

## **Determining Proper Law and Jurisdiction in International Commercial Disputes: Efficacy of Conflict of Laws Principles**

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**Abstract:** *This article is focused on efficiency of the principles and regulations under Conflict of Law rules and the criterion considered by courts in their application to appropriate cases. Rules of conflict of law are significant in all international disputes and as such, identity and test of efficacy of the established norms for bringing out such claims is essential. This is determined by seeing how efficient the principles under conflict rules are in determining proper law and jurisdiction in international disputes. Issues like which general principles and mechanisms are available under Private International Law to guide issues of contracts or commercial transactions; how these principles are applied by the courts in determining jurisdiction and proper law; and what are the practical and possible difficulties in applying such principles must be considered.*

**Keywords:** *Conflict of Laws, International Commercial Disputes, Jurisdiction, Proper law*

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### **I. Introduction**

The evolutionary nature of Private International Law has always given rise to different implications in determining cross border disputes. Despite this, respective rights and obligations of the parties, especially in international commercial contracts, have attracted a great amount of concern of the governments, courts and other administrative bodies around the world. Such issues have also been suggested and addressed by a number of authors. The basic purpose of considering these implications come from the necessity of greater consistency in deciding cases concerning international commercial disputes. Thus, it is much relevant to consider the efficacy of the established principles and regulatory mechanisms under private international law as they are applied by the courts in resolving the relevant issues. The efforts and achievements of international community and courts in ensuring conformity in similar cases are remarkable. However, this is sometimes difficult while taking into consideration the multidimensional nature and characteristics of international commercial disputes.

### **II. Conflict Of Laws In General**

Conflict of Laws and Private International Law are traditional alternatives in the area of International Law. According to Black's Law Dictionary, Private International Law is that branch of jurisprudence which arises from the diversity of the laws of different nations in their relevance to rights and remedies of individuals. In some legal systems, it is also known as 'International Private Law', for instance- ...the German conception of the subject as *internationales Privatrecht*.<sup>2</sup>

Private International Law upholds and applies both Common Law and statutory laws. Its basic purpose is to address and explain the nature of critical issues involved in a proceeding and also to critically analyze how they can be resolved in the best possible way. Most conflict rules specify a connecting factor and a type of proceeding.<sup>3</sup> The common problem in all cases of conflict of laws is that it has one or more foreign elements within it. Therefore it raises questions like which court has jurisdiction to accept the proceeding, how the jurisdiction will be exercised, what particular law is appropriately applicable to the subject-matter and to the parties to the proceeding and how the judgment would be enforced. It settles the issues in a case having foreign elements though the decisions are not always without criticism.

### **III. International Legal Address To The Issue**

Theoretically, international commercial disputes have attracted a number of international legislations. However, it is not possible to refer to any one of them as the unification process is still in progress. Some significant legislations are the Vienna Convention on the International Sale of Goods 1980, the Rome Convention on the Law Applicable to Contractual Obligations, 1980, UNIDROIT Principles of International

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<sup>2</sup> Briggs, Adrian, *the conflict of laws* (Oxford, Oxford University Press, 2008).

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Commercial Contracts, the 1968 Brussels convention, the 2001 Brussels I Regulation and the 2007 Lugano Convention. Other laws include the Hague Convention on the Law Applicable to International Sale of Goods, 1955, the Hague Convention on the Law Applicable to Agency, 1978 and the Hague Convention on the Law Applicable to Contracts for the International sale of Goods, 1985. Among these instruments, the Brussels I Regulation (BRI) 2001, the Rome Convention 1980 and the Rome I Regulation 2008 are particularly mentionable as they deal with commercial and contractual disputes. BRI deals with legal disputes of civil and commercial nature whereas Rome I deals with laws and disputes relating to contract.

The first important thing to look at and find in these laws is how broadly they cover the issues of commercial disputes in order that their efficacy is determined. For instance, the 1980 Convention specifies, by art 18 that in its interpretation and application, regard should be had to the international character of its rules and to the desirability of achieving uniformity in their interpretation and application.

The material scope of the 1980 Convention is, however, restricted to a fairly limited extent by art 1(2)-(4), which excludes certain types of transaction, certain terms, and certain issues from the ambit of the Convention, and thus remits them to the traditional conflict rules.

## **IV. The Common Principles**

### **4.1 Presence Of Foreign Element**

The test of determining if a particular proceeding falls within the area of conflict of laws is to see if it contains a foreign element. However, it has to be carefully noticed as under private international law, the meaning of a country and therefore its legal system is different from its ordinary meaning. For conflict purposes, 'country' normally refers to a territory having a distinct legal system.<sup>4</sup> The courts must apply wider international tests in deciding the presence of a foreign element in the proceeding and its nature. The concept of foreign element does not only mean that there is a foreign law on the subject-matter of the case but also includes parties to the proceeding belonging to different states.

### **4.2 Domicile Rule And The Implications**

A person cannot be without domicile and he cannot have more than one domicile at a given time though he can have residences at different places at the same time. It is imperative that the court considers the domicile of the parties before it can determine if it has the jurisdiction to entertain the proceeding. Therefore, the fundamental duty of the court is to ascertain whether the parties and/or the cause of action have a close connection with the forum where the claim is brought to substantiate the court's assuming jurisdiction.

The Common Law rule is that each adult person can change their domicile by leaving the previous domicile in order to permanently reside somewhere else. This is known as a domicile of choice. A domicile of choice can be abandoned if a new domicile of choice is acquired or if the domicile of origin revives.<sup>5</sup>

Also, international regional arrangements may adopt other mechanisms. For example- a person domiciled in a Member State of the European Union can be sued in the courts of another Member State in accordance with the terms of the 2001 Brussels I Regulation (BR I). According to Articles 2, 3, and 4 of the Regulation the test is whether the defendant has his domicile within the European Union, therefore in one of the EU Member States. If so, then irrespective of the parties' nationality and irrespective of the domicile of the plaintiff, the defendant's place of domicile will be the proper forum. The Brussels I Regulation not only applies in case both the parties are domiciled within the European Union, but also when the plaintiff belongs to a third State, which is not bound by the Brussels I Regulation, provided that the defendant has his domicile in one of the EU Member States.

Article 59, paragraph 1, BR I merely states that in order to determine whether a party is domiciled in the Member State whose court is approached, that court has to apply its internal law. Therefore, the court has to examine its domestic law regarding the domicile of natural persons to establish if the defendant (or plaintiff) has his domicile in that State.

If the defendant is domiciled in the European Union, but not in the Member State of the court approached, that court must refuse jurisdiction on the basis of Article 2 of the Brussels I Regulation, unless one of the exceptions of that Regulation is applicable. If the defendant is domiciled in a Member State, he may be sued in the courts of another Member State only if the courts of that other Member State are competent by virtue of the Regulation (Article 3 BR I). Articles 5 to 24 (Sections 2-7) of the Brussels I Regulation have to be consulted by the seized court to determine whether it may ground its jurisdiction or whether it must reject jurisdiction.

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<sup>4</sup> Stone, Peter, *the conflict of laws* (Harlow: Longman Group Limited, 1995).

<sup>5</sup> Fawcett, J.J., North, P.M., Carruthers, Janeen M, *Cheshire, North and Fawcett, private international law* (Oxford, Oxford University Press, 2008).

Notice has to be taken that in some particular cases the Brussels I Regulation itself indicates that domicile of the plaintiff is of more importance. One of these cases is where the plaintiff is an insured person or a policy holder under Article 9.

Also, where proceedings are commenced in England against a person domiciled in another Member State and the defendant does not want to bestow jurisdiction on the English court, the court must decline jurisdiction of its own motion.<sup>6</sup> So there can even be conflict in fixing whether the claimant's choice or the defendant's domicile rule should be given priority.

Where the question of domicile is brought before an English court, it means 'domicile' under English Law and whether a person is domiciled somewhere will then be decided according to English Law only. Although this ... is too wide a formulation to say that in an English Court, domicile means domicile in the English sense.<sup>7</sup> According to Lord Atkinson in *Casdagli v Casdagli*<sup>8</sup> ... a person's tastes, habits, conduct, actions, ambitions, health, hopes and projects are all regarded as keys to his intention.

A domicile continues to be a person's domicile until proved otherwise. In some countries- the United States and New Zealand, for example- the law of the domicile just abandoned continues until a new domicile is acquired.<sup>9</sup> Domicile of choice is established by residence and intention. The notion of home, or of permanent home, takes color from particular facts.<sup>10</sup>

The settling (by both act and intention) in a country for an indefinite period is regarded as the closest connection between the person and his domicile.<sup>11</sup> As pointed in *The Estate of Fuld (No.3)*<sup>12</sup>, the court must be completely satisfied about the change of domicile and this change must be due to a firm intention or act and not to be inferred from mere facts or words.

However, intention is very difficult to define and classify as it is a psychological element. The reason is that it is not just one thing or a few things that can resolve the intentional test of domicile. Besides a test which appears to be vital in one case, may prove to be irrelevant in some other position of facts. For example- spending a long period of time in a country but disliking it may compel the court to conclude that domicile of origin is not lost.<sup>13</sup> The proof of domicile therefore lies on a balance of probabilities.

#### **4.3 Determining Court's Jurisdiction**

In order to understand the rules regarding jurisdiction, it is important to note that the question of jurisdiction is always dealt with from the viewpoint of the court which is actually seized by the parties to the proceeding. The seized court only has to answer the question whether it has jurisdiction to provide a decision. If it thinks that it has jurisdiction, it will accept the case. If it thinks that it has no jurisdiction, it will refuse to take the claim into consideration. The seized court does not have to investigate if there is a possibility that courts in other States may or may not deal with the lawsuit.

The fact also to be noticed is as foreign judgment may have no direct effect in one country, it is to be expected that the domestic judgments of that country would not have automatic direct effect elsewhere.<sup>14</sup> However, where parties agree to submit to the jurisdiction, such court may pass an anti-suit injunction to prevent interference with a judgment<sup>15</sup> which may have considerable effect on the enforcement issues of the decision. However the courts have to struggle a lot to find good grounds for granting such a relief.

It should also be considered that protection of a court's jurisdiction and processes is one thing and prevention of unacceptable behavior in law is a completely different thing. Of course, Courts now embrace the doctrine of '*forum non conveniens*' to prevent forum shopping<sup>16</sup> but this principle should only be applied where it is essential to do so for ends of justice and not merely for upholding the superiority of a particular forum.

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<sup>6</sup> Brussels I Regulation, 2001, Art 26 (1).

<sup>7</sup> Morris, John Humphrey Carlile, McClean, J.D. and Beevers, Kisch, *the conflict of laws* (London, Sweet and Maxwell, 2009).

<sup>8</sup> [1919] A.C. 145 at 178.

<sup>9</sup> Domicile and Habitual Residence as Connecting Factors, The Law Reform Commission. Available at [www.lawreform.ie](http://www.lawreform.ie) Last accessed on 15.12.2015.

<sup>10</sup> Morris, John Humphrey Carlile, McClean, J.D. and Beevers, Kisch, *the conflict of laws* (London, Sweet and Maxwell, 2009); See also *Winans v Attorney General* [1904] AC 287 and *I R C v Bullock* [1976] I WLR II78.

<sup>11</sup> See *The Law of Domicile*, Law Com. No. 168, 1987, Joint Report with the Scottish Law Commission, paras 7.1- 7.8.

<sup>12</sup> [1968] 675 at 686.

<sup>13</sup> See *Winans v Attorney General* [1904] AC 287.

<sup>14</sup> Sim, Cameron, *Choice of Law and Anti-Suit Injunction Relocating Comity*, International and Comparative Law Quarterly, 62(3), 2013, 710. Available on <[www.westlaw.ac.uk](http://www.westlaw.ac.uk)> Last accessed on 1/12/15.

<sup>15</sup> See *Marsi v Consolidated Contractors International (UK) Ltd (No 3)* [2008] EWCA Civ. 625.

<sup>16</sup> See *Spiliada Maritime Corp v Consulex Ltd* [1987] AC 460 (HL).

Therefore, the proper place to bring the claim should be determined considering the interests of all the parties and for the ends of justice.

At least, if the substantial majority of cases is suited regarding the rules regulating the taking of jurisdiction, it can be accepted... that a simple rule may ultimately serve the same function as the reasonable expectation test, but even more efficiently.<sup>17</sup> More puzzling is the argument that the double actionability rule of *Phillips v Eyre*<sup>18</sup> may still have some applicability in the international context notwithstanding its denunciation now in many common law jurisdictions. In particular, it is suggested that a virtue of the rule is that 'the application by a forum of the foreign law (if subjected to a filter that the claim must be actionable under *lex fori*) is likely to be beset by fewer judicial errors.'<sup>19</sup>

In these cases,... if a forum court wants to insist that *lex fori* should apply as a filter for liability, the justification,... must be a deeper rejection of the standards of *lex loci delicti*<sup>20</sup> on the ground that its law cannot be interpreted or applied with reasonable knowledge.

So, when it come to conflict of laws, responsible law courts should enforce a liberal public policy reflected in their law, acting as guardians of the standards usually accepted by civilized states. If 'just and convenient solutions in the context of international society' are among the ends of an efficient public international law, so they might – even should – be also of an efficient private international law.<sup>21</sup>

However, as pointed out in *Actavis Group HF and Eli Lilly and Co*<sup>22</sup> it must also be noted that where the validity of the subject-matter in question is not challenged, the domestic court has jurisdiction.

The Brussels Regulation 2001 covers legal disputes of a civil and commercial nature. The Regulation deals with jurisdiction. Now it is Regulation Proposal 2012 that has replaced the 2001 Regulation. The Regulation is subject to the jurisdiction of the ECJ on questions of interpretation. Also the Brussels regime does not prevent a non-party state to allow similar proceedings in their courts.

Principles of Common Law have been unconcerned to the individuality or domicile of the plaintiff while assessing the personal jurisdictional competency of local courts to deal with a civil dispute. It has traditionally been defendant-oriented. However, the positioning of access to justice rights higher on the axis of normative hierarchy is not necessarily optimal if the local forum is interested in a wider reach of access to justice rights on the axis of extra territoriality.<sup>23</sup>

Despite this, there has not been an acceptable theory on what constitutes a connection that is sufficient to link between the parties and the jurisdiction of the forum over them. Under the normative model a special duty is created to effectuate the right created by local law as opposed to a right created by foreign law. What proves to be critical in the inquiry of assessing the availability of the access to justice rights is not who the plaintiff is but whether local law is governing or not.<sup>24</sup> Courts may sometimes adopt a filtering mechanism to distinguish between different cause of actions and thereby proper forum for bringing such action in.

Under the doctrine of '*forum non conveniens*' a defendant may ask the court selected by the claimant not to exercise its jurisdiction on the ground that the case was more appropriately tried elsewhere.<sup>25</sup> What is an appropriate jurisdiction may depend on the subject matter as much as on the identity and characteristics of the parties.<sup>26</sup> Also the pecuniary jurisdiction of the court should be considered in conjunction with the gravity of the wrong concerned.<sup>27</sup>

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<sup>17</sup> Richardson, Megan, Review Article: Policy versus Pragmatism? Some Economics of Conflict of Laws, *Common Law World Review*, Volume 31, Issue 2, 2002, 312 (189). Available on <[www.lexisnexis.com.ergo.glam.ac.uk](http://www.lexisnexis.com.ergo.glam.ac.uk)> last accessed on 24.12.2013.

<sup>18</sup> [1870] LR 6 QB.

<sup>19</sup> Richardson, Megan, Review Article: Policy versus Pragmatism? Some Economics of Conflict of Laws, *Common Law World Review*, Volume 31, Issue 2, 2002, 312 (189). Available on <[www.lexisnexis.com.ergo.glam.ac.uk](http://www.lexisnexis.com.ergo.glam.ac.uk)> Last accessed on 1/12/15.

<sup>20</sup> Richardson, Megan, Review Article: Policy versus Pragmatism? Some Economics of Conflict of Laws, *Common Law World Review*, Volume 31, Issue 2, 2002, 312 (189). Available on <[www.lexisnexis.com.ergo.glam.ac.uk](http://www.lexisnexis.com.ergo.glam.ac.uk)> Last accessed on 1/12/15.

<sup>21</sup> Ibid.

<sup>22</sup> [2013] EWCA Civ 517.

<sup>23</sup> Kyriakides, Nicolas, A European-wide Preservation Order: How The Common Law Practice Can Contribute, *Civil Justice Quarterly*, 33(1), 2014, 72. Available on <[www.westlaw.ac.uk](http://www.westlaw.ac.uk)> last accessed on 1/12/15.

<sup>24</sup> Kyriakides, Nicolas, A European-wide Preservation Order: How The Common Law Practice Can Contribute, *Civil Justice Quarterly*, 33(1), 2014, 70. Available on <[www.westlaw.ac.uk](http://www.westlaw.ac.uk)> last accessed on 1/12/15.

<sup>25</sup> Morris, John Humphrey Carlile, McClean, J.D. and Beevers, Kisch, *the conflict of laws* (London, Sweet and Maxwell, 2009).

<sup>26</sup> Ibid.

<sup>27</sup> See *Oceanic Sun Line Special Shipping Co Inc v Fay* [1998] 165 CLR 197.

Any national system should not discriminate against foreign right holders in terms of safeguard and enforcement. Proceedings have to be heard only in the right courts having some genuine connection with the parties and/ or the cause of action. Opening one's courts to the whole world encourages 'forum shopping'... which is not conducive to settled international business.<sup>28</sup> The majority of contractual claims will arise as civil or commercial matters<sup>29</sup> and therefore the jurisdiction issue will fall within the Brussels regime<sup>30</sup>

Furthermore, a claimant must show strong reasonable grounds as to why service on a foreign defendant should be allowed. Under general English conflict rules, an English court would not recognize as possessed by any foreign court in the absence of some treaty providing for such recognition.<sup>31</sup>

#### **4.3 The Issue Of Choice Of Law**

The indicator that is used by courts as a mechanism to determine the applicable law in conflict cases is known as 'connecting factors'. However, under common law these factors will be interpreted exclusively by domestic law for until the choice of law machinery has identified a foreign law to apply to a dispute, there is no rational basis for using any law other than domestic law for definitional purpose<sup>32</sup>.

A choice of Law problem, to put it generally, arises when there is more than one sovereign whose law might create rights or obligations related to a particular event.<sup>33</sup> However, case laws reveal that courts rely more on the law that reaches the facts of a case and therefore that law must also supply the rule of decision.<sup>34</sup> Despite this being a strong rationale, it may also be true that the systematic costs of a different rule would be greater if the plaintiff simply litigates the case in an inconvenient forum in order to preserve favorable law.<sup>35</sup>

The Rome Convention on the law applicable to contractual obligations 1980 (Rome I) has attempted to harmonize the choice of law rules in contractual matters. Those who are in support of the Convention's role in regulating choice of law rules, propose that such harmonization makes it definite, predictable and consistent when considering applicable law though this proposition is not without any controversy. There is still no sign of the empirical research which justified this alleged truth<sup>36</sup> and some issues in particular cases raise considerable complexity that may not be addressed with the help of Rome I.

Previously, most commercial cases brought in courts in England were determined by the 'proper law of contract'. The meaning of such term is that where there is no specific agreement or indication in the contract as to the selection of law, the court will take into account the wording of it. The purpose was to see if the parties impliedly agreed for such law to be applied in case of dispute. The English courts declined to be obliged by any stiffness in the method of choice of law in relation to *lex loci contractus*<sup>37</sup> (where the contract was made) or *lex solutionis* (place of performance). Preference was given to the intention of the parties.<sup>38</sup> The courts at modern times decline to apply the *lex loci contractus* principle. However, it still has some significance as it is one of the factors to consider while determining proper law.

Amongst the factors that a court will take into consideration in determining the system of law that has the closest and most real connection are:

1. where the contract was concluded;
2. the place of performance of the contract;
3. Lex domicile ( Law of domicile of the parties)<sup>39</sup>;
4. the place of integration of the incorporated bodies to the contract;
5. place where any security is to be taken or enforced;
6. whether the contract is linked with any other contract that contains a choice of law;
7. the currency used
8. Demurrage (if the contract contains such provision)

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<sup>28</sup> Clarkson, C. M. V. and Hill, Jonathan, *the conflict of laws* (Oxford, Oxford University Press, 2011).

<sup>29</sup> Briggs, Adrian, *the conflict of laws* (Oxford, Oxford University Press, 2008).

<sup>30</sup> Regulation (EC) 44/2001.

<sup>31</sup> *Amin Rasheed Shipping Corp -v- Kuwait Insurance Co* [1984] AC 50, [1983] 2 All ER 884, [1983] 2 Lloyds Rep 365, [1983] 3 WLR 241

<sup>32</sup> Briggs, Adrian, *the conflict of laws* (Oxford, Oxford University Press, 2008).

<sup>33</sup> Roosevelt, Kermit, Choice of Law in Federal Courts: From Erie and Klaxon to Cafu and Shady Grove, *Northwestern University Law Review*, 2012, Vol. 106, No.1, p.10.

<sup>34</sup> See *Erie Railroad v Tompkins*, 304 US. 64 (1938).

<sup>35</sup> Roosevelt, Kermit, Choice of Law in Federal Courts: From Erie and Klaxon to Cafu and Shady Grove, *Northwestern University Law Review*, 2012, Vol. 106, No.1, p.29.

<sup>36</sup> Briggs, Adrian, *the conflict of laws* (Oxford, Oxford University Press, 2008).

<sup>37</sup> See *Compton v. Bearcroft*, 1769 2 Hagg. Con. 444n.

<sup>38</sup> See *Mount Albert Borough Council v Australian Temperance Society* [1938] AC 224.

<sup>39</sup> See discussion in this study on domicile.

### 4.3.1 The Problem of Party Nationality

A commercial dispute has many dimensions when the parties are subject to different legal systems. According to Peter Stone<sup>40</sup>, although the use of a standard form of English origin is not in itself an important connection with English law, if the form has become commonly used in transactions otherwise unconnected with England, it may be relevant. Also, Morris<sup>41</sup> opines that a party seeking to rely on foreign law has to produce evidence of the content of that foreign law.

Possible factual complexities, parties from different countries carrying out business from there, nature of the dispute being completely different from the formation of the contract, which law has the closest and most real connection with the issue of the case are only some of the things that the court might have to consider in determining its jurisdiction and proper law in a given case.

It is sometimes assumed that may be in a diplomatic way the court can ask for an interpretation of the foreign law from the government of that particular country. However, this is not always possible and sometimes impossible in some legal systems. The English courts have not adopted the practice in civil law systems according to which a government may be requested to give an official statement of the law on some particular matter.<sup>42</sup>

### 4.3.2 The Agreement

When it comes to the question of applicable law to conflict cases of international commercial transactions, the preferred principle is to choose the law by reference to the agreement between the parties. In this respect, the contract between the parties should be construed as it is, taking it as a single unit of agreement. Therefore, a contract, as an economic unity, should normally be governed in most respects by a single law<sup>43</sup> though in view of the nature of the issues in question, the proper law can be otherwise to the extent of respective issues. Also it is necessary that choosing a particular law to be applied in such a case must support the purpose of the contract and not invalidate it. This idea has been confirmed in old as well as recent cases<sup>44</sup>.

Furthermore, ...the [Rome] Convention seems to encourage the application of the proper law to the greater extent practicable<sup>45</sup>. Thus Pilcher J favored the application of Portuguese law in *D' Almeida v Becker*<sup>46</sup> to determine whether the seller could recover damages from the defaulting buyer while considering the sale contract's clauses.

In *The Assunzione*<sup>47</sup> the court applied the most real and substantial connection test to determine what should be the proper law applicable to the contract. England was the forum, but the parties contended that either French or Spanish law should be applied to their dispute over a shipping arrangement where plaintiff wanted to recover part of a salvage award paid. The court decided Italian law to apply. Thus the rules of finding the proper choice of law are hard to predict.

### 4.3.3 Commercial Practice

In commercial disputes, another issue is commercial practice. In some jurisdictions, commercial practice has a great influence over legislation.<sup>48</sup> However, the principle of *lex situs* for the purpose of conflict of laws suggest that the law governing the transfer of title to property is dependent upon, and varies with, the location of the property although commercial practice at that place is different.<sup>49</sup>

At different times, courts have taken different approaches to apply the law which is best for the ends of justice. For instance, the English court may allow a foreign law to apply to a case for recovery of credits where the creditor's right is better protected by the application of foreign law rather than English Law.<sup>50</sup>

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<sup>40</sup>Stone, Peter, *the conflict of laws*, (Harlow: Longman, 1995).

<sup>41</sup>Morris, John Humphrey Carlile, McClean, J.D. and Beevers, Kisch, *The Conflict of Laws*, (London, Sweet & Maxwell, 2009).

<sup>42</sup>Fawcett, James and Carruthers, Janeen M., *Cheshire, north and fawcett on private international law* (Oxford, Oxford University Press, 2008).

<sup>43</sup>Stone, Peter, *the conflict of laws* (Harlow: Longman Group Limited, 1995).

<sup>44</sup>See *Peninsular Line v Shand* [1865] 16 ER 103 and *Sayers v International Drilling* [1971] 3 All ER 163.

<sup>45</sup>Stone, Peter, *the conflict of laws* (Harlow: Longman Group Limited, 1995).

<sup>46</sup>[1953] 2 QB 329.

<sup>47</sup>ER (CA), 1954.

<sup>48</sup>See *Century Credit Corporation v Richard* (1962) 34 DLR (2D)291 (Ontario Court of Appeal).

<sup>49</sup>See *Castrique v Imrie* (1870) LR 4 HL 414 (House of Lords).

<sup>50</sup>See *Miliangos v George Frank* (Textiles) Ltd (1976) AC 443 (House of Lords). See for further details MacLean, Robert M and Tovey, Gwyn, *cracknell's law students' companion conflict of laws* 1996, (London, Old Bailey Press, 1996).

Interestingly, in commercial disputes, even an express choice of law can be overridden by a particular statute or convention.<sup>51</sup> However, the court in such a case will consider that statute or convention as overriding the express choice only if the issue falls within the operation of that statute or convention and if the rights and obligations of the parties can be adjudicated better this way.

#### **4.4 Substance Or Procedure**

The better view is that the availability of right is a substantive matter and if it is available then on discretionary power, the court can determine how the right is to be awarded. It was also held in *Chaplin v Boys*<sup>52</sup> that the substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum. However, this is not conclusive as in one legal system or others, the procedure might be clearly embodied under legislation.

Nevertheless, a party to litigation in a legal system must take the law of the procedure as he finds it. He cannot by virtue of some rule in his own country enjoy greater advantages than other parties there.<sup>53</sup> Neither must he be deprived of any advantages that law may confer upon a litigant in the particular forum of action.<sup>54</sup> However, even the use of this certain principle may raise difficulty when the court efforts to establish a test for such distinction between matters that are substantive and matters that are procedural. Despite this, unless a distinction is made with a clear regard to the underlying purpose of private international law<sup>55</sup>, it may result in a failure to do justice. Law exists to fulfill foreign rights, not to destroy them<sup>56</sup> and this is one of the basic principle on which Private International Law is founded.

This is also the reason that Willes J attacked the decision in *Leroux v Brown*<sup>57</sup> for not allowing the plaintiff a right of action in England. The law of England applicable to this particular case imposed a rule of procedure which was binding on all litigants suing in England. As the claim was unenforceable under that statute, the plaintiff's action failed. Willes J thought that in the circumstances the statutory rule should not have been treated as procedural<sup>58</sup> so as to override the justifiable claim of the plaintiff under the foreign law.

Also per Lord Denning in *Monteross Shipping Co Ltd v International Transport Workers' Federation*<sup>59</sup>: "It seems to me that the true distinction is between the existence of ...[a] (substantive law) and the remedies for breach of it (which is the procedural law)." Also according to Scarman J in *Re Fuld's Estate* (No 3)<sup>60</sup> "I attempt no general answer to these questions; for answer can only be made after an analysis of the specific questions calling for decision, its legal background and factual context."

Another factor to remember is that ...The applicable substantive law will usually be the internal law of a particular country, but it could be a uniform law specified in a treaty<sup>61</sup> and therefore the issue is to be governed by that treaty. The Uniform law on International Sales, annexed to Hague Convention of 1964 can be mentioned as an example in this regard.

The truth is that substance and procedure cannot be relegated to clear-cut categories<sup>62</sup> though there have been many efforts on the part of authors and courts to discover a test to differentiate between them. There is no specific dividing line between them which can be discovered by one reason alone.

However, the two must be distinguished for the sake of the proceeding. It should be done by evaluating the relativity of the different aspects of the claim and the purpose for which such distinction has become necessary to make. But the question also to be considered by the forum is how far it can go following the foreign law without anyway affecting its own legal system. Probably the best answer is as far as it has gone and will go in future instances.

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<sup>51</sup>See *The Hollandia* (1983) 1 AC 565 House of Lords. See for further details Templeman, L and Moloney, Niamh, *casebook on conflict of laws* (London, Old Bailey Press, 1997).

<sup>52</sup> [1971] AC 356, at 378-379.

<sup>53</sup> North P.M and Fawcett J.J, *cheshire and north's private international law* ( Butterworths 1999).

<sup>54</sup> See *De la Vega v Vianna* [1830] 1 B and Ad 284 at 228.

<sup>55</sup> North P.M and Fawcett J.J, *cheshire and north's private international law* (Butterworths 1999).

<sup>56</sup> *Ibid.* 69.

<sup>57</sup> [1852] 12 CB 801.

<sup>58</sup> *Williams v Wheeler* [1860] 8 CBNS 299 at 316.

<sup>59</sup> [1982] 3 All ER 841.

<sup>60</sup> [1968] p 675 at 695.

<sup>61</sup> Stone, Peter, *the conflict of laws* (Harlow: Longman Group Limited, 1995). See Case C- 288/92 *Custom Made Commercial Ltd v Stawa Metalbau GmbH*, 29 June 1994.

<sup>62</sup> North P.M and Fawcett J.J, *cheshire and north's private international law* (Butterworths 1999).

#### **4.5 The Principle Of Party Autonomy In Choice Of Law**

Under Common law, the principle of party autonomy means that the parties to a contract can choose any law that they want to apply to the contract. The freedom of parties to enter into whatever contractual terms or obligation they think fit, is the essence of this principle and that freedom is not complete if the law governing the contract is imposed upon them. *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*<sup>63</sup> is a leading decision of the Judicial Committee of the Privy Council on conflict of law in such issue. The case stands for the suggestion that an express choice of law clause in a contract should be honored if the contract was *bona fide* and not against public policy. The case is significant in issues relating to law of contract. It greatly expanded the capacity of parties to select the jurisdiction of their contracts. Lord Wright observed in the decision of the case that "...the proper law of the contract is the law which the parties intended to apply. That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances." This approach could also be argued to be useful to the courts as it removed the deliberations of the court as to the most appropriate law for the contract.

However, the question is how it can be determined that the parties have made an effective and lawful choice. Also the interdependency between the contract and the governing law is another problem in applying this principle. If the identification of a governing law depends on the contract, what would be the result if the terms of the contract depend on the governing law?

For the principle of party autonomy to apply, the choice of law must be express or noticeably demonstrated in the contract or by the conduct of the parties with reasonable certainty. In *Wasa International Insurance v Lexington Insurance*<sup>64</sup> there was a reasonable deduction that a re-insurance policy was governed by the same law as the related insurance policy. Collins LJ observed in this case that in the absence of an express clause, the governing law of a contract would be inferred from the terms and nature of the contract and from the general circumstances of the case.

Parties may even choose a system of law which has no real connection to the parties or the subject matter. However, in such instances the courts will apply the non – derogable rules of the country that are most likely applicable to the contract.

Though it is not essential for courts to follow a jurisdiction-oriented approach, hence questions of jurisdiction and choice of law have to be determined under the same proceeding. Sometimes, the court views the matter not as a choice of law issue but as one of statutory interpretation. They take an interpretative approach that is somehow a deviation from the established principle of Private International Law.<sup>65</sup>

#### **4.6 Considering The Principles In Application Or Exclusion Of Foreign Law And Judgment**

Under Common Law, an English court will apply the domestic law unless a foreign law stands in a stronger position of applicability to the particular issue. However, in the same proceeding one issue may attract the application of the *lex fori* while others may be decided under foreign law if justice so requires.

First, the choice of law rules of English law must provide that a foreign law is in principle applicable to the issue in question.<sup>66</sup> Also, application of foreign law must not be prohibited under the *lex fori* and the party pleading the foreign law has the burden to prove its application and contents as applicable to the issue. However, courts are, now a days, repeatedly discharging claims and ...defence as unproven if foreign law pleaded as its support has not been established by evidence.<sup>67</sup>

Another factor to consider is what the court has to deal with while applying foreign law. The answer is, for example- 'French law' means 'French domestic law as a local judge would apply it.'<sup>68</sup>

In determining whether the foreign court had power to determine the dispute, the courts basically look to the legal system under which such foreign court is established. Courts will also consider the nature of the issue. For example - an action in contract concerning land, such as an action for breach of a contract with land, is an action *in personam*. However, the court is not always obliged to look into all related aspects of procedural law. On the contrary, it is obliged to resolve the issues in the light of the pleadings and evidence presented by the parties. As far as the enforcement of foreign judgments and arbitral awards is concerned the plaintiff must prove what is required under law of forum for such judgment or award to be enforced and the party must prove what is necessary to be proved according to the law of *lex fori* if it wants the foreign judgment or award not to be taken consideration of, enforced or stayed. In some cases the court will exercise its discretionary powers to

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<sup>63</sup>[1939] UKPC 7, [1939] A.C. 277 (P.C.), (1939) 63 LI L Rep 21.

<sup>64</sup> [2009] UKHL 40.

<sup>65</sup> See *Ross v. McMullan*, ABSC, 1971.

<sup>66</sup> Briggs, Adrian, *the conflict of laws* (Oxford, Oxford University Press, 2008).

<sup>67</sup> See *Damberg v Damberg* (2001) 52 NSWLR 492 and *Global Multimedia International Ltd v Ara Media Services* (2006) EWHC 3107 (Comm), [2007] I All ER (Comm) 1160.

<sup>68</sup> Briggs, Adrian, *the conflict of laws* (Oxford, Oxford University Press, 2008).



decide what to do. This underlines the meaning that the courts are not always bound to enforce or set aside a foreign judgment or award. If proceedings are brought *ex parte* for enforcement of a foreign judgment or award, the court must be satisfied that the party has properly invoked the right to have the judgment or award enforced. In practice the judge might ask the plaintiff's [or the party seeking enforcement] lawyers some questions about the sufficiency or otherwise of his evidence but the court does not set about in making its own enquiries.<sup>69</sup>

In exercising its discretion, it is not usually correct for the court to compare the quality of justice that can be obtained in a foreign court which follows a different procedural system with that obtainable in a similar case entertained by an English court.<sup>70</sup>

In *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*<sup>71</sup> it was rightly observed that- "... in questions relating to the conflict of laws rules cannot generally be stated in absolute terms but rather as prima facie presumptions. But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy. Connection with English law is not as a matter of principle essential."

Also in *Amin Rasheed Shipping Corp -v- Kuwait Insurance Co*<sup>72</sup> Lord Wilberforce said: 'It is not appropriate . . . to embark upon a comparison of the procedures, or methods, or reputation or standing of the courts of one country as compared with those of another'.

#### **4.7 Some Issues Specific To Contracts And Commercial Disputes Relating To Determination Of Jurisdiction And Proper Law**

Even the concept of a contract has given rise to different rulings by the Courts of Justice.<sup>73</sup> These have established that the concept must be interpreted independent of any country's law, that it is inclusive of any relationship which is similar to relationships which are undoubtedly contractual, and that it requires privity.

Under Articles 5-6A of the Brussels Convention 1968 and Lugano Convention 2007 a derogation<sup>74</sup> is possible in appropriate cases where the defendant's domicile rule can be avoided. The purpose of this exception to the general principle is to enable a contracting state which is mostly connected with the cause of action or to provide the plaintiff with choice of forum. However, the exceptions may be limited to only a number of grounds that that can constitute sufficient connection as required under arts. 5-6A of Brussels Convention 1968. Examples can be – the place of performance of the obligation in question<sup>75</sup>, when the defendant is not domiciled in any member state of EU or where the facts giving rise to the cause of action are disputed<sup>76</sup>.

On the other hand, it is not entirely clear how far a court, in determining its jurisdiction should investigate or decide disputed facts which are relevant to the existence of such jurisdiction.<sup>77</sup> Also, under English law, the court considers several factors in case of international commercial contracts to make a decision on alternative forum or the jurisdiction of an English court. Some of the instances are – if the defendant is present or has a place of business in England<sup>78</sup> or the place where the contract is concluded or the place where the breach of contract is committed and so on.

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<sup>69</sup> Luxford, Derek, European Lawyer, *Enforcement of Judgments, Awards & Deeds in Commercial Matters* 2013, Hicksons Lawyers, Hicksons Lawyers, Available at < [www.westlaw.co.uk.ergo.glam.ac.uk](http://www.westlaw.co.uk.ergo.glam.ac.uk) > Last accessed on 1/12/15.

<sup>70</sup> *Amin Rasheed Shipping Corp -v- Kuwait Insurance Co* [1984] AC 50, [1983] 2 All ER 884, [1983] 2 Lloyds Rep 365, [1983] 3 WLR 241

<sup>71</sup> [1939] A.C. 277 (P.C.).

<sup>72</sup> [1984] AC 50, [1983] 2 All ER 884, [1983] 2 Lloyds Rep 365, [1983] 3 WLR 241

<sup>73</sup> Stone, Peter, *the conflict of laws* (Harlow: Longman Group Limited, 1995).

<sup>74</sup> See also the 1980 Rome Convention, arts 8 -11 and 14.

<sup>75</sup> See Case 14/76, *De Bloos v Bouyer* [1976] ECR 1497; *Thompson Hayward v Sirena* [1988] ECC 319; *Re a consignment of Italian Wine* [1988] ECC 159; *Union Transport v Continental Lines* [1992] I All ER 161; Case 12/76, *Tessili v Dunlop* [1976] ECR 1473.

<sup>76</sup> See Case 38/81, *Effer v Kantner* [1982] ECR 825; *Overseas Union Insurance v Incorporated General Insurance* [1992] I Lloyd's Rep 439, CA.

<sup>77</sup> Stone, Peter, *the conflict of laws* (Harlow: Longman Group Limited, 1995).

<sup>78</sup> Stone, Peter, *the conflict of laws* (Harlow: Longman Group Limited, 1995). See *Barclays Bank of Swaziland v Hahn* [1989] I WLR 506.

In view of such factual complexities, most systems of private international law have given priority in this sphere to the policies of respecting and effectuating the expectations of the contracting parties<sup>79</sup> and thereby ensuring ends of justice.

In case of a conflict as whether the plaintiff's or the defendant's choice of law or jurisdiction should be applied, the courts must look into the international regulatory framework to find an answer. For example in the recent case of *Fondazione Enasarco v Lehman Brothers Finance SA*<sup>80</sup> while determining the validity of claiming sums due under a Derivative Agreement, the court found that the proceedings fell within the exemption for insolvency proceedings contained in the Lugano Convention 2007 art.1(2) (b).

In contrast, in *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi v VSC Steel Co Ltd*<sup>81</sup> it was held that a London arbitration clause had been validly incorporated into a contract when it had been signed by agents who had ostensible authority to enter the contract, notwithstanding the principal's insistence on arbitration in Turkey. Connecting factors may be considered by courts in a completely different way where the commercial aspect involves not a contractual breach but a tort or delict instead. For instance, the court held that the place of contract is not a substantial connecting factor in the choice between competing laws to govern a maritime tort.<sup>82</sup> Thus, the law relating to connecting factors is complex and often uncertain.

## V. Conclusion

Despite established principles of Private International Law - the domicile rule, different principles of determining jurisdiction and proper law applicable to the particular case (e.g. *lex fori*, *lex loci contractus* or *lex solutionis*), it is difficult to say that they are sufficient to deal with every issue that may be raised in a proceeding. A contract is basically formed to perform and when the performance is breached, justice demands some remedy. As discussed above, courts have dealt with so many cases and attempted to provide the parties with as proper a decision as possible. Nevertheless, it cannot be concluded that the courts have always been successful in doing so. The problems in applying the principles have also been highlighted above. Sometimes it is the complex nature of the facts and sometimes the approach of the courts. However, even with these shortcomings in the application of the principles and regulations, there is no other alternative than to resort to conflict of law rules to resolve a dispute in international transactions and agreements.

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<sup>79</sup> Stone, Peter, *the conflict of laws* (Harlow: Longman Group Limited, 1995).

<sup>80</sup> [2014] EWHC 34 (Ch).

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<sup>82</sup> *Zielinski v Empresa Hondurena de Vapores*, 113 F. Supp. 93 (D.N.Y 1953).

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