# THE PERSONAL CONNECTING FACTORS AND THE CONFLICT OF LAWS: THE *MARGOSA* TO THE CHOICE OF LAWS IN RESOLUTION OF DISPUTE CONTAINING FOREIGN ELEMENTS

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**Abstract:**

The conflict of laws has a dualistic character, balancing international consensus with domestic recognition and implementation, as well as balancing sovereign actions with those of the private affairs. The conflict of law is sometimes called private international law despite the fact these names are misnomer due to lack of criteria of being called so. This paper argues that the personal connecting factors are margosa (mwarobaini) to the choice of law in disputes involving foreign elements in *sui generis* because their application depends on the nature of conflict, legal system and the covenants as well as the public policies of the countries or states. Also, the paper argues that each personal connecting factor is too good to fit all circumstances enough to be applied worldwide under the same circumstances henceforth they lack much efficient in their application.

## 1.0 INTRODUCTION

This introductory remark covers the aspects of concept of key words that are found in the question such private international law and connecting factors. This is to make understanding of the concepts so as to know how to attempt this question. Under the concepts meaning, features and rationale behind the concepts generally are going to be explicated profoundly.

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### 1.1 Concept of conflict of law

There are various definitions of private international law made out by various authors and judiciary; however there is no acceptable definition which is scientific in nature. Notwithstanding diverse meanings the researcher finds the appropriate and general definition as per the work.

#### 1.1.1 Meaning of conflict of law

Private international law or conflict of laws is the body of conventions, model laws, national laws, legal guides, and other documents and instruments that regulate private relationships across national borders. Private international law or conflict of laws has a dualistic character, balancing international consensus with domestic recognition and implementation, as well as balancing sovereign actions with those of the private sector.[1]

Therefore generally it can be said that private international law or conflict of laws is the body of principles, rules, and at times, policies that indicate how a foreign element in a legal problem or dispute should be dealt with by determining which law and courts should be competent to resolve the dispute.

#### 1.1.2 Reasons for the application of private international law or conflict of laws

Private international law has its historical development in civil law. It is sometimes called the dispositive law as opposed to procedural law. It was developed under the main two bases such as justice and comity. Since before establishment of the conflict of laws parties did enjoy justice basing on their local jurisdiction and due to increase of the international relations between individuals, the states saw it good for the establishment of the mechanism for justice between

[1] D. Ford, Private International Law, at page 3

those persons residing in different countries. Also, since the states or countries had a goal of maintaining the good relations between individuals of their states even in civil or commercial transactions, there was a need of the law which could serve such interest. It was that triggered the establishment of the de conflict legume.

### 1.1.3 Features of private international law or conflict of laws

Private international is inherently and historically complex with debated theoretical underpinnings. It is relative and not universal hence relative. The rules of private international law supplemented with legislative provisions. Some of degree of uniformity is attempted by international conventions.

### 1.1.4 Functions of private international law or conflict of laws

Private international law actually prescribes the conditions under which court is competent to determine the dispute and the law applicable. The law determines whether the local court, or 'forum', has the power to hear and determine the case, or whether the contacts the case has with another state or country limit or otherwise restrain the forum court's power or willingness to decide the case. Also private international law determines for the rights of persons of different countries and determines the procedures for the enforcement of those rights under international arena as well as specifying the circumstances under which foreign judgments can be recognised in other countries.

## 1.2 concept of connecting factors

There are many jurist of conflict of laws who have tried to expound the meaning of the connecting factors without reaching conclusion of the one and universal meaning; however for

the purpose of this assignment, there is one meaning and general that is going to be employed for answering this question.

### 1.2.1 Meaning of connecting factors

Connecting factors are the circumstances that make linkage between event, thing, transaction, person and country; such factors link person, events, etc. to country. These elements linking dispute to particular countries are connecting factors links between event, thing, transaction, person and country; such factors link person, events, to country.[2]

### 1.2.2 Rationale behind connecting factors

Connecting factors enable courts to identify applicable law that means choice of law rule may say title to immovable property governed by law of country where land situated. They determine under which system of law and within the jurisdiction of which country's courts certain issues are to be determined.

These elements linking dispute to particular countries are connecting factors. Also connecting factors connect legal categories to applicable laws. Moreover, connecting factors explicate some outstanding fact which establishes natural connection between factual situation before court and particular system of law.

### 1.2.3 General remark on connecting factors

In common law jurisdictions the law of the domicile of the party involved is the one which controls status. In most of the civil law countries the rule has been changed, and the governing law is that of nationality. In the Anglo-American view of the matter, it is

[2] Private International Law: Connecting Factors, at page 1

the sovereign at the domicile, the place where the person has his permanent abode, who is most concerned in affairs like his domestic relations.

## 2.0 CONTENT SECTION

Actually this part focuses on the connecting factors in their detailed understandings. The section covers meaning, rationale, types, rules and strength as well as weakness of each connecting factor in the choice of the law under private international law.

### 2.1 Domicile

Domicile is a connecting factor which links a person with a particular legal system, and the law of his domicile is his personal law. The general meaning of domicile is 'permanent home'.[3]

#### 2.1.1 Meaning of domicile

A domicile of origin is ascribed to every person at birth by operation of law. It reflects the domicile of the relevant parent at the time of birth, and where a child is born or where his parents live is irrelevant. Therefore, the same domicile of origin can be passed on from generation to generation even though few members of the family have actually lived in the country of their domicile.

**Lord Cranworth V-C in Whicker versus Hume**[4] that a person's domicile is what he regards as his permanent home is far too simplistic and, indeed, somewhat misleading. It is true that for most people their domicile coincides with their permanent home.

However, domicile is a legal concept and a person's 'basic' domicile is his domicile of origin, which is ascribed to him by law at his birth, and is not necessarily the country of his family's

[3] J. G. Collier, Conflict of Laws, at page 37

[4] **(1858) 2**

permanent home at that time. His domicile of dependence, whilst he is a minor, is the same as that of both or one of his parents, even though he may have no home with either.

The ascertainment of a person's domicile of choice does depend upon showing that he intended to establish a permanent home in a particular country, but even so, what the law regards as permanent may not strike a layman as such.

### 2.1.2 Why domicile

Domicile determines under which system of law and within the jurisdiction of which country's courts certain issues principally those relating to status and property are to be determined. A person's domicile connects him with a system of law for the purposes of determining a range of matters, principally related to his status or property.[5]

### 2.1.3 Types of domicile

Generally there are three types of domicile such as domicile of origin, choice and dependency. But for the purpose of this assignment only two are going to be described because the rules governing the third domicile are equivalent to the second domicile. Henceforth only domicile of origin and choice are going to be expounded in fathom.

#### 2.1.3.1 Domicile of origin

A person's domicile of origin depends on the domicile of one of his parents at the time of his birth, neither on where he was born, nor on his parents' residence at that time. Every person receives at birth by the operation of law a domicile of origin which depends on the domicile of

[5] The law reform commission of Hong Kong, Report On Rules For Determining Domicile Executive Summary, at page 1

the appropriate parent at the time of his birth, but not on where he was born or where the parents live.[6]

In **Udny v. Udny**[7], for example, Colonel Udny was born and then lived in Tuscany, where his father resided as British consul. But his father was domiciled in Scotland, so the Colonel's own domicile of origin was Scotland. The court was of the opinion that domicile by origin is acquired at birth; arises by operation of law; person's domicile of origin depends on domicile of one parent at time of birth, and not where person is born nor where parents where residing at time of birth.

**2.1.3.2 Rules governing domicile of origin**

A legitimate child takes his father's domicile; legitimate child born during the lifetime of his father has a domicile of origin in the country of his father's domicile at the time of his birth. A legitimate child born after his father's death has a domicile of origin in the country of his mother's domicile at the time of his birth.

An illegitimate child; an illegitimate child, has a domicile of origin in the country of his mother's domicile at the time of his birth. A posthumous child, that is a legitimate child born after his father's death, both take his mother's domicile, and a foundling or one whose parents' domicile is unknown is domiciled in the place where he is found or born.

The domicile of an adopted child, the domicile of origin can be changed after the child's birth. By statute, an adopted child becomes thenceforth for all legal purposes the child of his adoptive parents, so he takes their domicile as his domicile of origin. A minor's domicile may change

[6] Ibid, at page 2
[7] HLC 124 at 160.

after his birth, but any new domicile he acquires is a domicile of dependence and not of origin (except where he is adopted); that remains the domicile he acquired at birth.

**2.1.3.2 Domicile of Choice**

It is acquired by residing in country with intention to remain permanently or indefinitely; two tests: objective test of residence *factum*, subjective test of intention *animus*; both must co-exist.

In the celebrated American case of **White versus Tennant**[8] a domicile of choice is acquired by a combination of two things, the factum of actual presence or residence in a country, and the animus, that is, the requisite intention. The two must coincide. If a person goes to a country and then leaves it, but later wishes to return there for good without actually returning, he will not acquire a domicile in that country. However, provided the necessary intention exists, even a stay of a few hours wills suffice.

In the case of **Bell versus Kennedy,** Lord Chelmsford observed that new domicile not acquired until there is not only fixed intention of establishing permanent residence, but until also this intention has been carried out by actual residence there.

**2.1.4 Differences between domicile of origin and domicile of choice**

First, the domicile of origin is ascribed to a person by law and does not depend on his own acts or intentions; a domicile of choice is acquired if a person goes to live in a country with the intention to remain there permanently.

Secondly, it is more tenacious than a domicile of choice. A domicile of origin can only be lost by intentional acquisition of another one, but a domicile of choice can be lost simply by leaving the relevant country intending not to return.

[8] (1888) 31 W Va. 790.

**If** this happen, then, unless another domicile of choice is acquired, the domicile of origin revives. This, the 'revival' of the domicile of origin, is a third distinguishing feature. It was established by **Udny v. Udny in 1869**. Colonel Udny was born in Tuscany where his father, then domiciled in Scotland, was British consul. Thus Scotland was his domicile of origin. He later acquired a domicile of choice in England, but then fled to France to evade his creditors. He thereby abandoned his English domicile, but did not acquire one in France.

### 2.1.5 Rules governing domicile as connecting factor

There are various rules that govern domicile as connecting factor in conflict of laws such as no person is without domicile as it was seen in the case of **Mark versus Mark**[9] where the court was of the view that every person has domicile of origin. The second rule is that no person has two domiciles under international law. This rule provides that every person has one domicile either of origin or of choice. Presence of one domicile excludes the other.

The third rule is that there must be proof of domicile and the standard of proof is based on the preponderance or balance of probability. The one who alleges the domicile of person is of certain country must prove. Generally the domicile of person is determined according to English and not foreign country that is civil country. Therefore common law legal system is more preferably. Finally the domicile of person signifies single legal system

### 2.1.6 Strengths of domicile as connecting factor

The law of the country of one's permanent home, which is the notion of domicile, is arguably a more appropriate one by which to determine questions of status and property than that of one's nationality, with which one may have little or no practical connection.

[9] 2005

For example, an Irishman immigrating to the United States may never obtain citizenship in that country but may live for fifty years in New York and never return to Ireland or have any interest in doing so.

It may be argued that to apply Irish law to questions of that man's status or of his property at the time of his death (which an application of nationality as a connecting factor would require) is less appropriate than to apply the law of New York, where he had long since become domiciled and with which he had (to use the term in section 102(3) of the Succession Act 1965 (No.25)).

**2.1.7 Challenges of domicile**

Legal domicile out of touch with reality as law may regard person domiciled in country he is not resident in that is if domicile of origin revives, which court places great emphasis on sometimes domicile artificial concept

Person may be regarded as not domiciles basing on intention dependent on future occurrence, but still lived in country for long time. Finding that person domiciled in particular country, often dependent on proof of intention; such intention often cannot be resolved with certainty without recourse to courts.

The concept of revival of domicile of origin has been much criticized since it may render a person domiciled in a country with which he has only a stale or tenuous connection, or even which he has never visited.

The common law rule on the domicile of married women seems to contravene article 15(4) of the Convention on the Elimination of All Forms of Discrimination against Women. This rule has long been criticized and Lord Denning said that it was "the last barbarous relic of a wife's servitude"

## 2.2 Residence

This connecting has been controversial in determining the choice of law in private international law. It is most used in civil law countries such as continental Europe as they prefer residence and nationality to domicile.

### 2.2.1 Meaning of residence

The place in which a person has his home is called residence.[10] It is the place where someone actually lives as opposed to domicile. It is act of fact of being prsent in the certain area.[11] It is possible to be a resident of more than one country at the same time.

Residence is unusual as a connecting factor but it does arise for instance formal validity of a will can be determined by the law of the place of habitual residence. There are variable terms – 'residence', 'ordinary residence', 'habitual residence'. It is probably ordinary residence that indicates the most permanent attachment.

Resident is uncertain whether a person's presence must have some degree of relative permanence: ***Re an Infant***[12] and in ***Re Taylor; ex parte Natwest Australia Bank Ltd*** [13] Some continual presence there is necessary common sense approach to what residence is.

### 2.2.2 Rules governing residence

**Residence must be lawful**; based on public policy: courts cannot allow person to acquire domicile in defiance of law. In the case of **Puttick v AG**: porosities fugitive in German; fled to England on forged passport; court: even though she had requisite intention to remain in England permanently, not domiciled; residence illegal, obtained by fraud.

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[10] Oxford dictionary of law, at page 430
[11] E., Garner, Blacks Law Dictionary, at page 1335
[12] [1981] Qd R 225;
[13] (1992) 37 FCR 194

**Resident must intend to settle permanently or indefinitely** ; In the case of **Re Fuld's Estate**[14] Scarman J observed that if man intends to return to land of birth upon clearly foreseen, reasonably anticipated contingencies i.e. end of his job, intention required by law lacking; but if he has in his mind only vague possibility, such as making fortune or some sentiment about dying in land of his fathers, such state of mind consistent w/ intention required by law.

### 2.2.3 Types of residence

There are two main types of residence such as ordinary residence and habitual residence which are going to be discussed below

#### 2.2.3.1 Ordinary Residence

In the case of **Shah versus Barnet London:** Lord Scarman defined ordinary residence refers to man's abode in particular place or country, which he adopts voluntarily and for settled purposes as part of regular order of life for time being, whether long or short. Ordinary residence question of fact may be ordinarily resident in more than one country.

Also in the case of **IRC versus Lysaght:** person lived in Ireland but spent one week each month in England while in England, he lived in hotels. The court was of the opinion that he was ordinarily resident in England and Ireland.

Ordinary residence: ***Akbarali v Brent London Borough Council***[15] per Scarman LJ

> "… a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration …."

[14] **(No 3)**
[15] [1983] 2 AC 309, 343, 4

### 2.2.3.2 Habitual Residence

In **Cruse v. Chittum,**[16] an early case which concerned the recognition an overseas divorce, habitual residence was said to denote 'regular physical presence which must endure for some time'. In several cases, he courts have said that it is a question of fact; this has turned out to the over-optimistic and, unavoidably, perhaps, legal rules have developed.

Habitual residence connotes person taken up residence, lived in relevant country for period of time that shows residence habitual in the case of **Nessa v Adjudication Officer:** habitually describes residence which achieves degree of continuity. Habitual residence is question of fact, determined by circumstances; child's habitual residence that of parents; if parent's live apart, habitual residence that of custodial parent.

### 2.2.3.3 Application of habitual residence

Habitual residence is used by the Hague Child Abduction Convention and the Hague Child Protection Convention. An appreciable period of residence is 'habitual': ***Re J (a minor: abduction***[17]***)***. It is rather difficult for the legislature and those responsible for implementing these conventions to understand what is meant by habitual residence not clear how this distinguishes from ordinary residence. More is required than for domicile continual presence is not required for domicile

### 2.2.4 Differences between ordinary and habitual residence

In the case of **Kapur versus Kapur** habitual residence regarded as similar to ordinary residence; however there are two main differences such as person may have more than one ordinary residence, but only one habitual residence and ordinary residence acquired within a day, habitual

[16] [1974] 2 All ER 940
[17] [1990] 2 AC 562, 578

residence acquired, as stated by Lord Brandon in *R J* "over an appreciable period of time Habitual residence is the place or country in which a person has his home. Habitual residence is necessary in order to establish domicile.[18]

### 2.2.5 Strength of residence as connecting factor

A person can only have one habitual residence because it is the centre of his living, the place with which he is most closely associated in his pattern of life. For the purpose of determining this place, his family and personal ties are particularly important elements.[19]

### 2.2.6 Weakness of residence as connecting factor

The application of the residence as connecting factor is criticized due to impracticality of its rules in resolution of dispute with foreign element as it was in the case ***Re J (a minor: abduction[20])*** where the court was of the view that It is rather difficult for the legislature and those responsible for implementing these conventions to understand what is meant by habitual residence not clear how this distinguishes from ordinary residence. More is required than for domicile continual presence is not required for domicile.

Moreover, the rules governing the residence as connecting factor are silent of the issue of appreciable time. Neither international instruments nor domestic law of law of residence tried to give the strict and acceptable computation of time so as to determine the degree of continuity in establishment of residence.

[18] Oxford dictionary of law, at page 226
[19] Hague Succession Convention XXXII of 20th October 1988 states at clause 51, at 549:
[20] [1990] 2 AC 562, 578

### 2.3 Nationality as connecting factor

Nationality represents a person's political status, whereby he or she owes allegiance to some particular country. Apart from cases of naturalisation, it depends essentially on the place of birth of that person or on his or her parentage. Nationality as a connecting factor was first adopted in France in 1803 with the promulgation of the Code Napoléon, in preference to domicile, which had generally prevailed throughout Europe before then. It gained very great support in Continental Europe as a result of the influence of Mancini in Italy. At present it is the basic connecting factor in the law of most continental European countries, some South American states and Japan.

#### 2.3.1 Meaning of nationality

Nationality is the relationship between citizens of nation and nation itself, customarily involving the allegiance of citizens and the protection by the state.[21] Nationality normally confers some protection of the person by the state, and some obligations on the person towards the state. What these rights and duties are vary from country to country.[22] It differs technically and legally from citizenship, although in most modern countries all nationals are citizens of the state and all citizens are nationals of the state.[23]

#### 2.3.2 Application of nationality as connecting factor

The application of the connecting factor of nationality to the capacity that falls under personal status seems to be objectively justified, above all, by the need to issue uniform decisions regarding the subjective conduct of a person, and thus, to apply a uniform rule of personal status

[21] E, Garner, Blacks Law Dictionary, at page 1052
[22] Weis, Paul. 1979, Nationality and Statelessness in International Law BRILL:, at page. 29-61
[23] Vonk, Olivier. Dual Nationality in the European Union: A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States Martinus Nijhoff Publishers; 2012-03-19 [cited 17 August 2011, pp. 19–20.

to the same person. Consequently, application of the connecting factor to personal status capacity is also justified by the opportunity reasons that always suggested that States submit personal status to subjective connecting factors, such as nationality.[24]

### 2.3.3 Merits of nationality s connecting factor

A person's nationality is normally an easy matter to determine, whereas a person's domicile is frequently quite difficult to establish. The difficulty can spring from the uncertainty of determining a person's intention on the available facts, or it may result from the application of the legal principles relating to domicile (e.g., the rules relating to domicile of dependency or domicile of origin). These uncertainties may compel those concerned with, for instance, administration of estates to have recourse to legal proceedings to settle the matter.

### 2.3.4 Flaw of nationality as connecting factor

The application of the connecting factor of nationality to the capacity regarding international commerce, however, does not seem objectively justifiable. This is because it is difficult to apply but necessary where the capacity to act is made subject to a law different than the one applicable to the act itself.[25]

Whilst a person may have only one domicile, he may have more than one nationality or he may have none. In such cases nationality as a connecting factor may become complex or inoperative.[26]

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[24] ibid

[25] G. CANSACCHI, Scelta e adattamento delle norme straniere richiamate, Torino 1939, passim; BOUZAVIDAL N., Problemas de adaptación en Derecho internacional privado y interregional, Madrid 1977, passim; JAYME E. (note 21), at 145; FERNÁNDEZ ROZAS J.C. / SÁNCHEZ LORENZO S., Derecho Internacional privado, Madrid 2004, at page 138

[26] http://www.lawreform.ie/_fileupload/consultation%20papers/wpHabitualResidence.htm accessed on 28th march 2014 at 22:25 PM

The connecting factor of nationality can lead to discrimination. The discrimination is indirect or factual. It is because involves individual nationalities of the persons and yet they are not treated the same way by applying the same law but are treated differently because of the reference to different applicable laws. Here, the discrimination is specifically found in the abstract difference between the laws required to regulate the case.[27]

It arises where the national law referred to by the provision of private international law only applies to citizens, not to aliens.[28] Application of national law creates obvious inconveniences with regard to long distance contracts between persons in different States when one contracting party does not have all the necessary time to trace back the national law applicable to the other contracting party capacity to act.

It also creates problems in internet contracts, where it is impossible to even identify the nationality of the other contracting party, let alone to trace back the national law applicable to his capacity to act. These inconveniences are countered by a reference to the lex contractus in the rules on negotiating capacity and, a fortiori, when the lex contractus is freely chosen by the parties.

## 2.4 POSITION OF CORPORATION

The personal law of a company is that of its domicile, which means the law of the place of its incorporation.[29] To this it owes its existence, and that law governs also its dissolution[30] and its

[27] B. UBERTAZZI The Inapplicability of the Connecting Factor of Nationality to the Negotiating Capacity in International Commerce, at page 720

[28] Ibid, at page 721

[29] Re B-M (Wardship Jurisdiction) [1993] 1 FLR 979; Re B (A Minor) (Abduction: Father's Rights) [1999] Fam. 1. Risdon Iron and Locomotive Works v. Furness [1906] 1 KB 49 CA

[30] Gasque v. IRC [1940] 2 KB 80. A company registered in England, Wales or Scotland cannot change its domicile since it cannot alter its place of registration. For domicile under the Civil Jurisdiction and Judgments Act 1982, see pp. 138–9 below.

capacity to contract. Nationality of a company is determined by the law of the place of incorporation.[31]

The law of the place of incorporation dictates who can sue (or cause it to sue) and be sued on its behalf[32], and governs the extent to which a member can be personally liable for its debts.[33] It also governs its status after an amalgamation.

Residence determines the company's liability to corporation tax generally alternative to domicile, nationality; more desirable connecting factor for regulating personal matters, such as education, health, family; residence is usually classified as ordinary or habitual.

The residence of a company, which is chiefly important for tax purposes, is determined not by the place of its incorporation, but by where its 'central management and control' is exercised. As it was seen in the case of **De Beers Consolidated Mines v. Howe**[34] a diamond company was incorporated in South Africa and had a head office there. A board of directors there handled day-to-day administrative matters. Another board in London, which joined with that in South Africa in making major policy decisions, in fact controlled them because most of the directors lived in London. Meetings of members and mining operations and sales of diamonds took place in South Africa.

The House of Lords held that the company should be assessed for tax as resident in the United Kingdom, since the central management and control was actually exercised there, where it 'kept house and did business.

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[31] Nationality is unimportant in the conflict of laws. The law of the place of incorpora- tion is the national law of acompany for the purposes of public international law. See Barcelona Traction Power & Light Co. Case, ICJ (1970), 3.

[32] Lazard Brothers v. Midland Bank [1933] AC 289 HL. Winding up of foreign com- panies in England will not be dealt with here.

[33] Bank of Ethiopia v. National Bank of Egypt and Liguori [1937] Ch. 413; Banco de Bilbao v. Sancha [1938] 2KB 176 CA; Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2) [1967] 1 AC 853 HL.

[34] [1906] AC 455 HL.

However, it should be noted that the test of residence may be different for a different purpose, for example enemy character, and the test stated above is not the test of residence for jurisdictional purposes.[35]

## 2.5 WHICH CONNECTING FACTOR IS BEST IN CHOICE OF LAW UNDER PRIVATE INTERNATIONAL LAW

### 2.5.1 Which connecting factor is best and reason behind

Actually from the strength and weakness explained in each connecting factor, the researcher of this assignment is of the view that the most appropriate in choice of law under conflict of law is **Domicile** because it is rules do not contradict with other factors in choice of law. Under nationality someone may dual nationality hence it may brings problem in the choice of law whereas residence has some difficulties such as determination of appreciable time in ascertaining the residence of individual so as to choose the appropriate law under conflict of laws.

Moreover most of the international conventions recognise the lex domicillii as appropriate law in the choice of the law under the conflict of laws. For instance, under article 5, 6 of the Lugano Convention[36] Also under article 2, 3, 5 and 6 of the EC convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Brussels[37]

### 2.5.2 General remark

Therefore domicile should be retained as a general connecting factor, but the existing rules for determining a person's domicile should be modified. For instance there should be no

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[36] EC EFTA Convention on Jurisdiction and the Enforcement of judgments in civil and commercial matters adopted on 16th September 1988

[37] Full Faith and Credit Convention of 1968

differentiation between legitimate and illegitimate children in determining their domicile. The requisite intention for a person of full age and capacity to acquire a domicile should be that the individual intends to make a home in the country concerned for an indefinite period. The domicile a person has at any time should continue until he acquires a different one, whether by choice or by operation of law. The domicile of dependency of married women should be abolished. The normal civil standard of proof on a balance of probabilities should apply in all disputes about domicile

## 2.6 CONCLUSIVE REMARKS

The different orientations of the civil and common law can, in the abstract, lead to the application of two different laws to the capacity to negotiate. This can create a situation where one of the laws determines that the person lacks capacity, while the other law determines that the person has capacity; consequently, the agreement or the act that is void in one State is valid in the other. This situation is unsatisfactory in determination of choice of law in dispute resolution containing foreign elements.

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