it is found impossible to ascertain the testator's intentions from the evidence, a rule of law is employed to fill what would otherwise be a gap in the will. This is done in order to carry out what was probably the testator's intention, or what probably would have been his intention, if he had foreseen the matter in dispute.

When designated law. The forum will give effect to a provision in a will that it should be construed in accordance with the rules of construction of a particular state. It is not necessary that this state have a substantial connection with the testator or with the land. This is because construction is a process for giving meaning to a will in areas where the intentions of the testator would have been followed if these intentions had been made clear.

When the testator designates the law of a state as the applicable law in matters of construction, it is to be inferred that he intends the local law of that state to govern. The forum will therefore apply the rules of construction of the designated state. Despite the absence of an express designation, it may be apparent from the language of the will or from other circumstances that the testator wished to have the local law of a particular state govern the construction of the will. In such a case, the rules of construction of this state will be applied.

When no designated law. When the testator has not provided that his will should be construed in accordance with the rules of construction of a particular state, and when his desires in this regard are not otherwise apparent, the forum will construe the will in accordance with the rules of construction that would be applied by the courts of the situs. The question is whether these courts would apply their own local rules of construction or the rules of some other state, such as the state where the testator was domiciled at the time when the will was executed.

Application of the rules of construction of the state of the situs may be justified in those states where the final decree of distribution does not amount to a judicial construction of the will. In those states, in the absence of a decree construing the will in an action brought for this purpose by an interested party, title searchers will have to use their own judgment in construing a devise in a chain of title. Hence it would appear that in such states both the convenience of title searchers and the security of titles would be served if the rules of construction of the situs were always applicable. Otherwise, there would be situations, perhaps uncertain both in their nature and number, where the rules of construction of one or more other states would have to be consulted.

Even in such states, however, there are weighty reasons favoring application of the rules of construction of the state where the testator was domiciled at the time the will was executed. The testator is more likely to have been familiar with the rules of this state than with those of the state of the situs, and the same is true of the lawyer who drafted the will provided that he was employed in the state of the testator's domicile. The land may be located in two or more states. If so, it is almost certain that the testator intended the words used in the will to bear a single meaning and not mean perhaps as many different things as there are states in which there is land covered by the will. Also, the land may have been acquired after the execution of the will. Furthermore, application of the rules of construction of the state of the testator's domicile is desirable in the interest of applying a single rule not only to his movables but also to his land wherever situated. The purpose of construction is to carry out the testator's intentions and it is probable that he intended the words used in the will to bear the same meaning throughout and not mean perhaps different things when applied to land and to movables.

There would seem to be little justification for applying the rules of construction of the situs rather than those of the testator's domicil in those states where the final decree of distribution amounts to a judicial construction of the will. In such states, questions of construction can easily be determined by an examination of the decree.

It should be reiterated that the significant domiciliary state will almost certainly be the state where the testator was domiciled at the time the will was executed and not the state where he was domiciled at the time of his death. A change of domicil after the execution of the will could hardly be considered as affecting the meaning of the words used therein. Whichever rules of construction would be applied by the courts of the situs will also be applied by the forum.

Rules Governing Choice of Laws in Property Under the Federal Conflict of Law

The Federal Draft Conflict of Laws Proclamation has got some provisions dealing with choice of law in property. In this subsection we will try to see the content and scope of these provisions in comparative way and evaluate very briefly their adequacy to enable Ethiopian courts to appropriately deal with cases. The presentation in the draft seems to treat property issues of ownership and possession in one hand and maters of succession on the other in separate chapters. For purpose of convenience let us start discussing the provisions dealing with ownership and possession.

Rules Governing Choice of Laws in Relation to Procession and Ownership of Properties

The part dealing with ownership and possession has got four provisions covering matters related to ownership, possession and any other right in rem over corporeal property; the exception provision dealing with goods in transit; pledge of claims and securities and matters related to intellectual properties.

A brief look at the provisions of Art.69- 72 reveals that the drafter approaches classification of properties in to corporeal and incorporeal. This, even if generally recognized as one method of classification, does not follow the conventional classification of properties in to movables and immovable as is the case with all other

jurisdictions. This classification based on movability or immovability is developed as discussed elsewhere in this material for the very reason that different principles guide choice of law for these categories of properties. However, the provisions in the draft proclamation are very general and covering all types of corporeal properties. This does not provide different rules for the movable and immovable properties as suited for their nature. In the US the second restatement separately treats rules governing movables and immovable.

Art. 69 of the draft reads: *"possession, ownership and any rights in rem relating to corporeal property shall be governed by the law of the place where the property is situated."* From the clear import of this provision one can understand that all matters related to possession, ownership and any other rights in rem like servitude, bare ownership, and usufruct and the rights arising from mortgage, pledge etc of both movable and immovable corporeal properties would be governed by the law of the situs. This is a blanket application of the situs rule invariably to all isues related to corporeal properties. This generalization and over emphasis on the law of the situs is ill fitted for the different nature of properties. At least when it comes to movable properties in conflict of laws the place where property is situated is not as essential in cease of immovable.

Moreover provision does not provide specific rules governing specific dealings with properties. As we have discussed earlier there are separate rules for conveyance and its effects for both movables and immovables. Separate rules for encumbrances and their effects are also provided. However the present draft will not enable courts of Ethiopia to appreciate the different nature of the dealings in relation to property rights. It would have been better if a detailed rule governing the different dealings in relation to movable and immovable properties is provided.

The provision under Art.70 states one important exception to the blanket rule of law of the situs governing all matters related to corporeal properties. This is the exception related to goods in transit. As goods in transit are found in the place where they are currently found only temporarily it is believed that it would not be reasonable to subject them to the law of a place they temporarily found. This would create unreasonable inconvenience to the disputing parties. It is rightly stated by the provision that the law of the place of destination would be more appropriate. This is currently a generally recognized rule both in Europe and USA.

The provision of Art.71 deals with pledge of claims and securities and other rights. This provision states that pledge of claims, securities and other rights shall be governed by the law selected by the parties. Therefore if the parties to pledge contact also made choice of law to govern their dispute then the law accepts this choice. However if the parties fail to make choice the default rule is s that the issue shall be governed by the personal law of the pledgee. It is true that the source of pledge as a juridical act is contract.

Concerning the scope of the provision there are some points worth mentioning which were not considered by the provision. First of all the provision does not cover any other dealings in relation to corporeal properties other than pledge. However pledge is not the only juridical action that could be made. The draft proclamation does not deal with the method of creation and transfer of these incorporeal rights at all this is a very grave gap that needs immediate attention. More over even if the parties could agree as to the governing law concerning their dealing the general rules governing contract provide important limitation to this freedom. The parties are not free to choose the law of a country of their liking. The law selected by the parties should have some relation with the parties or the transaction. This provision does not provide such important limitations.

The draft proclamation has provided separate article to deal with issues related to intellectual properties. As it is stated under Art.72 rights in intellectual property shall be governed by the law of the country in country in which those rights were created provided, however that the court may apply Ethiopian law when the defendant is an Ethiopian origin the interest of Ethiopia to do so. The message of this provision is that

matters relating to intellectual property should be governed by the law in which they were first recognized and registered as the appropriate place. It is only in exceptional circumstances that the Ethiopian law will be given priority to all other laws. This situation is where the defendant is of an Ethiopian origin and it is in the interest of Ethiopia to apply its laws that the Ethiopian law may be applied.

The terminology used in this provision when it states the defendant is of 'Ethiopian origin' it is very vague and ambiguous. Is it to refer the defendant is Ethiopian domiciliary or Ethiopian nationality or Ethiopian by blood even if he is currently domiciled outside Ethiopia or acquired foreign nationality? The idea seems to emphasize that if the defendant has got some strong relationship with Ethiopia, the laws of Ethiopia may be more relevant to govern the dispute. This may lead us to conclude that if the defendant is of Ethiopian domiciliary he deserves to be governed by Ethiopian law.

This provision seems to have elements of the governmental interest analysis theory in itself with its reference to the expression '…when the defendant is an Ethiopian origin and if it is in the Ethiopian interest to do so.' here the judge is supposed to identify the interest of Ethiopia if any in the dispute between the parties and weigh them whether they mandate the application of Ethiopian law.

In general the provisions in the draft conflict of laws dealing with property are incomplete and wanting both in relation to their scope and content. They are very general and lack clarity. Moreover the classification of property in to the generic category of corporeal and incorporeal does not seem appropriate in light of the specific nature of movable and immovable properties and the different governing law they accordingly require. Unless they are modified to include specific rules dealing with the various transactions related to property they may not be very helpful.

Rules Governing Succession on Death

Coming to the provisions of the draft proclamation dealing with succession to properties of the deceased person we have some three provisions.

The approach used in this part in classifying properties is in to movables and immovables. This seems to be in line with the practice of other countries we have discussed in the previous parts of the material. The problem, however, is that they deal with the two types of testate and intestate succession together in general terminology.

In terms of content however, as stated under Art. 66, it makes succession of immovable property to be subject to the laws of the place where the property is situated. This is a generally accepted rule in other countries also. This emphasizes the importance of the place of sitis for all matters relating to the immovable property one of which is transfer by succession. The provision of Art 67 on the other hand, deals with succession to movable property. It provides that succession to movable property whether testate or intestate shall be governed by the personal law of the deceased at the time of his death. Both provisions lack sufficient specificity to enable Ethiopian judges identify and apply the appropriate law governing the matter. It seems that all issues related to succession except construction of will are supposed to be governed by single law. It tries to separately govern under specific provision of Art. 68 matters relating the substantive validity of testamentary provisions and other provisions mortis cause and the construction of the intention of the testator or person making the provision .And it makes them subject to the personal law of the deceased at the time of his death, .i.e. the law of his domicile.

Generally, the content of the above stated provisions seems to be similar to the principles embodied in the laws and practices of other countries we have discussed. However, they lack specific details that would enable courts of Ethiopia too deal with the various issues that arise in this connection. For instance the provision dealing with wills does not cover issues related to formal validity of wills. They need some detail to make them capable of guiding Ethiopian courts to decide cases containing foreign element.

Summary

In this chapter, we have been discussing the main rules governing choice of law in property situations. People belonging to different jurisdictions may involve in transactions with property rights. Property situations in conflict of law group themselves around ownership, procession, and right of special creditors such as security or privilege.

Thus, in this chapter we have discussed the relevant questions that should be addressed in conflict of laws rules dealing with property which include: what law governs the creation, transfer and effect of property right? What are the different transactions in relation to property that would give rise to conflict of laws issues and what rules are available to resolve such issues? More over questions like which law should determine whether the property should be considered as movable or immovable are immovable and movables subject to the same law and other relevant questions are addressed.

The problem of creation, transfer, and effect of property rights in conflict of laws arise where a property interest involves more than one state. We have seen that different scholars at different times have suggested different solutions for this problem. Some argued like the *statutists*, immovables and movables were governed by the law of the *situs* and personal law of the owner respectively. This doctrine has, however, not acquired importance in the modern times. Nowadays, the tendency is such that both immovables and movables are governed by the *lex rei sitate, i.e., the law of the state in which the properties are situated.*

We have also noted that the definition of what properties are movable or immovable is different from country to country and it affects the outcome of cases. As we have seen authorities and the jurisprudence of many countries hold that the *lex situs* decides whether the property is movable or immovable.

The other important matter discussed was the general rule that governs choice of law for the creation, transfer and effects of property rights both in movables and immovable is the law of the situs. This law is wider in its scope of application. It is submitted that this rule should be quite broad and should include all questions related to capacity and formal requirements for the transaction.

Apart from the above general consideration, it is necessary for students of conflict of laws to know the specific rules governing different transactions that could be made on movables and immovable.

Transfer of rights in immovable property may occur by a contract entered between the parties in which case it is called conveyance or by operation of the law where the transfer comes about by other means than conveyance by the owner of the property. In the United States of America and in European countries, the general rule is that the *lex situs* is the governing law for all questions that arise with regard to immovable property. Issues falling within the scope of this rule are the capacity of the party who conveys to make an effective conveyance, the capacity of the party to whom the conveyance is made to acquire the interest involved, the formal validity of the conveyance, the validity of the conveyance in other respects, and the nature of the interest transferred.

Movable properties are classified in to corporeal and incorporeal categories based on whether the property has a physical manifestation or not. In conflict of laws corporeal movable properties are also known as choses in procession, while incorporeal movables identified by the name choses in action. It should be noted that different rules apply to these categories of movable properties. In relation to corporeal movables , there are various theories providing for the basis for selection of the governing law. In this regard mention should be made of the doctrines of *lex domicili, the lex citus , the lex loci actus* and the doctrine of *the proper law of the transfer*.

Among the above four alternative doctrines, the modern approach of choice seems to be between the lex situs and the proper law of the transfer. Nevertheless, it cannot be said that either of them governs to the exclusion of the other or that where they clash one of them must be applicable than the other. Which should prevail depends up on the nature of the issues at hand i.e., whether the issue is contractual or proprietary.

Intangible movables or choses in action or as known under the Ethiopian law incorporeal properties may manifest different nature than the corporeal properties deserving separate treatment. These intangible properties may be divided in to two depending on whether they are represented by a document or not. The first group is those rights which are mere rights of action entitling their owner the right to claim payment. The second category is those rights which are represented by some document or writing that is not only capable

of delivery but in the modern commercial world negotiated as a separate physical entity. A debt arising from loan or an ordinary mercantile contract is an example of the first category, while the second category is commonly exemplified by negotiable instruments and shares. Because of their nature it is advisable to treat the two categories separately.

Property may be used to secure liabilities or the right of the owner may be encumbered by the right of other persons created on the property either by law or contract. Under this chapter we have dealt with the rules governing the creation and effects of the different forms of encumbrances that could attach both movables and immovable properties. Concerning encumbrances on movable property, the validity and effect of a security interest in a chattel as between the immediate parties are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties. In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel at the time that the security interest attached than to any other contact in determining the state of the applicable law.

As to rules governing choice of law on issues related to encumbrances attaching immovable property, the law of the situs is given much weight. Whether a mortgage creates an interest in an immovable property and the nature of the interest created are determined by the law that would be applied by the courts of the situs. These courts would usually apply their own local law in determining such questions.

The other important issue that is related to property rights is transfer through succession. Concerning choice of law governing intestate succession, that has been established for some two centuries is that that , movable property in the case of intestacy is to be distributed according to the law of the domicile of the deceased person at the time of his death. Thus the devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death.

The general principle established concerning testamentary succession of movables both in England and U.S.A is that it is governed exclusively by the law of the domicile of the deceased as it existed at the time of his death. The rule is applicable to questions relating to testamentary dispositions of interests in movables.

Coming to the position taken by the Federal Draft Conflict of laws in general the provisions in the draft conflict of laws dealing with property are incomplete and wanting both in relation to their scope and content. They are very general and lack clarity. Moreover the classification of property in to the generic category of corporeal and incorporeal does not seem appropriate in light of the specific nature of movable and immovable properties and the different governing law they accordingly require. Unless they are modified to include specific rules dealing with the various transactions related to property they may not be very helpful.

Generally the content of the provisions of the draft conflict of laws proclamation dealing with succession seems to be similar to the principles embodied in the laws and practices of other countries we have discussed. However, they lack specific details that would enable courts of Ethiopia too deal with the various issues that arise in this connection. They need some detail to make them capable of guiding Ethiopian courts to decide cases containing foreign element.

Review Questions

After reading the material thoroughly, answer the following questions and problems.

Part I: Questions

1. What is the main Rule governing Choice of law in Property?
2. Describe the doctrine of *lex rei sitate* and its importance in resolving property disputes in general.
3. Why is it important from point of view of conflict of laws to classify property in to movable and immovable? What is the significance of such classification?

4. What is the general rule recognized in many jurisdictions concerning the the question in accordance which law characterization of a property in to movable and immovable be made?
5. What is the guiding principle in choice of law governing dealings with immovable in US? What about in Ethiopia?
6. How do you compare the approach taken by the US Second Restatement and the Federal Draft Conflict of Laws Proclamation concerning issue of immovable?
7. What short comings can you identify in the Federal Draft Conflict of Laws proclamation concerning procession and ownership of immovable properties?
8. What law supplies the governing rules concerning procession and ownership of movables under the US, under English and under Ethiopian legal systems?
9. Compare the above three systems in question No. 8 and identify the strength and weakness of the Ethiopian Federal Draft Conflict of Law.
10. What is the practice of Ethiopian Courts concerning procession and ownership of movable and immovable properties?
11. What are the rules governing encumbrances attaching immovable and movables properties under the US legal system? Do we have under the Federal Draft Comparable rules governing such issues? Discuss.
12. Describe the guiding principle for choice of law in succession of movable and immovable in testate cases. What is the position of Ethiopian Federal Draft Conflict of laws?
13. What guides intestate succession on movables and immovable in US legal system? What about in Ethiopia?
14. What is the practice of Ethiopian Courts on succession of movables? Immovable? Both testate and intestate?

Part II: Hypothetical Cases

Case One

Mr. Sandiago is national of Greece having a profitable business in Ethiopia, Dire Dawa; he has a wife back in Greece, Mrs. Laura Sandiago. He lived in Dire Dawa for the past ten years and visiting his wife once every year. He also had two sons one born out of wedlock in Ethiopia, from an Ethiopian mother and the other born from his wife Laura, a Greece national, in Greece. He has life insurance with Awash Insurance Company, in which he stated in the beneficiary part "in the event of my death pay my lawfully wedded wife and my law full children". Mr. Sandiago died of a car accident when he travels from Dire Dawa to Addis in the town of Adama.

The marriage of Mr. Sandiago and Laura was celebrated in Spain, Madrid .The Family Law of Spain requires that celebration of marriage should not be validly held unless the future spouses produce a certificate of HIV test, which Sandiago and Laura did not comply with.

Assumptions: The family law of Greece permits the law full wife to inherit one fourth of the share of the Husband's Property in addition to the half share of the common property she would get as a wife. Moreover, the law does not permit an illegitimate child to inherit his father.

Now, based on the above stated facts and the facts that will be state in the questions, answer the following questions.

1. Assume that Ethiopian courts have jurisdiction and the court follows the classical choice of law method, and the court framed issues as to the validity of the marriage of Mr.Sandiago and Miss. Laura. Which law governs the case?
2. Which law governs the case concerning the succession to the Business of the deceased? Would the wife and her son have the right to succeed?
3. Can the illegitimate Ethiopian son intervene and claim participation in succession?

Case Two

Ato Selamu, an Ethiopian national, died domiciled in Greece leaving movables in Ethiopia and in Greece, and movables in Greece .By his will, Ato Selamu gave his property in Ethiopia to his nice Mustafa and his property in Greece to his nephew Demeke with usufruct to his mother Alemitu for 20 years.Ato Selamu's only son Zeleke claims that by Greece succession law he is entitled to one half (1/2) of the property his legitimate portion. Therefore Zeleke argues that his father's will is not valid.

Now based on the above stated facts, answer the following questions:

1. On the basis of what law is the validity of the will in respect to the movables is governed? What about the immovables?
2. Assume that expert testimony revealed that the Greece courts would refer to Ethiopian law as the law of Ato Selamu's nationality in respect of the movables and immovable, what law should you think would govern the case?

Unit Eight

Marriage

Unit Objectives

At the end of this unit, students will be able to:

- Discuss the main issues involved in choice of law involving formation ,effects and termination of marriage (divorce);
- Describe the doctrine of *lexloci celebrationis* as a major rule used to determine formal validity of marriage;
- Discuss the different tests developed over the years to determine substantive validity of marriage;
- Describe the position taken by the different regional family laws concerning formation effects and termination of marriage;
- Discuss the position taken by foreign jurisdiction regarding the issue of choice of law in marriage and;
- Suggest solutions to the current gap created by the absence of binding conflict of law rule in Ethiopia

8.1 General Introduction on Status

Most of the issues in family relations belong in an eminent degree to the personal sphere and therefore concern (personal) status matters. And, as a consequence, most of them come very largely within the orbit of “the personal laws" whose determination clearly affects the interests of the individual or individuals whose status is are in issue. And more importantly, it should be emphasized that the law of family relations and others that involve capacity are amongst the branches the personal law is of the greatest importance. In line with due process, a person's acts are, most of the time, governed by the law which he expects his action will be subjected to. The person and his acts are considered to have

certain contacts with certain jurisdiction's laws more than any other laws. Therefore, to the maximum extent possible one should try to be fair enough to measure or judge the person and his acts by the laws of the jurisdiction he has much greater contact as to be stipulated by the choice of law rules. In other words, due process should be respected. Contact counting and weighing should be reflected in the rules. Why is contact emphasized this much?

Contact, especially in personal status touching cases, is important for the laws governing such are designed in a way they reflect relevant factors such as cultural ties or habits, ethnic origin or other background like economic circumstances, temperament and morality of the person, etc.

The contact element helps us direct to find the applicable law via the technique of choice of law rules. The applicable law is the law of the place where the transaction or the person has more contact when compared to the laws of other places. As we will see it later, it is this place that we call it "*situs*". Hence, the foundation of principles of the choice of (family) laws is situs. Every element known to the law has a situs somewhere and the law of that situs will regulate and control the legal effects of that element.

To reduce the discussion to our present concern, i.e. personal status, it necessarily has its own situs. Therefore, situs of status follows situs of the person....the law which governs the person is in general the law of his situs, which is not necessarily the place the person temporarily happens to be. Hence, the law governing the status of the person is the law of his situs. The law of the person's situs then is "the proper law" or the applicatory law controlling the status.

Most conflicts scholars and laws of countries employ the term connecting factor, which is equivalent to situs. Where is this situs or what can be the connecting factor employed for personal status matters in general and family matters in particular? There is difference of opinions on this score.

Different states have developed different connecting factors that help them find applicable law to solve a case with a foreign element. The major ones, which are even considered as leading principles, are nationality and domicile. Of course, literature of the discipline witnesses that some states employ "residence "or" habitual (principal) residence" in place of domicile. It can be generalized that many states seek the most appropriate and relatively speaking more suitable test that has "most intimate and most tense connection" of a person with a given legal system for the purpose of regulating one's personal status.

Just to mention it out of curiosity; generally, the continental countries use nationality principle, which the common law advancing countries (esp. the U.S and England) use the domicile principle. States have tried to rationalize their basis of choice of connecting factors on different reasons. Which one of them is suitable to the current situation of Ethiopia? Regarding the interstate problems of family nature, simply, nationality cannot be applicable. Both parties are either virtually always Ethiopians or they are looking for a state law. Even for the choice of family laws of an international nature, for we do not have a national family law, aside other substantive and practical reasons, adopting nationality as a connecting factor is not proper.

Rather, an important issue that one might ask at this juncture is, why we prefer domicile rather than habitual or principal residence or simply (ordinary) residence. In accordance with the currently in force law in our country, which we must employ until a law of domicile for the purpose of choice of law is proclaimed, the writer suggests that primarily we should employ domicile and, in its default, the other related concepts as subsidiary or supplementary connecting factors according to their degree of strictness in the ways they can be *acquired*. The draft law also, generally, adopts domicile.

The fertile ground to manipulate the choice of rules is found in habitual (or principal) residence and for stronger reason in ordinary residence more than in domicile. In other words, one can easily acquire residence in a certain state whose laws are favorable and then institute a suit in order to get undue advantage of that state's laws. It is more difficult

to acquire domicile in order to achieve a similar goal. Moreover, taking the stability or the state of being constant nature which is desirable in the field of family status; domicile controls. In other words, the application of the law of domicile ensures a certain amount of stability to a greater extent or degree than that of residence. The intention element in domicile, which is absent in residence, matters.

Our discussion is related to the contact (significant or sufficient contact) element, which is strictly required point to establish the relevant applicable law. The more one has contact with a given legal system, the more will be fair and appropriate for one's conduct to be regulated pursuant to that law. This is all what we mean by due process in the choice of law process. One's contact with a domicile's law is more solidified, most of the time than one's contact with that of residence's law, that are not necessarily the same. In other jurisdictions the duration required for one to establish residence is shorter than that of domicile. As one lives longer in one place, one will create more contact with that place's legal system. The contact of a resident to a given legal system is loose when compared to that of a domiciliary.

Admittedly, one difficulty is attached with the concept of domicile: it involves a subjective test of *animus manendi* or intention that leaves a broad margin of doubt and discretion to the judge, which is not to be encouraged in most circumstances. However, this is not a problem with a 'no way out'. Although not conclusive enough to do away with the problem, there are certain weighty evidences that can, to some extent, help find the intention of somebody who makes a certain place where the following things exist or are done as one's permanent home. These are the conduct of one's business, the presence of one's family, one's voting, the payment of one's taxes, etc. Arts 183 *cum* 185 of the 1960 Civ. C. employ substantially similar criteria. (See the immediately below section on this score).

Amongst the currently in force family laws of the states of the FDRE, only the Amhara Family Code (AFC) has provided us with a definition of marriage. According to this law, marriage is a relationship whereby a man and a woman, having attained majority,

officially establish out of their own free will and consent with an intention to sustainably live together united in law, or a legal institution structured as a result of this relationship thereto. (Art.11) Although none of the other family laws defined the term, one can come up with a definition of similar nature if one collects the elements needed for definition from the different provisions of the respective family laws.

In other jurisdictions, while the term marriage is primarily used to designate "the state or condition of being married", it is also used to refer to the act of becoming married or to the ceremony in which one becomes married and to the legal contract that makes a man and a women husband and wife. Still another definition: "the status or relation of a man and a women who have been legally united as husband and wife or the voluntary union for life of one man and one woman as husband and wife to the exclusion of others, for the discharge to each other and to the community, of the duties legally incumbent on the married persons."

From the above definitions one can understand that the differences amongst them have some important implications. The values attached to them have some differences. For example, the definition that declares marriage as a permanent relationship (for life) between the couple has a big policy difference from most of the present family laws of the FDRE states that have promulgated same. Their outlook towards divorce is different. As will be seen in its appropriate section, the present family laws have adopted liberal view towards divorce. On the other hand one can imagine the possibility of divorce in a "for life" marriage. It is difficult if not impossible.

Although the extent is limited, there are important differences amongst the current family laws of the states of the FDRE. Even some of the differences have behind them important policy implications that are important in choice of law discussions. Subsequently, we will see the main possible policy behind the family laws as to marriage. The other possible policies to be advanced by the family laws are discussed separately in their respective sections. For example, policies of the laws as to divorce are discussed on the section dealing with divorce, divorce laws and choice of law rules as to divorce.

8.2 Law of Marriage

8.2.1 Introduction

Among the areas of law in Ethiopian federal set up, the most relevant acute problem of conflict of laws arise in family cases. As stated previously, the regional states have enacted their own regional family laws. Therefore, the discussion, in this area, is not theoretical as it was with tort or property at least in interstate conflict of laws. It is a real problem that has to be tackled by the courts of Ethiopia. With this in mind in the following sections, we will deal with issues related to essential and formal validity of marriage, pblic policy consideration in this area and other relevant issues including matrimonial clauses, jurisdiction and recognition of foreign judgments in family disputes.

8.2.2 Formal Validity

According to Collier, no rules of conflicts is clearer or longer established or "universally conceded" than the one which lays down that the formal requirements of marriage are regulated by the *lex loci celebrations*, the law of the place where the ceremony of the marriage takes place. In other words, the state where the marriage was celebrated is the state that will usually be primarily concerned with the question of formalities such as the necessity of a license, the necessity of a formal ceremony, the person authorized to perform the ceremony, the manner of the performance of the ceremony, etc.

If the requirements of this state (the place of celebration) have been complied with, as a rule the marriage will not be held invalid in other states for lack of the necessary formalities. Hence, the old doctrine "marriage valid where celebrated is valid elsewhere." This is true even in a state of common domicile of the parties where stricter or different rules concerning formalities, in so far as they do not contravene public policies, are in force. However, if the law of the matrimonial domicile prescribes compliance with certain formalities to be very essential, amounting to policy requirements, failure to meet those requirements may preclude the recognition of the marriage celebrated out of the state.

Since the so far promulgated family laws employ and recognize substantially similar forms of marriage (i.e., religious, civil, and customary) together with their specific requirements, there will not be that much difficulty with the above choice of law rules problem. Most probably the other member states of the federation will enact family laws with similar provisions. Even they do not; however, the rule still persists for recognizing formal validity of marriage celebrated in another state with a bit different formal requirement does not usually affect substantive requirements of the forum/domiciliary state. But, if it unusually does so and such amounts to affecting some policy requirements of the domicile state of the spouses, it should be checked and tested by the formal requirements of the latter state.

Another general rule developed regarding the validity of marriage is that if a marriage was not celebrated in compliance with the *lex loci celebrationis* and therefore was invalid as to form under that law, but the spouses managed to be accorded with the certificate, their personal law would give recognition and upheld the marriage if it complies with the personal law's formal requirement. Some support this rule that the interest of the domicile is more significant than that of place of celebration. Even in certain situations, particular requirements of the state of celebration are interpreted as merely directory whose non-compliance does not invalidate the marriage rather subject the participants to minor form of punishment.

The general trend, one can observe from conflicts literature, as to choice of law rules of formal validity of marriage is that the rule is not that much strict. It seems that any state does not have very important interest in the formal requirements of a marriage. More importantly what is to be taken care of is, under the guise of formality, any basic value of the matrimonial domicile should not be infringed.

We have seen it above that the currently in force family laws are substantially similar as regards the formal requirements of marriage. Although the general presumption as to the possible future family laws is that they will come up with more or less similar requirements of form let us put ourselves in a narrow possibility that, may be, one of

them will enact a family law that includes formal requirements that are weighty enough to have a big impact on whether they fulfill or otherwise which may affect the validity of a given (esp. foreign or sister state) marriage in a domiciliary state. Let us buttress this idea using an example.

Ato Abebe Mulatu employs one scenario on this score. Suppose State X enacts a marriage law that requires future spouses to have blood test for HIV/AIDS before celebrating their marriage. W and H concluded their marriage in State Y where blood testing is not a prerequisite. They are now domiciliaries of State X. Will State X invalidate the marriage on grounds of the non-fulfillment of its formal requirements? Here, the doctrine "marriage valid where celebrated is valid everywhere" does not seem to work. It is important to consider whether such type of formal requirements(?) like blood test for HIV/AIDS have some policy implications. One may argue in the affirmative in that, for example, State X, the domicile, may want to make sure that her next generation (at least who are born in wedlock) is AIDS free. Although this does not seem to meet the whole problem, it gives its contribution to tackle the endemic, incidentally. Finally, the validity of the marriage will not be recognized until the formal requirement in question (of state X) is fulfilled. Meeting the formal requirements of state Y is not enough.

8.2.3 Essential Validity

Normally, marriage is a natural right that cannot arbitrarily be denied. However, it is not an absolute right. Within constitutional limits it is subject to state or public control and regulation with respect to its inception, duration, status, conditions, and termination. Moreover, the right to marry is made to depend upon the existence of the requisite mental capacity to consent to the marriage agreement, and is subject to certain qualifications as to age, physical capacity or condition, relationship between the parties, and freedom from an existing matrimonial alliance, etc.

As to a fully domestic case, concerning marriage, it is obvious that the state that the parties belong to shall have the authority to control it. But what about for a multistate case ─ a case that involves a foreign element? Many couples marry while domiciled in one state and subsequently establish a domicile in another state where an event occurs which require determination of the validity of the marriage.

Moreover, men and women of different domiciles may fall in love and marry in the state where they happen to be. Having these and other similar facts, which state is to control the marriage from its inception up to its termination? Which state is to control whether the substantive requirements to a valid marriage are fulfilled or not? It is far from obvious which law should determine such issues. Does it matter whether State A's or State B's family laws control it? Yes. Since different legislatures, guided by an enlightened sense of their public need, make laws that fix and regulate the marital relation on public considerations, according to the demands of propriety, morality, social order etc, and for these concepts are different in different localities, the necessary consequence is that for two states might have different family laws, the result matters whether State A's or State B's family laws control the validity (esp. essential validity) of marriage. So, which state's control?

The general rule developed and presently recognized by many countries to test the validity or permissibility of the capacity to marry is the personal status laws of the prospective spouses' common domicile or intended matrimonial domicile at the time of the conclusion of the marriage which is in accord with due process. This is the place where at the time of the ceremony the parties intend to, and after the ceremony, they both immediately do establish home - where the parties have "predominant contact" with and whose laws are most immediately before the parties. Such a state may have an interest sufficiently great to justify the invalidation of a marriage based on certain domestic grounds although it meets the requirements of the state where it was contracted.

In the absence of this principal rule, other similar but subsidiary connecting factors that are helpful to designate any circumstance capable of localizing an individual to a given jurisdiction with sufficient contact can be utilized.

Incidentally, the issue of the validity of marriage in most cases arises only as an incidental issue when cases of the incidents of marriage are raised principally. In other words, the principal issue in most multistate family matter litigations concerns property rights, support, divorce, etc. The issue regarding the validity of marriage arises only incidentally to the principal claim. The existence or otherwise of the status (here, validity of marriage) most of the time controls the question concerning each incident of marriage or its enjoyment. Beyond that "the determination of status is almost never the ultimate object of an action".

Another choice of law rule for the essential validity of marriage which is rival to the matrimonial domicile test and which is equally developed and advanced by modern writers is the dual or ante nuptial domicile test according to which if spouses have a capacity to marry each other by the laws of their respective domiciles during the ceremony, the marriage is to be held valid.

If we are to follow the dual domicile system, the spouses having been formerly domiciled in other states; if they establish another matrimonial domicile, say the forum, for their capacity to their relationship is governed by their domiciles (former ones) which accordingly is valid; the spouses, according to this rule, will validly consume their marriage even though any essential marriage condition of the forum's family law is frustrated by their relationship. The marriage law of the matrimonial domicile (a place other than the former two domiciles) will not govern the marriage of the spouses for other laws, former domicile's family laws, govern the latter.

This, however, amounts to enjoying a marriage relationship based on unjustified preference or discrimination. All spouses currently living in a state permanently or who intend to make such state their matrimonial domicile should be governed by the same law of that state. Two types of marriages (each subject to different laws) should not exist at one jurisdiction. All marriages whether they were concluded out of the state or within the state should be tested for their substantive validity by the forum's law.

Another rival basic principle, which came from the statutists, represented in its purest form by the dominant conflicts law of the U.S; is that the validity of a marriage as to either essential or formal, is as a rule governed by the law of the state in which the ceremony takes place. Hence; the rule a marriage good where contracted is good everywhere, and *vice versa*. The reason behind this rule that is in defiance of the traditional doctrine of status is perhaps that the machinery of marriage licensing has seemed inadequate to meet the unknown laws of the respective domiciles of the parties. And an avowed purpose of the principle has always been to make marriage possible for persons who could not marry under their domiciliary laws.

The writer adheres to the law of common domicile of the spouses for if either the law of respective domiciles or the place of celebration is employed in which the parties might not live either in either's domicile or the place of celebration, there might be a possibility for the contravention of the intrinsic conditions, and thereby possibly public policies, of the place the parties made their matrimonial home/domicile.

Legal capacity to marry constitutes substantive elements of the law that in case of their failure to be fulfilled render the relationship void or in most of the cases, at least, voidable. Although the parties have gone through a ceremony that is "formally" valid by the *lex loci celebrationis* and so valid in the state where celebrated, the marriage may but be considered as void or voidable if the spouses do not have the domicile's prescribed legal capacity to get married each other.

Chief amongst the legal capacity matters that arise in cases involving several types of substantive prohibitions upon marriage which advance certain policies are laws establishing a certain age below which parties are declared incapable of getting married for certain reasons, provisions against marriage of relatives within a certain prohibited degree of relationship (i.e., consanguinity and affinity)' statues concerning consent, and bigamy. For example, as we will see them along with their policy considerations in detail in the next subsections on their own comfort; if the place of ceremony permits bigamy, or marriage between infants younger than the domicile wants married or siblings, it is likely

to displease the domicile or more precisely the matrimonial domicile for the implementation of the relevant values or interests enshrined in the violated laws of the latter in the determination of the particular issue is of great importance in the area of choice of law with respect to marriage. As we will see them in detail, again, right after this section, there are important differences as to the essential conditions of marriage amongst the family laws that are currently being implemented. Presumably there might appear similar or other differences when the remaining member states proclaim their own respective family laws.

To argue from the point of view of the state of the matrimonial domicile; generally, any marriage between any parties, whether domiciliaries or not, will not be concluded there if the essential validity of the laws of the forum are violated, even they could do so (get married) by their own present personal laws, of course, if different from the law of common domicile. Equally a marriage celebrated in another state but violating the essential legal requirements of the forum state should not be upheld. Explained, it is not the violation of any rule but the "rules that the forum is likely to find embody a sufficiently strong policy … to warrant invalidation of an out-of -state marriage".

Furthermore, if one makes distinction between void and voidable marriages at this juncture, there is a further important point to be noted. Not the "violation" of an essential condition of marriage at any time would result in invalidation of a given out-of-state marriage. Of course; as mentioned in the immediately above paragraph's quote, a state should at any time refuse to recognize a marriage concluded outside its territory if it violates some of its "strong public policies". Strictly speaking, however, a marriage is considered to have always contravened the strong public policy of a domicile only if it has been legislatively labeled "void". Cases that fall under this category are subject to attack at any time without prescription or period of limitation and mostly by any interested body.

Similarly a state should invalidate a marriage concluded out of its sovereign territory only so long as it is at that time (time of invitation for invalidation) voidable. To illustrate, at

the time of marriage, out of the domicile, the present spouses did not attain the marriageable age. But now they do or if a marriage was bigamous but now the former wife has dead. It is no more bigamous. Etc. Hence, it will be recognized as valid. Time factor is pertinent in voidable marriages. It is not so, however, for *void* marriages in whose case a judge should not hesitate "to shoot the "marriage" down with the choice of law weapons" and the enjoyment of their incidents should be substantially prohibited.

Another situation to determine the substantive validity of a marriage celebrated in a state as to whose law the spouses lack capacity to marry but they managed to go through the ceremony. This is an issue because naturally no state would allow any would-be spouses to get married if they are not qualified in one way or another pursuant to its law. The general principle evolved is that if both parties have capacity to marry by their personal laws (*lex domicilli*) or more importantly by their matrimonial domicile, to be specific, the measurement of incapacity by the standard of *lex loci celebrationis* is to be ignored.

Still another situation is: suppose a certain family, for their own familial reasons, changed domicile after certain years of their marriage from one state, where their marriage was validly concluded or they were living at, to another state. What is the status of the marriage, which will obviously be viewed as foreign marriage, and the effects thereof in the latter state? It is provided that refusal to recognize the validity of a foreign marriage has unfortunate results, for it tends to render uncertain one of the most important of human relations, a relationship in which certainty is surely as imperatively demanded as in commercial transactions. In a mobile population, the family interests incident to marriage and the reasonable expectations there involved may change as the parties change domiciles and consequently the related states and their concerns must also be expected to change.

The factors of time and whether the attack on the marriage is internal or external (meaning parties other than either of the parties) are significant. In other words, the fact that a marriage lasts for a long time and is attacked by somebody other than a party "greatly strengthens the validation policies of sustaining expectation of the spouses and protecting those relying on the marriage.

If, however, the strong public policy of the present domicile is affected or if the violation of the new domicile's notion of good morals is fragrant, the marriage should be invalidated. However, this situation hardly occurs.

As mentioned in the previous section, always the law of the domicile where the parties currently *in fact* live as a family or the common domicile should be applicable. Besides it serves as a basic test for it is this state that is most significantly concerned with the marriage. The domicile or the place where the parties predominantly live as a family, changes with the mobility of the parties. The law should always bear in mind this situation and govern it accordingly. It, however, occurs very rarely since families, but a member of them, do not most of the time change domicile unlike residence with in a given state or territory or domicile. Even at the rare circumstances themselves, the validity of the marriage may not be impugned unless particular issues in a specific case such as if the parties get divorced or certain incidents of the marriage such as property matters are under controversy.

The above general discussion serves any interstate choice of law problems regarding *all* matters that touch essential validity of marriage amongst all the member states family laws currently in force and others to be proclaimed in the near further. Now, let us discuss the *main* substantive requirements along with their respective policies using the provisions of the present family laws as a frame of discussion.

**** Marriageable age***

Many family laws generally establish certain minimum age for marriage below of which parties are declared incapable of marrying. They do so for certain reasons.

Obviously, there might be justifications or policy reasons to be advanced through marriageable age stipulations. Some of them might be the following: generally, a certain domicile's interest might be protecting its young people by prohibiting early marriages which is harmful especially to the young girls and in effect to the society at large. She

will be psychologically and physiologically at a disadvantageous position. At her early teenage, in addition to being mentally immature, she is not physically strong enough to endure the problems of pregnancy, delivery of a child, etc. This is the most probable reason employed by the FDRE states and the City Administrations that make them to change the marriageable age of a woman from 15 to 18 during the reform of their respective family laws.

Furthermore, a state might have a mission to make her youngsters that are would-be-couples wait until they attain a certain age to the interest of the development of their overall personality, to enable them achieve financial independence or to make them economically viable citizens so as to prepare themselves bear the responsibility of helping each other and their household including their future offsprings. Marriage requires emotional maturity and the ability to be self-supporting. Which law regulates one's marriageable age?

Since attaining the marriageable age as requirement of a valid marriage belongs to the essential conditions of marriage, the family law to be chosen to regulate same is that of the matrimonial domicile's. In other words, the general choice of law rule is that the common domicile's law controls. What if the parties belong to two different states of the federation?

**** Prohibited relationships***

While prohibitions against incest are general, legislative policies differ in defining that degree of relationship within which an attempted marriage is regarded as incestuous. A certain lawful marriage cannot be formed if the parties to the relationship are related to each other within certain degrees, by blood or through an existing marriage though all other, formal or essential, requirements of their marriage have been met. Generally, marriage of persons with in the closer degrees of relationship have been universally condemned as grossly indecent, immoral, incestuous, and inimical to the purity and happiness of the family and welfare of future generations. Most probably this may be one of the policies behind the present provisions of the family laws.

This subsection mainly deals with the sensitive area, i.e., consanguinity of the two prohibited relationships, affinity and consanguinity. However, affinity's discussion is not completely ignored rather subsumed in the discussion of consanguinity. It is done so for the reasons employed in affinity are subsets of the reasons utilized in consanguinity. Although the violation of affinal relationships does not pose inordinate risk to stability or to social utility the concept of affinity is an outgrowth of the religious notion that upon marriage the husband and the wife become one flesh and blood and hence the relatives of each become the "blood relatives" of the other and therefore sexual relationship between such relatives would be taken as incestuous.

There are some differences amongst the relevant provisions of the states family laws:

- **The Revised Family Code: Art. 9; and the Amhara Family Code: Art. 20—Affinity**

(2) In the collateral like marriage between a man and the sister of his wife, and a woman and the brother of her husband is prohibited.

- **The Oromia Family Code: Art.5—Relationship by Affinity**

3) In the collateral line, it exists between a wife and her husband's relatives in the collateral line and between a husband and his wife's relatives in the collateral line.

: Art. 28. — Affinity

2) In the collateral line, conclusion of marriage is prohibited below the 3rd degree

- **The SNNP Family Code: Art 19 — Affinity**

2) In the collateral line, conclusion of marriage is prohibited up to the 3rd degree.

- **The 1960 Civ. C. : Art.583 Affinity**

Marriage between persons related by affinity is prohibited

: Art 552 - Affinity

3) In the collateral line, it exists between a person and the collateral of his spouse.

: Art 553 - Limitation up to third degree

Affinity shall be of no effect beyond the third degree in the collateral line

: Art 554-Double affinity

1) A bond of double affinity exists between a person and the spouse of the persons to whom he is related by affinity
2) Such bond of double affinity shall produce the same effect as a bond of simple affinity

- **The Tigrai Family Law: Art 29 ?— Affinity**

Marriage between persons related by affinity is prohibited

: Art.3 ?— Affinity

3) In the collateral line, it exists between a wife and her husband's relatives in the collateral line and between a husband and his wife's relatives in the collateral line.

: Art. 4 ?—Limitations up to third degree

Affinity shall be of no effect beyond the third degree in the collateral line.

: Art 5 ?— Double affinity

1) A bond of double affinity exists between a person and the spouse of the persons to whom he/she is related by affinity
2) Such bond of double affinity shall produce the same effect as bonds of simple affinity.

The above provisions clearly show us that while the Tigrai Family Law (TFL) and the 1960 Civil Code (CC) adopt a double affinity relationship, the latter is absent in the other family laws. Moreover, one can observe that the prohibition of affinity in the collateral line in the Revised Family Code (RFC) and the Amhara Family Code (AFC) is only up to the second degree. On the other hand, the remaining family laws prohibit marriage between affinals related in the collateral three degree. This includes the double affinal relationship for the TFL and the 1960 CC.

The effect in choice of law between the differences is that while persons related by affinity in the collateral line in the third degree (double affinity excluded) can get marry successfully in areas where the AFC and the RFC are in force, these people can hardly

make their matrimonial domicile outside the Regions or localities where the aforementioned laws are applicable. Moreover, those people affinally related in the collateral line by double affinity have the right to marry each other in areas where the TFL and the 1960 CC are not applicable. But they cannot make their matrimonial domicile in Tigrai and other places where the 1960 CC is applicable.

To illustrate, Mrs. X and Mr. Y are spouses. M is X's brother whose ex-wife is N. And Y's brother, P, has a son known by the name Q. According to the above family laws, Y, if divorced from X, can neither marry N in Tigrai nor can marry her outside Tigrai and go back to Tigrai and live there as a family. Besides, X cannot marry Q validly in Oromia while she can do same in the Amhara Region. Nor can she marry him in Addis and make their matrimonial domicile in Afar where the 1960 CC is applicable presently.

Here, we have to assume that the bond of affinity subsists though the marriage by which it was created is dissolved ─ the marriage between X and Y. (By the way while the three family laws ─ the 1960 CC, the TFC and the OFC ─ declare a bond of affinity to subsist even the marriage that is created by is dissolved, the remaining laws are silent on this score). The effect on choice of law process is that while persons who used to relate each other affinally in the collateral line can validly marry in places where the silent laws as to this point are applicable if the marriage that created the relationship no longer exists. But the writer thinks that these people can hardly manage to make Tigrai, Oromia and other places the above three laws are not applicable and then by extension the 1960 CC is enforceable for the TFL, the OFC and the 1960 CC prohibit so. For the concept at issue makes one of the essential conditions of a marriage which the domicile is interested to protect the public policy behind same, the law of the domicile controls to determine as to the validity or otherwise of a marriage concerning this point.

Due to the differences in the prohibited degree of relationship envisaged amongst the various family laws, cases requiring choice of law rules for the purpose of determination of the capacity or otherwise to enter into marriage between persons so related, because of consanguinity might arise. Looking into the currently in force family laws, one observes the following two categories as to differences.

On the one hand, Art. 551 (1) of the CC, Art 2? of the TFL, , Art 18 of the SNNPFC using nearly the same wording state in a stricter way that the degree of relationship by consanguinity that prohibits conclusion of marriage is to be counted in the collateral line up to seventh degree. However, the OFC is a bit different in the way it counts the degree of relationship.

The OFC: Art. 27—Consanguinity

1) In the collateral line, conclusion of marriage in prohibited below the 7th degree **: Art 4 —Degree of bonds of consanguinity**
2) The degree of relationship by consanguinity in the collateral line shall be decided by calculating and **adding** persons who descend from common ancestors.

On the other hand, Art 8(2) of the RFC and Art.19 of the AFC provide that "in the collateral line, a man cannot conclude marriage with his sister or aunt; similarly, a women cannot conclude marriage with her brother or uncle."

Since governing the prohibited degree of relationship by consanguinity is one of the essential conditions of marriage, the matrimonial domicile law of the would-be spouses will govern the capacity to marry each other. Accordingly, if the matrimonial domicile of the parties to the marriage is going to be, for example, in a state other than the RFC and the AFC are applicable, having in mind only the presently in force family laws, the degree of relationship by the consanguinity line of the spouses in the collateral line shall not be less than seven degree in each line to be counted from the common ancestor. A marriage celebrated in areas where the RFC and the AFC apply will not be recognized by other states and as a result will be validated if the consanguinity degree of relationship of the state's family law where the spouses are presently at is violated. It goes without saying that any marriage to be concluded in the states whose family laws provisions to the same effect forbid marriages between persons related by consanguinity in the collateral line less than seven degree in each line from the common ancestry is not to be given effect.

Under the RFC and the AFC, cousins could marry each other. In other words, a man can conclude marriage with his uncle's/aunt's daughter and a woman, similarly, can conclude marriage with her uncle's/aunt's son. These marriages cannot, however, be concluded according to other currently in force family laws. Then, what will be the status of the marriage if a marriage between the abovementioned persons is validly concluded in, for example, Addis Ababa where the RFC applies, and the spouses went to, for example, Tigrai to live there permanently?

As a rule, for places other than those where the RFC and the AFC presently apply; they have some values to the extent of strong public policies to be protected or to be advanced by the prohibitive legal provision, they will not lend a hand to recognize the marriage lest their public policies behind the prohibitive provisions of their laws should be infringed. At least at present Tigrai, Oromia, the SNNP, and the other states where the 1960 CC family law part still applies would render the marriage between persons related by consanguinity in the fourth degree in the collateral line – cousins, incestuous.

Other jurisdictions, that we can, *mutatis mutandis,* employ to explain our similar prohibitive legal provisions, tried to justify the same issue through some explanations. There are, accordingly, about three major reasons why incestuous marriages are forbidden. These are based on religious dogma, science of eugenics, and sociology. These points can virtually make the possible justifications or policies behind the family laws under consideration.

To illustrate these points, it is reported that a religious dogma to maintain divine law forbidding the marriage of close relatives, which is to be regarded as incest especially for the Christian-religion-followers – that in turn influenced the jurisprudence of the area concerned is found in the Old Testament Book of Leviticus, Chapter 18, and Verses 6-18. Preserving and strengthening the racial and physical quality of the population by preventing inbreeding being the second reason, which is found in the science of eugenics; the third and the last reason which is of sociological nature is to maintain the sanctity of the family and prevent the disastrous consequences of competition for sexual

companionship among member of the same family, in its broadest sense. Although all the reasons seem satisfactory even to our situations the last reason seems more weighty and entrenched in the culture of, at least, the Ethiopian Christian community.

Although it is to be regulated by the evasion/fraud provisions of the choice of law rules, it is important to note here that a marriage celebrated between domiciliaries of a state but who went to another state to conclude a marriage and came back to that state is invalid if the couple are related within the degree prohibited under that state ─ even if such marriage is permitted by the *lex loci celebrations*.

**** Bigamy***

Marriage is monogamous ‑ a cardinal element of Christian marriages in that one may only have one marriage partner/relationship at a time, and a prior subsisting marriage invalidates any further/second marriage which one may enter. In other words, bigamy means going through a marriage ceremony with someone when bonds of a preceding marriage to someone else already lawfully bind one. The second marriage must have been taken place during the lifetime of an existing spouse, still married to him/her. It is questionable whether this outright prohibition of bigamy is in line with the outlooks of the other section of the society, i.e., Muslims, who according to their religious teaching bigamy even polygamy within a limited number is not prohibited.

As pointed out above while discussing the general choice of law rules concerning virtually all the essential conditions of marriage, this matter is governed by the same rule as that which governs capacity to conclude marriage, generally the matrimonial domicile or personal law of the parties regulates.

Regarding recognition of bigamous or polygamous marriage by a state that does not allow same, the rule should be to deny *some* validity for it involves the concerned society's public policy, in that it is "an outrage of public decency and morals". This should not lose sight of what defines "the public decency and morals" for morality and

decency is relative in multicultural country like Ethiopia, at least on points of polygamy. If a state is going to recognize bigamous marriages concluded outside a given state that prohibits such, it cannot have any reason to refuse domiciliaries of that given state to celebrate a bigamous marriage. There is no reason to tolerate one and entertain the other.

However, a state may deny one incident to a foreign marriage (validly concluded in that foreign state) and at the same time allow the marriage's other incidents. In effect, a state may prohibit the parties to a bigamous or polygamous marriage from cohabiting with its territory, yet it may recognize the economic interest of the spouses such as a right to support on the part of one spouse against the other and the marital property interest, etc. The justification for the extension of recognition to some of the incidents of the marriage is due to pragmatic reason that there were factual relationships. Furthermore, it is because the recognized incidents, one could say would not violate public policy of the forum. One should always weigh the advantages and disadvantages of the act of recognition. The act of recognition must be exercised just to avoid some adverse consequences that arise due to non-recognition.

**** Consent***

Unlike the above three essential requirements of marriage, the conflicts literature does not seem to have given much attention to the consent element of a marriage despite the fact that it is one of the essential requirements of marriage and it is clear, under the currently effective family laws, that the factors that may vitiate the spouses' free and full consent to marry each other are points that have impacts on the determination of validity or otherwise of a marriage.

Although there are certain additions made into the new family laws while amending the family law part of the CC, generally the defects which are common to all the laws that amount to affecting the free and full consent of the spouses are extorting consent by violence and vitiating consent by fundamental errors. The family laws are substantially similar on this score. Errors: on the identity of the spouse where it is not the person with

whom a person intended to conclude marriage; on the state of health of the spouse who is affected by a disease that does not heal or that can be genetically transmitted to descendants; on the bodily conformation of the spouse who does not have the requisite sexual organs for the consummation of the marriage; are common to all the presently effective family laws. (See, for example, Art. 13 (3) of the RFC).

However, there are certain differences as to the listings that constitute fundamental errors. Accordingly, while some of them (e.g., the 1960 CC, Art. 591 (b)) and the TFL, Art. 37 (b))? consider mistake on the religion of the other spouse as fundamental error, others do not. Moreover, while some (e.g., the RFC, Art. 13 (3) (d) and the AFC, Art. 24 (3) (d)) took error on the behavior of the spouse who has the habit of performing sexual acts with persons of the same sex as a fundamental error, others do not.

One objective common to all the family laws is realizing marriage to be based on the exchange of complete and free consent of the individual future spouses. Article 34 (2) of the FDRE Const. declares that marriage shall be entered into only with the free and full consent of the intending spouses. To this effect, the law guarantees the equality of the spouses during the conclusion of the marriage that in fact lasts (the equality) during and at the time of the dissolution of same. In the exact language of Art. 34 (1) of the FDRE Const., "they have equal rights while entering into, during marriage and at the time of divorce".

By negation, through other ways other than the spouses' personal consent that aims at making the would-be spouses relate to each other is not valid. One possible way is through the consent of their respective families. This is outdated and does not go with the contemporary social development of a modern society at large. Unless the future spouses subsequently, after their families have agreed to get them married each other, if at all it has any value, gave their full and free consent; the marriage is not to be given effect.

Consent is usually given at the time the marriage is concluded. Due to mobility of people, marriage may be celebrated outside the spouses' domicile/state. Due to this fact and for

many marriages are concluded within one's state, in most instances, the state in a better position to regulate the consensual aspect of marriage is the state in which the marriage is celebrated, i.e., where the exchange of consent is given and manifested. However, the state most appropriately interested in the furtherance of the policy regarding consent is the state where the parties domiciled; for the relationship is "so personal and so concerned with social structure". This interest enables the state to control the out-of-state marriage of its citizens through the imposition of certain limitations.

Even most strongly, concerned state more than the above two is the state "where the incidents of (the marriage or) in during relationship are to be enjoyed". In other words, if the couple changed their domiciliary from the state of domicile at the time of the marriage to another state after marriage, the latter seems more significantly concerned, if the family decided to live in that state.

Back to the provisions of the family laws on this point, as a result of those and other differences the possible future FDRE States' family laws might come up with; a certain marriage valid in state A may be held invalid in state B – due to the requirements for validity of same might be different in both states. Thus, rules of choice of law to the effect are necessary. Which law governs?

Again as pointed out above while discussing the choice of law rules that govern the essential validity of marriage since consent belongs to the essential conditions of marriage, it is subject to the regulation of the common personal law of the parties rather than to the *lex loci celebrationis.*

8.2.4 Characterization as to Formal and Essential Validity

One of the most important issues regarding choice of law of marriage is to determine the validity or otherwise of a given marriage in more than one state. This being in general, this issue naturally is divided into two main parts: formal and material validity.

It is at this juncture that one encounters a conflict as to the categorization or classification

of elements into formal or essential category. The inclusion or exclusion of an element into either category might have an impact as to the final result of the validity or otherwise of the marriage. What are the criteria to be employed to the effect of the classification? What is the standard utilized to distinguish between matters of form and substance? Although some matters are straight forward (e.g., the number of witnesses, etc is plainly a matter of form, while to determine whether the parties are too closely related to marry, or whether they are old enough to marry, is ─ public policy aside ─ a matter of essential validity), it is sometimes far from clear to determine whether a matter is related to form or substance. In other words, the borderline between the two categories, extrinsic and intrinsic elements, is not traced uniformly in the various systems of municipal laws.

Despite the above fact; generally, matters that are irrelevant to the enjoyment of the marriage are formal and do not have that much force to affect substantially the effect of the marriage. But, for different states might attach different values for provisions that run similar purpose, it is difficult to have a standard for classification. After all, why is categorization necessary? It is said that the purpose of the distinction in the conflict of laws is obvious. For one thing, the personal law of the parties leaves the determination of formalities to the law of the place of celebration and disregards its prescriptions as to form but reserves to itself the determination of the intrinsic conditions of marriage.

Besides, it is important for the essential requirements of the place of celebration is to be disregarded (in case the parties manage to get their license though they violate its intrinsic conditions) and only the essential conditions of the matrimonial domicile, if different controls.

8.2.5 Policy as to Marriage

Many of the activities, transactions and institutions in a given legally and democratically governed civilized state are regulated by policies. Amongst other ways, these policies that are of permanent nature are expressed through the laws of the concerned state. Accordingly, family matters or domestic relations are protected and regulated by different

policies via legal provisions by the legislature of a given respective jurisdiction. It is also this point that is exactly stipulated in the main document of the country —the FDRE Const. As the latter provides, the family is entitled to protection by society and the state for it is the natural and fundamental unit of the society. (Art. 34(3))

Marriage, as the foundation of the family and society around which many of the social institutions are built; which is also the most important of the domestic relations or family matters, is a consensual transaction with a distinctive character of permanence. In view of its importance as a social institution with all its virtues, and the advantages resulting there from, it is favoured by different policies. Moreover, it is said that marriage is basic to morality and civilization and therefore is of vital interest to society and the state. Besides, the immediate parties (the spouses) and the children — the fruits of the relationship — have an interest in it. In general, many parties seem to have connection with it. It follows that a marriage will, if possible, be upheld as valid, and that is validity will be presumed unless disproved. A [law] will not be construed to make a marriage void unless the legislative intent to such effect is clear and unequivocal.

Is the policy of sustaining the validity of marriage once the relationship is assumed to have been freely entered so long as the present status of the marriage is in accord with certain values and public morals reflected in our family codes? Yes, some of them have provisions to the effect that a marriage celebrated outside a given state is accorded with validity under some tests.

But the why, should the state extend its hands to the recognition of validity of marriage and not just fully govern the foreign celebrated marriage according to the laws of the forum? The main aim lies on the preservation of the "justified expectations" of the parties at the expense of some local but not that much significant values, that are however, not strong enough to destruct the moral standards or/and very essential conditions of the local law. In other words, because marriage is a long continuing relationship, there normally is a need that its existence be subject to regulation by one law without occasion for repeatedly re-determination of the validity. Human mobility ought not to jeopardize the

reasonable expectations of those relying on an assumed family pattern; consequently, the courts will usually look to a law deemed to be appropriately applicable to the parties at the time the relationship is begun.

8.2.6 Effects of Marriage

The effects or incidents of marriage in those the rights and duties of the spouses are, as a rule, governed by the common personal status of the spouses during the lifetime of the marriage. In most instances, this law is the common matrimonial domicile of the spouses. The idea is that one should look for the law that has a "more close connection" to their relationship. It will be substantially just if their relationship along with its consequence is judged or controlled by the law they expect to govern same.

8.2.6.1 Personal effects

Under this heading, the relevant provisions of most of the family laws under discussion seem to advance important policies and in effect the parties to the marriage do not enjoy a large measure of freedom to shape their legal relationship as to this point as they see fit. They seem to have their foundation in morality or religion. They have carried important societal and constitutional values.

There are important departures of the new family laws from the 1960 CC mainly as regards the head of the family, management of family and determination or establishment of residence. The provisions of the laws are:

- **The 1960CC: Art 635- Head of the family**

1) The husband is the head of the family.

: Art. 637– Management of family.

1) The spouses shall cooperate under the guidance of the husband.

: Art 641– Establishment of residence

1) The common residence shall be chosen by the husband.

- **The RFC: Art 50; the AFC Art. 61; the OFC Art 66;**
- **The SNNPFC Art. 59 (1) – Joint management of family.**

1) The spouses shall have equal rights in the management of the family.

The RFC Art.54; the AFC Art. 65; the OFC Art.70; the SNNPFC Art. 63; – Determination of residence.

The spouses shall jointly decide their common residence.

- **The TFL: Art. 78– Management of the family** (translation mine)

The spouses shall, in all cases, cooperate and have equal rights in the management of the family.

One can, generally, observe that there is an absolute shift of policy from the 1960 CC which is influenced by patriarchal (male) dominance, to the other new family laws which proclaim the modern thinking of equality of spouses emanating from the constitutional principle of equality of women and men. (Art 34 of the FDRE Const.) They have equal rights while entry into, during marriage and at the time of divorce. The discussion also serves, *mutatis mutandis*, to the other above-mentioned categories of laws concerning management of family.

Aside the unconstitutionality element, the difference between the 1960CC, on the one hand, and of the other new family laws, on the other hand, amounting to *reform* and the possible differences that may happen when the other member states of the federation enact their own respective family laws force us adopt a choice of law rule to the effect. Like the rule for the essential validity of marriage, the general rule adopted presently by states is that the law of their matrimonial domicile governs personal relations between spouses. In default of common matrimonial domicile, the law of the state in which their matrimonial life is predominantly lived governs.

8.2.6.2 Pecuniary Effects

To avoid the complications resulting from a 'changeable' or 'mutable' law, it seems wise to timely fix the law governing marital property. Without prejudice to the rights of third parties and unless mandatory provision of the law are violated, a legal agreement concerning the pecuniary effects of their marriage entered between the spouses before, on or after the date of their marriage should be preferred as a basis to the effect.

Moreover; again without affecting the mandatory provisions of the law, the parties can stipulate to a choice of law to govern the nature of their ownership of specified property. This works, however, only if the member states of the federation are to enact their own respective conflicts laws, which is with a very less probability to be practiced in this country. Still more, under both circumstances, when the agreement made between the parties is not clear; the judge should try to the maximum extent possible to extract the most probable presumed intention of the contractants as parties enter into the marriage with forethought and the "protection of justified expectations of the parties is of considerable importance in the case of marriage relationship".

However, usually there may not be such type of stipulations made by the parties. Given the Ethiopian reality, many couples did not develop, though it seems wild assumption, the custom or habit of writing agreements so as to govern the legal implications of their action and relationships in pecuniary matters. The practice is very poor. Illiteracy, which is rampant amongst the major segment of the rural society, has got its own contribution. After all, two persons agree on something that has substantial existence. Do the majority of couples of the Ethiopian population have properties huge enough to make them worry to agree or not to agree on same? Any way in the absence of agreement, it is the business of law in general and choice of law rules in multistate cases in particular to control the problem in issue.

According to the U.S experience, the effects of marriage on pecuniary matters are governed by the parties' *current* matrimonial domicile as ordinarily having the most significant contacts. Normally, individuals act in accordance with the norms and laws they are subjected to. These laws cannot be other laws other than the laws of their country, state, or domicile – the place where the individuals have the most significant contact and whose laws are most likely to have been consulted by the individuals (here in our case the parties to the marriage). For they do not act otherwise, they do not expect their acts or transactions be governed or measured otherwise. They should be regulated as they acted and, as they expected. This will be in accordance with the principle of "protection of the justified expectations of the parties" to a marriage that promotes values

of certainty, predictability, and uniformity of results ─ a basic policy underlying esp. the field of marriage.

However, if the parties acquired property in different states overtime, the law of the state where the property was acquired controls. But this is true only to the portion of the property acquired in a given state. If there is another property acquired by the parties in another state, the latter state's law controls. Generally, the laws of the state where the property was gained and the concerned property are directly related. The rationale behind this rule is to protect the justified expectations of the parties as to their property relations. In this connection, the general choice of property law rule concerning immovables is - the law of the situs of the immovable controls.

What is the effect on the incidents of marriage, such as pecuniary matters, where such marriage was valid in the parties' former domicile but invalid for the forum or present matrimonial domicile found it contrary to its "strong public policy"? If there is any property say a house under the title of one of the spouses in a state where the marriage is held invalid or null can the other spouse claim any right in that state in the event of divorce ─ for normally the party in whose name the property (the house) is registered may object that there was no valid marriage under the law of the state where the property is situate?

As Cavers has put the U.S experience on this score, it is conventionally treated that some of the incidents of the status ("marriage") such as the rights, powers, privileges, and immunities that are attached to the parties by the "marriage" relationship are denied. The denial of recognition of the personal effects of marriage must be categorized under this rule in our family laws, in general. However, the present matrimonial domicile should gives effect to some of the incidents of the marriage. Thus, California which forbids its domiciliaries to have more than one wife accords the widows of such a bigamous marriage to receive from their deceased husband's California estate a widow's share as tenants in common. This seems quite realistic solution as pecuniary matters can be viewed apparently distinct from the marriage relationship which is taken as a status. The

fact that the former can be contracted out by the parties to the marriage strengthens this argument.

8.3 Law of Divorce

Conflict of laws problems around the divorce part of family law revolves around problems of mainly judicial jurisdiction and enforcement and recognition rather than on choice of law problems. In other words, the main discussion on divorce in connection to multistate problems is concerning jurisdiction.

Limited choice of law problems along with their rules will be touched up on immediately below. It must be clear, however, that other choice of law problems that are most probably connected with divorce ─ mainly pecuniary matters of a given marriage and the issue of the validity of marriage, are treated broadly above in their appropriate sections.

It is if the issue of divorce, *inter alia*, comes to the scene of a court that the issue of validity of marriage is questioned and it is if divorce, again *inter alia*, is required that questions of partition of property which are governed by the choice of law as to the effects of marriage happen to exist. So, it is not surprising that in both international and interstate relations there are no many developed choice of law rules regarding divorce.

However, for there are staggering diversities amongst the family laws regarding divorce, at least between the 1960 CC on the one hand and the new family laws on the other hand, choice of law to find the applicable law in case a suit for divorce is instituted is essential. As will be seen, the general category of the divorce laws are fault based" for the 1960 CC and non- fault based as to the new family laws. The provisions are:

- **The 1960 CC: Art. 665 ─ Divorce by mutual consent.**

1) Divorce by mutual consent is not permitted by law.

: Art. 668─ Pronouncement of divorce for serious cause

The family arbitrators shall make an order for divorce within three months from the petition having been made where the petitioner establishes in his favour the existence of a serious cause of divorce.

: Art 669 Serious cause of divorce ─ 1) Due to a spouse.

There is a serious cause for divorce:

a) When one of the spouse has committed adultery; or
b) When one of the spouses has deserted the conjugal residence and when, since at least two years, the other spouse does not know where he is.

: Art. 670. – 2. Not due to a spouse.

There is also a serious cause for divorce:

a) When one of the spouses is confined in a lunatic, since not less than two years;
b) When the absence of one of the spouses has been judicially declared.

: Art. 671. ─ 3. Annulment of religious marriage

There is also a serious cause of divorce when a marriage contracted according to the formalities of a religion has been declared null by the religious authority.

- **The RFC: Art. 76; the AFC: Art.87─and the NNPFC: Art 85─ Conditions of Decision for Divorce**

Marriage shall dissolve by divorce where:

a) The spouses have agreed to divorce by mutual consent and such agreement is accepted by the court.

- **The OFC: Art. 101. ─ Conditions of Divorce by Mutual Consent.**

Marriage shall dissolve by divorce where the spouses have agreed to divorce by Mutual consent and such agreement is accepted by the court.

- **The TFL: Art.102? ─ Divorce as a right.**

Either the husband or the wife has a right to divorce, upon petition when they reach the stage where they can no longer live together.

Explained, while divorce in the 1960 CC is fully based on fault, it is not so in the others. The TFL only requires, as it seems, the existence of incompatibility. Meaning, there must be a very deep and irreconcilable conflict in personalities or temperament of parties that makes it impossible for them to continue normal marital relationship.

Regarding the effects of divorce on the liquidation and of pecuniary relations between

spouses, the following provisions, to take them as emphatic samples can help us to appreciate the differences amongst the laws and thereby think about choice of law rules to address same.

- **The 1960CC: Art. 691.—Presents and matrimonial benefits.**

1) On the request of the persons who have given presents or of their heirs, the family arbitrators may order the restitution of such presents as may have been received by the spouse on the occasion of the marriage or by reason of the existence of the marriage whether by one spouse from the other or from the ascendants of one of the spouses or from other persons.

- **The TFL; Art.121— Presents and matrimonial benefits.**

1) Presents or benefits given to the parties from any body by reason of the existence of marriage may not be restituted to those who have given the presents or to their heirs either during the existence of marriage or after divorce.

The other family laws are silent on this score. This fact, the silence, itself being a difference of the new family laws from the TFL and the 1960 CC, there are also other observable differences amongst the laws especially, on property matters. The above discrepancies amongst the presently in force family laws lead us to imagine that a divorce suit governed by one or the other of them will have some important impacts on the final result of the case. For example, concerning the restitution of items given by grant, etc., the TFL and the 1960 CC have quite opposite consequences. But, there may happen a multistate case that puts a certain court in a position that either it should apply the TFL or the 1960CC. The point is that for the laws are different the decisions to be rendered in accordance with them will necessary be different. Therefore, we need choice of law rules that enable us determine or choose the applicable law to dispose with the multistate case at hand.

There are two choices of law views: the Common Law and the Civil Law. In the U.S as well as in the Common Wealth the rule is well established that the divorce court applies its own law to the substantive requirements of divorce that seems sufficient and

reasonable so long as the principle prevailed that the parties' matrimonial domicile is the basis of jurisdiction. The second view has a startling point in almost all laws of the civil law orbit —the parties common personal law applies. This is most of the time the last (or the predominantly lived) common domicile of the spouses.

We can distil from the above and carve a choice of law rule appropriate for our interstate divorce laws problem. The rule that the "law of the matrimonial domicile of the parties' control" seems proper. This is the law that is believed to have been accustomed to by the parties. This is the law the spouses are said to have predominantly connected with or the law of the parties their matrimonial life is predominantly lived. Therefore, it will not be unfair for either of them to be judged according to the law of the place they were living in. Hence, due process of law is respected.

After all the marriage relation, both in its creation and in its termination, is a matter of importance to the state with which one is most intimately connected i.e., ordinarily the matrimonial domicile, as well as to the parties. Hence, the laws of many jurisdictions have generally insisted upon adherence to the law of the matrimonial domicile in terminating the marriage relation by divorce.

*** Policy Considerations**

What are the policies behind these different laws? It is difficult to deal with each justification employed behind all the provisions of the family laws. However, it is important to have a glimpse on some, that are believed to be main, that can enable us infer the possible justifications behind the other laws, too.

One can say that the main reason why divorce is such difficult in the 1960 CC is due to the fact that marriage is taken as a relationship that lasts for a long period of the time even until death — an element that differentiates marriage from other contractual relations. Moreover, it was believed that children of the spouses will be better off so far as their immediate parent are living together and to this effect divorce should not be

easily available. At any cost they should remain tied.

On the other hand, there are several reasons adopted by the Board of Institute of Legal Research while drafting the RFC before the year 2000. Some of them are the following.

First, as entering into marriage is easy and based on the free consent of the spouses, divorce is not to be made difficult for it further leads the spouses into unnecessary quarrels. Instead of the latter, procedures should be made available that enable them to get untied in time of need. Furthermore, the above fault-based divorce has got a negative impact on would-be spouses in getting married for they will not be guaranteed of divorce, in case they are incompatible to each other unless there is fault on either side or/and at the expense of penalty.

Second, the law should not impose upon the parties to live together in the absence of love, agreement and compatibility between them. To penalize the one who seeks divorce is also improper, as a result. It seems just, like, reducing the relationship into a mere contract.

Third, the state protects marriage/the family does not mean that it should prohibit divorce. Instead, it should mean that the state /society affords legal and even possibly material support to the couple through various ways.

Fourth, a marriage relationship that lacks affection and compatibility between the spouses will not benefit the children rather it makes the latter develop hatred and generally it will make them have negative outlook towards marriage as an institution. Therefore; taking these and other possible reasons, since narrowing the possibilities for the parties to get divorced from their partner could not benefit either to the spouses themselves or to their children, adopting a non-fault or simple requirement divorce law is found to be the better alternative.

8.4 Summary

In this unit, we have discussed importance of personal status as regulation of family and marriage and the widely accepted rules governing jurisdictional and choice of law in this regard. We have particularly seen the situs to be important point of contact to find the applicable law. In this connection, the place given to nationality and domicile in different countries have been seen.

The unit has also covered basic issues related to the choice of law rules governing valid creation of marriage. These are formal and substantive validity of marriage. It has been reflected that it is a universally recognized rule that formal validity of marriage shall be governed by the *lex loci celebrationis.* Hence a marriage validly celebrated at a certain place shall also be valid in other places. The other important issue related to validity of marriage is essential validity. This raises matters like capacity, consent and other substantive requirements that must be fulfilled befor couples conclude a valid marriage. As to the essential or substantive validity of marriage, there is no such consensus. Some countries use the test of common domicile (matrimonial domicile).while others prefer to look at the ante nuptial domicile (dual domicile test) of the future spouses to determine whether the parties fulfilled substantive requirements of a valid marriage. For various theoretical and pragmatic reasons stated in the discussion use of the common domicile is shown to be preferable in the context of Ethiopia. Among the relevant substantive issues of legal capacity to marry that may be determined by the common domicile of the parties we have tried to cover: age, consanguinity and affinity, consent and bigamy.

The other relevant issue in relation to marriage is the choice of law that regulates its effects. These effects could be classified in to personal effects and pecuniary effects. As we have seen these effects or incidents of marriage i.e., those rights and duties of the spouses are, as a rule, governed by the common personal status of the spouses during the lifetime of the marriage. In most instances, this law is the common matrimonial domicile of the spouses.

The termination of marriage could be ushered by divorce and this could raise various

conflicts of law issues. There are two choices of law views: the Common Law and the Civil Law. In the U.S as well as in the Common Wealth the rule is well established that the divorce court applies its own law to the substantive requirements of divorce that seems sufficient and reasonable so long as the principle prevailed that the parties' matrimonial domicile is the basis of jurisdiction. The second view has a startling point in almost all laws of the civil law orbit —the parties common personal law applies. This is most of the time the last (or the predominantly lived) common domicile of the spouses.

8.5 Review Questions

After thoroughly reading the material, answer the following questions and problems.

Part I: Questions

1. Describe the main issues that would arise in relation to establishing validity of marriage in conflict situations. Discuss their importance.
2. What is the widely accepted rule governing choiceof law concerning formal validity of marriage? What do you think is the rational behind this rule?
3. What is the accepted rule in US governing choice of law on substantive validity of marriage?
4. Discuss the contending views concerning choice of law governing substantive validity of marriage. Which position seems appropriate for Ethiopia currently?
5. What is the position in Ethiopian courts concerning questions of formal and substantive validity?
6. What are the main issues that would arise in relation to divorce in conflict cases?
7. What is the governing rule concerning Divorce?
8. What is the position of Ethiopian Federal law on the issue of choice of law governing divorce?
9. What is the practice of Ethiopian courts on the issue of divorce in conflict cases?
10. What do you recommend for Ethiopian courts to follow as a rule in divorce cases containing a foreign element?

Part II: Hypothetical Cases

Case One

Ato Muzemil and W/o Khedija were married couples, residents of Dire Dawa. After two years of their marriage Muzemil opened a profitable business in Adama where he mate a girl by the name Zeineba.Since he was lonely there in Adama, he entered into Religious marriage with Zeineba colorfully celebrated in one of the Mosques of Adama. W/o Khedija came to Adama and discovered that her husband established a marriage while he is bound by an already existing marriage with her. She become furious and wanted to institute a case of opposition against the marriage claiming it is bigamy.

Assume that she filed her opposition to a court in Adama and you are a judge presiding in the court .Among the relevant family laws, based on which Law do you resolve the dispute?

*It is a well-known fact that the Family Law of Regional State of Oromia does not expressly out law bigamy.

Case Two

Abebe and Abeba, both Domiciliaries of Debub, met at work, where Abeba was an attorney and Abebe was an administrative assistant. They began dating in 1997. In 1999, Abebe and Abeba decided to buy a house together. After the closing but before either of them had moved into the house, Abebe informed Abeba that he would not move into the house unless they first got married. Abeba, whose assets were significantly greater than Abebe's, stated that she would not marry Abebe unless he signed a contract of marriage. Abeba moved into the house. Abebe moved his belongings into the house, but he did not move in and went to live with his brother. Several months later, Abebe and Abeba decided to get married in Lalibela,Amhara Region. Three days before the wedding,

Abebe and Abeba flew to Lalibela. The morning of their wedding day, Abeba presented Abebe with a contract of marriage, which Abebe signed after only a cursory review of its terms and without the opportunity to obtain independent legal counsel. Neither party exchanged tax returns, bank statements or other financial documents prior to the execution of the agreement. The agreement provided that each party would retain as separate property whatever property each owned before the marriage and that each would retain as separate property whatever property each acquired during the course of the marriage as if the marriage had never been consummated.

After the wedding and a lovely honeymoon, the couple returned to Debub and moved into their home together, where they lived for the duration of their marriage. Abeba continued to work as an attorney and Abebe continued to work as an administrative assistant. In 2006, Abebe learned that Abeba was having an extra-marital affair. The couple separated and Abebe sued Abeba for divorce in Awassa,Debub . Abebe has approximately 30,000 Birr in his bank account and Abeba has approximately 120,000 Birr in her bank account. Abebe seeks equitable distribution under Debub law of all of the property owned by both spouses. In her answer, Abeba claims that the Contract of Marriage bars Abebe from seeking any portion of the property that she acquired either before or during the marriage. Under Debub Family law, a Contract of Marriage is not enforceable if the party against whom enforcement is sought proves that he or she "was not provided a fair and reasonable disclosure of the property or financial obligations of the other party." Under the law of the Amhara Region, Contracts of Marriages are treated the same as all other agreements and are "binding without regard to whether the terms were fully understood or whether full disclosure was made and irrespective of whether the agreement reached is substantively fair."

If you were the judge in the Court where the case is instituted, which law governs the dispute? Why?(Show steps you follow in resolving the dispute applying the Federal Draft Conflict of Laws Proclamation)

Unit Nine

Agency and Partnerships

9.1General Introduction

There are various ways in which men can transact their affairs. They can do so by themselves; they can do so through agents, and they can do so through some form of association, which may be a partnership, some other kind of unincorporated association or a corporation. The choice-of-law problems which arise when a person acts for himself in two or more states are dealt with in previous units, This unit deals with those problems in the case of agency and partnerships and those which concern corporations. This unit deals with the choice-of-law rules relating to agency, partnerships and corporations in the field of contract. The problem of vicarious liability in tort is dealt with in chapter six of this material.

9.2 Agency

9.2.1 Relationship of Principal and Agent

The rights and duties of a principal and agent toward each other are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties and the transaction. An agency relationship can give rise to three choice-of-law problems: namely, what law should be applied to determine the rights and duties as between (1) the principal and agent, (2) the principal and some third person on account of one or more acts by the agent, and (3) the agent and the third person.

An agency relationship exists if there has been a manifestation by the principal to the agent that the agent may act on the principal's account, and the agent has either acted pursuant to the manifestation or has agreed so to act. Such a relationship will usually result from a contract between the parties. On occasion, however, an agency relationship may exist even though there is no contract between the parties and even though the agent

is not to receive compensation. When the agency relationship is created otherwise than by contract, the obligations of the principal and agent to each other are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties and the transaction. This state is selected by a process essentially similar to that employed in the case of a contract.

The law selected by application of the rule of this Section determines what the agent is authorized to do on the principal's behalf. It likewise determines the rights and obligations of the parties toward each other, such as the circumstances under which either the principal or agent can put an end to their relationship, the amount of compensation, if any, to which the agent is entitled, and the liability of the agent to the principal for an unauthorized act.

Sometimes, the principal and agent will intend that their rights and duties toward each other should be determined by the local law of a particular state. If so, the local law of that state will be applied. In situations where the principal and agent did not give advance thought to the question of which should be the state of the applicable law, or where their intentions in this regard cannot be ascertained, it may at least be said, subject perhaps to rare exceptions, that they expected that the provisions of their agreement would be binding upon them. The expectations of the principal and agent should not be disappointed by application of the local law rule of a state which would strike down their agreement, or a provision thereof, unless the value of protecting those expectations is substantially outweighed in the particular case by the interest of the state with an invalidating rule in having this rule applied. The extent of the interest of a state in having its rule applied should be determined in the light of the purpose sought to be achieved by the rule and of the relation of the parties and the transaction to the state.

Protection of justified expectations plays a less significant role in the choice-of-law process with respect to issues that involve the nature of the obligations imposed by a contract upon the parties rather than the validity of the contract or of some provision thereof. If the principal and agent have not spelled out in their agreement the nature of

their obligations with respect to a particular issue or, in the alternative, if they have not provided that their obligations should be determined by the local law of a given state, it is probable that they did not have any precise expectations with respect to that issue. It is unlikely in any event that any expectations the principal and agent might have with respect to that issue would be disappointed by application of the local law rule of one state rather than of the rule of another state.

Agency relationships may be placed into two broad categories. The first category comprises situations where the agent is to serve the principal for a period of time and is to do a number of acts on the principal's behalf. Situations where the agent is to do a single act on the principal's behalf fall into the second category. In either case, the state where performance by the agent is to take place will usually be given the greatest weight, in the absence of an effective choice of law by the parties , in determining what law governs the rights and duties owed by the principal and agent to each other.

When the agent is employed to do a number of acts on the principal's behalf in a single state, the local law of this state will usually determine the rights and duties owed by the principal and agent to each other in the absence of an effective choice of law by the parties. This will be so except possibly in a case where the agent is to do only a relatively few acts on the principal's behalf and where all, or at least the great majority, of the other relevant contacts, such as the domicile, residence and place of business of the principal and agent, are grouped in another state.

Situations will arise where the agent's activity is to be confined primarily to one state but where he is to do one or more acts on the principal's behalf in another state. So an agent employed to manage the principal's business in state X may in the course of his duties enter into a contract on the principal's behalf in state Y. In such a situation, the local law of the state where the agent is to do the great majority of his acts will usually determine what rights and duties are owed by the principal and agent to each other as the result of an act done by the agent on the principal's behalf in another state.

Situations will arise where, although the major portion of the agent's activity is to take place in one state, he is to engage in substantial activity in another state. So an agent may be employed to represent the principal in both states X and Y with the understanding that he is to spend most of his time in state X. In this situation, the local law of the state where the agent is to do most of the acts will usually determine what rights and duties are owed by the principal and agent to the other as the result of an act, or acts, done by the agent on the principal's behalf in the other state. As the number of acts that the agent is to perform in another state increases in relation to the number of acts the agent is to perform in the state of his principal activity, the relative importance of the latter state in the selection of the governing law decreases proportionately and increasingly greater weight must be given to other contacts.

Finally, there will be situations where the agent's activity on behalf of the principal is to be divided more or less among two or more states. In such a case, little weight can usually be given to the places of the agent's activity in determining the state of the applicable law. If, however, the agent's activity is to take place in two or more states which have the same local law rule with respect to the issue involved, the case will be treated for choice-of-law purposes as if the agent's performance were to take place in a single state.

The rule is essentially the same in situations where the agent is to do a single act on the principal's behalf. Usually, the state where the agent is to act will be the state whose local law determines what rights and duties are owed by the principal and agent to each other as a result of the act. On some occasions, however, the place of the agent's act may be outweighed by the grouping in another state of such contacts as the domicil, residence and place of business of the principal and agent and the location of the subject matter of the contract entered into by the agent. Finally, little weight can be given to the place of the agent's act in situations where, under the terms of the agent's agreement with the principal, the agent can do the act in any one of a number of states with different local law rules. If, however, the act is to be done in two or more states which have the same local law rule with respect to the issue involved, the case will be treated for choice-of-law

purposes as if the agent's performance was to take place in a single state.

To illustrate, in state X, A, the agent, sells and delivers the horse of P, the principal, to T, a third person. P sues A, claiming that A was authorized only to sell P's cow. Whether A did lack authority, as against P, to sell the horse will be determined by the law selected by application of the rule of this Section.

P, domiciled in state X, engages A, domiciled in state Y, to try to find a purchaser in Y for P's land in X in return for a stated commission. A finds such a purchaser and now sues P in state Z to recover his commission. P would not be liable under X local law because A had not been issued in X a real estate broker's license. P would, however, be liable under the local law of Y. The first question for the Z court to determine is whether the interests of both X and Y would be furthered by application of their respective local law rules. This is a question that can only be determined in the light of the respective purposes of these rules. Y's interests would be furthered by application of its rule if, as seems probable, this rule was intended to protect Y domiciliaries acting as brokers in Y. Whether X's interests would be furthered by application of its rule is more problematical. X's interests would be furthered if the purpose of its rule was to deter persons from seeking anywhere to sell X land without an X license. On the other hand, X's interests would not be furthered if the purpose of its rule was only to deter persons lacking an X license from seeking to sell X land in X. If X's interests would not be furthered by application of the X rule, the Z court should find for A by application of the Y rule. On the other hand, if the interests of X and Y would each be furthered by application of their respective rules, the Z court must choose between them. Among the questions for the Z court to determine are whether the value of protecting the justified expectations of the parties and the interest of Y in the application of its rule outweigh X's interest in the application of its invalidating rule. Factors which would support an affirmative answer to this question, and which indicate the degree of Y's interest in the application of its rule, are that A is domiciled in Y and that the contract called for performance by A in Y. If it is found that an X court would not have applied its rule to the facts of the present case, the argument for applying the Y rule would be even stronger. For it would then appear

that, even in the eyes of the X court, X interests were not sufficiently involved to require application of the X.

9.2.2 Contractual Liability of Principal to Third Person

Whether a principal is bound by action taken on his behalf by an agent in dealing with a third person is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties and the transaction. The principal will be held bound by the agent's action if he would so be bound under the local law of the state where the agent dealt with the third person, provided at least that the principal had authorized the agent to act on his behalf in that state or had led the third person reasonably to believe that the agent had such authority.

The local law of the state selected by application of the rule of this Section determines such questions as whether the agent acted with authority or apparent authority, the scope and extent of this authority, and whether such authority had been effectively revoked prior to the agent's act or was revocable at all. The rule of this Section is applicable whether the principal was disclosed or undisclosed to the third person at the time of the agent's act.

On what bases would the principal be responsible for agent's action? A principal may be liable to a third person for the act of an agent on four distinct bases: (1) that the agent acted with the principal's authority, (2) that the agent acted with the principal's apparent authority, (3) that the principal misled the third person as to the extent of the agent's authority, or failed to correct what he realized, or should have realized, were the third person's misconceptions about this authority, or (4) that the agent acted within his inherent agency powers, that is when because of the relationship of the parties or the subject matter involved, policy requires that the agent should have power to bind the principal. An example of this last basis is where an agent does a forbidden act which under the circumstances would naturally be expected to fall within his powers and the other party reasonably believes the agent was authorized to do the act and had no notice that the agent was not so authorized.

When, on account of the agent's action, the third person has rights against the principal, the principal will usually also have rights against the third person. Whether a principal is bound by an agent's action on any one or all of these four bases is determined by the law selected by application of the rule of this Section.

In determining whether the principal is bound by action taken on his behalf by an agent in dealing with a third person, the forum consider (1) whether the relationship between the principal and agent makes it reasonable to hold the principal bound by the agent's act and (2) whether there is a reasonable relationship between the principal and the state whose local law is to be applied. The first requirement is mentioned only for the sake of completeness. It is unlikely that a principal-agent relationship will be claimed to exist in a situation where the requirement that this relationship be a reasonable one is not satisfied.

The principal should not be held bound by the agent's act by application of the local law of a state to which he has no reasonable relationship. The forum will use its own judgment and will apply its own rules in determining whether such a reasonable relationship exists. The principal will have a reasonable relationship to a state where he has authorized the agent to act on his behalf. A principal who authorizes an agent to act on his behalf in a state assumes the risk that he will be held bound under the local law of that state by action, whether authorized or unauthorized, that is taken there by the agent on his behalf.

The principal will have a reasonable relationship to a state where he has not authorized the agent to act on his behalf, if, nevertheless, he has led the third person reasonably to believe that the agent was authorized to act on his behalf in that state. This is so even if the agent's action, although done on the principal's behalf, was not authorized by him. A principal who leads a third person reasonably to believe that the agent is authorized to act on his behalf in a particular state assumes the risk that he will be held bound under the local law of this state by action, whether authorized or unauthorized, that is done there by

the agent on his behalf. The principal may have led the third person reasonably to believe that the agent was authorized to act for him in the state by written or spoken words or by other conduct.

The principal may also have an adequate relationship to a state although he neither authorized the agent to act there on his behalf nor manifested to the third person that the agent had authority there to act. An analogy may here be found in the field of vicarious liability. If the principles developed there are transferable to the field of agency, the principal will have an adequate relationship to the state where his relationship to the agent is centered. Application of the local law of this state to impose liability upon the principal is particularly likely if this state has some relationship to the third person. There are undoubtedly still other situations where, for the purposes of the rule of this Section, an adequate relationship will exist between the principal and a state.

To illustrate, in state X, P directs A to procure for P in state Y a special kind of corkscrew. A enters into a contract with T in state Y for the purchase by P of a different kind of corkscrew. T is domiciled and has his place of business in Y. P will be held bound by A's action if he would so be bound under Y local law.

P appoints A his purchasing agent and orally instructs him to confine his activities to state X. With P's knowledge, A has cards printed describing himself as P's "general purchasing agent," and then sends the cards to a number of persons, including T, in state Y, a neighboring state. Thereafter, in state Y, A enters into a contract for the purchase by P of goods from T. T is domiciled and has his place of business in Y. P will be held bound by A's action if he would so be bound under Y local law because of the apparent agency.

In state X, P directs A to procure for P a special kind of corkscrew and imposes no geographical limitations upon A's authority to act on his behalf. Both P and A are domiciled in X. While vacationing in state Y, A meets T, who is domiciled and has his place of business in X, but who is also vacationing in Y at the time. In Y, A enters into a

contract with T for the purchase by P of a different kind of corkscrew. P will be held bound by A's action if he would so be bound under either X or Y local law. This is so because both X and Y have a reasonable relationship to the parties. Y has such a relationship because A was authorized by P to act there on his behalf and dealt there with T. X likewise has such a relationship because of its close connection with P and T.

The rule of this Subsection, which is an application of the rule of Subsection (1), reflects the position that it is not unfair to hold the principal bound by the agent's action in the circumstances stated. Usually the agent and the third person will have been in the same state when they negotiated and made their agreement. If so, the principal will be held bound by the agent's action if he would so be bound under the local law of this state and either had authorized the agent to act on his behalf in that state or had led the third person reasonably to believe that the agent had such authority. On occasion, the agent and the third person will have acted in different states, as may be true in a situation where they conduct their negotiations by mail or over the telephone. In such a situation, the principal will be held bound under the local law of either the state where the agent or the third person acted provided that the principal had authorized, or had led the third person reasonably to believe that the agent was authorized to act on his behalf in either state.

Which law governs agent's contract with third person? If the principal is bound by the agent's action under the local law of the state selected by application of the rule of this Section, the question then arises whether the agreement made by the agent with the third person is an effective contract, and, if so, what are the rights created thereby between the principal and the third person. These questions will be determined by the law selected by application of the rules governing choice of law in contract.

9.2.3 Ratification by Principal of Agent's Act

The consequences of a principal's ratification of action taken on his behalf by an agent in dealing with a third person are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties and the

transaction.

The rule of this Section is applicable if, but only if, the words or conduct of the principal can reasonably be considered an assumption of responsibility on his part for the act of the agent. The law selected by application of the rule of this Section will be applied to determine such questions as whether the act was of a sort that could effectively be ratified, and whether the principal's action or non-action amounted to ratification and was done in sufficient time.

By ratifying action taken on his behalf by an agent in dealing with a third person, the principal has evinced an intention to be bound by that action. Likewise, in situations where the existence of the principal was disclosed by the agent to the third person, the third person will usually have entered into the contract with the agent in the expectation that he and the principal would owe obligations to each other under the contract. In short, the expectations of both the principal and the third person will usually be upheld if the principal is held bound by his ratification of the agent's action. Accordingly, the principal should be held bound by his ratification if this consequence would ensue under the local law of any state having a substantial relationship to the parties and the transaction unless a contrary result is required by the overriding interest of a state in the application of its local law rule which would deny effect to the ratification. For the reasons stated above, the principal will usually be held bound by the agent's action if he would be bound under the local law either of the state where the agent dealt with the third person or of the state where the principal-agent relationship is centered. If the principal is held bound by his ratification of the agent's action in making an effective contract with a third person on his behalf, he and the third person will owe obligations to each other under the contract.

State where agent dealt with third person. Usually, the agent and the third person will have been in the same state when they negotiated and made the agreement. On occasion, the agent and third person will have acted in different states, as may be true in a case where they conducted their negotiations by mail or over the telephone. In such a situation, the agent's action will be held to have been effectively ratified, except as stated

above, if the principal's action or non-action amounted to ratification under the local law of either the state where the agent acted or the state where the third person acted.

Whether principal bound by agent's contract with third person. If the principal is bound by his ratification under the local law of the state selected by application of the rule of this Section, the question then arises whether the agreement made by the agent with the third person is an effective contract and, if so, what the rights are created thereby between the principal and the third person. These questions will be determined by the law selected by application of the rules governing choice of law in contract.

9.3Partnerships

9.3.1 Relationship of Partners Inter Se

The rights and duties owned by partners to each other are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the partners and the transaction. This law is selected by application of the rules governing choice of law in contract. Partnerships give rise to much the same choice-of-law problems as do simple principal-agent relationships. This Section deals with the question of what law determines the obligations of the partners as between themselves. In the next part we will deal with the problem of what law will be applied to determine the rights and duties which arise between the partnership and the partners on the one hand and some third person on the other because of one or more acts done on behalf of the partnership by a partner or other agent.

The law selected by application of the rule of this section will be applied to determine whether there is a partnership relationship between the parties and, if so, the rights and duties of the partners toward each other, such as the extent to which each may share in the profits and exercise a voice in the conduct of the enterprise, the liability of one partner to another, and whether the partnership relationship is dissolved by the death of a partner.

Sometimes, the partners will intend that their rights and duties toward each other should be determined by the local law of a particular state. If so, the local law of this state will be applied. In situations where the partners did not give advance thought to the question of which should be the state of the applicable law, or where their intentions in this regard cannot be ascertained, it may at least be said, subject perhaps to rare exceptions, that they expected that the provisions of their contract would be binding upon them. The expectations of the partners should not be disappointed by the application of the local law rule of a state which would strike down their contract, or a provision thereof, unless the value of protecting these expectations is substantially outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied.

Protection of justified expectations plays a less significant role in the choice-of-law process with respect to issues that involve the nature of the obligations imposed by the contract upon the partners rather than the validity of the contract or of some provision thereof. If the partners have not spelled out in their agreement the nature of their obligations with respect to a particular issue or, in the alternative, if they have not provided that their obligations should be determined by the local law of a given state, it is probable that they did not have any precise expectations with respect to that issue. It is unlikely in any event that any expectations the partners might have with respect to that issue would be disappointed by application of the local law rule of one state rather than of the rule of another state.

9.3.2 Contractual Liability of Partnership, Partners and Third Person

Whether a partnership is bound by action taken on its behalf by an agent in dealing with a third person is determined by the local law of the state which has the most significant relationship with the parties and transaction. Whether a general partner is bound by action taken on behalf of the partnership by an agent in dealing with a third person is determined by the local law of the state having most significant relationship. The liability of a limited partner for action taken on behalf of the partnership by an agent in dealing with a third person is determined by the local law of the state having the most significant relationship

to the parties and the transaction, unless the limited partner has taken a significant part in the control of the partnership business or has led the third person reasonably to believe that he was a general partner. In either of these latter events, the liability of the limited partner will be determined by application of the local law of the state having the most significant relationship.

The rule of this Section applies to action taken on behalf of the partnership by a partner or other agent. The local law of the state selected by application of the rule of this Section determines such questions as whether the partner or other agent acted with authority or apparent authority, the scope and extent of this authority and whether such authority had been effectively revoked prior to the act or was revocable at all.

Liability of partnership. If the partnership is bound by the partner's or other agent's act in entering an agreement with the third person, the law selected by application of choice of law rules governing contracts , determines whether the agreement amounted to a contract between the partnership and the third person and the rights created thereby.

Whether a partnership is bound by its ratification of an agreement made with a third person on its behalf by a partner or other agent is determined by the local law of the state having the most significant relationship.

Liability of general partner. A general partner has a voice in the management of the partnership's affairs and is personally responsible for an act done in the course of the partnership's business even though he did not do the act himself and was not even aware of its having been done. If the partnership is bound by an agreement made on its behalf by a partner or other agent, the general partners are also bound. Whether a general partner is liable to a third person for the entire amount of a partnership obligation incurred by an agent, or only for a portion thereof, is determined by the local law of the state having the most significant relationship.

Liability of limited partner. The local law of the state having the most significant relationship determines whether a given partner is a limited partner. The relationship of such a partner to the partnership can be compared to the relationship of a shareholder to a corporation. Whether a limited partner will be held liable for an act done on behalf of the partnership is determined by the local law of the state having the most significant relationship. Unless the limited partner has taken a significant part in the control of the partnership business or has led the third person reasonably to believe that he was a general partner. In either of these latter events, the limited partner will be held bound by the agent's action if he would so be bound under the local law of the state of most significant relationship. A limited partner may lead a third person reasonably to believe that he is a general partner by words or other conduct or by having his name included without limitation in the partnership name or in the list of partners.

Illustration:

1. Assume that the rights and duties of partners toward each other are determined under the relevant rule of the local law of state X. Pursuant to an agreement, A contributes Birr 1,000 to the partnership but takes no part in the management of the business and his name is not used in connection therewith. A does, however, receive a share of the partnership profits and, under a statute of X, is not liable for the debts of the partnership beyond his contribution thereto. In Y, a neighboring state, the general manager contracts valid partnership debts. Y has no statute limiting the liability of a limited partner. A is not liable for these debts.

2. Same facts as in Illustration 1, except that in state Y A represents himself as a general partner. Y local law will be applied to determine A's liability for the partnership debts contracted by the general manager in Y.

3. Same facts as in Illustration 1, except that A participated in the management of the partnership business and the debts in Y were contracted with his approval and consent. Y local law will be applied to determine A's liability for these partnership debts.

9.4Companies

This subsection deals with business corporations. It is concerned with the choice-of-law problems that arise when a business corporation extends its activities beyond the borders of the incorporating state. On the other hand, this section does not deal with municipal or other public corporations or with nonprofit corporations, charitable or otherwise.

Probably, the most important attribute of a business corporation is limitation of the liability of shareholders for any act or omission of the corporation. Other important attributes of such a corporation are the capacity (1) to sue in the corporate name for the enforcement and protection of common rights and interests and, conversely, to be sued in the corporate name for the enforcement of claims against the enterprise, (2) to have its affairs directed by official representatives who usually alone have the power to enforce and protect common rights and interests, (3) to acquire, hold and deal with property, real and personal, in the corporate name, and (4) to have succession for a term of years or in perpetuity. These attributes are also enjoyed in varying degrees by limited partnerships, joint stock associations and business trusts. As a result, it may be difficult on occasion to distinguish between a corporation and some other form of organization. In this regard, the only organizations dealt with are business corporations and partnerships.

9.4.1 Creation, Recognition and Dissolution

A) Requirements for Incorporation

In order to incorporate validly, a business corporation must comply with the requirements of the state in which incorporation occurs regardless of where its activities are to take place or where its directors, officers or shareholders are domiciled.

What is meant by incorporation? Incorporation, as the term is used in this material, is the process of forming a corporation. The more important attributes which an organization normally acquires through incorporation are those stated in the introductory

note to this section. Each state determines for itself what things must be done to secure incorporation under its local law. Thus the method of incorporation is a matter of local law. In most states a corporation is formed by complying with the conditions prescribed by general law. A corporation is a domestic corporation with respect to the incorporating state. With respect to other states, it is a foreign corporation. This implies that a corporation incorporated in one region of Ethiopia is a foreign corporation with respect to other regions of Ethiopia. A corporation incorporated in Oromiya, is "domestic," as the term is used in this Section, with respect to the Oromiya territory. Elsewhere, it is a foreign corporation.

Incorporation can take place in a state where the corporation conducts no business and where none of the directors, officers or shareholders are domiciled provided that this is permitted by the local law of that state. If the requirements of the state of incorporation have been met, the fact of incorporation will be recognized in other states.

B) Recognition of Foreign Incorporation

It is generally agreed that incorporation by one state will be recognized by other states. But what do we mean by recognition? A distinction must here be drawn between recognition of a foreign incorporation and permitting a foreign corporation to do various kinds of acts. The corporate status will be recognized everywhere, but it is customary for a state to place limitations upon the privilege of a foreign corporation to do business, or to conduct other activities, within its territory. The more important effects of the recognition of a corporate status are stated herein below.

Suits by and against the corporation. The capacity to sue and to be sued in the corporate name pertains to a corporation's status as such. In this regard, most States of the United States, however, refuse to permit actions on local transactions to be brought in their courts by foreign corporations which do business within their territory without having complied with their statutory requirements. Apart from this one qualification, a state will permit a foreign corporation to bring suit in its courts. A state will likewise permit

actions to be brought in its courts against a foreign corporation over which it has judicial jurisdiction.

Limitation of shareholders' liability. Insofar as this protection is accorded them in the state of incorporation, a state will usually recognize the immunity of the shareholders of a foreign corporation from being sued as individuals on matters arising out of the acts or omissions of the corporation and from having their individual property made responsible for obligations of the corporation.

The local law of the state of incorporation will be applied to determine a corporation's purposes and whether a given act is ultra vires. For a foreign organization to be recognized as a corporation by the courts of a second state, it is not necessary that the method of incorporation followed in the incorporating state be the same as that followed in the second state.

In relation to permission to do isolated acts, a state will usually permit a foreign corporation to perform within its territory such isolated acts as do not amount to the doing of business.

Illustration:

1. A, a corporation incorporated in state X and which does all its business in that state, purchases an automobile in state Y for the use of its president. The Y courts will recognize that, as a result of this purchase, title to the automobile is in A.

Treatment of Organization as Corporation

An organization formed in one state will be considered a corporation within the meaning of a statute or rule of another state if the attributes the organization possesses under the local law of the state of its formation are sufficient to make it a corporation for the purposes of the statute or rule.

A court will sometimes be faced with the task of determining whether an organization formed in another state should be considered a corporation within the meaning of a local

statute or rule. In deciding this question, the court will first determine what attributes an organization must possess to be a corporation for the purposes of the statute or rule. If the organization possesses such attributes under the local law of the state of its formation, it will be considered a corporation within the meaning of the statute or rule. This will be so even though the organization goes by some other name in the state of its formation, or even though there have been omissions or other defects in the process of incorporation which give the state of incorporation the power, through quo warranto or other action, to deprive the organization of its corporate status. Contrariwise, even though the organization is considered to be a corporation in the state of its formation, it will not be considered a corporation within the meaning of a statute or rule of another state if the attributes given it by the former state do not suffice to make it a corporation for the purposes of the statute or rule. In any event, the organization will be recognized in other states as possessing such attributes as are accorded it by the state of its formation.

Illustrations:

1. A is formed as a joint stock association under a statute of state X. A does business in state Y and the question arises whether it is taxable as a corporation under the Y statutes. The Y courts wil not consider this question foreclosed by the fact that A is not considered a corporation in X. Rather they will look to see what attributes have been accorded A by the X statutes, such as whether A can sue and be sued as an entity, whether its affairs are governed by duly elected representatives and whether its members enjoy limited liability. If these attributes are sufficient to make A a corporation within the meaning of the Y tax statutes, it will there be taxable as such.
2. Same facts as in Illustration 1 except that A is actually incorporated in state X. A will not, however, be taxable as a corporation in state Y if the attributes it possesses in X are insufficient to make it a corporation within the meaning of the Y tax statutes.

C) Termination or Suspension of Corporate Existence

Whether the existence of a corporation has been terminated or suspended is determined by the local law of the state of incorporation. The termination or suspension of a corporation's existence by the state of incorporation will be recognized for most purposes

by other states. The state which incorporates the corporation may terminate or suspend its existence. This is so even though all of the corporation's assets are situated and all of its business is done in other states. The local law of the state of incorporation will be applied to determine the terms and conditions upon which the corporate existence may be restored following its termination. This law will also usually be applied to determine the rights and obligations of shareholders, directors and officers upon the termination or suspension of the corporate existence. While a state may not terminate or suspend the existence of a foreign corporation, it may, in the absence of constitutional prohibition, forbid a foreign corporation to do business within its territory and may wind up the corporation's affairs there.

If the existence of a corporation incorporated in a State of the United States is terminated or dissolved by the State of incorporation, sister States will recognize that the corporation has lost those attributes of incorporation of which it has been deprived by the local law of the State of incorporation. Statute of state of incorporation may extend life of corporation. To facilitate collection by the corporation of its assets, and the assertion of creditors' claims against it, statutes commonly provide that for a period of time after the termination or suspension of the corporate existence, suits may be brought by or against the corporation. Likewise, such statutes usually permit the corporation to settle and discharge claims, to transfer its assets, and to do other acts incidental to the winding-up of its affairs.

A corporation whose existence has been terminated or suspended will usually be permitted to exercise in another state such powers as are accorded it by the state of incorporation even though the other state does not give similar powers to domestic corporations. Sometimes, however, the exercise of such powers will be prohibited by a statute or common law rule of the other state. For example, some states have statutory or constitutional provisions which provide that foreign corporations shall not enjoy greater rights or privileges than domestic corporations; these provisions might be interpreted to prohibit dissolved foreign corporations from acting in the state if domestic corporations in similar circumstances lack the power to do so.

Statute of other state making corporation subject to suit after termination or suspension of existence. Primarily for the purpose of saving local creditors from the inconvenience of having to present their claims in the state of incorporation, statutes sometimes provide that foreign corporations which own things or do business in the state can sue, and remain subject to suit, in the corporate name for a period after their existence has been terminated or suspended. Even if there is no similar statute in the state of incorporation, such a statute will permit suit to be brought in the state of enactment to wind up the corporation's business in that state or to proceed against corporate property located there. As between States of the United States, the Supreme Court of the United States has held that the State of incorporation, if it has no statute extending the life of the corporation, is not required by full faith and credit to enforce a judgment rendered in a sister State against the corporation after its dissolution.

As to method of terminating or suspending corporate existence, the local law of the state of incorporation determines the method of terminating or suspending the corporate existence. This law will be consulted in order to determine whether there has been sufficient compliance with the prescribed method to make effective the termination or suspension.

Illustration:

1. The local law of state X lays down certain requirements for the recording and publication of a corporation's dissolution document. C, a corporation of X, is sued in state Y. C pleads that it has been dissolved and shows a court order purporting to dissolve it. Failure to comply with the X requirements is alleged by the plaintiff to make the dissolution ineffective. This issue will be determined by the Y court in accordance with the X local law.

A considerable period of time may elapse between the institution of the proceeding and the effective date of the termination or suspension of the corporate existence. The legal effect of acts done by the corporation during this period of time is determined in accordance with the law of the state having the most significant relationship.

The termination or suspension in a foreign nation of the existence of a corporation incorporated there will usually be recognized in the United States. Recognition has, however, been denied such termination or suspension when this was thought to be required by the strong public policy of the forum. Thus, recognition has been denied a termination or suspension effected in a foreign nation for the purpose of confiscating the property of the corporation. It is at least uncertain whether there is still scope for the application of State, as opposed to federal, policy to deny recognition to such a termination or suspension.

Statutes extending the life of a corporation for purposes of suit after the termination or suspension of its corporate existence have been applied to foreign corporations which did business in the state even in the absence of a similar statute in the state of incorporation.

Whether full faith and credit should require extraterritorial enforcement of a judgment rendered against a dissolved foreign corporation under a statute of a State where the corporation did business depends upon which of two considerations is the weightier. The first is the desirability of having a unified winding-up of the corporation's affairs. This can best be achieved by limiting the effect of such statutes to property located within the particular State so as to permit the State of incorporation to insist that, in general, claims against the corporation must be proved before its courts. The second consideration is the convenience of the corporation's creditors who would usually prefer to prove their claims at home and might find it a serious hardship to be compelled to do so in the State of incorporation.

The Supreme Court of the United States has held that a judgment of a sister State rendered against a foreign corporation after its dissolution need not be treated under full faith and credit as conclusive of the creditor's claim by the receiver in the State of incorporation in Pendleton v. Russell, 144 U.S. 640 (1892). More recently, however, the Court has held that such conclusive effect must be given under full faith and credit in the State of organization to a judgment rendered in a sister State against an unincorporated association which had not formally been dissolved but whose affairs were in the process

of being wound up by a statutory liquidator in *Morris v. Jones*, 329 U.S. 545 (1946). Pendleton v. Russell was distinguished in this latter case on the ground that there the corporation had been formally dissolved. To date, judgments rendered against a dissolved corporation in states where the corporation had done business have been refused recognition in the state of incorporation on the ground that such judgments are only effective against the property of the corporation that is located in the state where the judgment was rendered.

Concerning winding up of foreign corporation, a state, without terminating the existence of a foreign corporation, may wind up its business in the State, subject to constitutional limitations. As part of its power to control what goes on in its territory, a state may there regulate and restrict the activities of foreign corporations. Subject to constitutional limitations, Ethiopia may forbid a foreign corporation to do business in its territory and may wind up the corporation's affairs there.

9.4.2 Corporate Powers and Liabilities

A) Rights Against and Liabilities to Third Person

The rights and liabilities of a corporation with respect to a third person that arise from a corporate act of a sort that can likewise be done by an individual are determined by the same choice-of-law principles as are applicable to non-corporate parties. This sub title is concerned with the rights and liabilities of a corporation with respect to third persons that arise from an act of the corporation that could likewise have been done by an individual. As to the law governing issues arising from acts that can only be done by corporations or other associations. As used in this Section, "third persons" are persons other than the state of incorporation and the directors, officers or stockholders of the corporation. As to the rights and liabilities of directors, officers and stockholders that arise from an act of the corporation.

Corporations can act only through agents. As used in this Section, the term "act of a corporation" means an act done on the corporation's behalf and for which the corporation is responsible under agency principles.

Effect of foreign corporation's act when not ultra vires. Many acts can be done both by corporations and by individuals. Thus, corporations and individuals alike make contracts, commit torts and receive and transfer assets. Issues involving acts such as these when done by a corporation are determined by the same choice-of-law principles as are applicable to non-corporate parties. This is so even though the corporation is forbidden by general statute or by common law rule of the state of incorporation to do the particular act. In such a case, the state of incorporation may, if it so desires, dissolve or otherwise punish the corporation for having done the act. But so too may the state of an individual's citizenship punish him for having done in some other state an act which was legal and effective under the latter state's local law. The state of incorporation may also impose liability upon the directors or officers for action taken by the corporation in violation of that state's local law.

A corporation's rights and duties under a contract are determined by the law governing choice of law in contract. If an agent of a corporation, while acting in the course of his employment, commits a tort, the law governing extra contractual liabilities determines whether the corporation is liable for the tort and the extent to which it is liable in damages. Likewise, the validity of a transfer by a corporation, or to a corporation, of an interest in land or in a chattel is determined by the law selected by application of the rules governing transfer of rights in property.. The choice-of-law rule applied to determine whether a transfer is in fraud of creditors will also be the same whether the transfer was made by a corporation or by an individual.

In some states, there are statutes restricting the activities of corporations but not of individuals. If there is such a statute in a state where a corporate act is done, the statute is usually applicable to foreign corporations as well as to domestic corporations. As to statutes prohibiting foreign corporations from doing business in the state unless they have fulfilled certain requirements.

What will be the effect of foreign corporation's ultra vires act? For the purposes of conflict of laws, an "ultra vires act" is an act done by the corporation in excess of the powers granted it by its charter or articles of incorporation.

The law selected by application of the choice-of-law rules stated in this Section determines whether, and under what circumstances, a third person is under a duty to inquire whether the corporation is empowered by its charter or articles of incorporation to do the particular act.

If the third person knew, or should have known, that the corporation was acting in excess of its powers, the question will then arise as to the effect, if any, which the fact that the corporation was acting ultra vires has upon the rights and duties of the parties. In this regard, the local law of the interested states may differ as to whether ultra vires is a defense in a suit by or against the corporation on a contract that has been fully executed by both parties, or that has been executed by one party but not by the other, or that is wholly executory on both sides. If *ultra vires* is not a defense in the particular circumstances under the law selected by application of the choice-of-law rules stated in this Section, the contract will not be held unenforceable on the ground of ultra vires. This is so even though the contract would be unenforceable on the ground of ultra vires under the local law of the state of incorporation.

Limitations imposed upon a corporation by its charter or articles of incorporation may be intended by the state of incorporation to be effective only within its own territory. Such limitations will not be applied to restrict the activities of the corporation in other states. So, if a corporation is prohibited by its articles of incorporation from owning land and if this provision is intended by the state of incorporation to apply only to local land, the corporation will not be prevented by this provision from acquiring title to land in other states.

Even if a particular limitation contained in the charter or articles of incorporation is intended by the state of incorporation to bind the corporation everywhere, it may

nevertheless be held ineffective by the law selected by application of the choice-of-law rules stated in this Section. So even if a corporation is prohibited by its articles of incorporation from owning land and even if this provision is intended by the state of incorporation to bind the corporation everywhere, the state where the land in question is situated may choose to disregard this limitation upon the corporation's powers and hold that the corporation has acquired good title to the land. If so, the courts of all other states will likewise hold that the corporation has acquired good title to the land.

Illustrations:

1. The A corporation is incorporated in state X under whose statutes corporations are not permitted to own land. The rule of state Y is to the contrary in this regard. A purchases land in Y. Assuming that the Y courts would apply their own local law, A will acquire good title.
2. The A corporation is incorporated in state X. A duly authorized agent of A enters into an oral contract in state Y for the purchase of land. By the local law of Y, a contract for the purchase and sale of land must be in writing; there is no such provision in the local law of X. A will be held not bound by the contract if, under the rules of choice of law in contract, Y local law is applicable.
3. C, a railroad company incorporated in state X, employs A to raise a crop of potatoes on its land in state Y. A buys 100 tons of fertilizer for the company from B in Y, and the fertilizer is delivered to A. By the local law of X, the company would be liable for the cost of the fertilizer; by the local law of Y, it would not. B sues C in a third state for the price of the fertilizer. Assuming that Y local law is applicable, judgment will be given for C.
4. The a Corporation is incorporated in state X. In state Y, A's president, with the authorization of the directors, attempts to transfer interests in such of A's movables as are situated in Y. The transfer would be invalid under a statute of X. The transfer, however, will nevertheless be valid if it would have this effect under the local law of Y, if this law is applicable. A's president and directors may, however, be held liable under the X statute for their actions in connection with the transfer .

9.5Summary

In this unit, the main point of focus was choice-of-law rules relating to agency, partnerships and corporations in the field of contract. Primarily an agency relationship can give rise to three choice-of-law problems: namely, what law should be applied to determine the rights and duties as between (1) the principal and agent, (2) the principal and some third person on account of one or more acts by the agent, and (3) the agent and the third person. When an agency relationship is created the obligations of the principal and agent to each other is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties and the transaction. This state is selected by a process essentially similar to that employed in the case of a contract.

This unit has tried to cover issues that would arise in relation management and liabilities of partners and the partnership. We have seen that the rights and duties owned by partners to each other are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the partners and the transaction. This law is selected by application of the rules governing choice of law in contract. Partnerships give rise to much the same choice-of-law problems as do simple principal-agent relationships.

We have also dealt with the problem of what law will be applied to determine the rights and duties which arise between the partnership and the partners on the one hand and some third person on the other because of one or more acts done on behalf of the partnership by a partner or other agent. On these counts, the law selected by application of choice of law rules governing contracts, determines whether the agreement amounted to a contract between the partnership and the third person and the rights created thereby.

Concerning share companies, we have raised several issues relevant to the subject. These are issues related to the governing law in relation to creation and recognition of corporations, liabilities of the corporation in relation to contacts and extra contractual liabilities entered in its name and the like. In order to incorporate validly, a business

corporation must comply with the requirements of the state in which incorporation occurs regardless of where its activities are to take place or where its directors, officers or shareholders are domiciled.

Whether the existence of a corporation has been terminated or suspended is determined by the local law of the state of incorporation. The termination or suspension of a corporation's existence by the state of incorporation will be recognized for most purposes by other states. The state which incorporates the corporation may terminate or suspend its existence.

The rights and liabilities of a corporation with respect to a third person that arise from a corporate act of a sort that can likewise be done by an individual are determined by the same choice-of-law principles as are applicable to non-corporate parties. A corporation's rights and duties under a contract are determined by the law governing choice of law in contract. If an agent of a corporation, while acting in the course of his employment, commits a tort, the law governing extra contractual liabilities determines whether the corporation is liable for the tort and the extent to which it is liable in damages. Likewise, the validity of a transfer by a corporation, or to a corporation, of an interest in land or in a chattel is determined by the law selected by application of the rules governing transfer of rights in property.. The choice-of-law rule applied to determine whether a transfer is in fraud of creditors will also be the same whether the transfer was made by a corporation or by an individual.

9.6Review Questions

After reading the material thoroughly, please answer the following questions and problems

Questions

1. What are the main issues that would arise in relation to agency in cases containing foreign elements?

2. What is the main rule governing choice of law concerning the creation of agency relationship?
3. What are the measures to determine whether a certain agency relationship has the most significant relationship?
4. Do you think we could apply this approach of the law of the state that has the most significant relationship in the Ethiopian context to resolve cases of agency containing foreign element? Why or why not?
5. It is said that the same rules governing choice of law in contract cases also govern liabilities which arise between the partnership and the partners on the one hand and some third person on the other. What do you think is the rational behind this rule? Would it be good to apply this rule in Ethiopian courts? Why or why not?
6. What law governs creation and dissolution of companies in conflict cases?
7. How do we resolve issues related to liability of company to its creditors in conflict of laws? Which law governs this issue?
8. Would it be appropriate if Ethiopia adopted the approach under the Second Restatement of US to deal with choice of law issues related to companies?
9. What is the position of Ethiopian Federal Draft Conflict of Laws Proclamation on issue of agency, Partnership and Companies? (Analyze the provisions of the Federal Draft Conflict of Laws Proclamation).

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