Conflict of laws

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1. Introduction to Conflict of Laws

- Definition and Scope
  - Private international law, also known as Conflict of Laws, deals with legal relationships that involve more than one legal jurisdiction, such as parties from different states or actions occurring in a foreign jurisdiction.
- Key Issues
  - Applicable Law: Determining which legal system applies to an international dispute, such as liability in a cross-border business transaction.
  - International Jurisdiction: Identifying where a legal action can be initiated, considering the rules of jurisdiction in various courts.
  - Recognition and Enforcement of Foreign Judgments: Addressing how a judgment from one jurisdiction can be enforced in another, especially when assets are located in different countries.

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- Nature of Private International Law
  - Private international law consists of national rules that vary across jurisdictions. Despite its name, it is not a branch of public international law and is primarily shaped by national legislation.
- Harmonization Efforts
  - International efforts, such as those by the Hague Conference, and regional initiatives in the European Union aim to harmonize private international law rules, although significant variations remain.
- Federal States Context
  - Issues of applicable law and jurisdiction also arise within federal states like the United States, where private law varies by state. Unlike the EU, where harmonization is progressing, private international law in the US remains largely a matter of state law.

Chapter 1: Choice of Law

Introduction to Choice of Law

- Private international law addresses the challenge of determining which national law applies to international legal relationships, known as the issue of choice of law.
- Unlike domestic legal relationships, which are governed by a single state's law, international relationships may involve multiple jurisdictions.

1. Traditional Methodology

- 1.1 Multilateral choice of law rules
  - Currently, many states utilize multilateral choice of law rules to address the issue of which law applies in international legal relationships.
  - The methodology was first proposed by German legal historian Karl Friedrich von Savigny, who is often associated with this approach in continental Europe, referred to as "la méthode savignienne" in French.
  - The multilateral methodology has specific limitations; it is not applicable to public law rules and has exceptions for rules that involve public interest considerations.

A) Basic Principles

- Multilateral choice of law rules determine the applicable law in international legal relationships using geographical criteria known as "connecting factors."
- These factors link a dispute to a specific legal order.
- Examples of Connecting Factors
  - European Regulation (Rome II): The law applicable to non-contractual obligations arising from a tort is generally the law of the country where the damage occurs.
  - Chinese Law: Statutory succession is governed by the law of the deceased's habitual residence, while immovable property succession is governed by the law of the property's location.
  - Japanese Law: A person's legal capacity is determined by their national law.

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- Structure of Choice of Law Rules
  - Each multilateral choice of law rule typically associates a connecting factor with a specific legal category (e.g., torts). The choice of law issue is resolved by applying the same connecting factor for cases within that category.
- Connecting Categories and Factors
  - For instance, in tort cases, the connecting category is "Tort," and the connecting factor is the place of damage.
- Variation in Sources of Choice of Law Rules
  - Historically, choice of law rules have been national, with countries like Japan and Brazil applying their specific rules.
  - The European Union has made efforts to harmonize these rules, but significant variation remains.
- Forum and Relative Nature of Choice of Law
  - The applicable law is determined from the perspective of a specific state, known as "the forum," the court addressing the choice of law issue. The law of the forum is considered the relevant law, while all others are termed foreign laws.

B) Conflicts justice v. substantive justice

- Focus on Geographical Proximity
  - The multilateral methodology emphasizes the geographical link between the dispute and the applicable law, relying exclusively on connecting factors without considering the substance of the laws involved.
- Substance-Neutral Approach
  - The methodology is described as substance-neutral and substance-blind, meaning it does not evaluate the content of the laws; it aims to achieve conflicts justice rather than substantive justice.
- Rationale for Conflicts Justice
- The rationale behind this approach is twofold:
  - 1. Expectations of Parties: It is assumed that all parties expect the law with the closest geographical connection to apply. For example, a person buying property in a foreign country would intuitively expect

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- Substantive Choice of Law Rules
  - While the multilateral rules are generally substance-neutral, it is possible to create choice of law rules that aim for specific substantive outcomes.
  - Examples of Substantive Outcomes
    - Rome I Regulation: Article 11 states that a contract is formally valid if it meets the requirements of either the law governing it in substance or the law of the place where it was concluded, favoring certainty in contractual relationships.
    - Rome II Regulation: Article 7 allows for a choice of law regarding environmental damage claims, providing the claimant the option to choose the law of the country where the damage occurred, thus favoring the interests of the victim.

C) Determining Geographical Proximity

- Objective of the Multilateral Methodology
  - The primary aim is to apply the law most closely connected to the relevant legal relationship by using connecting factors associated with specific legal categories.
- Structure of Multilateral Choice of Rules
  - Each rule links a connecting factor (e.g., the location where damage occurred) to a connecting category (e.g., tort), guiding the designation of applicable law based on geographical proximity to the legal relationship.
- Complexity of International Cases
  - In international disputes, multiple legal systems may be involved, as parties could have different nationalities, reside in different countries, or be affected by events occurring in various jurisdictions.
- Illustration of Legal Connection
    - An example is provided where a New York resident has an accident in Ontario, Canada. Questions arise about whether Ontario law should apply, especially when the connecting factors point to different jurisdictions.

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- Babcock v. Jackson Case
  - This influential case challenged the traditional rigid application of multilateral methodology, prompting discussions in both the U.S. and Europe about the need for flexibility in determining the law most closely connected to a dispute.
- Flexibility in Choice of Law
  - Recent regulations introduce provisions that allow for flexibility:
  - Rome II Regulation: Allows for the application of the law of the country where damage occurs but includes exceptions where both parties reside in the same country or when a case is manifestly more closely connected to another jurisdiction.
  - Swiss Federal Code: Provides an exception clause for situations where the designated law has a very limited connection to the case compared to another law with a closer connection.

1.2 International mandatory rules

- Conflict Between Private and Public Interests
  - Multilateral choice of law rules typically focus on private interests, which can lead to conflicts when a private law dispute also involves public interest considerations. In such cases, states may need to prioritize their own laws over foreign laws.
- Recognition of International Mandatory Rules
  - European scholars have proposed exceptions to the multilateral methodology, allowing states to apply their own laws when crucial public interests are at stake. These rules are termed international mandatory rules, which supersede the designated applicable law from multilateral choice of law rules.
- Examples of International Mandatory Rules

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- Case-by-Case Assessment
  - International mandatory rules should be viewed as exceptions to the multilateral methodology rather than competing methodologies. They must be identified on a case-by-case basis and are typically specific provisions rather than entire statutes.
- Identification Methods
  - In some instances, lawmakers explicitly designate certain provisions as internationally mandatory, ensuring their application regardless of the otherwise applicable law.

2. Governmental Interest Analysis

- 2.1 The Origin: Currie's Challenge to the Traditional Method
  - In the late 1950s and early 1960s, American scholar Brainerd Currie published transformative articles that revolutionized the choice of law field in the United States, leading to what is known as the American revolution of choice of law.
- Central Insight
  - Currie argued that choice of law should focus on interpreting the purposes behind substantive laws rather than strictly adhering to traditional choice of law rules. He believed courts should evaluate the policies that laws aim to advance in order to determine their applicability in interstate cases.

Currie's Method Summary

- Currie proposed a systematic approach to choice of law:
- 1. Courts should analyze the policies reflected in the laws of the states involved to understand their interests in applying these laws.
- 2. If one state has a legitimate interest in applying its law and the other does not, that state's law should be applied.
- 3. In cases of conflicting interests, courts should seek a moderate interpretation to avoid conflict.
- 4. If a conflict is unavoidable, the law of the forum should be applied.
- 5. If the forum has no interest but a conflict exists between two other states, the law of the forum should be applied until a better solution is found.

2.2 Resolving Conflicts

- New Approach Overview
  - The new approach requires courts to evaluate whether applying the laws of the states involved would further the respective policies of those states, leading to three distinct situations.
- 2.2.1 False Conflicts
  - Definition of False Conflicts
    - A false conflict arises when only one state has a genuine interest in applying its law. In such cases, the law of the interested state should be applied to avoid harming that state's interests without benefiting any other state.
  - Example Case
    - In the case of Tooker v. Lopez, applying the law of the accident's location instead of the common domicile of the parties would harm the interested state without advancing others.
- Currie's Contribution
  - Currie identified false conflicts and proposed that the law of the only interested state should resolve these choice of law issues.

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- 2.2.2 True Conflicts
  - Definition of True Conflicts
    - True conflicts occur when multiple states have interests in applying their laws, making resolution more complex.
  - Currie's Proposal
    - Currie suggested applying the law of the forum, particularly when the forum state is among those interested. This ensures that the forum is advancing its own state's policy.
  - Judicial Perspective
    - Currie argued that weighing the competing interests of sovereign states is a political function best left out of the judicial arena in a democracy.
  - Court Reactions
    - American courts have responded differently to true conflicts, employing various methods to resolve these situations.

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- 2.2.3 Unprovided-for Cases
- Definition and Example
- Unprovided-for cases occur when none of the involved states has an interest in applying its law.
- Oregon Supreme Court Case
- The Oregon Supreme Court identified an unprovided-for case in Erwin. The resolution method used in this case would need to be specified for a complete understanding.

3. Advanced Issues

- 3.1 Fundamental Rights and Choice of Law
- Compliance with Fundamental Rights
- Choice of law rules must align with fundamental rights, addressing potential discrimination, such as laws favoring one gender over another in matters like parenthood or marriage.
- Concerns Over Substance Neutrality
- The traditional choice of law methodology’s substance neutrality may shield it from scrutiny under human rights law, raising questions about its compatibility with fundamental rights protections.

Case Analysis: Phillips Petroleum v. Shutts

- Case Overview
- In this case, royalty owners from multiple states brought a class action in Kansas against Phillips Petroleum for delayed royalty payments. Kansas law was applied to all claims despite most leases and plaintiffs having no real connection to Kansas.
- Supreme Court's Holding
- The U.S. Supreme Court ruled that applying Kansas law to every claim was unconstitutional, as it violated the Due Process Clause and the Full Faith and Credit Clause.
- Justification of the Decision
- The Court emphasized that for a state's law to be applied constitutionally, there must be significant contacts with the state that create legitimate interests. Kansas had minimal connections

Rehnquist's Opinion

- Justice Rehnquist noted that the mere desire of plaintiffs to be governed by Kansas law (evidenced by their participation in the lawsuit) does not justify applying the forum's law. The Court rejected the notion that plaintiffs’ lack of opting out indicated consent to Kansas law.
- Significant Contacts Requirement
- The Court reiterated that Kansas must demonstrate significant contacts with the claims to justify applying its law. In this case, the lack of relevant interests from Kansas in the claims led to the conclusion that applying its law was unconstitutional.
- Implications for Future Cases
- The ruling highlights the need for courts to respect constitutional limitations in choice of law, even in nationwide class actions, ensuring that the rights of parties outside the forum are not abrogated.

3.2 Federalism and Conflicts of Laws

- Conflicts of laws exist in cases involving multiple nation-states and within federal systems with ununified state laws.
- Fundamental principles of federalism can influence the choice of law in both international and interstate cases.
- Federal systems aim to maintain an internal market for residents to freely circulate and trade.
- Internal market goals may prioritize eliminating obstacles to residents' rights, including choice of law rules.
- Federal principles can guide and sometimes dictate the solution to choice of law issues.

Case Study - Midwest Title Loans, Inc. v. David Mills

- Plaintiff Midwest Title Loans is an Illinois-based company.
- Indiana added a 'territorial application' provision to its Consumer Credit code.
- The provision affects out-of-state creditors advertising or soliciting in Indiana.
- The court ruled against the provision, citing violations of the Commerce Clause due to extraterritorial regulation.

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- Commerce Clause and Extraterritorial Regulation
  - The Commerce Clause protects against inconsistent legislation projecting one state's regulations into another.
  - Due process and commerce clauses serve different purposes in protecting against undue burdens and impeding interstate commerce.
  - Midwest's activities in Indiana, while advertised, were executed in Illinois, leading to a violation of the Commerce Clause.

Chapter 2. The Choice of Law Process

- 1. Characterization
  - Characterization is the initial step in determining the applicable law.
  - It involves identifying the relevant legal issue rather than specific rules.

1.1 Multilateral methodology

  - Multilateral choice of law rules connect legal issues to a choice of law, not rules themselves.
- Case Study - Caraslanis
  - Facts: Dimitri Caraslanis and Maria-Richarde Dumoulin married in Paris in 1931.
  - Dispute: Caraslanis argued the marriage was void under Greek law for lack of an orthodox ceremony.
  - French Court ruling: French law applied, considering the issue as one of formal validity, making the marriage valid.
  - Judgment: The civil marriage in France was deemed valid under the rule locus regit actum.

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- Legal Provisions
  - Romanian Civil Code (2009) Article 2.558:
  - Legal characterization follows Romanian law.
  - Characterization based on foreign law in case of renvoi.
- Quebec Civil Code Article 3078:
  - Characterization follows the legal system of the court.
  - Property classified as movable or immovable based on its location's law.

1.2 Unilateral Methodology in Choice of Law

- Fundamental principle: Rules should be interpreted based on the legal system's original conceptions.
- In unilateral methodology, the forum assesses which foreign laws are to be applied.
- Assessment should align with the foreign law's conceptions and characterizations to determine the foreign lawmaker's will.

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- Governmental Interest Analysis
- In governmental interest analysis, the interests of the foreign state to apply its law are crucial.
- Determining foreign state interests involves assessing them according to the foreign lawmaker's perspectives.
- The forum aims to faithfully respect the foreign state's views and intentions in applying its laws.

2. Evasion of the Law

- In multilateral choice of law, a connecting factor designates the applicable law.
- Manipulating the connecting factor can change the applicable law, allowing for its avoidance.
- Case Study - Princess of Bauffremont v. Prince of Bauffremont
- Facts: Princess obtained German nationality to remarry, circumventing French law prohibition on divorce.
- Legal Action: Prince sought annulment of the naturalization and second marriage.
- Ruling: Second marriage void due to evasion of French law, emphasizing the principle of indissolubility of marriage.

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- Legal Provisions on Evasion of Law
  - Tunisian Code of Private International Law (1998) Article 30:
    - Defines evasion of law as manipulating connecting factors to avoid designated laws.
- Belgian Code of Private International Law (2004) Article 18:
  - Prohibits acts aimed at evading designated laws.
- Interpretation of the Supreme People's Court of the PRC (2012) Article 11:
  - Disregards the effects of designated foreign law if connecting factors are manipulated to evade Chinese laws.

3. Renvoi

- Renvoi: French for 'return' or 'referral'
- Refers to the issue of conflicting choice of law rules in different jurisdictions
- Can lead to a situation where one jurisdiction's choice of law rule refers back to the law of another jurisdiction

3.1 Renvoi in Common Law Jurisdictions

- Case Example: In Re Schneider Estate (1950)
- Deceased was a US citizen with Swiss real estate in his estate
- Attempted to dispose of Swiss realty against Swiss law
- Court had to determine if the will's provisions were valid under Swiss law

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- Application of Renvoi
  - Courts must consider the law of the situs (where the property is located)
  - Renvoi principle may lead to a loop if not handled carefully
  - Renvoi rules differ across jurisdictions (e.g., US, England)
  - Emphasis on determining the law that governs the title to land or similar assets

Application of Renvoi in Case Examples

- Ross Case: Italian estate ownership and 'legitima portio' claim
- Court applied lex situs principle, considering Italian law as it would in Italy
- Emphasized that the law of the situs governs the succession to immovable property
- Similarity between how Italian and English courts would decide on succession

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- Renvoi Doctrine in New York State
- Dupuy v. Wurtz (53 N.Y. 556): Early case involving personal property
- Court introduced the renvoi doctrine, linking law of domicil to specific cases
- Relevance of substituting 'situs' for 'domicil' in real property cases
- New York State decisions affirm the applicability of renvoi in succession law

3.2 Renvoi in civil law countries

- Widely accepted in civil law systems like France since 1878 (Forgo case)
- Contrasts with common law jurisdictions by having a broader scope of application
- Two types of renvoi: to the law of the forum and to a third State's law

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- Renvoi in Italian and German Law
  - Italian Law (Art. 13): Criteria for accepting renvoi to another State's law
  - Cases where renvoi not applicable (e.g., party choice of law, statutory form of acts)
  - German Law (Introductory Act to the German Civil Code, Art. 4): Guidelines on renvoi and split law scenarios
- Renvoi in Japanese and European Law
  - Japanese Law: Provisions on renvoi, marriage effects, and parent-child legal relationship
  - European Regulation (EC) No 864/2007: Exclusion of renvoi in the application of specified country's law
- Renvoi in Russian and Chinese Law
  - Russian Civil Code (2013, Article 1190): Renvoi to substantive law, exceptions for natural person legal status
  - Law of the People's Republic of China on Foreign-Related Civil Relations (2010, Article 9): Exclusion of conflict rules in foreign law application

4. Incidental Questions in Choice of Law

- Historical Context
  - Issue of incidental questions identified in the 1930s by German scholars Melchior and Wengler.
- Core Problem
  - Conflict arises when the forum’s choice of law rule designates a foreign law for the main question, but the forum and foreign legal system resolve incidental questions differently.
  - Example case: Haque, where Australian law designated Indian law for the main issue, leading to different resolutions for incidental questions.

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- Difficulties Presented
  - Conflict of Laws: Disputes may be resolved differently depending on the forum, creating inconsistency.
  - Integrity of Foreign Legal Systems: The foreign legal system's perspective on incidental questions may be disregarded, undermining its integrity.
- Proposed Solution
  - Melchior and Wengler's recommendation:
    - Apply the forum's choice of law rule to the main issue.
    - Apply the foreign choice of law rule to the incidental question.
  - This approach ensures that the forum's decision mirrors what a foreign court would have decided, maintaining consistency in the resolution of the entire dispute.

Case: Haque v. Haque, August 1962: High Court of Australia

- Case Background
  - Abdul Haque's family history
  - Marriages: Kulsum Bibi, Azra Bux
  - Children: Two daughters with Kulsum, son and daughter with Azra

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- Multiple Issues in Legal Cases
  - Independent vs. Interrelated Issues
    - Cases often present multiple issues, which may be independent or related.
    - Resolving one issue may be necessary before addressing another (e.g., preliminary issue before the main issue).
  - Example Case: Marriage Validity
    - Validity of a marriage must be assessed to determine inheritance rights for a woman from her alleged husband.

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- Private International Law
  - Different issues may fall under various choice of law rules.
  - Each issue could be governed by different laws, leading to complex legal outcomes.
- Considerations for Interrelated Issues
  - Discussion on whether interrelated issues should be governed by a single law.
  - Potential argument for using the law governing the main issue for consistency and coherence.

Legal Provisions on Preliminary Questions in incidental issues

- Dutch Civil Code Book 10, Article 10:4
  - Establishes that if a legal effect arises from a fact and needs to be addressed as a preliminary question related to another question governed by foreign law, the preliminary question is treated as self-dependent.
- EU Regulation No 1259/2010 (Rome III Regulation)
  - Scope: Applies specifically to the dissolution or loosening of marriage ties.
  - Application of Law: The law determined by conflict-of-laws rules governs grounds for divorce and legal separation.
  - Preliminary Questions:
    - Legal capacity and validity of marriage.
    - Effects of divorce/legal separation on property, name, parental responsibility, maintenance obligations, and other ancillary measures.
  - These preliminary questions are determined by the conflict-of-laws rules of the relevant Member State.

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- Interpretation by the Supreme People's Court of the PRC (2012)
  - Article 12: When a preliminary issue is necessary before deciding an issue related to foreign civil relations, the applicable law for the preliminary issue is determined as if it were isolated.
  - Article 13: For cases involving multiple foreign-related civil relations, the applicable law must be determined separately for each relation.

5. Foreign law

- 5.1 Applying Choice of Law Rules
  - 5.1.1 Ex Officio Application
    - Distinction between law and fact is crucial in civil law systems.
    - Courts are responsible for identifying the applicable law (da mihi factum, dabo tibi jus).
    - Civil law courts must apply the correct choice of law rule and declare foreign law applicable, regardless of the parties' arguments.
    - Dutch Civil Code Book 10, Article 10:2: Courts apply private international law and the designated law ex officio (on their own initiative).

5.1.2 Permissive Application

- Common law systems rely on parties to present evidence and research applicable laws.
- In England, parties must plead the application of choice of law rules; if not, the court defaults to English law.
- This creates a situation where international cases can be treated as domestic, allowing parties the option between foreign law and English law.
- Concern: If foreign law has a mandatory rule and English law is permissive, does this allow parties to bypass foreign mandatory rules? Is this acceptable?

U.S. Perspective

- Federal Rules of Civil Procedure, Rule 44.1:
  - Parties must notify the court if they intend to raise issues about foreign law.
  - Courts can consider any relevant materials when determining foreign law, treating it as a question of law.
- Case Discussion: Vishipco Line v. The Chase Manhattan Bank:
  - The court held that foreign law must be proven as a fact, but challenges arose regarding the burden of proof and the application of foreign law.
  - After Rule 44.1 was adopted in 1966, foreign law is no longer seen as a fact to be proven by the claimant, but rather as a question of law that the court must determine.
  - The court concluded that the parties' failure to invoke foreign law regarding underlying obligations did not mandate dismissal of claims, maintaining that Chase was still obligated to fulfill its contracts unless relieved by affirmative defenses.

5.1.3 Mixed systems

- In France and other civil law jurisdictions, courts are responsible for determining the applicable law and can correct the legal arguments presented by the parties.
- However, the French Supreme Court has shown reluctance to impose a comprehensive duty on French courts to apply choice of law rules in all cases.
- Case Example: French Cour de cassation, 26 May 1999 (Belaid)
- Legal Context:
  - Article 311-1 4 of the Civil Code: Parenthood governed by the personal law of the mother at the time of the child's birth.
  - Article 3 of the Civil Code: French courts must apply choice of law rules and designate applicable foreign law in cases involving rights that cannot be disposed of by the parties.

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- Case Details:
  - Ms. Y gave birth to a child, Samy Z, and initiated proceedings to establish fatherhood under Article 340 of the French Civil Code.
  - The Court of Appeal allowed her claim; however, it failed to assess ex officio whether the claim should be allowed under the personal law of the mother, who had a resident card.
- Court Ruling:
  - The Cour de cassation found that the Court of Appeal violated legal provisions by not assessing the applicable personal law.
  - The appeal was allowed, and the judgment of the Court of Appeal was set aside, emphasizing the necessity of applying choice of law rules correctly in such cases.

5.2 Proof of foreign law

- 5.2.1 Role of Courts and Parties in Determining Foreign Law
  - Burden of Proof:
    - The question arises as to whether the burden of establishing the content of foreign law lies with the court or the parties.
    - This burden is influenced by whether courts apply choice of law rules ex officio. If they do, courts are generally expected to make efforts to establish the content of foreign law themselves.

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- Country-Specific Practices:
  - Belgian Code of Private International Law (2004) Article 15:
    - Judges establish the content of the designated foreign law and apply it according to its interpretation in the foreign country.
    - Judges can request cooperation from parties if they cannot establish the content, and if timely establishment isn't possible, Belgian law will apply.
  - United States: Courts expect parties to provide evidence of foreign law but may take a more active role if desired (e.g., Bodum case).
  - France: The burden to determine foreign law content primarily lies with the court, even if the choice of law rule was not applied ex officio.

5.2.2 Means to Determine Foreign Law

- There are two primary methods for establishing the content of foreign law:
  - 1. Direct Use of Primary Sources
    - This includes statutory provisions, judicial decisions, and scholarly writings from the foreign legal system.
  - 2. Expert Consultation
    - Courts may appoint an expert in the foreign legal system to provide a report on the applicable law.
- Party Responsibilities:
  - In countries like France, parties may:
    - Identify and produce relevant primary materials of foreign law.
    - Hire an expert, typically a foreign lawyer or academic, to assist in proving the content of foreign law.

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- Court Responsibilities
  - In legal systems where courts bear the burden of establishing foreign law content, it is generally expected that courts will:
    - Consult available primary materials directly when possible.
    - Alternatively, appoint judicial experts to assist in determining foreign law content.
  - Judicial Experts:
    - While appointing experts for factual assessments is common in many civil law jurisdictions, it is rare for courts to appoint experts specifically to establish foreign law content.
    - Exceptions:
      - ❑ Austria and Germany are notable exceptions where appointing experts for this purpose is more common.
      - ❑ In Germany, experts are often law professors specializing in comparative law, benefiting from rich resources and libraries at universities and research institutes.
      - ❑ Many countries, including France, face significant resource constraints when it comes to establishing the content of foreign law:
        - ✓ The French Supreme Court mandates courts to make efforts to determine foreign law, but available resources are limited.
        - ✓ Consequently, it often falls to the parties to present evidence of foreign law.

5.2.3 Failure to Determine the Content of Foreign Law

- When a court cannot establish the content of the applicable foreign law, the common rule in many jurisdictions is that the law of the forum should apply instead.
  - This is often explicitly stated in civil law traditions (e.g., Article 15 of the Belgian Code and Article 16 of the Swiss law).
  - In some cases, this application is based on an assumption of similarity between the foreign law and the forum law (e.g., Bumper Development case in England and Wales).
- Alternative Solutions:
  - A few legal systems, such as Italy, provide a different approach:
    - Reform of the Italian System of Private International Law (1995) Article 14:
    - If a judge cannot ascertain the foreign law, even with the parties' cooperation, they shall apply the law determined by other connecting factors relevant to the matter.
    - In the absence of other connecting factors, Italian law will apply.

5.2.4 The Subject Matter of Proof

- The final issue concerns whether the goal of establishing foreign law should focus on identifying the main sources and rules (e.g., applicable statutes and leading precedents) or determining the precise outcome that a foreign court would reach under that law.

o Legal Requirements:

- Most legal systems require an assessment of the precise and actual outcome a foreign court would achieve.
- German legal scholars emphasize that courts must determine the 'legal reality' of foreign law to ensure accurate application.

o Relevant Provisions:

- Russian Civil Code (2013) Article 1191:

❑ Courts must establish the content of foreign law based on its official interpretation, adopted practices, and existing scholarship in the relevant foreign state.

- Reform of the Italian System of Private International Law (1995) Article 15:

❑ Foreign law is to be applied according to its own criteria of interpretation and application, ensuring that the actual legal outcomes align with the intended foreign legal principles.

6. Public policy

- A fundamental principle in comparative private international law is that a forum will not apply foreign law if doing so would infringe upon its public policy.
- Rome I Regulation (2008) Article 21:
  - Foreign law may be refused application only if it is manifestly incompatible with the public policy (ordre public) of the forum.
- 6.1 Defining Public Policy
  - The public policy exception allows a forum to avoid applying foreign law based on its own policy considerations.
  - Questions arise regarding the definition of public policy:
    - Does it encompass all policies underlying the rules of the forum?
    - Is it limited to the most fundamental principles and values of the forum?

Case Example: Kuwait Airways Corporation v. Iraqi Airways Co. (House of Lords, 2002)

- Lord Nicholls of Birkenhead:
  - Conflict of laws is about appropriately resolving issues with foreign elements, recognizing that the laws of other countries may differ significantly from forum law.
  - Differences in law do not inherently justify refusing to apply foreign law; rather, they are often the reason for its application.
  - However, blind adherence to foreign law is not required; a court may disregard foreign law if it leads to results that are fundamentally alien to the justice principles of the forum (i.e., contrary to public policy).
  - Public policy lacks precise definition but generally relates to fundamental principles of justice and morality.
  - Example provided: The German law depriving Jewish émigrés of nationality was so fundamentally unjust that English courts refused to recognize it.

Relevant Provisions from Other Legal Systems

- Introductory Act to the German Civil Code Article 6:
  - Foreign law provisions will not apply if they lead to results manifestly incompatible with fundamental German principles, especially fundamental rights.
- Tunisian Code of Private International Law (1998) Article 36:
  - The public policy exception may only be invoked by the court if the foreign law contradicts fundamental choices of the Tunisian legal system.
- Quebec Civil Code Article 3081:
  - Foreign law does not apply if its application is manifestly inconsistent with public order as understood in international relations.

6.2 Limiting the Scope of the Public Policy Exception

- To ensure that the public policy exception is used only when absolutely necessary, several limits have been established:

o First Limit:

- Assessment of public policy violation should focus on the outcome of applying the foreign law in the specific case, rather than evaluating the foreign rule itself.
- The public policy exception requires a concrete assessment of the results, not an abstract evaluation of the foreign law.

o Belgian Code of Private International Law (2004) Article 21:

- Application of foreign law is refused if it leads to a result manifestly incompatible with public policy.

o Second Limit:

- A finding that a particular rule of foreign law is contrary to public policy should not result in the exclusion of all foreign law, but only that specific rule.

Case Example: French Cour de cassation, 6 July 1988 (Baaziz)

- Case Background:
  - Mr. Rabah Baaziz and Miss Marinette Arthaud, both French nationals, were married in France.
  - After Algeria gained independence, Mr. Baaziz acquired Algerian nationality and contracted a second marriage in Algeria, which was recognized under Algerian law.
  - Upon his death in France, the court addressed the implications of his second marriage concerning pension rights.
- Court's Ruling:
  - The Court of Appeal ruled that the pension must be split equally between Ms. Arthaud and Ms. M'djahri.
  - However, the court noted that French public order does not permit effects of a polygamous marriage contracted abroad to impact the rights of a French spouse.
  - The Cour de cassation found that the Court of Appeal violated principles of public order by allowing the polygamous marriage effects.
- Outcome:
  - The appeal was allowed, and the judgment of the Court of Appeal was set aside, reinforcing the significance of public policy in the context of foreign laws affecting domestic rights.

6.3 Limiting the Consequences of the Public Policy Exception

- When a rule of foreign law is found to be contrary to the public policy of the forum, the implications are significant:
  - The law deemed most closely connected to the case may not be applied.
  - However, the dispute still requires resolution.
- Common Practice:
  - In most jurisdictions, the substantive law of the forum is applied in lieu of the foreign law that has been rejected.
  - This approach has been seen as unsatisfactory by some lawmakers, as the forum law may not have a genuine connection to the dispute.

Reform of the Italian System of Private International Law (1995) Article 16: Section 1: No foreign law will be applied if its effects are incompatible with public policy (ordre public). Section 2: In such cases, the applicable law will be determined based on other connecting factors that may pertain to the matter. If no other connecting factors exist, Italian law will apply. Belgian Code of Private International Law (2004) Article 21: Paragraph 3: If a provision of foreign law is not applied due to public policy incompatibility, another relevant provision of that foreign law may still apply, or if necessary, the relevant Belgian law will be applied.

7. Choice of Law Problems in Ethiopian Courts

- Overview
  - No specific statute governing choice of law issues.
  - Courts employ various "approaches" based on decided cases.
  - Observed approaches include:
    - General jurisprudence
    - Precedent
    - Ignoring foreign elements and applying lex fori
    - Considering spatial conditioning of internal rules

Examples of Cases

- 1. Verginella V. Antoniani Case
  - Background: Italian petitioner living in Ethiopia seeks judicial separation from Italian wife.
  - Court's Decision:
    - Applied Italian law due to:
    - Both parties being Italian subjects
    - Marriage celebrated under Italian law
    - Absence of Ethiopian law on judicial separation
    - Established practice of applying foreign law when Ethiopian law is silent.

Cont...

- 2. Giuseppe Calderone Case
- Issue: Succession rights governed by law of domicile vs. law of nationality.
- Court's Ruling:
- Precedent favored law of domicile.
- Inconsistency noted in Ethiopian court decisions regarding governing personal law:
- Some courts favored nationality, others domicile.

Cont...

- 3. Zevi V. Zevi Case
  - Context: Italian couple married in Ethiopia, wife petitions for divorce.
  - Court's Approach:
    - Disregarded foreign nationality, applied Ethiopian Civil Code for divorce based on reasonable grounds.
    - Similar Case:
    - Zeyleka Gonji V. Rolbero Joseph, where the court applied Ethiopian law despite the husband being a Saudi Arabian national.
- 4. The Peter Case
- Context: Religious marriage in UAE between Ethiopian wife and British husband.
- Issue Framing:
- Questioned applicability of Ethiopian law to religious marriages.
- Suggested framing should have been broader: "Which law should apply?" to address multistate complexities.

Part II
JURISDICTION

Chapter 3: General rules

- Rules of international jurisdiction determine when a court has the authority to decide a dispute with a foreign element.
- These rules differ from choice of law rules, which govern the laws a competent court applies to resolve the dispute on its merits.
- Impact of International Jurisdiction on Choice of Law:
  - Different courts may have varying choice of law rules.
  - The court that retains jurisdiction will indirectly influence which law is applied based on its own rules of international jurisdiction.
- Sovereignty and Unilateral Jurisdiction:
  - While some scholars argue that public international law limits States regarding their courts' international jurisdiction, States freely determine their own rules.
  - States cannot dictate the jurisdiction of foreign courts, as this would infringe on the sovereignty of those States.
  - All rules of international jurisdiction are unilateral; a court lacking jurisdiction will decline to hear a case and will not direct parties to another court or indicate which court is 'the right' one.
  - It is the plaintiff’s responsibility to find another court that will accept jurisdiction.

1. Foundational Assumptions

- State Power and Jurisdiction:
  - Private international law has traditionally been viewed as an exercise of state power, with States exercising adjudicatory power over litigants without infringing on foreign sovereignty.
  - Various theories were developed to justify international jurisdiction in public law terms.
- Theories of Jurisdiction:
  - Personal Bond Theory:
    - Originating in medieval Europe, this theory emphasizes the duty of a ruler to provide justice to subjects.
    - Justice is seen as a right afforded by the State to its nationals, as reflected in the French Civil Code, which grants jurisdiction to French courts for disputes involving at least one national.
  - Power Theory:
    - This theory focuses on the actual power that can be exercised over the parties involved.
    - Adjudicatory jurisdiction can be justified when the forum State can exert physical power over the defendant within its territory.
    - This leads to jurisdictional grounds based on physical presence, whether habitual (domicile) or temporary.
    - In common law, particularly in England, service of legal documents on a defendant within the jurisdiction grants jurisdiction (tag or transient jurisdiction), allowing even brief physical presence to establish jurisdiction.

Cont…

- Shift in Paradigm:

o In the mid-20th century, a paradigm shift occurred, particularly in the U.S. and Europe.

o Jurisdiction began to be analyzed not only through a public law perspective but also by considering the private interests of the parties involved.

1.1 Minimum Contacts and Appropriateness of Jurisdiction

- 1.1.1 United States
  - Foundational Assumption:
    - Jurisdiction in the U.S. is based on "minimum contacts" between the dispute and the forum, ensuring fair treatment for the defendant as guaranteed by the Fourteenth Amendment (Due Process Clause).
    - The focus of the fairness theory developed by the U.S. Supreme Court is solely on the interests of the defendant.

Case Example: J. McIntyre Machinery Ltd v. Nicastro (U.S. Supreme Court, 27 June 2011)

- Due Process Clause:
  - Protects individuals from being deprived of life, liberty, or property without lawful power.
  - Jurisdiction requires sufficient contacts with the sovereign to avoid violating "traditional notions of fair play and substantial justice" (International Shoe Co. v. Washington).
- Purposeful Availment:
  - A defendant must "purposefully avail" themselves of the privilege of conducting activities within the forum state, thereby invoking its laws.
  - The court’s jurisdiction is justified when the defendant has engaged in activities connected to the state.
- Forms of Submission to State Authority:
  - Explicit Consent: Agreement that submits a party to the jurisdiction.
  - Presence in the State: Being physically present in the forum at the time of service.
  - Citizenship or Domicile: Indicates general submission to a state's jurisdiction.
- Specific Jurisdiction:
  - Jurisdiction may also arise from activities that are "arising out of or connected with" the defendant's actions within the state.
  - If a defendant has sufficient contacts related to the forum, specific jurisdiction may be justified.

Cont...

- State Law Variation:
  - International jurisdiction varies by state but must align with the constitutional minimum contacts doctrine established by the Supreme Court.
  - States are free to create their own rules of jurisdiction as long as they comply with the Due Process Clause.
- Examples of State Long-Arm Statutes:
  - New York: Allows jurisdiction over non-domiciliaries who commit tortious acts causing injury within the state if they expect or should expect the act to have consequences in the state.
  - New Jersey: Provides for jurisdiction consistent with due process of law.
- Jurisdiction Test:
- Until 2011, the Supreme Court's test for jurisdiction involved:
  - 1. Sufficient contacts between the forum and the defendant.
  - 2. Reasonableness of exercising jurisdiction.

Case: U.S. Supreme Court, 14 January 2014, Daimler A.G. v. Bauman

- Background:
  - The case discusses the evolution of personal jurisdiction, particularly in relation to the principles established in earlier rulings such as Pennoyer v. Neff and International Shoe Co. v. Washington.
- Key Legal Principles:
  - Territorial Jurisdiction:
    - In Pennoyer v. Neff, the Supreme Court held that a tribunal's jurisdiction is limited to the geographic boundaries of the forum state.
    - Attempts to assert extraterritorial jurisdiction would exceed the inherent limits of the state's power.
- Evolution from Strict Territoriality:
  - Technological advancements and increased interstate business necessitated a less rigid approach to jurisdiction.
  - The focus shifted from exclusive state sovereignty to the relationship among the defendant, the forum, and the litigation.

Cont....

- International Shoe and Its Implications:
  - The foundational case in this area remains International Shoe, which established that a state may exercise personal jurisdiction over an out-of-state defendant if they have "certain minimum contacts" with that state.
  - The standard of "fair play and substantial justice" became central to assessing personal jurisdiction.
  - Categories of Jurisdiction:
    - Specific Jurisdiction:
      - Arises when a lawsuit is directly connected to the defendant's contacts with the forum state.
      - In International Shoe, the defendant's in-state activities were continuous and systematic, giving rise to the liabilities in question.
    - General Jurisdiction:
      - Distinguished from specific jurisdiction, general jurisdiction applies when a corporation's operations within a state are so substantial that they are considered "essentially at home" in that state.
      - This allows courts to hear any claims against the corporation, irrespective of whether they arise from the defendant's activities in the forum state.
- Judicial Interpretation:
  - The Supreme Court emphasized that the assessment of personal jurisdiction should focus on the nature and quality of the defendant's contacts with the forum state, rather than solely on territorial boundaries.

1.1.2 European Union

- Foundational Assumption:
  - The European Union establishes that jurisdictional rules should be based on a close connection between the dispute and the forum.
  - While this resembles the U.S. minimum contacts requirement, the EU framework incorporates broader considerations beyond the defendant's interests.
- European Regulation (EU) No 1215/2012 (Brussels Ibis Regulation)
  - Preamble Highlights:
    - Jurisdiction should be predictable and primarily based on the defendant's domicile.
    - This principle ensures that jurisdiction is generally available based on domicile, with exceptions for specific situations where the subject matter or party autonomy dictates a different connecting factor.
    - The regulation emphasizes the need for clarity in defining the domicile of legal persons to prevent conflicts of jurisdiction.
    - The close connection requirement aims to provide legal certainty and prevent the defendant from being surprised by litigation in a jurisdiction they could not reasonably foresee, especially in cases involving non-contractual obligations like defamation and privacy violations.

CONT...

- Key Provisions of the Regulation:
  - Article 4:
    - Persons domiciled in a Member State may be sued in the courts of that Member State, regardless of nationality.
    - Non-nationals are subject to the same jurisdictional rules as nationals of the Member State where they are domiciled.
  - Article 5:
    - Persons domiciled in one Member State can only be sued in another Member State based on specific rules outlined in Sections 2 to 7 of Chapter II.
  - Article 6:
    - If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State is determined by the law of that Member State.
  - Article 7 (Special Jurisdiction):
    - Allows a person domiciled in a Member State to be sued in another Member State for:
      - 1. Contractual Matters:
      - Courts for the place of performance of the obligation.
      - Specific provisions for the sale of goods and provision of services.
      - 2. Tortious Matters:
      - Courts for the place where the harmful event occurred or may occur.

1.1.3 Commonwealth

- Members of the British Commonwealth generally adhere to traditional English rules regarding jurisdiction. This applies to England and Wales, where EU jurisdiction laws do not apply.
  - Case Example 1: AK Investment CJSC v. Kyrgyz Mobil Tel Ltd & Ors (Isle of Man) (Judicial Committee of the Privy Council, 10 March 2011)
  - Lord Collins' Requirements:
    - When seeking permission to serve a foreign defendant out of jurisdiction, the claimant must satisfy three key requirements:
      - 1. Serious Issue to be Tried:
      - There must be a substantial question of fact or law, akin to the summary judgment standard, meaning there is a real prospect of success.
      - 2. Good Arguable Case:
      - The claimant must demonstrate a good arguable case that the claim falls within the classes of cases permitting service out of jurisdiction.
      - 3. Appropriateness of Forum:
      - The court must determine that the Isle of Man is clearly the appropriate forum for trial, allowing for discretion to permit service out of the jurisdiction.

Case Example 2: VTB Capital Plc v. Nutritek International Corp & Ors (U.K. Supreme Court, 6 February 2013)

- Lord Mance's Commentary:
  - The classic case regarding appropriate forum is Spiliada Maritime Corporation v. Cansulex Ltd (1987), which emphasizes identifying the most suitable forum for all parties and the interests of justice.
- Distinctions are made between cases requiring permission to serve out of jurisdiction versus those allowing service without permission. In cases requiring permission:
  - The plaintiff must demonstrate that the case is proper for service out.
  - The jurisdiction may be considered "exorbitant" if permission is granted.
  - Burden of Proof:The burden rests on the plaintiff to prove that England is the appropriate forum for the action, and they must show this clearly.
  - Factors influencing the court's discretion include the residence or business location of the defendant and the grounds invoked by the plaintiff.
- Modern Rules:
  - The Civil Procedure Rules state that permission to serve out of jurisdiction should not be granted unless the court is satisfied that England and Wales is the proper place for the claim.

1.2 A special focus on product liability cases

- Does the difference between the concept of jurisdiction in the U.S. and in the civil law world produce different results?
- Let us compare U.S. and civil law rules of international jurisdiction in product liability cases.

Case: European Court of Justice, 16 July 2009, Zuid-Chemie BV v. Philippo's Mineralenfabriek NV/SA (Case C-189/08)

- Background:
  - Zuid-Chemie, a fertilizer manufacturer, purchased a product called "micromix" from Philippo's, which was manufactured in Belgium using raw materials supplied by HCI Chemicals.
  - After discovering that the zinc sulphate used in the micromix had excessively high cadmium levels, Zuid-Chemie suffered losses and sought to hold Philippo’s liable through legal proceedings in the Netherlands.
- Key Legal Questions:
  - The court was asked to clarify whether the term "place where the harmful event occurred" in Article 5(3) of Regulation No 44/2001 refers to:
    - 1. The location where the defective product was delivered.
    - 2. The location where the initial damage occurred as a result of normal use of the product.

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- Court's Analysis:
  - General Principle:
    - Article 5(3) allows for special jurisdiction based on the location of the harmful event, providing claimants with options about where to file suit.
  - Interpretation of "Place Where the Harmful Event Occurred":
    - The Court has established that this phrase encompasses both the place where the event giving rise to the damage occurred, and the place where the actual damage manifested.
    - In this case, it was determined that the place where the damage occurred was Zuid-Chemie's factory in the Netherlands where the micromix was processed into fertilizer.
- Causal Connection:
  - Jurisdiction hinges on the causal relationship between the event causing the damage and the resulting harm.
- The court emphasized that distinguishing between the place of the damaging event and the place of damage is crucial for establishing jurisdiction.
- Practical Implications:
  - The ruling clarifies that allowing jurisdiction in the Netherlands aligns with the objectives of the regulation to ensure effective legal proceedings and reflects the principle of proximity in tort claims.
  - The interpretation supports the rule of special jurisdiction, confirming that the claimant may sue in the courts closest to where the damage occurred.

Case: U.S. Supreme Court, 27 June 2011, J. McIntyre Machinery Ltd v. Nicastro

- Background:
  - The case arose from a products-liability lawsuit in New Jersey after Robert Nicastro was injured while using a machine manufactured by J. McIntyre Machinery, Ltd., a company incorporated in England.
  - The machine was not marketed or shipped to New Jersey by J. McIntyre, raising the question of whether New Jersey courts had jurisdiction over the company.
- Key Legal Issues:
  - The primary question was whether J. McIntyre had sufficient "minimum contacts" with New Jersey to justify the exercise of jurisdiction by the state courts.
- Court's Analysis:
  - Purposeful Availment:
    - The Court examined whether J. McIntyre had engaged in conduct that purposefully availed itself of the New Jersey market.
    - The respondent cited three points to support jurisdiction:
      - 1. An American distributor sold one machine to a New Jersey customer.
      - 2. J. McIntyre allowed its distributor to sell its machines throughout the United States.
      - 3. J. McIntyre representatives attended trade shows in various U.S. cities, but not in New Jersey.

CONT...

- Lack of Sufficient Contacts:
  - The Supreme Court found that the facts presented did not demonstrate that J. McIntyre had purposefully directed activities toward New Jersey.
  - The New Jersey Supreme Court's decision to assert jurisdiction was based on a "stream-of-commerce theory," which the U.S. Supreme Court indicated could not supersede the requirements of the Due Process Clause.
- Due Process Clause:
  - The Court emphasized that due process protects the right of a defendant to be subject only to lawful authority.
  - It concluded that J. McIntyre had no significant contacts with New Jersey that would justify jurisdiction, as it did not market or sell products there.
- Concurring Opinion (Justice Breyer):
  - Justice Breyer concurred, noting that the claims of jurisdiction based on a single sale were not supported by adequate contacts with New Jersey.
  - He referenced previous cases, including World-Wide Volkswagen Corp. v. Woodson and Asahi Metal Industry Co. v. Superior Court, suggesting that mere placement of a product into the stream of commerce is insufficient for establishing jurisdiction without additional connections to the forum state.
  - Breyer stated that Mr. Nicastro (the plaintiff) had not shown any specific efforts by J. McIntyre to sell its products in New Jersey or engaged in activities that would constitute purposeful availment of New Jersey's laws.

2 Exclusive Jurisdiction

- In the context of international disputes, while multiple jurisdictions may have the authority to hear a case, certain areas of law are designated as having exclusive jurisdiction. This means that only the courts of a specific state are authorized to adjudicate disputes within that area, and other states will not recognize foreign judgments in such matters.
- Rationale for Exclusive Jurisdiction:
  - The concept of exclusive jurisdiction serves to uphold the integrity of legal principles and provide clarity in the adjudication of disputes, especially in cases involving immoveable property and certain family law matters.
- A. Immoveable Property
  - Real property disputes exemplify a common instance of exclusive jurisdiction, with a universal understanding that the courts of the location of the property (the lex rei sitae) have exclusive authority over disputes concerning that property.

Case Example 1: British South Africa Co v. Companhia de Mocambique (House of Lords, 8 September 1893)

- Lord Herschell's Rationale:
  - The case discusses the jurisdiction over actions for trespass to lands situated in a foreign country. Lord Herschell emphasizes the distinction between transitory matters and local matters, with local matters being tied to the location of the property.
  - He cites the principle that suits concerning immovable property should occur where the property is located, reflecting a longstanding legal tradition
  - hat favors local jurisdiction for property disputes.
  - The ruling highlights that, according to both common law and Roman law, actions pertaining to real property must be brought in the jurisdiction where the property is situated, reinforcing the notion that the courts of the property’s location are best suited to resolve related disputes.

Case Example 2: Shaffer v. Heitner (U.S. Supreme Court, 24 June 1977)

- Court's Analysis:
  - The U.S. Supreme Court states that jurisdiction in rem should adhere to the same standards of "fair play and substantial justice" as jurisdiction in personam, requiring sufficient contacts to justify jurisdiction.
  - The presence of property in a state is a significant factor influencing jurisdiction, as it establishes a connection between the forum state, the defendant, and the litigation.
  - The Court acknowledges that a state has strong interests in the marketability of property and in providing a means for the peaceful resolution of disputes over property possession. This reinforces the rationale for exclusive jurisdiction over property-related disputes.

Case example 3: European Court of Justice, 15 January 1985, Rösler v. Rottwinkel (Case C-241/83)

- The case addresses the exclusive jurisdiction of courts concerning tenancies of immovable property, particularly under Article 16(1) of the Brussels Convention (now Article 24(1) of the Brussels I Regulation).
- Key Legal Points:
- Raison d'être of Exclusive Jurisdiction:
  - The exclusive jurisdiction granted to courts in the state where the property is situated is founded on the close connection between tenancies and the law governing immovable property.
  - This includes mandatory provisions relating to the use of property, such as rent control and tenant rights.
- Proximity and Rational Allocation of Jurisdiction:
- The Court highlights the importance of proximity, asserting that the court located near the property is in a better position to acquire first-hand knowledge of the facts relevant to the tenancy and its terms.
- This proximity facilitates more efficient legal proceedings and better understanding of local legislation.
- The Court cautioned against making exceptions to the general rule of exclusive jurisdiction under Article 16(1), emphasizing that such exceptions could lead to uncertainty and undermine national laws governing immovable property.

2.2 Exclusive Jurisdiction in Japan and the European Union

- Japanese Code of Civil Procedure
- Article 3–5 outlines situations where exclusive jurisdiction is granted to Japanese courts for specific actions, particularly concerning corporate matters, registration, and intellectual property rights.
- Rationale for Inclusion:
- Exclusive jurisdiction for actions related to companies and registrations allows for centralized decision-making within Japan, ensuring that matters are handled according to local laws and regulations.
- Having a defined jurisdiction helps establish clear and predictable legal outcomes, which is essential for the functioning of businesses and the protection of rights related to property and intellectual property.
- By designating Japanese courts as having exclusive jurisdiction for certain matters, the law protects local legal interests and ensures that local legal standards are upheld.
- Exclusive jurisdiction in matters of registration streamlines legal processes, ensuring that disputes regarding registration are resolved in the jurisdiction where the registration takes place, thus maintaining the integrity of public records.

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- Brussels Ibis Regulation (2012)
- Article 24 specifies several areas where exclusive jurisdiction lies with the courts of a Member State, irrespective of the parties' domicile.
- 1. Exclusive jurisdiction for rights in rem and tenancies ensures that disputes concerning immovable property are adjudicated in the jurisdiction where the property is located, reinforcing local laws and property rights.
- 2. By granting exclusive jurisdiction over the validity of companies and legal entities to the state where they are seated, the Regulation fosters stability and predictability in corporate governance and legal affairs.
- 3. Exclusive jurisdiction in matters concerning public registers maintains the integrity and reliability of public records, ensuring that disputes about entries in these registers are resolved by the local courts familiar with the relevant laws.
- 4. Designating specific jurisdictions for these matters allows for more efficient legal proceedings, as local courts are better equipped to understand and apply the relevant laws and regulations.

3 Exorbitant jurisdiction

3.1

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3.3 Jurisdiction Based on Nationality

- French Civil Code Articles 14 and 15
- Article 14:
- Provides that an alien, even if not residing in France, may be cited before French courts for obligations contracted in France with a French person, or for obligations contracted in a foreign country towards French persons.
- Article 15:
- • Allows French nationals to be summoned before French courts for obligations contracted in a foreign country, even if the other party is an alien.
- Case Example: French Cour de cassation, 29 February 2012, Case No 11-40101
- Background:
- The case revolves around questions regarding the constitutionality of Article 14, specifically whether it infringes on the right to a fair trial and the principle of equality.

Cont...

- Court's Findings:
- 1. Subsidiary Jurisdiction:
- The court noted that Article 14 does not grant exclusive jurisdiction but rather subsidiary jurisdiction, which is optional for the parties involved.
- This means that if there are other applicable jurisdictional rules, the subsidiary nature of Article 14 does not apply.
- 2. Waiver and International Context:
- The court highlighted that the article's application can be waived by the parties, and it does not prevent the existence of international treaties or regulations that may dictate a different jurisdictional approach.
- The operation of international lis pendens (the existence of overlapping lawsuits in different jurisdictions) is also acknowledged, indicating that Article 14 does not interfere with the recognition of foreign judgments.
- 3. Constitutional Principles:
- The court concluded that Article 14 does not infringe upon the principle of equality or the right to a fair trial as guaranteed by the Constitution and the Declaration of Human and Civil Rights.

1.1 With respect to litigation in foreign nations

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2. FORUM NON-CONVENIENS

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7 The Ethiopian Law and Practice of Judicial Jurisdiction

- The concept of judicial jurisdiction under Ethiopian law encompasses provisions found in various codes and a body of decided cases.
- The Federal Courts Proclamation No. 1234/2021 designates the Federal High Court as having first-instance jurisdiction over cases involving Private International Law (Arts. 5 and 11).
- However, there are no specific rules guiding this court in exercising its jurisdiction, resulting in a challenge for the court to establish principles for cases with foreign elements.

1. Relevant Code Provisions

- 1. The Civil Code
  - The Civil Code includes provisions on domicile (Articles 183-191), which the Addis Ababa High Court in Forti V. Forti suggested could serve PIL purposes.
  - Domicile is highlighted for determining jurisdiction in situations involving foreign elements, such as in the context of carriage by air and maritime law,.
- 2. The Civil Procedure Code
  - The Civil Procedure Code is significant for PIL, particularly Articles 8 and 20:
    - Article 8(2): Ethiopian courts can try civil suits pending in foreign courts, provided they possess judicial jurisdiction similar to that of the foreign court.
    - Article 20: Addresses defendants residing abroad:
      - Sub-Article (1): For non-resident Ethiopian defendants, suits can be filed in any Ethiopian court at the plaintiff's discretion.
      - Sub-Article (2): For non-resident foreign defendants with property in Ethiopia, suits must be filed where the property is located.
      - These provisions are primarily venue-based, assuming Ethiopia has judicial jurisdiction, but do not establish rules for judicial jurisdiction.

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- 3. The Commercial Code
  - Article 647 of the Commercial Code pertains to jurisdiction in carriage by air:
    - Claims for damage can be brought in the court where the carrier is domiciled, has a principal place of business, or where the contract was made.
    - This article does not apply to international carriage governed by the Warsaw Convention but is relevant for domestic flights involving foreign nationals or domiciles, indicating PIL considerations.
- 4. The Maritime Code
  - The Maritime Code provides judicial jurisdiction rules:
    - Article 208 applies to the carriage of goods, establishing jurisdiction for cases where the port of arrival is in Ethiopia.
    - Article 237 covers actions for damages related to collisions, applicable in various situations both inside and outside Ethiopia.
    - Both articles reference domicile, reinforcing its significance in determining jurisdiction.

2. Judicial Practice

- Ethiopian courts have adopted three distinct approaches regarding the issue of judicial jurisdiction in cases involving Private International Law (PIL):
  - 1: Silence Regarding Judicial Jurisdiction
    - In several decisions, Ethiopian courts have failed to explicitly establish judicial jurisdiction before addressing the choice of law.
    - Case Examples:
      - Verginella V. Antoniani: The court began by determining which law was applicable without establishing judicial jurisdiction first.
      - Abebech Wolde V. Estate of Signor Konstantinov Escrapino: The court ignored the Federal High Court's jurisdiction over PIL matters and jumped straight into the choice of law.
      - Nediya Chartes V. Estate of Antonio Chartes: The First Instance Court declined to hear the case due to a lack of subject matter jurisdiction, yet the Federal High Court directly proceeded to the choice of law without addressing jurisdiction.
      - The courts seem to imply judicial jurisdiction based on the consent of the defendant, but this assumption is not clearly articulated nor consistently applied.

o2: Recourse to the Civil Procedure Code

- Courts have sometimes relied on the provisions of the Civil Procedure Code to establish judicial jurisdiction, either by directly applying its provisions or by using local jurisdiction rules.
- Case Examples:

❑Dr. Henry Colombo V. Andrel Lewis Herald: The court examined whether it could entertain the suit despite the lack of specific regulations, ultimately ruling that jurisdiction was acceptable based on the Civil Procedure Code.

❑W/ro Astraid Debahian Jerahian V. Estate of Mr. George Jerahian: The Federal First Instance Court incorrectly referred the case to a court in Canada instead of recognizing its jurisdiction under federal law, which was later reversed by the High Court.

❑Brigadier General Tafesse Ayalew V. Clarville A.J Co.: The court examined the defendant's preliminary objection regarding jurisdiction, ultimately ruling that the choice of court clause in the contract limited the applicability of Ethiopian jurisdiction.

o3: Recourse to General Jurisprudence

- This approach involves looking to general principles of jurisprudence accepted in other countries when no codified law exists.
- Case Example:

- Hallock V. Hallock: The court examined European practices regarding divorce jurisdiction and determined it lacked jurisdiction based on the defendant's residence. The Supreme Court later ruled that the local practice in Alabama was not binding on Ethiopian courts, emphasizing the preference for domicile over residence.

Chapter 6
Foreign judgments

Other case examples

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Other requirements

3. Laws on the Execution of Foreign Judgments and Awards in Ethiopia

- Principle of Execution (Art. 456)
- Foreign judgments may only be executed in Ethiopia according to specific provisions, unless stated otherwise by international conventions.
- Execution requires a formal application to the appropriate High Court division where the execution is to occur.
- Application Requirements (Art. 457)
- list of 1 items
- • Applications must be written and include:
- list of 2 items nesting level 1
- • A certified copy of the foreign judgment.
- • A certificate confirming the judgment is final and enforceable, signed by the court’s President or registrar.
- list end nesting level 1
- list end
- Conditions for Allowing Execution (Art. 458)
- list of 1 items
- • Permission for execution will only be granted if:
- list of 5 items nesting level 1
- • Execution of Ethiopian judgments is permitted in the country of the foreign judgment.
- • The judgment was issued by a duly established court.
- • The judgment-debtor had the opportunity to defend themselves.
- • The judgment is final and enforceable.
- • Execution does not contravene public order or morals.
- list end nesting level 1
- list end
- Procedure for Application (Art. 459)
- list of 3 items
- • The court must allow the opposing party to present their observations within a designated time frame.
- • The court will determine if additional pleadings are permissible.
- • The court may suspend its decision if uncertainties arise until clarified.
- list end
- Decision Making (Art. 460)
- list of 3 items
- • Decisions are based on the application unless a special reason necessitates a hearing.
- • The court will also address costs associated with the application.
- • If granted, the foreign judgment is executed as if issued by an Ethiopian court.
- list end
- Enforcement of Foreign Arbitral Awards (Art. 461)
- list of 2 items
- • Foreign arbitral awards cannot be enforced unless:
- list of 6 items nesting level 1
- • Reciprocity is assured.
- • The award was made under a valid arbitration agreement in the country of origin.
- • Parties had equal rights in appointing arbitrators and were summoned to attend.
- • The arbitration tribunal was properly constituted.
- • The award does not concern matters not arbitrable under Ethiopian law or contradicts public order or morals.
- • The award is enforceable under Ethiopian law conditions.

3. Ethiopian Principle of Execution of Foreign Judgments

- 3.1 Modes of Execution in International Law
  - 1. Continental Europe and Latin America
    - Enforcement of foreign judgments requires:
      - Satisfaction of prescribed conditions.
      - Authorization of recognition through an exequatur.
      - A foreign judgment is ineffective until a formal decision of enforcement is granted by the local tribunal.

Cont...

- 2. Anglo-American Law
- Foreign judgments are not executed directly but are endorsed by a domestic judgment.
- • United States Requirements (Hilton V. Guyot Case):
- 1. Full and fair trial conducted.
- 2. Foreign court had competent jurisdiction.
- 3. Regular proceedings were followed.
- 4. Defendant received due service or appeared voluntarily.
- 5. Impartial administration of justice is ensured.
- 6. No evidence of prejudice or fraud.
- 7. Reciprocity is met.

Application of International Principles in Ethiopian Law

- Ethiopian law aligns more closely with the Anglo-American model, requiring a domestic judgment to affirm a foreign judgment before execution.
- Conditions outlined in Ethiopian law (Article 458) for executing foreign judgments include:
- a) Execution of Ethiopian judgments is permitted in the country where the foreign judgment was issued.
- b) The judgment must come from a duly established court.
- c) The judgment-debtor must have had the opportunity to defend themselves.
- d) The judgment must be final and enforceable.
- e) Execution must not contradict public order or morals.

Procedures for the Execution of Foreign Judgments in Ethiopia

- Application Process
  - Filing Requirement: No foreign judgment can be executed in Ethiopia without a written application to the Federal High Court.
  - Necessary Documents:
    - Certified copy of the foreign judgment.
    - Certificate from the president or registrar of the foreign court confirming the judgment is final and enforceable.

Translation and Authentication

- Translation:
  - There is no explicit requirement in Ethiopian law for translating foreign judgments into Amharic, the working language of the Federal High Court.
  - Judicial practice suggests that translation into Amharic and authentication by the Ethiopian consulate in the jurisdiction of the foreign judgment is often required.
- Authentication:
  - Many countries mandate authentication of foreign judgments, such as Brazil, where consular authentication is mandatory. However, Ethiopian law does not explicitly require this.

Court Procedures

- Observations:
  - The court allows the party against whom the judgment is directed to present observations within a specified timeframe.
- Pleadings:
  - The court has the discretion to decide if pleadings can be submitted and may suspend its decision if there are uncertainties.
- Hearing:
  - In cases where special reasons exist (e.g., objections to execution), the court may conduct a hearing with both parties present.
- Execution:
  - If the application is granted, the foreign judgment is executed as if it were an Ethiopian court judgment, and costs may also be determined.

Reciprocity in the Execution of Foreign Judgments in Ethiopia

- Definition of Reciprocity:
  - Reciprocity is a legal requirement in Ethiopian law for the execution of foreign judgments, meaning that the execution of Ethiopian judgments must be permitted in the country where the foreign judgment was issued.
- Legal Framework

❑ Ethiopian Code:

  - States that execution of a foreign judgment in Ethiopia is contingent upon reciprocal recognition in the foreign jurisdiction.
  - This principle aligns with practices in various legal systems that prioritize mutual recognition of judgments.

Burden of Proof

- Defendant's Responsibility:
  - A defendant challenging the execution of a foreign judgment must provide evidence that the foreign court would not execute a judgment from an Ethiopian court.
  - If the Ethiopian court finds the evidence satisfactory, the application for execution will be denied.
- Variations in State Practices:
  - In the U.S., reciprocity is often established via affidavits from two practicing attorneys in the relevant state.
- Comparative Perspectives
  - Some jurisdictions, such as Argentina and Brazil, do not require reciprocity as a condition for executing foreign judgments.
  - Despite the Hilton V. Guyot precedent, several states in the U.S., including New York and California, have moved away from strict reciprocity requirements.

A Court Duly Established and Constituted

- The Ethiopian Code stipulates two essential criteria for the court that rendered a foreign judgment: due establishment and due constitution.
- There is ambiguity regarding which law should determine whether a foreign court meets these criteria: Ethiopian law, foreign law, or international law.
- The Code does not provide guidance, complicating the application of these requirements.
  - Hypothetical Scenario:
    - If a person obtains a judgment in France and seeks execution in Ethiopia, questions arise regarding the jurisdiction of the French court.
    - French law may allow jurisdiction over non-residents, while Ethiopian law requires residency for jurisdiction. Should Ethiopian courts refuse to execute the French judgment based on differing jurisdictional criteria?

Comparative Jurisdictional Standards

- Anglo-American and Latin American Systems: Jurisdiction is determined by the law of the court that rendered the judgment (the rendition forum).
- Continental Law Systems (Greece, Turkey, Austria): Jurisdiction is based on the law of the recognition forum, where the execution is sought.
- Venezuelan Law: Adopts an international perspective on jurisdiction.
- French Law: Applies a double-barreled principle, requiring both international and domestic jurisdiction criteria to be met.

o Limitations of Existing Standards

- If defined by the law of the rendition forum, a judgment might contradict Ethiopian law regarding residency.
- Defining jurisdiction based on the recognition forum undermines the principle that a court should primarily rely on its domestic laws.
- An international definition of jurisdiction remains elusive and has not gained universal acceptance.

Proposed Approach for Ethiopia

- It is advisable for Ethiopian law to adopt a compromise approach:
- Accept the law of the rendition forum when appropriate, ensuring that it does not undermine Ethiopian jurisdiction, especially in cases involving land or patents registered in Ethiopia.
- Foreign courts must not assume jurisdiction contrary to Ethiopian interests or areas exclusively reserved for Ethiopian courts.
- Judicial Precedent
- A notable case from the Ethiopian High Court illustrates this approach:
- The court rejected a request for the execution of a foreign judgment from Bombay, India, regarding land located in Ethiopia, affirming that such matters must be handled according to Ethiopian law by Ethiopian courts.

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

- Legal Requirement in Ethiopian Law
  - Under Ethiopian law, it is essential that the judgment-debtor has the opportunity to appear and present a defense before a foreign judgment can be executed.
  - The judgment-debtor must be served with a summons in a timely manner, allowing sufficient time to prepare a defense.
- Consequences of Insufficient Notice
  - If the judgment-debtor has not received adequate legal notice due to ineffective service methods, the foreign judgment cannot be executed.
  - Effective means of notice should be utilized to ensure the debtor is informed of the proceedings against them.
- International Law Practice
  - International law supports the notion that a foreign judgment against a defendant who was not properly served in a timely manner should be refused execution.
  - The foreign court is responsible for ensuring that the defendant is adequately informed of the suit to allow for a proper defense.

Jurisdictional Considerations

- The foreign court must have jurisdiction over the parties for the service of summons to be deemed acceptable.
- A personal judgment rendered without jurisdiction over the parties is considered invalid under international law.
- If the judgment-debtor has been given an opportunity to plead their case but fails to do so, a foreign judgment rendered ex parte may still be valid, provided jurisdiction was properly established.

• Standards for Service of Summons

- The law of the rendition forum dictates the acceptable methods for serving summons on defendants.
- When a foreign judgment is submitted for recognition or execution, the recognition forum must consider whether the service standards align with its own principles of fairness.
- Execution of the foreign judgment may be denied if the recognition forum determines that the party was not properly served with summons.

Finality and Enforceability of a Foreign Judgment

- Definition of Finality and Enforceability
  - Finality: Refers to the status of a judgment that is conclusive and not subject to review, modification, or being set aside by another judgment.
  - Enforceability: Indicates that the judgment can be executed against the parties involved, thereby having practical effects on their rights and obligations.
  - Ethiopian law lacks explicit provisions addressing questions of finality and enforceability, leading to challenges in interpretation and application.
  - In the absence of judicial practice, looking to foreign laws and judicial practices can provide guidance.
- Characteristics of Final and Enforceable Judgments
  - A judgment must achieve the status of res judicata, meaning it is binding and conclusive on the parties involved.
  - Various circumstances affect finality, including:
    - Judgments that are on appeal.
    - Ex parte judgments.
    - Judgments whose execution is suspended.
    - Judgments lacking a definite remedy.
    - Interlocutory orders, maintenance decrees, and custody decrees.

Determining Appropriate Law

- Two prevailing practices worldwide exist for assessing finality and enforceability:
  - 1. Law of the Rendition Forum: Evaluates whether a judgment is final based on the law of the country where the judgment was issued.
  - 2. Law of the Recognition Forum: Uses the law of the country where execution is sought to determine finality and enforceability.
  - While Ethiopian law does not explicitly state a preference, the requirement for a certificate from the rendition forum indicating that the judgment is final and enforceable suggests an inclination towards the first practice.

Public Order and Morality

- Under Ethiopian law, as in many other jurisdictions, adherence to public order and morality is a prerequisite for the execution of foreign judgments.
  - Public Order: Serves as a protective mechanism allowing courts to deny enforcement of foreign laws and judgments that contradict fundamental national principles.
  - Morality: Refers to foreign judgments that are inconsistent with the customs or accepted practices of the society where recognition is sought.
  - Role of Public Order in Execution
    - The concept of public order plays a restrictive role against executing foreign judgments that are at odds with essential national policies.
    - It prevents the application of foreign laws that may be seen as unjust or overly harsh.

Grounds for Denying Execution Based on Public Order

- 1. Fraudulent Judgments:
  - Foreign judgments obtained through fraudulent means cannot be executed. This includes cases where evidence was misrepresented or where foreign judges had conflicts of interest.
- 2. Judgments from Opposed Governments:
  - Foreign judgments from states whose governments are recognized as oppressive or in violation of human rights will likely be denied execution in Ethiopia.
  - This includes judgments related to activities deemed illegal under Ethiopian law, such as prostitution proceeds or gambling debts.
- 3. Contradictory Judgments:
  - A foreign judgment that conflicts with a prior Ethiopian judgment on the same matter will not be enforced.
  - Ethiopian law explicitly disallows recognition of foreign judgments that contradict its own, regardless of the timing of the decisions.
- 4. Public Law Judgments:
  - Judgments of a public nature, such as administrative, tax, or criminal judgments, are not subject to execution in Ethiopia.
  - The principle of territoriality supports the idea that countries will not enforce foreign penal laws.