

## UNIT-I

### INTRODUCTION

Private International Law or Conflict of laws is the part of English law which comes into operation whenever the court is faced with a claim that contains a foreign element. By foreign element, we mean a situation which makes it necessary for the court to refer to or to examine a foreign system of law in order to give a proper decision.

In the words of **Cheshire** : “Private International Law, then, is that part of law which comes into play when the issue before the courts affects some facts, events or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system.”

Foreign element has three main objects. Firstly, to state the rules or conditions under which the court is competent to entertain such a claim. Secondly, to determine for each class of case the particular municipal system of law by reference to which the rights of the parties must be ascertained. Thirdly, to point out the circumstance in which (a) a foreign judgment can be recognized as decisive of the question in dispute; (b) the right vested in the judgment creditor by a foreign judgment can be enforced by action.

Private International Law directs the court to apply the relevant foreign rules of law although these rules are at variance with those of the **lex fori** (the law of the forum i.e. the law of the country where the court is situated).

### DEFINITION OF PRIVATE INTERNATIONAL LAW

Private international law refers to that part of the law that is administered between private citizens of different countries or is concerned with the definition, regulation, and enforcement of rights in situations where both the person in whom the right inheres and the person upon whom the obligation rests are private citizens of different nations.

It is a set of rules and regulations that are established or agreed upon by citizens of different nations who privately enter into a transaction and that will govern in the event of a dispute. In this respect, Private International Law differs from public international law, which is the set of rules entered into by the governments of various countries that determine the rights and regulate the intercourse of independent nations.

Private international law has been defined as law directed to resolving controversies between private persons, natural as well as juridical, primarily in domestic litigation, arising out of situations having a significant relation to more than one state.

## **CHESHIRE**

“Private international law is that part of law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system”.

## **BATY**

“Private international law is the rules voluntarily chosen by a given state for the decision of cases which have a foreign complexion”.

## **P TANDON**

"Private international law is a body of principles determining questions as to jurisdictions and questions as to selection of appropriate law, in civil cases which present themselves for decision before a court of one state or country, but which involves a foreign element i. e. which effect foreign persons or foreign or transactions that have been entered in a foreign couna or with respect of foreign system of law"

## **PITT COBBET**

"Private international law is the body of rules for determining questions as to selection of appropriate law, in civil cases which present themselves for decision before the courts of one state or country, but which involve a foreign element i. e, which effect foreign persons or foreign things or transactions that had been entered into wholly or partly in a foreign country or with reference to some foreign system of law."

Private international law may be defined as the rules voluntarily chosen by a given state for the decision of cases which have a ‘foreign’ element or complexion.

Thus, where two Englishmen make a contract in Portugal for the sale of goods situated in Lisbon, payment to be made in London, an English court would certainly recognize and apply Portuguese law as far as it affected the validity of the contract.

The Private International Law forms part of municipal laws of a state and is meant for purpose of deciding whether a given case involving “foreign’ element (i) shall be adjudicated upon by its own domestic laws or by laws of some other state; and (ii) shall be subject of its courts of some other state.

Thus, Private international law deals with cases in which some relevant fact has a geographical connection with a foreign country and may on that ground raise a question as to

the application of Indian or some other appropriate foreign law to the determination of the issue or as to the exercise of jurisdiction by Indian or foreign courts.

## **SCOPE OF PRIVATE INTERNATIONAL LAW**

Private international law is not a separate branch of law in the same sense as, say, the law of contract or of tort. It is all-pervading.

It starts up unexpectedly in any court and in the midst of any process. It may be sprung like a mine in a plain common law action, in an administrative proceeding in equity, or in a divorce case, or a bankruptcy case, in a shipping case or a matter of criminal procedure...The most trivial action of debt, the most complex case of equitable claims, may be suddenly interrupted by the appearance of a knot to be untied only by Private International Law.

Nevertheless, Private International law is a separate and distinct unit in the English legal system just as much as the law of tort or of contract, but it possesses this unity, not because it deals with one particular topic, but because it is always concerned with one or more of three questions, namely:

- (a) Jurisdiction of the English court.
- (b) Recognition and enforcement of foreign judgments.
- (c) The choice of law.

We must be prepared to consider almost every branch of private law, but only in connection with these three matters.

### **(a) JURISDICTION**

The basic rule at common law is that the English court has no jurisdiction to entertain an action in personam unless the defendant has been personally served with a claim form in England or Wales. This rule, which cannot be satisfied while the defendant is abroad, applies, of course, whether the case has a foreign complexion or not, but there are three reasons which require the question of jurisdiction to be separately treated in a book on Private International law. First, there are certain circumstances in which the court is empowered by statute to assume jurisdiction over absent defendants, a power which naturally is of greater significance in foreign than in domestic cases. Secondly, there are certain types of action, such as a petition for divorce, where the mere presence of the defendant in the country does not render the court jurisdictionally competent. Thirdly, there is a separate regime of jurisdictional rules in the case of a defendant domiciled (in a specially defined sense) in a Member State of the European Community.

## **(b) RECOGNITION**

Where there has been litigation abroad, but the defendant has most of his assets in England, it will be important to ascertain whether English law will recognize or permit the enforcement of the foreign judgment. Provided that the foreign court had jurisdiction to adjudicate on the case, according to English private international law, the English court will generally recognize the foreign judgment as if one of its own and it can be forced accordingly. Again, our membership of the European Community has led to the introduction of important specific rules for the recognition of judgments from courts of the Member States.

## **(C) CHOICE OF LAW**

If the English court decides that it possesses jurisdiction, then a further question, as to the choice of law, must be considered; i.e. which system of law, English or foreign, must govern the case? The action before the English court, for instance, may concern a contract made or at on committed abroad or the validity of a will made by a person who died domiciled abroad. In each case that part of English law which consists of private international law directs what legal system shall apply to the case, i.e. to use a convenient expression, what system of internal law shall constitute the applicable law. English private international law, for instance, requires that the movable property of a British subject who dies intestate domiciled in Italy shall be distributed according to Italian law. These rules for the choice of law, then, indicate the particular legal system by reference to which a solution of the dispute must be reached. This does not necessarily mean that only one legal system is applicable, for different aspects of a case may be governed by different laws, as is the case with marriage where formal and essential validity are governed by different laws.

The function of private international law is complete when it has chosen the appropriate system of law. Its rules do not furnish a direct solution of the dispute, and it has been said that this department of law resembles the inquiry office at a railway station where a passenger may learn the plat format which his train starts. If, for instance, the defense to an action for breach of contract made in France is that the formalities required by French law have not been observed, private international law ordains that the formal validity of the contract shall be determined by the French law. But it says no more the relevant French law must then be proved by a witness expert in this subject.

It is generally said that judge at the forum “applies” or “enforces” the chosen law or alternatively that the case is “governed” by the foreign law. These expressions are convenient to describe loosely what happens, but they are not accurate. Neither it is strictly accurate to say that the judge enforces not the foreign law, but a right acquired under the

foreign law. The only law applied by the judge is the law of the forum, the only rights enforced by him are those created by laws of the forum. But owing to the foreign element in the case the foreign law is a fact that must be taken into consideration and what the judge attempts to do is to create and to enforce a right as nearly as possible similar to that which would have been created by a foreign court had it been decided in a case which is purely domestic in character.

## **UTILITY OF PRIVATE INTERNATIONAL LAW**

Private international law explores cross-border legal relationships. The discipline investigates core legal issues pertaining to international communication, such as the criteria for resolving conflicts of law arising under contracts.

Private international law plays a vital role to develop the existing legal systems of the different states. It helps to understand various legal orders all over the world. By the proper recognition and enforcement of foreign judgment, Private International Law broadens the domain of states legal arena. Private International law helps to develop international legislation and international law association.

Private international law develops the notion of international harmony of decisions. Private International Law ensures the stability with regard to cross-border legal relationships.

## **NATURE OF PRIVATE INTERNATIONAL LAW**

Private international law is the area of law that comes into play whenever a court is faced with a question that contains a foreign element, or a foreign connection. The presence of such a foreign element in a legal matter raises a number of questions and it is the function of private international law to provide an answer to these questions and to ensure just solutions. It is concerned with all legal relationships between private entities and thus includes, for example, family law and the law of contracts and obligations. These laws differ from country to country.

Private International Law is a branch of municipal law. PIL is essentially a system of indicating choice, choice of jurisdiction, choice of law and recognition of a foreign judgment.

Private International Law contains the following basic nature:- its subject matter always includes a foreign element, one of its prime nature is the pursuit and application of the appropriate legal system and jurists have been more influential in this branch of the law than is typical with other legal subjects.

Mr. Justice J.C. Shah (as he then was, afterwards C.J.I.) as late as 1963 in *R. Vishwanathan vs. Syed Abdul Wajid* gives an enlightening explanation of what Private International Law is “It is not the law governing relations between States. It is simply a branch of the Civil Law of the State evolved to do justice between litigating parties in respect of transactions or personal status involving a foreign element. Its rules in the very nature of things differ from State to State, but by the comity of nations, certain rules have been recognised as common to civilized jurisdictions. Through part of the judicial system of each State, these common rules have been adopted to decide disputes involving a foreign element and enforce foreign judgment, often as a result of International Conventions”.

A Division Bench of the Bombay High Court in a case of divorce involving two conflicting legal systems, *Monica Variato vs. Thomas Varia* stated that the principles of Private International Law are not universal. They vary from State to State. What may be applicable in one State may not be applicable in another State”.

In 1952, *Indian & General investment Trust Ltd. vs. Raja of Kholikhote*, the High Court devoted substantial part of the judgment to general principles of Private International Law:-

“The name “Private International Law” is rather unfortunate because it is difficult to conceive of a law which is both International and at the same time private. It is called “private” inasmuch as it deals with the legal relations of individuals and not of States; it is “International”, in as much as its rules are enforced by Courts, and in that respect it is a branch of the ordinary law of the land.

## **UNIFICATION OF PRIVATE INTERNATIONAL LAW**

Need for unification of Private International Law arises primarily because of two reasons. The internal laws of different countries differ from each other and the Private International Law rules adopted by different countries also differ from each other. Therefore unification of laws also takes place in two steps:

1. Unification of Internal laws of the countries of the world.
2. Unification of the rules of Private International Law.

The first step in the direction of the unification of internal laws was taken by the Bern Convention of 1886 under which an international union for the protection of the rights of authors over their literary and artistic works was formed. After the First World War an International Institute for the Unification of Private Law was established at Rome. The Warsaw Conventions of 1929 which has been amended by the Hague Convention of 1955 is a very important landmark in that direction. This Convention provides for uniform rules

relating to carriage of goods and persons by air. In the Brussels Convention of 1922-23 the unification of rules relating to carriage to goods and persons by sea came into existence. Then came in the Geneva Convention on International Carriage of Goods by Road of 1956. The Geneva Conference of 1930 resulted in a Convention on the Uniform Law of Bills of Exchange.

On account of basic ideological differences among the countries of the world, it is not possible to achieve unification of all private laws. Therefore, another method of avoiding the situation where courts in different countries may arrive at different results on the same matter is the unification of all private laws. In 1951, a permanent bureau of Hague Conference was constituted. This has been done under a Charter which has been accepted by many countries. There are numerous other Charters, Conventions and International Institutes working towards unifying Private International Law. But international Conventions can be part of municipal law only when the same have been recognized or incorporated in the municipal law.

## **CODIFICATION OF PRIVATE INTERNATIONAL LAW**

Codification is the elaboration of a methodic and systematic body that comprises the rules of a specific branch of law. Codification occurs both in the international and the national spheres of the legislative process. The instruments adopted at these two levels are closely interdependent. They complement each other, yet share a relationship characterized by tension and discrepancies which act as incentives for further improvement.

Codification of private international law has the same characteristics and fulfils objectives similar to those of general codification, but concerns the normative aspects that regulate cases containing elements of foreign law. From the inception of the codification movement, international private relations have been regulated both within the States in which they are created or produce their effects, and within the international community by way of policies and principles acceptable to all the legal systems to which the international private relationship may be connected.

## **ARGUMENTS FOR AND AGAINST CODIFICATION**

Several arguments have been used to challenge the need for and suitability of the codification of private international law, particularly conventional codification. On the other hand, cogent arguments have been used in support of the view that private international law reaches perfection through unification. Without attempting to exhaust the discussion of this topic, which has profound doctrinal implications, we shall briefly present the arguments for and against codification. The objection made to most of the solutions supplied by codified

rules, especially those dealing with conflict rules is that they prevent the appropriate treatment of specific cases according to justice and equity. The judge-made doctrine required by such a view contradicts the very concept of codification. In fact, since Cavers' theories have become known, a school of thought particularly prevalent in the United States has emphasized the need for a choice of law system largely related to the values of justice on a case by case basis. This notion of justice, and not the conflict rule, would determine the applicable law in each instance.

The conflict rule, therefore, would be deprived of its neutral character on which predictability and certainty factors promoted by codification are based. It would appear to be a true conflict of values in which the interests of justice become subordinate to the needs of certainty, but as it is pointed out that justice and equity continue to be fundamental principles of adjudication in civil law systems and the proper use of the conflict rule has contributed to attaining both in most cases. Without ignoring the operational deficiencies of the conflict rules, one must admit that conflict rules continue to be an indispensable instrument for the regulation of international private relations, and that the codification of such rules improves their operation.

Other arguments against codification are fundamentally concerned with the negative effects that conventional unification may have on the quality of the rules adopted and their possible counterproductive impact on national systems. It has been said that the different levels of development of the legal systems of the countries participating in the unification process hamper the adoption of adequate rules for all, thereby reducing the effectiveness of the process. Moreover, it is also felt that the substance of the unified rule may lack the necessary clarity as a result of compromise between systems that reflect deep-rooted doctrinal traditions. It is argued that political factors may outweigh technical factors in the adoption of rules. It is also contended that international unification may impair the unity of the national system, because the slow pace of domestic legislative processes prevents a coherent integration of conventional rules originating from various sources (sub regional, regional and universal).

A traditional criticism aimed at codification in general, though at international codification in particular, is that normative uniformity implies a rigidity that may impair interpretation and curb the adjustment of the legal system to the requirements of social dynamics. Allegedly, this may be especially burdensome in private international law, a branch of law with extraordinary adaptability, and which has achieved its most important solutions through the use of alternative sources, including, in particular, general principles of law. Arguably, a rigid unification with express solutions for each and every issue, far from

facilitating judicial decisions, could trigger an abusive use of the negative mechanisms of private international law to reach solutions in accord with the **lex fori**.

Although rigidity is a real drawback of codified systems, it is, however, a relative one. While it is true that the inherent empiricism of the common law system lends itself to creative decision making and is, therefore, apparently more flexible than codified systems, the facts have not always supported this assertion.

## **WHAT IS FOREIGN LAW?**

Foreign law is the law of any other country apart from the law of the country where an issue is for consideration.

Foreign law is law referenced or cited by a court that comes from a country other than that in which the court sits. Foreign law is usually not binding on the court sitting it, and citation to foreign law as persuasive can be controversial. However, in some circumstances, a court may be called upon to determine the meaning of a foreign statute, such as when one is incorporated into the language of a contract before the court.

According to **Black's Law Dictionary**, Foreign laws refer to the laws of a foreign country, or of any other state. In conflict of laws, it is the legal principles of jurisprudence which are part of the laws of any other state. Foreign laws are additions to our own laws and in that respect are called "**jus receptum**"

Foreign laws are those laws enacted and in force in a foreign state or country. The courts do not judicially take notice of foreign laws and so they must be proved as facts. Such proof varies according to circumstances.

## **PUBLIC INTERNATIONAL LAW AND PRIVATE INTERNATIONAL LAW**

### **AS TO CONSENT:**

Public international law based on the consent of the state. Private international law is not based on the consent of the states.

### **AS TO OBJECT:**

Public international laws regulate relationship of states inter se and determine rights and duties of the subject states at international sphere.

Private international law determines as to which law will apply of two conflicting in a particular case having foreign element.

### **AS TO CONFLICT OF LAWS:**

Public international law does not involve in conflicts of laws. Private international law involves in the conflicts of laws.

### **AS TO NATURE:**

Public international is same for all the states. Private international may be different in various states.

### **AS TO SOURCES:**

Public international law has its sources in treaties, custom etc. etc. Private international law has its sources in the legislation of the individual state to which the litigant belongs.

### **AS TO APPLICATION:**

Public international law is applicable to criminal as well as civil cases. Private international law is applicable to civil cases only, which present themselves for accession of courts of the state.

### **AS TO SUBJECT:**

Public international law deals with the states. Private international law deals with the individuals.

### **AS TO MUNICIPAL LAW:**

Public international law is not part of municipal law but Private International law is a part of municipal law

### **AS TO JURISDICTION**

Public international law does not involve determination on the question of determination. Private international law determines court which will have jurisdiction to decided issue in question.

### **AS TO SCOPE:**

Public international law has wider scope. It is of universe character. Private international law has minimal scope.

### **PRIVATE INTERNATIONAL LAW OR CONFLICT OF LAWS**

The term "Private International Law" was coined by Justice Story and was adopted by such famous authors as Westlake and Foote. It has been used by most of French authors on this subject. The chief drawback of this term is that it tends to confuse this branch of law with Public International Law or law of nations. We have seen that the two are basically different from each other. It has been pointed out that the term "Private International Law" is

misnomer as there is no international law in it but is mainly a branch of law applied in disputes between individuals in municipal courts. It can be said however, that this branch of law deals with international private relations or private law problems of international character.

Another term which is equally current is “**conflict of laws**”. It means as a system of law to avoid or minimise the conflict between different systems of laws as to which system should govern a case, then it is misleading. There is no conflict in this sense. For example, English Court is seized of a case which involves a French element as the transaction had taken place in France. It is misleading to think that there is a struggle between French Law and English Law as to which should govern the case. It is English law that governs the case. French law is looked into and applied by the English court only if the English Private International Law directs the court to do so. There may be conflict between the particular rule of French law and corresponding rule of English law and English Private International Law seeks to avoid that conflict by choosing the French rule. Consequently, the decision will be the same whether the case arises in a French court or an English court. This is the true position.

If understood correctly the term “**conflict of laws**” would seem to be preferable to Private international law. In addition to these two well-known terms, other terms such as “**International Private Law**” and “**Inter Municipal law**” have also used to denote the subject. As **Cheshire** says “the fact is that no title can be found which is accurate and comprehensive. Both “Private International law” and “conflict of laws” have been widely used and well-known and any of them can be adopted without any harm. The present editor of “**Cheshire**” prefers the term “**conflict of laws**” as it is a little unrealistic to speak in terms of international law, although Cheshire had adopted the term of “**Private International law**”.

## **THEORIES OF PRIVATE INTERNATIONAL LAW**

Doctrinal matter in private international law was virtually monopolized by civil law thinkers. In the civil code nations, private international law is a part of the code. Over nearly **200 centuries**, therefore, the development of the law in this field in civil Law Nations consisted of new provisions formulated in civil new codes or their re-formulation in new or revised codes.

It is only in the recent times that theoretical analysis of common law problems has been taken over by the common law jurists particularly Americans

### **(a) STATUTORY THEORY:**

The statute theory is probably the most ancient theory. In its original version, it is a product of the 13<sup>th</sup> century Italian theories. It was propounded by **Bartolus** may be called the father of this theory. Personal Law may be applied if it is not opposed to public policy or public order. The term 'statute' was used to indicate any local law, whether customary or legislative of a city state. These statute or local are classified according to statute theory into three categories namely personal statute, real statute and mixed statute.

A personal statute is connected with persons, the real statutes regulate things and mixed statute deals with acts such as formation of a contract or infliction of an injury. Real statutes are territorial in application and will be applied only by local courts. Personal statutes on the other hand are applicable not only within the enacting City state but also within jurisdiction of other City states; if the persons governed by such statute went to the other City State. Mixed statutes applied to all acts done within the territory of the enacting City States even when the case in respect of such an act arose within another City State.

This theory appears on the force of it to be very simple. But in actual practice it preserved it preserved great difficulties because it was not easy to determine whether a statute was real, personal or mixed.

### **(b) INTERNATIONAL THEORY:**

These are rules of conflict of laws which are universal and common to various legal systems of the world. This theory rejected the statute theory as well as the territorial theory. **Savigny** said, solution of the problem did not lie in classifying the loss on the basis of their object, but in the ability to find out the seat of each legal application, as each legal relationship has its natural seat in some local law. Therefore, even if the law of the forum is the law of the place which is the seat of legal relationship, it will be the later which will be applicable. The international treat has been criticized on many courts. The most damaging criticism of this theory is the starts on the assumption that there is uniformity in the loss of the countries on the characterization of legal relations, why in fact it is not so. For instance, reach of marriage promise is regarded as breach of contract in some countries while in some it is regarded as a tort. In such a situation, it may be difficult to find out the natural seat of the legal relationship. Then, in our contemporary world there are still more than one international system, of which the important ones are, the common law system and civil law system.

### **(c) THE TERRITORIAL OR ACQUIRED THEORY**

**Territorial and vested rights theory was originally formulated by the Dutch jurist Ulrich Huber (1635-1694) in his book "De Conflict Legam". Latter it was elaborated by Dicey in England and by Beale in U.S.**

As expounded in **Holland's jurisprudence**, this theory is based on the principle of territoriality of administration of law, that judges can only enforce the law and recognize the judgment of their own legal system to which they belong or circumscribed by the territory. Courts of Sovereign state do not apply foreign law but merely recognize the consequences of the operations of a foreign law.

This theory tries to reconcile the territoriality of a law and the need for private international law. Dr. Cheshire has vehemently criticized this theory as being, 'unnecessary', 'untrue', and 'unhelpful'.

**(d) LOCAL LAW THEORY:**

**'Local law theory is expounded by Walter Wheeler Cook in his book 'logical and legal basis of conflict of laws 1942'.**This theory is fully founded on common law genius namely that law is not deducted from logical reasoning of any philosophers and jurists, any inherent principle but simply an observations of what judges have done in the past in order to prophecy how they will probably act in the future. This theory is a slight variation from territorial theory. The gist of this theory is that the court recognizes and enforces a local right that is created by its own. This theory approves the foreign right when it is recognized in the Local law. But as the dispute in question has a foreign element the court would necessarily apply the rule of the forum that would be applied in the case of a purely domestic dispute. But for reasons of social expedience and practical convenience it takes into account the laws of a foreign country in which the decisive facts have occurred.

**(e) THE THEORY OF JUSTICE:**

The approach of English courts to private international law is pragmatic and ethical. It has sociological, ethical and legal aspects towards the end of justice. According to **Dr.Graveson**, the basis of public international law is sociologically, in the international need for fair treatment in the private transactions of individuals, ethically, in the desire of English courts to do justice; and legally, in the obligation of their oath in office. In essence the rules of private international law in made from the precedents with the view of doing justice.

## THE LAW OF THE PLACE

The law of the place, like the personal law provides a fairly straight forward test and one which, unlike the personal law, can be applied automatically. The law of the place where something was done or something happened also seems perfectly sensible.

### LEX DOMICILII:

The **lex domicilii** is the Latin term for "law of the domicile" in the Conflict of Laws. Conflict is the branch of public law regulating all lawsuits involving a "foreign" law element where a difference in result will occur depending on which laws are applied.

When a case comes before a court and all the main features of the case are local, the court will apply the **lex fori**, the prevailing municipal law, to decide the case. But if there are "foreign" elements to the case, the forum court may be obliged under the Conflict of Laws system to consider:

- whether the forum court has jurisdiction to hear the matter or not;
- it must then characterize the issues, i.e. allocate the factual basis of the case to its relevant legal classes; and
- then apply the choice of law rules to decide the **lex causae**, i.e. which law is to be applied to each class.

The **lex domicilii** is a common law choice of law rule applied to cases testing the status and capacity of the parties to the case. The civil law states use a test of either **lex patriae** (the law of nationality) or the law of habitual residence to determine status and capacity.

### LEX LOCI CELEBRATIONIS:

The **lex loci celebrationis** is the Latin term for "law of the place where the marriage is celebrated" in the Conflict of Laws. Conflict is the branch of public law regulating all lawsuits involving a "foreign" law element where a difference in result will occur depending on which laws are applied. When a case comes before a court and all the main features of the case are local, the court will apply the **lex fori**, the prevailing municipal law, to decide the case. But if there are "foreign" elements to the case, the forum court may be obliged under the Conflict of Laws system to consider:

- whether the forum court has jurisdiction to hear the case;
- it must then characterise the issues, i.e. allocate the factual basis of the case to its relevant legal classes; and
- then apply the choice of law rules to decide which law is to be applied to each class.

The **lex loci celebration** is a choice of law rule applied to cases testing the validity of a marriage. For example, suppose that a person domiciled in Scotland and a person habitually resident in France, both being of the Islamic faith, go through an Islamic marriage ceremony in Pakistan where their respective families originated. This ceremony is not registered with the Pakistani authorities but they initially establish a matrimonial home in Karachi. After a year, they return to Europe. For immigration and other purposes, whether they are now husband and wife would be referred to the law of Pakistan because that is the most immediately relevant law by which to decide precisely the nature of the ceremony they went through and the effect of failing to register it. If the ceremony was in fact sufficient to create a valid marriage under Pakistani law and there are no public policy issues raised under their personal laws of **lex domicilii** or habitual residence, and under the **lex fori**, they will be treated a validly married for all purposes, i.e. it will be an in rem outcome.

### **LEX LOCI CONTRACTUS:**

The **lex loci contractus** is the **Latin term for "law of the place where the contract is made"** in the Conflict of Laws. Conflict is the branch of public law regulating all lawsuits involving a "**foreign**" law element where a difference in result will occur depending on which laws are applied. When a case comes before a court and all the main features of the case are local, the court will apply the **lex fori**, the prevailing municipal law, to decide the case. But if there are "**foreign**" elements to the case, the forum court may be obliged under the Conflict of Laws system to consider:

- whether the forum court has jurisdiction to hear the case (see the problem of forum shopping);
- it must then characterise the issues, i.e. allocate the factual basis of the case to its relevant legal classes; and
- then apply the choice of law rules to decide which law is to be applied to each class.

The **lex loci contractus** is one of the possible choice of law rules applied to cases testing the validity of a contract. For e.g., suppose that a person domiciled in Canada and a person habitually resident in France, make a contract by e-mail. They agree to meet in New York State to record a CD of hip hop music. The possibly relevant choice of law rules would be:

- the **lex domicilii** and law of habitual residence to determine whether the parties had the capacity to enter into the contract;
- the **lex loci contractus** which could be difficult to establish since neither party left their own states (reliance on postal rules for offer and acceptance in the several putative **lex causae** might produce different results);

- the **lex loci solutionis** might be the most relevant since New York is the most closely connected to the substance of the obligations assumed;
- the proper law; and
- the **lex fori** which might have public policy issues if, say, one of the parties was an infant.

### **LEX LOCI SOLUTIONIS:**

The **lex loci solutionis** is the **Latin term for "law of the place where relevant performance occurs"** in the Conflict of Laws. Conflict is the branch of public law regulating all lawsuits involving a "**foreign**" law element where a difference in result will occur depending on which laws are applied.

When a case comes before a court and all the main features of the case are local, the court will apply the **lex fori**, the prevailing municipal law, to decide the case. But if there are "**foreign**" elements to the case, the forum court may be obliged under the Conflict of Laws system to consider:

- whether the forum court has jurisdiction to hear the case (see the problem of forum shopping);
- it must then characterise the issues, i.e. allocate the factual basis of the case to its relevant legal classes; and
- then apply the choice of law rules to decide which law is to be applied to each class.

The **lex loci solutionis** is one of the possible choice of law rules applied to cases testing the validity of a contract and in tort cases. For example, suppose that a person domiciled in Bolivia and a person habitually resident in Germany, make a contract by e-mail. They agree to meet in Arizona to research a book. The possibly relevant choice of law rules would be:

- the **lex domicilii**, **lex patriae** or the law of habitual residence to determine whether the parties had the capacity to enter into the contract;
- the **lex loci contractus** which could be difficult to establish since neither party left their own states (reliance on postal rules for offer and acceptance in the several putative **lex causae** might produce different results);
- the **lex loci solutionis** might be the most relevant since Arizona is the most closely connected to the substance of the obligations assumed;
- the proper law; and
- the **lex fori** which might have public policy issues if, say, one of the parties was an infant.

## **LEX LOCI DELICTI COMMISSI:**

The **lex loci delicti commissi** is the **Latin term** for "**law of the place where the tort was committed**" in the Conflict of Laws. Conflict is the branch of public law regulating all lawsuits involving a "**foreign**" law element where a difference in result will occur depending on which laws are applied. When a case comes before a court and all the main features of the case are local, the court will apply the **lex fori**, the prevailing municipal law, to decide the case. But if there are "**foreign**" elements to the case, the forum court may be obliged under the Conflict of Laws system to consider:

- whether the forum court has jurisdiction to hear the case
- it must then characterise the issues, i.e. allocate the factual basis of the case to its relevant legal classes; and
- then apply the choice of law rules to decide the **lex causae**, i.e. which law is to be applied to each class of issue or to the case as a whole.

The **lex loci delicti commissi** is one of the possible choice of law rules applied to cases arising from an alleged tort. For example, suppose that a person domiciled in Australia and a person habitually resident in Albania, exchange correspondence by e-mail that is alleged to defame a group of Kurds resident in Turkey. The possibly relevant choice of law rules would be:

- the **lex loci solution** is might be the most relevant but this might be difficult because three laws might equally apply, i.e. the parties themselves corresponded from two states but the damage was not sustained until the correspondence was published in Turkey;
- the proper law which is the law which has the closest connection with the substance of the wrong alleged to have been committed; and
- the **lex fori** which might have public policy issues if, say, one of the parties was an infant or there was the possibility of multiple jurisdictions having involvement over a world-wide internet issue.

## **LEX SITUS:**

The term **lex situs (Latin)** refers to "**the law of the place in which property is situated for the purposes of the Conflict of laws**". For example, property may subject to tax pursuant to the law of the place of the property or by virtue of the domicile of its owner. Conflict is the branch of public law regulating all lawsuits involving a "**foreign**" law element where a difference in result will occur depending on which laws are applied. When a case comes before a court and all the main features of the case are local, the court will apply the **lex fori**,

the prevailing municipal law, to decide the case. But if there are "**foreign**" elements to the case, the forum court may be obliged under the Conflict of Laws system to consider:

- whether the forum court has jurisdiction to hear the case (see the problem of forum shopping);
- it must then characterise the issues, i.e. allocate the factual basis of the case to its relevant legal classes; and
- then apply the choice of law rules to decide which law is to be applied to each class.

The **lex situs** is a choice of law rule applied to identify the **lex causae** for cases involving title to, or the possession and use of property.

In law, there are two types of property:

- Real property is land or any permanent feature or structure above or below the surface. Ownership of land is an aspect of the system of real property or realty in common law systems (immovables in civil law systems and the Conflict of Laws).
- All other property is considered personal property or personality in common law systems (movables in civil law systems and the Conflict of Laws), and this property is either tangible or intangible, i.e. it is either physical property that can be touched like a computer, or it is an enforceable right like a patent or other form of intellectual property.

The term **lex situs** is applied only to immovable property and **lex loci rei sitae** ought to be used when referring to the law of the situs of movable property but this distinction is less common today and is ignored for the purposes of the Conflict pages on the Wikipedia. Land has traditionally represented one of the most important cultural and economic forms of wealth in society. Because of this historical significance, it is vital that any judgment affecting title to or the use of the land should be enforceable with the minimum of difficulty. Hence, compliance with the **lex situs** should produce a judgment in rem.

### **LEX FORI:**

In Conflict of Laws, the Latin term **lex fori** literally means the "**law of the forum**" and it is distinguished from the **lex causae** which is the law the forum actually applies to resolve the particular case. Sovereignty comes into being through a process of recognition by the international community in which a de facto state is formally accepted as a de jure state and so becomes the legitimate government with territorial control over a defined area of land and all the people who reside within its borders. One of the most important sovereign powers of any government is to enact laws and to define the extent of their application.

Some laws will apply to all the land and its peoples. Others will be of more limited application. These laws will be applied through different bodies and institutions. Some will be formally constituted as courts. Other bodies will exercise specific functions within quasi-judicial, administrative, religious or other frameworks. When a lawsuit is instituted and the court has accepted that it has jurisdiction, the parties will normally expect the local laws to apply, reflecting a presumption of territoriality? That each state is sovereign within its own borders and the laws of no other state or international body will apply extraterritorially or supranationally. If foreign laws did apply, the state would be less than sovereign within its own borders. However, as social mobility has increased and the internet encourages people to trade across national boundaries, a need to recognise the relevance and importance of foreign laws to dispute resolution has arisen. Hence, within the precise limits set by the **lex fori**, local courts may sometimes apply one or more foreign laws as the **lex causae** if the local politics, public policy and the dictates of justice require it.

### **LEX PATRIAE:**

The term **lex patriae** is Latin for “the law of nationality in the Conflict of Laws” which is the system of public law applied to any lawsuit where there is a choice to be made between several possibly relevant laws and a different result will be achieved depending on which law is selected. When a case comes before a court and all the main features of the case are local, the court will apply the **lex fori**, the prevailing municipal law, to decide the case. But if there are “foreign” elements to the case, the forum court may be obliged under the Conflict of Laws system to consider:

- whether the forum court has jurisdiction to hear the case;
- it must then characterise the issues, i.e. allocate the factual basis of the case to its relevant legal classes; and
- Then apply the choice of law rules to decide the **lex causae**, i.e. which law is to be applied to each class.

The **lex patriae** is a civil law choice of law rule (in some states, the law of habitual residence is used) to test the status and capacity of the parties to the case. For e.g., suppose that a person with a nationality in Denmark decides to take a “round-the-world” trip. It would be inconvenient if this person's legal status and capacities changed every time he or she entered a new state, e.g. that he or she might be considered an infant or an adult, married or free to marry, bankrupt or creditworthy, etc., depending on the nature of the laws of the place where he or she happened to be.

Assuming that there are no public policy issues raised under the relevant **lex fori**, the **lex patriae** should apply to define all major issues and so produce an in rem outcome no matter where the case might be litigated.

The common law states use a test of **lex domicilii** (the law of domicile) to determine status and capacity. Because the **lex patriae** choice of law rule may select the law of a country that contains more than one legal system, there must be rules to determine which of the several possible laws might apply (e.g. a reference to the law of the United States is actually a reference to one of the U.S. states).

A supranational example of this selection process is contained in Article 19 of the Rome Convention:

#### **STATES WITH MORE THAN ONE LEGAL SYSTEM:**

1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.
2. A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.

#### **HAGUE CONVENTION**

The Hague conference on private international law ( HCCH ) is a global intergovernmental organisation in the area of private international law that develops several international conventions, protocols and principles. A melting pot of different legal traditions, it develops and services multilateral legal instruments, which responds to global needs. The Hague conference held its first meeting in 1893, on the initiative of T.M.C. Asser. In 1911 T.M.C. Asser received the Nobel prize for peace for his work in the field of private international law, and in particular for his achievements with respect to the HCCH. The Hague conference had its first session back in 1893 and became a permanent intergovernmental organisation after its seventh session in 1951 and the statute came into force on 15<sup>th</sup> July 1955.

#### **ETIMOLOGY :**

The acronym HCCH is derived from using the respective capitals of the phrases “ Hague Conference ” and “Conference de la Haye”. It represents the bilingual nature of the HCCH, which has both English and French as its working languages.

## **MISSION :**

The Statutory mission of the Conference is to work for the “progressive unification” of these rules. This involves finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.

Over the years, the conference has, in carrying out its mission, increasingly become a centre for international judicial and administrative co-operation in the area of private law, especially in the fields of protection of the family and children, of civil procedure and commercial law. The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law, including by creating and assisting in the implementation of multilateral conventions that promote the harmonization of the rules and principles of private international law or conflict of laws.

## **DIPLOMATIC SESSION OF THE HCCH :**

The first diplomatic session of the HCCH was convoked in 1893. The first to fourth diplomatic session of the HCCH took place in 1893, 1894, 1900 and 1904 respectively. They resulted in a number of multilateral treaties, the Hague conventions, that unified the rules of private international law in the area of Marriage 1902, Divorce 1902, Guardianship 1902, Civil procedure 1905, Effects of Marriage 1905 and Deprivation of Civil Rights 1905.

After world war I, the fifth and sixth diplomatic sessions took place in 1925 and 1928 respectively. The result of those diplomatic sessions was the protocol to recognize the competence of the permanent court of international justice to interpret the Hague conventions on private international law.

## **INTERGOVERNMENTAL ORGANISATION :**

After world war II, steps were taken to establish the HCCH as an intergovernmental organisation, governed by its member states and administered by a Secretariat, the Permanent Bureau. The treaty establishing the HCCH, the “statute of the Hague conference on private international law ” was adopted during the seventh diplomatic session of the HCCH in 1951.

The Hague conference on private international law is a long and some what unusual name for an intergovernmental organisation. It can be explained by its history. In the period of 1893 it was known as Adhoc Hague Conferences and later in 1955 it was changed as an intergovernmental organisation.

## **MEMBERS :**

The Membership of the HCCH comprises 83 Members (82 states and 1 Regional Economic Integration Organisation), 68 states are not members (signed and ratified or in the process of becoming a member). A total of 68 non member states are parties to one or more conventions. HCCH identifies them as “Connected States”

## **AMENDMENTS :**

Amendments were adopted during the Twentieth Session on 30 June 2005 (Final Act) approved by Members on 30 September 2006 and entered into force on 1 January 2007. The approval of these Regulations and approval of amendments shall be subject to a two-thirds majority of the Member States represented at the meeting of the Council of Diplomatic Representatives, or in the case of a written procedure, a two-thirds majority of the member states eligible to cast a vote. If approved, the Regulations shall enter into force upon a date determined by the Council.

## **GOVERNANCE :**

The governance of the HCCH convention consist of Statute, Council on General Affairs and Policy, Rules of Procedure, Financial Regulations, Other Governance documents, Co-operation with other International Organisations.

## **GOVERNING BODIES:**

The HCCH acts through a number of governing bodies, which are established under the statute. The Council on General Affairs and Policy, the team of the Permanent Bureau ensures the operation of the HCCH and its meetings are currently held annually. Financial regulations of the HCCH deals with the Regulations on Financial Matters and Budgetary Practices. The Organisation is funded principally by its Members. Its budget is approved every year by the Council of Diplomatic Representatives of Member States. The Council of Diplomatic Representatives is the supreme financial and budgetary authority of the conference. It shall exercise oversight of the financial administration of the Conference. The Organisation also seeks and receives some funding for special projects from other sources.

The Organisation meets in Plenary Session (ordinary Diplomatic Session) to negotiate and adopt Conventions and to decide upon future work. The Conventions are prepared by Special Commissions or working groups held several times a year, generally at the Peace Place in The Hague, increasingly in various members countries. Special Commissions are also organised to review the operation of the Conventions and adopt recommendations with the object of improving the effectiveness of the Conventions and promoting consistent practices and interpretation.

The Standing Committee of the Council of Diplomatic Representatives shall assist the council in this role. It shall consider any financial or budgetary matters that may be brought to its attention by any Member State or the Secretary General. It shall consider, and may make recommendations in relation to, the budget. The Standing Committee shall be open to all Member States. Its meetings shall be chaired by a member of the Council of Diplomatic Representatives who shall be elected by the Council for a period of two years. The Council on General Affairs and policy shall be consulted on the draft budget. The Secretary General shall be responsible for the day-to-day administration of the Conference and the operation of the Permanent Bureau. The Financial Year of the Conference shall run from July to 30 June. By 1 February of each year, the Secretary General shall prepare a draft budget for the Financial Year. Before 15 April of each year, the Secretary General shall submit the draft budget to the Council of Diplomatic Representatives for final approval. Members shall have until 10 May to submit written comments to the Secretary General on the draft budget. Every year, the Council of Diplomatic Representatives shall meet before 1 June to approve the budget. All expenditures and revenues shall be expressed in Euro. All contributions from Members of the Conference shall be paid in Euro. The Final Accounts shall be audited by an independent auditor to be appointed by the Council of Diplomatic Representatives. The Secretary General shall report once a year on the status of the pension reserve fund.

#### **SUBJECT MATTER OF COVENTIONS:**

The HCCH instrument covers subject matters in the area of family law and child protection, international civil proceeding and legal co-operation as well as cross-border commercial and finance laws. These areas are often referred to as the “Three Pillars” of the HCCH.

#### **CONVENTIONS, PROTOCOLS AND PRINCIPLES:**

The Hague Convention totally has 40 conventions between 1954 to 2015. The major conventions are listed below

1. Convention 6 of 15 June 1955 relating to settlement of the conflicts between the law of Nationality and the law of Domicile
2. Convention 12 of 5 October 1961 Abolishing the requirement of Legislation for Foreign Public Documents
3. Convention 14 of 15 November 1965 on the Service Abroad of Judicial and Extra judicial Documents in Civil or Commercial Matters
4. Convention 20 of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

5. Convention 28 of 25 October 1980 on the Civil Aspects of International Child Abduction
6. Convention 33 of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
7. Convention 37 of 30 June 2005 on Choice of Court Agreements
8. Convention 40 of 19 March 2015 on Principle on Choice of Law in International Commercial Contracts

**CONVENTION 6 OF 15<sup>TH</sup> JUNE 1955 RELATING TO THE SETTLEMENT OF THE CONFLICTS BETWEEN THE LAW OF NATIONALITY AND THE LAW OF DOMICILE:**

This convention contains 13 Articles which determining to establish common provisions concerning the regulation of conflicts between the law of nationality and the law of domicile.

The Domicile as defined by this convention as the place where a person ordinarily resides, unless that residence is dependant upon that of another person or upon the seat of another authority. This convention applies automatically to the metropolitan territories of the contracting states.

**CONVENTION 12 OF 5<sup>TH</sup> OCTOBER 1961 ABOLITION THE REQUIREMENT OF LEGALISATION FOR FOREIGN PUBLIC DOCUMENTS :**

The Apostille Convention facilities the circulation of public documents executed in one states party to the convention and to be produced in another state party to the Convention. The Convention has also proven to be very useful for states that do not require foreign public documents to be legalized or that do not know the concept of Legislation in their domestic law. The citizens in these states enjoy the benefits of the Convention whenever they intend to produce a domestic public documents in another state party which for its part, requires authentication of the document concerned.

**PUBLIC DOCUMENTS :**

The following are deemed to be public documents

- a. Documents emanating from an authority or an official connected with the courts and tribunals of the state, including those emanating from a public prosecutor, a clerk of a court or a process server.
- b. Administrative documents
- c. Notarial acts and

d. Official certificates

The Convention excludes certain documents from its scope and ambit. They are

- a. Documents executed by diplomatic or consular agents
- b. Administrative documents dealing directly with commercial or customs operations.

**AUTHORITIES WHO CAN ISSUE APOSTILLE:**

A Competent Authority designed by the state and not the Permanent Bureau, issues the apostille. In India, the Joint Secretary (consular), Consular, Passport and Visa Division, Ministry of External Affairs is the designated Competent Authority to issue an apostille certificate. The Apostille to conform as closely as possible to the Model annexed to the Convention and also necessary to keep a register to record those Apostille issued.

**EFFECTS OF AN APOSTILLE:**

The effect is to certify the authenticity of the signature, the capacity in which the person signing the document has acted and where appropriate the identity of the seal or stamp which the document bears. Further it is to be noted that the Apostille does not relate to the content of the underlying document itself (apostilled public documents). The operation of the Apostille convention is regularly reviewed by special commission meetings convened by the Permanent Bureau of the Hague conference.

**THE E-APP ( ELECTRONIC APOSTILLE PROGRAM ) :**

The e-Apostille pilot program was launched in April, 2006 to promote and assist with the implementation of low cost, operational and secure software's for issuance of Apostille and operation of electronic Registers of Apostilles to verify the origin of Apostilles. This dramatically increases security and offers a very powerful and effective deterrent to fraud.

**CONVENTION 14 OF 15<sup>TH</sup> NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS:**

The Service Convention provides for channels of transmission to be used when a judicial or extrajudicial document is to be transmitted from one state party to another for service in the latter. It does not address or comprise substantive rules relating to the actual service of process.

## **REQUIREMENTS TO BE MET FOR THE APPLICATION OF CONVENTION:**

- a. A document to be transmitted (law of the forum state to determine whether or not it is to be transmitted abroad for service in the latter – convention is non- mandatory) from one state party to another ;
- b. An address for the person to be served is known;
- c. document to be served is a judicial or extrajudicial document;
- d. Document to be served relates to a civil or commercial matter.

The alternative channels of transmission are the consular or diplomatic channels under Article 8(1) and Article 9, postal channels under Article 10(a), direct communication between judicial officers, officials or other competent persons of the state of origin and the state of destination under Article 10(b) and 10(c). The Service Conventions practical operation was last reviewed by a special commission in 2009. It confirmed wide use and effectiveness as well as the absence of major practical difficulties.

## **CONVENTION 20 OF 18<sup>TH</sup> MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS:**

The Evidence Convention establishes methods of Co-operation for taking of evidence abroad in civil or commercial matters. The Convention, which applies only between states parties, provides for the taking of evidence by means of

- a. Letter of request
- b. Diplomatic or consular agents and commissioners

The Letter of Request is transmitted under Article 24(2) and 25, forwarded to the competent authority for execution. The judicial authority of one state party may request the competent Authority of another state party to obtain evidence which is intended for use in judicial proceedings in requesting state.

In case the Diplomatic or Consular agents to take evidence, they have to obtain prior permission of the appropriate authority of the state, such persons are not to exercise any compulsion and if the manner in which evidence is taken is forbidden by the law of the state, it may not be used. The practical operation of the Convention has been reviewed by several Special Commissions.

## **PRE-TRIAL DISCOVERY UNDER ARTICLE 23:**

Requests after the filing of a claim but before the final hearing on the merits are avoided if the party merely seeks to find out what documents might be in possession of the other

party to the proceedings. Cross examination is also permitted, while the person required to give evidence has the privilege to refuse.

### **CONVENTION 33 OF 25<sup>TH</sup> OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION:**

This convention is a multilateral treaty, which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. It seeks to combat parental child abduction by providing a system of co-operation between Central Authorities and a rapid procedure for the return of the child to the country of the child habitual residence. The Child Abduction Section provides information about the operation of the convention and the work of the Hague Conference in monitoring its implementation and promoting international co-operation in the area of child abduction.

Though ratified by 97 countries, much debate is going on for India to ratify it based on various reasons

- Generalized issue as observed by the Law Commission, as it might lead to exploitation of the rights of women.
- Pushes the women who returned to India to seek counsel in foreign courts making it hard to seek justice.
- Dissatisfactory for India women who return home with their children after conflicts with their husband, as it forces to go back to foreign country for settlement purposes.
- Absence of domestic law in India as the term ABDUCTION itself is wrong as observed by the Law Commission (just the custody of either parent as per Indian cultures and values).

The application can be rejected under Article 13, if there is a grave risk involved while returning the child that may affect physical or psychological status and place the child in intolerable situation. According to Article 20 of the Convention, return may be refused if not permitted by the fundamental rules relating to the protection of human rights and fundamental freedom of the state.

### **CONVENTION OF 29<sup>TH</sup> MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION:**

The objective of this Convention is to provide a sound basis for adoption within the framework of the forms and principles. It establishes minimum standards, but does not intend to serve as a uniform law of adoption. It also respects and protects the rights of families of origin and adoptive families. It has been recognized that growing up in a family is of primary

importance and is essential for the happiness and healthy development of the child, to provide the advantages of a permanent family to a child. It makes it clear that both the receiving states and the state of origin must share the burdens of regulating the intercountry adoptions.

The provision of the convention emphasis the welfare of the child as

- a. It only covers adoptions which creates a permanent child relationship
- b. An adoption can only take place after
  - The competent authorities of the state of origin have determined that the child is adoptable
  - The competent authority states the parents are eligible to adopt
- c. An adoption can only take place if these formalities have been completed before the child attaining the age of 18 years.

The Inter country Adoption Technical Assistance Programme (ICATAP) to provide assistance directly to the governments of concerned states and is operated directly by the Permanent Bureau as well as in co-operation with international consultants and experts.

The principle features of the convention are

- a. The Best interests of the child are paramount
- b. Subsidiary principle—only after due consideration to national solutions, should the international approaches be considered and in the child best interests.
- c. Safeguards to protect the child from abduction, sale and trafficking and to protect the birth family from undue pressure and exploitation, preventing improper financial gain and consumption.

### **CONVENTION 37 OF 30<sup>TH</sup> JUNE 2005 ON CHOICE OF COURT AGREEMENTS:**

The Hague Convention on Choice of Court Agreements between parties to international commercial transactions. This was an effect over the Brussels I Regulations for as Jurisdiction is concerned. This Convention desires to promote international trade and investment through enhanced judicial co-operation, uniform rules on jurisdiction and enforcement of foreign judgments in civil and criminal matters.

This Convention excludes consumer and employment contracts. The reasons for exclusion are, in most cases the existence of more specific international instruments and national, regional, or international rules that claim exclusive jurisdiction for some of these matters.

The convention contains three basic rules that give effect to choice of court agreements are

- a. The chosen court must hear the case
- b. Unchosen court must decline to hear the case.
- c. Any judgment rendered by the chosen court must be recognized and enforced in other contracting states, except where a ground for refusal applies.

Article 3 defines Exclusive Choice of Court Agreements, Article 5 deals with the jurisdiction of the chosen court to decide a dispute to which agreement applies, Article 6 says the power of other courts to decline jurisdiction and Article 8 deals with recognition and enforceability, that they may be refused only on the grounds specified in this convention under Article 9.

### **CONVENTION 40 OF 19<sup>TH</sup> MARCH 2015 ON PRINCIPLE ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS:**

This Convention sets forth general principles concerning choice of law in International commercial contracts. This is used as a model for national, regional, super natural, or international instruments as a principle of party autonomy with limited exceptions. It is used to interpret, supplement and develop the rules of private international law, which is applied by the courts and arbitral tribunals.

### **SCOPE OF THE PRINCIPLES:**

In order to apply the principles the following two criteria must be satisfied

- The contract in question must be international
- Each party to the contract must be acting in the exercise of its trade or profession.

The Preamble and 12 Articles mentioned in this Convention are considered to be an international code of current best practice with respect to the recognition of party autonomy in choice of law in international commercial contracts.

The world has to graciously acknowledge the contribution the Hague conference on private international law and continue to make in its endeavor to obtain from the world community approval and acceptance of the outcome of its efforts to unify rules of conflict of laws. Hence, the work of Hague conference is really remarkable, noteworthy and praiseworthy for the world.

## UNIT - II

### JURISDICTION

"Jurisdiction" is a word susceptible of several different meanings, but in the present account it is used in its widest sense to refer to the question of whether an English court will hear and determine an issue upon which its decision is sought. The position is complicated by the fact that there are now four separate sets of rules determining the jurisdiction of English courts.

#### WHO CAN FILE SUITS?

##### POSITION IN ENGLAND:

Anyone can file a suit in England

- British subjects
- Foreigners
- Bodies corporate, whether Inc in England or not, provided they enjoy legal personality under the law under which they are Inc.

##### EXCEPTION:

The only persons who cannot adopt proceedings in English court are enemy aliens. Who is an alien enemy depends not on the nationality of a person, but by the place that he is residing or carrying on business voluntarily. A person regarded as an alien enemy cannot file a suit, but can do so if he's in the UK with the Royal license.

An alien enemy can be sued, and if he is sued, he can defend himself, and find an appeal against any adverse order, final are interlocutory.

##### POSITION IN INDIA:

A foreigner can file a suit in India. A Pakistani citizen can do after the war with Pakistan was over, and the proclamation of emergency had come to an end.

In India, the position is regulated by section 83 of the code of civil procedure, 1908 which is based on the principles of the common law. It is provided that alien friends, and alien enemies residing in India with the permission of the Government of India can file suits like any Indian citizen, but alien enemies residing in India without such permission, or alien enemies residing in a foreign country cannot file a suit.

An alien enemy can, however, defend a suit. It has been held by the Madras High Court (*OhemAbheong vs. Mahomed Rowther, AIR 1946 Mad 328*) that the provisions of section

83 differ from the common law in cases where a friendly country is invaded and occupied by the enemy. A person residing in such a place can't be regarded as an enemy alien as the Government of that country was not at war with India; the court held that the word 'government' must mean the government of the country recognised as such.

### **IMMUNITY FROM SUITS:**

In International law, the foreign states are immune from being proceeded against in the municipal courts of other countries. The leading international conventions are the United Nations Convention on privileges and immunities of the United Nations, 1946 and the Vienna Convention on diplomatic relations, 1946 which provide for immunity to the United Nations and its agencies and diplomats. It is universally recognised.

### **EXCEPTION:**

A foreign head of state or other foreigner, who is entitled ordinarily to claim immunity from process or prosecution, would not be able to do so if its acts falling within International Convention against torture and other inhuman or degrading treatment or punishment 1984 are alleged against him. Such a view has already been taken in the UK.

### **POSITION IN ENGLAND**

Earlier the theory of absolute immunity was in place which provides total immunity to the sovereign i.e. for both Government acts and commercial acts. The leading case that expresses the absolute theory of sovereign immunity is the *Christina case (1938 A.C 485)*.

Later the theory of restricted immunity was in practice wherein immunity is given only to Governmental acts and not commercial acts (*Trendtex Trading Corpn vs. Central bank of Nigeria, 1977 QB 529*).

The position is now regulated by the (English) state immunity act, 1978. Under this act, sovereign immunity applies to

- Foreign heads of state subject to criminal proceedings relating to torture etc.
- Officers of a foreign state in respect of acts done by them in their official capacity.
- State entities to the extent to which the proceedings relate to governmental acts.
- Property of foreign states so that such property cannot be attached in execution.
- Foreign diplomats, foreign consuls, and international organisations such as the United Nations, its specialised agencies and numerous other international organisations. The immunity does not extend to several situations.

## Example-

- Where the state submits to jurisdiction.
- Acts of a commercial nature.
- Matters relating to contract entered into, or to be performed in England.
- Contracts of employment of individuals employed in England.
- Tort claims arising in England.

## **WAIVER OF IMMUNITY:**

A foreign state can waive immunity by submitting to the jurisdiction of an English court.

## **POSITION IN INDIA**

In India, the question is governed entirely by statutes, namely

- Section 86 of the code of civil procedure, 1908
  - The United Nations (privileges and immunities) act, 1947
  - The diplomatic relations (Vienna Convention) act, 1972
- Section 86 of the code of civil procedure, 1908:

**Section 86(1)** conferred immunity from suits to foreign rulers and 'chiefs' of Indian states, and provided that they could not be sued without the consent of the government of India. The object of providing for such consent is to protect the foreign state from harassment or from being dragged into frivolous litigation.

## **EXCEPTIONS:**

Section 86 will not apply to

- Applications under the arbitration act, 1940 for filing an award and for a decree in terms of an award, or proceedings under labour laws.
- Insolvency proceedings
- probate proceedings
- a suit to recover rent from a foreign state in respect of property belonging to the applicant
- rulers of Indian states in case of taxation under the income tax laws. Foreign diplomats and representatives of the United Nations, however, enjoy such immunity under the United Nations (privileges and immunities) act, 1947 and the diplomatic relations (Vienna Convention) act, 1972.

## **WAIVER OR ACQUIESCENCE:**

Immunity can be waived by a foreign state and such waiver can be presumed from conduct. Waiver was presumed when a foreign airline participated in proceedings for 16 years without contending that as the Department of foreign state, it was entitled to immunity (*Kenya Airways vs. Jinibai B Keshwala, AIR 1998 Bom 287*). Waiver of immunity in a previous suit does not amount to a waiver in a subsequent suit.

## **JURISDICTION:**

In International law, courts of any country have jurisdiction over property situated within the country, and over persons who are citizens of that country or domiciled there, who owe allegiance to that country.

## **POSITION IN ENGLAND:**

Under English law the courts have jurisdiction in an action inter parties if the defendant is served with the process, irrespective of the fact that he is a foreigner or was casually present in England, such as a tourist or a person who is in transit. Once the process is served on the defendant the court has the jurisdiction to try the suit, even if the subject matter of the suit is in no way connected with England. On the other hand, if process cannot be served on the defendant or the defendant evades it, then how so ever closely connected the subject matter of the suit maybe with England, English court cannot try the suit. In respect of actions inter parties the court may have jurisdiction in the following situations

- When the defendant is present within the jurisdiction.
- When the court assumes jurisdiction against an absentee defendant.
- When the defendant submits to the jurisdiction.

## **ASSUMED JURISDICTION OF ENGLISH COURTS:**

Clauses (a) to (i) of rule 1 of order 11 embody some of the exceptional cases where the English court may order service out of jurisdiction. Thus jurisdiction may be assumed

- Where the whole of subject matter is land situated within the jurisdiction.
- Where any act, deed, will, contract, obligation or liability affecting land within the jurisdiction is sought to be construed, rectified, set aside in an action.
- Where any relief is sought against any person or corporation domiciled or ordinarily resident within jurisdiction.
- Administration of the estate of a person who died domiciled in England.

- Execution of trust that ought to be executed according to English law. For the application of the rule some property subject to trust must be situated in England; if the trustee had sold out the property situated in England and departed abroad, the rule does not apply.
- Breach of contract which was either made in England or made by or through an agent trading or residing in England on behalf of principal, trading or residing out of England, or by its terms or by implication is to be governed by English law.
- Where the action is based on a tort committed in England.
- Where an injunction is sought ordering the defendant to do or refrain from doing something in England, whether damages are or are not sought in respect thereof.
- Where in action, begun by the writ, properly brought against a person duly served in England, a person out of England is the necessary or proper party thereto.
- Where an action is by a Mortgagee or mortgagor of property (other than land) situated in England.
- Where an action is brought under the carriage by air act, 1961, the carriage of goods by road act, 1965, the merchant shipping (oil pollution) act, 1971 or the nuclear installations act, 1965.

#### **SUBMISSION TO JURISDICTION:**

A person may submit to the jurisdiction of the court either under an express agreement or by contract.

- Submission by conduct
- Submission by contract

#### **STATUTORY PROVISIONS RELATING TO JURISDICTION IN INDIA:**

The general provisions are contained in the Code of Civil Procedure, 1908.

**Section 16** provides that suits for immovable property as also for movables actually under distraint or attachment can be filed in the court within whose jurisdiction the property is situated.

- **Section 19** provides that suits for compensation for wrong done either persons or movables can be filed in the court within whose jurisdiction the wrong was done, or the defendant actually and voluntarily resides, carries on business or personally works for gain.

**Section 20** provides that all other suits can be filed within whose jurisdiction the defendant, or some of the defendants actually and voluntarily reside or carry on business or personally work for gain, or the cause of action wholly, or in part, has arisen.

A Corporation is deemed to carry on business at its sole or principal office in India or in respect of cause of action arising in any place where it has a subordinate office, at such place.

A company incorporated outside India which has established a place of business in India is required to file with the registrar of companies, the name of a person and address where process can be served on it, and service can be effected on such person and at such place (S.592(1)(d) of the companies Act,1956).

### **WHEN COURTS WILL DECLINE TO EXERCISE JURISDICTION OR GRANT AN ANTI-SUIT INJUNCTION:**

Courts in England, other common law countries and in India, while having jurisdiction in personam to restrain a defendant from filing or continuing proceedings in a foreign court, or deciding a matter on a contract executed or to be performed in India may, in certain cases, decline to do so when proceeding between the parties are pending, or proposed to be filed in a foreign court, and if it is found that the dispute may more conveniently be tried in the courts of a foreign country which has jurisdiction, they may decline to exercise jurisdiction.

The court may also decline to exercise jurisdiction because a party has, by a contract made earlier, agreed either that any dispute of particular kind will be determined in a court in another country or by arbitration, in such cases, courts generally compel a party to adhere to an earlier contractual obligation.

### **FORUM NON CONVENIENS:**

#### **DEFINITION:**

A court's discretionary power to decline to exercise its jurisdiction where another court may more conveniently hear a case.

#### **OVERVIEW:**

Forum non conveniens is a discretionary power that allows courts to dismiss a case where another court, or forum, is much better suited to hear the case. This dismissal does not prevent a plaintiff from re-filing his or her case in the more appropriate forum. This doctrine may be invoked by either the defendant, or by the court.

Even if a plaintiff brings a case in an inconvenient forum, a court will not grant a forum non conveniens dismissal if there is no other forum that could hear the case, or if the other forum

would not award the plaintiff any money even if he or she won. Similarly, courts will not grant a forum non conveniens dismissal where the alternative forum's judicial system is grossly inadequate. For example, an American court would not grant a forum non conveniens dismissal where the alternative forum was Cuba.

## **CLASSIFICATION**

All legal systems work on the basis of categories in their common need to structure human relations into legally manageable units. However, this common need is not mirrored in common categories or, if the categories are common, their contents are not. When a purely domestic case comes before an English court, the judge will be concerned to ensure that matters are dealt with in logical order. In broad terms, he will be concerned to pose and answer the following:

- (a) does the court have jurisdiction over the parties and the cause of action?
- (b) has admissible evidence established the basic facts?
- (c) can one classify the cause of action by allocating the relevant legal questions disclosed by the facts to the appropriate legal category.

For example, is the case about the commission of a tort, the breach of a contract or the infringement of a copyright?

- (d) having formulated the correct legal questions, the judge will then be concerned to apply the relevant law as dictated by statute and precedent.

A process similar to steps (a)–(d) is undertaken on a daily basis by judges concerned with domestic litigation. In respect of step (c), the judge will not employ the word ‘classify’, but, in formulating the precise legal questions this is in fact the task that he is performing.

## **CLASSIFICATION AS TO THE CAUSE OF ACTION**

When the court has established the essential facts, it will be necessary to engage in the first stage of the process of classification. In a purely domestic case, a tribunal may ask itself the following questions:

- (a) was a contract concluded?
- (b) if so, was it subsequently breached?

In cases involving a foreign element, it will be similarly necessary to select the correct legal category.

There are a number of theories as to how classification of the cause of action should be undertaken and they will be dealt with below. However, there is little doubt that, in England, initial classification is on the basis of the **lex fori**. In recent years, there have been a number of judicial dicta to the effect that, where a foreign element is in issue, then the task of classification should be undertaken in a liberal and sympathetic spirit.

### ***De Nicols vs. Curlier***

A Frenchman and Frenchwoman married in Paris without any express agreement as to family property so that, under French law, their property rights would be regulated by the rule of *communauté de biens*. Both parties came to England in 1863 and lived here until the death of the husband in 1897. The husband died domiciled in England, leaving a will that failed to recognise the wife's rights under the doctrine of community of property. The widow took proceedings in England to recover her share under the doctrine.

Under English private international law, such proprietary rights are governed by the matrimonial domicile of the parties, save in cases where there is a contract, express or implied, prior to the marriage. So, the point of classification was to determine whether the action of the widow was testamentary, in which case, it would be governed by English law, or whether the claim was contractual, in which case, the suit would be governed by French law. In finding for the widow and overruling the Court of Appeal, the House of Lords found that the claim of the widow was based on an implied contract arising at the time of the marriage and unaffected by the subsequent change of domicile.

## **CLASSIFICATION OF CONNECTING FACTORS**

The **lex causae** has to be ascertained by applying the correct choice of law rule. The choice of law will depend on some connecting factors, such as domicile, situation of the property, place of celebration of marriage etc. The decisive connecting factor may not be the same in all systems of Private International law. For example, when a man of his Germany nationality domiciled in Russia dies leaving movable property in England, the decisive connecting factor in English Private International law domicile but in the eye of Russian Private international law it is nationality. Even when the connecting factor is the same, the meaning given to the connecting factor may be different in two legal systems. When a conflict like this arises, it is necessary to decide which of differing conception about the connecting factor should be accepted. According to English Private International Law English courts looks exclusively to the meaning given by English law and the interpretation given by **Lex fori** prevails.

## **PROCEDURAL AND SUBSTANTIAL LAWS**

Every legal system distinguishes matters either under the category of procedural law or substantive law for various purposes. This distinction acquires a particular significance in private international law. It cannot be determined what law governs a particular issue until that issue is characterized as procedural or substantive.

### **PROCEDURAL LAW**

Procedural law is also called as “law of action”. It is a branch which governs the division of litigation. The term action includes civil, criminal and administrative proceedings and the term “procedure” means the mode by which a legal right is enforced. Thus, procedural law can be defined as the law governing the way in which court proceedings are undertaken. It explains the methods and practices that are followed in the court for a case and describes the series of steps followed in civil, criminal and administrative cases.

As procedural law governs the proceedings of a lawsuit, it is in accordance with the due process of law and due process of law establishes a person’s legitimate right to have legal proceedings if he or she is sued.

In order to sum up it can be said that procedural law governs everything from investigating a matter, through filing a lawsuit, through gathering evidences, to the settlement process and so on. So, basically, procedural laws provide the state with the machinery to enforce substantive rights on people. The well-known example for procedural laws in India are Civil Procedure Code, and Criminal Procedure Code.

In *Barker vs. St Louis County* it was held that, procedural law is a law which prescribes the method of enforcing rights or obtaining redress for the invasion of such rights and it is a machinery of for carrying on a suit.

In *State vs. Elmore* it was held that, as in relation to crimes, procedural law is the law which provides or regulates the steps by which one who violates a criminal statute is punished.

### **PROCEDURAL LAW IN RELATION TO PRIVATE INTERNATIONAL LAW**

It is a well established principal in private international law that all matters of procedural law should be governed by “**Lex Fori**” and no rule of procedure of foreign law can be given effect in this context. It was established in the case of *Huber vs. Stenier* that there is no exception for the general principle. This is because the procedural law of any legal system is the most technical branch of law and the process that will work most smoothly will be provided by the “**Lex fori**”. Therefore, any person who chooses the forum for enforcing his rights must accept the procedure laid down by the forum as held in the case of *De la vega vs. Vianna*. The advantage of this principle is that it ensures certainty and

equality. The following are usually considered as the matters of procedural law in private international law: jurisdictional competence of courts under the domestic law, question of actionability, the procedure for filing proceedings, methods and modes of a trial, all matters relating to evidence, execution of judgments etc.

### **SUBSTANTIVE LAW**

Substantive laws are the written statutory rules passed by a legislature to govern the behavior of a person in a society and the legal relationship between people and between people and the state. These laws define an act and the punishment for it and also define a person's rights and responsibilities. Both civil and criminal law consists of substantive elements.

Substantive law is used to decide whether a crime or a tort has been committed and decide what charges might apply to such. So, when it comes to a lawsuit, substantive law in that suit refers to the subject matter of a case which defines the area of law that would apply to a case. Some example for substantive law includes Law of Contracts, Company's Law, Indian Penal Code etc.

In **Kill Breath V. Rudyit** was held that substantive law creates rights, duties and obligations, whereas a procedural law prescribes method of enforcement of rights or obtaining them.

### **SUBSTANTIVE LAW IN RELATION TO PRIVATE INTERNATIONAL LAW**

In private international law the substantive laws are governed by the principle of "lex cause".

### **CHARACTERISATION OF PROCEDURAL AND SUBSTANTIVE LAW IN PRIVATE INTERNATIONAL LAW**

Though there is a theoretical difference between the substantive laws and procedural laws, a clear cut distinction is too difficult to be made in its practical application. What matters are procedural and what matters are substantive are sometimes difficult to be established as the laws of different countries differ in this aspect.

As mentioned earlier procedural laws are governed by "Lex Fori" and substantive laws are governed by "lex cause", but then there is yet another matter that has to be considered, which is determining if a matter is a substantive law or a procedural law. The determination of this issue is also decided by "Lex fori" as mentioned in the case of *Huber vs. Stenier*.

When private international law was in its developing stage the English court tried to give an extended meaning to the matters that would come under procedural law, to avoid

what they thought was an inconvenient foreign choice of law rule. A judgment was given with this view in the case of *Leroux vs. Brown*. In this case the question brought before the court was that, an oral agreement of service for more than a year entered into in France was enforceable in England. In England, under the statute of fraud, all such agreements for more than a year must be under the seal. An action brought in the English court for its breach failed as the court held that the statute was a matter of procedural law. This judgment was widely criticized.

It was observed by Sir Joncely Simon that, not everything that appears in a written form on the law of evidence has to be seen as a procedural law, but only those provisions which are of technical and procedural nature, e.g. rules as to the admissibility of hearsay evidence. This shows how a difference between these two laws can be made.

On the whole it is stressed that though how much ever difficult it is, there has to be a distinction made as to the matters concerning procedural laws and substantive law, and the principle of “*Lex fori*” applies best to govern such distinctions.

### ***Ogden vs. Ogden***

In 1898 a marriage was celebrated in England between Sarah, a domiciled Englishwoman, and Philip, a domiciled Frenchman, who was 19 years of age. In 1901 this marriage was annulled by a French court on the ground that the consent of Philip's surviving parent had not been obtained as required by French law. Philip subsequently married a French woman in France. Sarah thereupon, in 1903, instituted a suit in England for the dissolution of her marriage with Philip on the ground of his adultery and desertion. This suit was dismissed for want of jurisdiction because Philip was domiciled in France. In 1904 Sarah, describing herself as a widow, married Ogden, a domiciled Englishman, in England. In 1906 Ogden obtained an annulment of the marriage on the ground that at the time of their marriage Sarah was married to Philip. The court classified the rule of parental consent as one relating to formality or procedure. As the marriage took place in England, the formal validity is governed by English law and French procedural rules are inapplicable. This classification has been subject to severe criticism.

## RENVOI

The doctrine of Renvoi is one of the very important and vital subjects of Private International Law, or Conflict of Laws. Because sometimes court sees that the issue will be decided in accordance with the law of another country, it is the time when doctrine of renvoi plays its role in solving the problem.

Renvoi is a technique for solving problems which arise out of differences between the connecting factor used by English law and that of the law to which the English connecting factor leads.

Renvoi is a French word, which literally means “to send back” or “return”.

### PARTIAL OR SINGLE RENVOI

The doctrine of partial renvoi involves a reference to the conflicts rules of the chosen system, which results in either transmission to another legal system or remission to the forum's law.

#### *Re Ross case*

A British national and domiciled in Italy. She died in Italy and left there movable and immovable property as well as some movable property in England. She had made a will about her movable and immovable property in Italy and England. This will was valid in English law but invalid in Italian law as she did not leave half of the property for her son. As she was domiciled in Italy, the English court referred the case to Italian court. Under English conflict of laws the issue was governed by the law of the domicile of the testatrix (Italian law). However, under Italian conflict of laws, the issue was governed by the nationality of the testatrix (English law). Hence, the Italian court referred the issue back to the English court, which held that the will was valid.

#### *Forgo case*

Forgo, an illegitimate Bavarian national, was born with a domicile in Bavaria, but lived most of his life in France without ever acquiring a “domicile” under French law. He left movable property in France but no relatives except for some remote collateral relatives of his mother. These could not succeed him under French law, and under French law the property, being ownerless, would go to the French state. Under Bavarian law they could succeed. The French Private international law the law to be applied was the *lex patriae*. i.e. law of nationality namely the Bavarian law. Bavarian Law was taken in wide sense of the whole law of Bavaria including Bavarian Private International law. According to Bavarian Private International law succession to movable property (intestate) was governed by the law of the place (*lex situs*). This reference was accepted by the French court and the French Law of Succession was applied, thus depriving the right of succession to Forgo's collateral relatives.

## **TOTAL OR DOUBLE RENVOI**

Total or double renvoi is also known as “foreign court theory”. Cheshire and North defines total renvoi in these words: “This demands that an English judge, who is referred by his own law to the legal system of a foreign country, must apply whatever law a court in that foreign country would apply if it were hearing the case.” The English judge is required to make an imaginary journey to the Foreign land (*lex causae*) and sit in the court of that country.

### ***Collier vs Rivaz***

A British subject who died domiciled in Belgium made a will which was valid according to English law, but not according to Belgian Law. At that time the validity of the will should be tested by the law of the place where the testator was domiciled at the date of his death. If the case were to arise in a Belgian Court, that court would apply the English law as the law of nationality. The validity of the will was tested by English Law and the will was held valid.

### ***Re Annesley***

Annesley an English woman left a will; according to English law, she died domiciled in France but, according to French law, she had not acquired a French domicile because of a failure to comply with registration formalities. The testamentary dispositions were valid by English law but invalid by French law because she had failed to leave two thirds of the property to her children. English Private International law referred the question of validity of will in the law of domicile, namely, French law. French law was taken in wide sense including French Private International law. French Private International law would have applied law of nationality. i.e. English Law and the English law would refer the matter back to French Law. Partial renvoi is accepted by the French law and therefore that reference would be accepted the French Internal law would be applied. Thus, the English court applied the French law and held the will to be invalid.

## **ADVANTAGES OF RENVOI**

Firstly, on resorting to foreign choice of law rules, the court avoids a foreign internal law that has no connection with the *propositus*.

Secondly, it is argued that it promotes the reasonable expectation of the parties. It might be argued that this was the case in *Re Annesley* but it is difficult to imagine how the same could have been said of the result in *Re O’Keefe*.

Thirdly, it is argued that renvoi produces a degree of uniformity of the decision, terms of the governing law at least, in cases where English choice of law rules put the premium in this, that is, where the *lex situs* is applied on the basis of effectiveness. Moreover, it is arguable that such degree of uniformity is not achieved by the single renvoi doctrine. Against this, it

must be observed that, in a world in which different connecting factors are used, then such a degree of uniformity is probably unattainable. Moreover, it is arguable that such a degree of uniformity is not achieved by the single renvoi doctrine; if both country A and country B adopt connecting factors of domicile and nationality respectively and then both adopt the partial renvoi doctrine, then the result will differ according to where the case is litigated.

Fourthly, In respect of the total renvoi technique, while, in principle, it should produce uniformity of decisions, it can, in practice, be applied only by one country because, if the *lex causae* were also to apply it, then there would be no way out of the revolving door. The experience since 1945 is that uniformity of decision making is more likely to be achieved by the implementing of internationally agreed conventions. It is also argued that the technique of renvoi can be manipulated to avoid applying an inappropriate foreign rule, however, the same object can be achieved by the development of appropriate public policy rules.

### **DISADVANTAGES OF RENVOI**

It has been argued that the study of the cases indicate that English court concludes by subordinating its own choice of law rules to those of another country. Against this, however, it can be argued that this would not happen in those cases where the foreign rule offended some particular rule of public policy.

Secondly, its opponents argued that the application of the doctrine required to familiarise himself with

a) The foreign internal law

b) The relevant choice of law rules

c) The policy, if any of the foreign law towards the doctrine law towards the of single renvoi. This limitation of the doctrine of renvoi is that it normally involves calling detailed expert evidence as to the state of foreign law; normally, parties will seek to avoid such a course.

Thirdly, the opponents of renvoi argued that having regard to the fact that nationality is the connecting factor most commonly employed in the civil law world, the English courts out itself in a position of being unduly influenced by nationality when there is no concept of English nationality having regard to the states of U.K.

## **DOMICILE**

Domicile is a legal concept. It is a connecting factor which links a person with a particular legal system. The concept has played a significant role within the English conflict of laws since the middle of the 19th century. A tentative definition of 'domicile' would be 'permanent home'

Lord Cranworth in *Whicker vs. Hume* stated that 'By domicile we mean home, the permanent home, 'And if you do not understand your permanent home, I'm afraid that no illustration drawn from foreign writers or foreign languages will very much help you do it.'

### **RULES REGARDING DOMICILE**

- (a) No person can be without a domicile.
- (b) A person cannot at the same time have more than one domicile (at least, no more than one for the same purpose)
- (c) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired.
- (d) The question of where a person is domiciled is determined solely in accordance with English law and
- (e) The relevant standard of proof is the civil standard of proof.

There are three forms of domicile:

- (a) Domicile of origin, which is the domicile attributed at the time of birth;
- (b) Domicile of choice, which is the domicile a competent person may acquire during his lifetime; and
- (c) Domicile of dependency, which means that the domicile of the dependent person is dependent on the conduct of another.

### **DOMICILE OF ORIGIN**

Domicile of origin is assigned by law to a child when it is born. The domicile of a legitimate child is the domicile, of whatever sort, his father had at the time of the child's birth. An illegitimate child takes its domicile of origin from its mother's domicile at the time of its birth but this is somewhat artificial, as the issue of legitimate status may itself depend on domicile. The domicile of origin acts as a fall back, whenever there is no other domicile, it comes to fill the gap. It avoids assuming the continuance of an abandoned domicile.

## ***Udny vs Udny***

Colonel Udny was born in Leghorn in 1779 (where his father held a consular post) with a Scottish domicile of origin. He joined the Guards in 1797 and acquired a property in London, where he lived with his family until 1844. He then left for France to avoid pressing creditors but did not acquire a domicile of choice. At a later date, he fathered a child and then married the mother. In proceedings before the Scottish courts, the question arose as to whether the child was legitimated per subsequens matrimonium.

In giving judgment for the House of Lords, Lord Westbury stated as follows

“It is a settled principle of law that no man shall be without a domicile, and to secure this result the law attributes to every individual, as soon as he is born, the domicile of his father if he be legitimate ... this has been called the domicile of origin and is involuntary.”

In considering the particular nature of the domicile of origin, Lord Westbury further noted:

“... as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles, of which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished.”

In these circumstances, the House of Lords held that, even if Colonel Udny had acquired a domicile of choice in England, he had abandoned it by departing for France and, at that point, his Scottish domicile of origin revived.

## **DOMICILE OF CHOICE**

Every person who is over the age of majority, and is not mentally incapable, is regarded by English law as able to acquire a domicile of choice by residing in a country with the present intention of making it his permanent home. There are two requirements (a) the fact of residence (*factum*) and (b) intention to reside (*animus*).

## ***Winans vs. AG***

William Winans was born in Maryland. He built railways in Russia and also constructed gunboats against England. He, then, became affected with tuberculosis and being advised by doctors to reside in England and lived there all his life at various places until his death. Question dealt was whether he had the intention of making England his permanent home. House of Lords held that there was no evidence to show that Mr. Winans had abandoned his domicil of origin. There was no intention from winans to stay in England other than getting treatment for his disease.

### ***Ramsay vs. Liverpool Royal Infirmary***

George Bowie was born in Scotland and worked for a time as a commercial traveler in Glasgow. He gave up work in 1882 and decided in 1892 to live in Liverpool, where his brother and sister were resident. He lived in Liverpool for 36 years until his death in 1927 at the age of 82. The holograph will that he left at his death would be valid under Scottish law but not under English law. It therefore became necessary to determine his domicile at the date of death. House of Lords held that despite his long stay in England, George Bowie had not acquired a domicile of choice, as he would have moved from England if those members of his family with whom he was living had decided to move.

### **PRISONERS**

The essence of imprisonment is that the individual is deprived of his personal freedom to move from place to place. In these circumstances, the prisoner will continue to retain the domicile that he possessed before his imprisonment.

### **REFUGEES**

It is difficult to say the same with regard to refugees who flee the country of their birth out of necessitous circumstances. They may lodge a hope in their minds to return to the country of origin when it becomes safe to do so. It may be said that there is a presumption against the change of domicile in such cases. It may equally be said that what is dictated by necessity in the first instance afterwards becomes a matter of choice.

### **FUGITIVES FROM JUSTICE**

A fugitive from justice may acquire a domicile of choice if it is clear that he intends to establish links with his new country, it is open to argument as to whether the mere flight from justice raises a presumption in favour of the acquisition of a fresh domicile. In certain instances, there may be value in examining whether the individual has remained in a particular country long after he could have returned home in safety. Where there is evidence that England is being used as a staging post in circumstances where the fugitive may move again to avoid extradition, then a domicile of choice is not acquired.

### **DOMICILE OF DEPENDENCE**

At birth, a child receives two domiciles, origin and dependence, which are initially, in the vast majority of cases, the same. The domicile of origin will be overlaid by the domicile of dependence. While the domicile of origin remains constant throughout life, the domicile of dependency changes with the domicile of the person on whom the child is domiciliary dependent.

As per English law, there were three categories of persons that were regarded as being subject to a domicile of dependence, namely:

- (a) married women;
- (b) children; and
- (c) Lunatic.

As per common law, the rationale was that such persons lacked the capacity to acquire a domicile of choice. The law on the subject was changed by the Domicile and Matrimonial Proceedings Act 1973 and these changes will be considered below.

## **MARRIED WOMEN**

As per English, rule was that a married woman acquired the domicile of her husband and her domicile would change with that of her husband. This rule has now been abolished in England by section 1 of “The Domicile and Matrimonial Proceedings Act of 1973 which states that the domicile of a married women at any time on or after January 1, 1974 shall instead of having the husband’s, shall chose her domicile as that a independent person.

### ***Lord Advocate vs. Jaffrey***

A husband and wife were domiciled in Scotland. The husband left to live in Queensland with the consent of his wife. He contracted a bigamous marriage in Queensland. The wife remained in Scotland where she died. Proceedings were brought in Scotland to determine the domicile of the wife. On appeal to the House of Lords, it was ruled that the wife was domiciled in Queensland, even though she had never visited there.

### ***Puttick vs. AG***

The petitioner a German National and domicile of Origin was arrested in Germany and charged with the number of serious offence. While on bail, she absconded and using illegally obtained a passport of another German national came to England and married an Englishman in 1975. The question before the court was whether she had acquired an English domicile. It was held that rule of unity of domicile of husband and wife had been abolished by Domicil and matrimonial proceedings act 1973 and therefore, she did not acquire domicile in England. The court further that she did not and could not acquire domicile in England as she was staying in England to avoid it trial in Germany and not a set up a permanent home. The illegal entry and residence according to the court barred her from acquiring and English domicile of choice.

The Indian statutory law does not allow English law. The Indian Succession act, 1925, Section 15 and 16 incorporate the general rule: on marriage the wife acquires the domicile of

her husband during the coverture her domicile is the domicile of her husband. Then it is laid down that wife acquire her own domicile in the following two cases:

- (1) If wife is living separately under the decree of the court, or
- (2) If husband is undergoing a life sentence.

### ***Prem Pratap vs. Jagat Pratap***

A German domicile women married a domiciled Indian and setup matrimonial home in India. After some time the husband left the wife. The wife filed a suit for maintenance in Indian Court. The main defence of the husband was that on abandonment of the wife by him, the wife's pre-marriage domicile had revived and therefore the court has no jurisdiction to entertain the petition. Rejecting this plea, the court observed that during coverture domicile of the wife remains that of the husband.

## **CHILDREN**

The general rule at common law was that, upon birth, a legitimate child acquired the domicile of its father, while an illegitimate child acquired the domicile of its mother. As a dependent domicile, this would change with that of the parent, so that a legitimate child born to a father domiciled in Italy would acquire a domicile of origin and dependence in Italy but, if the father then acquired a domicile of choice in France, the child would then acquire a domicile of dependence in France. The operation of the rules is not without difficulty because the question of whether a child is legitimate or not is itself referred to the **lex domicilii** so that, in such circumstance, it will be necessary to come to a conclusion on the validity of the marriage of the parents. In respect of particular cases concerning children, the position can be summarised as follows:

- (a) After the mother of an illegitimate child has died, or both parents have, in the case of a legitimate child, the child will continue with the domicile of dependence until he is capable of acquiring an independent domicile;
- (b) A child is capable of acquiring an independent domicile when reaching the age of 16 or if he marries under that age;
- (c) In cases of a legitimate child whose the parents are living apart and where the child has a home with the mother, then the child will acquire the domicile of the mother and, in such a circumstance, if he lives with the father he will acquire the domicile of the father;
- (d) In situations where the father dies, the domicile of the child will normally follow that of the mother, save in those situations where the mother leaves the child with a relative when moving to a new country;

(e) In the case of an adopted child, such a child will be treated as if he were the natural child of his adopted parents. Thus, from the date of adoption, if not earlier, he will have the domicile of his parents.

## LUNATIC

As with other children, an insane child also has a domicile of origin communicated at the time of birth. Is a lunatic capable of acquiring a domicile of dependence? It is an agreed principle that the domicile of a lunatic cannot be changed either by himself, as he cannot have the requisite intention) or by the person to whose care he has been entrusted. If a person becomes a lunatic after becoming a major and after acquiring a domicile of choice he retains this domicile during the period of lunacy, as a general principle. This is so because he is incapable of either acquiring a fresh domicile or of losing an existing domicile. It has been suggested if a person is insane continuously both during his infancy and after he reaches the age of 16, his domicile will change with that of his father. On the other hand, if a person becomes a lunatic after the age of 16 the domicile he had at that time could not be changed as to allow this would do great damage to the "interests of others". This distinction has been characterized by **Cheshire** as irrational. The correct solution, according to him, would be that the court of protection should be entitled to change the lunatic's domicile if this appears to be for his benefit.

This solution cannot be seriously objected to as the paramount consideration should be the interest of the lunatic and not the interests of others.

## COMMERCIAL DOMICILE

The term '**commercial domicile**' is a misconception and is in no sense akin to domicile. It is a legal conception used in war time as a test of enemy character. Foote called it "**Quasi domicile**". It denotes any person, natural or artificial, who resides voluntarily or carries on business in an enemy territory. It includes a firm carrying on business in an enemy territory. It has nothing to do with the nationality of the person who resides there or trades there. He may be an Indian national or a national of a friendly country or of a neutral or of an enemy country. Sometimes even the property is attributed to have a commercial domicile so that it is made liable to seizure.

The distinguished features of domicile and the so-called commercial domicile are:

(1) Domicile attaches to a person all throughout his life, while the commercial domicile comes into effect only during war-time.

(2) *animo et facto* is essential in the case of domicile in case of commercial domicile neither residence nor intention is necessary. A person may not reside in enemy territory, but if he trades there commercial domicile attaches to him,

(3) No person can have more than one domicile for one and the same purpose but a person can have more than one domicile for one and same purpose, but a person may have any number of commercial domiciles, and

(4) The commercial domicile is *sine animo revertendi* but domicile is not lost unless a new one acquired.

### **DOMICILE COMPANIES OR CORPORATION**

One of the important question status of the artificial legal person like a company or corporation are governed by the same law that governs the status of an individual. i.e. The law of domicil. The company is domiciles in the country where it is incorporated. Every individual on birth gets a domicile by operation of law, namely the domicile origin. So also, a company, the movement is brought into existence is given a domicile of origin. i.e. the country of incorporation. But there is one difference. An individual can change his domicil by acquiring domicile of choice. This is not possible in the case of corporation. The Corporation throughout its existence has only one domicile- the place of incorporation.

### **NATIONALITY OF CORPORATION**

In conflict of laws cases the nationality of corporation does not usually figure as relevant issue. According to English law a corporation is regarded as the national of the country where it is incorporated.

### **PRESENCE**

We have seen that and English Court gets jurisdiction over a person by his mere presents. The same principal applies to artificial persons like corporations. It is not necessary that a corporation should be resident or domiciled or incorporated within the jurisdiction. The question therefore is when can a corporation be said to be present in the jurisdiction. The answer is 'by doing business'. The only way in which artificial entry can show its presence is by transaction of business. The business must have been done in England not merely done with England. This is ascertained by examining whether an agent have been employed in England with authority to enter into transaction binding on the Corporation. If he only receives, offers in England which he transmits abroad for acceptance there is no business done in England. It is also necessary that agent must have operated at a fixed place of business for a definite period of time, it does not matter that place of business is temporary or that the time of business is very short.

## **RESIDENCE**

Residence of corporations is very important as the basis of liability for income tax is residence, not domicile. It becomes necessary to determine whether a foreign Corporation is resident in England. Residence depends upon control. A company or corporation is regarded as resident in the country where the centre of control exist, i.e. the place from where its affairs are controlled. The place of incorporation is not at all decisive; it is only one of the factors to be taken into consideration in determining where the centre of control is located.

## UNIT - III

### MARRIAGE

#### **FORMAL VALIDITY: THE PRINCIPLE OF LOCUS REGIT ACTUM:**

It has been settled since 1725, that formalities of marriage are governed by *lex loci celebrationis*, law of the place where the marriage was celebrated. The maxim is *locus regit actum*, i.e. the place governs the act. In the words of Cheshire “there is no rule more firmly established in private international law than that which applies the maxim *locus regit actum* to the formalities of marriage”. If a marriage is good by the law of the country where it is effected, it is good all the world over even though the ceremony would not be recognised in the country where the parties are domiciled.

#### **FORMAL VALIDITY OF MARRIAGE:**

In order to determine the formal validity of marriage the English court will apply *Lex loci celebrationis* (law of the place where marriage was celebrated). A marriage which is formally valid according to the law of the place where marriage was celebrated would be declared valid by the English court even though it is invalid according to English law.

#### **DISTINCTION BETWEEN FORMAL VALIDITY AND ESSENTIAL VALIDITY:**

The statement made above that a marriage good by the *lex loci celebrationis* is good all the world over is correct only with regard to formal validity. Essential validity of marriage is governed by entirely different principles. Therefore the question whether a particular requirement relates to formal validity or essential validity is supremely important.

#### **EFFECT OF CHANGES OF CHANGES IN LEX LOCI CELEBRATIONIS**

The formalities required by the *lex loci celebrationis* may be altered by change introduced in law. It seems clearly that the *lex loci* at the time of celebration of marriage once for all determine formal validity; the married status unaffected by changes introduced subsequently. Otherwise the relationship between parties will remain insecure.

Although a marriage valid by *lex loci celebrationis* at the time of marriage will not be invalidated by subsequently changes in that law, the converse may not be correct. A marriage which does not comply with the formalities prescribed by the *lex loci* at the time of marriage may be validated by subsequently retrospective changes in the *lex loci*. Though originally invalid by the local law, if such marriages are validated by retrospective changes in the local law, the principle *locus regit actum* is satisfied.

### ***Starkowski vs. Attorney General.***

Two Roman Catholic domiciled in Poland were married in May 1947 in Roman Catholic Church in Austria without a civil ceremony. After a few weeks, an Austrian legislation validated such marriages retrospectively. So, the marriage was registered in 1949 by which time the parties had acquired an English domicile. By 1950, the wife married another man in England. The issue before the House of Lords was whether the second marriage in England was valid; this depend upon the validity if the Austrian marriage. The Austrian marriage was valid and therefore the English marriage was bigamous void. The Court accepted the retrospective Austrian legislation.

### **EVASION OF DOMESTIC RULE WILL NOT AFFECT THE “PRINCIPLE OF *LOCUS REGIT ACTUM*”:**

The predominance of *lex loci celebrationis* with regard to formal validity is not affected even if the sole object of the parties in celebrating their marriage in another country is to void some inconvenient rule of their *lex domicilii*.

### ***Simonin vs. Mallac,***

The parties ‘domiciled in France, crossed the channel and celebrated their marriage in England without obtaining parental consent as enquired by French law. English law does not require parental consent. The wife later petitioned for a decree of nullity. The court dismissed the petition since consent is only a required formal validity and its absences will not affect a marriage celebrated in England.

### **EXCEPTION TO THE RULE OF *LOCUS REGIT ACTUM*:**

There are certain exceptions to the rule that a marriage which does not satisfy the formal requirement of *lex loci celebrationis* is invalid. Under the following circumstances a marriage is regarded as valid even though it has failed to observe the formal requirements of *lex loci celebrationis*.

#### **a) THE TWO STATUTORY EXCEPTIONS:**

By virtue of the foreign marriages act of England, a marriage solemnised before a marriage officer in a foreign country would be valid if one of the parties is a British subject.

#### **b) MARRIAGE OF MEMBERS OF BRITISH FORCES SERVING ABROAD:**

A marriage of a member of British armed force serving in a foreign country will be formally valid if it was celebrated by the Chaplin serving with the force or by the authorised commanding officer.

### **c) THE COMMON LAW EXCEPTION: COMMON LAW MARRIAGES:**

If there is an insuperable difficulty in following of *lex loci celebrationis*, (for eg: Christian parties wishing to marry in a heathen country, or a Mohammed country or in a desert or uninhabited island etc.) the marriage will be regarded as formally valid, if the marriage is celebrated in accordance with the requirement of English common law. The requirement of English common law is:

1. The parties should take each other as husband and wife.
2. An episcopal ordained priest should perform the ceremony.

### **d) MARRIAGE ON THE HIGH SEA:**

A view has been expressed that the absence of an ordained priest would be fatal to the formal validity of a marriage at sea, unless it is a marriage of necessity. This would imply that if there are circumstances which would justify the marriage being celebrated on board the ship without waiting for the ship to reach a port, the marriage may be regarded as valid even in the absence of an ordained priest. This appeared to be the present position with regard to the marriage at the sea.

Marriage on board British warship are how regulated by section 22 of the Foreign Marriage Act, as amended by the Act of 1947.

### **ESSENTIAL VALIDITY OF MARRIAGE OR CAPACITY TO MARRY:**

The legal capacity to marry deals with the matter such as consanguinity and affinity, bigamy and lack of age. Consideration is given later to the law to govern matters of consent and physical incapacity.

The capacity of the parties to enter into a valid marriage is, no doubt, a matter relating to essential validity. All impediments to marriage such as lack of age, prohibited degrees of consanguinity affinity, previous marriage, and physical incapacity in fact all impediments other than purely formal ones come under this topic.

### **WHICH LAW SHOULD GOVERN THE CAPACITY TO MARRY? RIVAL THEORIES:**

With regard to the capacity to marry, there are two theories:

#### **a) DUAL DOMICILE THEORY:**

According to this theory, a marriage is invalid unless according to the law of domicile of both the parties at the time of marriage, they have the capacity for marriage. In order to determine the capacity of parties to a marriage, the law of anti-nuptial domicile of both the

parties have to be considered by the English court. If they have capacity as per the law of domicile before their marriage, the marriage will be declared valid.

For e.g., the marriage between an uncle and a niece, Jews by religion, uncle being domiciled in Russia and the niece being domiciled in England at the time of marriage. According to the dual domicile theory, the marriage is invalid since the parties do not have the capacity to marry by English law, although by Russian law such marriages are allowed.

#### **b) INTENDED MATRIMONIAL HOME THEORY:**

According to this theory, the capacity to marriage should be governed by the law of the country where the parties at the time of marriage intended to establish their matrimonial home and actually established their matrimonial home.

#### **ENGLISH LAW:**

When we examine the decisions of English court, we could see that the English court have given recognition to both the theories. However, most of the English cases strongly support the dual domicile theory.

***Brook vs. Brook, (1961)*** a marriage was celebrated in Denmark between a domiciled English man and his deceased wife's sister also of English domicile. Marriage between a man and his deceased wife's sister was legal by Danish law but was illegal by English law at that time. The House of Lords applied the dual domicile theory and held that the marriage was invalid.

#### **Case law: *Mette vs. Mette,***

In this case, an English domiciled man married his deceased wife's sister of German domicile. The marriage was celebrated in Germany, and after the marriage, they settled at England. The marriage was valid by German law but invalid by English law. The court held that the marriage was invalid according to both the theories.

# **GUARDIANSHIP AND ADOPTION**

## **ADOPTION**

Adoption is the process by which a child is brought permanently into the family of the adopter and parental responsibility for the child is transferred to the adopter. It is recognized that there are many children in India and abroad who are in need of a permanent home and an adoptive family, and for whom Inter-country adoption offers the best prospects of stable domestic life. However, the dissatisfaction with the domestic law on adoption led to the establishment of a departmental committee to review adoption law and procedure, and the committee produced its report in 1972.

The recommendations of the committee reached the statute book in the form of the Children Act 1975 and then the entire legislation on adoption was consolidated in the Adoption Act 1976. The Adoption Act 1976 came into force on 1 January 1988 and has been subject to limited amendments made by the Children Act 1989.

In England, the domestic law begins with the Adoption of Children Act 1926. However, the legislation was later considerably amended and then consolidated in the Adoption Act 1958. In 1965, the UK signed the Hague Convention, relating to the adoption of children, and this was given effect to in the Adoption Act 1968. The English law emphasizes the legal nature of adoption as being in the nature of a transfer, the social purpose being to establish ties between the child and the adoptive parents. In contrast, civil law systems draw upon the Roman law concepts of *adoption* and *adrogatio*; under Roman law, one of the purposes of adoption was to prevent a family becoming extinguished and to create heirs. This legacy is to be found in civil law systems, where adoption may be used to provide heirs or to affect the inheritance of other relatives.

### **JURISDICTION OF ENGLISH COURT TO PASS ADOPTION ORDER**

The English courts have jurisdiction to make an adoption order on the following grounds.

- 1) If the applicant is domiciled in England or Scotland, and
- 2) If the applicant and infant reside in England.

In exceptional cases the competent court can make an order of adoption although the applicant is not ordinarily resident in England. It may be noted that there is no jurisdictional requirement that the infants must be domiciled in England.

## **CONVENTION ADOPTIONS**

In the year following the 10th session of the Hague Conference on Private International Law 1964, the UK signed the Hague Convention on Adoption. Legislation to give effect to the Convention was introduced in the Adoption Act 1968, although the jurisdictional requirements were modified by Section 24 of the Children Act 1975. The UK ratified the Convention in 1978 and the domestic legislation came into force thereafter. The relevant domestic legislation is now contained in the Adoption Act 1976. The guiding principle of the Convention is to provide uniformity of status by balancing the rules of the country of the adoptive parents with the legislative requirements of the country of the natural parents. The legislation does not apply to domestic adoptions, where the applicants and the child are UK nationals living in British territory.

The effect of the provisions is to extend the jurisdiction so as to enable an English court to make an order in favour of an applicant or applicants who are UK nationals or nationals of a Convention country and who must be habitually resident in British territory or a Convention country. The child must also be a national of, and be habitually resident in, the UK or a Convention country. Although, in general, English law will apply, the national legislation reflects the Hague Convention in providing that, where the applicant or applicants are from a Convention country, then no order must be made if it conflicts with the internal law of that country. In cases where the child is not a national of the UK, then an order will only be made if the rules in respect of consents and consultations arising under the internal law of the Convention country of which the child is a national have been complied with and those who consent do so with full understanding. The legislation contains provision for quashing orders where there has not been compliance with these requirements.

## **RECOGNITION OF FOREIGN ADOPTIONS**

There are many circumstances in which a case may arise in which an English court is concerned with whether a foreign adoption order should be recognised and, if so, with the effect of any such order. The case law indicates that the question will often arise incidentally, for example, in property and succession cases as to whether a particular person can succeed under a will.

Questions of recognition also arise in cases in immigration law, social security law or rights on intestacy.

There are three distinct aspects of recognition, namely,

- (a) Recognition of adoptions made elsewhere in the British Isles;
- (b) Recognition under the Adoption Act 1976; and

(c) Recognition at common law.

A number of statutory provisions are directed to the recognition in England and Wales of an adoption order made in another jurisdiction. An adoption order made in Scotland will be recognised in England and Wales as will an adoption order made in Northern Ireland, the Channel Islands or the Isle of Man. The Adoption Act 1976 makes provision for both 'overseas adoptions' and 'regulated adoptions'. An overseas adoption<sup>96</sup> is an adoption effected under the law of a country outside Great Britain of such a description as is specified by the Secretary of State in a statutory instrument. The object of the provision was to permit the recognition of adoptions that were granted by legal systems that followed criteria broadly the same as those in England and Wales. By delegated legislation, the adoption must have been made under statutory provision and the person to be adopted must be under the age of 18 and unmarried.

The Adoption Act 1976 provides for the recognition of overseas adoptions (and, therefore, also regulated adoptions). The statute provides two circumstances in which recognition will be denied, namely, where the adoption is contrary to public policy or where the authority that made the order lacked jurisdiction, save that the English court will be bound by any finding of fact pertaining to jurisdiction.

There will still be countries to which the statutory rules do not extend and recognition will be dependent on the relevant common law rules. The early case law was inconclusive as to whether English courts would give any effect to an adoption effected in a foreign country. In *Re Marshall, Harman J* indicated that he was prepared to recognise a foreign adoption if the child and the adoptive parents were domiciled in the same country but, on the facts of the case, the learned judge found that the child did not enjoy full rights of succession. The Court of Appeal, in upholding the judgment, did not find it necessary to deal in detail with the circumstances in which a foreign order of adoption might be recognised.

The leading authority on the recognition of foreign adoptions at common law is *Re Valentine's Settlement*

### RE VALENTINE'S SETTLEMENT

A British subject domiciled in Southern Rhodesia created a settlement of funds for his son, Alastair, for life, remainder to his children. Alastair, who was domiciled and resident in Southern Rhodesia, married and had a child, Simon. At a later date, he and his wife adopted two children in South Africa; these adoption orders were not recognised in Southern Rhodesia. The question for the court was whether the two adopted children could benefit under the settlement.

The Court of Appeal, by a majority, upheld the judgment of Pennycuik J and refused to recognise the adoption. **Lord Denning MR** ruled that, at common law, for the adoption to be recognised, the adoptive parents must be domiciled, and the child resident, in the country where the order was made. This was in line with the *Travers vs. Holley* principle of the English court recognising a jurisdiction which, *mutatis mutandis*, it claimed for itself.

One other point that emerges from *Re Valentine's Settlement* is that the Court of Appeal agreed that a foreign adoption order would be refused recognition in England if it was contrary to public policy. This is a matter of some practical importance, given that, in some countries, adoption orders are applied for in respect of adults in order to achieve some advantage in respect of succession.

### **THE EFFECT OF A FOREIGN ADOPTION ORDER**

As **Lord Denning MR** indicated, in *Re Valentine's Settlement*, there is an important distinction between (a) the recognition of a foreign adoption order; and (b) the effect of any such recognition. As a general principle, the Adoption Act 1976 provides that an adoption order recognised by statute or common law will have the same effect as an English adoption order.

The English law regards the adopted child as the legitimate child of the adoptive parents. In respect of succession by adopted children, the law prior to 1 January 1976 was less than clear. The law on the matter had changed several times since 1926 and the relevant statutory rules applied to adoptions made in Great Britain.<sup>107</sup> However, the succession rules in respect of children adopted abroad were governed by common law and it was difficult to reconcile the case law. The provisions of Section 38 of the Adoption Act 1976 provide that a child adopted abroad will have the same legal status as one adopted in England and Wales. Section 39 of the same legislation then provides that, in respect of any instrument taking effect after 1 January 1976, the adopted child will be treated as if he had been born in lawful wedlock. Although Section 38 provides that 'adoption' includes both overseas adoptions and adoptions recognised at common law, it would seem that the provisions of Section 39, in so far as they pertain to succession, will only apply when English law is *the lex successionis*. If the *lex successionis* provides for only limited rights for adopted children, then such limited provision will apply. Although there is no direct authority on the point, it is in line with the distinction drawn in *Re Valentine's Settlement* to the effect that recognition of the status of adoption is determined by the *lex domicilii* but rights of succession should be governed by the *lex successionis*.

## **GUARDIANSHIP AND CUSTODY OF MINORS**

### **POWERS OF THE ENGLISH COURTS:**

It was the prerogative of the crown, acting in its capacity as parent's paltrie, "To do what was necessary for the welfare of its minor subjects". From time in memorial, this power was exercised by the courts on behalf of the crown. Thus the courts have an inheritant jurisdiction over infants. In addition, the courts now have statutory jurisdiction under The Guardianship of Minors Act 1971. Once the jurisdiction of court is invoke; it is in complete control of the minor; it can restrain him or her from marrying without its consent and it can prevent it from leaving the country. The court also gets power to deal with any case containing a foreign element. It can appoint a guardian to a British minor who is resident abroad .It is competent to restrain the removal an infant from England; whatever be is domicile or nationality .It is equally competent to direct that a foreign infant be send home and placed in the care of his foreign guardian .There is one limitation; however in the case of foreign minors. This limitation is that the court is in competent to pass orders relating to a minor unless the minor is personally subject to its jurisdiction.

### **JURISDICTION OF COURTS**

It is a fundamental principle that the sovereign accords protection to all those who owe him allegiances And this include not only British subjects those aliens whom are present in England. Therefore, ithas long been established that court has jurisdiction to appoint a guardian for a minor if he is present in England even though he is not domiciled in England and owns no property in England. The court can exercise jurisdiction not withstanding that the court of his domicile has already appointed guardian for him .The court can exercise jurisdiction also in cases where the minor is a British subject, Though not resident in England .But in the present day conditions, jurisdiction on this ground will be exercised only in exceptional circumstances, since the concept of British nationality as been radically changed.

### **DOMICILE AND ORDINARY RESIDENCE AS JURISDICTIONAL BASIS**

It is important to bear in mind that the English domicile of a minor by itself is not sufficient to confer jurisdiction on the court. Similarly the flat that the minor possess property in England is also not a ground to exercise jurisdiction.

It has already been stated the physical presence of the minor in England is a sufficient jurisdictional base, even if the foreigner .It is now established that the court is competent to exercise jurisdiction that he is ordinary resident in England. Although physically not present this was decided in the case of rep (1965 ch. 568). Here a husband and wife, both stateless persons lived separately in England. They had a six year old son who spends five days a

week with his mother and the weekends with his father. One weekend the father flew with the son to Israel and the mother filled a petition seeking to make her son a ward of the court. On the question whether the English court exercise jurisdiction over this infant, Domicile was rejected as a jurisdictional ground. Lord denning M.R. said that “the testus of domicile or far too unsatisfactory in order to find out a person’s domicile, You have to apply a lot of archaic rules Russell, rejecting domicile send that the whole trend of English authority on the parental jurisdiction of the crown over infants basis the jurisdiction of protection as a corollary of allegiance in some shape of form. Domicile an artificial which may will involve no possible connections with allegiance’. The court assumed jurisdiction the basis of ordinary residents it was held that the child was ordinarily resident in England, though for the last two years he was physically present in Israel.

We may, therefore , state the present position as follows: In the case of an alien minor, the English court as jurisdiction if, at the time of the proceeding either (1) he is physically present ,although not domiciled in England or (2) he is ordinarily resident though not in fact present in England. In the case of a person too young to decide for himself where to live, his ordinary is the matrimonial home of his parent’s if they lived together but if they live separate, The ordinary residents is at home where he normally lives.

#### **PRINCIPLES UPON WHICH POWERS ARE EXERCISED:**

#### **RECOGNITION OF FOREIGN ORDERS RELATING TO MINOR:**

In a case where the court as jurisdiction, whether it will in fact exercise its powers will depend upon the facts circumstance of the case. It may happen sometimes that in the case of an alien infant, a guardian as already been appointed by the court in the place of his domicile and the foreign guardian clients custody of the child present in England. There have been recently a large number of cases involving kidnapping of children, when they have been brought into England by one of the parents against the wishes of the other parents are in flagrant violation of the orders of the competent foreign court.

In every case, whether there is a foreign court order or not, the paramount consideration is the welfare of the child to which everything else should yield. “There is but one subject, who ought to be kept strictly in view, it was said in an old case,” and that is the interest of the minor. This has been reiterated by section by 1 of guardianship of minors Act; “where is any proceeding before any court ... the custody or upbringing of a minor... is in question, the court in deciding the question, shall regard the welfare of the minor as the first and paramount consideration...” the court as amply discretion and it will consider the orders of foreign courts but these will be disregarded if such a course is found necessary for the well-being of infant. the scope of judicial discretion discarding foreign custody orders

illustrated by the case *Mckee vs. Mckee* (1951:Ac.352) a husband and wife, American citizens and residents in the United States, separated and agreed in writing that neither should remove their minor and out of the United States without the written consent of the other. A year later, a California court in divorce proceedings awarded the custody of the boy to the wife with access to the husband. Five years later, the husband without the permission of the wife took the boy to Ontario, in Canada and settled down there. The wife came to Ontario habeas corpus proceedings before the Ontario court. The trial judge awarded the custody of the child to the husband put on appeal by the wife; the Supreme Court of Canada reversed this decision. The husband took the matter to the Privy Council and restored the order of the Ontario court awarding custody of the boy to the husband. The Privy Council took the view that the trial court was justified in concluding that in the light of other circumstances the interest of the minor could be best served, if the minor was placed in the custody of the husband. The order of the Californian court was an important factor to be considered, but it could never be taken as decisive.

It must be realized, however, that the courts generally do not encourage the unilateral movement of children and prima facie the parent who breaks up the home will not be allowed. To profit from the conduct in *re R*, 1966 a custody order in respect of a child was passed by a New York court. In violation of this order, the mother unilaterally without the knowledge of the father removed the child to England. The English court passed orders allowing the father to take the child to New York. The court said that in the present day world, kidnapping of children from one country to another has become very common and it is the duty of the courts in every country not to allow the kidnapper to represent the benefits of his misdeeds, in another case *R v T* (1968) 1 All ER 441 Willmer, L J observed 'every court should give recognition to the orders of foreign courts in respect of custody and guardianships of children unless it comes to the conclusion that to give effect to the foreign order will not be in the interests of the child'.

### **POWERS OF THE FOREIGN GUARDIAN**

A foreign guardian if he is confirmed by an English court, can exercise in England all the powers which are limited to those recognized by English domestic law that is he cannot exercise powers in England as are possessed by him in the country of his appointment. His authority can be challenged before an English court and then it lies within the power of the English court to replace him with another guardian, if it is necessary in the interest of the minor.

## INDIAN LAW

The Indian courts have follow the principle of English law in exercise of jurisdiction over infants once the court assumes jurisdiction, the merits of the case will be decided in accordance with *lex fori* which guardian and wards act,1890 and personal law of consent .

Regarding the recognition of foreign custody of guardianship orders, it have a full bench decision of the Kerala high court in *Margarate vs. Dr.Chacko*(A.I.R.1970 KERALA) where: Dr. Chacko, an Indian Christian domiciled in 'India, went to Germany to study medicine, and there fell in love with margarate a German domiciled women they had two children out of his union, a boy and girl but there married life ran into heavy weather and finally the marriage broke down .both husband and wife approached the German court for custody and the guardianship of the children. The German court decreed custody of the children to the wife with access to the husband once a day every week. Dr.Chacko,in violation to the custody order of the German court, took away the children with him and flew to India and went to his native place in Kerala. Marggarate there upon, came to Cochin and started habeas corpus proceedings before the Kerala high court to recover the custody of the children.

The main question before the Kerala high court was whether German custody order should be recognized under the custody of the children restored to the petitioner. **Govindhan Nair. J**(as he then was) cited with approval the decision RE P and particularly the observation of lord denning in that case about the unsuitability of child's domicile as jurisdiction ground and held that the ordinary residence of the child is sufficient to confer jurisdiction to court. So, even assuming that Dr.ChackoIndian domicile thus: conferring the Indian domicile of origin to the children, since the children were ordinary resident and present in Germany, the German court at jurisdiction to pass custody orders in regard to them.

On the question of recognizing the German custody's order, **GovindhanNair.J** observed: "it is no doubt true that in all cases the courts need not blindly follow the order of custody passed by a foreign court..." But "all courts in all countries respect each other's orders passed with jurisdiction and passed after a fair contest subject to any material and sufficient change in circumstances that would justify the alteration of the term of the order passed by the foreign courts". Finally the court examined in detail the question whether it will be in the interests of the children to give them to the custody of the mother in accordance with the order of the German court. The court, after considering all the aspects came to the conclusion that the interests of the children will be better served in restoring the custody to the mother. The effort of his decision is that a custody or guardianship order passed by a foreign court of competent jurisdiction will be recognized and given effect unless it clearly found that it is against the welfare of the child.

## UNIT-IV

### CONTRACT

The contract in conflict of laws involves many transactions in trade and commerce. The contracts are more complex when there is an involvement of foreign element; it is difficult to determine the rights and liabilities of the parties. For instance the contract may be signed in one country, the subject matter of the contract in another country, the place of the performance in another country and the domicile of the contracting parties may be in another country, so in that case there is a involvement of four different laws of four different countries involved in the contract, so there is a conflict of laws exist there to determine which of the following law can be applied to determine the rights and liabilities of the parties in the contract. The nature of problem in contractual obligation is ascertaining the proper law due to diverse connecting factors.

#### **ROME CONVENTION:-**

The Rome convention or convention on contractual obligation, 1980 is the principle convention governing the contractual obligations. The Scope of the convention is given in Article 1(1) provides that 'the rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different Countries.

The Main purpose of Rome convention is to adopt uniform rules of conflict of laws within the European community in which it was proposed by the Benelux nations (Belgium, Netherlands, Luxemburg) countries in 1967 and it was finally drafted in the year 1980 and came into force on April 1990. It is even accepted in India due to its international recognition so that it would increase legal certainty and make it easier to anticipate more easily.

#### **APPLICATION OF THE CONVENTION:-**

It applies to all contractual matters but does not have retrospective effect. It also does not limit other international convention applicability to which the state is a party. For the application two essentials are the one is contractual obligation and secondly choice of law must be in question.

#### **CONNECTING FACTORS:-**

Two connecting factors have been appropriate to govern the law of a contract, viz;

- (i) *Lex loci contractus* (law of the place where the contract was made);
- (ii) *Lex loci solutionis* (law of the place where performance of the contract was due.)

However, each of these connecting factors has its limitations.

## **THE ENGLISH CONCEPT OF PRIVATE INTERNATIONAL LAW**

The English Private International Law Has Evolved The Principle Of Proper Law Of Contract To Decide Questions Regarding Contractual Obligations Involving Foreign Element. They Defined It As The Law Which The English Court Is To Apply In Determining Obligations Under A Contract.

### **HOW TO ASCERTAIN THE PROPER LAW?**

There are two theories in Determining Proper law for Contract

#### **1. THEORY OF INTENTION OR SUBJECTIVE THEORY**

It is the proper law in which the parties intended to apply and parties themselves have chosen their rights and liabilities to determine under a particular law and when not expressly mentioned, the relevant circumstances must be taken into consideration to determine the intention

#### **2. THEORY OF LOCALISATION OF THE CONTRACT OR OBJECTIVE THEORY**

The contract in which the most part of the transaction takes place which is the natural seat of the contract, then the law of that particular country will be applicable. **Westlake** says: "proper law should be the law of the country with in which the contract has the most real connection and not the place of the contract will be taken into account".

An illustration in which X is domiciled in France, Y domiciled in Italy, place of contract will be Italy, place of performance will be Italy and the money must be paid in a French bank and in this contract, Italy is the country in which the contract is most densely grouped or the country which is closely connected, so the Italian law is the proper law of the contract according to localization theory supported by Westlake.

#### **DOCTRINE OF PROPER LAW:-**

The law chosen by the parties is often referred to as the proper law of the contract' and this choice can be express or implied. If there is no choice then governed by the most closely connected test. Thus the law by which the contract is intended to be governed is called proper law contract.

**Article 3 (1) of the convention** says: "A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of a contract."

**Choice is of two types express and implied choice.** Both are mentioned in **Article 3**. In express choice the parties themselves choose the proper law like *lex domicile, lex loci contractus* etc.. Whereas in implied choice it is determined from the terms of the contract, nature, circumstances then the proper law is determined.

The term ‘proper law’ was clearly defined in **Indian General Investment Trust vs. Raja of Kholikote** as “the proper law of contract means the law which the court is to apply in determining the obligation under the contract”.

The matter of ascertaining proper law depends on the intentions of the parties to be ascertained in each case on consideration of: a) the terms of the contract, b) the situation of the parties and generally on c) all surrounding facts from which the Intention of the parties is to be gathered.

### **EXPRESS CHOICE**

In *Vita Food Products Inc. vs. Unus Shipping Co. Ltd. (1939)* In this case, even though the contract is mostly connected with just one country, the court chose to go with the law in which the parties have chosen expressly and mentioned despite it has no connection with the contract. **Lord Wright** an English jurist said that: ‘where there is an express statement by the parties to select the law of contract, it is difficult to see other criteria to determine proper law provided that the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on grounds of public policy’ the intention of the parties as to the choice of law prevails’.

### **IMPLIED CHOICE**

When the intention regarding governing law is not expressly stated, intention to be inferred from the terms and nature of the contract, circumstances and the inferred intention determines the proper law of contract. The court should find out the implied intention to govern the contract, in the absence of such implied intention the court has to find out the intention. The major task of the court is that they have to find the intention under which the reasonable man and a prudent man under the same circumstances would have did, the judges should have placed himself in the place of the reasonable man and find out the intention of the parties.

### **THE ASSUNZIONE:**

The contract is a carriage of wheat from French to an Italian port on an Italian ship and the charter party was French merchants. The wheat was shipped under an exchange agreement between French and Italian government and this deal is not known to Italian ship owners and the contract was concluded in France by Italian and French brokers. The contract is drawn up

in English language in a Standard English form and the freight and demurrage to be payable in an Italian currency in Italy. On the question of proper law of contract, we can see that the facts and the circumstances are equally balanced between French and Italian law. The court of appeal held that Italian law is the proper law since the contract to be performed in Italy and the freight and demurrage to be paid in Italian currency

**In *Amin Rasheed vs. Kuwait insurance company***, a Liberian company resident in Dubai, insured a ship with the Kuwait Insurance Company. When a claim made by Liberian company under this policy was rejected by Kuwait Company. Plaintiff sought an order to serve a writ on Defendant which could be granted, providing the contract 'by its terms, or by implication, [was] governed by English law.' There was no express choice of English law, nor was it clear as to what was the implied law: both Kuwaiti law and English law had claims to being the proper law of the contract. However, based on the surrounding circumstances as well as the terms of the contract the rights and obligations should be determined in accordance with the English law of marine insurance'. A significant factor was that at the time of making the contract, Kuwait had no law of marine insurance.

#### **LIMITATIONS:-**

The limitation over determining the proper law is explained with Mandatory rules and most closely connected test.

#### **MANDATORY RULES:-**

Article 3(3) of the convention speaks about mandatory rules. The purpose of this provision is to prevent evasion of mandatory rules of law. This can be of any rules based on public policy or invalidate provision.

#### **MOST CLOSELY CONNECTED TEST:-**

In the absence of an expressed or an implied choice of law, the contract shall be governed by the law of the country with which it is most closely connected as per Art.4 (1) of the convention.

The factors which help the court determine the proper law of the contract are those with which the transaction had its 'closest and most real connection'.

The following factors are considered by the Court when deciding this issue:

1. The form of the contract.
2. The place where the contract was concluded.
3. The place where the contract is to be performed.

4. The parties place of residence and business.

#### **THE PUTATIVE PROPER LAW:-**

When the existence of a valid contract is in issue, perhaps because a vitiating factor is claimed to be present, it cannot be said that the issue in question is governed by the proper law: if there is no contract there can be no proper law. It is uncertain as to whether the parties to a contract can choose a particular legal system as the putative proper law.

Whether a contract has been concluded is, apparently, determined by the putative proper law: *The Parouth (1982)*. Thus, whether an offer has been accepted is determined by the putative proper law.

The putative proper law will also determine whether consideration is a necessary element of a contract. If the putative proper law is English law then the absence of consideration will render a purported contract *void ab initio*. However, if the putative proper law does not require consideration as a necessary element of a valid contract, then a valid contract may result: *Re Bonacina (1912)*.

#### **EFFECT OF JURISDICTION CLAUSE:**

Sometimes there is a jurisdiction clause in contract like when a dispute arises in a contract, it must be submitted to courts or arbitral tribunal situated in a particular country, in this case, there is no express selection of law. But there is a selection of tribunal expressly so there is a presumption that the parties intended the dispute to be governed by the law of the country where the chosen tribunal is situated.

#### ***TZORTZIS vs. MONARK LINE***

The Contract was mostly connected with the Sweden law, Hence the Swedish law is the proper law, if determined objectively. But there is a clause in a contract that all disputes arising should be settled by arbitration in England, so court held that that choice of law was clearly implied, that the parties choosing an English arbitration tribunal.

#### **ADVANTAGES AND DISADVANTAGES OF PROPER LAW DOCTRINE:**

The Parties have the ultimate freedom and no restriction to select the law in which their rights and liabilities will be governed unless it is legal and done with bonafide intention and not chosen to avoid any public policy.

The Biggest disadvantage is that when the law is not expressly stated, intention has to be presumed or imposed upon the parties which introduce an element of uncertainty in the proper law.

## **FORMATION OF CONTRACT:-**

The formation of contract contains the essentials such as the offer, acceptance, consideration, legal object, capacity but should not contain any vitiating factors such as fraud, mistake, misrepresentation etc. the agreement can be seen in two ways i.e. factum of the agreement (offer and acceptance) and reality of the agreement (personal laws of the parties).

The validity of contract is of two types formal and essential validity:-

### **FORMAL VALIDITY:-**

The concern in this is not with procedural formalities such as status of fraud but with non-procedural formalities such as a contract for the conveyance or creation of a legal estate in land having to be in a deed. It is likely that compliance with either the *lex loci contractus* or the putative proper law will suffice to formally validate the contract.

### **ESSENTIAL VALIDITY**

The proper law determines whether the contract or its terms, including exemption clauses, are valid and effective. If a contract made in England is procured through pressure which amounts to duress, it is voidable by the innocent party:

### **INTERPRETATION:-**

Whereas interpretation of the terms of a contract is usually governed by its proper law, it is permissible for the contracting parties themselves to nominate one legal system to govern the contract and to specify that another system be used to interpret it, i.e. 'the parties may well contemplate that different parts of their contract shall be governed by different law'.

### **PERFORMANCE OR DISCHARGE OF OBLIGATIONS:**

The proper law is to determine whether the parties obligations have been discharged.

### **CAPACITY:-**

The three possibilities are,:

Capacity can be governed by;

- (i) *the lex domicilii* of each contracting party (unreasonable); or
- (ii) the proper law of the contract or
- (iii) *the lex loci contractus* (which may be entirely fortuitous).

***Ralli Bros. Case.***

Here, Spanish shippers contracted with R, English charterers, in London, to carry goods from Calcutta to Barcelona. The shippers were to be paid £50/ton freight in Barcelona on delivery there. [i.e. Barcelona was the place where the contract was to be performed]. However, after the voyage had begun, but before the goods arrived in Barcelona, a Spanish law enacted that freight must not exceed £10/ton freight. Accordingly, the charterers, R, agreed to pay £10 but no more. The shippers brought an action in England for the balance. It was held English law, which was the proper law of the contract, regarded the Spanish legislation as a frustrating event. The action for recovery of the balance was unsuccessful.

### **RENVOI:-**

As per Article 15 of the convention it excludes the application of renvoi over contractual obligation.

### **SPECIAL PROVISIONS:-**

Articles 5 and 6 of the Rome Convention contain special provisions in relation to consumer contracts and individual contracts of employment. These have the effect of either limiting the ambit of the general choice of law provisions or excluding the presumptions.

Article 5 - Consumer Contracts provides that a consumer contract is one 'the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

Article 6: Individual Contracts of Employment.

### **CASE WHERE THE PROPER LAW IS NOT THE ONLY LAW APPLICABLE**

The increasing tendency today in English law is to follow the view that all aspects of contract should be governed by proper law in the objective sense i.e., the law of the country with which the contract is most substantially connected. The subjective theory of proper law (proper law is the law chosen by the parties, irrespective of existence of connection with the contract) is not gaining ground. The view expressed by **Cheshire** that "the courts should, and do have a residual power to strike down, for good reason, choice of law clauses totally unconnected with contract," has a good deal of supporters. Be that as it may, it should be borne in mind that there are a few areas in the law of contracts where some other law than the proper law becomes relevant. The more important these are stated below among:

#### **(a) FORMAL VALIDITY**

In earlier times jurists advocated the exclusive application of *Lex loci contractus* (the law of the place where the contract is made) to determine the formal validity of contracts.

According to this view, local formalities are compulsory, and if a contract fails to satisfy the formalities prescribed by the law of the place where the contract is made the contract is unenforceable. But now the generally accepted view is that compliance with local formalities is not compulsory and its absence by itself will not affect the enforceability of contract. Nevertheless, *lex loci contractus* still remains important because, as regards formal validity, the observance of formalities prescribed by it will be sufficient.

In other words, compliance with the local form is sufficient, though in other respects the contract may be totally unconnected with the place where the contract is made. Thus the proper law of a particular contract may be Indian law; but the contract might have been made in Germany. In such a case the contract is formally valid if it complies with the forms prescribed by the German law. Failure to comply with the formalities required by the Indian contract act will not render the contract void. Thus the contract is formally valid if it satisfies either the formalities of *lex loci contractus* or the formalities of the proper law.

#### **(b) ILLEGALITY :**

It is not possible to decide the question of illegality of a contract by referring exclusively to proper law; it may be necessary to take into account other legal systems also. For example, an English court will not enforce a foreign contract regarded as immoral, although it may be perfectly valid according to the proper law. Same is the case when a foreign contract offends against an English rule of public policy. It may be said that in the matter of illegality of contract, in addition to proper law. *Thelex fori, Thelex loci contractus* and *The lex loci solutionis* (the law of the place of performance) are relevant and should be taken into consideration.

**HERE, WE MUST EXAMINE THE FOLLOWING FIVE PRINCIPLES:**

#### **(1) ILLEGAL TO PROPER LAW :**

A contract that is illegal by its proper law cannot be enforced in England. This is so even if the illegality is based upon the revenue laws of that legal system.

#### **(2) CONTRARY TO ENGLISH PUBLIC POLICY :**

A foreign contract, though valid by its proper law, will not be enforced in English if the contract violates a fundamental public policy of English law, as *lex fori*, English courts have on this ground, refused enforcement of champertous contracts involving collusive and corrupt arrangements for divorce, contracts involving trading with the enemy and contracts for breaking the law of a friendly country. The modern tendency, however, is to confine the doctrine of public policy within narrow limits in private international law cases. As pointed

out by Cheshire, it is only rarely that contracts valid under proper law are denied enforcement in England as being contrary to the public policy of the *lex fori*.

When a foreign contract is merely void but not illegal by the English *lex fori*, can it be enforced in an English court? For instance, wagering contracts are void in English law, but not illegal. The position is that if the contract is valid by its proper law, it is enforceable in England notwithstanding its infringement of the English law, as *lex fori*. Thus money won at play or lent for play is recoverable in England, if the same is recoverable by the law of the place where it was won or lost.

### (3) ILLEGAL BY LEX LOCI CONTRACTUS

According to **Cheshire**: a contract that is valid by its proper law does not become unenforceable in England merely because it is illegal according to the law of the place where the contract is made. The same position is taken by **Morris**; but **Graveson**: expresses the view that “English law will, probably not enforce a contract illegal by the law of the place of making”. So far as judicial opinion is concerned, there are dicta strongly supporting both the views. On practical consideration, however, the view taken by Cheshire is more acceptable, because in the modern conditions of commerce, it is inadvisable to apply rigidly the *lex loci contractus* in determining the question connected with the enforceability of contracts.

### (4) ILLEGALITY BY LEX LOCI SOLUTIONIS (LAW OF THE PLACE OF PERFORMANCE)

If a contract is illegal by the *lex loci solutionis*, can it be enforced in an English court? When the *lex loci solutionis* and the proper law are the same, there is no difficulty and the contract is clearly unenforceable. But when the *lex loci solutionis* and the proper law are different the question is not susceptible of a clear cut answer.

According to **Dicey**, “a contract (whether lawful by its proper law or not) is, in general invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed” (Exception to Rule 151) this view that a contract which is illegal by *lex loci solutionis* cannot be enforced in England whether it is valid by its proper law or not, is supported by several judicial pronouncements. **Lord Wright**: stated in one case (*R. V. International Trustees*, (1936) 3 All E. R. 407 p. 238) : “the well – known proposition that an English court will not enforce a contract where performance of the contract is forbidden by the law of the place where it must be performed, is too clearly established now to require any further discussion”.

But **Cheshire** strongly repudiates the above view of yielding completely to the *lex loci solutionis* ignoring the proper law. To attribute this unqualified effect to the *lex loci*

*solution is*, says Cheshire, is contrary to doctrine since it may involve an unjustifiable disregard of the proper law if the contract is governed by a foreign legal system. Cheshire maintains that the decisions generally cited in favour of the above propositions do not actually support it. According to **Cheshire**: when the proper law and the *lex loci solutionis* are not identical, performance of the contract is a matter to be governed by the proper law. For a decisive answer, we have to wait till the English court gets an opportunity to consider the effect of illegality of contract at a foreign place of performance its proper law being the law of still another foreign country.

#### **(5) ILLEGALITY BY LEX DOMICILI OR LEX PATRIAE**

It is an obvious proposition that a contract is not unenforceable in England merely because the contract is illegal by the *lex domicili* or the *lex patriae* of the parties to the contract. Similarly a contract, if valid by its proper law, does not become unenforceable in England merely because its performance is illegal by the law of the country in which the contractual debt is situated.

Thus we find that while proper law is always relevant it becomes necessary to consider other systems of law in matters of formal validity and illegality.

#### **CAPACITY OF PARTIES TO ENTER INTO A CONTRACT**

There is no clear English authority to indicate the law which governs the question of capacity to enter into a contract. Some dicta favor the application of the *lex domicilii* of the parties. But according to **Lord Greene**: “the question of capacity is to be determined not by the law of the domicile but the law of the place where the contract is made”. Some are of the view that “capacity should be determined by the application of proper law in the objective sense”. So, as **Cheshire** says, “the choice lies between *lex domicilii*, *lex loci contractus* and the proper law”.

Of these, *lex domicilii* is not the proper test of capacity, particularly in view of the modern conditions of trade and commerce. It will engender injustice and undermine the trust that lies at the basis of mercantile dealings, the second solution, i.e., the *lex loci contractus* is equally objectionable. The place of contracting in modern conditions may be the place where the parties were temporarily present. If the *lex loci* is to be made the sole law applicable, it would enable a party to evade an incapacity imposed by the law with which the contract is most closely connected, by the simple device of concluding the contract in a country where there is no such incapacity.

The best solution is to decide the question of capacity by the proper law of contracts objectively ascertained, i.e., the law with which the contract is most closely connected. The

parties should have capacity by the law with which the contract has the most substantial connection. **Cheshire** supports this view. The valid formation of a contract in other respects is governed by the proper law. It is desirable that capacity to contract also be governed by the same proper law.

## **NEGOTIABLE INSTRUMENTS**

Negotiable instrument is a document that contains several distinct contracts and each party who puts his signature to the document incurs a separate liability. In view of this, the important question in relation to negotiable instrument is that should this series of contracts be regarded as single transaction and therefore governed by single law or should they be regarded as distinct transaction capable of being subject to several laws. In bill of exchange the original contract between the drawer and the acceptor creates the primary liability. Hence it can be said that when a conflict of laws the portion of each contracting party should be decided by reference to single law, i.e. the law that governs acceptance. But this view is not taken by English law. The English law and the Indian law adopts the general principle that liability of each separate contracting party is governed by the law of place where is separate contract is made. The party has no right to select their own proper law.

It has to be noted that both in English law and Indian law regarding Negotiable Instruments have been codified; in England, the Bill of Exchange Act, 1882 and India, the Negotiable Instrument Act 1881. This codification covers conflict of laws rules in relation to Negotiable Instruments. But the statutory provision in England as well as in India is not exhaustive. Therefore in regard to matters not covered by statutory provisions the general principles of Private International Law should be applied.

## **VALIDITY OF A BILL OF EXCHANGE**

The validity of a bill and its supervising contracts depends upon compliance with the law governing formal validity, capacity and essential validity including interpretation.

### **FORMAL VALIDITY**

Formal validity is subject to certain exceptions governed by principle *locus regit actum* (place governs the apt meaning in the case of contracts formalities of the place where the contact is made governs the contract)

Section 72 (1) of the Bill of Exchange Act contains the English rules on this matter. The Indian Act, it may be noted is silent on necessary formalities. According to the English statute, the formal validity of bill drawn in one country and accepted, negotiated and payable in another, shall be determined by the place of issue. Formal validity of each of the

supervising contracts such as acceptance and endorsement shall be determined by the law of the place where such contract is made.

## Two exceptions

- (1) A bill issued out of the United Kingdom is not invalid by reason that it is not stamped in accordance with the place of issue. This is based upon the principle of non-recognition of foreign revenue laws
- (2) A bill issued out of the United Kingdom which is formally valid according to the law of the United Kingdom, though not according to the law of the place of issue, is, for the purpose of enforcing payment therefore valid as between all persons who negotiate hold or become parties to it in the United Kingdom

## CAPACITY

Neither the Negotiable Instruments Law, nor the Bills of Exchange Act, nor the Hague Convention has attempted to lay down a uniform municipal rule governing capacity. On the continent there were formerly many special restrictions affecting the capacity of parties to obligate themselves by means of bills and notes, and in a few countries some of these restrictions still subsist. The principal conflicts that may arise will relate to the capacity of married women and infants. What should be the rule in the Conflict of Laws governing their capacity to bind themselves by bill or note?

The Bills of Exchange Act does not answer the above question. The general rule governing commercial contracts therefore applies. What the English law on the subject is cannot be stated with certainty. There appears to be only a single case throwing direct light upon the subject, that of *Male vs. Roberts*. In that case an action was brought in England to recover a sum of money advanced in Scotland to an infant who appears to have been domiciled in England. Lord Eldon, at Nisi Prius, held that the defence of infancy depended upon the *lex loci contractus*, the law of Scotland. At the time the decision was rendered, the English law seemingly favoured the view, both with respect to ordinary commercial contracts and contracts of marriage, that the law of the place where a contract was entered into determined the capacity of the parties. A noticeable change in the English cases appears during the latter half of the nineteenth century, indicating a decided tendency to adopt the continental view, which regards the question of capacity as belonging to the personal law and as subject, therefore, to *the lex domicilii or the lex patriae*.

In the case of *Sottomayor vs. De Barros* the Court of Appeal per Cotton, J. says: "As in other contracts, so in that of marriage, personal capacity must depend on the law of the domicile." And this rule is said to be "a well recognized principle." In *Cooper vs. Cooper* the

Lord Chancellor, **Lord Halsbury**, makes the categorical statement that “The capacity to contract is regulated by the law of domicile.” These statements were mere dicta, as both cases related to marriage. Foote feels, nevertheless, that the dictum of the Court of Appeal in *Sottomayor vs. De Barros* “has unsettled the whole subject, if, indeed, it has not gone further, and established the right of the *lex domicilii* to decide all questions of capacity for every purpose.”

## **ESSENTIAL VALIDITY AND INTERPRETATION**

Essential validity and interpretation of negotiable instruments are governed by the *lex loci contractus* according to the provisions of the English Act. The act however, makes one exception to the exclusive application of *lex loci contractus*. It is provided that “where an inland bill is endorsed in a foreign country, the endorsement shall as regards the payee be interpreted according to the law of the United Kingdom” (section 72 (2) Provision) The Indian Act makes a distinction between liability of the maker or drawer and liability of the acceptor or endorser. In the former the *lex loci contractus* governs essential validity; in the latter *lex loci solutionis* governs. (Section 134 of the Negotiable instruments Act.)

## **PRESENTMENT, PROTEST, AND NOTICE OF DISHONOUR:**

Section 72(3) of the English Act provides: “The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of protest or notice of dishonor are determined by the law of the place where act is done or the bill is dishonoured.” This provision is ambiguous and has been differently interpreted by authors. The section refers to three events namely, presentment, protest and notice of dishonor and on the question of choice of law indicates two legal systems, the law of the place where bill is dishonoured. How are the two systems of law to be distributed between three events? For example, is a question of presentment to be decided by the law of the place where the act is done or by the law of the place where the bill is dishonored? Cheshire takes the view the matters mentioned in the section come within principle that the incidents and mode of performance are determined by law of place of performance.

## **E- CONTRACTS**

E-contract is a contract modelled, specified, executed and deployed by a software system. E-contracts are conceptually very similar to traditional commercial contracts. Vendors present their products, prices and terms to prospective buyers. Buyers consider their options, negotiate prices and terms (where possible), place orders and make payments. Then, the vendors deliver the purchased products. Nevertheless, because of the ways in which it differs from traditional commerce, electronic commerce raises some new and interesting technical

and legal challenges. For recognition of e-contracts following questions are needed to be considered.

## **LEGAL VALIDITY OF E-TRANSACTION**

Electronic contracts are governed by the basic principles elucidated in the Indian Contract Act, 1872, which mandates that a valid contract should have been entered with a free consent and for a lawful consideration between two adults. It also finds recognition under section 10A of the Information Technology Act, 2000 that provides validity to e-contracts. Accordingly, both Indian Contract Act, 1872 and Information Technology Act, 2000 needs to be read in conjunction to understand and provide legal validity to e-contracts. Further, provisions of the Evidence Act, 1872 also provides that the evidence may be in electronic form. The Supreme Court in *Trimex International FZE Ltd. Dubai vs. Vedanta Aluminum Ltd.* recognizing the validity of e-transaction has held that e-mails exchanges between parties regarding mutual obligations constitute a contract.

## **THE ROLE OF PRIVATE INTERNATIONAL LAW IN E- CONTRACTS**

Private international law, also known as conflict of laws in more common law-oriented jurisdictions, is a body of law that seeks to resolve certain questions that result from the presence of a foreign element in legal relationships.

e.g. Instances of such relationships include contractual disputes between parties located in different jurisdictions, the marital status of partners of different nationalities, the legal status of real estate located in a foreign jurisdiction, and, in the intellectual property context, disputes between a copyright owner residing in one country and Internet users residing in other countries who are accused of making available, on servers located in multiple jurisdictions, copyrighted material for download by any person anywhere in the world, without the necessary permissions. With the advent of the Internet, cross-border relationships have intensified, raising more complex questions of jurisdiction and applicable law. A number of special characteristics of Internet-based transactions have added novel dimensions to the debate. Among the most noteworthy of such characteristics the following can be mentioned.

- (i) Instantaneous Global Presence
- (ii) Consumer Protection Issues
- (iii) Relevance of Intellectual Property

## **HARMONIZATION AND INTELLECTUAL PROPERTY**

The fundamental difficulty in coping with legal relationships involving foreign elements flows from the fact that the legal systems of more than one country may reasonably

be found to have a connection with them. The application of the laws of one system, rather than the other, in most cases will lead to different results. One solution to this problem consists of selecting, based on certain criteria, from among the various potentially applicable legal systems, the laws of one particular legal system, to govern the legal relationship. This, in essence, is the exercise of determining the applicable law under a private international law approach. It is also the solution which encroaches the least on existing national law, because it requires no changes to such law in order to resolve the problem posed by the presence of the foreign element. A radically different solution, which is much more intrusive on existing national law, consists of trying to remove, through a process of harmonization, the source of the problem by eliminating the differences that exist between the laws of countries on a given issue.

Harmonization is achieved through the negotiation between States of treaties establishing uniform rules and, after the international instruments in question have been ratified or acceded to by the States concerned, the subsequent modification of municipal laws in order to bring them in line with the treaty provisions. The principles of Private International Laws are accepted in India. It is open to the parties to agree to choose one or more competent courts to decide their disputes if more than one court has jurisdiction to try their case. In case parties under their own agreement expressly agree that their dispute shall be tried by a particular court, then the parties are bound by the forum selection clause. It was held in *Ramanathan Chettiar vs. Soma Sunderam Chettiar* that India accepts the well-established principle of private international law that the law of the forum in which the legal proceedings are instituted governs all matters of procedure.

## **PRINCIPLE OF NATIONAL TREATMENT**

Apart from private international law and substantive harmonization of national laws, there exist also other means of dealing with problems resulting from cross-border legal relationships which may be considered to fall in between those categories in terms of their effect on existing national laws. Examples of the latter category in the intellectual property field include, for instance, the principle of national treatment. In the industrial property area, this principle is enshrined in the Paris Convention, which states as follows:

*“Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.”*

A similar requirement of national treatment exists in copyright and is contained in the Berne Convention providing that “authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.”

The three great international intellectual property treaties, the Paris Convention, the Berne Convention and the TRIPS Agreement, all place the emphasis on harmonization, both in terms of substance and procedure, and contain few provisions that could be characterized as rules of private international law. Nonetheless, they do not exclude a private international law approach altogether. A classic example in the latter regard is Article 5(2) of the Berne Convention, which states that “the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.” More recently, negotiations during the WIPO Diplomatic Conference on the Protection of Audio-visual Performances (December 7 to 20, 2002) on the question of the international recognition of the transfer of rights of Audio-visual performers centred at least in part on a possible private international law approach in order to bridge differing positions among delegations.<sup>73</sup> The relatively modest attention which has been brought to private international law as a means of resolving problems arising from the presence of foreign elements by the intellectual property system results from three essential features:

- a) The territorial nature of the intellectual property system, “It is conceivable that nations would agree to treat inventors and authors as having personal rights to patents or copyright which are determined by their country of origin. In principle, then, they would be able to carry their rights thus defined to other countries and demand recognition and enforcement there. In the early period of industrialization, the political unacceptability of this approach was soon enough appreciated and instead the territorial character of intellectual property became widely accepted during the nineteenth century.”
- b) The need for introducing minimum intellectual property standards across jurisdictions and
- c) The reliance of the intellectual property system, notably in industrial property, on registration as a means of enabling, or at least, facilitating the protection of the rights concerned.

## TORTS

When an action is brought upon a tort committed in a foreign country, the question arises as to may say, there are three theories: They are (i) theory of *lex fori*, (ii) theory of *lex delicti* and (iii) theory of proper law of tort. We may examine briefly each of these three theories.

### LEX FORI: LAW OF THE FOREM

The theory that liability in tort should be governed by *lex fori* is of German origin, advocated by Savigny in 1849. Although not adopted by English law as such, it has, as will be seen, profoundly influenced the development of English law. The fundamental defect of the theory is that a defendant would be held responsible if his act is actionable according to the *lex fori*, although it is quite innocent according to the law of the country where the act was committed. Moreover, if the *lex fori* were the sole deciding factor, the plaintiff would be free to choose a forum most favourable to him and this may encourage what is called forum-shopping.

### LEX LOCI DELICTI COMMISSI:

The *lex loci delicti commissi* is the Latin term for “law of the place where the tort was committed” in the Conflict of Laws. Conflict is the branch of public law regulating all lawsuits involving a “foreign” law element where a difference in result will occur depending on which laws are applied. When a case comes before a court and all the main features of the case are local, the court will apply the *lex fori*, the prevailing municipal law, to decide the case. But if there are “foreign” elements to the case, the forum court may be obliged under the Conflict of Laws system to consider:

- whether the forum court has jurisdiction to hear the case
- it must then characterise the issues, i.e. allocate the factual basis of the case to its relevant legal classes; and
- then apply the choice of law rules to decide the *lex causae*, i.e. which law is to be applied to each class of issue or to the case as a whole.

The *lex loci delicti commissi* is one of the possible choice of law rules applied to cases arising from an alleged tort. For example, suppose that a person domiciled in Australia and a person habitually resident in Albania, exchange correspondence by e-mail that is alleged to defame a group of Kurds resident in Turkey. The possibly relevant choice of law rules would be:

- the *lex loci solutionis* might be the most relevant but this might be difficult because three laws might equally apply, i.e. the parties themselves corresponded from two states but the damage was not sustained until the correspondence was published in Turkey;
- the proper law which is the law which has the closest connection with the substance of the wrong alleged to have been committed; and
- the *lex fori* which might have public policy issues if, say, one of the parties was an infant or there was the possibility of multiple jurisdictions having involvement over a world-wide internet issue.

## THE PROPER LAW OF THE TORT

The theory of the proper law of the tort acquired an increasing degree of prominence. Inboard terms, it was argued that in most instances one would not need to go beyond the place of the wrong, but in certain cases one should 'choose the law which, on policy grounds, seems to have the most significant connection with the chain of facts and circumstances in the particular situation'. It was argued that such an approach would be more flexible and it was claimed that experience with the doctrine of the proper law of the contract had shown that the concept was workable.

Further, it was argued that the expansion in the forms of tortious action in the post-war period made it an appropriate model because of its inherent flexibility. The law of the State which had the most significant relationship with the occurrence and the parties determine their rights and liabilities. Thus, in a typical case, the law chosen would be dependent on the social environment and this would be determined by weighing a number of factors such as: (a) the place of the injury; (b) the domicile and nationality of the parties; (c) the place of incorporation and the place of business; and (d) the place where the event causing the injury occurred.

## MODERN ENGLISH LAW: THE RULE OF DOUBLE ACTIONABILITY

The common law approach can be traced to the judgment of Willes J in *Phillips vs Eyre*.

### *Phillips vs. Eyre.*

Eyre was the Governor of Jamaica at a time of rebellion in the colony. In putting down the rebellion, he contravened the civil liberties of the plaintiff. At a later date, the legislature retrospectively validated the action of the Governor by passing an Act of Indemnity. The plaintiff's action for assault and false imprisonment was dismissed by the Court of Exchequer Chamber.

It is unlikely that the case would have attracted much legal notice had it not been for the attempt of Willes J to state a general rule. His words have been scrutinised by generations of commentators as if he were seeking to legislate for all time. The central passage, which became known as the rule in *Phillips vs. Eyre*, reads as follows:

“As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. Secondly, the act must not have been justifiable by the law of the place where it was done”.

Authority for the first limb of the rule, that the wrong complained of must be a tort by English domestic law, is provided alone by the judgment of the Judicial Committee of the Privy Council in *The Halley*.

### ***THE HALLEY***

Foreign ship owners sued the owners of a British steamer in respect of collision damage caused by the negligent navigation of a compulsory pilot in Belgian territorial waters. The defendants contended that they were obliged, by Belgian law, to employ a pilot but were not liable for his negligence. English law, at that time, differed from Belgian law, the *lex loci delicti*, in holding that a ship owner was not liable for the negligence of a compulsory pilot. The Privy Council allowed an appeal from the Court of Admiralty and dismissed the action of the foreign ship owners, holding that it would be contrary both to principle and authority to award a remedy for an act that constituted no wrong by English law.

Within a short period of time, the second limb of the rule in *Phillips vs. Eyre* was given a very liberal interpretation by the Court of Appeal, in the case of *Machado vs. Fontes*.

### ***Machado vs. Fontes***

The plaintiff sued the defendant in England in respect of a libel contained in a pamphlet published in the Portuguese language by the defendant in Brazil. As his defence, the defendant contended that, as the act was not subject to civil liability in Brazil, it was not actionable in England. The plaintiff contended that as the act could be the subject of criminal prosecution in Brazil it was not justifiable and, thus, actionable in England.

The Court of Appeal, in allowing the appeal and giving judgment for the plaintiff on a question of pleading, ruled that the second limb of the rule in *Phillips vs. Eyre* would be satisfied unless it could be demonstrated that the act in question was authorised, innocent or excusable in the country in which it was committed. Thus, in fitting the case within the rule

in *Phillips vs. Eyre*, there was no problem over the first limb of the rule – had the libel been published in England, it would have given rise to a successful action here.

With regard to the second, the fact that there was a possibility of criminal proceedings in Brazil was regarded as sufficient to make the wrong non-justifiable by that law. The judgment in *Phillips vs. Eyre* was subject to criticism because it made the whole substance of the obligation turn upon English law, a legal system which is involved in the case solely because the plaintiff decided to bring his action in England.

## **THE JUDGMENT IN *BOYS vs. CHAPLIN***

Since the judgment in *Phillips vs. Eyre* no case had gone as far as the House of Lords in which the question of choice of law in respect of an exclusively foreign tort was directly in issue. The rather mundane facts of *Boys vs. Chaplin* provided such an opportunity for the House of Lords to consider this entire area of law.

The plaintiff and the defendant, both normally resident in England, were temporarily stationed in Malta as members of the British forces. While both were off duty, the plaintiff, riding as a passenger on a motor scooter, was seriously injured in a collision in Malta with a motor car driven by the defendant. There was no dispute as to liability. However, under the law in Malta, the plaintiff could only recover special damages, being out of pocket expenses and proved loss of earnings. In the circumstances of the case, this was £53. However, by English law a claim for general damages was available for pain, loss and suffering of £2,250. The House of Lords was unanimous in deciding that the plaintiff should recover the higher sum under English Law. But the reasons and the principles of law have been differently stated by the judges who participated in the decision and a chance to elucidate the law on this topic has been lost.

## **IMMOVABLE PROPERTY**

### **INTRODUCTION:**

Whether a thing is movable or immovable is a question of fact but legal systems attributes to things a character that is not immediately apparent. According to English conflict of laws, the law of the land where a thing is physically situated determines whether it is movable or immovable property. In English law it is regarded as realty (immovable) and personality (movable).

A rent charge on lands, the right under a will to the proceeds of immovable property situated in England are regarded as immovable property. Leasehold interests, Interest in the mortgage, Land held on a trust for sale etc., are regarded as movable property in English domestic law but immovable property for the purpose of conflict of laws.

**POSITION IN CANADA:** The *lex situs* determines whether a particular property is movable or immovable. It follows English law.

**POSITION IN INDIA:** There are few Indian decisions on the question of nature of property in matters raising issues of conflict of laws. Therefore it is useful to consider how property is regarded in domestic law. The best general definition is contained in the General Clauses Act 1897. According to Section 3, "Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

The Transfer of Property Act 1882, gives a narrower definition by excluding standing timber, growing crops or grass. It also defines "attached to the earth" to mean rooted in the earth.

Thus the definition in "The Transfer of Property Act 1882" is applicable when the questions arise as to the transfer of property. In other situations the more general definition contained in General Clauses Act 1897 is applicable in defining immovable property.

In private international law of most countries including England, India, the United States and most other countries, it is an established rule that in respect of transactions relating to immovable property, all rights over it are governed by *lex situs* (law of the land where the immovable is situated). There appears to be no international convention on the subject.

**Lex Situs:** Is it domestic law or entire law including the rules of conflict of laws of the country where the immovable property is situated? Most writers on private international law unanimously take the view that it is the entire law of the country where the immovable property is situated.

### **JURISDICTION IN THE CASE OF IMMOVABLE PROPERTY - THE MOCAMBIQUE RULE:**

In the leading case of *British south Africa co, vs. companhie de mocambique (1893)* the house of lords laid down the rule that an English court has no jurisdiction to adjudicate upon the right of property on or the right to possession of foreign immovable, even though the parties may be resident or domiciled in England.

The general rule of exclusion of foreign immovable property is based upon the consideration that only the courts of the situs will be able to make effective orders in respect of landed properties.

*Mocambique* case, in this case the plaintiff company alleged that it was in possession of large tracts of land in South Africa and the defendant company wrongfully trespassed and took possession of those lands. The plaintiff company prayed for,

- A declaration that it was in lawful possession of the lands
- An order of injunction against the defendant and
- A large sum of money as damage.

The court of appeal took the view that such an action is maintainable before English court. The House of Lords reversed the decision of the court of appeal and held that an English court has no jurisdiction to entertain a suit with respect to foreign immovable.

According to Dicey and Morris “the sovereign of the country where the land is situated has absolute control over the land within his dominion: he alone can bestow effective rights over it. His court alone is, as a rule, entitled to exercise jurisdiction over such land”.

## **EXCEPTION TO THE RULE.**

### **FIRST EXCEPTION: ACTION FOUNDED ON PERSONAL OBLIGATIONS,**

If the conscience of the defendant is affected in the sense that he has become bound by a personal obligation to the plaintiff, the court in the exercise of its jurisdiction in personam, will not shrink from ordering him to convey or otherwise deal with foreign land.

(Eg) if ‘x’ has entered into an agreement with ‘y’ to sell an immovable property in India while they were in England. The English court can exercise jurisdiction and pass a personal decree against ‘x’ and direct ‘x’ to transfer the property to ‘y’. If ‘x’ fails to act as per the direction of the court, the court will execute its order by imprisoning him in England or attach his property in England. Hence the court acts upon the conscience of the defendant.

*Penn vs. Baltimore* (1750) the court held that it could not pass a decree in rem but in the exercise of its jurisdiction in personam, a decree for specific performance was ordered.

The circumstances that have been considered sufficient to create this personal equity mainly relate to:

#### **(a) CONTRACT RELATING TO FOREIGN LAND**

A contract relating to foreign land creates a personal law obligation affecting conscience and can be enforced by the personal process of the English court provided the defendant is amenable to the jurisdiction of the court.

## **(b) FRAUD AND OTHER UNCONSCIONABLE CONDUCT**

Fraud always creates a right in the injured party to sue the defendant in personam wherever he can be found and irrespective of where the cause of action has arisen or where the subject matter of the action is situated.

## **(c) FIDUCIARY RELATIONSHIP**

A trust for instance, attached to foreign land can be enforced by the English court if the trustee is present in England, though the author of the trust is not subject to its jurisdiction.

## **(d) MATRIMONIAL PROPERTY**

An English court can pass an order applicable to the matrimonial property of the spouses including immovable property in another country, if the other spouse is amenable to the jurisdiction of the English court.

## **SECOND EXCEPTION: QUESTIONS AFFECTING FOREIGN LAND INCIDENTALLY RAISING IN AN ENGLISH ACTION:**

In the case of administration of a trust or estate of a deceased person, if the property includes immovable or movables in England as well as immovable situated in a foreign country, the English court has jurisdiction to determine questions affecting the foreign immovable property for the purpose of administration.

*Re duke wellington* (1947), the duke of wellington a British subject domiciled in England left wills deal with immovable properties in Spain and England. The English court did not decline to decide questions relating to Spanish land which were incidental to the main issues involved in the wills.

## **THIRD EXCEPTION: ADMIRALTY JURISDICTION IN TRESPASS:**

The high court in England can in the exercise of its admiralty jurisdiction decide on question of trespass to foreign land.

*The Tolten* (1946), the plaintiff was the owner and occupier of Warf in Lagos 'Nigeria'. The Warf was damaged owing to the negligent navigation of the defendant. The plaintiff filed a suit in England claiming compensation for injury caused to the Warf. The court held that the ban imposed by the *mocambique rule* is not applicable when the high court exercises its admiralty jurisdiction.

## **CHOICE OF LAW:**

All questions in respect of rights over immovable property should be determined by the application of *lex situs*.

***Nelson vs. bridport***(1864) in this case, the court held that the incidents of real estate depend entirely on the law of the country where the estate is situated. The *lex situs* governs the following issues.

1. Capacity to take immovable.
2. Capacity to transfer immovable by sale, gift, mortgage or in any other form.
3. Formal validity of transfer of immovable
4. Essential validity of transfer of immovable.
5. Succession, both the testate and intestate.

***Bank of Africa vs. Chohen*** (1909), in this case, the court held that, the person's capacity to make a contract with regard to an immovable property is governed by the *lex situs*.

### **INDIAN LAW:**

The Indian law is substantially the same as English law. Section 16 of the CPC provides that in matters relating to immovable property, the suit be instituted in the court within the local limits of whose jurisdiction the property is situated. But, can exercise jurisdiction in personam if the right is contractual pertaining to immovable property even if it is situated outside India.

In ***Neelkant vs. vidhya*** (1930), it was held by the Privy Council that the British Indian courts had no jurisdiction to entertain an action with regard to the mortgage of immovable property situated in a foreign land.

In ***Nachiappachettiar (MYAA)vs.MYAA Muthu Karuppan Chettiar***, it was held that whether a party has the capacity to alienate immovable property is to be determined by applying the law of the place where the property is situated.

In ***Hamlin vs. Hamlin*** (1986), Indian courts can pass appropriate orders regarding matrimonial immovable property situated outside India if they can make the order effective in personam.

Indian courts are also likely to apply the rules of *renvoi*.

### **MOVABLE PROPERTY**

Movable properties are either tangible or intangible. The transfer of movables can be affected by the act of parties or by operation of law. A state has absolute authority over personal or movable property within its borders.

The state has the rights to regulate the transfer of such movable property and only in instance where the state allows can such property be affected by the law of any other states.

Whenever a dispute with regard to the transfer of movable property comes before an English court, the first duty of the court is to determine whether the movable property under dispute is tangible movables (choses in possession) or intangible movable property (choses in action).

The law to be applied for determining the dispute with regard to the transfer of tangible movable and intangible movable if different.

### **LAW GOVERNING THE TRANSFER OF TANGIBLE MOVABLES BY ACTS OF PARTIES (TRANSFER INTER VIVOS)**

When a case related to transfer of tangible movables property comes before the English court, it can exercise jurisdiction even though the movable property is not situated in England. However the plaintiff should not be an enemy alien and the defendant should be present in England and a summons should be served upon him. If the court assumes jurisdiction, the next task of the court is to select the law to be applied for determining the validity of transfer.

There are various theories with regard to the choice of law.

They are the following.

#### **a) THE *LEX DOMICILIE* THEORY**

According to this theory transfer of movables are governed by law of the owners domicile. This theory was generally accepted in England and U.S.A. in earlier times. But today, it has very few advocates and has been judicially abandoned both England and U.S.A.

#### **b) THE *LEX ACTUS* THEORY**

According to this theory the disputes with regard to the transfer of Movable Property should be governed by the law of the place where it was performed.

#### **c) THE *LEX SITUS* THEORY**

According to this theory, the validity of a transfer of a tangible moveable and its effects on the proprietary rights of the party are to be governed by the law of the country where the movable is situated at the time of the transfer.

## **d) THE PROPER LAW THEORY**

According to this theory the appropriate law to be applied for deciding questions arising out of transfer of movables is the law of the country with which the elements of transfer has the most substantial connection.

### **MODERN ENGLISH LAW**

In a connected with transfer of tangible movables property, mainly two types of questions arises. They are:

- a) Questions contractual in character
- b) Questions proprietary in character.

The questions of contractual nature should be determined by the law of the country with which transfer has the most substantial connections. The questions of proprietary in character are to be determined by the application of *lex situs* at the time of transfer.

### ***Camel vs. Sewell (1858)***

'x' a domiciled English man purchased some timber in Russia and the seller shipped the timber to 'x' in England by a Russian vessel. The ship was wrecked off the coast of Norway. At a public auction held at Norway at the instance of the master of the ship, the timber was sold to 'y'. By the law of Norway, 'y' got a valid title to the timber but not according to the English law. The timber was shipped by 'y' to England and transferred to the defendant. A suit was brought by 'x' continued to be the owner notwithstanding the auction sale in Norway. The defence was that by virtue of the auction sale at Norway, the defence got the title over the timber. The English court held 'y' title conferred by the Norwain law (*Lex situs* at the time of transfer) superseded the earlier title of the English purchaser.

### **INTANGIBLE MOVABLES**

Choses in action are intangible movables. They can be divided into two groups.

- a) Those which are mere rights of actions.

Eg: a debt arising from a loan

- b) Those which are represented by some documents are writing that is capable of being negotiated as a separate physical entity.

Eg: promissory notes, bill of exchange, cheque, shares etc.

### **1) ASSIGNMENT OF DEBT**

In the case of assignment of intangible movables like debt involving foreign element the question would be which law governs the rights and liabilities of the parties. There are various theories.

**a) *LEX DOMICILIE OF THE CREDITORS***

According to this theory the law to be applied for deciding the rights and liabilities of parties to the assignment is the law of domicile of the creditors.

**b) *LEX SITUS OF THE DEBT***

According to this theory debt situated in the country where the debtors reside and the law to be applied to determine the rights and liabilities of parties to the assignment is law of the country where the debtor resides.

**c) *LEX LOCI ACTUS THEORY***

According to this theory, the assignment of debt should be governed by the law of the place where the assignment was made.

**c) *THE PROPER LAW OF ASSIGNMENT***

According to this theory, the rights and liabilities of parties to the arising out of assignment of a debt is law of the country with which the assignment is most closely connected.

**d) *THE PROPER LAW OF DEBT***

According to this theory the law to be applied for deciding any dispute arising out of assignment of a debt of the country with which the elements of the original transaction which created debt has more connections.

**MODERN ENGLISH LAW**

In a case related to the assignment of a debt, the formal validity and essential validity of the assignment may arise. The essential validity and capacity of parties to the assignment would be decided by the English court by applying the proper law of assignment.

The formal validity would be decided by applying the law of the place where the assignment is made.

***REPUBLICA DE GUATEMALA vs. NUNEZ (1927)***

In 1906, the president of Guatemala deposited a huge sum of money in a London. In 1919, he assigned this sum by a letter written from Guatemala. He was deposited and imprisoned in 1920. While in prison, he was forced to assign this sum to the republic of Guatemala. The republic filed a suit in England claiming the money from to bank and Nunez.

The assignment of 1919 was valid under the English law but void under the law of Guatemala. The proper law of assignment in this case was law of Guatemala in favour of

Nunez and held that the assignment and in favour of Nunez was invalid. The assignment in favour of republica was also held to be void for duress.

In this case, the English court held that formal validity of assignment is governed by the law of the place where the assignment was made.

## **SUCCESSION TO MOVABLE PROPERTY**

### **INTESTATE SUCCESSION**

Intestate succession to the movables is governed by the law of domicile of the deceased at the time of his death.

Section 5 of the Indian succession act provides that succession to the movable property of a deceased person is regulated by the law of the country where he was domicile at the time of his death.

### **TESTAMENTARY SUCCESSION**

The question with regard to the capacity of the testator will be determined by the lex domicile of the testator at the time of making the will.

The capacity of a legatee to take a bequest under the will is determined either by a law of his domicile or by the law of the testator's domicile. If there is conflict between these two laws, the law most favourable to the legatee will be applied.

The essential validity or the efficiency of testamentary disposition is determined by the law of the country where the testator was domiciled at the time of the death.

The formal validity of the will shall be decided by applying the law of any one of the following countries.

- a) The country where the will was executed.
- b) The territory (country) where the testator was domiciled either at the time of execution of the will or at the time of his death.
- c) The country where the testator was habitually resided at the time of execution of the will or at the time of his death.
- d) The country in which he was a national either at the time of execution of a will or at the time of his death.

## **INSOLVENCY JURISDICTION AND EFFECTS OF FOREIGN INSOLVENCY PROCEEDINGS**

### **INTRODUCTION:-**

Adjudication of a person as insolvent or bankrupt confers a status of bankruptcy or insolvency on him and accords him protection from his creditors. When a person is unable to pay his debts, proceedings may be filed in a court of law by that person himself or by his creditors for his adjudication as insolvent or bankrupt. Problems of insolvency arose in the world once it became common to extend credit in trade and commerce. Inevitably from time to time people were unable to meet their obligations. Once a person is adjudicated as insolvent a disabling status is conferred on him and he cannot henceforth deal with his property till he is discharged by the court. From the date of his adjudication as an insolvent and till his discharge, his entire property vests in the administrator (the term used in a very wide sense so as to include all categories of officials who administer or manage insolvent's property).

In private international law insolvency is referred to as a general or universal assignment of property, since insolvency implies disposal of entire assets of the insolvent among his creditors. On the adjudication of a person as insolvent all his assets are distributed equitably among his creditors. On this being done the debtor is discharged from the disabling status and is allowed to start a fresh life. The concept of insolvency is recognised all over the world. All systems of law agree that the purpose of insolvency proceeding is the appointment of administrator for the benefit of creditors of the insolvent. Apart from this there is no agreement in the laws of bankruptcy of the countries of the world. In the common law system any person can be adjudicated as insolvent but in European countries rules relating to insolvency had been evolved in Roman law from which they became a part of the 'Law Merchant'. Only merchants can be declared insolvent in European countries.

### **LEGAL CONCEPT OF INSOLVENCY:-**

The legal concept of insolvency serves threefold interest

- The individual interest of the debtor
- The interest of the community of creditors
- Social interest according to the protection of trade and commerce

### **ENGLISH LAW ON INSOLVENCY:-**

English law uses the term bankruptcy and Indian law uses the term insolvency. Traditionally in English law a distinction was made between the concepts of insolvency and

bankruptcy; Insolvency describes the actual state of a person or a company who or which is unable to satisfy his or its obligations; Bankruptcy describes the status in law of a person who is insolvent. The basic feature of all insolvency laws are collectivity, equal treatment of creditors and the discharge of the insolvent. The modern English law of bankruptcy is statutory law and is contained in the Bankruptcy Acts, 1914-1926; most of the conflicting matters are covered by the acts. Some of the provisions of the acts have been given a fairly wide interpretation.

### **JURISDICTION OF ENGLISH COURTS:-**

Under the Bankruptcy Acts a petition for bankruptcy may be filed by the debtor himself or by any of his creditors. When the former files a petition the jurisdiction of the court is much wider. When a creditor files a petition for adjudicating the debtor as insolvent, the jurisdictional rules are somewhat narrow. An English court can exercise jurisdiction when the following two preliminary conditions are satisfied

- There must be an act of bankruptcy
- There must be a debtor

Act of Bankruptcy: - Under the acts the following circumstances constitute acts of bankruptcy

1. If the debtor in England or elsewhere makes any conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally
2. If the debtor in England or elsewhere makes a fraudulent conveyance, gift, delivery, or transfer of his property or any part thereof
3. If the debtor, in England or elsewhere makes any conveyance or transfer of his property or any part thereof or creates any charge thereon which would under the Bankruptcy Act, 1914 or any other Act be void as fraudulent preference if he was adjudicated bankrupt.
4. If the debtor with intent to defeat or delay his creditors departs out of England or being out of England remains out of England or departs from his dwelling house or otherwise absents himself or begins to keep house.
5. If an execution against the debtor has been levied by seizure of his goods under process in an action in any court or in any civil proceeding in the High court and the goods have been either sold or held by the sheriff for twenty one days

6. If the debtor files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself.
7. If the debtor fails to comply with a bankruptcy notice issued by a judgement creditor requiring him to pay the judgement debt or
8. If the debtor gives notice to any of his creditors that he has suspended or that he is about to suspend, payment of his debts.

Of the above eight acts of bankruptcy ordinarily only the first four relate to conflictual problems. Acts 1, 2, and 3 may be committed in England or abroad. In the fourth case the act of bankruptcy is committed by departing out of England or by remaining out of England if already out of England. Acts 5, 6 and 7 must be committed in England though it is not necessary that the debtor should be present in England. Of these the first four acts have given rise to some controversies and difficulties.

In *Theophile vs. Solicitor general* the House of Lordshad suggested that the rule laid down in *Cook vs. Chas. A. Vogeler Co.* may no longer be applicable as sec 1(2) of the act of 1914 now defines jurisdiction in bankruptcy by reference to the person of the debtor.

#### **JURISDICTION IS DISCRETIONARY:-**

Court's jurisdiction to adjudicate a debtor bankrupt being equitable jurisdiction is in its very nature discretionary. Thus even when all the conditions for the exercise of jurisdiction are fulfilled, it may nevertheless refuse to exercise the jurisdiction. The court had declined to exercise the jurisdiction when the debtor has been made bankrupt in another country.

#### **INDIAN LAW ON INSOLVENCY:-**

The Indian law on insolvency is contained in two statutes: the Presidency Town Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The Indian law is primarily based on English law. The former statute is applicable only in towns of Bombay, Calcutta and Madras, while the latter applies to the rest of the country. Now Insolvency in India is governed by Insolvency & Bankruptcy code. Sec 234 enable legislative to make bilatevul treaties to recognise Foreign insolvency judgements.

#### **JURISDICTION OF THE INDIAN COURTS:-**

Just as under the English law so under the Indian Law, the following two conditions are necessary for the exercise of the jurisdiction by the court.

- Act of Insolvency

- Debtor

**Act of Insolvency:** - In both the statutes, the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act 1920 has eight acts which are identical. Under both the acts a debtor commits an act of insolvency of the following cases

1. If in India or elsewhere he makes transfer of all or substantially all his property to a third person for the benefit of his creditors generally
2. In India or elsewhere he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors.
3. If in India or elsewhere he makes a transfer of his property or of any part thereof which would under this or any other enactment for the time being in force be void or fraudulent preference if he was adjudicated an insolvent
4. If with intent to defeat or delay his creditor
  - He departs or remains out of the territories to which the act extends
  - He departs from his dwelling house or usual place of business or otherwise absents himself
  - He secludes so as to deprive his creditor of the means of communication with him
  - If any of his property has been sold in execution of the decree of any court for the payment of the money
5. If any of his property has been sold in execution of the decree of any court for the payment of the money under the Act of 1919 this clause is worded thus: if any of his property has been sold or attached for a period of not less than twenty one days in execution of the decree of any court for the payment of money.
6. If he petitions to be adjudicated as insolvent
7. If he gives notice to any of his creditors that he has suspended or that he is about to suspend, payment of his debt or
8. If he is imprisoned in execution of the decree of any court for the payment of money

The Indian statutes specifically lay down that an act of insolvency committed by an agent may constitute an act of insolvency of the principal.

Debtor: - The second condition for the exercise of the jurisdiction by the court is that there must be a debtor who under the Provincial Insolvency Act

1. Ordinarily resides within the jurisdiction of the court or
2. Carries on business within the jurisdiction of the court or
3. Personally works for gain within the jurisdiction of the court or
4. Is on being arrested or imprisoned in custody within the jurisdiction of the court
5. If the debtor at the time of presentation of the insolvency petition, imprisoned in execution of the decree of a court for the payment of money in any prison to which debtors are ordinarily committed by the court in the exercise of its ordinary original jurisdiction or
  - If the debtor within a year before the date of the presentation of the Insolvency petition has ordinarily resided or had a dwelling house or had carried on business either in person or through an agent within the limits of the ordinary civil jurisdiction of the court or
  - If the debtor personally works for gain within those limits or
  - If in the case of a petition by or against a firm of debtors the firm has carried on business within a year before the date of the presentation of the insolvency petition within those limits.

### **EFFECT OF INDIAN INSOLVENCY:-**

In regards to the vesting of the property in the administration in insolvency there is a slight difference between the provisions of the Presidency Towns and Provincial act. Under the former on the making of order of adjudication the property of the insolvent wherever situated shall vest in the official assignee and shall become divisible among the creditors and thereafter except as directed by this act no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt.

In *B.N Lang v Jasvantlal* the Bombay High Court said that all the properties of the insolvent wherever situated vest in the official assignee though it is different matter whether he will be able to take possession of them, particularly when properties are situated in a foreign country. In this case the execution of a decree passed by a foreign court one of the creditors has got attached certain properties of the insolvent by the order of the court. The official assignee applied for the vacation of the attachment order on the plea that this

property should be set free so that it is also available for rateable distribution among all the creditors. The court accepted the prayer and released the property from attachment. It was observed that all the properties of the insolvent vest in the official assignee and the court should not bother itself as to how the official assignee would be able to get the possession of the foreign situated assets.

### **CHOICE OF LAW IN ENGLISH AND INDIAN COURTS:-**

Whenever in English courts exercises jurisdiction in a petition for adjudication of a person as bankrupt it applies the English law concerning the administration of assets of the bankrupt.

In all proceedings for adjudication of a debtor insolvent the Indian courts apply *lexfori*.

### **FOREIGN INSOLVENCY ORDERS:-**

In regard to foreign insolvency orders two main questions that have come before the Indian courts are: what effect is to be given to foreign insolvency order in respect of properties of the insolvent situated in India and should the Indian courts stay the execution petition pending before it in respect of property situated in India after an order of adjudication had been passed by a foreign court.

In *Anantpadmanabhswami v Official Reciever Secunderabad* a creditor of the insolvent got a preliminary decree passed in the latter's suit for partition in the Madras High Court in execution or his money decree obtained by him from a Bombay court in 1926. In 1928 the debtor was adjudged insolvent by a secunderabad court. At the time of execution proceedings were pending in the Madras High court. When the creditor sought to proceed further with the execution of attachment proceedings the official receiver of secunderbad opposed them.

Vnicitral Model Law in adopted and followed by almost 41 countries now. It provides for provision related to representation in insolvency proceeding to conduct multiple proceeding recognition of foreign judgements, co-operation among courts and procedure to conduct multiple proceedings.

## UNIT - V

### ENFORCEMENT AND RECOGNITION OF FOREIGN JUDGMENTS

Unsatisfied judgments of foreign courts give rise to delicate and complicated questions of Private international law. For instance, X brings an action against Y in France for damages for breach of contract, and finally obtains a judgment. By this time Y has secretly removed all his assets from France and moved to England. X finds it is useless to enforce the judgment against Y in France. In this situation what X has do is the question? Can he file the French judgment in English court within whose jurisdiction Y has assets in England and request the English court to exercise the judgment? If this is not possible, can he file a suit in England on the basis of the French judgment? Or must he begin all over once again by bringing an action on the original cause of action, leaving aside French judgment?- based on the principle of territorial sovereignty, judgment delivered by a court in one country cannot be executed or put into operation directly in another country, in the absence of an inter-state agreement which says that a judgment given by French court cannot be directly executed in England by an English court.

Where English courts have long recognized and enforced foreign judgments with certain defined limits. Such recognition and enforcement is essential if one of the primary objectives of private international law is the protection of right sunder foreign system of law, is to be attained in any substantial measure.

Today most of the commonwealth countries including India and the United States of America give recognition to foreign judgment. Continental system of law recognizes foreign judgments which appears on the basis of reciprocity. The recognition of foreign judgment must be distinguished from its enforcement. While a court must recognize every foreign judgment it enforced, it need not enforce every foreign judgments it enforces, it need not to enforce every foreign judgment it recognizes. It is not possible to enforce certain foreign judgments, the can only be recognized.eg a foreign judgment dismissing a claim, foreign decree of divorce or of nullity of marriage. Judgments which are declaratory in nature or which determine status of persons, generally speaking needs only recognition in the courts of other countries. Circumstances under which foreign judgments will be recognized are approximately the same as those under which they will be enforced. It is not necessary to consider recognition and enforcement separately.

#### THE BASIS OF RECOGNITION OF FOREIGN JUDGMENTS:

The basis of recognition and enforcement of foreign judgment was based on the 'principle of comity'. English judges in the older cases believed that the law of nations

required the courts of one country to assist the courts of other countries- feared that if foreign judgments were not enforced in England, English judgments would not be enforced abroad. Comity, surely is an inadequate basis, an uncertain ground and gives rise to difficulties. It means that the judgments of English courts are not enforced in a country in a country; the judgments emanating from that country should be denied enforcement in England irrespective of other considerations. Again if the judgments of English courts are enforced in a country, on the **principle of comity**, the judgments from that country should necessarily be enforced by English courts and there would be no "Scope for any defense against those judgments except possibly the want of jurisdiction". To carry enforcements of foreign judgments to such lengths is obviously against the elementary notions of justice. The **theory of comity replaced by a more defensible principle "the doctrine of obligation"**- means **when a foreign court of competent jurisdiction had adjudicated a certain sum to be due from one person to another, the liability to pay that sum becomes a legal obligation.** This legal obligation can be reinforced in England by an action before the proper court. **'BARON PARKE' expounded this theory in 1842** as "where a court of competent jurisdiction has adjudicated a certain sum of money to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained- thus the judgments of foreign and colonial courts are supported and enforced". (*William v. Jones-1845, 13 M & w 633*)- Once the foreign judgment is proved, the burden lies on the defendant to show why he should not perform that obligation. The foreign judgment in other words, invests the creditor with a new right and imposes on the debtor a new obligation. The doctrine of obligation has 2 merits when compared to the principle of comity. 1<sup>st</sup>- the question of reciprocity is completely eliminated. If A is under legal obligation to B by virtue of foreign judgment, it is not necessary to examine how a judgment of an English court is treated in that foreign country. An obligation, once recognized by English law must be enforced irrespective of the substantive rules of law under which it has been created. 2<sup>nd</sup> – there is no difficulty in prescribing the defenses against a foreign judgment. Existence of an obligation being the basis of liability, any ground which negatives the obligation can be pleaded in defense.

### **NO MERGER OF CAUSE OF ACTION IN A FOREIGN JUDGMENT:**

It is a basic rule of English internal law that a plaintiff who has obtained a judgment against the defendant is barred from suing again on the original cause of action. The original cause of action merged in the judgment and thus becomes extinguished. But this domestic theory of merger does not apply to foreign judgments. A foreign judgment does not like an English judgment does not extinguish the original cause of action. As the foreign judgment does not result in merger of the original cause of action, the plaintiff is entitled to sue on the original cause of action, he has an option that either he may sue on the basis of

foreign judgment or resort to the original cause of action. Says that if A has obtained a foreign judgment against B for a debt, A may either sue B in England on the foreign judgment or he may bring an action against B in England on the debt in which case the foreign judgment can be used only as evidence of the debt.

There is no substantial justification for making distinction between English judgments and foreign judgments. There was old position that the foreign judgment was not a final and conclusive adjudication but was only a piece of evidence of the rights and liabilities of the parties. The original cause of action though **res judicata** in foreign country was still alive in the eyes of English law & could be re-examined on merits. These considerations mainly influenced the judges in old English cases in taking foreign judgments out of the purview of the doctrine of merger. It has become firmly established since in the case- (*Godard vs. Gray 1870, L R 6Q.B. 139*) that a foreign judgment given by competent court is conclusive and final and cannot be re-examined in England on merits. In spite of this rule, the rule of non-merger continued to survive and it has now become an 'illogical anomaly'. Lord Wilberforce characterized it as an "illogical survival" and regarded its continued existence as "precarious" in a 1967 case (*Carl Zeiss vs. Rayner & Keeler 1967. I.A.C., 835 at p.966*)

#### **ENFORCEMENT OF FOREIGN JUDGMENTS AT COMMON LAW:**

The common law principle is that a foreign judgment though creating an obligation that is actionable in England cannot be directly enforced in England by direct execution. It is necessary to bring a new action in England on the foreign judgment- but when such an action is brought in England, the plaintiff can apply for summary judgment (**under Order 14 of the Rule of the SC**), on the basis that the defendant has no defense to the claim & if this application is successful the defendant will not be allowed to plead at all.

The simplicity of the procedure and the fact that he defenses to an action on foreign judgments have been confined to narrow limits, make foreign judgments easily enforceable in England. In this theory it is the English judgment (obtained in the basis of the foreign judgment) that is executed or enforced in England. In short, at common law a foreign judgment can be enforced in England only indirectly & not by direct execution. The enforcement is through, medium of an English judgment.

#### **ENFORCEMENT OF FOREIGN JUDGMENT UNDER STATUTES:**

The said common law doctrine that foreign judgment can be enforced only by institution of fresh legal proceedings in England is subject to certain statutory exceptions. Under some statutes, a foreign judgment under which a sum of money is payable may be

enforced directly (without the medium of an English judgment) by the process of registration: The most important of these statutes are:

**(1) The Judgments Extension Act 1868.**

**(2) The Administration of Justice Act 1920.**

**(3) The Foreign Judgments (Reciprocal Enforcement) Act 1933.**

**(1) SCOTTISH AND IRISH JUDGMENTS:** The judgment extension act is a judgment obtained in one part of the united kingdom, to be registered in another part & enforced as if the judgment had been given by the court in which it is registered. (This has been necessitated by the fact that Scotland and Ireland, though within united kingdom, are regarded as foreign countries for purposes of private international law). Registration can be effected as matter of right & no defenses can be pleaded by the judgment creditor, not even the defense of want of jurisdiction.

**(2) COMMONWEALTH JUDGMENTS:** Part II of the Administration of Justice Act 1920 for reciprocal enforcement by registration of judgments of superior courts of Commonwealth countries. The Act to be applicable must be particularly extended to a Commonwealth country by an Order in Council. Before the order is made it is essential for the majesty to be satisfied that reciprocal provisions have been made in the concerned Commonwealth country for similar enforcements of judgments rendered by courts in United Kingdom. The registration is not as of right, it is discretionary since it can be refused unless the registering court comes to the conclusion that “in all the circumstances of the case it is just an convenient that the judgment should be enforced in the United Kingdom”. The effect of registration has the same force and effect as one rendered by the registering court.

**(3) JUDGMENTS IN COUNTRIES OUTSIDE THE COMMON WEALTH:** The Foreign Judgment (**Reciprocal Enforcements Act**) 1933 provides for reciprocal enforcement by registration of judgments of superior courts of foreign countries outside the Commonwealth. The enactment is more important than the Act of the 1920 as it is better & more comprehensively drafted. The provisions of the Act can also be extended by any Commonwealth country. This has been done with a view to end 2 aspects of registration, one for Commonwealth countries & the other for countries outside Commonwealth. It has been provided that when the Act of 1933 is made applicable to a Commonwealth country, the Act of 1920 will automatically cease to apply to that country. Registration under this Act is as of right and not at the discretion of the court unlike the Act of 1920.

## **ENFORCEMENT OF FOREIGN JUDGMENT UNDER THE INDIAN LAW:**

In the Indian law, foreign judgments are recognized and enforced under the provisions of the civil procedure code. **Section 13 of the Civil Procedure Code** provides that if certain conditions are satisfied. “a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties under the same title”. In view of this statutory provision, it is not judgment in India, although Indian judges, following English decisions have referred to both the comity and obligation doctrines. Except in certain specified cases (**sections 44 and 44A**) foreign judgment cannot be enforced by direct execution in India. It can be enforced only by the institution of a suit upon the judgment, as in England. Before independence, judgments of the court in the Indian native states were considered as foreign judgments in British India and consequently could be enforced in British India only by a suit on the judgment.

Section 44 of the code as it stood before (**1947**) provided that the government of India may by notification in the Official Gazette declare that a decree of any civil or revenue court of any Indian state might be executed in British India as if it has been passed by the courts in British India. From **1951 the Civil Procedure Code** has been extended to all the states of the Indian union and by virtue of **clause (3) of Article 261 the Constitution of India**, final judgments and orders passed by civil courts established in any part of the territory of India shall be capable of execution anywhere within the territory of India.

Consequently, **sections 43 & 44** have been modified by the **amendment act of 1951**. The modified **sections 43 & 44** provide for direct execution of decrees and orders of civil and revenue courts situated in any part of India to which the provisions of civil procedure code do not apply. **Section 45** provides for the direct execution of decrees of Indian courts in territories outside India by courts established by the authority of the central government.

**Section 44 – A** relates to the reciprocal enforcement of judgment given by courts in foreign countries. This section has been modeled on the analogous provision in **the Foreign Judgments (Reciprocal Enforcement) act referred to Above (1915)**. Under **section 44 – A** decrees of the superior courts of the United Kingdom and other foreign countries with which India has reciprocal agreements are enforceable in India as if they are decrees of Indian courts.

The foreign countries with which India has reciprocal arrangements for direct execution of decrees is called reciprocating territory. **Explanation 1 to section 44 –A** defines reciprocating territory as- “**Reciprocating territory**” means any country or territory outside India which the central government may by notification in the official gazette, declare to be a reciprocating territory for the purposes of this section; and “superior court”

with reference to any such territory means such courts as may be specified in the said notification.” **Foreign decrees can be directly executed under section 44 – A only in district courts”.**

## **CONDITIONS FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS**

### **1. JURISDICTION OF THE FOREIGN COURT**

The foreign court should have had jurisdiction in the international sense. The most fundamental of all requirements for the recognition and enforcement of foreign judgments (whether at common law or under the statutes) is that the foreign court should have had jurisdiction according to the rules of English private international law. “The first and overriding essential for the effectiveness of a foreign judgment in England is that the adjudicating court should have had jurisdiction in the international sense over the defendant”-it is not enough if the foreign court has jurisdiction according to the system of law under which it sits; it is necessary that the foreign court is a court of competent jurisdiction in the international sense, that is, according to the principles of private international law as understood in England.

In the leading case of (*sirdar gurdialsingh v. the rajah of faridkote (1984, A. C. 670)*), the Rajah of faridkote obtained two ex parte judgements for a huge sum of money from a civil court at Faridkote against the applicant. The appellant who had been the treasurer to the Rajah left faridkote five years before the suits were instituted in the civil court and had never returned to that place again. Subsequently the Rajah brought an action against the appellant on these judgments before a court at Lahore where the appellant at the time was resident. Lahore was a part of British India and Faridkote was an Indian state with independent jurisdiction. Therefore, the suit before the Lahore court was an action on foreign judgment. It was held by the Privy Council that the action before the Lahore Court must fail because the civil court at Faridkote had no jurisdiction on any recognized principle of international law against a man who had left the territory and had not submitted to the jurisdiction of the court. The competence of the foreign court is judged by the tests that are applicable to decide whether an English court can exercise jurisdiction and in this regard it is necessary to consider **judgment in personam and judgment in rem** separately.

#### **(a) JUDGEMENT IN PERSONAM**

In English law personal jurisdiction depends upon the rights of a court to summon the defendant and the right is exercisable only against those who are present in England (apart from the exceptional cases where by virtue of statutory provisions the court is empowered to exercise jurisdiction against absent from a country and has no business in that country, the

general principle according to English law is that the defendant is not subject to the jurisdiction of any court there, unless he voluntarily submits himself to this jurisdiction. The position, therefore is that for personal jurisdiction in international sense either of the following two conditions must exist: (i) defendant's presence in the foreign country, or (ii) his voluntary submission to the jurisdiction of foreign court.

### **(i) RESIDENCE OR PRESENCE**

It is natural for the plaintiff to sue in the country where the defendant resides and it is well settled that residence in the Foreign Country is sufficient to confer jurisdiction to the foreign country. But the question whether mere presence, however temporary would be sufficient is not free from doubt. It is argued that a person who is present within the territory of a state becomes subject to the laws of the state and consequently to the jurisdiction of its courts and the length of his presence is immaterial. Moreover, it is a settled principle of English law that temporary presence of the defendant in England is sufficient to confer jurisdiction to the English court and the same yardstick should be used to determine the jurisdictional competency of the foreign court.

This view is supported by the decision in *Carrick v. Hancock (1895, 12)* where a domiciled English man while he was on a short visit to Sweden was served with the writ of summons of a Swedish court. Later an action on the judgment of the Swedish court was brought in England. It was held that the Swedish court exercise jurisdiction over him despite his mere temporary presence in Sweden (Although the ruling is very definite on the point, the actual decision can equally be supported on the ground of submission to the jurisdiction because defendant appeared in court in answer to summons and was represented throughout the proceedings.) But there is also the view that casual presence as distinct from residence is not a desirable basis of jurisdiction if the cause of action arose outside the foreign country concerned. The reason is that in such cases, the court is not in a favourable position to deal intelligently either with the facts or with the law. In the case of the artificial person like a corporation, neither residence nor presence has any real meaning: the only practical test is whether it is carrying on business in the foreign country. We may say that the transaction of business corresponds to physical presence in the case of artificial persons. "In the eyes of English law, a corporation is not amenable to the jurisdiction of a foreign court unless at the time of the commencement of the action, substantial business was being carried on by it at some definite and more or less permanent place in the country of trial."

### **(ii) SUBMISSION OF THE DEFENDANT TO THE FOREIGN COURT**

It is a clear principle of Private International Law that if a person voluntarily submits to the jurisdiction of a foreign court, the judgment of that court will be regarded as one

rendered by a court of competent jurisdiction. Submission can take place in various ways. The most obvious case is where a person invokes the jurisdiction of the foreign court as the plaintiff. He, then undoubtedly renders himself liable to a judgment in respect of counter claim or a cross – action or costs. With regard to the defendant he may voluntarily appear in court and plead on merits.

This is clearly submission to the jurisdiction of the court. This is so even if he questions the jurisdiction of the court along with contesting the plaintiff's case on merits. If a defendant before a foreign court prefers an appeal from a judgment obtained by the plaintiff from the foreign court it will amount to voluntary submission. (*S.A. Consortium v. Sun and Sand.*) (1978) 2 All E.R. 339). But if defendant appears before the court only to question its jurisdiction, can he be taken to have submitted to the jurisdiction? Can such appearance be regarded as voluntary? For example, if the defendant has properties in the foreign country where he is sued, he is faced with a dilemma. If he takes no part in the proceedings, a judgment obtained against him can be executed and his properties become liable to be seized. On the other hand if he appears in court simply to question the jurisdiction of the court and if this qualified appearance constitutes submission, the judgment is liable to be enforced in England also by an action on the judgment.

Thus by adopting the latter course he is making his assets in England also liable to seizure. In regard to the above matter, the older cases have made a distinction in what may be called property cases, that is if the defendant's property has already been seized by the foreign court, an appearance to protest against jurisdiction is not voluntary. But if he enters appearance to save his property (which will be liable to seizure if judgment is given against him) then his appearance is treated as voluntary. It is now generally accepted that there is no merit in the above distinction and an appearance merely to contest the jurisdiction of the court will not amount to submission. **Lord Denning, L.J.** observed: I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all" (*Re Dulles. Settlements; 1951, 2 All E. R. 69*). "It can be said with some assurance that to protest is not necessarily to submit". We may therefore, say that an appearance merely to contest the jurisdiction of the court is not voluntary and cannot be taken as submission to the jurisdiction.

### (iii) NATIONALITY AS A GROUND OF JURISDICTION

Is there any other ground of jurisdictional competency other than the two mentioned above, i.e. presence and submission? *In Emmanuel vs. Symon (1908, IK. B 202)* Buckely L.J., enumerated five grounds of competency. “In action in personam.” He said, “there are five cases in which the courts of this country will enforce a foreign judgment : (1) where the defendant is a subject of the foreign country in which the judgment has been obtained ; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he had voluntarily appeared and (5) where he was contracted to submit himself to the forum in which the judgment was obtained”.

Of these the last four are covered by the grounds of presence and submission. The first one, i.e. the fact that the defendant is the national of the concerned foreign country is a sufficient jurisdictional ground is a doubtful proposition. There is no direct English authority on this point. Some writers support this view, but the more accepted position is that nationality as such is not a reason which can justify the exercise of jurisdiction by the foreign court.

### (b) JUDGMENTS IN REM

A **judgment in rem** is a judgment of a court of competent jurisdiction determining the status of a person or a thing. It binds all persons claiming an interest in the subject matter of the judgment, while a **judgment in personam** binds only the parties to the case. A **judgment in rem** looks beyond the individual rights of the parties, but a **judgment in personam** is directly solely to the rights of the parties. It is a well – established principle of Private international law that a judgment pronounced by a court of competent jurisdiction in an **action in rem** is accorded universal recognition although the defendant is neither a resident of the foreign country nor has submitted to the jurisdiction of its courts.

### 1. FINALITY OF THE FOREIGN JUDGMENT

The second condition for the recognition and enforcement of foreign judgment is that it should be a final adjudication, i.e., it should amount to **res judicata** by the law of the country where it was given. If the foreign can be altered in later proceedings between the same parties in the court, it is not enforceable by action in England. Thus provisional judgment preliminary decrees given by foreign courts are not enforceable as they are not final. The requirement of finality does not mean that there should be no right of appeal. It only means that the judgment must be final in the particular court in which it is pronounced. Therefore, the fact that the foreign judgment is likely to be reversed in appeal or even the fact that an appeal is actually pending in the foreign country is not a bar to an action in

England country is not a bar to an action in England. But in cases where an appeal is pending, the English courts have the equitable jurisdiction to stay the action, and this is usually exercised.

## **2. THE FOREIGN JUDGMENT, IF IN PERSONAM, MUST BE FOR A FIXED SUM**

In the case of **judgment in personam** it is a condition for enforceability in England that the judgment must be for a fixed sum. The obligation to pay under a foreign judgment can arise only in the case of a definite sum. So in the case of **actions in personam** the foreign court should finally and definitely determine the amount to be paid; otherwise an action on the foreign judgment is not maintainable in England. For EG, in (*Sadler v. Robins 1808, 1 Camp 253*) a court in Jamaica decreed that the defendant should pay to the plaintiff a particular sum after deducting the full costs expended by the defendant, the determination of which was left to an official of the court. It was held that until the costs were finally determined, an action would not lie in England as the sum under the Jamaican judgment was indefinite

## **CONCLUSIVENESS OF FOREIGN JUDGMENT**

The question to be considered here is how far a foreign judgment can be impeached before an English court on merits? It is now established beyond any doubt that the foreign judgment given by a court of competent jurisdiction cannot be reopened in England on merits. The English court is not entitled to investigate the propriety of the proceedings in the foreign courts. If a party is not satisfied with the decision of the Foreign Courts. If a party is not satisfied with the decision of the foreign court, his proper course is to take appellate proceedings in the forum of the judgment. It is not for the English court to sit as a court of appeal against a foreign judgment pronounced by a competent court.

## **THE EFFECT OF MISTAKE FOREIGN JUDGMENT**

Following the above principle, it has become established that a foreign judgment is not liable to be impeached in England on the ground that the Foreign Court was mistaken as to the facts of the case or as to the foreign law applicable to the case. What if the foreign court had committed a clear mistake notion of position is that even an obvious mistake as to English law does not constitute a bar to the enforcement of the judgment in England. Thus as, “the doctrine that a foreign judgment conclusion.” -This is illustrated by the decision *in Godard vs. Gray (1870. L. R. 6Q B 139)*, the plaintiffs (French men) sued the defendants (English men) in France on a contract, a clause: the penalty for the non - performance of this agreement, estimated amount of freight.” The effect of such a clause in English law is not to fix the amount of damages exactly, but to leave the damages to be assessed according to the actual loss suffered. But the French court mistakenly believing that the clause should be

taken in the natural sense fixed the damages payable by the defendant at the exact amount of freight. When an action was instituted in England on the French judgment, the defendants pleaded this mistaken view of English law as a defence. The plea was rejected by the court. It was held that there can be no difference between a mistake as to English law and any other mistake. The remarkable result, therefore, is that an English court may be compelled to enforce a foreign judgment solely based on a complete error of English law.

## **THE POSITION IN INDIAN LAW**

The Indian law under the **Civil Procedure Code** cannot be said to be the same with regard to the doctrine that a foreign judgment cannot be impeached on merits. **Clause (b) of section 13 of the Civil Procedure Code** lays down that a foreign judgment shall not be conclusive “if it has not been given on the merits of the case”. Indian courts are competent not to enforce a foreign judgment, if it is not given on merits. This means that a foreign judgment can be examined to ascertain whether it has been given on merit or not. It has been held that a decree passed without recording any evidence is not a judgment on merit. (*Babu Nemi Chand vs. Y.V.Rao, AIR 1948 Madras 448*). In *D. T. Kaymer vs. P. Viswanathan (1916 P.C. 121)*- a suit was filed against the defendant in England and he duly entered appearance to answer the claim made against him. When certain interrogatories were served on him, he refused to answer them and on this defence was struck off and judgment was passed against English court. When this judgment was sought to be enforced in India the defendant pleaded that the judgment was not on merits and hence was not enforceable. The Privy Council held that the merits of the case were not investigated and the judgment was not on merits. It may be noted, however, that the enquiry is only to see whether the foreign judgment has been given on the merits of the case. It does not mean the Indian court can reopen the whole case and examine the correctness or otherwise of the decisions arrived at by the foreign court. Certainly, the Indian court cannot act as a court of appeal. The position has been aptly explained by the Bombay High Court as follows: “it was not open to this court trying the suit on a foreign judgment to decide whether the decision of the foreign court was right or not. The duty of the court was merely to see that the foreign court had applied its mind to the facts and to the law” (*Mallappa Yellappa vs. Raghavendra 1938 Bom. 173*).

## **DEFENCES AVAILABLE TO AN ACTION ON A FOREIGN JUDGMENT**

When the action is brought on a foreign judgment, the defendant can escape liability pleading any one of the following defences. These are, apart from the plea of lack of jurisdiction, that the judgment has been obtained by fraud, or that it is contrary to natural justice or that it is repugnant to the public policy as understood in England.

### **(a) LACK OF JURISDICTION**

The most usual defence to an action on foreign judgment is that the foreign court had no jurisdiction in the international sense, i.e. according to the rules of English Private International Law. The details have already been examined above (See 19).

### **(b) FOREIGN JUDGMENT OBTAINED BY FRAUD**

Fraud is an extrinsic, collateral act; which vitiated the most solemn proceedings of courts of justice. It is settled that a foreign judgment, like any other judgment, can be impeached for fraud. Therefore it is a good defence to an action for the enforcement of foreign judgment that the foreign judgment itself was obtained by fraud. Such fraud may take various forms. It may go to the very root of the international jurisdiction of the foreign court as, in cases of collusion between the parties to the proceedings (eg. Parties to a divorce proceeding making a false statement that they were domiciled within the jurisdiction of the foreign court).

The fraud may be on the part of the successful party as when he suppresses evidence or produces false evidence, and misleads the court. It is true that you cannot impeach a foreign judgment by alleging that the court was mistaken as to facts or law. But you can allege that the court was mistaken as to facts or law. But you can allege that the court was misled because mistake and trickery are essentially different. The fraud sometimes may be on the part of the court itself as where it is interested in the subject matter of the suit or it had been bribed by one of the parties.

When there is fraud on the part of the foreign court itself, it is only a case of fraud, but also a case of denial of natural justice. The difficult question in this area is whether in order to prove fraud the foreign judgment could be reopened on merits. Foreign judgments are undoubtedly impeachable for fraud, but as we have seen, it is a settled principle that foreign judgments cannot be reopened on merits. These two principles are likely to come into conflict when fraud is sought to be established. In this situation it has been clearly laid down in more than one decision of the court of appeal that the principle of conclusiveness of foreign judgment will have to give way when an allegation of fraud necessitates the reopening of the case.

It is not necessary to prove new facts to substantiate the plea of fraud in an action on foreign judgment. In other words, an allegation of fraud can be sustained before an English court on the same facts and evidence placed at the original trial in the foreign court. This of course, involves a reopening of the case on merits in the English court.

*In Abouloff vs. Oppenheimer (1882, 10 Q B. D. 295)* an action was brought on a Russian judgment which ordered the defendant to return certain goods or pay their value. The defendant's main case before the Russian Court was that the allegation of the plaintiff was false as the plaintiff herself was in possession of the goods; but judgment was given in favour of the plaintiff. Before the English court, one defence was that the Russian judgment was obtained by fraud, in that the plaintiff had falsely represented to the Russian Court that the defendant was in possession of the goods while as a matter of fact the goods were in the possession of the plaintiff.

The plaintiff contended that the above plea was one which was raised before the Russian Court which the Russian court could and did in fact consider and to examine it once again would mean the reopening of the case on merits. Over – ruling this contention, **Lord Esher** said: “I will assume that in the suit in the Russian court the plaintiff's fraud was alleged by the defendants and that they gave evidence in support of the charge. I will assume even that the defendants gave the very same evidence which they propose to adduce in this action; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it”.

*Vadala vs. Lawes (1890, 25 Q, B D.310)* raised the simple point whether an allegation of fraud fully investigated by the foreign court could once again be investigated by the English court, when an action is brought before it on the foreign judgment. In this case the plaintiff sued the defendant before an Italian court for the non – payment of certain bills of exchange. The principal defence was that the bills though purported to be ordinary commercial bills, were given in gambling transactions without the defendant's authority. This defence was tried on merits and found against by the Italian court. In an action on the Italian judgment before the English court, the defence was fraud, fraud consisting in the fact that the plaintiff induced the foreign court come to a wrong conclusion by adducing false evidence.

The court of appeal unanimously held that the English court could re-examine the matter although no new evidence was adduced and ordered a new trial for finding out whether the bills were given for genuine mercantile dealings or for gambling transaction. **Lindley L. J. reaffirmed the view taken in Abouloff's case** thus : “If the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, you can reopen the whole case even although you will have in this court to go into the very facts which were investigated and which were in issue in the foreign court... the fraud practiced on the court, or alleged to have been practiced on the court, was the misleading of the court by evidence known by the plaintiff to be false”- The effect of the

decisions is that the doctrine as to the “conclusiveness of foreign judgments is materially and most illogically prejudiced”.

It is significant that the above critical remarks have been quoted with approval by **Mathew J. of our supreme court in *Sankaran Govindan vs. LekshmiBharathi* (AIR 1974 SC 1764 at p. 1772)**. In this case, the administrators of Dr. Krishnan’s estate raised the question whether Dr. Krishnan died domiciled in England by a proceedings before the High Court in England and on the strength of affidavits and oral evidence adduced the High court came to the conclusion that Dr. Krishnan died domiciled the England. In the District court and high court in Kerala, this finding of the English court was challenged on the ground of fraud. The contention was that the English court was misled by adducing false evidence. The Kerala high court found that the decision of the English court was imposed upon it by evidence which was known to be false by the party adducing it.

On appeal this finding of the high court was reversed by the Supreme Court. After examining the relevant decisions including **Abouloff v. Oppenheimer and Vadala v. Lawes-Mathew J.**, said he was not prepared to accept a position which would permit a retrial of an issue already determined by foreign court, under the guise of alleging fraud. That the foreign judgment was obtained by trickery or false evidence should be established not by the same evidence adduced in the foreign court, but by new evidence not known to the parties at the time of the former trial. Otherwise, it will simply be making a mockery of the doctrine of conclusiveness of foreign judgments and re – establishing the discredited view that a foreign judgments is only **prima facie** evidence of a debt and can be re–examined on merits.

### **(C) FOREIGN JUDGMENTS CONTRARY TO PUBLIC POLICY OF ENGLISH LAW**

An action on a foreign judgment cannot be sustained in England if the judgment is contrary to the principles of English public policy or if the judgment was given in a proceeding of penal or revenue nature. Cases where enforcement or foreign judgments have been successfully prevented by the plea of violation of public policy are extremely rare. One eg., is ***Re Macartney* (1921, 1 Ch. 522)**. In this case, a ***Maltese judgment*** ordered a person to pay to his illegitimate daughter perpetual maintenance (i.e. without anytime limit such as during her minority). This judgment was sought to be enforced by an action on ***Maltese judgment*** lay in England because the general recognition of permanent rights of illegitimate children as recognized in Malta was contrary to the established policy of England.

### **(D) FOREIGN JUDGMENT CONTRARY TO NATURAL JUSTICE**

At common law an action on a foreign judgment can be defended on the ground that the proceedings of the foreign court were opposed to natural justice. But it is extremely

difficult to indicate the cases in which the contravention is of such nature as to justify a refusal of enforcement. The proceedings are not contrary to natural justice merely because the judgment is manifestly wrong. Also the proceedings cannot be said to be opposed to natural justice merely because the court admitted evidence which is inadmissible in England or did not admit evidence which is admissible in England.

When applied to foreign judgments, the expression “contrary to natural justice” relates merely to alleged “irregularities in the procedure adopted by the adjudicating court and has nothing to do with the merits of case.” It is not enough that the proceedings are in accordance with the practice of the foreign court. **Bramwell J.**, has aptly said: “If the proceedings be in accordance with the practice of the foreign court, but that practice is not in accordance with justice, this court will not allow itself to be concluded by them” (*Crawley v. Issacs (1867) 16 L.T. 529 at 531*). If the defendant has been deprived of an opportunity to present his side of the case it is clearly a violation of natural justice because the maxim “**audi alteram partem**” is deemed to be of universal & not merely of domestic application. The maxim applies in the case of exercise of jurisdiction over absent defendants- but care should be taken not to confuse absence of jurisdiction from violation of natural justice. If the mode or citation or summoning the defendant is manifestly insufficient as judged by any civilized standard, the procedure can be regarded as contrary to natural justice. There may be cases where though the litigant was present at the proceeding, he was unfairly prejudiced in the presentation of the case before the court- this can amount to a violation of natural justice,. For instance, if the party was totally denied the right to argue the case though he was present in court, clearly a violation of natural justice is involved.

### **DEFENCES TO FOREIGN JUDGMENT UNDER INDIAN LAW:**

According to Section 13 of the civil procedure code the following defences are available against the enforcement of a foreign judgment in India: (i) That the judgment has not been pronounced by a court of competent jurisdiction, (ii) that it has not been on the merits of the case, (iii) that it appears on the face of proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases where it is applicable, (iv) that the proceedings in which it was obtained are opposed to natural justice, (v) that it has been, obtained by fraud. Or (vi) that it sustains a claim founded on a breach of any law in force in India.

## STAY OF ACTION

Most countries of the world keep the doors of their courts of justice open to all and sundry litigants. This implies that a litigant is not only free to choose any country as a forum of his action, but can also pursue his remedy more than one Jurisdiction. In **action in personam**, the service of process on the defendant within the Jurisdiction or without the Jurisdiction is enough to confer jurisdiction on the court.

In our contemporary world the jurisdictional rules are very simple and very wider under the internal rules of the country or under the international conventions- it has become possible for litigants to file proceedings on the same or substantially same subject matter & between the same parties in more than one jurisdiction.

The multiplicity of suits sometimes results in injustice- with a view to avoid injustice and inconvenience, the domestic law of country lay down rules for **stay of actions** pending before it or for restraining a party- from proceeding from further with his action that he had filed in a foreign country.

### LIS ALIBI PENDENS

The court has inherent jurisdiction to stay an action in England or to restrain by injunction the institution or continuance of proceeding in a foreign court to prevent simultaneous legal proceeding in different, countries regarding the same cause of action. But this jurisdiction to stay action is discretionary and will be exercised only with extreme caution.

It is possible for the same dispute to be litigated in the court of two or more countries at the same time. For instance a person who commits a tort in France may be sued not only in France but also in England.

In such a situation the defendant in the English action may raise the plea of **lis alibi pendens (suit pending elsewhere)**. When such a plea is raised, the question before the English court is whether it should stay one of the actions on the ground that the applicant is doubly vexed by simultaneous proceedings in two different countries.

**This question may arise in two different situations.**

#### (i) THE PLAINTIFF IN ENGLAND IS ALSO THE PLAINTIFF IN THE FOREIGN PROCEEDINGS

Here the court may stay the England proceeding or injunct the plaintiff not to proceed with the foreign proceeding. The court can also require the plaintiff to elect between the two proceedings. If the plaintiff disobeys the order to discontinue the foreign proceedings, he can

be proceeded against for contempt of court. But as already indicated, the court will exercise great caution in granting stay of action because the right to access to a foreign court should not be lightly interfered with. Due to the possible difference between the laws of two different countries, it may be necessary for the plaintiff to sue in more than one forum to make sure that he succeeds in his claim.

There may be situations which would justify a prudent claimant to sue in more than one country. For instance, he may not have a personal remedy against the defendant but only against his properties in the country where the cause of action arose, but he may have a personal remedy also in England. A plaintiff may also start double proceedings in two different countries deliberately in order to go ahead with the one which affords him a speedy remedy. Therefore double proceedings one in England and the other in a foreign country cannot be taken *prima facie* as vexatious. Consequently, it is not sufficient merely to show the existence of double proceedings to succeed in a **plea of *lis alibi pendens***: vexation in point of fact must be proved. Stay of action will not be granted unless the defendant clearly proves that there is unnecessary oppression in the continuance of both the proceedings. Also, stay of action will not be granted if the stay may result in injustice to the plaintiff.

#### **(ii) WHEN THE PLAINTIFF IN THE ENGLISH PROCEEDINGS IS THE DEFENDANT IN THE FOREIGN PROCEEDINGS AND VICE VERSA**

Here the person against whom the stay is sought has not initiated both the actions as in the first case. So, the party stay is not in control of both actions. Consequently in these type of cases the courts are much more reluctant to grant a stay of action than in cases where the (*Perwillmer j.in Orr-Lewis v. Orr-Lewis (1949) 1 All E.R.504, at.p. 506*) that stay of action in such cases should not be granted unless the foreign action is not merely oppressive or vexatious to the applicant, but also calculated to cause him “serious, if not irreparable damage”.

#### **STAY OF ACTION ON THE BASIS OF JURISDICTION CLAUSE:-**

In international business it is common to provide in the contract a jurisdiction clause to the effect that all disputes arising from the contract shall be subject to the jurisdiction of a foreign court. In such cases if suits are brought in England in violation of the jurisdiction clause of the contract, the English courts have jurisdiction to stay such suits. The English court will grant stay of proceedings brought in England unless it is shown that it is just and proper to allow the plaintiff to continue the action in England. If, as a result of revolution in the country of the foreign court, the country becomes independent and the law applied by the foreign court changes after the contract is made, the English court will refuse to grant stay of proceedings brought in England by one of the parties in contravention of the jurisdiction

clause (*Carvatho vs. Hullblyth Angola*) (1979) 3 *All.E.R.*280). (The burden is on the plaintiff to show that for getting justice, it is necessary to bring the action in England.

## **STAY OF ACTION ON THE GENERAL GROUND OF FORUM NON CONVENIENS**

Apart from staying action on the ground of **lis alibi pendens** and jurisdiction clauses, can stay of action be granted and if so, on what grounds? The court has jurisdiction to grant stay of action even in the absence of action in a foreign country, but such jurisdiction will be exercised only sparingly. The court may stay an action if the proper forum from all aspects is a foreign country and an action in England has been instituted merely because it was possible to serve a writ on the defendant during a short stay in England. In such a case the vexation to the defendant is clear. But there is no presumption that the English proceedings are oppressive merely because the defendant was served with a summons while on a short visit to England and the dispute otherwise has no connection with England. The fact that the more convenient forum in a foreign court will not by itself be sufficient to stay an England action. The English action will be stayed only if the following two conditions are satisfied:

- (1) That the continuance of the plaintiff's action would work an injustice because it would be oppressive or vexatious to the defendant or would be an abuse of the process of the court in some other way and
- (2) That stay of this action will not cause an injustice to the plaintiff.

The above proposition is illustrated by the recent court of appeal decision in – (*Maharani of Baroda vs. Wildenstein* 1972:2 *All E.R.*689). The plaintiff the Maharani and the defendant, a famous art dealer, both lived in France. But both the parties travelled widely and has substantial personal and business connection in England and both visited England occasionally. The Maharani purchased a painting from the defendant in Paris. The painting was sold to the Maharani as the work of the reputed painter, Boucher. Later, English art experts expressed the view that this painting was not a work of Boucher and its actual worth was much less than what the Maharani paid to the defendant. Maharani sued the defendant in an English court of breach of contract and the writ was served on the defendant while he was a short visit to England. The defendant moved for a stay of action on the ground that the suit was vexatious and the proper forum to decide the case was France. Stay was refused by the court of appeal. It was held that a mere balance of convenience is not a sufficient ground for depriving the plaintiff of her right of action in an England court. The defendant has to prove that the plaintiff's action will result in injustice to the defendant and that a stay of action will not cause an injustice to the plaintiff. In this case the defendant was unable to show that the continuance of the England action would cause in any way injustice to him. It appeared that

if the action were instituted in France there would be difficulty in admitting an English expert opinion under French law. It also appeared that there would be greater delay in arriving at a decision in the French court. So the defendant was not able to show that granting a stay of action will not cause any injustice to the plaintiff.

## **STAY OF ACTION UNDER INDIAN LAW**

**Section 10 of the Civil Procedure Code** deals with stay of suits. Section 10 is as follows: No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially an issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed or in any court beyond the limits of India established or continued by the central government and having like jurisdiction or before the supreme court”.

This section is designed to prevent courts of concurrent jurisdiction from simultaneously proceeding with the same cause of action resulting in different verdicts. It is to be noted that under section 10 second suit should be stayed and not the previous suit. Also to be noted is the position that once the conditions in **Section 10** are satisfied the court has no opinion but to grant a stay.

**Section 10** is applicable only to domestic cases, not in the case of double proceedings, with one case in India and the other in a foreign country. In the case of simultaneously proceedings in a foreign court, the explanation to section provides: “**The pendency of a suit in a foreign court does not preclude the court in India from trying a suit founded on the same cause of action**”. This explanation does not empower the Indian court to grant a stay of proceedings. It only lays down that the Indian courts can proceed with a suit although a foreign proceeding is pending with regard to the same cause of action. However the Indian court has granted stay of action when foreign proceeding is pending under the inherent jurisdiction by virtue of **section 151 of the C.P.C.**

In granting stay of action the Indian court would be guided by the principles enunciated in English cases. This jurisdiction, as in the case of jurisdiction exercised by English courts is discretionary and will be exercised with extreme caution.

## **STAY OF PROCEEDINGS IN REFERENCE TO ARBITRATION AGREEMENT:**

Under Indian law, Section 34 and 36 of the Arbitration and Conciliation (Amendment) Act, 2015 deals with setting aside an arbitral award by the court, enforcement of Arbitral Awards. Under English law, section 4 of the Arbitration Act, 1950 deals with stay of legal proceedings when an agreement stipulates for arbitrations.

### **a. DISCRETIONARY POWER OF THE COURT :**

This is the common law power of the courts to stay proceedings when parties have agreed to settle their disputes by arbitration.

### **b. MANDATORY POWER OF THE COURT :**

This relates to those agreements to which the International Protocol on Arbitration Clauses applies. Here the court has no discretion but to stay proceedings.

### **DISCRETIONARY POWER UNDER ENGLISH LAW:**

The power under the sub-section (1) of section 4 of the Arbitration Act, 1950, is a discretionary power which the court may exercise whenever a legal action is filed in breach of an arbitration agreement. It is immaterial that the agreement to refer disputes to arbitration is governed by English law or foreign law and irrespective of the fact whether the parties are citizens of the United Kingdom or alien. But, it is necessary that the arbitration agreement is “a written agreement to submit present and future differences to arbitration”.

The basic principle is that people must abide by their contracts and the courts should respect the sanctity of agreements. This implies that once an agreement to arbitrate is shown, the burden of proof is on the plaintiff to show why proceedings should not be stayed. Whether the arbitration clause is wide enough to include the dispute in respect of which proceedings have been filed is a question of interpretation and must be decided by the proper law of the contract. That law will also determine whether the arbitration clause will apply when one of the parties alleges that the contract is void or voidable or has become void. When the court exercises its power to stay proceedings it is not concerned nor does it enquire whether under the law governing arbitration or under the proper law of the contract, the foreign court has or has not the power to grant stay. The discretionary power of stay can be exercised only in respect of an arbitration agreement which does not fall under mandatory power of stay.

### **MANDATORY POWER UNDER ENGLISH LAW:**

Under this sub-section (2) the court has no discretion and is duty bound to stay proceedings if a party relies on ‘submission to arbitration made in pursuance of an agreement to which the Protocol applies’. “Submission to arbitration” includes an agreement to refer present or future disputes to arbitration. Even if no arbitrators have been appointed, the court is under a duty to stay proceedings. The submission of a dispute to arbitration is not a condition precedent to the application of sub-section (2). An agreement to submit the dispute or actual submission of the dispute to arbitration is enough. The sub-section applies only to commercial matters or any other matter capable of settlement by arbitration. The sub-section applies to the parties which are subject to the jurisdiction of two

different Contracting Parties, i.e., the parties reside or do business in two different states (though both the states should be parties to the Protocol). The stay of proceedings can be refused only on one ground: if the court is satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not, in fact, a dispute between the parties.

### **DISCRETIONARY POWER UNDER INDIAN LAW:**

The court's power under section 34 of the Arbitration and Conciliation (Amendment) Act, 2015 is discretionary power and a party cannot claim stay of proceedings as a matter of right. The discretion however, is to be exercised judicially. Section 7 says that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. An arbitration agreement shall be in writing. An application for stay can be made before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court. In accordance with section 9, an interim measure can be given by court.

#### **In Rungta Sons Private Ltd. Vs Jugometal Trg. Republike 1959 Cal, 423.**

The court granted stay of proceedings on these facts : under a contract between an Indian company and a yugoslovia company parties agreed to refer their disputes arising under their contract to arbitration to a Zurich tribunal. On the plaintiff arguing that it would be difficult for him to produce evidence at Zurich, the court said that there was no reason why necessary evidence could not be given at Zurich ,the mere fact that parties may have incur large costs in the arbitration held at Zurich is no sufficient reason for not staying the proceedings filed in India.

### **MANDATORY POWER UNDER INDIAN LAW:**

This section is almost a verbatim copy of section 4 (2) of the English Arbitration Acts. The International Protocol on Arbitration Clauses applies on the satisfaction of the following two conditions:

1. When parties are subject to the jurisdiction of different states between whom the protocol is in force, and
2. When parties have agreed to submit to arbitration present or future disputes in connection with a contract relating to commercial matters capable of settlement by arbitration.

The court has no discretion in the matter and is bound to stay proceedings. It applies only to commercial matters or any other matter capable of settlement by arbitration. In **The Merak** (1965) ,there was a judicial difference of opinion as to whether under section 4(2) an actual

reference to arbitration was necessary or as to whether mere agreement to arbitration was enough. This difference of opinion was resolved by the decision in *The Merak*, which laid down that actual reference to arbitration was not necessary, an agreement to refer the dispute to arbitration was enough.

### **STAYING OF MATRIMONIAL PROCEEDINGS :**

The power of the English court to grant stay in matrimonial proceedings have been scanty and have been exercised in a very exceptional case. The English matrimonial court has exercised the power of staying English proceedings in a case where the husband plaintiff has failed to make payment under a maintenance order. The English courts have power to stay English suit or restrain a party from pursuing his suit filed by him in another country, when the suit is between the same parties, relating to the same subject matter and claiming the same relief. However this power has been exercised by English courts only sparingly. This provision applies to matrimonial suits also.

The Domicile and Matrimonial Proceedings Act, 1973 has now very much extended the jurisdiction of the court to entertain divorce proceedings giving rise to the possibility of matrimonial suits being filed in several jurisdictions. The act confers specific powers of staying matrimonial proceedings between parties. It contains two sets of powers: 1. Obligatory stays 2. discretionary stays. When there are concurrent proceedings in more than one jurisdiction in respect of the same marriage, then the power of staying proceedings can be exercised.

### **OBLIGATORY STAYS :**

Under this provision the court cannot stay proceedings at its own motion. One of the parties to the proceedings must move an application. Under this provision a stay as matter of right is available to a party to an English divorce suit. Once a case is made out, the court is bound to stay English divorce proceedings.

Paragraph 8 of the Schedule I deals with obligatory stays. It runs as under:

1. Where before the beginning of the trial or first trial in any proceedings for divorce which are continuing in the court it appears to the court on the application of a party to the marriage –
  - a. that in respect of the same marriage proceedings for divorce or nullity of marriage are continuing in a related jurisdiction; and
  - b. that the parties to the marriage have resided together after its celebration; and

- c. that the place where they resided together when the proceedings in the court were begun or, if they did not then reside together, where they last resided together before those proceedings were begun, it is that jurisdiction; and
- d. That either of the said parties was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which the proceedings in the court were begun.

It shall be the duty of the court to order that the proceedings in the court be stayed.

### **DISCRETIONARY STAYS :**

Under this provision the court has the power to stay proceedings of its own accord even if no application to do so is made to the court. The court's power of granting discretionary stay extends to not only divorce proceedings but "any matrimonial proceedings", which it seems, would include even non-judicial matrimonial proceedings. "Another jurisdiction" means "any country outside England and Wales". In order to justify stay of proceedings the following two conditions must be satisfied

- The defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense,
- The stay must not deprive the plaintiff of a legitimate advantage which would be available to him if he invoked the jurisdiction of English court.

Paragraph 9(1) of Schedule 1 to the Domicile and Matrimonial Proceedings Act, 1973 lays down the provision for discretionary stay. It runs as under :

1. Where before the beginning of the trial or first trial in matrimonial proceedings which are continuing in the court if, it appears to the court,
  - a. that any proceedings in respect of the marriage in question, or subsistence, are continuing in another jurisdiction; and
  - b. that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken in the proceedings in the court or in those proceedings so far as they consist of a particular kind of matrimonial proceedings,

The court may, if it thinks fit, order that the proceedings in the court be stayed or, as the case may be, those proceedings be stayed so far as they consist of proceedings of that kind.

“Balance of fairness” is elucidated above and under this head the court can have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expenses which may result from the proceedings being stayed or not stayed. This is nothing but enunciation of basic common law principles.

**Gadd vs Gadd (1984) 1 W.L.R. 1435** is good illustrative case. Here the parties were British nationals who married in Bahamas in 1967 and lived there until 1973. They then lived in France and Monaco until 1983 when the marriage broke down. The wife returned to England and filed a petition for divorce. The husband commenced divorce proceedings in Monaco and applied for a stay. The court refused to grant stay and the reason was the England domicile wife would be deprived of the advantage of financial provisions available in England which was not available to her in Monaco proceedings. Therefore, balance of fairness required that the wife’s petition should be allowed to continue.

### **DISCHARGE OF STAYS:**

Paragraph 10(1) of Schedule 1 deals with discharge of stays. The obligatory stays as well as discretionary stays may be discharged by the court if it thinks fit, on the application of a party to the proceedings, that the other proceedings by reference to which the order was made are stayed or concluded, or that a party to those other proceedings has delayed unreasonably in prosecuting them. Once the obligatory stay is discharged, the same proceedings cannot be stayed over again.

## **PROOF OF FOREIGN LAW**

### **Definition of Foreign Law:**

Foreign laws refer to the laws of a foreign country, or of any other state (**Black’s Law Dictionary**). It is the law of any jurisdiction having a different system of law from that considering the issue (**David Walker, The Oxford Companion to Law, (1980) p 479**). They are laws enacted and in force in a foreign state or country.

### **Question of fact:**

Foreign law is usually not binding on the court where an issue is for consideration as anything which is not deemed to be law in a country is a fact and must be proved as a fact. The courts do not judicially take notice of foreign laws. It is referred to as “**jus receptum**”. The onus (**burden of proof**) lies on the party who relies on a foreign law. One exception in English law is introduced by **British Law Ascertainment Act of 1859**. According to this Act, if foreign law involved is the law of “**some British territory**” the court has the power of ascertaining that law and applying it, although it has not been pleaded or proved by the parties.

Generally, the appellate courts do not disturb the findings of fact by the trial court but this position is different with respect to foreign law. *In Parkasho vs. Singh (1968 p.233 at 250)* the trial court's finding was reversed as an erroneous decision on a point of foreign law stating that, "it is a question of fact of peculiar kind".

### **Mode of Proof:**

When foreign law is applicable by virtue of the conflict of laws rules of the forum, there are several methods by which that law can be made known to the court:

- (1) by judicial notice,
- (2) by pleading and proof and,
- (3) by presumption.

These methods are governed by the *lex fori*.

The courts will not take judicial notice of foreign law unless authorized to do so by the statute. Foreign law when relevant operates as fact and not as law. Therefore the party who relies on a foreign law must plead it and prove by evidence. A judge cannot decide a case containing foreign elements according to his personal knowledge of the foreign law. Even if the judge had previously practiced the law of that other country, his knowledge is irrelevant.

The consequences of treating foreign law as fact would be that:

1. Foreign law must be pleaded like a fact;
2. Foreign law must be proved like a fact;
3. Foreign law questions go to the jury in appropriate cases;
4. If facts are not considered on appeal, foreign law cannot be considered on appeal; and
5. The holding of a court on questions of foreign law in one case is not evidence in other cases involving the same foreign law problems; and holdings of appellate courts on foreign law do not have the force of *stare decisis*.

In (*Pfleuger vs. Pfleuger case*); where an objection is raised before trial to the omission to plead foreign law, the defect cannot be cured by judicial notice nor by presumption but should be pleaded and proved just like a fact.

### **Competent witness**

No clear-cut answer is given by English decisions. Where the case turned on foreign written law - statutes, codes, proclamations or decrees was to be proved in the first instance by copies of the statutes or decrees themselves; oral testimony alone of the foreign written law was insufficient.

According to the common law rules, a copy of the foreign statute was required to be authenticated by exemplification, the testimony of a witness who had examined the original, or by the certification of a judicial officer of the foreign jurisdiction. The Judge can only apply local law. The court can evaluate and interpret the text of a foreign law or foreign decision or the opinion of an academician only with the assistance of expert evidence before it. Unwritten Foreign law may be proved by oral testimony of expert witnesses subjected to cross examination. The testimony may include the unwritten law as collected from the reported decisions of the foreign courts and the treatises of learned men.

The general principle is that, the witness should have practical experience (a foreign judge, legal practitioner, ambassador, embassy official, a reader in law, a Roman Catholic Bishop have been held to be competent) in that particular legal system which caused him to familiarize himself with the law to which he testifies. Personal knowledge of the foreign law of a judge is not sufficient. In "*Frith vs. Sprague*" (14 Mass.Rep.455) it was held that Foreign laws may be proved by the testimony of witnesses acquainted with such laws.

## EXCLUSION OF FOREIGN LAW

### INTRODUCTION:

There can be no doubt that the forum controls the cases that come before it and the forum must have power to reject suits, both domestic and foreign, which offend against some fundamental principle of its operation. The general principle was clearly expressed by Lord Parker in *Dynamit Actien Gesellschaft vs. Rio Tinto Zinc*; where the learned judge stated:

Whenever the courts of this country are called upon to decide as to the rights and liabilities of the parties to a contract, the effect on such a contract of the public policy of this country must necessarily be a relevant consideration. Every legal decision of our courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the foreign law but our own law to which effect is given ... As has often been said, private international law is really a branch of municipal law and obviously there can be no branch of law in which the general policy of such law can be properly ignored.

There is some authority for the view that, in England, there are three forms of legislation that will not be enforced by English courts:

- (a) Foreign revenue laws;
- (b) Foreign penal laws; and
- (c) Fundamental public laws.

### **Foreign Revenue Laws**

Lord Mansfield stated in the old case of *Holman vs. Johnson* (1775): "No country ever takes notice of the revenue laws another." Since then it was assumed that the English courts will not enforce foreign revenue laws. But in *Holman v. Johnson*; Lord Mansfield was not directly concerned with the case of a foreign power suing in English court to recover revenue and doubts were raised as to whether the principle in Lord Mansfield's widely stated proposition would be accepted by the higher courts in the modern conditions; All such doubts had been put to rest by the decision of the House of Lords in "*Government of India vs. Taylor (1955)*".

In this case the Government of India claimed from a liquidator in England a large sum of money due as capital gain under the following circumstances. The Delhi electric and traction company limited was a company incorporated in England, but carried on business in India. In 1947 the company sold its business to government of India. The sale price was paid to the company in India and amount was remitted to England after a few days. Two years after this, company went into voluntary liquidation in England and Taylor was appointed as liquidator. In the liquidation proceedings Indian Commissioner of Income Tax claimed about 11 1/2 lakh of rupees due to the company as capital gains tax on sales of companies business.

The liquidator rejected this claim and the case finally came to House of Lords. For the Government of India, it was contended that the rule of exclusion of foreign laws properly applied only to penal laws and Lord Mansfield strong in extending it to revenue loss. Further, whatever may have been the rule in the past there is a necessity for modification the case of country belonging to the commonwealth particularly in the case of taxes similar to those imposed in England. Their documents were not accepted by the House of Lord.

It was unanimously held that the English courts will not enforce the revenue laws of another country. "Tax gathering is not a matter of contract but of authority and administration as between the State and those within its jurisdiction". And it is a settled principle that English courts refuse to enforce any claim which, in their view, is a manifestation of a foreign State's sovereign authority.

## **INDIRECT ENFORCEMENT EQUALLY PROHIBITED**

English courts will not enforce foreign revenue laws, whether the enforcement is direct or indirect. Enforcement is direct when a foreign State or its nominee seeks or recovers tax in England. Indirect enforcement arises, for example, when a debtor pleads that the debt has been attached by a foreign garnishee order obtained by a sovereign State claiming a tax. The identity of the plaintiff or the form in which the action is brought will not in any way affect the applicability of the rule of non-enforcement of foreign revenue laws. It is the substance of the claim that will be examined.

The recent case of "*Brokaw vs. Seatrain U.K. Ltd, (1971)2 All E.R. 91*" provides a good example of indirect enforcement of foreign revenue laws. Mr. A, an American citizen, shipped certain goods in an American ship to be delivered in England to his son-in-law, Mr. B. While the ship was at sea, the U.S. Treasury served a notice of levy on the ship owners in respect of taxes unpaid by Mr. A and ordered the ship owners to surrender the goods shipped by A. When the ship docked in Southampton, England, the consignee Mr. B demanded delivery but the ship owners refused to deliver the goods as the United States Government claimed possession of the goods. Mr. B filed a suit against the ship owners claiming delivery of goods. The defendant ship-owners look out on interpleader summons bringing in the U.S. Government as the claimant of goods. It was held that this was an attempt to enforce indirectly, by the seizure of goods, the revenue laws of a foreign country and the English courts will not aid in the enforcement of a foreign revenue law.

## **WILL BE RECOGNISED ALTHOUGH NOT ENFORCED**

The above rule of exclusion does not mean that foreign revenue laws will be totally ignored. Where no enforcement, either direct or indirect, arises, foreign revenue laws are freely recognised, in spite of Lord Mansfield's dictum. Thus the courts will not recognise any transaction which is purposely designed to violate the revenue law of a foreign state. For instance, the court will not enforce a contract which involves fraudulent evasion of tax of a foreign country. Thus the proposition of Lord Mansfield that "**no country ever takes notice of the revenue laws of another**" is too widely stated.

## **FOREIGN PENAL LAWS**

It is an obvious principle, that an act of sovereignty by one State cannot have any effect in the territory of another state. The infliction of a penalty normally indicates the exercise of sovereign power; consequently English courts will not directly or indirectly enforce a foreign penal law. The words "penalty" and "penal" are ambiguous and are capable of being extended to non-objectionable penalties such as those provided in

commercial contracts for prompt performance. It is therefore necessary to bear in mind that a penal law in this context mean a criminal law imposing a penalty recoverable at the instance of a State or its duly authorised agent. And in the matter of classification it is for the English court to decide according to its own interpretation whether the foreign law in question is penal or not in character; it is not bound by any different interpretations which may be placed by the foreign law.

The leading English authority on the enforcement of foreign penal laws in *Huntington vs. Attrill*; a decision by the Privy Council (1893 A.C 150). By provisions of a New York statute, the directors of a company were personally liable for debts contracted by the company upon proof that false reports of its financial conditions had been punished. Sums so recovered were payable conditions has been published. Sums so recovered were payable to the creditors in satisfaction of their debt. The defendent was the director of a New York Company. He has signed a certificate which stated falsely that the whole of its capital stock has been paid up. The plaintiff who has lent money to the company sued the defendant for the recovery of the loan and obtained a judgement. As the judgment remained unsatisfied, the plaintiff brought an action on it in Ontario. The defence was that the New York Law under which the New York judgement was obtained, was penal in nature and hence the Ontarian court could not enforce the judgment. In support of this defence, reliance was placed on the fact that the New York courts has interpreted the above statute as penal.

The Privy Council affirmed the principal that foreign penal laws are enforceable in English courts. But English courts are not bound by the view taken by foreign courts as to the nature of the law in question. Whether the foreign law is penal in character, is to be decided by the English courts. The Privy Council analysed the New York Statute and held that the statute was not penal, but remedial only.

On the country in *Banco de Vizcaya vs. Don Alfonso* (1935 I K.B. 140) the foreign law considered as penal and so was refused enforcement in England. In this case, the king of Spain deposited certain securities with the Westminster Bank in London. The King was expelled and the new Spanish Republican Government decrees that all his properties and rights, wherever situated should be confiscated and seized for the benefit of the Spanish State. In pursuance of this decree, an action was brought in English Court by a nominee of the State to recover the securities from the bank. The action was dismissed holding the Spanish decree to be penal in character.

In *S.A Consortium vs. Sun and sand* (1978) 2 All E.R 339 it was held that the provision for "resistance abusive" a head of damage which could be awarded under French law against a

defendant who had unreasonably delayed payment of a plain claim was only in the nature of compensatory damages and that therefore, could not be treated as a fine penalty.

As in the case of foreign revenue laws, what is forbidden is only enforcement of foreign penal laws, not their recognition for other purposes. For example, a contract which is illegal according to a foreign law ( which is the proper law of contract) will be treated as invalid and will not be enforced in England, although the foreign law is penal in nature.

## **FOREIGN EXPROPRIATORY LEGISLATION**

The question to what extent foreign laws of expropriatory nature will be recognised by English courts one can find it discussed in Public International law. Such laws are not directed against a particular person, as in *Don Alfonso's case* but are general in nature, expropriating all private properties to the state, as in the case of laws of nationalisation. In determining the effect of a foreign expropriated legislation, the English judge will look into three factors, namely, (1) the interpretation of the foreign legislation, (2) The suits of the property at the time of the legislation, and (3) the question whether the foreign sovereign was in actual possession or control of the property outside his territory of the foreign stateless, expropriatory laws will be recognised and given effect to in England, although the property in question was later brought to England and was there during litigation. This is the position taken in the important case of *Luthae vs. Savor*. But a foreign expropriatory law cannot affect the ownership of properties situated in England at the time of foreign legislation.

In *Luther vs. Sagittarius*; the owners of the confiscated timber were a private company incorporated in Russia. The question arises as to whether the decision in *Luther v. Sagittarius*, is applicable in cases where the owners of the confiscated properties are aliens, although the properties are situated within the jurisdiction of the confiscating State. This came up for the decision in the case of "*The Rose Mary*" (*Anglo Iranian Oil Co. vs. Jaffate, 1953, I W.L.R 246*). The plaintiff company has been granted an exclusive concession to extract petroleum from certain parts of Persia for a period extended up to the year 1993. By an agreement entered into with the Government of Persia, in 1951, the Persian Government nationalisation all petroleum industries without giving effective compensation to the affected owners. In pursuance of the law of nationalisation all properties vested in the plaintiff were confiscated by the Persian Government sold the crude and when *Rose Mary*, a vessel carrying this crude oil docked in the Aden harbour, the plaintiff sued claiming delivery of the oil or a declaration that it was their property. **Campbell J.**, allowed the claim. He held that the decision in *Luther vs. Sagittarius* is not applicable to the confiscation of properties belonging to an alien unless adequate compensation is paid.

Different considerations arise when the foreign sovereign is in possession or effective control of the confiscated property which is outside the territory. The owner of such confiscated property can take no effective step unless the foreign sovereign is made a party to the proceedings. This is not possible under the rule of jurisdiction immunity. (*See the case of The Christina etc, above*).

## **FOREIGN LAWS REPUGNANT TO THE FUNDAMENTAL POLICY OF ENGLISH LAW**

It is a well settled principal that English courts will not enforce or recognise any right arising under a foreign law if such enforcement or recognition would be inconsistent with the fundamental or distinctive policy of English law. In the words of **Scarman, J**; at English court will refuse to apply a law which outrages its sense of justice and decency. But before it exercises such power it must consider the relevant foreign law as a whole". The English doctrine of public policy is, as is well known, an unruly horse; it covers a multitude of sins of varying degrees and it has been clearly laid down that in domestic cases the doctrine should be involved only in case where the harm to the public is substantial and incontestable. In the field of private international law it is essential to restrict the applicability of the doctrine more stringently; otherwise the whole foundation of private international law is liable to be undermined. As Cheshire has clearly stated, the conception of public policy is, or should be narrower and more limited in private international law than in internal law, A transaction that is valid by the foreign Lex cause should not be invalidated on this ground unless it's enforcement would offend some moral, social or economic principal so sacrosanct in English eyes as to require its maintenance at all costs without exception (**Cheshire; Ninth Ed. p. 149**). Cardozo, the famous American judge said: "the courts are not free to refuse, to enforce a foreign right at pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of goods morals; some deep-rooted tradition of the common weal". (*Loucks Standard oil vs. Co.,(1918)224 N.Y. 99 at p.111*). If the court decides that a fundamental policy of English law in the above sense is violated, the inconsistent foreign rules should be totally excluded.

## **INSTANCES WHERE FUNDAMENTAL PUBLIC POLICY INFRINGED**

(a) When fundamental conceptions of English justice are discarded: e.g. violation of the principles of natural justice, in that no opportunity was given to the other party to present his case.

(b) When English conceptions of morality are infringed: e.g. a contract or some other transaction which promotes sexual immorality a contract to pay money to a prostitute as the price of prostitution.

(c) When the interests of United Kingdom or its good relations with foreign powers are affected: e.g. a contract to pay money for revolutionary activity in a friendly country or a contract to import liquor in violation of the prohibition laws of friendly foreign country, or a contract to export prohibited commodity etc.

(d) When the foreign law or statute Offends Against English conception of human liberty and freedom of action: e.g slavery, Germany on Jess, discriminatory laws against coloured people etc. The paralysing restrictions on freedom imposed by despotic government will not be recognised by English courts.

### **ENFORCEMENT OF FOREIGN JUDGMENT IN INDIA**

The Indian Code of Civil Procedure, 1908 (CPC) lays down the procedure for enforcement of foreign judgments and decrees in India. The basic principle which is followed while enforcing a foreign judgment or decree in India is to ensure that the judgment or decree is a conclusive one, passed on the merits of the case and by a superior court having competent jurisdiction.

### **FOREIGN JUDGMENT OR A FOREIGN DECREE**

A foreign judgment is defined under section 2 (6) of the CPC as a judgment of a foreign court. A foreign court, under section 2(5) of CPC, means a court situated outside India and not established or continued by the authority of the Central Government.

A foreign decree is defined in Explanation II to section 44A of the CPC as, "Decree" with reference to a superior court means any decree or judgment of such court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitral award, even if such an award is enforceable as a decree or judgment.

### **FOREIGN JUDGMENT OR DECREE TO BE CONCLUSIVE**

A foreign judgment or decree should be conclusive as to any matter adjudicated by it. The test for conclusiveness of a foreign judgment or decree is laid down in section 13 of the CPC which states that a foreign judgment shall be conclusive unless:

- It has not been pronounced by a court of competent jurisdiction;
- It has not been given on the merits of the case;

- It appears, on the face of the proceedings, to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
- The proceedings in which the judgment was obtained are opposed to natural justice;
- It has been obtained by fraud;
- It sustains a claim founded on a breach of any law in force in India.

Thus, before enforcing a foreign judgment or decree, the party enforcing it must ensure that the foreign judgment or decree passes the seven tests above. If the foreign judgment or decree fails any of these tests, it will not be regarded as conclusive and hence not enforceable in India.

### **MODE OF ENFORCEMENT OF A FOREIGN JUDGMENT OR DECREE**

There are two ways in which a foreign judgment or decree can be enforced in India depending on whether the judgment or decree has been given by a court in a reciprocating territory or not.

#### **1. Foreign decree of a reciprocating territory be executed as an Indian decree**

By virtue of section 44A of the CPC, a decree of any superior court of a reciprocating territory shall be executed in India as a decree passed by the Indian district court.

A reciprocating territory is defined in Explanation I to section 44A as: "**Reciprocating territory**" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section, and "**superior courts**", with reference to any such territory, means such courts as may be specified in the said notification.

A judgment from a court of a reciprocating territory can be directly enforced in India by filing an execution application. Section 44A (1) of the CPC states that where a certified copy of a decree of any superior court of a reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court (meaning that the entire scheme of execution of decrees as laid down in Order 21 of the CPC will be applicable).

While filing the execution application the original certified copy of the decree along with a certificate from the superior court stating the extent to which the decree has been satisfied or adjusted has to be annexed to the application.

## **2. Filing a suit in case of decrees from non-reciprocating territories**

Where a judgment or decree is not of a superior court of a reciprocating territory, a suit has to be filed in a court of competent jurisdiction in India on that foreign judgment or on the original cause of action or both.

In *Marine geotechnicsllc v/s coastal marine construction & engineering ltd. 2014 (2) bomcr 769*, the Bombay High Court observed that in case of a decree from a non-reciprocating foreign territory, the decree holder should file, in a domestic Indian court of competent jurisdiction, a suit on that foreign decree or on the original, underlying cause of action, or both. He cannot simply execute such a foreign decree. He can only execute the resulting domestic decree. To obtain that decree, he must show that the foreign decree, if he sues on it, satisfies the tests of section 13 of the CPC (as discussed above). A suit on a foreign judgment/decree must be filed within a period of three years from the date of the judgment/decree.

*SankaranGovindan v. Lakshmi Bharathi*, the Supreme Court while interpreting the scope of S. 13(d) and the expression “principles of natural justice” in the context of foreign judgments held as follows:

“... it merely relates to the alleged irregularities in procedure adopted by the adjudicating court and has nothing to do with the merits of the case. If the proceedings be in accordance with the practice of the foreign court but that practice is not in accordance with natural justice, this court will not allow it to be concluded by them. In other words, the courts are vigilant to see that the defendant had not been deprived of an opportunity to present his side of the case. ... The wholesome maxim *audi alterem partem* is deemed to be universal, not merely of domestic application, and therefore, the only question is, whether the minors had an opportunity of contesting the proceeding in the English Court. If notices of the proceedings were served on their natural guardians, but they did not appear on behalf of the minors although they put in appearance in the proceedings in their personal capacity, what could the foreign court do except to appoint a court guardian for the minors.”

### ***I&G Investment Trust v. Raja of Khalikote***

It was held as follows, Under Section 13(f) of CPC the following proposition may be laid: A judgment or a decree, passed by a foreign court, on a claim founded on a breach of any law in force in India may not be enforceable. However, in case it is based upon a contract having a different “proper law of the contract” then it may be enforced.

## **ENFORCEMENT OF FOREIGN ARBITRAL AWARDS**

The growth of international commerce has necessitated the creation of efficient methods of resolution of disputes like arbitration and enforcement of the consequent awards that determine the rights and obligations of the parties. In some situations securing an award or a final judgment from the courts may only be a battle half won; this is especially true in the Indian context.

We have come across situations where the opposite parties decide not to participate in the arbitral processor abandon it mid-way. The enforcement of these awards/judgments where the party is in absentio is sometimes more complicated than one where the opposite party has participated in the proceedings.

In some situations, objections have been raised even against costs awarded by the tribunal or then jurisdiction of the tribunal or court, as the case may be. Therefore, the stage of execution of an award or decree warrants a high degree of caution.

The procedure for enforcement and execution of decrees in India is governed by the Code of Civil Procedure, 1908 (“CPC”) while that of arbitral awards in India is primarily governed by the Arbitration & Conciliation Act, 1996 (“Act”) as well as the CPC.

Domestic and foreign awards are enforced in the same manner as a decree of the Indian court. This is true even for consent awards obtained pursuant to a settlement between parties. However, there is a distinction in the process for enforcement of an award based on the seat of arbitration. While the enforcement and execution of an India - seated arbitral award (“domestic award”) would be governed by the provisions of Part I of the Act, enforcement of foreign - seated awards (“foreign award”) would be governed by the provisions of Part II of the Act.

A few steps that are crucial for ensuring successful enforcement of arbitral awards and execution of decrees are:

- Making effective service on opposite party/ judgment debtor is crucial to prevent objections at later stage
- Taking necessary steps by way of attachment/notice/arrest/appointment of receiver or in another manner;
- Remember that principles of natural justice apply to even execution proceedings.

## **ENFORCEMENT OF DOMESTIC AWARDS**

An award holder would have to wait for a period of 90 days after the receipt of the award prior to applying for enforcement and execution. During the intervening period, the award may be challenged in accordance with Section 34 of the Act. After expiry of the aforesaid period, if a court finds the award to be enforceable, at the stage of execution, there can be no further challenge as to the validity of the arbitral award.

Prior to the recent Arbitration and Conciliation (Amendment) Act, 2015 (“Amendment Act”), an application for setting aside an award would tantamount to a stay on proceedings for execution of the award. However, by virtue of the Amendment Act, a party challenging an award would have to move a separate application in order to seek a stay on the execution of an award.

## **ENFORCEMENT OF FOREIGN AWARD**

India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“New York Convention”) as well as the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (“Geneva Convention”). If a party receives a binding award from a country which is a signatory to the New York Convention or the Geneva Convention and the award is made in a territory which has been notified as a convention country by India, the award would then be enforceable in India. Out of the 196 countries in the world only 48 countries have been notified by the Central Government as reciprocating countries, with the most recent addition being Mauritius.

The enforcement of a foreign award in India is a two-stage process which is initiated by filing an execution petition. Initially, a court would determine whether the award adhered to the requirements of the Act. Once an award is found to be enforceable it may be enforced like a decree of that court. However at this stage parties would have to be mindful of the various challenges that may arise such as frivolous objections taken by the opposite party, and requirements such as filing original/ authenticated copy of the award and the underlying agreement before the court.

## **CONDITIONS FOR ENFORCEMENT OF ARBITRAL AWARDS – DOMESTIC AND FOREIGN**

A party may resort to the following grounds for challenging an award. Such an award would be rendered unenforceable when:

- The parties to the agreement were under some incapacity.

- The agreement in question is not in accordance with the law to which the parties have subjected it, or under the law of the country where the award was made (especially in case of foreign awards).
- There is a failure to give proper notice of appointment of arbitrator or arbitral proceedings.
- Award is ultra vires the agreement or submission to arbitration.
- Award contains decisions on matters beyond the scope of submission to arbitration.
- Composition of the arbitral authority or the arbitral procedure is ultra vires agreement.
- Award is not in accordance with the law of the country where the arbitration took place.
- The award (specifically a foreign award) has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made.
- Subject matter of the dispute is not capable of settlement by arbitration under Indian law.
- Enforcement of the award would be contrary to the public policy of India.

## **STAMPING AND REGISTRATION REQUIREMENTS OF AWARDS – DOMESTIC AND FOREIGN**

### **A. DOMESTIC AWARD :**

- The Stamps Act 1899 provides for stamping of arbitral awards with specific stamp duties and Section 35 provides that an award which is unstamped or is insufficiently stamped is inadmissible for any purpose, which may be validated on payment of the deficiency and penalty (provided it was original). Issues relating to the stamping and registration of an award or documentation thereof, may be raised at the stage of enforcement under the Act. (*M. Anasuya Devi and Anr v. M. Manik Reddy and Ors*(2003) 8 SCC 565). The Supreme Court had also observed that the requirement of stamping an award and registration is within the ambit of Section 47 of the CPC and not covered by Section 34 of the Act.
- The quantum of stamp duty to be paid would vary from state to state depending on where the award is made. Currently, as per the Maharashtra Stamp Act, the stamp duty for arbitral awards stands at five hundred rupees in Maharashtra; and in case of Delhi, as per Schedule 1A to the Stamp (Delhi Amendment) Act 2001, the

stamp duty is calculated at roughly 0.1% of the value of the property to which the award relates.

- Under Section 17 of the Registration Act, 1908 an award has to be compulsorily registered if it affects immovable property, failing which, it shall be rendered invalid.

## **B. FOREIGN AWARDS**

- As far as foreign awards are concerned, the Delhi High Court in *Naval Gent Maritime Ltd v Shivnath Rai Harnarain* (I) Ltd. 174 (2009) DLT 391, observed that a foreign award would not require registration and can be enforced as a decree, and the issue of stamp duty cannot stand in the way of deciding whether the award is enforceable or not. A similar approach was adopted by the Bombay High Court in the cases of *Vitol S.A v. Bhatia International Limited* 2014 SCC Online Bom 1058. A similar principle has been set out by the High Court of Madhya Pradesh in *Narayan Trading Co. v. Abcom Trading Pvt. Ltd.*, 2012 SCC OnLine MP 8645.

## **HOW COURTS EXAMINE AWARDS**

- The grounds of challenge enlisted are exhaustive and courts cannot expand the grounds for refusal of enforcement.
- Executing court cannot re-examine the award apart from satisfying itself on a superficial basis about the award.
- Executing court cannot examine the merits of the case.
- The exercise is not an “appeal” on merits against order of tribunal, but merely review.
- Accordingly, the court has to first make enquiry as to enforceability of award and secondly hold that it is enforceable and thereafter enforce it.

## **ENFORCEMENT OF ARBITRAL AWARDS: APPROPRIATE FORUM & LIMITATION**

***Award arising out of an India seated arbitration (being an International Commercial Arbitration):***

By virtue of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 (“Commercial Courts Act”) and the Amendment Act, the Commercial Division of a High Court where assets of the opposite party lie shall have

jurisdiction for applications relating to enforcement of such awards if the subject matter is money.

In case of any other subject matter, Commercial Division of a High Court which would have jurisdiction as if the subject matter of the award was a subject matter of a suit shall have jurisdiction, i.e., where the opposite party resides or carries on business or personally works for gain.

***Award arising out of an India seated arbitration (not being an International Commercial Arbitration):***

As per the Commercial Courts Act and the Amendment Act, for such cases, the appropriate court would be the Commercial Court exercising such jurisdiction which would ordinarily lie before any principal Civil Court of original jurisdiction in a district, as well as the Commercial Division of a High Court in exercise of its ordinary original civil jurisdiction.

***Foreign Awards:***

Where the subject matter is money, the Commercial Division of any High Court in India where assets of the opposite party lie shall have jurisdiction. In case of any other subject matter, Commercial Division of a High Court which would have jurisdiction as if the subject matter of the award was a subject matter of a suit shall have jurisdiction

**LIMITATION PERIOD FOR ENFORCEMENT OF AWARDS**

***Domestic awards***

Since arbitral awards as deemed as decrees for the purposes of enforcement (as observed by the Supreme Court in **M/s UmeshGoel vs. Himachal Pradesh Cooperative Group Housing Society (2016) 11 SCC 313**), and the Limitation Act 1963 applies to arbitrations, the limitation period for enforcement of such an award is twelve years.

***Foreign awards***

Various High Courts have given varying interpretations on the limitation period within which a party may enforce an award. The Bombay High Court has observed that since a foreign award is not a decree per se and would not be binding on parties unless a competent court records it as enforceable, it would undergo a two-step process. Thus, the application for enforcement of a foreign award would fall within the residuary provision of the Schedule to the Limitation Act, that is, the limitation period would be three years. Thereafter, on recognizing the award as a decree, the limitation period for execution of such a decree would be twelve years there from. However, the Madras High Court held a contrary view by referring to foreign awards as deemed decrees, and the corresponding limitation period

would be twelve years. It held that, “the foreign award is already stamped as a decree and the party having a foreign award can straight away apply for enforcement of it and in such circumstances, the party having a foreign award has got 12 years time like that of a decree holder.”

The Act provides that certain conditions (as listed above) have to be assessed prior to enforcement of a foreign award, and where the court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of that court. However, the Supreme Court in **M/s. Fuerst Day Lawson Ltd vs. Jindal Exports Ltd. 2001 (6) SCC 356**, held that under the Act a foreign award is already stamped as the decree. It observed that, “In one proceeding there may be different stages. In the first stage the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court/decree again.”

## **ENFORCEMENT OF DOMESTIC DECREES IN INDIA: APPROPRIATE FORUM & LIMITATION**

### **A. Appropriate forum:**

On a decree being passed, execution proceedings can be initiated for enforcement of the decree. Section 36 to 74 and Order XXI of the CPC set out the provisions in respect of execution.

The person in whose favour a decree has been passed or an order capable of execution has been made is known as a “decree-holder” while the person against whom a decree has been passed or an order capable of execution has been made is known as a “judgment-debtor”.

The proceedings to execute a decree must be initiated, in the first instance, before the court which passed it. Where appropriate, such court may transfer the decree to another court for execution for various reasons including the locus of the judgment debtor or the locus of the property against which the decree is sought to be executed.

### **B. Limitation Period**

As per the Limitation Act 1963, the period of limitation for the execution of a decree (other than a decree granting a mandatory injunction, in which case, it is three years) is twelve years from the date of the decree. However, an application for execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

## **PLEADING AND PROOF OF FOREIGN LAW.**

In proceedings with a foreign element there are manifold interactions between the law of civil procedure on the one hand and private international law as well as (domestic or foreign) substantive law on the other hand. The procedure is governed by the principle “*forum regit processum*”; it is conducted under the law of the court seized with the action (*lex fori*), irrespective of the law applicable to the substance of the case. Private international law designates the applicable substantive law and thus provides the basis for a judgment on the merits (*lex causae*). Problems arise whenever the rules of private international law refer to foreign law, because its content normally is unknown to the court. In this situation it is again a matter of the *lex fori* to decide on the questions whether the judge has an obligation to apply such foreign law *ex officio* and by which means he may ascertain the content of the *lex causae*.

Therefore, procedural law has a key function in international civil proceedings: it governs not only the proceedings, but it may limit the scope of private international law by establishing specific procedural prerequisites for its application, as for instance a duty of the parties to plead the applicability of foreign law. Furthermore, it is the procedural law of the forum which determines the question to what extent and by which means a judge is allowed to examine the content of foreign law.

## **THE STATUS OF FOREIGN LAW IN DOMESTIC PROCEEDINGS: QUESTION OF FACT OR QUESTION OF LAW?**

### ***Significance of the Distinction***

Procedural law is essentially characterized by the distinction between questions of fact and questions of law. The effects of a classification as a question of fact or law, respectively, are threefold: 1

Firstly, it depends on this classification who has to introduce a certain matter to the proceedings. Facts have to be pleaded by the parties, while questions of law have to be considered by the court *ex officio*. In principle, the workload is distributed between the parties and the court according to the Roman maxim “*da mi facta, dabo tibi ius*”.

Secondly, the distinction between questions of fact and questions of law is relevant for the decision whether a certain matter is subject to evidence. Whereas questions of law are governed by the principle “*iuris novit curia*”, questions of fact have to be proven by the parties. The obligation to prove certain facts lies normally with the party to which these facts are favourable. In case that the proof of certain facts cannot be established (“*non liquet*”), the decision is made in favor of the party on which the burden of proof lies.

Thirdly, the distinction is important with regard to the judicial control of court decisions. The decision of a lower court may be overruled on appeal as far as questions of law are concerned, whereas the statements of fact made by the lower court normally are binding on the court of appeal.

Foreign law confronts the judge with the dilemma, that on the one hand its normative character is obvious, while on the other hand its content – and this is the parallel to facts is unknown to the judge. With regard to the quality of the determination of foreign law in domestic proceedings, its pleading and proof, the approach of the main legal systems in Europe still is quite divided to date. Therefore a comparative study of the different approaches might be of some interest.

### **“DEFAULT RULE” AND THE ROME CONVENTION**

It is discussed controversially whether and to what extent the Rome Convention affects the rules of the Contracting States on the pleading of foreign law. The language of the Convention appears to make it mandatory in contract cases for a court to consider what a contract’s applicable law is by virtue of the Convention, regardless of whether the parties plead foreign law. According to the Convention its rules “shall apply to contractual obligations in any situation involving a choice of law between the laws of different countries” and the Convention goes on to provide, for example, in Article 3 that “a contract be governed by the law chosen by the parties”.

The answer of the English doctrine is that according to its Article 1 (2) (h) the Convention does not apply to “evidence and procedure”. And since the rules on pleading and proof of foreign law are part of the law of evidence and procedure it follows that they cannot be affected by the Convention. Therefore, the Rome Convention would not impose any legal obligation on the Contracting States to alter their rules in this respect.

Even if there is no legal obligation on Contracting States to apply foreign law *ex officio* the English requirement of pleading foreign law might undermine the objectives of the Convention which, according to its Article 18, aims at a uniform interpretation and application of its rules by the courts of all Contracting States. But, as can be inferred from Article 3 of the Convention, its main objective is to guaranty the freedom of the parties to choose the law governing their contract. And Article 3 (2) allows expressly for a subsequent alteration of the law applicable to the contract. An express or implied choice of the *lex fori* as governing law by the parties during the proceedings in accordance with Article 3 (2) of the Convention thus has the same effect as a decline to plead foreign law. Therefore, the spirit of the Rome Convention does not require an *ex officio* application of foreign law whenever the parties are free to choose the applicable law.

A different approach has to be followed, however, as far as *mandatory* conflicts rules are concerned which exclude or restrict the autonomy of the parties. Within the Rome Convention this is the case in Articles 5 and 6 which guaranty to consumers and employees the protection by the mandatory provisions of the State in which they have their habitual residence or place of employment, respectively. The mandatory character of these conflicts rules is ignored if the weaker party is required to plead and prove foreign law. Therefore, a distinction should be made between the question by which means and methods foreign law has to be pleaded and proven, this has always to be answered in accordance with the procedural law of the forum and the question whether the parties are obliged to plead foreign law, this only depends on the legal nature of the conflicts rule concerned, namely whether it is mandatory or not.

Therefore, the courts of the Contracting States including English courts are held to apply the rules in Articles 5 and 6 of the Rome Convention *ex officio* in order to ensure the protection of consumers and employees irrespective of the procedural rules of the forum on the pleading of foreign law. The practical effect of this solution is limited, however, because under the Brussels I Regulation the jurisdiction in consumer and labour law cases normally lies with the courts in the State of the weaker party's residence which apply their own mandatory law, and not foreign law.

**MODEL QUESTION PAPER**  
**PRIVATE INTERNATIONAL LAW**

**PART – A (2 X 12 = 24 marks)**  
**Answer TWO of the following in about 500 words each**

1) Discuss the meaning, nature, scope and unification of Private International Law.

- \* Introduction
- \* Definition of Private International Law
- \* Nature of Private International Law
- \* Scope of Private International Law
- \* Unification of Private International Law
- \* Conclusion

2) Critically examine the theories of Renvoi and discuss the approach of the English courts to the doctrine of Renvoi. Refer to decided cases.

- \* Introduction
- \* Concept of Renvoi
- \* Types of Renvoi
- \* Single Renvoi
- \* Double Renvoi
- \* Advantage and Disadvantage of Renvoi
- \* Conclusion

3) Critically examine the law relating to Domicile of Origin and Domicile of Choice with reference to English Law and Indian Law.

- \* Introduction
- \* Concept of Domicile
- \* Types of Domicile
- \* Domicile of Origin
- \* Domicile of Choice
- \* Case laws
- \* Conclusion

**PART – B (2 X 7 = 14 marks)**  
**Answer TWO of the following in about 300 words each**

4) Discuss the difference between Public International Law and Private International Law?

- \* Introduction
- \* Public International law and Private International Law
- \* Application in Municipal Laws
- \* Jurisdiction
- \* Scope
- \* Nature
- \* Conclusion

5) Explain the significance of various theories of Private International Law?

- \* Introduction
- \* Statute theory
- \* International theory
- \* Acquired rights or territorial theory
- \* Local Law theory
- \* Theory of Justice
- \* Conclusion

6) Discuss the Classification of the Cause of action?

- \* Introduction
- \* Classification of fact
- \* Cause of action
- \* Classification of Cause of action
- \* Connecting factor
- \* Conclusion

**PART – C (5 X 4 = 20 marks)**

- 7) a) Hague Convention on International Commercial Contracts  
b) Indian Statutory on domicile  
c) Lex fori  
d) Lex loci delicti commissi  
e) Corporation  
f) Lunatic  
g) Proper law theory of contract  
h) Lis alibi pendens

**PART – C (2 X 6 = 12 marks)**

**Answer TWO of the following by referring to provisions of law and decided cases with cogent reasons**

- 8) Vimal, a Delhi born man studied in U.K and acquired his domicile in U.K. Vimal, in letter to his friends, repeatedly said he would go back to India. Is it a ground for acquisition of domicile by choice? Decide.

**ANSWER:**

(i) **Issues of the case:** Ground for acquisition of domicile by choice.

(ii) **Legal Consequence:** Domicile of choice as U.K.?

(iii) **Legal Provisions:** The relevant case law is “*(Shankaran Govindan vs. Laxmi Bharathi, 1974 S.C. 1964)*” - *Dr. Krishnan goes U.K. to study Medicine, practices & buys house & settles there. He is an prompt tax payer, gets domicile of U.K. & dies there. He has property in Kerala & U.K. He wrote letter a to his friends (i.e), My brother tries to cheat me in the property in Kerala. (Later Appeal to SC)- SC ordered that mere words he written in a letter is only an intention to come India & not to settle in India.*

- 9) Rahul and Reena Austrian domiciled couple married in Vienna. Due to internal problem in Vienna the couples fled to India without an intention to return to Austria. Decide their domicile for matrimonial proceedings.

**ANSWER:**

(i) **Issues of the case:** Domicile for matrimonial proceedings.

(ii) **Legal Consequences:** Refugee?

(iii) **Legal Provisions:** The relevant case law is “*(Mandal vs, Mandal 1956 Punj.215)*” – 2 Austria Citizens marries in 1936 & In 1939 German invites Austria for war. Due to war the couples came to India. Court held that in 1945 they would have go back but settled in India by paying proper Tax – as it states India as their Domicile after their matrimonial proceedings.

10) Nazin, an English domiciled man, entered into a contract for marriage in Germany with his deceased wife’s sister domiciled in Germany. Decide the status of the marriage?

**ANSWER:**

(i) **Issues of the case:** The Status of the marriage.

(ii) **Legal Consequences:** Marriage- void (void ab initio) or valid?. & effect of wills.

(iii) **Legal Provisions:** The relevant case law is “*(Mette vs. Mette, (1859) 1 S.W. and Tr. 416)*” – (Section 18A of the wills act; 1837) – T was German- born but British by Naturalisation. He made a will during his marriage to W1 died; he married W1’s half-sister W2 in Germany (where such marriage was lawful) & subsequently had children by her. When T died; his executor sought letters of administration for the benefit of the children, arguing that the will had been revoked by the marriage to W2. The Judge found that T had been domiciled in England at the time of “second marriage”, which (According to English law) was therefore void. Since it was void ab initio, it could not have revoked the earlier will, which therefore stood as valid.

*Marriage is the only change in circumstances that has the effect of revoking all previous wills; other events such as the death of a spouse or the birth of a child leave the will intact, though they may clearly affect its application. However, Section 18A of the wills act 1837 as amended provides that following divorce or annulment, any bequest to a spouse lapses as if the spouse had died, unless a contrary intention is shown.*

\* \* \* \* \*