

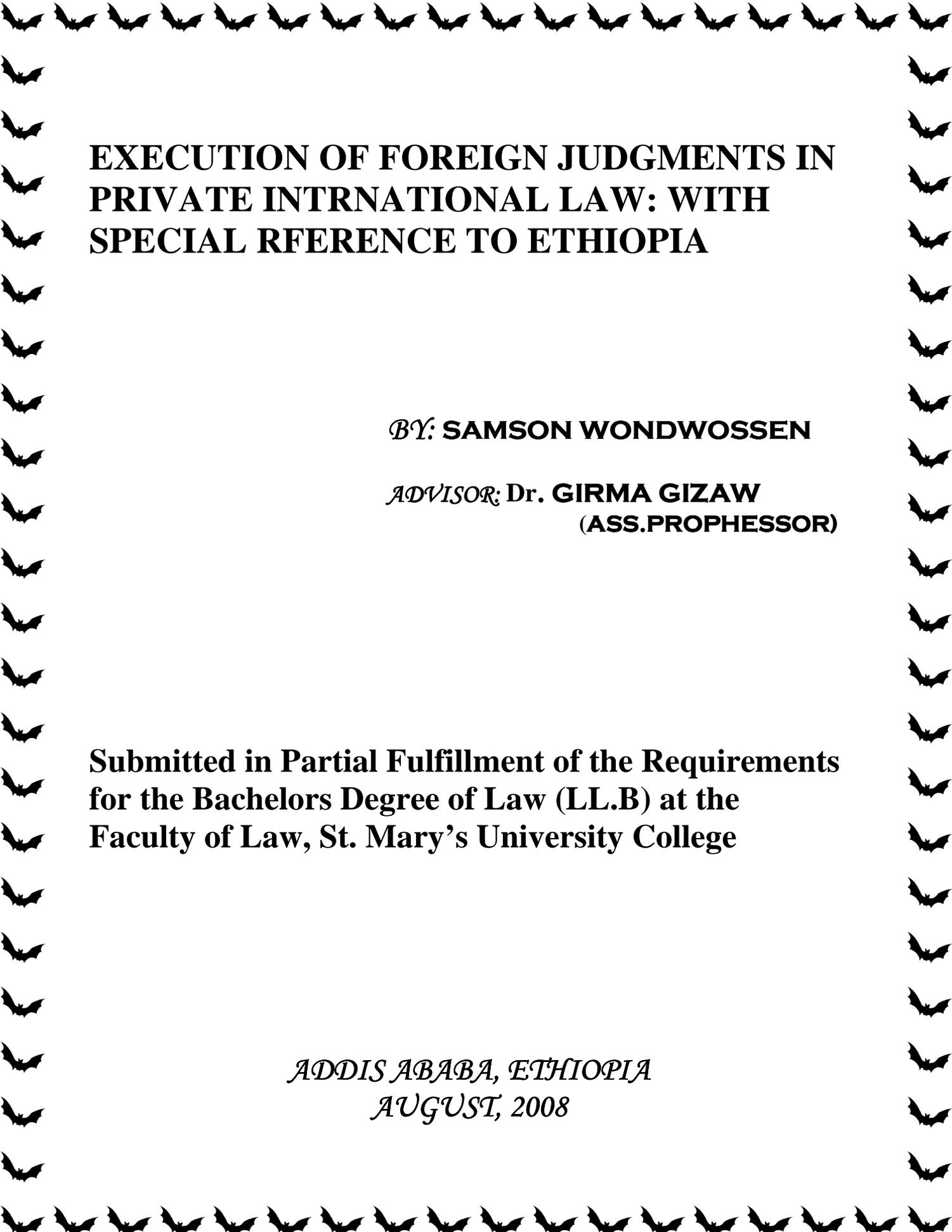
**ST. MARY'S UNIVERSITY
COLLEGE
FACULTY OF LAW**

LL.B THESIS

**EXECUTION OF FOREIGN JUDGMENTS IN
PRIVATE INTERNATIONAL LAW: WITH
SPECIAL REFERENCE TO ETHIOPIA**

BY: SAMSON WONDWOSSEN

*ADDIS ABABA, ETHIOPIA
AUGUST, 2008*



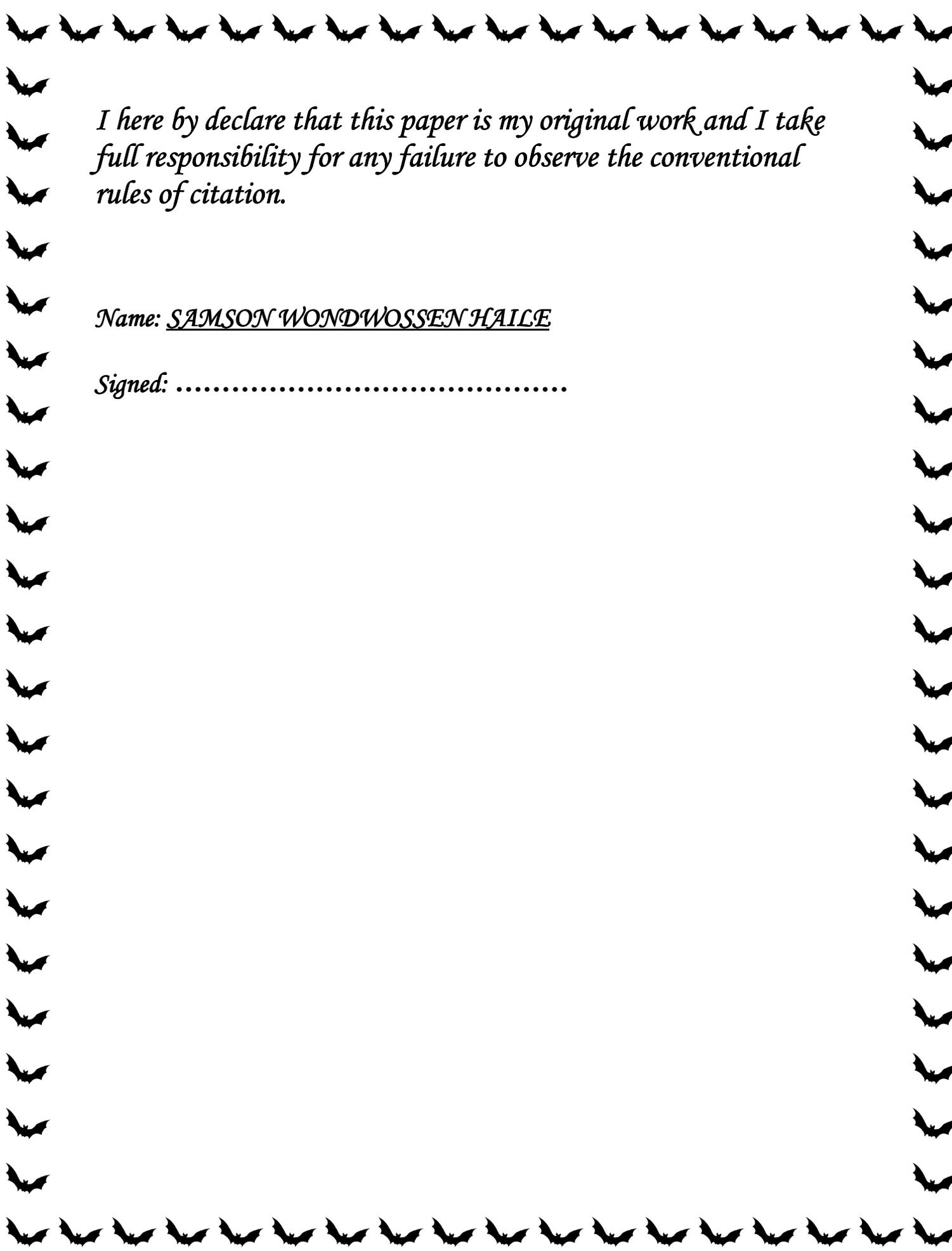
**EXECUTION OF FOREIGN JUDGMENTS IN
PRIVATE INTERNATIONAL LAW: WITH
SPECIAL REFERENCE TO ETHIOPIA**

BY: **SAMSON WONDWOSSEN**

ADVISOR: **Dr. GIRMA GIZAW**
(ASS. PROFESSOR)

**Submitted in Partial Fulfillment of the Requirements
for the Bachelors Degree of Law (LL.B) at the
Faculty of Law, St. Mary's University College**

ADDIS ABABA, ETHIOPIA
AUGUST, 2008



I here by declare that this paper is my original work and I take full responsibility for any failure to observe the conventional rules of citation.

Name: SAMSON WONDWOSSEN HAILE

Signed:

Table Contents

Acknowledgment.....	
Introduction.....	1
.CHAPTER ONE: General Introduction	4
1.1. Definition of Private International Law	4
1.2. Comparison of the Name Given Conflict of Laws	8
1.3. Historical Development of Private International Law	12
1.4. Perspective Development of Private International Law in Ethiopia	17
1.5. The Need and Function of Private International Law	20
1.6. The Nature and Subject Matter of Private International Law	22
1.7. Sources of Private International Law in the General	24
1.8. Sources of Private International Law in Ethiopia	27
CHARTER TWO: The Principle of Recognition and Execution of Foreign Judgment	29
2.1. The Distinction between Recognition and Execution of Foreign_Judgment	30
2.2. Types of Judgment	33
2.2.1. Ordinary Court Judgment	33
2.2.2.. Arbitral Court Judgment	34
2.3. Justification (Rationale) to Recognize and Enforce Foreign Judgment	37
2.3.1. Facilitating International Private Relations	37
2.3.2. Comity (Reciprocity)	40
2.4. Theories of Execution of Foreign Judgment	41
2.4.1. Basis of Execution	41
2.4.2. Principle	41
2.4.3. Comity (reciprocity) Theory	41
2.4.4. Obligation Theory	43

2.5. Mode of Execution	44
2.6. Principles of International Convention on the Subject	47
2.6.1. Principles of the Hague Convention	48
2.6.1.1. The Basic Features and Rules of the Convention	49
2.6.2. Principles of the Brussels Convention	53
2.6.2.1. The Basic Features and Rules of the Convention	53
2.7. Practices of Some Selected Countries on the Subject	57
2.7.1. Italy	57
2.7.2. Switzerland	61

CHAPTER THREE: Requirements to be fulfilled for The Execution of Foreign Judgment in General	64
3.1. Procedural Requirements	65
3.1.1. Form and Application	65
3.1.2. Jurisdiction of Court to Accept the Application in Enforcement of Foreign Judgment	66
3.2. Substantive Requirements	67
3.2.1. Reciprocity	67
3.2.2. Competence of the Court	67
3.2.3. Finality and Enforceability of the Case	68
3.2.4. Public Order and Morality	69
3.2.5. Opportunity by the Judgment Debtor to Appear and Present his Defense	70
3.3. Additional Requirements	71
3.3.1. Judgment Opposed to Natural Justice	71
3.3.2. Judgment Vitiating by Fraud	73

CHAPTER FOUR: <u>The Concept and Practice of Foreign</u>	
<u>Judgment in Ethiopia</u>	74
4.1. The Practice of Execution of Foreign Judgment in Ethiopia	75
4.2. Conditions to be fulfilled for the Execution of Foreign Judgment in Ethiopia	77
4.2.1. Procedural Requirements	77
4.2.2. Substantive Requirements	78
4.2.2.1. Public Order and Morality	78
4.2.2.2. A court duly established and constituted	81
4.2.2.3. Finality and Enforceability of the Case	82
4.2.2.4. The Judgment Debtor's Right	83
4.2.2.5. Reciprocity	83
4.2.2.6. Decision Making Process	85
4.3. Case Analyzing	87
4.4. The Concept of Execution and Enforcement of Foreign Judgment in Ethiopia	92
4.5. The Rationale and Applicable Theory Envisaged by the Draft Proclamation of Private International Law (1996)	94
4.6. The Concept of Foreign Judgment in the Federal Context of Ethiopia under the Draft Proclamation Rule of Private International Law	96
4.7. Brief Description of Major Departures of the Draft Law from the Existing Law (Civil Procedure Code Art.456-461)	98
4.8. Conclusion and Recommendation	100
4.8.1. Conclusion	100
4.8.2. Recommendation	104

Acknowledgment

*First of all, I present my thanks to the **Almighty God** who has done every thing on time. Had not been his tangible cooperation added to it, this paper would not be accomplished.*

I am highly indebted to my adviser Dr. Girma Gizaw for his invaluable scholarly comments and advice.

I also extend my heart felt gratitude to Ato Tariku Belay for his unreserved financial and moral assistance throught the accomplishment of my L.L.B. courses. And also, I am grateful too, all my family for their financial and moral support.

I would like to extend my gratitude to all my friends for their constructive suggestion and to those who helped me in finding court cases and materials relevant to my research.

Last but not least, my gratitude goes to Firehiwot Tesfaye and Teyent Ketema who has devoted their time and effort in typing this research.

“NOT GOOD WIH BUT GOD WISH”

THUNKS to God...

CASE ANNEX

Definition of Terms

Comity – The doctrine requiring courts of one state to recognize the laws and judgment of competent courts of another state, in order to secure the reciprocal execution by that foreign state of the laws and the judgments of the first state.

Foreign judgment – refers a judgment, decrees, or order of the nature of a judgment, which has been pronounced or given by a foreign court.

Execution – Denotes that the granting of compulsory relief based on the judgment pronounced in a foreign judgment.

Recognition – is understood to imply foreign judgment as having resjudicata states and conclusions on the other hand it is an act of the forum that makes the foreign judgment on the parties to it just as domestic judgment.

Resjudicata – it is a status given to a certain judgment which has already been litigated and it is not possible to bring a new suit on the same cause of action.

An Exequatur – is a form of preceding which means retrial of the foreign judgment.

Jurisdiction - may refer the competence of the court which rendered the judgment to that effect or it may also refer to which level of court of a certain state has power to accept the application of execution of that judgment.

Choice of Jurisdiction- in private international law, the principles and rules applied by courts in order to determine the proper court for instituting legal proceeding.

Choice of law – in the Private International court, the principles and rules applied by courts in order to determine the law applicable in order to determine the law applicable to one or more of the legal issues to be decided.

Ius civile – Municipal law the whole body of Roman law.

Ius gentium – the law of peoples.

BIBLIOGRAPHY

TABLE OF BOOKS AND ARTICLES

Albert A Ehrenzweg and Eric Jaime. Private International Law, 1973

Atul M. Setalvald, Conflict of Laws, (1st edition) Lexisnexis Butter worth, New Delhi India, 2007.

Arthur Massbahum, Jurisdiction and Foreign Judgment, Colombia Law Review, Vol. 4, 1948.

Ali Assefa, Alternative Dispute Resolution Method Lecture Note, SMUC, (unpublished), 2007.

Barbara Kulzer, Some Aspects of Enforceability of Foreign Judgments: A Comparative Summary, Buffalo Review, Vol.16, 1966.

Clive M. Shcimithof, the Law and Practice of International Trade.

Dicey and Morris, Conflict of Laws, 8th edition, 1967.

Distance Education Module, Private International Law, SMUC, (unpublished), Addis Ababa, 2007.

.

Donald P. Blake, Conflict of Laws: Effect of Foreign Judgment: Cornel Law Quarterly, Vol 12, 1926-27.

Dr.Gizaw Girma, Conflict of Laws, Lecture Note, SMUC, (unpublished) 2007.

Earnest G, Lorton, the Enforcement of the American Judgments Abroad, Yale Law Journal, Vol.29 1919-20.

Eugene F. Scholes and Peter Hay, Conflict of Laws, St. Paul mint, West Publishing, 1984.

Fredrick Harrison, Jurisprudence and Conflict of Laws, 1919.

H. Graveson, the Conflict of Laws, 6th edition 1969.

H.J Sjjiders et al, Access to Civil Procedure Abroad, C. N. Beck kuwer Sakkourlas Stamfi Sweet and Maxwell, 1996.

G.C. Cheshire, Private International Law, 6th edition 1963

Idris Ibrahim, the Applicability of Foreign Civil Laws in Ethiopian, .Journal of Ethiopian Law, Vol.13

Idris Ibrahim, the Execution of Foreign Judgments in Ethiopia Vol.19,Dece.1999

Idris Ibrahim, Materials to the Study of Private International Law in Ethiopia, Faculty of Law Addis Ababa University, 1998.

Ian Brown Lie, Principles of Public International Law, (2nd Edition), 1973.

Istvan Szazy, the Conflict of Laws in the Western Socialist Developing Countries, 1974.

Istvan Szazy, Private International Law in the Europeans Democracies, 1964.

J.D Mclean Morris: Conflict of Laws, (4th Edition), Universal Law Publishing pvt LTD, New Delhi, 2007.

J.G Collier, Conflict of Laws, (2nd Edition) Cambridge University, 1994.

J. H.C. Morris, the Conflict of Laws, (8th-Edition) 1973.

Mar thin Wolf, Private International Law, (2nd Edition), 1950.

N. Bentwich, Private International Law in Ethiopia, International Law Quarterly Vol. 4,1951.

Niamh Maloney, Conflict of Laws, (7th Edition); LLM (Harvard) Attorney, 1996/ 97.

North Peter and Cheshire, Private International Law, (13th Edition)
Butterworth, 1999.

Paras and Peeyushi Diwan, Private International Law, (4th Revised and
Up dated Edition) New Delhi, 1998.

Philmore, Commentary on Private International Law or Comity, (3rd
Edition).

Peter Stone, Conflict of Laws, USA, New York, 1995.

Rebel, the Conflict of Laws: a Comparative (2nd Edition) 1958.

Robert. Allen. Sedler, Conflict of Laws in Ethiopia, Faculty of Law, Addis
Ababa University, 1965.

Robert Allen Sedler, Ethiopian Civil Procedure, Faculty of Law Addis
Ababa University, 1968.

Robert N. Hornick, the Recognition and Enforcement of Foreign
Judgment In Indonesia, Harvard Law Journal Vol
18, 1997.

Ruth Bader Ginsberg, Recognition and Enforcement of Foreign civil
judgments: Summary view of the Situation in
USA, International Lawyer, Vol.4 June, 1970.

Salmond, Jurisprudence, (7th edition), 1924

S.K. Verma, Introduction to Public International Law, 1928.

The American Statement of Conflict of Laws, 1934.

The Public Policy Concept in the Conflict of Laws, Columbia Law Review,
Vol 33, 1933.

Walter S. Johnson, Conflict of Laws, 2nd (Edition) Montréal 1962.

Westlake, Private International Law, (7th Edition) 1925.

Table of Case

Commercial Bank of Ethiopia V Demere Gobena and Senait Assefa,
Civil Case, (Federal Supreme court) File No. **15908/97** (unpublished)

Table of Laws

The Civil Code of Ethiopia, Proclamation No. 165/1960 Federal
Neg.Gaz.year 19, No.2, Addis Ababa, 5 may, 1960.

The Constitution of the Federal Democratic Republic of Ethiopia, Federal
Neg.Gaz. Year 1 Na1 Addis Ababa, 21st August, 1995.

The Civil Procedure Code, Decree No 52, Federal Neg.Gaz, year 25,No 3,
Addis Ababa, 8 October 1965.

The Federal Courts Establishment, Proclamation, No 25 Federal No. Gaz,
year 2, No 13, 1996.

The Federal Rules of Private International Law Proclamation No -----
Federal, Neg. Gaz; Addis Ababa 20 ----

The Hague Convention on Recognition and Enforcement of Judgments in
Civil and Commercial Matters, 1971

The Law Reforming the Italian System of Private International Law, May
31, 1995.

The Nationality Law Proclamation No, 378 Federal, Neg Gaz. Addis
Ababa, 2003.

The New York Convention on the Recognition and Enforcement of Foreign
Arbitral Awards, 1958.

The Revised Family Code, Proclamation No 1 Federal Neg. Gaz. Year 6,
Addis Ababa 4 July 200.

The Swiss Federal Code on Private International Law, December 1987.

Introduction

Rules of Private International Law is one of the signals that display states mutual relationship with each other and to the international community at large in the current speedy movement to globalization where by our planet has been in constantly reduced in to a single village; individuals are frequently mobilizing from one state to the other state is undoubtedly unavoidable.

As they are inconstant and continuous interactions through marriage trade and other activities of daily life in a foreign state, where in the courses of their relationships disputes are invariably bound to arise.

In desire to address those conflicting legal disputes arising, states have adopted Private International Law or Conflict of Law rules; because it helps these states to get answers concerning the determination of the court having jurisdiction over a case involving foreign element, to which appropriate governing law is applicable and under which a foreign judgment could be recognized and or executed.

As Ethiopia is a country with no rules of Private International Law, courts may not know or find to know what special procedures to follow in deciding matters in which foreign elements are involved.

As a member of international community and as a Federal state, though too late, it was a correct decision for the current Ethiopian government to issue the Draft Proclamation of Private International Law. But it is considered only as an attempt unless it is provided in an applicable form of law.

The Execution of foreign judgments, the title which this paper is purported to address, is an important aspect or one of the ingredients of Private International Law. Again in order to assist their courts resolve problems associated with the execution of foreign judgments rendered by other states, quite several states have adopted legislation which include

provisions on the execution of foreign judgments. Many states have also entered in to a treaty or convention bilateral or multilateral.

As it is known that, up to now, Ethiopia has neither concluded a treaty nor entered in to a convention on the basis of which its courts would recognize and enforce foreign judgments. The provisions which guide its courts are those incorporated in the Civil Procedure Code (art 456-461) under the section of the **“Execution of Foreign Judgments and Arbitral Awards”** Nevertheless, apart from the fact, these provisions are difficult to understand, that they are very broadly formulated and they cannot accommodate as many legal situations as either countries do.

This research paper will mainly concentrated on the execution of foreign judgments. In doing so, the paper includes five chapters.

Chapter one is devoted to introduce the definition, historical development, nature and subject matter of Private International Law. This chapter will also discuss the need, function, and sources of Private International Law in general and in Ethiopia.

Chapter two discusses; the principle of recognition and execution of foreign judgment. For this purpose, the chapter deals with the distinction between recognition and execution, types of judgments, and the justification to recognize and enforce foreign judgments. It is also the concern of this chapter, to discuss the theories of execution of foreign judgment, principles of International Convention and practices of some selected countries on the subject. In doing so, the writer has come across discussing the two notable documents of the Brussels and Hague conventions with their basic features and rules on Jurisdiction and Enforcement of Judgments enacted in 1968 and 1971 respectively .In the practice of the states, the Italian and Swiss are available to this paper.

Chapter three is trying to examine the requirements to be fulfilled for the execution of foreign judgments in general.

The last chapter is concerned about the main concern of the thesis. It is designed to examine, the concept and practice of foreign judgments in Ethiopia. In further detail, it gives emphasis to the conditions to be fulfilled for execution of foreign judgments in Ethiopia.

In order to look into the efficacy of the code provisions, an attempt has made to analyze a case in this chapter.

And also the last chapter comprises, the concept of Execution and Enforcement of Foreign Judgments, the rationale and applicable theory envisaged by the draft proclamation, the concept of foreign judgment in the Federal context of Ethiopia under the draft rule of Private International law and brief description of major departures of the draft law from the existing law of (Civil Procedure. Code. Art .456-461).

Finally conclusion and recommendation are part of it.

CHAPTER ONE

General Introduction

Private International Law is the law that provides rules, which regard cases involving foreign relations i.e. relations that are private in nature, but involving some foreign elements that cross the boundary of the particular state.

Wherever legal case involving foreign element comes to a court of a state, it is Private International Law that serves the purpose of determining as which state's court is competent to hear and decide the case and which state's law must be applicable to it. In this sense, Conflict of Laws presupposes the existence of two or more competing national laws.

If there were no difference in the laws of state of the world, there would have not been conflicting laws at all.

Private International Law emerged as a distinct branch of law from the need of states to guide their courts in the dispensation of justice in civil cases in which foreign elements are involved.

The foreign element may arise from a connection of a person involved (such as the foreign domicile, habitual or other residence, or nationality of an individual, or the foreign location the place of incorporation, the head quarters or a branch of a company), or of acts or events involved for example, that the contract involved was concluded or performed abroad, or contained a clause choosing a foreign law or court; or that the accident giving rises to a tort claim occurred abroad; or of property involved such as the foreign location of land whose title is at issue. Private law problems arising from factual situations which are connected with more than one country have common place in the modern world. Individuals or families move from one country to another for a variety of purposes (for example, economic, social, familial, educational, or touristic), and for a Variety of contemplated or actual durations companies based in one country establish branches or subsidiaries in other countries. Much international commerce is carried out by way of dealings between parties based in different

countries, and investments are often made by individuals or companies in assets located in a country other than that in which the investor is based.

With a view to achieving to some extent a satisfactory resolution to the Private International Law problems to which such multi- country factual situation give rise, develop legal systems have adopted special rules known as Conflict of Rules, and this rules form the legal area known as “conflict of laws” or “Private International Law”.

In the modern world every country having a developed legal system has also its own set of conflict rules, which form part of its private law. This conflict rules are differ from one country to another in the same way as other rules of private law, and have no greater connection with public international law than have any other rules of a country’s private law.

As in fact in every other world nations, there are series of social, economic and political factors bringing Ethiopia in to contact with foreign countries and peoples. The conflicting situations resulting from these contacts undoubtedly demand the employment of Private International Law to resolve the conflicts. However, Ethiopia has yet not adopted its own law, nor has it become a party to any convention or treaty dealing with the issues of Private International Law.

The sphere of Private International Law may comprise three kinds of problems dealt with conflict rules that relate respectively to direct judicial jurisdiction; choice of law; and the **Recognition and Enforcement of Foreign Judgments.**

Rules on direct judicial jurisdiction, define the circumstances in which the courts of the forum country are competent, and should be willing, to entertain proceedings in respect of dispute which have some connection with another country.

Rules on choice of law select from the connected countries the one whose law is to supply the substantive rules which have to be applied by the forum determining the merits of the dispute.

Rules on the recognition and enforcement of foreign judgments define the circumstances in which a judgment of a foreign court is to be given some, and if so what, effect in the forum country.

Among those ingredients of Private International Law, the rules in the sphere of the **Recognition and Enforcement of Foreign Judgments**, is one of the controversial areas in conflict of laws.

Ethiopia, has as yet neither become a party to any treaty nor convention regarding Recognition and Execution of Foreign Judgments. Except a few rules are provided in its Civil Procedure Code of 1965. However, the provisions are concerned with the Execution of Foreign Judgments and comparison of these provisions with similar provisions in other countries, manifests that they are not detailed enough to accommodate relevant provisions capable to resolve problems involving foreign element. Other problems and definitions will be discussed in the subsequent chapters.

The paper has four subsequent chapters. In its chapter one, the writer has concentrated on the definition of Private International Law, historical development in general, historical development in Ethiopia, the need and function of Private International Law, sources of Private International Law in general and in Ethiopia.

1.1. Definition of Private International Law

With in the scope of the study, the writer is concerned with different definitions that are given by different legal scholars. Some of which are provided here under.

In the words of Cheshire: **“Private International Law then , is that part of law which comes in to play when the issue before the court affect some facts, events or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system”**.¹ In such circumstance application of a foreign law may be necessary to prevent in justice.

¹ Cheshire, Private International Law (8th . ed)p.5

In the words of Johnson: **“Private International Law is the body of rules applied by a country justifying and controlling the occasional application by the courts of foreign law instead of its own”**.²

Graveson on his part defined **“Private International Law, or Conflict of Laws as branch of law which deals with cases in which some relevant facts has geographical connection with a foreign country and may, on that ground raise a question as to the application of ones own or the appropriate foreign law to determination of the issue, or as to the exercise of jurisdiction by ones own or foreign courts”**.³

According to Westlake: **“Private International Law is that department of private jurisprudence which determines before the courts of what nation each suit should be brought and the law of what nation it should be decided.”**⁴ From all and other definitions given to conflict of laws by different scholars, it is possible to get some general truth, only five of which are given in relation to the subject. Firstly it is a branch of law that comes in to view only when the case before the courts involves one or more foreign elements. Secondly, it is applicable only when the case is of private nature like marriage, divorce, succession, tort, contract, property, agency business organization, labor and the like.

Thirdly, it guides the court to determine as to whether or not it has jurisdiction to hear and decide the case, and as to whether or not it is obliged to apply the law of another state. Fourthly, conflict of laws is also the branch of law that aids the court to determined whether it should give recognition and enforce the judgment and awards given by tribunal of another state Finally, each state has its own rules of conflict of laws.

² Johnson, Conflict of Laws, (2nd . ed) 1962, p. 1

³ Graveson, the Conflict of Laws, (6th ed.) 1969, p. 3

⁴ West lake, Private International Law, (7th ed.) 1925, p. 5

1.2. Comparison of the Name Given Conflict of Laws or Private International Law

There is no agreement as to what this branch of the law should be named. The Private International Law and conflict of laws are the two names by which this subject is widely named.⁵

The name first used by distinguished scholars such as Story in 1834 in the United States and Westlake in England was Private International Law.⁶

Westlake supports this nomenclature by saying that **“the subject. Matter of this branch of laws falls within the purview of international law as the court are required to choose one of the several foreign laws, and jurisdiction of one of the several foreign courts.”**⁷

Later, in the United States the name adopted was “conflict of laws; and this is commonly used there and is also preferred in some of the leading text books on the subject in common law countries.⁸ The term primarily used in the United States, Canada and more recently in England, at list since the writings of Westlake, refer to **“Private International Law”**.⁹ Fault can be found with both names.¹⁰ Regarding the nomenclature of Private International Laws, some scholars such as Paras Diwan and Cheshire argued that **“it is likely to create confusion with public international law.**

But there are obvious differences between the two.” The later primarily governs the relation between sovereign states and it may perhaps be regarded as the common law of mankind in an early state of mankind; the former is designed to regulate disputes of private nature notwithstanding that one of the parties may be sovereign.¹¹ Public International Law is mostly concerned with nations and not individual, while the Private International Law is concerned with the disputes between the individual and state.¹²

⁵ Atul.M.Setalvad, Conflict of Laws (1st ed.) 2007, p. 6

⁶ Ibid,p.6

⁷ Supra note 4, p.

⁸ Supra note 5 p.

⁹ Peter Hay, Conflict of Laws (2nd ed.) p.1

¹⁰ Supra note 5

¹¹ Supra note 1p.13

¹² Paras Diwan, Private International Law (4th revised and updated ed.)1998,p.47

The rule of Public International Law is uniform for all states, while each state had its own Private International Law.¹³ All the criticisms, as far as they go, are correct on their own premises.

It can not be said that there is no link between Private international law and Public international law.¹⁴ Some principles of law, such as requirement of natural justice are common to both; some rules of Private International Law, as for example the traditional common law doctrine of the “proper law” of contract, have been adopted by a court in the settlement of a dispute between sovereign states; equally; some rules of Public International Law are applied by a municipal court when hearing a case containing a foreign elements.¹⁵

Regarding the other nomenclature of Conflict of Laws again Paras Diwan and Cheshire argued that this branch of law is also defective from many aspects. This name includes within its ambit the rule of choice of law, but it leaves out the rule of jurisdiction.¹⁶ So far as the name indicates that there can be conflict between international law of two countries, this name may be unobjectionable.¹⁷ Cheshire says that on balance this is innocuous if it is taken as referring to a difference between the internal laws of two countries on the same matter.¹⁸ When for instance a question arises whether the assignment in France of a debt due from a person resident in England ought to be governed by English or by French internal law, it may be said that these two legal systems are in conflict with each other in the sense that they can each put forward claims to govern the validity of the assignment.¹⁹ But the title is misleading if it is used to suggest that two systems of law are struggling to govern a case.²⁰

The serious objection against this name is that in fact there is no conflict of laws; the very purpose of this branch of law is to avoid conflict.²¹ Morris very aptly says that so far as the question of Conflict of Laws arises it may be in the mind of the judge adjudicating a case

¹³ Ibid,

¹⁴ Ibid,P.48

¹⁵ Supra note 1 p. 13

¹⁶ Supra note 12 p.48

¹⁷ Ibid

¹⁸ Supra note 15

¹⁹ Ibid, p.13 – 14

²⁰ Ibid, p.14

²¹ Ibid, p. 15

having foreign element, but it indicates that there is a conflict between the internal laws of two countries; each trying to have domination over the suit, then the name is misleading.²²

As has been seen, the function of Private International Law is to indicate the applicable foreign law, with a view to do justice in the case.²³

There are several other names that have been suggested for this branch of law. Some of them are: **International Private Law,**²⁴ **Inter Municipal Law,**²⁵ **Comity,**²⁶ and **Extra - territorial Recognition of rights,**²⁷ **Law of Multi state of transnational problems.**²⁸ Szaszy suggests that it could be named as “Civil, Family and Labor Law; but he himself rightly says that “this would be not only unfamiliar, but rather clumsy and too long; moreover, this would not be quite accurate either, because Private International Law comprises also the rules governing legal relations which contain foreign elements and which are encountered, quite exceptionally, in other branches of the legal system e.g. land or farmers co-operative law.²⁹

The fact is that no title can be found that is accurate and comprehensive,³⁰ and the title Private International Law and Conflict of Laws are so well known to and understood by lawyers that no possible harm can ensure from the adoption of either of them.³¹

It might be argued that the latter title is preferable because it is a title unrealistic to speak in terms of international law if the facts of the case are concerned which England and some more other part of the British Isles.³² However, the former is the title most widely used through out the world and, significantly for this country, it is the description used in the

²² Dicey and Morris, Conflict of Laws, p 5

²³ Supra note 12, p 48

²⁴ Fredric Harrison, Jurisprudence and Conflict of Laws, 1919,p.130

²⁵ Ibid

²⁶ Phil more, Commentary on Private International Law or Comity, (3rd Ed.)p.11

²⁷ Holland, Jurisprudence

²⁸ Eugene F. Scholes, Conflict of Laws (2nd Ed.)p 2

²⁹ Szaszy, Private International Law in the European Peoples Democracies, 1964,p 5

³⁰ Supra note 23, p 49

³¹ Other terms which have been used to describe the subject are International Private law “ Inter Municipal Law,” “ Comity” and “the Extra – territorial Recognition of rights”

³² Supra not 21 p.14

European community and most other international bodies of which the United Kingdom is a member.

On the believe of the writer of this study and Paras Diwian, it is submitted that of all the names current and suggest the most appropriate seems to be Private International Law as it denotes the two essential aspects of the subject ,viz. . . International character of the subject and the relation of the subject with private law as distinguished from public law. And above all, this is the most current and internationally accepted name.³³But for the purpose of the writing of this paper, the writer may use the two words interchangeably.

Ordinary meaning of Conflict of Laws shows the existence of contradictions between two sets of laws. Conflict of law generally refers to a situation in which two or more rules that apply to the same relation are in the contradiction. Conflict of Laws becomes an issue only when two or more different and contradicting laws and jurisdiction are in competition to govern the same legal case.

As a result, for instance, with the same state Conflict of Laws may arise between different laws of two or more regional state of a Federal state.For instance, Ethiopia today where Conflict of Laws in the different regional states may arise. In this sense, the term conflict of laws is preferred because describing it as a branch of international law would be confusing as the regional state of federal state has no international personality.

Like wise, Conflict of Laws may arise between laws of two or more different sovereign and independent states. The pre- requisite for existence of Conflict of Laws is there for the existence of two or more different and contradicting laws and jurisdictions.

The scope of this paper is however, limited to the Conflict of Laws that govern the private relation of individuals of two or more sovereign and independent states. Conflict of Laws in this sense, refers to the law that provides the rules, which are applicable to cases that fall under Private International relations.

³³ Ibid

1.3. Historical Development of Private International Law

1.3.1. Era of territorial Law

Among the laws, Private International Law is perhaps the youngest.³⁴ it could be said that, countries such as ancient Israel, Greece and Egypt have laid down the foundation stone of as to the development of Private International law. It is generally agreed that the conflict of laws as we know it began to emerge in the early 13th century in Italy.³⁵

All the conditions that could be said to be essential for the development of the rule of Private International Law were present during the Roman Empire. Each provinces of the Roman Empire has it is own law.³⁶

In Rome the “ius civile” was deemed to form a part of the right of Roman citizens and thus, was not applicable to cases involving foreigners.³⁷

In other words to the Roman citizens the Roman law applied and to the citizens of Province the Provincial law applied. Disputes between Romans were decided under Roman law but the disputes between citizens of province (who were aliens for Romans) were decided by a different law, called law of nations.³⁸ This seems to be the reason that, despite ideal conditions for the development of Private International Law, there was practically nothing like Private international Law during the Roman Empire.³⁹ Separate courts for case involving foreigners may be considered the initial step in the development of the Conflict of laws.⁴⁰ Thus the “corpus iuris civilis” does not contain even a word on the application of foreign law in any situation.

It was incidentally some concept of Private International Law such as domicile⁴¹ or the rule that the “lex situs” governs all matters relating to immovable then place in Roman law, but it

³⁴ Supra note 30 P 53

³⁵ Robert Allen Sedler, Conflict of Laws, 1965, p8

³⁶ Supra note 34

³⁷ Supra note 35 p.7

³⁸ The law of nations was a body of rules different and distinct from provincial laws of either party

³⁹ Supra note 37

⁴⁰ Supra note 36

⁴¹ Under Roman law domicile meant connection of a person to a place which he had made his permanent abode

is submitted, to build any structure of Private International Law from these rules would be an exercise in futility.⁴²

1.3.2. The Era of Personal Law (6th – 10th centuries)

After the Barbarians overthrew the Roman Empire and settled tribe after tribe in the territories where hitherto to Roman law had prevailed, there arose what is called the system of personal laws.⁴³ This covers roughly a period of four centuries.⁴⁴ This ended the territoriality of Roman law. Each tribe, Visgoth, Lombard, Burgundian and soon retained its own tribal law, in much the same way as now a days Europeans, Hindus and Mohammedans in India have their own family and religious laws. The implication of law becoming personal was that wherever a person went, he carried his law with him. Thus a Saxons was governed by Saxon law and end Sabian was governed by Sabian law wherever he might go.

⁴⁵There were of course exceptions to this system of personal or tribal laws.⁴⁶Two of these exceptions were that the same criminal law and canon law applied to all persons. Some times, parties themselves specified the law by which their transaction would be governed.⁴⁷ Thus in a country like Italy which had a huge mixed population, it was usual for the parties to state the law by which they chose their contract or transaction to be governed. It is likely that in such a situation some cases of conflict of personal laws might have arisen.⁴⁸ But no coherent picture is discovered.

1.2.3. Era of Feudalism and City States (11th and 12th centuries)

Eleventh and twelfth century witnesses the exit of the era of Personal law and its replacement by the era of Feudalism in the north Alps and of city state to south of Alps.⁴⁹ Feudalism is the negation of personality. It is a remarkable historical development that two diverse tendencies

⁴² Supra note 39, p. 54

⁴³ Supra note 21, p. 20

⁴⁴ It may be noted that in 212 AD. Roman law was made the law of entire Roman Empire

⁴⁵ Supra note 43,

⁴⁶ Supra note 45, p.21

⁴⁷ Supra note 42

⁴⁸ For instance, the rule that capacity to contrite is governed by personal law, succession by personal law of the deceased, transfer of property by the law of the transferor or the validity of marriage by personal law of the husband

⁴⁹ Supra note 47

put the era of personal laws to an end.⁵⁰ During this period in France, Germany, Spain England and other countries, north of the Alps, Feudalism came in to existence.⁵¹ And with this was ushered in the era of territorial laws. Feudalism does not tolerate the application of any foreign law.⁵² The policy of a Feudal superior was rigorously to disregard all laws save his own and to refuse protection to rights which had been acquired under an extraneous legal system.⁵³ Thus for instance, strangers were right less.

A person who passed from one fief to another was in danger of losing his property and even his freedom, and though the treatment that he received varied infinitely in different Fiefs, almost universal burden was that he could not transmit his property on death.⁵⁴ Thus, again, there was no scope of or the development of rules of Private international Law.

In the south of Alps also territorial law emerged, but for different reasons. The city state of Italy came in to existence and it was laid down that all persons living in a city were governed by the law of the city.⁵⁵ At this period of history, there gradually emerged a large number of prosperous cities, such as Florence, Bologna, Milan, Pisa and Padua, which had succeeded in winning their independence, and which not only had their own territories but also possessed laws that showed many individual variations from the generally prevailing Roman law.⁵⁶

Each of these states had their own laws and these laws different from each other. It was this diversity of municipal laws combined with commerce between city and city, that demanded some respect to be paid to alien laws and that ultimately gave rise to the science of Private International Law.⁵⁷ In this back ground the emergency of rules of Private International Law becomes imminent.

⁵⁰ Ibid

⁵¹ Ibid

⁵² Ibid

⁵³ Supra note, 43, p.22

⁵⁴ Ibid

⁵⁵ Supra note, 49

⁵⁶ Supra note, 53

⁵⁷ Ibid

1.2.4. The Era of the Statutes (13th – 18th centuries)

The credit of witnessing the emergency of rules of Private International Law goes to the thirteenth century. The feudal doctrine of the reality of laws become unworkable in a country like Italy, where commercial inter course between the inhabitants of the various cities was a matter of daily occurrence.⁵⁸ It was in the interest of trade and commerce that city states recognized each other's laws.⁵⁹ This was also the age of revival of Roman law.

The eleventh century glossators of the corpus juris had already done much preliminary work in this direction.⁶⁰ How ever it was left to post glossators to make systematic and scientific study of rules of private international law, they hung the rule of Private International Law on certain doubtful rule of corpus juris. These rules hardly existed in corpus juries, but such hardly existed in Corpus juris, but such high was the authority of corpus juris that these doubtful pegs held firmly the rule of Private International Law.⁶¹ One such peg was the Justinian rule that the catholic religion applied to all citizens. Howsoever, illusory there pegs might be too hung on them. And they held. Among the authors of this age the name of Bartolus⁶² is perhaps the greatest name. He had influenced the legal thought of European countries for several centuries, with Bartolus came the statute theory.⁶³

In the middle age the word "statute" meant any law or custom which prevailed in any city of Italy contrary to Italian law.⁶⁴ Originally the theory was conceived to provide solution to the conflict among the laws of Italian city states and between the laws of Italy and other city states.⁶⁵ The protagonists of the statute theory classified statutes under three heads; (a) statutes relating to person, (b) statues relating to things, (c) mixed statues.⁶⁶ It is for this reason that the theory is nomenclature as statute theory. Apparently under this theory it seems to be very easy to provide a solution to any problem.

⁵⁸ Supra note, 53 p 23

⁵⁹ Supra note, 49 p. 55

⁶⁰ Supra note, 53 p.23

⁶¹ Supra note, 59

⁶² His full name is Bartolus, desaxofeurato (1314 – 1357)

⁶³ Supra note, 60 p.24

⁶⁴ Supra note, 61

⁶⁵ Supra note, 63

⁶⁶ Supra note, 64

Conflict of Laws, but in practice it is not so easy.⁶⁷ The greatest difficulty is of characterization; which matters, transaction legal relations, things etc would fall under which statute?

In the sixteenth century the credit of developing the statute theory goes to French jurists. For most among them are Dumoulin (1500 -1566) and D'Argentre (1519-1590).⁶⁸ Although both accept the division of statute in to two, yet we find that Dumoulin exaggerated the scope of personal statutes, while D'Argentre, being the protagonist of territoriality of laws, was not in favor of giving extended mean to personal statutes. According to him if there was any doubt about a matter as to which category a subject should fall, it should be treated to fall in statutes pertaining to things.⁶⁹

In the seventieth century the Dutch jurists attempted to give a new twist to statute theory. vote and Huber were Dutch writers who developed their political power of sovereignty on the territorial theory. According to them it depended up on the will of the sovereign as to what solution should be provided to any problem, including the problems of Conflict of laws. This led to the emergency of doctrine of territoriality of laws.

1.2.5 Modern Era

The nineteenth century may be regarded as the beginning of the modern era. Fredrich carl van Savigny the famous German jurist, propagated a new theory. According to him for the entire civilized world there can be developed one uniform system of Private International Law.⁷⁰

Rejecting the statute theory, Savigny said that to classify law with its object in view is not correct. The object of private international law is, he says to establish the co-relations of a legal relation ship with some territorial law.⁷¹ According to him every legal relationship must belong to some law and there for the object of Private International Law is to find out the

⁶⁷ Ibid

⁶⁸ Supra note, 65 p. 24

⁶⁹ Supra note, 67 p. 56

⁷⁰ Ibid p. 29 and supra note, 68 p.29

⁷¹ Ibid

‘seat’ of every legal relationship.⁷² In the event there being a conflict between the territorial law and the law of the place to which legal relationship belongs, the latter should be applied.

When we came to our century, we find that initially the development of Private International Law was influenced by the Napoleonic civil code and nationalism.⁷³

On the European content this led to the acceptance of the principle that personal law of an individual is the law of his nationality.⁷⁴ Mancini is the top of nationalism.

On the continental Europe, and perhaps elsewhere also, the emergency of the soviet union after the first world war and its allies, the east European countries, after the second world war, has influenced the development of private international law. According to Szaszy the great October socialist revolution accomplished at the end of the first world war and the socialist revolution that took place is the peoples democracies after the second world war have change the aspect of the world. “Parallel to the capitalist system founded on private property, the socialist legal system founded on the social property of the means of production came in being. Accordingly, contacts of completely new type where established as regards the relationship between capitalist and socialist states and between socialist states themselves, and nature of these contacts was substantially different from that of international relations which had been previously prevailing. Economic and other contracts of a new type were created between the organizations of the socialist too and the nature of these contacts is also essentially differing from international contacts existing between the citizens and organization of the socialist and capitalist states.”⁷⁵ But the road to the uniformity of rules of international law is along one with many detours since ideological differences do affect the development of law.

⁷² Supra note 66 p.56

⁷³ Mancini Held the field for quite some time

⁷⁴ Supra note 72

⁷⁵ Szaszy

1.4. Perspective Development of Private International Law in Ethiopia

An examination of Ethiopian legal history reveals that, of all branches of law of the country, private international law has received the least attention, hence it is an embryonic stage of development,⁷⁶ except for the four materials prepared by three foreign scholars, and one the domestic, Norman Bentwich, a former adviser of the ministry of justice, and Norman L.Singer and Robert Allen Sedeler, former professor of the faculty of law of Addis Ababa university, and Ibrahim Idris, lecturer in law of faculty of Addis Ababa university, no other research has been conducted to help to promote the study of Private International Law. The material by singer, “teaching material for the study of Private International Law,” and that of Sedeler “conflict of laws in Ethiopia,” have up to now been the only two materials used to support the study of Private International Law in the faculty of law particularly, in the post 1974 period in which Ethiopia has embarked up on a new program of development, and has consequently operated fundamental changes in the socio- economic and political fields, the materials refers to no longer quality to render the assistance expected any standard teaching material.⁷⁷

Apart from failing to include comprehensive explanations necessary to help to teach private international law to students of a law faculty, the works of both Singer and Selder have not included comparative descriptions even on such areas as the concept of Private International Law, its scope, functions and characteristics. Surprisingly enough, when it is evident that both scholars have been trained in and influenced by the Anglo- American legal system, in which the laws relating to the recognition and execution of foreign judgments is studied within the scope of Private International Law, they have not given coverage to these laws in their materials intended to serve in Ethiopia.⁷⁸ Also, the fact that no problems or question or notes have been included the materials do not facilitate the comprehension and assimilation of relevant Private International Law concepts to the Ethiopians situation. But, a better

⁷⁶ Ibrahim Idris, Materials for a Study of Private International Law in Ethiopia, 1998

⁷⁷ Ibid

⁷⁸ Ibid

performance, Ibrahim Idris, has tried to come up with what the above scholars have failed to do.

Ethiopia has not yet adopted rules of private international law. Again she has not become party to any treaty for conflict of laws except a treaty signed between Ethiopia and Djibouti on the judicial assistance. There are no specific rules of Conflict of Laws promulgated in Ethiopia. There were drafts of it prepared by Professor Rene David who drafted it as part of the civil code of the 1960 and yet it was separated and left out during promulgation. Needless to mention, the draft rules of Private International Law prepared by Professor Rene David which was supposed to appear as part of the Ethiopian civil code of 1960 did not include any provision on the execution of foreign judgment.⁷⁹ Similar attempt was made by Robert Allen Selder who prepared the draft of code of conflict of laws. Again he did not give coverage to the law of execution of foreign judgment. Commissions were also established in 1968 and 1983 for reconsideration of these rules but with no success in both cases. And also the recent legislative body has drafted rules on Private International Law. But none of them can achieve success.

The internal Conflict of Laws was not a problem in Ethiopia as she used to be a unitary state until 1991, after which division of power and Federalism were adopted under the 1995 FDRE constitution. Conflict of Laws in Federal Ethiopia may, therefore, be one of the areas of the law that need a special consideration more than ever due to this fact. In other words, there is fertile ground for the development of Conflict of Laws in the Federal Ethiopia, as a result of which, it becomes necessary to make independent researches and studies in this field in order to get the rules that govern Conflict of Laws within the Federal and the Conflict of Laws that involve foreign elements.

⁷⁹ Ibrahim Idris, Ethiopian Law of Execution of Foreign Judgments Articles, p 17

1.4. The Need and Function of Private International Law

What would happen if a state does not have rules on Conflict of laws for consideration of foreign laws, jurisdiction and judgments? Why should a state be worried about considering application of foreign laws and judgments while it could easily apply its own laws to any case that comes to its courts? Can a state confine its citizens to its territorial boundary? What about its territorial boundary to its citizens alone?

None of this questions may get positive response particularly in today's highly interactive international community as a result obviously almost each state of the world has its citizens living in the territorial boundaries of other state and citizens of other states also live in its territorial boundary. This provides the chance for creations of relations of diversified character like marriage, a contract, employment, adoption, partnership etc. among the subject of different states.

Wherever legal disputes arise from such relations that involve foreign elements dispensing justice becomes necessary just like any other domestic cases. In case a state decided to make no consideration of the issues of conflict of laws, it causes injustice to the parties to the international relations, which may be either its own national or that of other states. This on the other hand may make citizens of other states to refrain from entering in to any relation with the subjects of such state. This in turn affects the commercial activities and investments of the particular state as no foreigner may have the courage to deal with such state does not render justice if dispute arises. Hence, making consideration of conflict of laws is the duty of all states that need to administer justice to safeguard and encourage international legal transactions of private relations.

The need for Private International Law arises because different countries have different systems of law. Every country makes law regarding marriage matrimonial causes, adoption, succession, contract, debts, torts and like matters.⁸⁰ But more often than not, laws of different countries have different rules in respect of these matters. Sometimes even with in a country laws are different for instance laws of different state of USA are differ from each other. Had it not been so, there would not have been any need for Private International Law. Thus if

⁸⁰ Supra note 72 p. 37

marriage means the same thing all over the world and the rule of capacity and ceremonies of marriage are the same in all country, the question of conflict between the laws of different countries would not arise.⁸¹ And if there is no conflict between the laws of different countries, there would be no need of private international law.

Since the laws of different countries differ, it becomes necessary in every country that there should be a branch of law which resolves these conflicts.⁸² It is this branch of law which is given the name of Private International Law or Conflict of Laws.

It is the function of Private International Law to indicate the area over which a rule of law extends that it deals primarily with the application of laws in space.⁸³ Wherever a legal case that involves a foreign elements comes to a court of a state with law that contradicts with the laws of another states interested in the same case, it is Private International Law that serves the purpose of determining which state's courts is competent to hear and decide the case and which states law must be applicable to it. Private International Law is that branch of law by reference to which no adjudication can be finally determined. Private International Law by its very nature merely indicates the governing law under which a case is to be decided.⁸⁴ For example, a court is called up on to determine the validity of marriage performed between an Indian domiciled man and an English domiciled woman, the ceremonies of marriage were performed in Paris.

The Private International Law merely informs us that question as to capacity to marriage is to be determined by the law of the domicile of the parties and the questions of the performance of ceremonies is to be determined by law of the place where marriage is solemnized. On knowing this, the court will decide the case accordingly: if the question is of capacity the matter will be determined by reference to Indian law or English law; or if the question is whether request ceremonies were performed or not, the court will decide it by reference to French law.⁸⁵ That is why Cheshire analogizes this function of Private International Law with

⁸¹ Ibid

⁸² Ibid

⁸³ Supra note 65, 11th ed,p.6

⁸⁴ Supra note 82 p.38

⁸⁵ Ibid

that of an inquire office at a rail way stations where a passenger may learn the plat form at which his trains starts.⁸⁶ If you ask for the right train for you, the officer tells you the plat form number and it is up to you to get on board the point is Private International Law shows you that of India or France or England law are applicable to the particular case. Its function ends after indicating the substantive law that should be applied. It does not supply its own substantive rule.

1.5. The Nature and Subject matter of Private International Law

The rules of conflict of laws are rule of our domestic law which are enforced by our courts, and are not there fore, rule of international law.⁸⁷ Whilst Public International Law is a law between states and is generally not enforceable in domestic courts Conflict of Laws is a branch of the domestic law of countries.⁸⁸ Private International Law, despite the word international is a domestic law. In fact, it has significant difference from Public International Law.

Private International Law has the following distinct nature. It is not a separate branch of law in the same sense as, say the law of contract or tort. It is all pervading.⁸⁹ In other words this mean is that it is not a department of law in the sense that contract or tort etc. It is a technique or a method rather than a substantive law.

The two major systems of law the common law and the civil law, differ from each other as to the subject matter of Private International Law. In civil law countries the law to be applied to a case ordinary has little to do with a courts jurisdiction, except coincidentally, as in cases dealing with local land or immovable.⁹⁰ Germany, Switzerland and Scandinavian countries restrict the scope of Private International Law to problems of Conflict of Laws, and matters relating to status of foreigners fall under a separate branch called the Law of Foreigners.⁹¹ Private International Law of Soviet Union and of the peoples democracies of eastern Europe include within its ambit the rule of choice of law along with all the connecting factors such as

⁸⁶ Supra note 83,13th p.8

⁸⁷ Atul M. Setalvad, Conflict of Laws (1st ed) p.6

⁸⁸ Ibid, p 3

⁸⁹ Supra note 82 p 7

⁹⁰ Scoles and Hay, Conflict of Laws p.2

⁹¹ Supra note 80 p.39

nationality or domicile, the place where the contract was entered in to, or is to be performed.⁹² However the rule relating to resolving of conflict of jurisdiction is not included with in the rules of Private International Law. They are considered to relate to procedural law.

Similarly, the regulation of legal status of foreigners is not considered to fall with in the scope of Private International Law as the majority of the rules relating to legal status of foreigners are considered, by these countries, as a branch of administrative law, and not of civil law.⁹³

According to Szaszy **“problem connected with conflicts of jurisdiction cannot be included in Private International Law, either because the subject of regulating the competence of courts for exercise jurisdiction belongs to the law of civil procedure more precisely, to the international law of civil procedures.”**⁹⁴

In the Soviet Union and the peoples democratic countries of east European, the object of Private International is constituted by legal relationships that have an international bearing, or an international character, which in the other words, contains a foreign, international elements and which are tied up with the legal system of several states.

⁹⁵

In common law countries, rules of jurisdiction and as well as rules of choice of law are included within the scope of Private International Law.⁹⁶

With respect to a Recognitions of Foreign Judgments, civil law countries ordinary have well established rule by statute or treaty while the American statutes follow a variety of approaches in the case of foreign countries judgments as in the main they are free to do but are bound by the mandate of the united states constitution full faith and credit clause in the case of sister state judgments.⁹⁷

⁹² Ibid

⁹³ Ibid p. 39 – 40

⁹⁴ Szaszy p.22

⁹⁵ Ibid

⁹⁶ Supra note, 93 p.14

⁹⁷ Supra note, 90

Consequently civil law nations regard question of jurisdiction and of judgment- recognition as belonging to the related category of international procedural law and not to Private International Law. To them, Private International Law deals primarily with choice of law problems. However, since choice of law rule of civil law nations frequently turn on the connecting factors of the nationality of one or both parties, Private International Law in those countries often also encompasses the law of nationality and citizenship and special rules pertaining to aliens.⁹⁸

This is not the case in the common law world. In the common law countries including the United States, facts or contacts with jurisdiction other than the forum raise conflict of laws concerns primarily in three different situations: first, whether a court can appropriately entertain a case which has foreign contacts, i.e. jurisdiction, second, if a court does hear a case, to what extent does the law of another state have claim to consideration, i.e. choice of law? Third, if a court hears a case, what is the effect of the determination or judgment in another state, i.e. judgments?⁹⁹

1.6. Source of Private International Law in General

Sources can be divided into two: formal and material sources. According to Salmond; **“a formal source is that from which a rule of law derives its force and validity, the material sources, on the other hand, are those from which derived the matter, not the validity of the law. The material source supplies the substance of the rule to which the formal sources gives the force and nature of law.”**¹⁰⁰ The formal source is that confers binding authority on a rule and converts it in to law. The state is the formal source of law in this sense. It is the state that confers a binding authority to a law. The other what we call the material source of law. This is what supplies matter or content of the law.

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Salmond, Jurisprudence, 7th ed. (1924) para, 44 cited in G SchwarZengerger, A. Manual of International Law ,v 1(3rd ed)Stavens and sons Ltd , London, 1957 pp 26 – 27

In the sphere of private International Law, we have at least the following five sources.¹⁰¹

(a).custom, (b) legislative act, (c) judicial and arbitral decision, (d) opinion of jurists and (e) international treaties.

(a) Custom: is a habitual course of conduct. Rules are involved after a long historical process culminating in their recognition by the community.¹⁰² It is not tradition. It is different from tradition. It is a practice repeatedly frequently applied in a certain country or localities, in such circumstances in the extent it is accepted as a rule of law or conduct in that locality. Custom in order to be a rule of conduct, there should be:

- . –That rule of conduct should be exist for a long period time,
- This rule of conduct should be recognized by the reasonable number of society,
- This rule of conduct should be frequently and repeatedly exercise and applied in the long day to day activities of the society.¹⁰³

(b) Legislative Act: the laws enacted by the parliament can be served as other sources of Private International Law. As we will see it in discussing the issues of Private International Law in Ethiopia, laws enacted by the parliament; such as the court establishment proclamation, nationality law proclamation, the federal family code of Ethiopia may serve as sources of private international law to Ethiopia.

(c) Judicial and Arbitral Decisions: can be served as one source of Private International Law. The court applies existing rules either directly or by analogy. More extensive is the analogy drawn, the more creative the court's role becomes, and inspite of the view that judges do not make law but only apply the exciting principles, the decisions reached by the court are of immense value and in those cases where there is no preexisting rule, they will be a direct source of law.¹⁰⁴

¹⁰¹ Dr. Grma Gizaw, Private International Law, lecture note, 2007

¹⁰² S.k. Verma, an Introduction to Public International Law 1998 p.23

¹⁰³ Ibid

¹⁰⁴ Supra note 102, p 41

Morris magnifies this role of judges to the development of Private International Law as a source by saying “of course the increasing activities parliament does not mean that the function of the courts is restricted to statutory interpretation. There remain large areas of the conflict of laws where case law is still the most important source, and the courts have still a creative part to play.”¹⁰⁵ So, judicial and arbitral decisions can be considered as source of Private International Law.

(d) Opinion of Jurists: the juristic work is an important source of Private International Law. It is a unique feature of the Conflict of Laws, as compared with other branches of English law, that jurists have exerted to considerable influence on the decisions of the courts. The most influential foreign jurists have been Ulrich Huber (1636 – 1694), who was successively a professor of law and a judge in Friesland; Joseph Story (1779 – 1845), who was simultaneously a justice of the supreme court of the USA and a professor at the Harvard law school; and the nineteenth century German jurist Friedrich Carl von Savigny.¹⁰⁶ In the twentieth century the most influential writers have been arise. Dicey, whose conflict of laws was first published in 1935. Each of these well known books has passed through many editions, and each is frequently cited by the courts.¹⁰⁷

(e) International Treaties: there has been, since the end of the last century, a strong movement in favor of the unification, by way of treaties of the rules of private international law.¹⁰⁸ These treaties are of two kinds: multilateral and bilateral. Regarding the multilateral, the Montevideo and the Hague conventions are relevant examples in addition to the multilateral treaties, both the post war periods produced numerous bilateral treaties, containing clauses promoting international intercourse.¹⁰⁹

¹⁰⁵ J.H.C Morris, Conflict of Laws,(4th ed) p 6

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Grepeau, elements d'une introduction all droit international prive compare pp 20 – 21

¹⁰⁹ Rabel, the Conflict of Laws; a comparative, (2nd ed) 1958, pp 29 – 46

1.8. Sources of Private International Law in Ethiopia

As there is no codified Private International Law in Ethiopia yet, the judge deciding a case of Private International Law needs to validate his decisions by relying on the appropriate source of law.¹¹⁰ The source of law in Ethiopia is either custom or legislation. A custom is the habitual repetition of a certain conduct. A conduct's recurrence may originate with the people, or with judges or with other makers.¹¹¹ Legislation which is said to have a clear cut starting point emanates from the declared will of a legislator Ethiopia is a code country i.e., its legal system is highly influenced by the continental legal system.¹¹²

Examination of Ethiopian courts decisions relating to cases in which foreign elements are involved revealed that the courts have attempted to resolve legal problems by resorting to certain provisions of the various codes of the country.¹¹³ For example the civil code on domicile, the civil procedure code on the **Execution of Foreign Judgments** and arbitral awards, which this paper is going to purport addressing the legal and practical problems involving around it. The Federal courts establishment proclamation (proc.no.25/96) may also be considered as a legislative act since it confers the jurisdiction over cases regarding Private International Law to the Federal High Court.¹¹⁴ The nationality laws proclamation (proc.no.378/2003) which governs the acquisition and loss of Ethiopian nationality contains provisions that can influence settlement of Private International Law.¹¹⁵

Article 5 of the recent family law of Ethiopia enjoys courts to recognize marriage celebrated abroad if consistent with Ethiopian public moral.¹¹⁶

Ethiopia is a code country, i.e., its legal system is highly influenced by the continental legal system. Judicial interpretation of a law is not binding in a subsequent cause. But where such

¹¹⁰ Distance Education Module, on Private International Law, SMUC

¹¹¹ Ibrahim Idiris, Materials for the Study of Private International Law in Ethiopia, 1998, p. 107

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ Court establishment proc.no.25/96

¹¹⁵ Nationality law proc.no.378/2003

¹¹⁶ Family code of the FDRE, 2000

interpretations became settled, they acquire a persuasive force in a regard to future adjudications of the same or lower order.¹¹⁷

Absent of a statute of Private International Law, judge made law is the most important source of law in Ethiopia; in certain cases, the courts have cited precedent cases. However the dominant view seems that “courts should not follow precedent, as Ethiopia is a civil law country.”¹¹⁸ Regarding treaty as a source of Private International Law, the treaty of judicial assistance signed between Ethiopia and Djibouti is the notable international convention on in the filed of private international law. Since there is no codified law to fill the private international law gap in Ethiopia, our courts have occasionally cited foreign doctrinal writings in support of there holdings. The most frequently cited writing is of course Sedler’s “the conflict of laws in Ethiopia.” But he failed to incorporate the concept of execution of foreign judgment in his respect material.

¹¹⁷ Supra note 112

¹¹⁸ Supra note 111

CHAPTER TWO

The Principle of Recognition and Execution of Foreign

Judgments

Introduction

Recognition and enforcement of foreign judgments and decrees is the matter which comes under the province of Private International Law. The Private International Law has to determine circumstance in which and the basis on which foreign judgment are to be recognized or executed.

peoples life are not restricted with in the boundaries or single state of territorial unit as they are in constant and continuous interactions through marriages trade and other activities of daily life in a foreign state where in the course of their relationship disputes are in variable bound to arise. Because of the mobility of people and some other circumstances, however the just and fair dispositions of cases may demand the recognition and enforcement role o such decision by other states.

But failure to do that would create inconveniences to the parties concerned as a result of which international transactions and interactions among different individual will be paralyzed. It will be un economical tortuous and unnecessary to multiply a law suit. Hence a law suit, once effectively completed, needs to be recognized and enforced to avoid repetition of the suit.

A party may invoke a previous judgment made in a foreign country to defend his case. Thus, he seeks recognition of that judgment.. Alternatively, he may demand the property of the judgment debtor to be seized, attached, or sold in satisfaction of a judgment granted abroad. This requires enforcement in other states

Imagine what international trade agreements or other cross border legal relationship would end up if countries ignored themselves against foreign judgments.

These will definitely a sever paralysis of a flow of goods, people and services from one country to another. Recognition and enforcement of foreign judgments is an important issue to smooth international and interstate relationships.

In the advanced legal system, this had already been understood long ago, and a system of Recognition and Enforcement has been put in place. That is, in order to assist their courts resolve problems associated with the execution of judgments rendered by other states, quiet several states have adopted legislation which also includes provisions on the execution of foreign judgments.

Many states have also entered into a treaty or conventions; bilateral or multilateral involving the execution of foreign judgments. But Ethiopia did not have its own rules of Private International Law to solve problem regarding the Execution of Foreign Judgments except the incorporated few provisions in its civil Procedure code of 1965. And yet neither a party to any treaty nor conventions on recognition and execution of foreign judgment

In this chapter, the writer wants to discuss what recognition and enforcement of foreign judgments mean with their distinction, what type of judgments are subjective for execution, the justification why we need to recognize and enforce foreign judgments, the basic theories of recognition and enforcement of foreign judgment and the principle and practice of execution of foreign judgment in the selected international convention and some selected countries on the subject

2.1. The Distinction between Recognition and Execution

Although execution of foreign judgments Presupposes recognition, the two terms represent different concepts.

Recognition is understood to imply foreign judgment as having resjudicata status and conclusiveness.¹¹⁹ In other words the judgment rendered in a foreign country is held to be as

¹¹⁹ Ruth Bader Ginsberg, Recognition and Enforcement of Foreign Civil Judgment; Summary View of the Situation in the USA, International Lawyer, June 1970, vol.4,p.721

binding up on parties as domestic judgments in the country in which it is recognized. Execution denotes the granting of compulsory relief based on the judgment pronounced in a foreign country.¹²⁰

A judgment given in one country may receive effect in another country by way of mere recognition, or by way of enforcement. Enforcement of a foreign personal judgment implies that a personal judgment has been given by a court of one of country (the original country) which orders a person to perform some particular act (such as the payment of a definite sum of money to another person), or not to perform some particular act (such as not to disturb his neighbors sleep by excessive noises) and that steps are taken by the courts or authorities of another country (the country addressed) with a view to procuring compliance with the obligation imposed by the judgment .¹²¹

It is plain that, while a court must recognize every foreign judgment which it enforces, it needed not enforce every foreign judgment which it recognizes.¹²²Some foreign judgments do not lead themselves to enforcement, but only to recognition.

Enforcement involves recognition, but mere recognition (with out enforcement) of a foreign personal judgment is also possible. Mere recognition implies that the judgment whether or not it ordered a person to perform (or not to perform) some particular act, is given conclusive effect in the country addressed in respect of questions which it decided, but with out steps being taken by the courts or authorities of the country addressed with a view to securing compliance with an obligation imposed by the judgment.¹²³

In some cases mere recognition is all that is necessary or possible: for example a judgment dismissing a claim (unless it orders) unsuccessful plaintiff to pay costs, or a declaratory judgment; or a decree of divorce or nullity.

¹²⁰ Ibid

¹²¹ Peter Stone, *The Conflict of Laws*,p.307

¹²² J.H.C Morris, *The Conflict of Laws*,(4th edn.) 2004,p.103

¹²³ Supra note 3

A person in whose favor a judgment is granted in a foreign court may seek to have that judgment executed or otherwise carried out against the judgment debtor. The plaintiff is then seeking to enforce the judgment. Similarly, when a person is made a defendant in an action in Ethiopia involves the foreign judgment by way of counter claim or other cross – proceeding.

A person in whose favor a judgment is given in a foreign country may seek on its basis merely to resist an action (here in Ethiopia) in the same or connected matter. For example **George** sues **Alemu** in Ethiopia for a debt and **Alemu** defends the action by showing that the matter has already been litigated in an English court. The latter has found the alleged debt does not exist and has in consequence judgment for **Alemu**. Here **Alemu** is relying on a foreign judgment. He is seeking the recognition of English judgment.

Enforcement necessarily involves recognition whereas recognition does not involve enforcement. Mere recognition if granted, will prevent the claimant from reviving in the country addressed a claim which has been rejected or accepted but in his optional to inadequate extent by the foreign judgment.¹²⁴

Under the general principle of international law it is a common practice for states to render the status of recognition to foreign judgments.

Foreign judgments represent rights acquired through the application of foreign laws, and to deny recognition to such right could amount to violation of the laws of nations.¹²⁵ By recognizing a foreign judgment a state is viewed as cooperating in the avoidance of wastage of time, wastage of resource and the protection of the successful litigant.

When we approach the Ethiopian legal situation, despite the absence of pertinent provisions in relation, to recognition of foreign judgment, there is no reason why foreign judgments should not be recognized in Ethiopia, unless the sovereignty and independence of the country is jeopardized. and indeed, as far as an act is consistent with the general principles of

¹²⁴ Supra note 3, P.307

¹²⁵ J.H.C MORRIS the Conflict of Laws, (9th edn.) 1973, p.987-988

International law and practice, the non-valiantly of permissive rules in Ethiopian law need certainly not preclude Ethiopian courts from rendering justice.¹²⁶ Provided that the criteria command international acceptance are met, a willingness on the part of Ethiopian courts to recognize foreign judgments would manifest the courts commitment in the observation and promotion of international law.

Unlike the execution of foreign judgments, the Ethiopian law is silent about the recognition of foreign judgments, nor has the court practice developed in that respect. In this regard, the writer will try to discuss it in the last chapter which will focus on the concept and practice of execution of foreign judgments in Ethiopian context.

2.2. Types of Judgments

2.2.1. Ordinary Court Judgment

This type of judgments are judgments rendered by any court other than that of the forum irrespective of where that court is established. But it has to satisfy the requirements of competent jurisdiction. These judgments which are sought recognition or execution should be civil and commercial matters by excluding criminal matters and other judgments which are not covered by the conventions to be subject for execution of recognition.

To be recognized or executed, judgments rendered other than the forum should satisfy all the requirements except the competence of the court required by principles laid down on the conventions bilateral, regional or multilateral treaties or the domestic laws of the country which recognition or execution is sought.

Because the competence of the foreign court is determined by the rules of private international law and not by the rules of the law the forum or by the law of the country where

¹²⁶Ibrahim Idris, the Applicability of Foreign Civil Laws in Ethiopia, Journal of Ethiopian Law, Vol.13, p.227-233

the foreign court is situated.¹²⁷ A final judgment in civil and commercial matters of a court of competent jurisdiction will be accorded recognition and it may also be enforced.¹²⁸

Regarding the ordinary court judgments the following civil judgments are may be classified to it:

- ✓ In matters relating to contract
- ✓ In matters relating to tort
- ✓ In matters relating to insurance
- ✓ In proceeding, which have as their object rights in rem, immovable
- ✓ Property etc.

However, it has been said that judgments should be civil and commercial matters by their nature to be recognized or executed, not all civil judgments and commercial matters are subject for recognition or execution.

It is provided in the **international convention of The Hague and Brussels conventions of the recognition and execution of foreign judgments:**

They are:

- ✓ In matters relating to the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and successions.¹²⁹
- ✓ In matters relating to bankruptcy¹³⁰
- ✓ In matters relating to social security
- ✓ In matters relating to decisions for the payment of custom duty, tax or penalty¹³¹
- ✓ Administrative matters.

¹²⁷ Paras Diwan, Private International Law, (4th edn) 1998,

¹²⁸ The Hague Convention of 1971 on Recognition and Enforcement of Foreign Judgment in Civil and Commercial matters

¹²⁹ Brussels Convention, Art.1 and Hague Convention, Art.1

¹³⁰ Ibid

¹³¹ Ibid

2.2.2. Arbitral Court Judgment

When we are talking about arbitral court judgments, we are referring to the award given by an international arbitral court. An international arbitration is an arbitration when foreign element is involved as a party to the dispute.

International arbitration follows two streams.

- (a) Public law arbitration between states and
- (b) Commercial arbitration

Commercial arbitration is a remedy that is same times used in an effort to resolve disputes that arise international business transactions.

Arbitrations may be resorted to by agreement or by provision in a Treaty or Friendship, commercial and navigation.¹³²

It will allow trading partners to work out same of these differences without resort to litigation.

Commercial arbitration allows international trading partners to agree in advance on the ground rules for resolving their trade disputes as they happen. Their agreement to arbitrate should be in writing and, the parties must agree on the choice of an arbitration, the conduct of the hearing, and they must be in writing to be bound by the arbitrators award.¹³³

In case of trade disputes, the International Chamber of Commerce in Paris, the Swedish Chamber of Commerce and Specialized Commodity associations in London have been called on to act as arbitrators in resolving trade disputes.

In the view of international businessmen, arbitration offers distinct advantage. First, the parties to an international contract can entrust the resolution of their dispute to judges of their own choice, as the parties live in different countries, which sometimes found their

¹³² Assefa Ali, Alternative Dispute Resolution Method, (lecture note)

¹³³ Ibid

laws on legal concepts having a different traditional and cultural background. The arbitration award is at least in principle, final but a court case may go to appeal and a long time may pass before the final word is spoken.¹³⁴

Those kinds of judgments rendered by an International Arbitral Court to resolve disputes are not the main task of the writer. But as there are foreign judgments which are subject for recognition or execution are sought, arbitral court judgments have also the same effect when they are rendered by an arbitral court other than the forum. However they have the same effect with regard to their enforcement or recognition, they have different application of laws to be governed. Because as, I have said earlier in discussing the ordinary court judgment, they are judgments given by a court which have competent jurisdiction other than the forum.

The enforcement of arbitral awards is made easier by **the 1958 United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards** to which most of the worlds leading commercial nations are parties.

That is the New York convention of 1958 – a significant international agreement provider for the recognition of arbitration agreements and for the enforcement of foreign arbitral awards.

Article III of the convention provides:

Each contracting state shall recognize arbitral awards and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement or arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” Every state has enacted its own arbitration statute which applies to intrastate /when there ate federated states/ and inter states /between states/.

¹³⁴ Clive M. Schimithof, the Law and Practice of International Trade p.574

The basic purpose of the 1958 convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts. The convention does allow a domestic court to refuse or to enforce an award on the following grounds.

1. Public policy¹³⁵
2. Non – Arbitrability¹³⁶
3. An inadequate opportunity to present a defense¹³⁷
4. An excess of jurisdiction¹³⁸
5. A “manifest disregard” of law¹³⁹

2.3. Justification to Recognize and Enforce Foreign Judgments

Various reasons have been given from time to time to explain as to why municipal courts apply foreign law. There are two different reasons that induced countries to recognize and enforce foreign judgments.

2.3.1. Facilitating International Private Relations

The world today presents a picture of diverse states the interaction of which is in different spheres of life often results in conflicting international legal situations. These conflicting international situations have immensely been enhanced as result of the highly developed transportation and telecommunication system the world has witnessed over the last several decades. The interactions of nationals and domiciliaries of different state in such as in family relations, trade, commerce, investment and etc. have become the cause for the creation of contacts between the laws of such states which eventually compete to dominate the resulting conflict in legal situations.

Of these legal situations, the recognitions and execution of foreign judgments is one of the controversial areas of conflict of laws. One of the conditions most investors study before

¹³⁵ Article 5(2) (a) and (b); implemented by the 1975 Act

¹³⁶ Ibid

¹³⁷ Ibid art 5(1)(b) and (d)

¹³⁸ Ibid art 5(1)(e)

¹³⁹ Ibid(5(1)(e)

starting businesses in a foreign country is its regime of recognition and enforcement of foreign judgments. If the concerned country does not have conducive environment for recognition and enforcement of foreign judgment, then that raises the cost of transactions to the investor. If the foreign judgment is not recognized and enforced in that country, then he has to relitigate the case.

Thus he has to incur cost of litigation over again. Hence, he will be discouraged to enter in to transaction with the domiciliary or nationals of that country. However if a given country recognizes and enforces foreign judgments with out much a do, then foreigners will increase, their transactions with those residents of that country.

Because of the mobility of people and some other circumstances however the just and fair disposition of cases may demand the recognition and enforcement role of another state. But failure to do would create inconvenience to the parties concerned as a result of which international transactions and interactions among different individuals will be paralyzed.

In the words of Von Mehren and Traut man, the reasons for recognition of foreign judgment may be summarized as follows.

“A desire to avoid the duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated ; a related concern to protect the successful litigant, whether plaintiff or defendant from harassing or evasive tactics on the part of his previously unsuccessful opponent;; a policy against making the availability of local enforcement the decisive elements as a practical matter, in the plaintiff’s choice of forum , an interest in fostering stability and unity in an international order in which many aspects of life are not confined to any single jurisdiction ; and, in certain classes of cases, a belief that the relationship jurisdiction is a more appropriate forum than the recognizing jurisdiction , either because, as the predominantly concerned jurisdiction for some other reason, its views as to the merits should prevail.¹⁴⁰

¹⁴⁰ Athur von Mehren and Donald T. Trautman, Recogniton of Foreign Adjudication;a Survey and a Suggested Approach.

Although, on the one hand, for the aforementioned reasons, it is maintained appropriate to recognize foreign judgments states are unwilling to render unconditional recognitions to such judgments. The act of unconditional recognition would indeed be regard by states as being tantamount to states to surrendering one states sovereignty and independence to another. And it is for this reason that states become willing to conclude a treaty or enter in to a convention, or else formulate their own domestic rules under which they would recognize foreign Judgment, taking however, their own national interests in to a count.¹⁴¹

One of the common law scholars Paras Diwan suggests some idea with regard to this justification. **“For the application of the foreign law is said to be the demand of justice requires that the foreign law should be applied.”**¹⁴² It is for Justice that the court applies the foreign law, because its application is convenient.¹⁴³

Justice is said to be full, it has to comprises the recognition or execution of judgments which is the ever expectation of the concerned parties. This means is that if there is a certain judgment creditor who has a vested interest of recognition or execution of foreign judgment in other country, this country would recognize or enforce the judgment. This situation has two implications. Firstly, the application of foreign law is necessary for determining rights of parties. That is why Graveson propounded that **“the court applies the foreign law, because its application is convenient.”**Because when we are recognize or enforce judgments which are in a foreign state, we are applying foreign laws with in our jurisdiction. So, this can satisfy the demand of the recognition and enforcement role of another state for the just and fair disposed of case.

Secondly, it implies that it is for their own sake that countries would apply a foreign law i.e. recognize and enforce foreign judgments. That is to able to attract foreign capital and investments. Foreigners will increase their transactions with those residents of that country.

¹⁴¹ Ibrahim Idris, Materials to The Study of Private International Law to Ethipia,1992, p.430

¹⁴²Paras Diwan, Private International Law, (1998) p.45

¹⁴³ Graveson,The Conflict of Laws,1969, (6th.edn.) p.7

By doing so international private relations would be facilitated and reliable. International transactions and interactions among different individual will not be paralyzed. Recognizing and enforcing foreign judgments will facilitate international harmony a state is viewed as cooperating in the avoidance of wastage of time, wastage of resource and the protection of the successful litigant by recognizing and enforcing foreign judgments.

2.3.2. Comity

Comity has no exact meaning. Some consider it as mere international courtesy while other consider it as an international obligation.

Duch jurist, John Voet, its earliest protagonists, said that **“one national applies the law of another to show its regard towards it”**. But cheshire has propounded the concept disregarding Voets idea that **“the application of foreign law implies no act of courtesy, no scarifies of sovereignty.”**¹⁴⁴ The reality is that the function of courts is to do justice between the parties and, in doing so it they feel that a foreign law is applicable and consequently apply it, then they do so irrespective of the fact whether the other country is at war with the country whose law it applied.¹⁴⁵ Therefore when a court applies foreign law, it applies it because it has been directed to do so by its own internal law.

As the case may be, the writer believes that the reason why gives execution to the judgment rendered by the other country is, in order to show their respect to the other state for those lawfully alien made by that particular state. On the other hand, what it meant that states usually gives execution to a certain foreign judgment, in considering its judgment would get execution on the same hand. That is done, in order to maintain their strong relationship each other.

¹⁴⁴ Cshire, Private International Law, (13th edn.) 2000

¹⁴⁵ Paras Diwan, Private International Law, (1998) p.44

2.4. Theories of Execution of Foreign Judgment

2.4.1. Basis of Execution

On the execution of foreign judgments, various theories have been propounded, of which the theory of comity is considered to be the oldest theory. Apart from the theory of comity, the obligation theory is another one.

2.4.2. Principle

Law suits are a necessity in life. It will be uneconomical, tortuous and unnecessary to multiply them. Hence, a lawsuit, once, effectively completed, needs to be recognized and enforced to avoid repetition of the suit.

For instance, **Peter** who had obtained a many decree against **Daniel** from a court in **Kenya** fails to get it satisfaction there. On getting the information that **Daniel** has assets in **Sudan**, **Peter** files an application in a court of Sudan for the enforcement of the decree. In this situation, the judgment creditor, **Peter** demands the property of the judgment debtor **Daniel** to be seized, attached, or sold in satisfaction of the judgment granted in **Kenya**. To execute this judgment, there are various theories which the execution of the judgment should be based up on. It may be based on the theory of comity (reciprocity) or obligation theory.

2.4.3. Comity (Reciprocity)

The doctrine of comity of nations was the earliest. Dutch jurist, John Voet, its earliest protagonist, said that “**one nation applies the law of another to show its regard towards it. For one thing, the question of comity arises in respect of relations among nations; no court of law enforces the rights of private parties on account of comity.**¹⁴⁶ This principle was necessitated by the absence of international sanction against states that reject foreign judgments.

There is no obligation under public international law demanding states to enforce the judgment originating from other states. Hence, in order to induce other countries to enforce

¹⁴⁶ Ibid

foreign judgments; reciprocity was adopted as a kind of self-help measure. Understanding its origins and missions helps to apply this rule precisely for its destined purpose.

Cheshire on the other hand, said; **“this vague principle would appear to mean that, in order to obtain reciprocal treatment from the courts of other countries, we are compelled to take foreign judgments as they stand and to give them full faith and credit.”**¹⁴⁷

When the court of a certain country refuses to enforce judgments duly given in a nation, the latter may opt to retaliate and refuse judgments originating from former. To base enforcement upon this uncertain ground quickly leads to difficulties. One result is that the question of reciprocity becomes relevant, for enforcement must be withheld if the judgment emanates from a country which refuses to grant a similar measure of credit to the judgment.¹⁴⁸ This doctrine of reciprocity which has retaliation as its base against a state, but which simultaneously victimize innocent individuals,¹⁴⁹ has indeed become a controversial issues since 1895, when the case Hilton VS, Gyt was decided by the supreme court of the united states. Criticisms have grown against refusing to execute a foreign judgment for reason of reciprocity.

It is argued that reciprocity might cause in justice to an individual foreign litigant because of the policies of the country whose court has rendered the judgment. It is considered that this practice of reciprocity should be eliminated.¹⁵⁰

The difficulty consequence in the theory of comity is that no foreign judgment can be recognized unless there is reciprocity. Cheshire rightly says that **“if the English court is compelled by comity to enforce the judgment logic would seem to exclude all defenses, except the want of jurisdiction in the foreign court; but to carry enforcement to these**

¹⁴⁷ Cheshire; Private International Law, (13th edn.) p.628

¹⁴⁸ Ibid, p.629

¹⁴⁹ Alber A.Ehrenzweig and Eric Jayme,Private International Law,1973,p.53

¹⁵⁰Barbara Kulzer, Some Aspects of Enforceability of Foreign Judgments,Vol.16, p.90

lengths is obviously in consistent with the most elementary notion of natural justice.¹⁵¹ It is evident that English private international law does not base the recognition of the foreign judgments in the bases of reciprocity.”

Despite there are criticisms regarding the inadequacy of the principle of comity,¹⁵² how ever the requirement of reciprocity still plays a significant role in many legal systems, including of course that of Ethiopia.

2.4.4. The Obligation Theory

The obligation theory too was propounded at an early time in 1842. Black burn, J. said; **“the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to say the sum for which judgment given which the courts in this country are bound to enforce.”**¹⁵³

Thus an adjudication of a competent for in court becomes a legal obligation which can be enforced in a country as such. Once the judgment is proved, the burden lies upon the defendant to show why he should not perform obligation.¹⁵⁴ In other words, a new right has been vested in the creditor and a new obligation imposed up on the debtor at the instance of the foreign court.

The merits of this theory, as compared with the principle of comity, are classified in to two. In the first place, the question of reciprocity is eliminated.¹⁵⁵ If **B** is under the legal obligation to pay the amount to **A** under a judgment obtained by the later from a court in country **X**, then that is enough for its enforcement in country **Y**. The question as to what treatment would be meted to a person under similar circumstances in country **X** immaterial.¹⁵⁶

¹⁵¹Cheshire, Private International Law,(8th edn.) p.613

¹⁵² Donald p. Blake, Conflict of Laws;Effect of Foreign Judgment: Cornell Law Quarterly, Vol.12,1926-27,p.66

¹⁵³ Cheshire,Private International Law,(13thedn.) p.629

¹⁵⁴ Ibid

¹⁵⁵ Ibid

¹⁵⁶ Paras Diwan,Private International Law,(4th.edn) p.613.

In the second place, the doctrine of obligation simplifies the question of defenses available to the judgment debtor against the foreign judgment.¹⁵⁷ All those defenses that go to nullify the obligation of **B** would be available to him.¹⁵⁸ In criticisms of the doctrine of obligation, the most valid argument is that it brings a fictitious contract in to play and can not justify the recognition of divorce decrees and other judgments in rem.¹⁵⁹

The writer supposes, this theory because it eliminates the requirement of reciprocity, in order to give execution. According to this theory, a judgment would get recognition or execution, wherever it originates from; whether the country whose rendered the judgment gives recognition and execution, is immaterial. What matter it is, a judgment would be granted execution or execution because it has a lawfully made alien claim of right. So, it is a preferable theory than denying execution of a foreign judgment due to absence of reciprocity.

2.5. Mode of Execution

Under international law, there are now two widely accepted modes concerning the execution of foreign judgments.¹⁶⁰ The first is exemplified by the laws of continental Europe and Latin American countries.

According to the laws of these countries, foreign judgments accorded enforcement only after the satisfaction of prescribed conditions, and after the satisfaction of prescribed countries and after an *exequatur*¹⁶¹ is written and authorized recognition has been granted.¹⁶² In the laws of these countries a foreign judgments, until supported by a formal decisions of enforcement /*exequatur*/ passed by a tribunal of the country in which it is desired to be enforced, will have no effect in that country. In the laws of such countries a foreign judgments is, therefore, not regarded as conclusive.

¹⁵⁷ Supra note, 36, p. 630

¹⁵⁸ Cheshire, Private International Law, (8th.edn.) p. 251

¹⁵⁹ Martin Wolf, Private International Law, p. 251

¹⁶⁰ Earnest G. Lorenlen, The Enforcement of the American Judgments Abroad, Yale Law Journal vol. 29, 1919-20, p. 192-93

¹⁶¹ An *Exequatur* is a form of proceeding which means a retrial of the Foreign Judgment

¹⁶² Supra note, 43,

The other mode is characteristic of the laws of the Anglo-American countries.¹⁶³In accordance to the laws of these countries, foreign judgments are not executed as such, but are endorsed by domestic judgments, i.e. judgments by judgment. Foreign judgments are accepted as conclusive provided that certain conditions provided in the law of the country in which the judgments is sought to be enforced are satisfied.

For instance, in English law, foreign judgments are accepted as conclusive if the following conditions are met;

- The foreign judgments must be final and conclusive in the country in which it was pronounced;
- The foreign courts in question must have been completed to adjudicate upon the matter in questions;
- The judgment must not have been obtained by proceeding contrary to natural justice;
- The judgment must not have been based upon a cause of action contrary to English public policy.¹⁶⁴

In the United States, foreign judgments are also recognized and executed as a matter of comity as conclusive judgments, provided, however, certain requirements are met. These requirements which were established in *Hilton v Guyot* case are;

- There has been a full and fair trial conducted by the foreign court;
- The foreign court has competent jurisdiction;
- The foreign court has conducted the trial upon regular proceeding
- The defendant has been given due service or voluntarily appeared before the court;
- There is a system in the country of the foreign court likely to secure an impartial administration of justice between the citizens of its own country and those of other countries,;
- There is nothing to show either a prejudice in the court, in the system of the laws under which it was sitting or found in procuring the judgment, or any other special reason why the country of the United States should not allow its full effect, and

¹⁶³ Supra note,43

¹⁶⁴ R.H. Graveson, *The Conflict of Laws*,(6th.edn) 1969, p.663-680

- The requirement of reciprocity is met.¹⁶⁵

As close examination of Ethiopian law of the execution of foreign judgments would suggest, of the aforementioned two internationally accepted requirements for executing foreign judgments, Ethiopian law seems to have adhered to the second.¹⁶⁶ Before a foreign judgment is given effect, it is necessary that a domestic judgment must be pronounced in order to render a domestic judgment which confirms the foreign judgment; the court is bound to ascertain if the conditions stated in the civil procedure code are met.¹⁶⁷ Comparison of Ethiopian law with the English and United States laws shows that the conditions enumerated in the European law are by and large similar to those out lined in the laws of these two countries. The conditions are laid down in the civil procedure code under **article 458** as prerequisites for the execution of foreign judgment in Ethiopian.

The Ethiopians law allows the execution of foreign judgments on the basis of fulfillment of the conditions laid down in the above articles. This is true where there is no binding international convention on the execution of foreign judgments. Because it is evidently true that, however internationally minded a state may be, foreign judgments cannot command unconditional execution by the courts of that state.¹⁶⁸ In the absence of international treaties or convention providing otherwise, a state to whose court a foreign judgment has been submitted for execution usually insists that the foreign judgment should meet the requirement laid down in its national laws.

As far as the knowledge of the writer goes, Ethiopia has as yet not become a party to any treaty or convention on the execution of foreign judgments. In view of the absence of any international treaty or convention on the execution of foreign judgment binding Ethiopia, the fulfillment of the conditions provided in the code has, therefore, become the prerequisite for a foreign judgment.

¹⁶⁵Hilton V.Guyot, A Case decided by The American Supreme court

¹⁶⁶Ibrahim Idris,Ethiopian law of Execution of Foreign jJudgment,J.E.L VOL.19,1999

¹⁶⁷ The Ethiopian Civil Procedure Code,1965,Art.458

¹⁶⁸ Robert N.Hornick, The Recognition and Enforcement of Foreign Juggment in Indonesia,Harvard law Journal,Vol.18,1977,p.77-78

We will discuss the requirements of execution of foreign judgments in the next chapters in detail. But we should note that the rational behind the writing of this paper is to induce the legislator that it has to incorporate additional requirements and detailed rules of execution of foreign judgments laid down in the following will be discussing international conventions and practice of some advanced countries in their laws of private international law. Because the concepts laid down in civil procedure code is not comprises detailed rules of execution of foreign judgments as laid in some other countries laws.

2.6. Principles of International Conventions on the Subject

The world today presents a picture of diverse states, interactions of which in different spheres of life might result in conflicting international legal situations. Such are judicial jurisdiction, choice of law and recognition and execution of foreign judgment. Of these legal situations, the recognition and execution of forcing judgments, in relation to which the paper is going to addressed, is one of the controversial areas in conflict of laws.

As examination of the legislation of different states demonstrates, a state may attempt to resolve problems associated with recognition and execution of judgments rendered by other states on the basis of a treaty of convention to which it is a party, or in accordance with its domestic laws.

From those conventions, the multilateral one, for in stance, **the Hague Convention of 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Maters and the most comprehensive and successful multilateral agreement of the European Community's (Brussels) Convention of 1968 on Jurisdiction and the Enforcement of Foreign Judgment in Civil and Commercial Matters** are the prominent.

In this sub – unit, we will try to discuss these conventions with their features and rules incorporated towards recognition and execution of foreign judgments. One important feature of the conventions is that they abolish nationally available exorbitant bases of jurisdiction in relations of member countries to each other, but generalize the availability of all such bases

in favor of domiciliaries of member states as against parties of third states a resulting judgment is entitled to recognition in all members.

2.6.1. Principles of the Hague Convention

Under the traditional rules of international law, courts had no jurisdiction over persons who owed no allegiance to the country in which the court was situated.¹⁶⁹ This rule was unduly narrow, and did not reflect the practice in most common law countries and some civil law countries, which convert jurisdictions on their courts in several cases where the cause of action had, arise within the country. There were also growing practices in commercial contracts with an international element to specify in the contract itself that the courts in a particular country would alone have jurisdiction to determine any disputes that may arise between them relating to the contract.

In order to harmonize the rules and bring them in accord with the modern practice of states, an international convention called The Hague Convention on the choice of court was entered into in 1965.

The convention permits parties to agree, in advance in civil and commercial matters, that any disputes which may arise between them would be decided in the courts of a particular country the judgment of a court so chosen will be recognized and enforced in other states which have implemented the convention.

This convention is followed by The Hague Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters in 1971; which should be read with a protocol agreed to on the same date. This convention covers some of those judgments which are not covered under other convention. It is a specific convention which we will discuss in later.

¹⁶⁹ Atul M. Setalvald, conflict of laws, (1st.edn.) 2007, p.212

2.6.1.1. The Basic Features and Rules of the Convention

- The convention applies to all decisions rendered by courts of contracting states in civil and commercial matters (excluding provisional or protective orders) but does not apply to judgments in fields such as disputes between spouses, or regarding the rights of children, issues of successions, states, bankruptcy, social security damages for injury in respect of nuclear matters or orders relating to customs duty or penalty.¹⁷⁰
- The convention also provides that, the rules apply to judgments of courts having jurisdiction which is final and enforcement in the country where it is delivered.¹⁷¹
- It has also presupposes that, the rules relating to recognition and enforcement will only be enforced and recognized if the two contracting states concerned have entered into a supplemental agreement between them which may provide a clarification of the meaning of ‘civil and commercial matters’, habitual residence and social security, the meaning of law in countries with more than one system of law, the application of the convention to provisional or protective order, or matters relating to injury or damage in nuclear matters, or to judgments in criminal matters, and numerous other matters specified.¹⁷²
- This convention has also provided that the grounds of refusal to execution. Accordingly a judgment may not be recognized if;
 - a. it is regarded as manifestly contrary to public policy by the court which is asked to enforce it
 - b. the judgment results from proceedings incompatible with the requirements of due process or if either party did not have an adequate opportunity, to fairly to present his case;
 - c. the decision was obtained by fraud in procedural sense:

¹⁷⁰The Hague Convention on the Recognition and Enforcement of Judgment of in Civil and Commercial Matters,1971,art.1 and 2

¹⁷¹ Ibid,Art.4

¹⁷²Ibid,Art,21-23

d. Proceeding, between the same parties on the same facts and having the same purpose are pending in the court asked to enforce the judgment or have been decided by the court on the court of another country whose judgments are entitled to be recognized & enforced.¹⁷³

➤ Contracting states may, by a supplemental agreement, provide between them that if two concurrent proceedings have been adopted in their courts, one may be stayed or dismissed.

174

➤ A default judgment will only be recognized if the defaulting party had notice in accordance with the law of the state of origin in sufficient time to enable him to defend the proceeding.

175

➤ Recognition or enforcement can not be requested on the sole ground that the judgment has applied a rule of law other than that applied by the private international law rules of the state addressed.¹⁷⁶

➤ Recognition or enforcement may be refused if the judgment is based on a decision of a question relating to a status of capacity of his rights in other matters executed from the convention under article 1 and has record a result different from that which would have followed had the rules of Private International Law of the state addressed been followed.¹⁷⁷

➤ It is not permissible for a court to recognizing or enforcing a judgment to review a decision on merits.¹⁷⁸

¹⁷³Ibid,Art.5

¹⁷⁴ Ibid,Art.20

¹⁷⁵ Ibid,Art.6

¹⁷⁶ Ibid ,Art.7

¹⁷⁷Ibid,

¹⁷⁸Ibid,Art.8

- On question of the jurisdiction of the court delivering the judgment, the authority addressed is bound by the finding of that court except in cases of judgments rendered by default.¹⁷⁹

- A court shall be considered to have jurisdiction if:
 - a) the defendant is habitually resident there when the proceedings were instituted, or if the defendant is not natural person, its place of incorporation or principal place of business is located there;
 - b) If the defendant had, when the proceedings were instituted, commercial, industrial or business establishment in the state and the proceedings arose from there;
 - c) If the action had, at its sole object, the determination of an issue relating to immovable property located there;
 - d) In case of injuries to persons , or damage to tangible property, if the facts which occasioned the damage occurred in the territory of that state and if the author of the injury or damage was present in that state when the proceedings were instituted;
 - e) If by a written agreement, or an oral agreement confirmed in writing within a reasonable time, the parties had agreed to submit to that court, disputes that have arisen or which may arise in respect of a specific legal relationship unless the law of the court addressed does not permit such agreements in respect of the subject matter of that dispute;
 - f) If the defendant has argued that matter on merits without challenging the jurisdiction of the court or making reservation as to jurisdiction; further, the jurisdiction shall not be recognized in such cases if the matter has been argued by the defendant to resist the seizure of his property or to obtain its release, or if the recognition of jurisdiction would be contrary to the law of the court addressed because of the subject – matter of the dispute;¹⁸⁰
 - (g) In respect of counter – claim, the court will have jurisdiction if it has jurisdiction over the counter claims had it been the principal claim, or if it arises out of the contract or facts which are the basis of the principal claim.¹⁸¹

¹⁷⁹ Ibid,Art.9

¹⁸⁰ Ibid,Art.10

¹⁸¹ Ibid, 11

- A court addressed need not recognize a foreign judgment if.
 - (a) Under the law of that state, exclusive jurisdiction is conferred on the courts of the state addressed because of the subject matter of the dispute or because of an agreement between the parties;
 - (b) Under the law of that state, exclusive, jurisdiction is conferred on the courts of another state because of the subject matter of the dispute or because of an agreement between the parties,
 - (C) If the authority addresses consider it bound by an agreement to refer the dispute to arbitration.¹⁸²

- The party seeking to have a judgment recognized or enforced must file a true and authenticated copy of the judgment, in specified cases, the prescribed documents and translations.¹⁸³

- The procedure for obtaining such enforcement or recognition will be governed by the law of the authority addressed, unless the convention provides otherwise.¹⁸⁴

- An order for costs and expenses may also be recognized and enforced.¹⁸⁵
- In specified cases, parties to the supplemental protocol have agreed to also confer jurisdiction in certain other cases, depending on the nationality or domicile of the plaintiff.

So, that as it is known, still today Ethiopia grants execution of foreign judgment by referring those undetailed provisions embodied in its own civil procedure cod of 1965.the writer wants to give insight to the legislator that it has to amend those provisions by adopting detail rules and principles of International Conventions on the subject as it is laid don in the above discussed one, the Hague Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

¹⁸² Ibid,Aart.12

¹⁸³ Ibid,Art.13

¹⁸⁴Ibid,Art.14

¹⁸⁵Ibid,Art.15

2.6.2. Principles of the Brussels Convention

The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was enacted in 1968 by the High contracting parties to the treaty establishing the European Economic Community. Such as Belgium, Denmark, France, Germany, Ireland, Italy Luxemburg, Netherland,and UK are parties to this convention.

The rational behind enacting this convention was the state parties being Anxious to strengthen in the community the legal protection of persons there in established and considering that it is necessary for their purpose to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and courts settlements.

We need to study this particular Convention for two reasons. Firstly, the convention incorporates very advanced principles and has been tested in practice for long. Secondly, the convention is a compromise between the civil law and the common law traditions. As member countries to the two different traditions, the convention has attempted to have the best of the two worlds.

The Convention, which is ratified within the context of the European Community, lays down specific rules for allowing or prohibiting recognition and enforcement of foreign judgment, it has also prescribed rules of procedure for enforcement of foreign judgment

2.6.2.1. The Basic Features and Rules of the Convention

- Title III of the convention lays down rules for recognition and enforcement. Article 25 states that for the purpose of the convention a judgment any judgment given by a court or tribunal of a contracting state, what ever the judgment may be called. In order to be a “judgment” for the purposes of the convention the decision must emanate from a judicial body of a contracting states deciding on its own authority on the issues between the parties.

- The Brussels Convention has a fast procedure for the recognition and enforcement of judgments falling within its scope and given in a contracting state. The relevant provisions may be found in art 26 and the following of the convention.
- It must be noted that the judgment to be recognized (or to be enforced) must be within the scope of art 1 of Brussels Convention. The court before which recognition is sought must examine independently whether it concerns a subject within the scope of the convention.
- Judgments given in a contracting state must be recognized without any special procedure being required. If objections are made against recognition, the party interested in the determination of recognition as a principal matter, may use the rules laid down for enforcement (Title III, section 2 & 3) if in the contracting state where the decision was given an ordinary appeal has been lodged against the judgment whose recognition is sought the court before which recognition is sought may stay the proceedings (art 30 Brussels convention).
- Recognition may be refused if any of the situations referred to in art 27 or 28 Brussels convention occurs. According to the literature there articles must be applied by the court of the state in which recognition is sought.
- Article 27 of the Convention provides for the following grounds of refusal:
 - Conflict with international public policy.
 - Where it was given in a default of appearance, if the dependant was not duly served with the document which instituted the proceeding or with an equivalent document in sufficient time to enable him to arrange for his defense;
 - If the judgment is irrisonsible with a judgment given in a dispute between the same parties in the state in which recognition is sought.
 - If the court of the state in which the judgment was given, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills

- or succession in a way that conflicts with a rule of the private international law of the state in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of the state.
- If the judgment is irreconcilable with an earlier judgment given in a non – contracting state involving the same cause of action and between the same parties, provided that this latter judgment fulfils the conditions necessary for its recognitions in the state addressed.
- Enforcement is provided for in article 31 and the following. It provides that judgments given in contracting state and enforceable in that state shall be enforced in another contracting state when, on the application of any interested party, the order for its enforcement has been issued there.
 - Article 32 provides to which court of the contracting states an application for enforcement shall be submitted if a party against whom enforcement is sought is not domiciled in the state in which enforcement is sought, jurisdiction must be determined on the basis of the place of enforcement.
 - Article 33 provides that the law of the state in which enforcement is sought determines the procedure of an application for enforcement. The contracting state must indicate in their domestic laws which provisions apply.
 - An applicant must give an address for service of process within the area of jurisdiction of the court to which he makes the application or, if the law of the state in which enforcement is sought does not provide for the choosing of such an address, the applicant must appoint a representative.
 - The following documents must be attached to the application;
 - A certified copy of the judgment which establishes its authenticity;

- In case of a judgment given in default a document which confirms that the party in default was served with the document instituting the proceedings. If such document can not be submitted, art 48, Brussels convention offers a solution.
- A document confirming that the applicant is receipt of legal aid. Here, too, art 48 applies if a proper document can not be produced.

- Article 34 compels the court to which an application for enforcement is made to give its decision without delay. The party against whom enforcement is sought will not be heard at this stage of the proceedings.

- The reasons for refusal specified in arts 27 & 28 apply in the same way as in respect of recognition. In case of enforcement, too, the foreign judgment may under no circumstances be reviewed as to its substance. (Art 34)

- The appropriate officer of the court must without delay notify the applicant of the decision given on the application in accordance with procedure laid down by the law of the state in which enforcement is sought. (Art 35).

- The party against whom enforcement is authorized may appeal against the decision within one month of service there of. The time for appealing in two months if this party is domiciled in a contracting state other than the state in which the decision allowing enforcement was given (art 36).

- Article 37 Brussels convention provides that an appeal against the decision authorizing enforcement must be lodged in accordance with the rules governing procedure in continuous matter in the court appointed in that article.

- Article 38 contains a procedure whereby, at the request of the party who appeals against the judgment of enforcement, the proceedings as to whether the appeal will succeed may be stayed if an ordinary appeal has been lodged against the judgment in the state in which that judgment was given. The court may also make enforcement

conditional on the provision of security. This article gives the court discretionary power.

- Article 40 Brussels Convention provides that if at first instance an application for enforcement of a decision given in another contracting state has been refused, an appeal can be lodged.

- In that case, the party against whom enforcement is sought shall for the first time in these proceedings be summoned to appeal before the appellate court. Article 20(2) and (3) Brussels convention apply in case of non – appearance irrespective of the party being domiciled in a contracting state or not.

Article 43 allows enforcement of a judgment ordering a penalty payment, provided the amount of the payment was determined by the courts of the state in which the judgment was given.

2.7. Practices of Some Selected Countries on the Subject

2.7.1. ITALY

Italy was one of the first countries to adopt a complete conflict of laws system in 1995. Before the 1995 reform the conflict rules in force were those of the general provisions of the 1942 Civil Code, directly stemming from those of 1865. Although clear and systematically coherent, they were too rigid and incomplete to satisfy the present needs of international life and commerce. Italy joins other European countries, such as Austria, Germany, Spain and Switzerland, which have recently renewed their conflict of laws systems.

In addition, the conflict system needed to be harmonized with the various international conventions, Italy has ratified (e.g. the 1961 Hague Convention on the Jurisdiction and the law applicable to the protection of minors, the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments etc-

The present reform of the Italian system is also characterized by its comprehensiveness. It is not only limited to Private International Law rules (conflict rules), but it also covers jurisdiction and foreign judgment recognition and enforcement issues.

Italy recognizes and enforces foreign judgments through article 64-71 of its code of Private International Law of 1995. According to Article 64 of the Italian Private International Law, a judgment rendered by a foreign authority shall be recognized in Italy without requiring any further proceedings if;¹⁸⁶

- a. The authority rendering the judgment had jurisdiction pursuant to the criteria of jurisdiction in force under Italian law;
- b. The defendant was properly served with the document instituting the proceedings pursuant to the law in force in the place where the proceedings were carried out, and the fundamental rights of the defense were complied with.
- c. The parties proceeded to the merits pursuant to the law in force in the place where the proceedings were carried out, or default of appearance was pronounced in pursuance of that law;
- d. The judgment became final according to the law in force in the place where it was pronounced;
- e. The judgment does not conflict with any other final judgment pronounced by an Italian court authority;
- f. No proceedings are pending before an Italian court between the same parties and on the same object, which has initiated before the foreign proceedings;
- g. The provisions of the judgment do not conflict with the requirements of public policy (ordre public).

As recognition presupposes execution, the requirements of recognition shall also be applicable to the enforcement of the foreign judgment unless special requirement is provided by law.

¹⁸⁶ The Reform of the Italian System of Private International Law, art. 64 (May 31, 1995)

Regarding the recognition of foreign rulings, article 65 of the same law discusses that any rulings by foreign authorities relating to the capacity of persons as well as to the existence of family relations or personality rights shall take effect in Italy if they were issued by the authorities of the state to whose law reference is made under this law, or if they produce effects under the law of that state, irrespective of their having been issued by the authorities of another state, provided that they do not conflict with the requirements of public policy (*ordre public*) and the fundamental rights of the defense were complied with.¹⁸⁷

And also recognition of foreign rulings relating to voluntary jurisdiction shall be recognized without requiring any further proceedings upon compliance with the requirements of Article 65, when applicable, if such rulings were issued by the authorities of the state to whose law reference is made under this law, or if they produced effects under the law of that state irrespective of their having been issued by an authority considered to have jurisdiction pursuant to criteria corresponding to those in force under Italian law.¹⁸⁸

With regard to enforcement of foreign judgments and relating to voluntary jurisdiction, and challenging of recognition, as well as where enforceable execution is required, any person concerned may request the court of appeals (*corte d' appello*) of the district where enforcement is sought to determine the prerequisites for recognition. The foreign judgment or voluntary jurisdiction ruling, together with the ruling acceding to the request referred to under paragraph 1, shall entitle to enforcement and enforceable execution, if the foreign judgment or ruling is challenged during a proceeding, the court seized shall render a decision effective only in relation to this sole proceeding.

In Italy, judgments and rulings by foreign judicial authorities relating to the examination of witnesses expert evidence, oaths, or any evidence to be obtained shall be enforced through a decree issued by the court of appeals of the district where those acts are to be carried out. And if any of the parties concerned requests the taking of evidence, the application shall be made to the court by lodging a compliant accompanied by a certified two copies of the foreign

¹⁸⁷ Ibid,Art.65

¹⁸⁸ Ibid,Art.66

judgment or ruling ordering the performance of the acts. Where the taking of evidence is requested by judicial authorities, the application shall be transmitted through diplomatic channels. The court of appeals shall decide in chambers and if the permission for the taking of evidence is granted, all relevant documents shall be forwarded to the competent court. The taking of further items of evidence as well as the performance of preparatory acts other than laid down by Italian law may be provided for, unless this is contrary to the principles underlying Italian law.

Italian law shall apply to the taking of evidence as well as to the performance of preparatory acts; nevertheless, the form expressly provided for by the foreign judicial authorities shall be complied with in so far as this is not incompatible with the principles underlying Italian law. Where the request for the taking of evidence of the performance of preparatory acts was made through diplomatic channels and the party concerned did not appoint an agent in charge of taking of the evidence, any necessary decisions shall be rendered by the judicial authority in charge of the proceeding, acting *ex-officio*, and the relevant document shall be served by the clerk.

Finally article 71 of the same law provided that the service of summons to appear before foreign authorities as well as of any further foreign documents shall be authorized by the public prosecutor at the court having jurisdiction in the district where the documents are to be served. If the service of document was requested through diplomatic channels, it shall be carried out as provided for by the public prosecutor, who shall designate a bailiff for this purpose. And also service of documents shall comply with the provisions of Italian law. Nevertheless, the method for service requested by the foreign authority may be complied with if this is not incompatible with the principles underlying Italian law and if the process server delivers the documents to the addressee where the addressee is willing to accept them.

As it has been tried to show, the Italian law has comprised detailed and specific rules of Private International Law towards the recognition and enforcement of foreign judgments. And for those countries who did not adopt their own rules of Private International Law, especially

Ethiopia, this law can be served as a source of law. It is also helpful to clarify the undetailed provisions embodied in the civil procedure code in the part of execution of foreign judgment.

2.7.2. SWITZERLAND

Switzerland was also one of the first countries to adopt a complete conflict of laws system in 1987. Although clear and systematically coherent, they were too rigid and incomplete to satisfy the preset needs of international life and commerce. That is why Switzerland joins the other European countries, which have recently renewed their conflict of laws systems. As Italy does, Switzerland is also a party to the Hague convention of 1971 on the recognition and enforcement of civil and commercial matters.

In Switzerland, matters relating to recognition and enforcement of foreign decision are governed by the provisions provided in its chapter one of section five from article twenty five to thirty of its Federal Code on Private International Law.

According to article 25 of this law, a foreign decision shall be recognized in Switzerland.

- If the judicial or administrative authorities of the state in which the decision was rendered had jurisdiction.
- If no ordinary appeal can be lodged against the decision or the decision is final; and if there are no grounds for refusal under article 27.

The law also provided under article 26, that the foreign authorities have jurisdiction.

- If a provision of this code so provides or, in the absence of such a provision, the defendant was domiciled in the state in which the decision was rendered
- If, in the case of pecuniary claims, the parties have submitted by an agreement valid under this code to the jurisdiction of the authority that rendered the decision;
- If, in the case of pecuniary claims, the defendant proceeded to the merits without objecting to jurisdiction or
- If, in the case of a counter – claim, the authority which rendered the decision had jurisdiction over the principal claim and there is a factual connection between the principal claim and counter claim,

It also summarizes the conditions or grounds which recognition or enforcement may be refused.

- A foreign decision shall not be recognized or enforced in Switzerland if such recognition would be manifestly incompatible with Swiss public policy
- If a party establishes that he was not duly summoned, either according to the law of his domicile or according to the law of his place or habitual residence unless he has proceeded to the merits with or without contesting jurisdiction:
- If a party establishes that the decision was rendered in violation of fundamental principles of Swiss procedural law, in particular that he was denied that right to be heard;
- If a party establishes that a lawsuit between the same parties and concerning the same causes of action had already been brought or decided in Switzerland or that the lawsuit had proceeded to judgment in a third state and that judgment can be recognized in Switzerland. And except as here provided, the foreign decision is not subject to review on the merits. A decision recognized under article 25 to 27 shall be declared enforceable upon application by the interested party.

Regarding the procedure, it provided that the application for recognition or enforcement must be submitted to the authority having jurisdiction in the canton in which the foreign decision is to be enforced. It must be accompanied by;

- A complete and authenticated copy of the decision.
- A confirmation that no ordinary appeal can be lodged against the decision or that it is final, and
- In the case of a judgment rendered by default, an official document establishing that the defaulting party was duly summoned and that he had the opportunity to enter a defense.
- The party opposing recognition and enforcement shall have the right to hearing; he may introduce evidence.
- If a foreign decision is invoked in a proceeding of a preliminary question, the authority to which the application is submitted may itself rule on the recognition.

- Article 25 to 29 shall apply to a court settlement having the same status as a court decision in the state in which it was entered.

The last article which presupposes the recognition and enforcement of foreign judgment discusses about;

- A foreign decision or a foreign act regarding civil status shall be entered in the register of births, deaths, and marriages pursuant to an order of the cantonal supervisory authority the entry shall be authorized when the requirements of Article 25 to 27 are satisfied. The persons affected shall have the right to a hearing before the entry is made if it is not established that in the foreign state where the decision was rendered, the procedural rights of the parties were adequately safeguarded.

As it has been tried to show, the Swiss law has also comprised detailed and specific rules of private international law towards the recognition and enforcement of foreign judgment. and for those countries who did not adopt their own rules of private international law like Ethiopia, this law can be serve as a source of law. It is also helpful to clarify the existing undetailed provisions embodied in the civil procedure code, on the part of “execution of foreign judgment and awards.” so it is highly recommended that the legislator should give account it when it amends those provisions.

CHAPTER THREE

Requirements to Be Fulfilled For the Execution of Foreign

Judgment

Introduction

Foreign judgment is any decision rendered by any court other than that of the forum irrespective of where that court is established. Recognition is an act of the forum that makes the foreign judgment binding on the parties to it just as domestic judgment binds the parties to the litigation.

Execution however refers to the act of the court of the forum that gives compulsory relief to it based on the decision. Generally, there is no state that unconditionally gives recognition and execution to foreign judgment.

Many of them consider this as surrendering their sovereignty and independence. Instead, many of them preferred to enter into treaties and conventions or to enact domestic rules to protect their national interests.

Except when there is a provision to their effect in the treaties or convention to which a state is a party, there is no state that unconditionally recognizes or executes any foreign judgments. As a result, all states generally provide preconditions that must be fulfilled by the judgment that is under consideration.

As we have seen in discussing chapter two on the title ‘modes of execution,’ the practice of states courts in this regard can be divided into two. European and Latin American states require what they call ‘exequatur’ written authorization for recognition and execution of the judgment. The Anglo American countries require domestic judgment that allows enforcement of judgment. This is the approach followed by the Ethiopian legislature that provided rules under Article 456-461 of the 1965 civil procedure code that the court must consider in order to give recognition and execution to foreign judgment. This authorizes the court to give judgment up on the foreign judgment by considering the requirements listed.

For the purpose of this paper, this requirement is classified in to three parts. Such as procedural requirement, substantive requirement and additional requirement each of which are dealt with here in under.

3.1. Procedural Requirements

3.1.1. Form and Application

The issue of recognition and execution of foreign judgment comes in to view only when application is made by the concerned party to require recognition and executions of the foreign judgment.

The procedure of an application for enforcement is determined by the law of the state in which enforcement is sought. **According to article 33 of the Brussels convention provides that the law of the state in which enforcement is sought determines the procedure of an application for enforcement.** The contracting states must indicate in their domestic laws which provisions apply.

In England the requirements can be found in section 4 (1) civil jurisdiction and judgments Act 1982.¹⁸⁹ In Ethiopia unlike the civil procedure code, the draft rule of Private International Law has provided the applicable provision for the procedure of an application for enforcement under article 91. It will be discussed briefly in the next chapter when trying to show the conditions to be fulfilled for recognitions and executions of foreign judgments in Ethiopian context.

For the general consideration, an applicant must give an address for service of process within the area of jurisdiction of the court to which of he makes the application or, if the law of the state in which enforcement is sought does not provide for the choosing of such an address, the applicant must appoint a representative.¹⁹⁰

The following documents must be attached to the application, according to art 46-48 of the Brussels convention

¹⁸⁹ H.J.Snijers etal, Access to Civil Procedure Abroad,1996,p.5

¹⁹⁰ Supra note,1

1. A certified copy of the judgment which establishes it's authenticity.
2. In case of a judgment given in default, a document which confirms that the party in default was served with the document instituting the proceeding. If such document can not be submitted, art 48 Brussels convention offers a solution,
3. A document confirming the enforceability and service of the judgment and,
4. A document confirming that the applicant is in receipt of legal aid. Here, too art 48 applies if a proper document cannot be produced.

More or less it is similar with the Ethiopian context which provided in the draft rule proclamation of private international law.

According to article 91 of the Draft Rule Proclamation of Private International Law, an application for recognition or enforcement shall be in writing and shall be accompanied by:

- (a) A complete and certified copy of the judgment to be executed and an official translation into Amharic of same,
- (b) A certificate signed by the president or the registrar of the court having given judgment to the effect that such judgment is final and enforceable'
- (c) An authentication of the judgment by the Ethiopian consulate in the country in which the judgment was given,
- (d) In case of judgment by default, a document establishing that the losing party was properly and timely served with process, and had a reasonable opportunity to defend himself itself in a accordance with the law of the place where the decision was rendered.

3.1.2. Jurisdiction of Court to Accept the Application in Enforcement of Foreign Judgment

After having the necessary documents which should be attached to the application are fulfilled, the next step is to identify to which court has jurisdiction to accept the application. It is determined by the law of the country which enforcement is sought that to which court is the application should be submitted

According to article 32 of the Brussels convention, it provides to which court of the contracting states an application for enforcement shall be submitted. In Belgium, the application must be submitted to the tribunal de premiere instance, in England and Wales the application must be submitted to the High court of justice (in case of maintenance) judgment to the magistrate's court through the secretary of state.¹⁹¹

In Ethiopia, according to article 83 (3) of the draft proclamation and art 5(2) and (4) of proc. No 25/96 of the federal court establishment proclamation, it is the federal high court which has jurisdiction to accept the application of recognition and enforcement of foreign judgments.

3.2. Substantive Requirements

3.2.1. Reciprocity

Reciprocity is one of the preconditions that must be considered first of all. It is a principle by which a state revenges other states that do not give recognition and enforcement to its judgment by denying not recognizing and not enforcing their judgment. This principle is applicable in all states even if the application may be considered as injustice and unfair to the parties involved in the judgment.

Hence no state expects to get recognition and execution for its judgment unless it recognizes and enforces that of other states. The same is true for Ethiopia, as the judge before whom the issue is laid must first ask as to whether or not the state that gave the particular judgment has the practice of recognizing and enforcing judgment given by Ethiopian tribunals. Nonetheless, this victimizes innocent individuals.

3.2.2. Competence of the Court

States establish institutions which they think appropriate to resolve various kinds of disputes. This may include institutions such as a family council or an Islamic court.¹⁹² A certain type of tribunal established in one state may be unknown in another state. In view of this fact it

¹⁹¹ Supra note,2

¹⁹² Ibrim Idris,Materials to the Study of Private International Law in Ethiopia,1990.P.423

would, therefore, be absurd to test the status of a court of one state by the law of another state which may not have an identical or even a similar court in its territory.¹⁹³

The competence of the foreign court is determined by the rules of Private International Law and not by the rules of the law of the forum or by the law of the country where the foreign court is situated.¹⁹⁴

3.2.3. Finality and Enforceability of the Case

The concept of finality and enforceability implies that the foreign judgment sought to be executed is not liable to review, modification or be set aside by another judgment.¹⁹⁵ According to the British judge named Lord Herchell, **the concept of finality implies that the judgment pronounced is conclusive, final and for ever established the existence of rights of which it is made to be conclusive evidence in a country.**¹⁹⁶

A judgment deemed final and enforceable is said to obtain a status of res judicata and is, therefore, binding upon the parties to the suit in question.¹⁹⁷ It is a settled rule of Private International Law that no cause of action arises on a foreign judgment in which the matter at issue has not been conclusively and finally determined.¹⁹⁸

As it is only when the judgment is final and enforceable that it can be executed, the court has to determine if the foreign judgment fulfills this condition. Some states apply the law of the rendition others apply that of the recognitions for such determination.

So that finality and enforceability of the foreign judgment refers to exhaustion of all remedies available for that case. This is very important particularly in relation to judgment on appeals, exparte, suspensions executions, and definite amount interlocutory decrees.

¹⁹³ Ibid

¹⁹⁴ Paras Diwan, Private International Law,(4th.edn) 1998

¹⁹⁵ Walter S.Johnson,Conflict of Laws(2nd.edn) 1962, p.758-759

¹⁹⁶ Novion V Freeman, 15.april,case1,see notes, law Quarterly Review,vol.6,p.235

¹⁹⁷ J.H.C.Moris,the Conflict of Laws,(9th.edn.) 1973,p.1039

¹⁹⁸ Supra note,6,p.617

3.2.4. Public Order and Morality

There is no universal definition to this phrase. But according to the soviet scholar, **“public order is a doctrine which serves as a safety value for a country to enable its courts to deny effect to foreign laws and judgment, which for one reason or another, should not be enforced.”**¹⁹⁹ The concept of morality also refers to the fact that those foreign judgments appearing repugnant to the conduct, customs or accepted practices of the society of the recognition forum would not be carried out. Since a foreign judgment contrary to the morals of a society also implies violation of the public order.²⁰⁰

The government is responsible to maintain public order and morality as a result of which, court should not allow execution of any foreign judgment that violates this interest of the government.

The term public order is a difficult term to define and several attempts to define it have proved to be a failure.²⁰¹ The most that can be said of the term is that it is a developed concept and that it finds its expression in various states’ basic moral, ideological, social, economic and cultural ideas, and in constitutions, statues, and practices of the courts.²⁰²

The concept of public order which is also referred to as public policy indeed plays a restrictive role against the execution of foreign judgments Decey and Morries wrote.

“ the court will not enforce or legal relationship arising power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental policy in English law.”²⁰³

The employment of the principle of ‘public order’ does prevent the execution of foreign judgments, and this is the case with the law of every country it is an essential requirement in

¹⁹⁹ Istavan Szazy, Private International Law, p.279

²⁰⁰ Ibid

²⁰¹ Robert N.Hornik, the Recognition and Enforcement of Foreign Judgment in Indonesia, Harvard Law Journal, vol.18,1977,p.279

²⁰² The Public Policy Concept in the Conflict of Laws ,Colombia Law Review, vol.33,1933,p.514

²⁰³ Dicey and Morris, Conflict of Laws,(8th.edn.)1967,p.921

the execution of foreign judgments. It helps prevent the application of foreign law on the basis of which the foreign judgment is rendered as being repugnant to the recognition forum.²⁰⁴ It also helps prevent injustice in the circumstance of the particular case before the court such as the harsh affliction of the foreign law in rendering the judgment.

3.2.5. Opportunity by the Judgment Debtor and Present His Defense

The judgment debtor must have been served with a summon in due time, so that he could avail himself of the opportunity to defend the case. If the debtor of a foreign judgment has not received a legally sufficient notice, because ineffective means were used when effective means were readily available, so that in consequence the debtor failed to appear in court, the foreign judgment cannot be executed.²⁰⁵ This requirement includes the issue as to whether he given the summon and notice with sufficient time for his response.

Non-fulfillment of any of such requirements would make the execution questionable. **Exparte judgment** is executable as long as the debtor was given the opportunity to present and defend his case and did not use it.

Under international law and practice, a foreign judgment passed against a defendant who was not duly served in sufficient time with the document instituting the proceedings leads to a refusal of execution.²⁰⁶

The foreign court is duty bound to ensure that the defendant is informed in sufficient time of the suit instituted against him so that he can defend himself or his interests as the case may be here, it is worthwhile to take note that the court rendering the foreign judgment must be one having jurisdiction on the parties for the service it ordered to be regarded as acceptable. A personal foreign judgment rendered without jurisdiction on the parties is internationally invalid.²⁰⁷

²⁰⁴ Ibrahim Idris, Execution of Foreign Judgments in Ethiopia, J.E.L, vol.19, p.31

²⁰⁵ Robert Allen Sedler, Conflict of Laws in Ethiopia, 1965, p.110-119.

²⁰⁶ Supra note, 16, p.28

²⁰⁷ Supra note, 7, p.649

In international law, the law of the rendering forum is the law on the basis of which summons may be served on defendants. Where a foreign judgment is filed for recognition and/or execution, the fact that the standards employed as regards the issuance of services to the defendants must be found acceptable to the recognition forum. The nature of services given should be adequate to suggest basic fairness. The foreign judgment may not be executed, if the recognition forum is convinced that the party was not given proper service of summons.²⁰⁸ On the other hand, if a judgment debtor has been given an opportunity to plead his case but failed to do so, a foreign judgment may be executed.

3.3. Additional Requirements

3.3.1 Judgment Vitiating by Fraud

It is a well established rule of Private International Law that a judgment obtained by fraud may be impeached. The point however, which has an important bearing up on Private International Law, is the meaning of fraud in this connection.²⁰⁹

Fraud is an extrinsic, collateral act, which vitiates most solemn proceedings of the court of justices.²¹⁰ Thus, it seems that unsuccessful party cannot bring an action to get a judgment set aside on the ground that the court made a mistake of fact or law, but it can bring an independent action on the ground that in passing the judgment the court was tricked or imposed up on.²¹¹ He must be able to point to some fact 'from without; some fact which was not before the court that pronounced the judgment. The facts up on which he bases his present claim must not have been in issue in the original action.²¹² An English domestic action on this ground can be maintained only if the party wanting to get the judgment was pronounced and which could not have been reasonably discovered at the time of the trial.²¹³

Most laws on enforcement of foreign judgments explicitly deny recognition to judgments obtained by fraud. And also in the point of view of Private International Law, it has been

²⁰⁸ Istavan Szazy,p.574

²⁰⁹ Cheshire, Private International Law, (8th.edn.)p.668

²¹⁰ Ibid

²¹¹ Paras Diwan,Private International Law,(4th.edn),1998,p.668

²¹² Supra note 21,p.669

²¹³ Supra note ,23,p.642

repeatedly been affirmed that a foreign judgment is impeachable for. Fraud and decisions are to be found which exemplify the proper application of this rule, i.e. which have applied it to cases where the court was imposed up on by some fraudulent trick discovered later.²¹⁴

For instance, suppose that there was a dispute between **A** and **B**. Then when **B** was preparing to respond to **A**'s suit, the latter tells him that he agrees to settle the dispute out of court (arbitration). But he, nonetheless, he proceeded or continuous with the action and obtained a judgment in his favor. When he filed an action on the rendered judgment **B** was successful in impeaching the judgment on the ground that the court was tricked in to passing the judgment. The truck was not apparent of that time but was discovered afterwards, there fore, the prujury must be in a material matter and therefore it must be established by evidence not known to the parties at the time of the former trial.²¹⁵

Fraud vitiating a judgment may be classified in to two:

1. The fraud of one of the parity to the proceedings.
2. The fraud of the court itself.²¹⁶

The former is the usual case. For instance, that judgment have been set a side up on proof that the parties acted in collusion, or that an essential document was suppressed, or that a forged will, a false affidavit, or certain false and counterfeit documents were put in evidence, or that the judgment debtor was fraudulently induced not to appear in the original proceedings.²¹⁷

Whenever a foreign judgment is impeached on the basis of the latter, it usually merges in to the plea of judgment being contrary to the principle of natural justice. The cases of court's fraud are rare. A usual illustration is when the foreign court takes bribe or the judge is himself personally interested in any of the parties or in the subject – matter of the suit.²¹⁸

²¹⁴ Cheshire,Private International Law,(8th.edn)p.669-670

²¹⁵ Supra note,3 p.645

²¹⁶ Paras Diwan ,p.645

²¹⁷ Cheshire,p.669

²¹⁸ Supa note,8,p.646

3.3.2. Judgment Opposed to Natural Justice

Judgment opposed to natural justice is also grounds to impeach the judgment. But it is extremely difficult to define the expression of ‘contrary to natural justice.’ And also there is a practical difficulty in the application of this principle to the foreign judgments. Cheshire rightly says that **“it is difficult to trace the delicate gradations of injustice so as to reach a definite point at which it deserves to be called negation of natural justice.”**²¹⁹

Cheshire is also against the extension of the principle of natural justice to, what “substantive justice.” He says such a vague general principle contrary to natural justice, but also those where there has been fraud as to the jurisdiction. It merely seems to confuse that which was reasonably clear in a way so as to create undesirable uncertainty in the field of recognition.²²⁰

What ever the difficult might be in defining the expression contrary to natural justice with precision, in its actual application to judicial proceedings, it would be always be violation of natural justice;

- A. If the defendant was not given adequate opportunity to present his case,
- B. If the defendant was not served with any notice of the proceeding,
- C. If the judge was interested in the subject matter of the suit.²²¹

The Ethiopian law does not specifically address those requirements which are judgments impeached on the grounds of fraud and natural justice. In other legal systems, a judgment obtained by fraud could be denied recognition or execution. As the same time judgment could be denied recognition or execution if it is obtained on the ground of natural justice.

Since they are well – established rules of Private International Law, it is highly advisable that they need to be accounts of Ethiopia.

²¹⁹ Cheshire,p.658.

²²⁰ Ibid.

²²¹ Paras Diwan ,Private International Law, (4th.edn.)1998,p.637

CHAPTER FOUR

The Concept and Practice of Foreign Judgment in Ethiopia

Introduction

Private International Law emerged as a distinct branch of law from the need of states to guide their courts in the dispensation of justice in civil cases in which foreign elements are involved. The major ingredients of this branch of law include judicial jurisdiction, choice of law and recognition and enforcement of foreign judgment.

It is now evident that quite several numbers of states have enacted their own rules of Private International Law, and or have become parties to international conventions concerning matters of significance in Private International Law. This however is not true with respect to Ethiopia.

The recognition and execution of foreign judgments, in relation to which this paper is addressed, is one of the controversial areas in conflict of laws. Because it involves that the issue of whether or not a judgment given by a state's court is to be given recognition and enforcement in the courts of other states.

As examination of the legislation of different states demonstrates, a state may attempt to resolve problems associated with recognition and execution of judgments rendered by other country states on the basis of the treaty or convention to which it is a party, or in accordance with its domestic laws.

Ethiopia which has yet become a party to any neither treaty nor convention on recognition and execution of foreign judgments has incorporated few provisions on foreign judgments in its civil procedure code of 1965. However, the provisions are concerned with the execution of foreign judgments, and comparison of these provisions with similar provisions in other countries and international conventions which have seen in the second chapter of the thesis, manifests that they are not detailed enough to accommodate as many legal situations of other countries do.

However, there has been a little bit practice on the part of the legislator to adopt its own rules of Private International Law by considering those unavoidable problems of the conflict of international situations on the recognition and enforcement of foreign judgments and other untouched issue of Private International Law. Though it is still at the draft level.

In this final chapter, an attempt is made to look in to the application of Ethiopian civil procedure code provisions on execution of foreign judgment this and also to suggest possible solutions to legal situations, in relation to which the provisions failed to render assistance.

For these purpose, the chapter discusses about the concept and practice of execution of foreign judgments in Ethiopia, the conditions to be fulfilled for the execution of foreign judgments. The chapter also discusses the Federal set up of Ethiopia and the concept of foreign decisions under the Draft law of Private International Law. It has also come up with brief description of major departures of the draft law from the existing law.

To look the efficacy of the code, an attempt is made to find out a specific case decided by the Federal High Court and taken by appeal to the Federal Supreme Court. The parties to the case are the judgment creditor who is now the plaintiff the commercial bank of Ethiopia and the judgment debtor is **Demere Gobena** with his wife **Senait Assefa** who are now the defendants.

4.1. The Practice of Execution and Enforcement of Foreign Judgments in Ethiopia

The Ethiopia court practice regarding the execution and enforcement of foreign judgments shows that there are no developed judicial practice and rules in the country. Except the undetailed some provisions provided in the civil procedure code of 1965. However, there are provisions also provided in the recent Draft Proclamation Rules of Private International Law, though it is still at a draft level.

Except when there is a provision to this effect in the treaties or conventions to which a state is a party, there is no state that unconditionally recognizes or executes any foreign judgment.

As we have seen in the preceding chapter, the practice of state courts in this regard can be divided in to two. European and Latin American states require what they call exequatur written authorization for recognition and execution of the judgment.

Anglo – American countries require domestic judgment that allows enforcement of judgment. This is the approach followed by the Ethiopian legislature 1965 civil procedure code that the court must consider in order to give recognition and execution to foreign judgment. This authorizes the court to give judgment up on the foreign judgment by considering the requirements listed. One of the writer Ibrahim Idris confirmed that **“the fulfillment of the conditions becomes mandatory; in as far as no international convention to which Ethiopia has become parity provides other wise.”**

As far as the knowledge of the writer, Ethiopia has not yet become a party to any convention or treaty, bilateral or multilateral on this subject. In view of this fact, therefore, the fulfillment of conditions provided in the code becomes a prerequisite of a foreign judgment to be executed in Ethiopia.

But I have strongly argued that being the mandatory application of those requirements may have an adverse effect on the rights of individuals and or the mutual relationship between Ethiopian and other sates. In so far as foreign laws are established to be the appropriate governing law, and if their application would not cause harm to the state’s policy and the interest of the people of Ethiopia, to hold that courts should not give effect to such foreign laws is liable to adverse criticism. In this respect, the writer is coming across the foreign judgment disregarded enforcement by the Federal Supreme Court by raising the unfullfilment of one of the requirements of reciprocity.

4.2. Conditions to be full filled for Execution of Foreign Judgments in Ethiopia

4.2.1. Procedural Requirements

Before simply proceed to the substantive requirements, it is better to introduce the procedures adhered to regarding execution of foreign judgments in Ethiopia.

Under Ethiopian law, no foreign judgment may be executed without an application being lodged to this effect.²²² It is the Federal High Court, to the division of which the application of recognition and enforcement is to be made, is responsible for ascertaining as to whether the requirements are met or not. The court is vested with this jurisdiction as per article 83 (3) of the Draft Proclamation Rules of Private International Law and article 5(2) & (4) of proclamation No. 25/88 of Federal Court establishment.

As usual the law orders that an application for recognition and enforcement need to be made in writing by producing a complete and certified copy of a the judgment with its Amharic official translation since the official language of the country is Amharic.²²³ In addition, like may other legal systems it requires the judgment be certified that it is final and enforceable.²²⁴ The foreign judgment should not be liable to review, modification or being set a side by another judgment.

There exists a question however, as to which law to be referred in ascertaining its finality and enforceability. To my belief, the Ethiopian law seems to order consultation to the law of the country the court of which the judgment was rendered in. The application shall be accompanied by a certificate signed by the president or the registrars of the court which assures its finality and enforceability.²²⁵

²²² Ethiopian Civil Procedure Code,Article 456(2),1965

²²³ Ibid,Article,457(a) and Art.91(1) of the Draft Rule Proclamation of Private International Law of Ethiopia,1996.E.C

²²⁴ Ibid ,Art.457(b)and Art.91(1)

²²⁵ The Draft Proclamation rule of Private International Law of Ethiopia,1996.EC,Art.91(1)(b)

Regarding the copy of foreign judgment, Ibrahim Idris argued that there are two questions must be answered. The first one, should the copy of the foreign judgment be translated into Amharic, the official language of Ethiopia, from whatever language it has been pronounced in? Secondly, should the judgment be authenticated by the Ethiopian embassy in the jurisdiction of which the foreign judgment was rendered?

Even if, there is no express provision in Ethiopian civil procedure code, pertaining to the translation in Amharic of a foreign judgment and pertaining to the authentications of that judgment by an appropriate Ethiopian consulate, the Draft Rules of Private International Law has provided in its **article 91 (1) a** and **c** that the translation in to Amharic of the foreign judgment to be executed and the authentication of the judgment by the Ethiopian consulate in the country in which the judgment was given.

The judicial practice includes both as prerequisites that a foreign judgment must be translated into Amharic and authenticate by the Ethiopian consulate in the country in which the judgment was produced.²²⁶

4.2.2. Substantive Requirements

According to the civil procedure code a party seeking enforcement of a foreign judgment in Ethiopia, must show that the rendition court had jurisdiction, that the judgment debtor was given the opportunity to appear and defend his case, that the judgment was final and conclusive, that the judgment is not contrary to Ethiopian public order and moral, and he has to show that the foreign court enforces Ethiopian judgments in its jurisdiction.

4.2.2.1. Public Order and Morality

Pubic order and morality is one of the requirements for execution in Ethiopia. It is strongly suggested that recognition and enforcement of a foreign judgment must not amount to hampering the country's public policy or morals. The same kind of commitment is embodied

²²⁶ Ibrahim Idris, Execution of Foreign Judgment in Ethiopia, 1999, J.E.L, Vol.19, p.24

in many of the provisions of Ethiopian laws; be it in the constitution or other statutory legislations and subsidiary enactments.

To begin with the FDRE constitution has stressed the point in issue. In its art 85, the constitution affirmed that any organ of the government shall, in the implementation of the constitution, other laws and public policies, be guided by the national policy principles and objectives specified under **chapter 10 (ten)** thereof. Among such national policy principles incorporated there in, the principles for external relation is one under **art. 86** of chapter ten.

In addition, the preamble of the draft law has emphasized that the application of foreign law shall not contradict the public policy, fundamental principles of law and morals of the society as per **art. 90 (1)** incompatibility with the Ethiopian public policy and morals is one of the grounds for non recognition and enforcement too.

The concept of morality also refers to the fact that those foreign judgments appearing repugnant to the conduct, the customs, or accepted practices of the Ethiopian society would not be carried out.²²⁷

Unlike the practice in a number of other countries, grounds on which foreign judgments would be denied execution for reason of public order are not enumerated under the Ethiopian law, nor has there been an attempt to enumerate them on the part of the courts.

However, Ibrahim Idris has tried to enumerate that there are a series of internationally recognized grounds which may be employed by Ethiopian courts to deny execution of foreign judgments for a public order reasons.

1. A foreign judgment obtained by fraudulent means²²⁸ when it is proved to have been procured by false evidence; as a result of the suppression of material facts which if

²²⁷ Ibrahim Idris, Materials to the Study of Private International Law in Ethiopia, 1990, p.444

²²⁸ The American Statement of Conflict of Law, 1934, comment(a) cited in section 440

cited or discovered, would have affected the outcome of the case²²⁹ or where the foreign judges were themselves interested in the outcome of the action.²³⁰

2. A foreign judgment rendered by a court of a state the government of which Ethiopia opposes, for instance, a judgment from a state whose government is outlawed by the international community for its grave violation of fundamental rights and human rights freedom, is unlikely executed in Ethiopia.²³¹

-

Furthermore a foreign judgment will not be enforced in Ethiopia if it pertains to the recovery of proceeds of prostitution, though the contract may be held valid by the law of the foreign court, or debts from gambling, sale of drugs or breach of any other contracts considered unlawful under Ethiopian law.

²³²

3. A foreign judgment which are of a public law nature. Such as administrative, tax and criminal judgments or other public laws are denied execution.²³³ However, the enforcement of civil aspects of criminal judgments shall not be regarded as the enforcement of public law of a foreign country because public law judgments are considered to be promoting the governmental interests of a foreign state for which Ethiopia is a sovereign and independent state, will not be an agent.²³⁴

Public policy and morals as it is explained here in before is to another criteria. If the judgment is related to matter related to public order or morality execution will be denied.

²²⁹ Istavan Izazy, Private International Law, p.278

²³⁰ H. Greveson, The Conflict of Laws, (6th.edn.) 1969, p.67-675

²³¹ Ian Brownlie, Principles of Public International Law, (2nd.edn.) 1973, pp.101-108

²³² The Ethiopian civil code, 1960, Art.1716

²³³ The Draft Proclamation Rule of Private International Law of Ethiopia, 1996 E.C., Art.90(2)(4)

²³⁴ Supra note, 42

4.2.2.2. A Court Duly Established and Constituted

In discussing this requirement, it becomes necessary to ascertain the appropriate law by which the court is deemed duly established and constituted. Should such matters be determined on the basis of Ethiopian law? Or the foreign law? Or international law? etc.

With regard to this, nothing is mentioned on these points in Ethiopian law, except putting the requirement alone that Ethiopian court is bound to ascertain the existence of the requirement of that judgment was given by a court duly established and constituted in the civil procedure code of 1965, **art.458 (b)**. Thus rendering the application of the conditions is very difficult.

But the Draft rule Proclamation of Private International Law has provided in its article **89(1) (b) and (2)** that the courts being duly established and constituted shall be ascertained by the laws of the country in which the judgment was rendered. Ibrahim Idris also shares this acclamation by suggesting that **the Ethiopian court to resort to the laws of the foreign country concerned to determine whether or not the tribunal rendering the judgment at issue is one duly established.**²³⁵

Similarly, the determination of jurisdictional status or competence of a foreign court is another difficult issue. Again, the Ethiopian law is neither silent, nor has it developed a judicial practice applicable to this situation. In this regard, again the Draft Rules of Private International Law presupposes that the jurisdiction of the court shall be ascertained by the laws of the country in which the judgment was rendered.

Supposing this idea, Ibrahim Idris said in his respective writing of “the execution of foreign judgment in Ethiopian” “it would be advisable to adhere to a method of definition of jurisdiction in which a compromise solution is attained”. It appears justifiable for Ethiopian law to accept the law of rendition forum as appropriate.²³⁶ Consequently care must be taken to that the Ethiopian form of jurisdiction is not jeopardized. According to **article 89 (2)** of the Draft rules of PIL provided that “the application of determining duly established and

²³⁵Supra note,38,p.26

²³⁶Aster Nssbahum, Jurisdiction and Foreign Judgment, Columbia Law Review, vol.4,1948, cited in supra note,38.p.27

constituted court shall not affect the provision of the draft law and recognized principles of international law.

4.2.2.3. Finality and Enforceability of the Foreign Judgment

Finality and enforceability of the foreign judgment is the third precondition to permit execution of foreign judgment.²³⁷ As it is only when the judgment is final and enforceable that it can be executed, the court has to determine if the foreign judgment fulfils this condition.

Due to the absence of judicial practice in this area, the Ethiopian law does not help us to render a solution to the question of what does finality and enforceability mean. What sorts of foreign judgments are deemed to be final and enforceable? Which countries law should be consulted to determine the finality and enforceability of a foreign judgment?

It is maintained that the issue of finality of a foreign judgment which is defined by **article 3** of the civil procedure law is to include also an order and decree. This is very important particularly in relation to judgment on appeals *exparte*, suspension by the court rendering the judgment, interlocutory orders as part of the final judgment.²³⁸

Even though no express provision is available to the appropriate law of the country by which the issue of finality and enforceability of a foreign judgment is determined, the requirement that the foreign judgment must be accompanied by a certificate signed by the president of the registrar of the rendition forum,²³⁹ to the effect that such judgment is final and enforceable that the signature of the president or the registrar of the foreign court has the purpose of serving as the means of knowing whether the judgment is final or not. That it seems, the Ethiopian law opts to apply the law of the forum which pronounces the judgment.

²³⁷ Ethiopian civil procedure code,1965,Art.457(b)

²³⁸ Supra note,39,p.442

²³⁹Supra note,50,Art.459

It is also confirmed by article **91 (2)** of the Draft Rules of Private International Law that the finality and enforceability of a judgment shall be ascertained by the laws of the country in which the judgment was rendered.

4.2.2.4. The Judgment Debtor's Right

The fourth pre-requisite to permit execution of a foreign judgment is whether the judgment debtor was given the chance to appear and present his defense.²⁴⁰ This requirement includes the issue as to whether he was given the summon and notice with sufficient time for his response. The judgment debtor must have been served with a summon in due time, so that he may avail himself of the opportunity to defend his case,

Robert Allen Sedler presupposes the idea **that if the foreign judgment has not received legally sufficient notice, because ineffective means were used when effective means were readily available so that in consequence the debtor failed to appear to court the foreign judgment can not be executed.**²⁴¹ Ex parte judgment is executable as long as the debtor was given the opportunity to present and defend his case and did not use it.

This requirement is accounted by article **89 (1) (d)** of the Draft Rule of PIL that the judgment debtor shall be given the opportunity to appear and resent his defense.

4.2.2.5. Reciprocity

Reciprocity is also one of the preconditions that must be considered first of all in Ethiopian law for the execution of foreign judgment. The judge before whom the issue is laid must first ask as to whether or not the state that gave the particular judgment has the practice of recognition and enforcing judgment given by Ethiopian tribunals.²⁴² In upholding this principle, Ethiopian law follows the course undertaken by many other legal systems,

²⁴⁰ Ibid, Art. 458(c)

²⁴¹ Robert..Allen Sedler, Ethiopian Civil Procedure Law, 1968, p110-119

²⁴² Ethiopian civil procedure code, 1965, Art. 458(a) and Art. 89(1)(a)

which incorporate in their laws the requirement of reciprocity in order to ensure, inter alia, that the foreign state recognizes the judgments rendered by their courts.²⁴³

In this regard, Robert A. Sedler maintains in his Article of, “the Ethiopian civil procedure,” that, **“if the courts of the country (a foreign country) refuse to execute Ethiopian judgments, the Ethiopian court must, in turn, refuse to execute their judgments in as much as most countries will execute the judgment of other countries, it should be presumed that any country will execute an Ethiopian judgment that contrary is provided.”**²⁴⁴

A judgment debtor, who wants to attack the sought execution of foreign judgment, would be expected to plead and prove that the foreign court rendering the judgment in question would refuse to execute the judgment of Ethiopia pronounced by an Ethiopian court. Where the Ethiopian court is satisfied by the proof presented by the defendant, the application to have the foreign judgment executed will not be granted.²⁴⁵

In connection to the need of proving that the foreign court would grant execution to a judgment of the Ethiopian forum, the experience of states might be different. So that the Ethiopian court may prove that the foreign court rendering the judgment executes Ethiopian judgments in its jurisdiction. It may be done by the following two ways.

1. Firstly, the court may prove it by gathering direct information from the court which rendered the judgment or the judgment debtor.
2. Secondary, as it is known, that is the Ministry of Foreign Affairs which concerns all foreign affairs of a certain country. Hence, the court can prove that foreign court executes Ethiopian judgment by asking the concerned body of Ministry of Affairs.

²⁴³ Supra note, 38, p. 23-24

²⁴⁴ Supra note, 53, 1968, 394

²⁴⁵ Ibrahim Idris, The Execution of Foreign Judgment in Ethiopia, 1999. J.E.L, V. 19, P. 23-24

The doctrine of reciprocity which has retaliation as its base against a state may simultaneously victimize innocent individuals. It is because of the policies of the country whose court has rendered the judgment.

It will be seen in the following will be attached case that the Ethiopian court (Supreme Court) disregarded enforcement on the judgment rendered by the American Supreme Court by the merely reason of the Ethiopia does not have a treaty signed with the American government to that effect of execution of the judgment.

But the fact is that even though there is no treaty signed between them, the Ethiopian judgments are enforced in the American territory. So it is not proper to ignore foreign judgments since that particular state enforces Ethiopian judgment without treaty.

As the case may be, many states do not include reciprocity as a prerequisite for execution of foreign judgments. Such as Argentina Brazil that is what the believe of the writer to give insight to the legislator that the application of the requirement of reciprocity should be taken in to account. Because, it may have some adverse affect on the innocent individual. It has to be eliminated, unless the application of the foreign judgment jeopardized the sates public policy and the interest of the community.

4.2.2.6. Decision Making Process

It is not a substantive requirement but after all formalities and proper procedural rules are observed, the court decides on the basis of the application to enable the party against whom the judgment is liable to be executed to present his observation.²⁴⁶ That is to give a chance for the judgment debtor to have a say on the issue.

By doing so the court decides on the necessity of whether or not pleadings may be submitted.²⁴⁷ Where it believes that there are doubts, the court may suspend the decision until

²⁴⁶ Ethiopian Civil Procedure Code,1965,Art.459(1)

²⁴⁷ Ibid, Art 459(2)and Art.91(3)of the draft rule of PIL of Ethiop[ia]

all doubtful points have been clarified.²⁴⁸ If the court however, is convinced of further litigation for some special reason, it may decide to hear the parties which it shall fix, according to **art.92 (1)** of the Draft Proc. of PIL. But under no circumstances the permission of hearing would amount to retrial of the foreign judgment sought to be recognized or enforced. In other words parties to the judgment can not institute a law suit based on the same cause of action. Nor can court can accept such application and make retrial of the judgment applied for recognition and enforcement previously.

As the same time, the court should also make a decision on the cost incurred by the parties during the proceeding and as to whom should it be compensated by in accordance to **art 92 (2)**

As it is in almost all states of the world, the effect of a foreign judgment that got recognition or permission of execution by Ethiopia.²⁴⁹ Courts are given the status of resjudicata as long as it fulfilled the requirements ²⁵⁰listed by the law. In other words, it means, once it is recognized and permitted to be executed the judgment automatically loses its alien or foreign nature and acquires the status of domestic judgment as if it were decided or rendered by one of the Ethiopian courts; the foreign judgment will be executed in the territorial limit of Ethiopian having the same effect inherent to internal judgment.²⁵¹

²⁴⁸ Ibid,Art.459(3) and Art.91(5)

²⁴⁹ Ethiopian civil procedurecode,1965,Art.5

²⁵⁰ Ibid

²⁵¹ The Draft Proclamation Rule of PILof Ethiopia,1996 E.C.Art.92(3)

4.3. Case Analyzing

In order to have a full picture of the requirements which have been discussed here in above, it is better to look in to a case which is decided by the American Supreme Court and sought execution in the Ethiopian court.

Commercial Bank of Ethiopia Vs Demere Gobena and Senait Asefa

The case which is attached at end to this paper and going to be discussed here in under, deals about on the decision given by the Federal High Court and taken by appeal to the Federal Supreme Court of Ethiopia disregarding the American judgment sought execution by holding the position that “**there is no a signed treaty or developed experience between Ethiopia and America**”²⁵². This decision is pronounced on **Tir 9, 1997 E.C on the file No. 15908**.

When we look in to the factual background of the case, in short, the appellant is **the Commercial Bank of Ethiopia** who was the lower plaintiff and the first respondent is **Demere Gobena Yirorshe** who was the lower first defendant. The defendant Demere Gobena was an employee of the commercial Bank from **April 24, 1967** until **January 15, 1993**. He took the banks money by using his last position at commercial bank that he was a senior staff member and head of the incoming foreign payments department. He took **1,088187.48 million US Dollar** and fraudulently transferred it in to some banks in American. Having taken the money, he disappeared illegally from the country.

The second respondent **Senait Assefa Bongar** who was the wife of the first defendant or respondent **Demere Gobena** has taken **68,000 Ethiopian Birr** in different ways having full awareness that her husband the defendant **Demere** fraudulently had taken the money and illegally disappeared from the country.

And now the plaintiff **Commercial Bank**, instituted a case to the Federal High Court which has power to entertain the case the both the defendant **Demere** and **Senait** should have turned back the money to it.

²⁵² Commercial Bank of Ethiopia Vs Demere Gobena and Senait Assefa,1997,file.no.15908

Both the respondent **Demere and Senait**, on their part said to the court that the judgment has given a final decision and partial enforcement in the American Supreme Court. Hence, the suit brought by the bank should be given resjudicata effect and be rejected in accordance to **article 5** of the civil procedure code.²⁵³

After having evaluated the pleading of the parties, the court has decided in favor of the respondents that the case has obtained final judgment, in hence, there can not be brought a new suit on the same cause of action which already been decided.

The appellant the **Commercial Bank**, who is dissatisfied by the decision given by the Federal high court, brought his appeal to the Federal Supreme Court of Ethiopian. This court again rejected his allegation by saying that **“There is no a signed treaty or developed experience between Ethiopia and America.”** Finally, rejected the decision given by the High court and backed the file to it.

In the absence of a signed treaty or a convention, a state to whose court a foreign judgment has been submitted for execution usually insists that the foreign judgment should meet the requirements laid down in its national law. That is what the courts rejected the suit in applying the undetailed provisions of the civil procedure code on the execution of foreign judgments.

This happened because Ethiopia follows the Anglo-American position that the foreign judgment will be recognized or executed when the formalities required by the national law is fulfilled. So, that is why both level of courts that decided on the above discussed case that from those requirements,such as reciprocity **“which Ethiopian does not have a treaty or developed experience with the country rendered the judgment.”**²⁵⁴

²⁵³ Supra note,64

²⁵⁴ Ibid

In this regard, it is better to look in to whether the courts position is proper or not in applying the condition embodied? If it is proper or not, does it taken in to consideration of the rights of the party especially the judgment creditor?

Does it consider the relationship which it has with the judgment rendered country?

In order to answering the above questions, it is better to start from the first one. I think apart from the fact, the court strongly has taken consideration of **article 456 (1)** of the civil procedure code that provides unless there is a treaty bind Ethiopia, judgment which rendered out side of Ethiopia will be executed in accordance to the provisions laid down in the same law.

When it started to apply the conditions laid in the code, it has begun with reciprocity under **article 458 (a)**.

In proving the existence of reciprocal treatment, states have different ways to follows. In the Ethiopian approach it may be conducted on the following two ways.

1. First, the court may prove it by gathering direct information from the court which rendered the judgment or the judgment debtor himself.
2. Secondly, as it is known that is the Ministry of Foreign Affairs which concerns all affairs of a certain country hence, the court can prove that foreign court executes Ethiopian judgment by asking the concerned body of the Ministry of Foreign Affair.

Before the case came to the Federal Supreme Court by appeal, the Federal High Court has decided that **“the judgment which is now brought a Suit has obtained a final judgment in the United States of America in the New York Supreme Court. In hence, there cannot be brought a new suit on the same cause of action which already been litigated.”** And the court rejected the suit brought by the plaintiff by accepting the objection raised by the judgment debtor in accordance to **article 5(c) of the code**.

The Federal High Court, before pronouncing this decision, has proved that whether there is a signed treaty or common interest between those countries. For this purpose, the court opted

to get information from the Federal Ministry of Foreign Affairs. **The Ministry has approved that there is no treaty signed between Ethiopian and USA. But it has also makes sure that usually Ethiopian judgments are executed in USA.**

On the basis of this, the point is that the ascertainment of existence of reciprocity or common interest on the execution of Ethiopian judgments in the county which rendered judgment in any ways.

Even if this is the case, it seems that when the Federal High Court pronouncing the decision, has believed on the fulfillment of the conditions laid down in the code. (Civil Procedure Code). I have strongly agreed with the courts presumption that it does not allege there must be the existence of a signed treaty. It is enough if it is proved that usually Ethiopian judgments are executed in U.S.A without any treaty.

But when we see the position holding by **the Federal Supreme Court**, it does not considered what the Federal Ministry of Foreign affairs approved that the usual existence of execution of Ethiopian judgments in U.S.A. In holding the position, it is based on the strict application of the law. **Unless there is a treaty to that effect, foreign judgments will be executed in accordance to the conditions laid in the code.**

When trying to analyze the other condition, it is better to see that whether the judgment debtor has given the chance to appear and present his defense or not in accordance to **art. 458(c)** has given. Because we can inferred it from that the judgment debtor does not raised and objection that Ethiopian judgments did not have executed in U.S.A.

Rather he has pleaded that partial enforcement is taken in U.S.A. In my belief, even if other condition are provided mandatorily, in any case what the court should have ascertained before all things is that to give a chance whether the judgment debtor raises an objection or not.

By doing so, if it is ascertained that the judgment debtor does not raise an objection and given him chance to defend the case in the original judgment, the other conditions are revolving around this

When supplying answer to the second raised question, I think the court does not have taken in to consideration of the rights of the party especially the judgment creditor. Because, since he has a full claim of right on the judgment rendered which is effectively completed, it will be uneconomical tortuous and unnecessary to multiply a law suit to him. Because he is compelled to pay extra – cost and extra -time. But if the judgment were recognized and enforced, the state is viewed as cooperating in the avoidance of wastage of time, wastage of resource and the protection of this successful litigant.

With regard to the third one, it does not consider the relationship which it has with the judgment rendered country. Because, it is obvious now that Ethiopia would have a sisterly relationship with U.S.A in all matter of circumstance. Such as economical, social, and political. And also even so many Ethiopian are flowing from their country to U.S.A. their interactions is now developing day to day. So that since U.S.A judgments represent rights acquired through the application of U.S.A laws, and to deny recognition to such right could amount to violation of the laws of U.S.A.

So that in my own view, the position taken by Ethiopian courts in general when pronouncing the decision it does not consider the justification behind applying foreign laws that it is to create better relationship with the country which rendered the judgment and to facilitate international private relationship since the party may have acquired rights on the judgment rendered. However, it means that when a state is granting recognition and execution, in other hands it is applying the foreign law. Because the judgment rendered by that particular state is in accordance to its own law.

As tried to show in supporting evidence the case which have been discussed above has fulfilled the requirements laid in the Civil Procedure Code **article 458.**

So that the position holding by the Federal Supreme Court that “**there is no a signed treaty or developed experience for execution between Ethiopia and U.S.A,**”²⁵⁵ is not proper it seems me that lack of experience and does not have legal basis.

Rather, on the view of globalization and the policy which now Ethiopian follows that international unity, it is not proper holding the position that the application of one of the requirements of reciprocity is mandatory.

Because, since if it is not contrary to the sovereignty of the state, public interest and morality, there is no harm if courts given recognition and execution of foreign judgments with out strict application of the requirement of reciprocity.

And even this requirement should be avoided since some states do not include it as a prerequisite for the execution of foreign judgments. For instance Latin American countries such as Argentina and Brazil did not include the requirement of reciprocity in their laws. And even now some of the Anglo American countries are disregarding the application of this requirement. The fact is that since the rendered judgment sought execution if not contrary to the public policy and morality of its state, the judgment rendered should be given recognition and execution.

4.4. The Concept of Enforcement of Foreign Judgment in Ethiopia

The concept of enforcement of foreign judgments in Ethiopia has been given a little bit attention both in the law and the academic circle. In the law cycle, the Draft Rules of Private International Law prepared by Professor Rene David which was supposed to as part of the Ethiopian civil code of 1960 did not include any provision on the execution of foreign judgment. And also the provisions embodied in the 1965 civil procedure code of Ethiopia on the title “Execution of foreign judgments and awards, are not detailed enough to accommodate as many legal situation of other countries do.

²⁵⁵ Ibid

However, there has been a little bit practice on the part of the legislature to adopt its own Rules of Private International Law including governing the execution of foreign judgments, but it is still at the draft level.

In the academic cycle, for instance, professor Sedler and singer, former members of the faculty of law of Addis Ababa university, did not give any coverage to the issues in their respect materials (i.e. conflict of laws rules for Ethiopia and materials for the teaching of Private International Law in Ethiopia) they prepared for the study of Private International Law in Ethiopia.

As the case may be, in simple terms, the civil procedure code of 1965 has provided for its definition of foreign judgment in its **article 3**. Accordingly **foreign judgment means a judgment of a foreign court.**²⁵⁶ **In other words, it meant that judgment not rendered by a court of the forum.** The related issue with regard to the definition of foreign judgment is that the foreign court, **under article 3 of the (Civil Procedure Code)** is stated as a court situated outside of Ethiopia. The question may arise as to whether it is necessary to relate the term “foreign” to a place alone. What would be the fate of the definition in a Federal set up of Ethiopia? The writer believes that the term “foreign” is basically related to the alien nature of the court wherever it is i.e, a court other than Ethiopia.

In addition, **art 3 of the draft law** which seems to confirm with the Amharic version of the previous provision, affirms that its scope of application includes regulating the conditions for recognition and enforcement of foreign decisions and arbitral awards in the field of international and interstate private matters.²⁵⁷

From the cumulative readings of these definitions provided for under both the civil procedure code and the new draft law, one may assert safely that a foreign judgment is a statement given by a lawfully established foreign court on the ground of a decree or order.

²⁵⁶ Ethiopian civil procedure code,1965,Art.3

²⁵⁷ The Draft Proclamation of Private International Law of Ethiopia,1996,Art.3

In connection with the recognition and execution of foreign judgments; there are certain preconditions that must be fulfilled to execute the foreign judgment. But the rules did not specifically provide that of the recognition. Some believed that recognition suppose execution and therefore what is provided for the latter applies to the former. Yet there can be judgments that need recognition alone and not executions as a result of which may need separate recognition though not execution.

In relation to the rules of recognition which is not separately dealt by the law, some scholars propose that the judges may use the same rules provided for execution or the rules used by other states. Enforcement presupposes the existence of recognition. But recognition does not necessary to be followed by execution. Because, mere recognition of judgments with out enforcement is possible.

4.5. The Rationale and Applicable theory envisaged By the Draft proclamation

4.5.1. The Rationale /Justification

In most, if not all, occasions of statutory legislation, the law maker enacts a rule being initiated by a certain need that justifies its issuance. In the draft law, the policy consideration or the need that necessitated its enactment is revealed in clear terms of the preamble there of.

The preamble starts by asserting that peoples live are not restricted within the boundaries of a single state or territorial unit, as they are inconstant and continuous interactions through marriage, trade and other activities of daily life in a foreign sate where in the courses of these relationships, disputes are invariably bound to arise.

A dispute which arises in a state between individual and among the same and/or different nationals may be resolved in the same state. Because of the mobility of people and some other circumstances, however, the just and fair disposition of such cases may demand the recognition and enforcement role of another state (say Ethiopia).

The preamble also recognizes in its 2nd paragraph, “**the mobility of people and diversity of laws.**” If so, there is no way to think that a foreign decision may be denied recognition and enforcement and let different kind of treatment for the same cause of action be arise.

4.5.2. The Applicable Theory

As it is well known, there exist two prevailing theories that are applied in making a decision as to whether to grant recognition and enforcement to foreign judgment: Theory of comity (reciprocity) and of obligation. The former is entirely based on the reciprocal treatment of state for their respective nationals requiring recognition and execution of its decision in other and vice versa while the latter is based on the case at hand issues Irrespective of the party’s nationality.

To the extent that recognition and enforcement does not contravene public policy and morality, the draft law seems to follow the theory of obligation fore reasons stated here in under even though there exist some indication which might have lead to deduce otherwise.

To begin with the preamble, it went on to affirm “as a member of international community, the country accepts the diversity of laws and recognizes and respects the interests of other states and their residents in (Page 5). This statement discloses the fact that the interests of the parties is the primary goal of the law not with standing that the other state to which either or both of the parties are national acts otherwise.

Moreover some provisions of the draft reveals that there won’t be any occasion for the Ethiopian courts to deny recognition and enforcement being committed to reciprocal treatment of nationals pursuant to article 88), 89, (1) and 92 (2), what matter is only the competence of the court which rendered the judgment where there is no international agreement to this effect and public interest will not be affected there by.

However, it seems that the draft law has come up with the new theory of obligation, when we fully read the preamble, which was non existent in the civil procedure code, the fact as well

as same specific provision of this draft revealed that it follows the same hand what has been followed by the civil. Prrocedure.Code..

What matter should be looked in to be that both the Civil. Procedure. Code. Provisions towards execution of foreign judgments and the draft rule follows the theory of comity. Because the former provided under **art. 456 (1) and 458 (a)** accordingly that **“the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed was given “considered as one of the presesiquites for execution of foreign judgments in Ethiopia.** The latter has confirmed in its **article 89 (1) (a)** that **“the recognition or enforcement of Ethiopian judgments is allowed in the country in which the judgment to be recognized or enforced was given “is also one of the conditions to be fulfilled for execution in Ethiopian.**

By the cumulative reading of the above discussed article, one can conclude that Ethiopia follows the Anglo American approach; Reciprocity is the primary requirement to grant recognition and enforcement.

4.6 The Concept of Foreign Judgments in the Federal Context of Ethiopia under the Draft Rule of Private International Law (1996)

In any Federal arrangement division of power between the national and constituents sub national (regional states in Ethiopian case), governments is one among many inherent characteristics of there of. In so doing the power of the government will be distributed in parallel by allocating exclusive and concurrent areas of jurisdiction between Federal (national) and regional government. And the same power of each government will further be divided horizontally among the three separated layers; legislative, executive and judiciary.

Ethiopia as one of Federal States follows the same pattern. **Art 50(5) and 52(2) (b) and (f)** of the **FDRE** constitution display the fact that the state council have the power of legislation on matters falling under their jurisdiction, they enact different kinds of law, including their own constitution, in so far as they are not beyond the limit of their power.

Currently, besides their own constitution and some other public laws, states are enacting laws related to civil matters. For instance, significant number of regional governments has codified their own family laws.

Besides a conflict in international sense, interstate conflicts may arise out of the laws of member states and that of the Federal /national/ government. This is a fact revealed by the preamble of the draft proclamation, the purpose of which is to use its word “resolving conflict of laws problems between the laws of Ethiopia and the laws of other countries.

In addition of the preamble, there exist considerable provisions dealt with interstate conflicts. For instance, **as per art.4**, the scope of application of the draft proclamation includes, inter alia, regulating conditions for recognition and enforcement of foreign decisions and arbitral awards in the field of interstate private law matters in accordance to **art 3 (1) (b)**.

In relation to jurisdiction the draft law art **17 (3)** and Federal courts proclamation **art 5(2)** gives power to the federal court to adjudicate in interstate disputes. The former remarks “in interstate disputes jurisdiction shall lie with the Federal High Court.” The latter also affirms” Federal Courts have the jurisdiction over suits mutantis mutandis, between persons permanently residing in different regions. It gives specifically to the high court, too, cases regarding Private International Law along with the power to see the application regarding the enforcement of foreign judgments and decisions in accordance to article **3 (1) (b)** of the draft rule.

There is a fundamental provision which makes available contribution to the issue at hand. **Article 7** goes on to say “**in inter state matters full faith and credit shall be given to the laws, judicial proceedings and judgments of the competent court of a state by all other sates.**” This would mean that any member state of Ethiopia must implement or recognize, unconditionally, judgments and judicial proceedings of the other state in so far as it is rendered lawfully. In other words, the only requirement that should be assured is that whether the court which gave of the judgment is competent enough to do so or not.

Competence of the court is not as such difficult like the previous one (which was in international sense). It is a matter of ability to adjudicate the case in internal (municipal) sense. i.e. whether the court has material, personal and local jurisdiction to give a binding decision.

4.7. Brief Description of Major Departures of the Draft Law from the Existing Law (Civil.Procedure.Code Arts 456-465)

There has been no rule of Private International Law in Ethiopia as it is recognized in the preamble that would guide the courts in adjudicating cases involving foreign element. There was, though in sufficient and in complete, few provisions on the area. In the civil p.c. governing only matters related to pendency (at 8) and execution or enforcement of foreign judgments and an arbitral award (**art 456-461**).

All these provisions are alleged to be repealed expressly in art 100 of the draft we even if they are incorporated by the latter law some how with some or modification and change. Their replacement or incorporation (in some cases) is believed to help the courts to minimize or reduce (if not avoid) differences in stance and inconsistency of decisions which they have been persisted with in the limited judicial practice due to differences in principles in accordance to the preamble paragraph 6.

In order to appreciate and evaluate the draft it is highly suggested to analyze it by making reference to the repealed provisions. Here under comparisons are made by only pointing out some of the basic departures.

To begin with in the former law (which is still existing or in force until the day the draft law come to force). There was no rule governing matters of recognition. All the relevant provisions of the civil.p.c were entirely concerned with only enforcement of foreign judgment and award. But the draft law has incorporated recognition and enforcement of judgments simultaneously being side to side even if circumstances under which a foreign decision will be recognized are similar with those of which it will be enforced.

The concept of interstate conflict is a new phenomenon of the draft, since the previous law was enacted envisaging unitary form of government. There was no rule which considers a Federal set up. Nor it intended to resolve interstate disputes which is in avoidable feature of there of. However, currently detailed rules are developed to such an issue in the draft.

Unlike the old law, jurisdiction lies exclusively on the Federal high court in such matters. But in the civ. P.C. **as pert art, 456 (3)** and application for the execution of foreign decision shall be made to the division of the high court or circuit in the Teklay Guezat where execution is to take place.

Now days, there are a number of high courts in each regional states like that of the former “Teklay Guezat” and provinces.

The other valuable departure is disclosed in the criterion demanding form of application what is new in it requires the copy of the judgment be complete and come with an official Amharic translation mean while, the application must be accompanied by an authentication of the judgment by the Ethiopian consulate in the country in which the judgment was given. This is too, is a new introduction.

In the draft law, which is the last point, retrial of the foreign judgment before the Ethiopian courts is impossible if it is sought for recognition and enforcement. In the old law, however, there was no such as provision in fact the contrary, **art 8** of the code which is repealed expressly by the draft law **art. 100 (2)** states that the pendency of a suit in a foreign court shall not preclude the courts in Ethiopia from trying a suit founded on the same cause of action.

Finally but not least, at the time when the draft proclamation becomes active, the conditions for recognition and enforcement embodied there in shall be applicable even for pending motions there fore **(art 101 (3))**.

4.8. Conclusion and Recommendation

4.8.1. Conclusion

Private International Law is the law that provides rules, which regard cases involving foreign relation i.e. relations that are private in nature but involving some foreign elements that cross the boundary of the particular state it emerged as a distinct branch of law from the need of states to guide their courts in the dispensation of justice in civil cases in which foreign elements are involved.

The execution of foreign judgments, the title which this paper has addressed, is an important aspect or one of the ingredients of Private International Law again, in order to assist their courts resolve problems associated with the execution of foreign judgments rendered by other states, quite several states have adopted legislation which include provisions on the execution of foreign judgments; many states have also entered in to a treaty or convention bilateral or multilateral some of which have been discussed in this paper. Recognition is understood to imply foreign judgment as having resjudicata status and conclusiveness. But execution denotes that the granting of compulsory relief based on the judgment pronounced in a foreign court. Justice is said to be full, it has to comprises the recognition or execution of judgments which is the ever expectation of the parties.

Ethiopia has not yet adopted rules of Private International Law, except some consideration of an attempt is made. Again, she has not become party to any treaty nor entered in to a convention, for conflict of laws promulgated in Ethiopia. And also as it is known that up to now, Ethiopia has neither concluded a treaty nor entered into a convention on the basis of which its courts would recognize and enforce foreign judgments.

The provisions which guide its courts are those incorporated in the civil procedure code (**art 456 – 461**) under the section the “Execution of foreign judgments and arbitral awards.” Nevertheless, apart from the fact, these provisions are difficult to understand, they are broadly formulated that they cannot accommodate as many legal situations as other countries do. For instance, countries such as Italy and Switzerland which have been discussed in this

paper, have accommodated a brief legal provisions of execution and recognition in their respect measure of enacting Private International Law.

If Ethiopia permits its courts to give effect to applicable foreign laws, this may be viewed as a manifestation of readiness on the part of that the Ethiopian state justice be gendered to cases containing foreign element.

The application of foreign laws to cases involving foreign elements especially the execution of foreign judgments constitutes a courtesy or respect towards the foreign country whose law is applied moreover, it could create a closely attachment between countries concerned and strengthen their friendly relations.

In fact, the application of foreign laws in granting recognition and execution of the foreign judgment by courts of Ethiopia could manifest the readiness of the state of Ethiopia to discharge its international obligation. If the Ethiopian court grants recognition and execution to the foreign judgments similarly its judgments would be granted similar treatment in a foreign country.

By recognizing and enforcing foreign judgments, it would make valuable contribution in attracting the confidence of our judicial system.

By recognizing and enforcing the foreign judgment Ethiopia viewed as cooperating to the avoidance of wastage of resource of time and cost.

As the same time, if Ethiopia does not permit its courts to give applicable foreign judgment, failure to give the necessary value or due regard to lawfully made aliens division (judgments and awards) does its own image created by foreign national towards Ethiopia which is contrary to chapter ten of the FDRE constitution(national policy principles and objectives).Their attitude especially on the areas of trade and other relationship will be structured accordingly.

The problem may also go to the extent of jeopardizing the country's development potential by being unable to attract foreign capital and investments. It cannot win the confidence of its judicial system unless it has an appropriate applicable law for the foreign involved elements as special that the recognition and execution of foreign judgments.

It is futile to think that judgments decided by Ethiopian courts would be recognized and enforced in another state unless Ethiopia does the same.

Imagine what international trade agreements or other cross border legal relationships would end up if countries insulted themselves against foreign judgments; these will definitely cause a severe paralysis of flow of goods, people and services from one country to another.

Once a law suit is effectively completed, it needs to be recognized and enforced to avoid repetition of the suit particularly to the advantage of judgment creditor. Because it will be uneconomical, tortuous and unnecessary to multiply them to the judgment creditor.

In applying the requirement of reciprocity, to grant recognition and enforcement might cause injustice to an individual foreign litigant; because of the policies of the country whose court has rendered the judgment.

To refrain from granting execution of foreign judgment would be found to be applicable would amount to rejecting the practice that has succeeded in winning international acceptance. Furthermore the reluctance of the Ethiopian courts to give effect to the application of such law, may serve to foreign courts as a pretext for refusing the application of Ethiopian judgments within their jurisdiction.

In so far as foreign laws are established to be the appropriate governing law, and if their application would not cause harm to the state policy and the interests of the people of Ethiopia, to hold that courts should not give effect to such foreign laws is liable to adverse criticism.

In order to give solutions to the problems arising in the international private relations, and especially to that of the recognition and execution of foreign judgments, it is very important to adopt rules of Private International Law with amending the provisions embodied in the civil procedure code, on the part of “the execution of foreign judgment and awards,” for Ethiopia which could enable courts to show what special precautions they should take when confronted cases which foreign elements are involved.

So that in the view, of the writer the position taken by Ethiopian courts in general when denying execution, it does not consider the justification behind applying foreign laws that it is to create better relationship with the country which rendered the judgment and to facilitate international private relationship since the party may have acquired rights on the judgment rendered. However, it means that when a state is granting recognition and execution, in other hands it is applying the foreign law. Because the judgment rendered by that particular state is in accordance to its own law.

As tried to show in supporting evidence the case which have been discussed in this paper has fulfilled the requirements laid in the **Civil Procedure Code article 458**.

So that the position holding by the Federal Supreme Court that “**there is no a signed treaty or developed experience for execution between Ethiopia and U.S.A,**”²⁵⁸ is not proper it seems me that lack of experience and does not have legal basis.

Rather, **on the view of globalization** and the policy which now Ethiopian follows that international unity, it is not proper holding the position that the application of one of the requirements of reciprocity is mandatory.

Because, since if it is not contrary to **the sovereignty of the state, public interest and morality**, there is no harm if courts given recognition and execution of foreign judgments with out strict application of the requirement of reciprocity.

²⁵⁸ Ibid

And even this requirement should be avoided since some states do not include it as a prerequisite for the execution of foreign judgments. For instance Latin American countries such as Argentina and Brazil did not include the requirement of reciprocity in their laws. And even now some of the Anglo American countries are disregarding the application of this requirement. The fact is that since the rendered judgment sought execution if not contrary to the public policy and morality of its state, the judgment rendered should be given recognition and execution.

In order to give solutions to the problems arising in the international private relations, and especially to that of the recognition and execution of foreign judgments, it is very important to adopt rules of Private International Law with amending the provisions embodied in the civil procedure code, on the part of “the execution of foreign judgment and awards,” for Ethiopia which could enable courts to show what special precautions they should take when confronted cases which foreign elements are involved.

4.8.2. Recommendation

The aim of any research is to find out problems related to the subject matter of the research and to formulate remedy measures for those problems. So that, having taken in to the facts rose, the writer of this paper wants to recommend the following points.

- 1. The legislator should have give** attention to improving the requirements for the execution of foreign judgments provided under the the Civil Procedure Code’s article 458. The requirements should be revised in such a way that courts could apply them with no or minimum difficulty. In other words, the legislation ought to clarify and elaborate the code’s provisions so that they could be easily understood and applied.
- 2. A part from the need for clarifying and elaborating the already existing provisions on the execution of foreign judgments, it is high time that provisions on recognition should be adopted** in Ethiopia law So that **the legislator should have also account** the principle of recognition in the coming will be enacted Private International Law.

3. As the provisions stand now, they are not sufficient to accommodate as many legal situations as similar provisions of the laws of other countries do. By revising the code's provision, **the legislator must get** itself prepared for the inevitable Private International law problems. .

4. In amending the provisions, **the legislator should have to eliminate** the requirement of reciprocity as a prerequisite, which have an adverse effect on the rights of individual because of the policy followed by the country which rendered the judgment.

- In order the court is able to grant recognition and execution without considering the requirement of reciprocity, **the legislator should** have to eliminate it as a requirement to grant execution.

5. In amending the provisions, **the legislator should have** incorporate the uncovered requirements such as judgment vitiated by fraud and judgment opposed to natural justice which are non existent even in the Civil Procedure Code and the Draft Proclamation rules of Private International Law.

6. As there are so many treaties have been signed on different matters and circumstances, **there also should be given** attention with regard to execution of foreign judgments to minimize the denying of execution of the judgment by the merely reason of absence of treaties. Because as tried to show in the case discussed in the paper, since it is ascertained that the particular state usually grants execution to Ethiopian judgments in its jurisdiction without existence of a signed treaty, there is no reason why Ethiopian courts denying execution of that state's judgment.

So that, I recommend, **treaties should be signed** in order to minimize the danger at

7. As a member of international community and as a federal state, though too late, it was a correct decision for the current Ethiopian government to issue the Draft Proclamation Rules of Private International Law. But it is considered only as an attempt unless it is provided in an applicable form of law. **So that, the legislator should have to persist** in enacting the

draft proclamation rules of Private International Law in to the real form of law, in order to direct the court in what circumstances and have to entertain the foreign element cases.

8. It is advisable to the courts that if they grant recognition and execution of the foreign judgment, unless the application of such law in Ethiopia would not affect the state policy and the interest of the Ethiopian people.

9. The writer would like to advice the courts that it is better if they grant execution to judgments pronounced by foreign courts, as it would want its judgments to be recognized and executed by foreign courts.

10. Until the legislator enacts its own amending provisions on the execution of foreign judgments, it is better if courts would take care of in applying the existing provisions that they have not engaged themselves in the strict sense of application of requirements embodied in **article 458 of the Civil Procedure Code particularly ‘reciprocity’**.

- Because, as it can be understood from the case discussed in this paper, the court denied execution of the judgment by the merely reason of absence of reciprocity singed judgment between **Ethiopia** and that of **USA**. But what the fact is that the Ministry of Foreign Affairs has approved that Ethiopian judgments are usually granted execution in the state of USA.
- So that it is the belief of the writer, that if **courts would not only** consider the strict application of the law, but it would also consider what the reality shows.

11. Even, if it said that reciprocity is one of the requirements for execution, and if the country which rendered the judgment usually grants execution to Ethiopian judgments, there is no reason why Ethiopian courts denying execution of foreign judgments.

12. Finally, I recommend, that in order to achieve what has been stated in the advantages of granting execution or applying a foreign law in Ethiopia; specially in discharging of

Ethiopia's international obligation and the relationship with other countries what Ethiopia should have, **the legislator should play** its own role by enacting new provisions with amending or the existing provisions on the execution of foreign judgments.

CHARTER TWO

THE PRINCIPLE OF RECOGNITION AND EXECUTION OF FOREIGN JUDGMENT

2.1. The Distinction between Recognition and Execution of Foreign Judgment

2.2. Types of Judgment

2.2.1. Ordinary Court Judgment

2.2.2. Arbitral Court Judgment

2.3. Justifiction (Rationale) to Recognize and Enforce Foreign Judgment

2.3.1. Facilitating International Private Relations

2.3.2. Comity (Reciprocity)

2.4. Theories of Execution of Foreign Judgment

2.4.1. Basis of Execution

2.4.2. Principle

2.4.3. Comity (reciprocity) Theory

2.4.4. Obligation Theory

2.5. Mode of Execution

2.6. Principles of International Convention on the subject

2.6.1. Principles of the Hague Convention

2.6.1.1. The Basic Features and Rules of the Convention

2.6.2. Principles of the Brussels Convention

2.6.2.1. The Basic Features and Rules of the Convention

2.7. Practices of some selected countries on the subject

2.7.1. Italy

2.7.2. Switzerland

