PRIVATE INTERNATIONAL LAW

Prepared by;

Mamenie Endale (LL.B, LL.M, LL.M, Assistant Professor)

School of Law, Bahir Dar University

September 2021

Chapter one
Introduction to Conflict of Laws
1.1. Definitions and analysis of PIL

- Scholars have defined it in different manner
- The reason is that an aspect of PIL emphasized in one writer's definition may not be considered or given peripheral consideration in others' because the origin of the writers matters a lot here.

1. Goodrich defined "…***part of the law which deals with the extent to which laws of a state operates, and determines whether the rules of one or another state should be applied in a legal situation***"

This definition: failed to establish the legal category and restricted the subject-matter of PIL to the issue of choice of law

CONT….

2. Westlake, defined the concept of PIL as;

"***….department of private jurisprudence which determines before the courts of what nation each suit should be brought and the law of what nation it should be decided.***"

3. Murphy,

"***…part of law in each state, country or other jurisdiction that determines whether, in dealing with a particular situation, its law or the law of some other jurisdiction will be applied,***" **…**domestic law

4. Contrarily, classic Encyclopaedia, considers PIL as;

" …the body of conventions, model laws, legal guidelines and other documents and instruments that regulate private r/nship across borders."…international law

- Though it has a dualistic nature

CONT…

5. Cheshire defined it as;

"part of law that comes into play when the issue before the courts affects some fact, event or transaction that is closely connected with a foreign system of law as to necessitate recourse of that system."

- This definition emphasized on specification of situations that necessitate the application of conflict rules.

Elements

- It is part of national/local/domestic law of state
- It comes into scene when a court adjudicates over a civil case containing a foreign element (three factors parties(personal- at least one be a foreign national, domiciliary or residence), place of cause of action occurred (local- the act or event forming the subject matter of the dispute) and situs of property (material- the object of the disputed relationship)). Foreign element in sense of interstate conflict should be understood narrowly – as implying an out of state factor in a federation/polis (occurring in two manners – country consisting of a number of provinces each having its own law or in a single country different systems of laws govern different classes of citizens in respect to the same subject matter)
- It deals generally, with questions of jurisdiction, choice of law and recognition and enforcement of foreign judgement and enforcement of arbitral awards

NOMENCLATURE

- The name used to describe this branch of law is different in different countries or legal systems
- Two names for the subject are in common use – PIL in continental law tradition and Conflict of Laws in common law world since middle of 19th century
- Before it dealt under the title of the 'theory of statutes' and in France as 'questions Mextes'
- Law of multistate problems or transnational problems as naming which seem technically accurate and more descriptive but lacks well established usage
- The reason for this variation is that none of the names are wholly accurate or properly descriptive
- Then each group opts to its naming over other

Cont…

- Conflict of laws – believed to be first employed by American jurist J. Story in 1864, but some other as it was given by Dicey 1896
- This naming is somewhat misleading – mainly in two ways

1. this name may appear to suggest to provoke a conflict among two or more systems of laws, whereas the object of this branch of the law is to eliminate any conflict between two or more systems of law which have competing claims to govern the issue which is before the court
2. It may also lead to confusion for literally referring only to a part of PIL, i.e. legislative competence or choice of law problems

CONT…

- PIL – was given by international lawyers in 19th century who had dreamt internationalization of PIL.
- It is also more misleading and each of its three words requires comment
- 'Private' – distinguishes the subject from 'public' IL or IL *simpliciter* . It may imply that it is concerned to regulate legal relations between private individuals and corporations.
- Though it also deals with the relations between states and governments so far as their relationships with other entities are governed by municipal law
- In fact, the word 'international' employed here to indicate that the subject is concerned not only with application by a nation's court of its own law but of rules of foreign law also.
- However, the word is inapt, however, in so far as it might suggest that it is in some way concerned with the relations between states; though it is for a very large extent only branch of domestic law of each county.

CONT…

- 'Law' - must be understood in a special sense. The application of the rules of private international law does not by itself decide a case, as does that of the rules of the law of contract or tort
- It is not a substantive law, it merely provides a body of rules which determine whether the court of a given country has jurisdiction to hear and decide a case; what system of law, forum or foreign, will be employed to decide it and whether a judgment/arbitral awards of a foreign court/arbitral tribunal will be recognised and enforced in other country.

09/02/2015

RAISON D'ÊTRE OF PIL

- What necessitate the existence of the choice of law discipline? why does private international law exist at all?
- Two general factors may be considered as factors that necessitated the emergency of PIL

1. Diversity of laws
2. Cross-frointier movement of persons, things and transactions

As Arthur Taylor von Mehren noted if human society were so organized that all aspects of life moved within economic, social, legal, and political spheres that were unitary and coexistence; this discipline would have not been developed.

NATURE OF PIL

- Just like other branches of law PIL has its own unique features that characterizes it as a subject.

1. Attributive of competence (comparing to substantive laws- solve directly a legal problems), PIL merely designate a court that will hear the case or a legal system whose rules will be called upon to solve the case
2. Local but exceptionally international rules – in origin and application
3. Unilateral or bilateral rule

Unilateral conflict- the connecting factor is so specific that can only apply on a certain category of conflictual situations

eg. In case involving a dispute relating to immovable situated in Ethiopia, Ethiopia law applies (legal propositions) (what if located in other country?)

CONT…

- Bilateral conflict rule- the connecting factor is so general or broader that the rule can apply to general situation.
- Not restricted to a limited and predetermined situation. Eg. …, the law of the place where the property situated applies.
- It is recommended to frame rules of PIL in bilateral form for two reasons

1. Unilateral conflict rule solves only half of a problem; courts needed to fill the gap which is a difficult task
2. Bilateral rule expresses an idea of equality and confidence among states – facilitates recognition of foreign judgements; otherwise adaption of different standards may happen.

FUNCTIONS OF PIL

Four main

1. Dispute resolution – from judge's perspective Because effective dispute resolution requires both a decision and finality. Selecting the rule of decision is the central inquiry of the choice of law and finality is the core concern of judgment enforcement and recognition.
2. Conflict Avoidance by providing certainty and predictability to applicable law, state having jurisdiction and the enforceability of the judgment by other sovereigns. Otherwise, if parties are not in position to plan and predict the consequences of their action and interactions that involve persons or things to d/t sovereigns, those interactions decease and society will suffer.

CONT…

3. Maintaining sovereignty – the important concern of decision maker. Usually it is the concern of court of the forum state. This consideration is manifested by applying of forum law, preferring of forum policies, favouring forum-citizens, exercising forum jurisdiction or refusal to recognise foreign judgements.

- But it is a forum's concern to maintain harmonious relation with other state and to avoid causing retaliatory action that could harm the forum sovereign.

09/03/2015

CONT…

4. Rendition of justice

Its ultimate purpose is insuring fairness and preventing injustice

- This is done if the court of the forum recognises the existence of foreign law and validate a normal foreign judgement.

SUBJECT MATTER (SCOPE) OF PIL

- The other area of disagreement
- The two legal system also disagree in this regard
- the traditional view, conflicts mainly deal with three major sub-divided but interrelated areas
- Chronologically Judicial jurisdiction, choice of law and recognition and enforcement of foreign judgments and arbitral awards
- Besides most continental countries and some Anglo-American writers – the rules of a particular states governing acquisition and loss of nationality and status of foreigners as part of PIL
- Common law tradition often consider the matter of domicile as forming part of PIL

CONT…

- The argument against incorporation of nationality in the PIL is based on the claim that its rule must be different in and peculiar to each state and determined w/out regard to policy consideration of PIL
- In favour of incorporation – importance of nationality in PIL cases in jurisdiction and personal law

SOURCES OF PIL

- As it is predominately domestic law, it sources are similar to domestic laws
- Has both national and international
- The predominate source depends on the legal traditions to which a country belong
- Civil law – legislations
- Common law- case laws/stare decisis
- Treaties – unification efforts
- Writing of scholars – influential an renowned scholars
- International customary – eg. Jurisdictional and choice of law rules with regard to disputes involving immovable property - reflecting territorial sovereignty principle

HISTORICAL DEVELOPMENT OF PIL GENERAL

- Conflict problems predate to the emergency of the modern nation-states
- Arose when members of d/t societies whose legal system had sufficiently matured began to deal with each other
- Existed as early as 4th c BC, when Greek city-states come to their leading and trade was active in the eastern Mediterranean
- The 1st step began with d/t positions foreigners were accorded when they were involved in litigation
- In Hellenic period – special courts

CONT…

- Roman civilization – Jus Civile (roman law) – form part of rights of roman citizens and not applicable to cases involving foreigners
- Jus Gentium and the Judges for foreigners – site in special court called praetors
- They are free to depart from procedural formalism and rigid indigenous rules.

CONT…

- Other historical development related religious world
- John 18:31 'then Pilate said… take ye and judge of such according to your law'
- then scholars in the 11th - 13th C preferred to tackle the problem of choice of law in a conceptualist rather than a teleological fashion (rather than looking for substantive solution they theorized about spatial reach of local laws)
- PIL as we know it today began to emerge in early 13th in Italy.
- Magister Aldricus …the father of the conflict of laws developed the propositions that in certain cases the court might apply the law of another state
- He suggested that whenever a foreign element was present, the court should look both laws – forum and foreign
- When the two laws are different----there was 'a conflict of laws'
- In such case he suggested that the judge should apply the 'more effective and useful law' – vague and general rule which latter replaced by variety of theories.

CONT…

- Nationality of the defendant(foreigner)
- But a person may not carry all of his national law
- Statute theory developed as result – under which the statute of the defendant's national state whether they affect 'persons' (apply extra-territorially movable property) or 'things' (not apply)
- 17th new approach, the territoriality
- Voet and Huber Dutch writers – the power of a sovereign to regulate all activities taking place in its territory under its control.
- Here all laws are territorial and given extraterritorial effect only as matter of comity… three fundamental principles of PIL
- 19th century and onwards d/t scholars developed different theories.

THEORIES OF CONFLICT OF LAWS

- The set of propositions that explain why events occur the way they do address to answer three questions
- Most of the theories developed by scholars are related to choice of law problems
- They developed because jurist are not found to be satisfied with the justification the application of forum law might work a grave injustice, though judges and lawyers are at better rate know the forum law.
- Eg. Parties to the contract have selected English law and have regulated their positions on the assumption that it does govern, it would be wholly wrong for Ethiopian courts to impose different rights and duties on them by applying Ethiopian law.
- Or if two persons have gone through a ceremony in Kenya which makes them husband and wife, it would be unjust for Ethiopian law to step in and say that they are not man and wife and that their children are illegitimate b/c they didn't marry by a ceremony known to Ethiopia

1. How the forum employs the law of another state?
2. Why it does so?
3. Which law shall be employed?

TERRITORIAL THEORY OF LAW
- THE THEORY OF COMITY
- THEORY OF VESTED RIGHT
- THE LOCAL LAW THEORY

- Territorial theory propounded by a Dutch jurist huber in the 17th C.
- He put forward three propositions which influenced later theorists

1. The laws of each state have authority within its frontiers; they obligate all its subjects there, but not beyond.
2. A state's subjects must be taken to be all those who are to be found within its frontiers, whether residing there permanently or merely for a time.
3. Those who govern the state must act with comity so that the laws of another state which have been applied within its frontiers maintain their force everywhere, so long as no prejudice results to the power or rights of another sovereign or his citizens.

- Q. But if law is territorial, the question arises, why should the law of one territory be applied by the courts of another? Three theories

THE THEORY OF COMITY

- Propounded by the distinguished American jurist and judge Story J. (1779–1845),
- Three propositions of territoriality approach also recognized here. (absolute sovereignty within its own territory and may bind all persons and property, transactions located there, no sovereign can give laws beyond its territory; and whatever force the laws of one state have beyond its borders depends on comity given to those laws by another state.)
- It is said that it is necessary to apply foreign laws in cases involving a foreign element because not to do so would constitute a disregard of the sovereignty of another state within its territory and thus show a lack of comity towards it.
- However, it is not always clear what 'comity' means in the context in which it is used and it is far too vague
- It may mean 'courtesy' in the sense of lack of rudeness, or reciprocity, in the sense of do as you would be done by, or friendship, or as 'comity of nations' to mean public international law

CONT…

- Story did not take a position on how the foreign law operates
- Why foreign law applies? Answered by comity – it operates b/c another state chooses to let it do so.
- Absence of compulsion to apply foreign law; emphasized on the forum's discretion to admit foreign law which may later cause it to refuse to enforce when it is different from the forum's law
- There is a danger that comity will be confused with reciprocity
- Weaknesses of this theory 1. doesn't tell us w/c law should be applied (especially when the events of the case occurred in more than 1 foreign state); 2. it is primarily juristic explanation after the event; when the forum decides to give effect to foreign law; 3. does not answer the 'how question' – how does the forum applies the foreign law

THE RIGHT THEORY

- Three theories are included here from which the two are differ from each other only on the question of how the foreign law is employed ---
- No difference in the final result
- Vested rights; highly homologous right; and local law

1. Vested right theory – developed by Dicey of England, Beale in USA; advocates of this theory agree on ;

- laws are territorial- one state could not enforce the law of another state as such, however,

- Rights that are created by the law of a foreign state could and should be recognised when those rights were called into question in the forum, as the basis of claim or as matter of defence

- the conflict of laws rules are treated as part of the positive law of each state

CONT..

- The purpose of conflict of laws – to determine which state has the power to create a right.
- The foreign law operates to the extent that the rights created by foreign law are recognised and enforced
- The foreign right is recognised b/c under the forum's rules of conflict of laws (why question)
- How question- by recognising the foreign rights
- Which state law---answered by reference to the 'jurisdiction' of states to create rights.
- Accordingly, a state has jurisdiction to create a right if it is the state where the last act necessary to the existence of the right occurred
- To determine this state, the forum must look to its principles of substantive laws

Eg. Tort ---most state the plaintiff must suffer harm; the state where the injury has suffered --- the power to create a right to compensation for wrong

CONT..

2. Highly homologous right

- Its explainers are judge Learned Hana- USA and Prof. Morris in England
- Forum cannot enforce rights created by foreign own law
- There can be no law but the law of the forum
- The forum enforce a right created by its law
- When the operative events occurred elsewhere, it will create a right that is identical/highly homologous to a right created by the law of the state where the events occurred – employs foreign law as a model law

this theory differs form vested right on how the forum uses foreign laws

CONT…

- Criticisms – has directed against the vested right theory
- 1. some logical difficulty in squaring this with the doctrine of the territoriality of law
- The way out of this is to say that B's courts do not enforce A's law, but only rights acquired thereunder.
- But this seems to be a figment of the legal imagination; a right does not exist *in vacuo*, apart from the law from which it is derived.
- If say I have a right I am making inference to rule of law
- 2. not all rights acquired under one system of law can be thus protected. If X has a right under the law of A and Y an inconsistent right under the law of C, B's courts have to make a choice. If they select X for protection, this cannot be explained on the ground that X has a vested right, since so has Y.
- 3. rigidity
- 4. enforcing a right that the state to which it looks would not enforced if the same brought before it (contract place of formation; but parties may choses the applicable law)

THE LOCAL LAW THEORY

- Developed by USA prof. Walter Wheeler Cook- pragmatic and realistic
- It is characterised as policy-oriented, strict –rules and formulas are abandoned and pragmatic
- He construct a theory out of observable fact by concentrating upon what, in fact, courts do; and not necessarily upon what they say.
- He accepts the propositions of highly homologous right , contending that a country's courts never apply foreign law as such, but only their own law.
- But if there is a foreign element in the case the rule of law applied will not be that which is employed in a purely domestic case, but will be one modelled upon the appropriate foreign rule

08/02/2015

CONT…

- He approached the extent to which the forum will use law of another state as a model as follows
- Frist – determine whether there is in fact a conflict b/n the forum law and the laws of the other states which might be applied b/c of their connection with the transaction at hand.
- If difference exists between the domestic rule/substantive law/ and the locus--- apparent conflict of laws
- He also maintained that though the forum may know the domestic rules of the locus, it does not necessary know how the locus would decide this case (having foreign element--- some of the operating events occurred in other states as well)

CONT

- Thus, in this theory the forum first looks to how courts of the locus would decide the case at hand
- If it apply the same law as forum – no conflict
- If employ d/t law – then the forum decides whether it would use that as a model
- All these questions answered in light of social and economic polices and court's notions of fairness.
- No rigid rule and emphasized on flexibility
- Gives fullest opportunity for the court to reach on just and sound result

CONT…

- Criticisms-

1. Not provide definite rules for choice of law and prevent uniformity

Important developments

1. Just and sound decisions is not sacrificed for an illusory uniformity– give necessary flexibility for courts

2. Limits conflict problems to conflicts in fact--- not apply the law that would not be applied by locus

3. Enable courts to take into account social and economic policies---just like domestic cases

THE LOCATION OF LEGAL RELATIONS

- Developed by Savigny of Germany in the middle of 19th c
- He maintained the principle of territorial sovereignty developed by Huber and Story
- He rejected the answer to why foreign law was applied ---- comity
- Why? PIL – a part of international law 'international common law of nations'
- It is not the discretion of the forum state to give comity to foreign law
- But it was bound by principles of international law to recognize foreign law in the proper case
- There is a scientific basis for solutions of conflict of laws problems

CONT…

- Which law applies? He gave a positive guidance
- The method of selecting the proper law was to discover for each legal relation the legal territory to which the legal relation belongs
- The factual situation which gave rise to the legal relation is determinative of the seat of that relation
- Significant factual situation included the domicile of person, the situs of thing, the place where the legal transactions occurred and the location of the court.
- Based on this he had formulated a number of rules
- Like question of capacity, succession and family law of person's domicile; rights in things determined according to the law of the place were the thing situated; the law of the place where the tort committed controlled the obligation arising thereto; especial rule for contractual rule subjecting the expectations of parties; the location of the court determine procedure---law of forum

CONT…

- Critcisms
- General
- International obligation to apply foreign law is not always true
- Rigidity---rights theory

THE NATIONALITY THEORY

- Developed by Italian writer Mancini in mid of 19th c
- The essential notion of this theory is that law is personal and not territorial
- It is made for a given people rather than a given territory
- They govern subjects wherever they reside
- Conversely, they don not bind foreigners within the territory, though they domiciled and acted there
- The only exception wherein the application of territorial law when the requirement of public order demands or contrary agreement of parties

CONT…

- Criticisms

- It is err to consider laws are made for persons of a particular nationality wherever they may act. Rather it is made for persons living in society
- The approach that national law governs unless the order of public require the application of territorial law is too simplistic; doesn't consider each category, each problem to reach at sound, just and practical solutions
- It doesn't give an answer for more complicated cases involving of individuals of d/t nationalities

Significance – status and family relation – personal law

LEX FORI AND GOVERNMENTAL INTEREST

- This theory is just reinforcement of local law theory
- It advocates that conflict of laws must be policy-oriented and courts should not be bound by absolute rules w/out regard to the practical result
- Lex fori (the law of the forum) theory – dictates that the basic law is the law of the forum
- The foreign law used only to fill the 'gap' in the forum law
- Taking the historical development it argued that specific conflict rules have developed as an exception to the application of the lex fori.
- Foreign law is to be employed only where the defendant would be dealt unfairly by the application of lex fori or
- Where the superior governmental interest of another state requires the displacement of the lex fori

CONT…

- No fixed rule
- Lex fori is not displaced in the absence of specific justification

THE GOVERNMENTAL INTEREST APPROACH

- Recognises lex fori approach
- But concerned with ascertaining of the governmental interest of the state having some connection with the transaction
- Conflict in governmental interest of the forum state and the other in the application ---the forum prefers its interest and apply its law
- The forum law is displaced only where another state is shown to have a superior governmental interest
- Then such states law is used as a model for rule of decision

THE RELATIONSHIP OF PIL TO PUBLIC INTERNATIONAL LAW

- The existence of r/nship b/n these laws is a very controversial and much debated one
- The views of legal scholars on this point classified into three positions and run from the extreme position of considering PIL as integral part of Public IL to another extreme of denying any connection whatsoever b/n them.
- 1. **the doctrine of universalists/the law of nations**

- sought to argue that public international law is a source of authority for PIL

- Rules of PIL are derived from and sanctioned by public IL
- It received its initial impetus from the writing of Savigny---location of legal relation

CONT…

- He tried to derive principles from the existence of a community of nations and thought it advisable for the courts of the different countries to model their choice of law rules thereon so as to produce approximate uniformity in accordance with them.
- His general conclusion was that PIL is part of public IL and the rules of PIL are imposed by the 'international common law of nations' implying individual states are under an international obligation to apply them.
- Another Mancini- the need for harmonisation of private international law rules
- This view has won adherents in Europe

CONT…

- 2. on the other extreme some writers have denied any connection of the two laws
- Anglo-American jurists with some exceptions
- Dicey – has took the position that the rules governing choice of law and jurisdiction are rules of municipal law exclusively
- He argued that 'rights acquired under foreign laws' can be enforced by permission of the territorial sovereign
- PIL is strictly national law – proceeds from the sovereign of a given state

CONT…

- 3. Internationalists view
- not, in modern times at any rate, sought to argue that public international law is a source of authority for private international law,
- Many jurists take a middle position that while some aspects of PIL are intimately related to public IL, others have no significant connection therewith
- Domestic courts apply conflicts rules, both of jurisdiction and choice of law, by the same authority as they apply the rest of municipal law, that is, by authority bestowed by the state in which they sit.
- It acknowledges the fact that states tend to shape their own law that regulates private litigations w/c in turn leads to the existence of varied laws on the subject; owning to their unwillingness to sacrifice their own national interest and policies

CONT…

- On the other side, this view has maintained the existence of inter-relatedness b/n the two
- 1. there is an international consensus on certain rules of private international law, in the sense that domestic systems adopt and apply them, so that they may be said to be general principles of law and thus of public international law.
- The principles like (1) every state must have a system of the conflict of laws; (2) states must not altogether exclude the application of foreign laws and must respect rights acquired thereunder; (3) but states may exclude the application of otherwise relevant rules of foreign law on the ground of public policy; (4) status bestowed on a person by his personal law must be respected in other states in which he is transiently present; (1-4 do not prescribe any rule to govern anything) (5) the *lex situs* governs immovables; (6) *mobilia sequuntur personam*, that is, title to movables, is governed by the personal law (ambiguous); (7) the *lex loci actus* governs the form of a transaction; (8) the parties have a free choice of the law to govern their contractual obligations. (5 -8 specific rules; some may not be applied by all states

CONT…

- Moreover, even if all these eight principles or rules constitute general principles of law, they are principles of PIL, not public international law.
- They are not, therefore, sources of the conflict of laws as applied by domestic courts, derived from or ordained by public international law, but general principles of law applicable by international tribunals and in that sense sources of public international law.
- 2. Sharing ends or goals by both branches of law
- Both are ultimately concerned with the possibility of maintaining a unified economic and social order for the conduct of international trade and intercourse among independent political units and diverse cultures and stages of civilizations, d/t legal and economic systems and varying degree of physical power and position

CONT…

- 3. the other contact point is PIL Norms Applied by International Tribunals
- In determining its jurisdiction – find their source in its consecutive treaty or agreement… it is clearly public international law
- Increasing number of international conventions on different matters of conflict of laws
- E.g convention concluded by the Hague Conference on PIL
- In conclusion – still arguments
- But PIL part of municipal law of each state but it has got r/nship in some area with Public IL

TENDENCIES TOWARDS UNIFICATION OF PIL

- PIL exists b/c of differences in various legal systems
- Theoretical it would be unnecessary if the law of various countries were assimilated, even though conflict of jurisdiction would probably remains.
- At international level d/t attempts have been made to achieve the end of harmonization
- Two ways
- 1. Assimilation of the internal rules of law of various systems – certain branches of law (commercial law) are susceptible to unification than others (family law)
- To do this a permanent organization called International Institute for the Unification of Private Law has set up after WWI
- Head quarter in Rome
- Not directly concerned with PIL as it is concerned with unification of private laws rather than PIL
- Indirectly by eliminating conflict of laws by removing the differences on which such conflict is based

CONT…

- The institute has produced useful result in certain fields
- Partial elimination of conflict of laws are the 1964 convention relating to Law of the International Sale of Goods; Uniform Law on the Formation of Contracts for International Sale of Goods
- Other assimilation projects have succeeded in the field of international copyright, maritime law and carriage of goods by sea

CONT…

- 2. unification of the rules of PIL of various systems
- This process is simpler as it leaves untouched the sensitive branches of internal law and it seeks to realize more effectively the international function of the conflict of laws
- There are series of international conventions
- Uniformity within limited fields of Conflict of laws especially b/n continental European countries and to some extent in South American states.
- In this area, the Hague Conference of PIL- the most important inter-governmental organization
- Since 1893 it sessions have produced conventions on various conflict of laws issues.
- It 7th session has addressed the issues concerning corporations, sale of goods and the conflict of nationality and domicile
- The statute of The Hague Conference of PIL that come into force in 1955 aimed at the realization of progressive unification of the rules of PIL

CONT…

- According to its latest report ..2008 on the status of signatures, ratifications and accessions of the Hague Convention
- Conventions on 38 matters have been prepared
- 26 have been entered into force
- The most important ones from the latter group includes conventions on civil procedure, sales of goods, child abduction, agency, marriage, divorce, adoption, protection of minors, product liability, matrimonial property and enforcement of foreign judgements

Different countries from both legal systems are members to these conventions

Ethiopia, however, not a member state

What is/are the advantages or disadvantages if Ethiopia accedes to these convention?

09/05/2018

CONT….

- Give the country an opportunity to integrate itself in to a system that is based on widely accepted rules of conflict of laws
- The benefit will be even greater in the present order of globalization
- Conventions on recognition and enforcement of foreign judgement, international sale of goods, and product liability and the like are very essential for a country that strives to attract foreign investments for its economic development (b/c the legal regime including PIL would be one of the things that a foreign investors focuses on)
- The absence of comprehensive binding rules on PIL/ at least some aspects of it…compensated by the adoption of these conventions
- Recently, Ethiopia ratified the New York Convention and CISG.
- Kenya, Botswana, Mali, Malawi, Mauritius

PIL IN ETHIOPIA

- Ethiopia hasn't yet developed fixed rules of PIL
- Created the problem of lack of certainty and uniformity in the field
- Attempts have been made in different times
- The first attempt was during the drafting of the Civil Code, Rene David has incorporated; but it was rejected/ omitted for unknown reasons
- The reason?
- Two predictions
- 1. it was not a problem at that time or
- 2. the legislature wanted to adopt a pragmatic approach
- Second draft in 1965 R.A. Sedler
- 3rd draft by ministry of justice
- 4th two drafts the law revision Committee and the Justice and Legal System Research Institute

CONT…

- Courts try to fill the dead-lock or gap by adopting d/t means
- The problem further exaggerated we do not have a precedent system – except the FSC's cassation bench decisions
- Doctrinal sources –Sedler's 'the conflict of laws in Ethiopia' and different articles written by Ibrahim Idris and Samuel Teshale
- Moreover, the adoption of the federal system of government necessitate it

CHAPTER TWO
JUDICIAL JURISDICTION
2.1. INTRODUCTION

- Generally jurisdiction is meant by a government's general power/competence to exercise authority over all persons and things within its territory
- It can take three forms
- 1. legislative jurisdiction- a legislature's general sphere of authority to enact laws and conduct all business related to this authority
- 2. executive jurisdiction
- 3. judicial jurisdiction

JUDICIAL JURISDICTION

- The legal power and authority of a court to make a decision that binds all the parties to any matter properly brought before it
- The competence of the courts to hear and decide a case
- Powers of a court to inquire into facts, apply the law, make decisions and declare judgments
- It takes three forms
- 1. Judicial jurisdiction – whether court/s of particular nation
- 2. Material jurisdiction – which court among the courts in the hierarchy and the federal or state court
- 3. Local jurisdiction

JUSTIFICATIONS FOR REGULATION OF JUDICIAL JURISDICTION

- 1. Avoidance of forum shopping
- Selfish selection of court
- The practice of choosing the most favourable jurisdiction or court in which a claim might be heard
- Naturally the selection of court is the right of the plaintiff and unless judicial jurisdiction is regulated the plaintiff may choose the forum disregarding the defendant's interest
- The regulation – by requiring some kind of defined contact b/n the plaintiff/defendant/cause of action and the forum, the plaintiff cannot shop the forum in a manner that suits his/her/its interest and undermine the defendant's rights.
- Failure to regulate judicial jurisdiction put the defendant in a disadvantaged position

CONT…

- If the plaintiff selects a forum, the benefits ensued may
- The forum really affects the outcome – by many influences; the plaintiffs win much more often when they get to choose the forum – forum matters / empirical researches revealed
- The plaintiff my choose a forum that have substantive and procedural laws as well as choice of law doctrines (there are differences among countries in these regard); choice of forum – results in joyous victory or depressing defeat

- 2. Avoidance of inconvenience to the defendant
- Inconvenience in the form of distant litigation
- Distant and new place for the defendant numerous
- Huge amount of money
- Local biases – in social context, language, culture
- Difficulties in collecting evidence and calling witnesses faraway _regulating avoids these otherwise artificially created by the plaintiff

- 3. Avoidance of Unnecessary fight over jurisdiction
- Provision of absolute freedom to select the forum to the plaintiff may lead the defendant to claim transfer of venue or enter in to the motion of dismissal objecting jurisdiction
- The regulation besides avoid the above fights enables the court to focus on important points of the dispute so that save considerable resources
- 4. Avoidance of the possibility of denial of recognition and enforcement of the judgement out of the rendition forum
- Loss of practical value

CLASSIFICATION OF JURISDICTION

- Basic classification is jurisdiction *in personam (*personal jurisdiction) and in *rem*
- *Personam* jurisdiction – an action/claim brought against individuals
- these are actions brought to compel a defendant to do or to refrain from doing something or to pay damages.
- *Court* imposes its decision on the parties to an action
- Result in a judgement that impose a personal liability/ obligation on the defendant (to do, refrain from doing)
- *Rem* jurisdiction – an action against a thing
- Relief sought is with respect to a thing itself
- No personal liability/obligation
- But there is still named defendant
- Eg. Seeking ownership over a certain thing
- 'actions *quasi in rem*' - divorce or nullity of Marriage - involve
- determination of personal status,

CONT…

- Two ways of checking personal jurisdiction
- **General Jurisdiction** – determined whether the forum state has jurisdiction on the basis of the relationship between the parties to the dispute; particularly the defendant with the forum state
- Different grounds but generally includes nationality, domicile, habitual residence and consent
- It is dispute-blind type of jurisdiction; without regard to the nature of the dispute
- **Special/specific/alternative jurisdiction** – if we are unable to determine judicial jurisdiction in general manner; then we resort to specific – looking into the nexus between the forum and the nature of the dispute/cause of action
- It widen the alternative forums to sue the defendant
- Provides additional forum

THEORIES OF JUDICIAL JURISDICTION

- Different and distinct theories developed by scholars that tries to justify why a court of a certain state/country assumes judicial jurisdiction over PIL case and on what grounds
- 1. **power/ the territorial power/territorial theory**
- Here judicial jurisdiction is assumed if the given court has the power over the defendant to compel him into its judicial process/ a corporation doing business
- began with the concept of physical power exercised by arresting and physically bringing the defendant before the court
- This theory determines the judicial jurisdiction upon the satisfaction of two elements

- 1. The court's ability/capacity to bring the defendant to it judicial process…. Delivery of summon
- 2. Rendition of a judgement that can be effectively enforced by it
- 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 physical presence of the defendant in the territory and it does not concern with the plaintiff b/c it is the one who chooses the forum
- Developed in common law tradition
- Q. how should the physical presence of a defendant in a given states?
- A transient defendant/ this theory has extended to mere sojourn if summon can be properly served
- Grace V. McArthur…in America the summoning over skies of USA flying from Mexico
- The duration of stay doesn't matter; a presence for a short period suffices

2. The Minimum Contact Theory

- Seems too complementary to power theory
- Developed to avert the deficiencies/defects of power theory
- Two defects:
- (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*
- With the aim of averting these defects American jurists have developed this theory
- *International Shoe Co.* V. *Washington*. we have certain minimum contacts ; does not offend traditional notions of fair play and substantial justice

- It is vague and doesn't give a single solution
- But most of the case decisions indicate that 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.

3. FAIRNESS THEORY

- A court assumes judicial jurisdiction only if it can provides fair, convenient, and just forum to the parties
- It is not based on the court's power to subject the parties to its authority
- Rather on the basis of this theory a country will have a judicial jurisdiction over a given case; if litigating there is fair and convenient to the parties to the dispute; witnesses are accessible without any cumbersome; doesn't cause a procedure and language barrier
- The very assumption of these theory is that a fair decision will be recognised and effected in everywhere in the world as the world shares fairness as a common value
- It doesn't bother on its ability of enforcing the judgement
- Focuses on practicability
- The defect of this theory is that its foundations are vague; fairness, justice and efficiency…etc

JUDICIAL JURISDICTION IN COMMON LAW AND CONTINENTAL LAW LEGAL SYSTEMS

- **Bases for Personal jurisdiction in common law legal system**
- General jurisdiction
- Presence; agency, domicile, and consent
- **Presence**
- If the defendant is served with a claim form or equivalent document the courts have jurisdiction; if he is not, then (generally) they have none
- Defendant served with the process
- Foundation is physical power
- Two things – physical presence and serving a proper summon (2 purpose – jurisdiction and informing)

- It matters not that the defendant is only here as a casual traveller or for a few hours or minutes, provided that he has not been tricked or kidnapped into coming here
- The transient rule – temporary presence
- In civil law countries – personal service procedural requirement not as such grant a jurisdiction
- Defect of this; the defendant may forced to defend in unfamiliar place; and the forum may not be in a good position to deal the case intelligently
- Positive side – limit the plaintiff's in fair choice of forum
- To rectify the defects; some common law countries like England and US; developed the principle of due process and forum-non convenience doctrine to reject a jurisdiction

2. DOMICILE

- Permanent home
- It gives a power to entertain any personal claim if the defendant is domiciled in the territory of the forum
- The rationale - the state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties
- Mobility nature of human being – defendant may hide himself to prevent the service process
- Administration of justice requires there should be a forum the defendants is always available for suit
- Avoids chasing the defendant wherever he/she is, and it not be unfair and illogical for absent domiciliary to appear and defend the case
- But if absent for a long time with no intention of return in such case it creates – inconvenience

- There are three kinds of domicile: domicile of origin, domicile of choice and domicile of dependence.
- A person's domicile of origin depends on the domicile of one of his parents at the time of his birth, not on where he was born, nor on his parents' residence at that time. (given by law)
- The rules for the ascertainment of the domicile of origin are: (i) a legitimate child takes his father's domicile, (ii) an illegitimate child and (iii) (possibly) a posthumous child, that is a legitimate child born after his father's death, both take his mother's domicile, and (iv) a foundling or one whose parents' domicile is unknown is domiciled in the place where he is found or born. In one situation only, (v) the domicile of an adopted child, the domicile of origin can be changed after the child's birth.

- Domicile of dependency; dependent domicile changes with changes someone else
- A minor's domicile may change after his birth, but any new domicile he acquires is a domicile of dependence
- **Domicile of choice –** independent person acquires for himself – residence (factum) and intention (animus)
- Distinguished from domicile of origin
- 1. a domicile of choice is acquired if a person goes to live in a country with the intention to remain there permanently.
- 2. 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.
- 3. the 'revival' of the domicile of origin,

- General principles of domicile
- 1. no person can be without a domicile
- 2. no person can at the same time have more than one domicile
- 3. domicile of origin/ dependence is presumed to continue until it is proved that a new domicile has been acquired
- 4. question of domicile is determined by law of the forum

- Determining place of domicile of legal person
- Since a corporate person, has no real existence, it can have no actual presence or residence
- Two grounds
- 1. place of incorporation (in civil law – Statutory seat
- 2. principal place of business (in common law – real seat
- Proponents of the first view justified
- 1. the corporation intentionally chooses to create a r/nship with the state of incorporation – to obtain benefits of its legal system
- 2. unlike natural persons, corporation can't absent from the state of incorporation
- 3. it may familiar with that state's law … b/c formation is based on the state's substantive law

3. Agency

- If the defendant has designated a local person to be his/her agent for some specific task
- Summon serving to agent is considered as service to defendant himself

4. CONSENT/SUBMISSION

- By free willing consent of both parties to the dispute
- Before the dispute/after the after dispute
- Expressed or implied
- Express –
- 1. choice of jurisdiction clause – the defendant contract to submit; any forum – may violates the procedural due process of law requirement of notice and the right to defend
- Impliedly – by the conduct of parties
- 1. the defendants pleads on the merits
- 2. a claimant who is abroad sues a defendant in the local forum – gives jurisdiction over the counterclaim

SPECIAL JURISDICTION

- Alternative for plaintiff – not necessarily required to forum linked to the defendant
- No uniformly applicable base for all kinds of conflict matters – as it depends on the nature of the dispute
- Contractual disputes –
- - place of formation/ conclusion
- - place of performance
- - some use both/others either of the two
- Tort – two grounds
- *either* (a) the damage was sustained within the jurisdiction *or* (b) the damage sustained abroad resulted from an act committed within the jurisdiction

- Eg. Defamatory statement through internet
- USA – result of tort
- Ethiopia – place commission of tort action
- Matrimonial cases – determination of marriage status, divorce, --- not regulated by special jurisdiction
- Domicile of spouses
- - it shows the centre of their social relations
- - there is a belief that the society to which the spouse belong by virtue of domicile has interest in their marital status
- - avoiding difficulties

PERSONAL JURISDICTION IN THE CIVIL LAW LEGAL SYSTEM

- Nationality, domicile (differently understood from common law residence France) and consent (special apperance0
- Nationality
- b/c it achieved the purpose of stability
- Sacrifice of a man's freedom to adopt the legal system of his own choice
- Easier to ascertain than domicile – formal action not depends on the subjective element –animus
- Different grounds
- Problems: one may have different nationality; statelessness

- Special jurisdiction
- Contract – in almost all civil law countries – place of performance
- Tort – the tort action took place
- Matrimonial matters – similar to common law domicile but its importance is lesser
- Since, it is alternative to nationality and the test of domicile is now changing into the test of habitual residence
- Corporations siege reel (effective/actual seat vs. statutory seat

JURISDICTION IN REM

- The general principle – jurisdiction over a thing the *situs* of the property
- Object of property ---movables or immovable
- Corporeal an incorporeal
- Regarding immovable – unanimously recognized *situs* rule
- The situs of the thing is the only competent forum to dispose the case----exclusive jurisdiction
- i.e. no other court claims jurisdiction
- Movables ---- place of its location
- This not apply if the thing is casually or in transit
- Domicile
- Intangibles ---if represented in a document (negotiable instruments) the place where the documents located/ some issued
- If not general jurisdiction

LIMITATION ON THE EXERCISE OF JURISDICTION

- *Lis alibi pendens*
- There are particular problems when proceedings between the parties are taking place in another country. These may have been started by the defendant or the claimant, or even a third party in a complex multiparty action.
- Duplication of proceedings can often be unfair to both parties. Each party may be subject to two sets of costs, and the time and trouble necessary to conduct two proceedings is unnecessary.
- The risk of conflicting judgments is not conducive to overall justice and may lead to an unseemly rush to judgment.
- Taking these consequences courts of some states have a discretionary power to grant a stay --- until the out come known (stay of proceeding) eg. USA, England, Germany but France and Italy and Netherlands
- Ethiopia see art.8(2) of CPC

- court can stay its own proceedings in favour of the other court, or the court may decide that it should try to prevent the proceedings continuing in the other court. The latter option, often known as an anti-suit injunction,
- Pendency in Britain - foreign forum has made **substantial progress in the proceeding**, which action started first being irrelevant.
- **The First Seized Approach** – western Europe
- Stay until jurisdiction established or decline to 1st
- When? Institution of the suit/proceedings served to the defendant
- Brussels and Lugano Conventions on Civil and Commercial Matters

- Problems with 1st seized approach
- 1. same parties and same cause of action… parties may to evade the pendency provision add another party
- 2. Actions started simultaneously
- 3. a disincentive to parallel proceedings- race by the parties to be the first to commence proceedings
- 4. lack of uniformity on when
- **Recognition Prognosis-** prediction
- a court declines jurisdiction if the action abroad is likely to lead to a judgment which is recognizable in that court

FORUM NON-CONVENIENS

- Proper rule of jurisdiction may result in multiple forum to entertain the case
- The court before a case is brought might consider surrendering the jurisdiction in favour of another court for the sake of avoiding inconvenient and hardship that might otherwise caused to the defendant
- It is a discretionary power for a court to decline jurisdiction on the basis that the appropriate forum for trial is abroad and adjudication at the local forum is inappropriate
- Inconvenience for defendant in accessing evidences; calling witnesses; language barriers
- Accepted in both legal system but awarded in civil law countries exceptionally ; family matters
- Roles; an antinode to excessively wide bases of jurisdiction (presence), providing flexibility; preventing forum shopping
- Critics are poses a greater potentiality for abuse by courts; additional and lengthy hearing before the final trial-

JURISDICTIONAL IMMUNITY

- **The Full Faith and Credit Clause**
- guarantee against relitigation of matters which are already determined by a competent court in prior litigation
- Needs to give effect for judicial decisions of other sister states
- the *res judicata*
- Rationale 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
- Most federal states do not vest power on a state to determine for the extraterritorial recognition of its judgments
- dual court system, where each state and federal courts have their own hierarchy, and not subject to control and influence of one another

- 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.
- 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
- 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
- the scope of the local *res judicata* rules; in some parties and the cause of action in both suits must be identical – claim preclusion; in other An issue necessarily determined in an earlier litigation – issue preclusion
- In Ethiopia FDRE Con. Art.50(8) 'mutual respect clause'

JUDICIAL JURISDICTION IN ETHIOPIA

- Ethiopia does not have comprehensive laws on PIL
- It has a direct impact on the manner of handling disputes having extra-territorial element; in particular judicial jurisdiction and caused judicial uncertainty
- However we have insufficient and scattered laws and judicial practices
- The laws are
- **1. proc.25/96**
- Art.5(2)--- inter-state conflicts
- Like USA--- the federal courts suits b/n persons permanently residing in different regions
- This is justified – the forum neutrality, avoid potential hostility b/n states, encourage out-of state investment and quality of justice

- International conflicts – Art.11(2(a)) FHC first instance jurisdiction states that cases regarding PIL; (c) regarding recognition and enforcement of foreign judgements or decisions
- Art. 5(4) foreign national –party to the case
- Not specific guide how judicial jurisdiction assume
- 2. **The Civil Code**
- Domicile were destined to serve PIL (183-191); justified
- Used no where in the code it used for purely domestic disputes (but residence)
- Domicile employed to carriage by air (art.647 com co)
- Jacquious Vanderlinden, in his Commentary on the [Ethiopian] Law of Physical Persons, in confirmation to this argument
- 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.
- But the draft part of the civil code based on the nationality principle
- It is plausible but the world is shifting to habitual residence (rome conv. On Con. Obl. And Hague Conv. Inter. Sales of Goods)
- B/C avoids difficulty of discovering intention; retains advantages of domicile as well reflecting close r/nship b/n party and forum; and sustainability to inter-state conflicts in federal system

- **3. The Civil Procedure Code**
- Art. 4 (courts don't need especial authorization to try civil suit—power of court exceptionally other institutions, 8(2) and 20
- Art. 8(2)---courts in Ethiopia are not precluded from trying civil suit pending in a foreign court
- Not jurisdiction granting provision; it assumes that in very beginning they have judicial jurisdiction
- Art. 20 'defendant residing abroad
- 1) when a defendant is non-resident (even though Ethiopian national) suit be instituted in any court of plaintiff's choice in Ethiopia --- if the suit relates to immovable in the situs
- 2) if defendant is non-resident foreigner – owning property in Ethiopia – suit shall be instituted in the court of the place where such property situated
- Venue provisions presupposes establishing judicial jurisdiction

- **4. Commercial code**
- Art.647—jurisdiction on carriage by air
- Concerning contracts of carriage- any claim for damage may be brought; as plaintiff chooses; in court of the place where the carrier is domiciled, has principal place of business, or has an agent who made the contract or before the court of place of destination
- Otherwise agreement is void
- May not be cited for international carriage by air.. b/c Ethiopia is member to Warsaw convention
- Rather for carriage exclusively performed within Ethiopia; foreign element in terms of passengers or carrier foreign national/ domiciliary
- Can a carrier be foreigner in Ethiopia?

- **5. The Maritime code**
- Two situations
- Art. 208 in respect to carriage of goods --- port of arrival is in Ethiopia (samuel said it as unilateral it doesn't tell us when the port of arrival is elsewhere… is it necessary?)
- Art. 237 action for incidental to collision/ multilateral b/c it provides collision inside and outside of Ethiopia…but not applicable since Ethiopia has become inland nation
- Defendant is domicile in Ethiopia and the defendant ship is registered in Ethiopia

JUDICIAL PRACTICES

- 3 d/t approaches
- - silence regarding judicial jurisdiction
- - recourse to civil procedure code
- - recourse to general jurisprudence

SILENCE REGARDING JUDICIAL JURISDICTION

- A court seized of a case of PIL should first establish judicial jurisdiction before settling choice of law
- In fact, it must do so if its judgement is to have any practical value
- Without framing an issue on this point
- Numerous decisions has not mentioned it
- One may argue that the court has established it via implied consent of parties--- not consciously
- However, this fact was not stated in the decisions
- Consent of parties has limitation from the perspective of the forum– resource of the court and public policy of the forum state
- The effect of total disregard to judicial jurisdiction are
- 1. denial of recognition and enforcement—loss of practical value
- 2. failure to safeguard the forum's public policy

RECOURSE TO THE CIVIL PROCEDURE CODE

- Courts/parties had made recourse to the CPC provisions
- In two ways
- 1. by applying the provision referring to cases containing foreign elements directly… Art. 8(2) 20(1) and (2);
- 2. by applying the rule for local jurisdiction to determine judicial jurisdiction…venue provisions (Art.19 – 31)
- They applies only if Ethiopian courts have judicial jurisdiction
- Why not apply these provisions to judicial jurisdiction?

- Samuel stated the following points for non-application of these provisions by raising the following justifications
- 1. The local jurisdiction provisions are made to fit neatly domestic disputes
- Are result of areal division of adjuratory power by the legislative organ of a state
- It doesn't take into its calculation they vital factors for judicial jurisdiction like harmony with international practice and recognition and enforcement of the judgement by another state
- Rather as adjective to the substantive law; their content is predicated (based) on the policy, rules and principles of the substantive law
- They meant to facilitate the process of obtaining the remedies provided in substantive laws
- Since the substantive laws are enacted to regulate domestic legal r/n ships then they are alien to the demands of conflicts justice – other

- 3. The weight of the factors of judicial jurisdiction taken in the venue provision d/t
- E.g.,. Art 19 suit to be made at residence of defendant
- Based on the traditional norm of protecting the challenged against the challenger; in terms of travel expenses and like
- In PIL case these factors are equally important to the plaintiff's interest
- He might come from the other end of the world
- 4. The local jurisdiction provisions are unaware of the possible exposure of the foreign party to strange institutions, attitudes and values since they meant for citizens of a country subject to one legal system
- In PIL such diversity unless limited may become source of forum shopping by plaintiffs; according in designing of judicial jurisdiction rules should avert the plaintiffs" engagement in forum shopping to take advantage of defendants by dragging the latter to inconvenient courts

RECOURSE TO GENERAL JURISPRUDENCE

- On power theory and fairness theory
- Sedler's 'the conflict of laws in Ethiopia'--- number of parties and courts cited it as sole and influential
- According to him Ethiopia courts shall have judicial jurisdiction
- 1. The defendant is Ethiopian national or domiciliary
- 2. Act or event in dispute occurred or has significant contacts
- 3. The defendant consented to submit
- 4. Action in rem, property situated in Ethiopia
- 5. Legal persons statutory seat
- 6. Contract made or to be performed in Ethiopia

CRITICISMS

- + Mere nationality unacceptable
- b/c it indicates political loyalty and may be artificial--- the defendant may established family and business and resides in abroad
- Unfair to demand his submission
- Cause him much expense; unfamiliar with the legal system and enforcing the judgement against his property may be impractical…
- + sedler is an exponent of power theory…the defendant Ethiopian national/ domiciliary …irrespective of where the subject matter of the dispute occurred
- Doesn't envisage forum non- convenience limitation of the power theory
- Defendant has no opportunity to plead the exceptional difficulties in bringing evidences and request change of venue

- + legal persons irrespective of the transaction occurred abroad but established by Ethiopian law
- Foreign legal persons … suits arising out of their activities conducted in Ethiopia
- Ethiopian legal persons… unfair for suits arose from a transaction occurred in abroad b/c difficulty in bringing evidence and misinterpretation of law of the state the transaction occurred
- + contract … qualification needed regarding assumption of jurisdiction based on place of conclusion …. May happened incidentally or unplanned… transit parties by chance
- + action in rem… situs; how it applies for intangible that has no location in space
- +consent …. No connection with Ethiopia but defendant consented; why Ethiopian courts spend any resources and judicial time on it that has no value at all to Ethiopia?
- Sedler's proposal…. Power theory criticisms
- Fairness theory….but states are not yet cooperative in granting recognition and enforcement
- Power theory…for enforcing….defect its dependence on physical contact… Excludes suits arising intangible property; the world pay tributes for fairness

- What you recommend the theory to be followed in Ethiopia? Why?