A Critical Appraisal of the Jurisprudential Role of Connecting Factors in Private International Law with an Emphasis on Commercial Contracts

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A CRITICAL APPRAISAL OF THE JURISPRUDENTIAL ROLE OF CONNECTING FACTORS IN PRIVATE INTERNATIONAL LAW WITH AN EMPHASIS ON COMMERCIAL CONTRACTS

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Abstract

This thesis explores the jurisprudential aspects of connecting factors in cross-border disputes with a special focus on international commercial contract disputes. The thesis consists of three parts (part I, part II, part III). Finding out all the major loopholes concerning the application of connecting factors to cross-border disputes and their consequences under English law, Swiss law and EU law that question state court adjudication of cross-border disputes, their verdict and the ultimate aims and objectives of private international law, has been the crux of this thesis throughout in the pursuit of answering one of the major questions of my thesis as to if and/or what extent the employment of connecting factors is being turned out to be effective in the state court adjudication of cross-border disputes. The thesis investigates historical development of private international law (part I) and the evolution of connecting factors in the jurisprudence of private international law (part II). Knowledge acquired in part I and part II played a significant role to the development of the proposed recommendations (conclusion) as regards commercial contracts in this thesis. Part III entails the implication of the application of connecting factors in international commercial contract disputes in three jurisdictions namely EU, Switzerland and England and Wales. The research methodology utilised in this thesis adopts a comparative approach, through which private international law rules in the aforementioned three legal systems, especially provisions concerning connecting factors, have been examined using qualitative research methods. The sources that have been particularly looked at are statutory instruments, court cases, writing of various renowned legal scholars, and recent developments in PIL within Swiss law, English law and EU law. The reasons of choosing the above mentioned three legal systems are that I have read law at English and Swiss universities, and the selected legal systems encompass civil law jurisdiction which is Switzerland, common law jurisdiction which is England and Wales as well as the understanding of private international law at the supranational level which is EU. These choices have helped me grasp and strengthen my knowledge of private international law elements, particularly connecting factors, from a comparative study perspective. The study concludes by proposing, based on the findings of the research, a supranational court adjudication system founded on online dispute resolution (ODR) for cross-border disputes, which I firmly believe shall be capable of resolving a number of issues particularly those related to connecting factors in cross-border civil disputes.

Keywords: connecting factors, cross-border disputes, private international law, English law, Swiss law, EU law, commercial contract, jurisdiction, applicable law, recognition and enforcement of foreign judgments, characterisation, ODR online dispute resolution, supranational court.

Résumé

Cette thèse explore le rôle des facteurs de rattachement dans les litiges transfrontaliers, en mettant l'accent en particulier sur les litiges internationaux en matière de contrats commerciaux. La thèse se compose de trois parties (partie I, partie II, partie III). Au cœur de cette thèse se trouve l'identification des principales lacunes liées à l'application des facteurs de rattachement aux litiges transfrontaliers et leurs conséquences en droit anglais, en droit suisse et en droit de l'UE, lesquelles remettent en question l'adjudication des litiges transfrontaliers aux tribunaux nationaux, leurs verdicts et les objectifs ultimes du droit international privé. Cette thèse a pour objectif de répondre à la question de savoir dans quelle mesure l'emploi de facteurs de rattachement se révèle efficace pour coordonner la compétence des tribunaux nationaux dans les litiges transfrontaliers. La thèse examine le développement historique du droit international privé (partie I) et l'évolution des facteurs de rattachement en droit international privé (partie II). Les connaissances acquises dans la partie I et la partie II ont joué un rôle significatif dans l'élaboration des recommandations proposées en matière de contrats commerciaux dans cette thèse. La partie III porte sur les conséquences de l'application des facteurs de rattachement dans les litiges internationaux en matière de contrats commerciaux dans trois juridictions, à savoir l'UE, la Suisse et l'Angleterre et le Pays de Galles. La méthodologie de recherche utilisée dans cette thèse adopte une approche comparative, à travers laquelle les règles de droit international privé dans les trois systèmes juridiques susmentionnés, en particulier les dispositions concernant les facteurs de rattachement, ont été examinées à l'aide de méthodes de recherche qualitative. Les sources qui ont fait l'objet d'une analyse particulière sont les textes législatifs, les décisions de justice, les écrits de juristes renommés et les développements récents en droit international privé dans le droit suisse, le droit anglais et le droit de l'UE. Le choix de ces trois systèmes juridiques résulte du fait que j'ai étudié le droit dans des universités anglaises et suisses, et que les systèmes juridiques sélectionnés englobent une juridiction de droit civil, qui est la Suisse, une juridiction de common law, qui est l'Angleterre et le Pays de Galles, ainsi que l'appréhension du droit international privé à un niveau supranational, avec l'exemple de l'UE. L'analyse des juridictions choisies m'a aidé à comprendre et à renforcer mes connaissances en matière de droit international privé, en particulier les facteurs de rattachement, dans une perspective comparative. L'étude se conclut en proposant, sur la base des résultats de la recherche, un système de cour supranationale fondé sur la résolution en ligne des litiges (RDL)

pour les litiges transfrontaliers, que je crois fermement être capable de résoudre un certain nombre de problèmes, en particulier ceux liés à l'utilisation de facteurs de rattachement dans les litiges civils transfrontaliers.

Mots-clés: facteurs de rattachement, litiges transfrontaliers, droit international privé, droit anglais, droit suisse, droit de l'UE, contrat commercial, juridiction, loi applicable, reconnaissance et exécution des jugements étrangers, qualification, RDL (résolution en ligne des litiges), Cour supranationale.

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List of abbreviations

AJA	Administration of Justice Act 1920
ADR	Alternative Dispute Resolution
CIGS	Contracts for the International Sale of Goods
CPR	Civil Procedure Rules
EC	European Commission
ECHR	European on Human Rights
ECJ	European Court of Justice
ECJ	Court of Justice of the European Union
EEC	European Economic Community
EFTA	European Free Trade Area
EPC	European Political Cooperation
EU	European Union
EULA	End User License Agreement
EUPIL	European Union Private International Law
FJA	Foreign Proceedings (Reciprocal Enforcement) Act 1933
HCCC	Hague Choice of Court
HCCH	Hague Conference on Private International Law
HOL	House of Lords
ICJ	International Court of Justice
IIL	Institute of International Law
JHA	Justice and Home affairs
MSA	Master Services Agreement
ODR	Online Dispute Resolution
PIL	Private international law
PILA	Federal Code on Private International Law (Switzerland)

QMV	Qualified voting majority
TFEU	Treaty on the functioning of the European Union
UNCITRAL	United Nations Committee on International Trade Law
UNIDROIT	Institute for the Unification of Private Laws
US	United States of America
UK	United Kingdom

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Part I:

The role of private international law in the international legal system

Chapter 1: Notion and components of private international law and its relationship with culture and religion

1.1 Introduction

In any transnational legal dispute that is private in nature, it is always imperative to determine, across different legal jurisdictions, where the dispute should be adjudicated (jurisdiction/appropriate forum), which law should apply (applicable law) to the dispute and when a domestic court should recognise and/or enforce a judgment of a foreign court (the recognition and enforcement of foreign judgments). In the process of these determinations, various connecting factors are employed (e.g. the place where a contract was concluded). This entire course of action is handled by private international law (PIL). This has been delineated by the Swiss Federal Department of Justice as:

> "Private international law consists of the rules of law which govern legal relationships of private law nature (family law, inheritance law, contract law, company law etc.) featuring an international aspect. Private international law answers mainly the following questions: which national law applies? which jurisdiction is competent? under what conditions will a decision that has been handed down in a particular State be recognized and enforced in another State? Some matters are regulated by international treaties which were drafted by international organizations like the Hague Conference on Private International Law, the UN Commission on International Trade Law (UNCITRAL) or the Council of Europe."[1]

The idea of PIL is to spell out the procedures for resolving disputes between natural persons, companies, corporations and legal entities of different jurisdictions, without being inclined to any particular side. However, every country has its own rules of PIL, often different from the rules of other countries. Therefore, the same case (e.g. a contractual dispute) could be treated differently depending on the court of any particular jurisdiction that hears the case. This is because different jurisdictions invoke different connecting factors to define the nature of the dispute and determine which law applies, possibly leading to different outcomes.

[1] Swiss Federal Department of Justice <https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht.html>.

1.2 The concept of private international law

1.2.1 Preferences in terminology between private international law and conflict of laws

The term 'Private International Law' was first coined by Story in 1834. Later, it was adopted by English authors, such as Westlake and Foote. The term is also used in most civil law countries along with common law jurisdictions.[2] While elucidating the term, Fredric Harrison said:

> "It starts up unexpectedly in any court and the midst of any process. It may be sprung like a mine in a plain common law action, in an administrative proceeding in equity, or in a divorce case, or a bankruptcy case, in a shipping case or a matter of criminal procedure, … The most trivial action of debt, the most complex case of equitable claims, may be suddenly interrupted by the appearance of a knot to be united only by Private International Law."[3]

Private international law is all-pervading. Hence, it is difficult to nominate it as a separate branch of law like the law of tort or law of contract.[4] From a technical point of view, sometimes it may not be called international law, even though it deals with different cross-border issues. International law, as a whole, is commonly understood as public international law and rightly so, since the enactment of public international law takes place at the international level, where the participation of different countries is inevitable. Private international law, on the other hand, may also be deciphered as international law since the word 'international' exists in its terminology. However, such assumption is wrong. It is enacted domestically, hence it is very much a part of domestic law. Though different PIL rules have now been made at the international and regional level, which will be discussed later.

International law or public international law sets out rules and regulations that regulate and control the relationships and disputes between nations on any particular issue that contains the interests of the nations involved; for example, human rights, armed conflict, territorial boundaries, international humanitarian law. Private international law, on the other hand, sets out guidelines for legal disputes between private persons, private institutes and any such legal entities that are not in direct contact with any governmental institute. The asymmetrical

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2 Ugljesa Grusic and others, *Cheshire, North & Fawcett Private International Law* (Paul Torresmans and James J Fawcett eds, 15th edn, Oxford University Press 2017) 15.

3 Fredric Harrison, *Jurisprudence and the Conflict of Laws* (Clarendon Press 1919) 101–102.

4 Grusic and others 6.

relationship between public international law and PIL can be drawn upon three points, namely, the enactment procedure, the nature of content and authority. It has already been mentioned that the enactment of public international law or international law takes place at an international level with the participation of relevant and different nation actors, whereas PIL is made in state parliaments just like other domestic laws without the intervention of any foreign country. As far as the content is concerned, the content of public international law always stresses the mutual interests of nations at the international level and, in the case of PIL, the content defines the procedures for upholding the interests of individuals at all times, without being inclined to any particular nationhood. The only commonality that is evident between public international law and PIL is that neither is designed or enacted considering any particular jurisdiction. However, such nature of content is somewhat questionable in PIL, due to its procedure and approach. Public international law does have the authority to employ a great deal of authority on its signatories. They are obliged to prioritise international law over national law. In the words of Hersch Lauterpact, who is recognised as one of the founders of modern international law, 'The self-evident principle of international law [is] that a State cannot invoke its municipal law as the reason for the non-fulfilment of its international obligations'.[5]

On the other hand, although in theory PIL cannot wield such authority over other member states, a number of PIL rules have been made at the EU level, as a part of its unification and integration process, and by the Hague Conference on Private International Law (HCCH), where the authority of conventions over the signatories might seem akin to the authority exerted on the states by public international law.

One of the most baffling aspects of PIL lies in its terminology. The term PIL is commonly used in Europe whereas the term 'conflict of laws' is used in the United States (US) and some other English-speaking countries. Although both of these terms are used interchangeably, there is a thin line between these two terminologies. Where there is a conflict between two states in a federal country, such conflicts can be called conflict of laws, although there is no involvement of any foreign element; for example, the US PIL.

1.2.2 The magnitude of space

[5] 'Principles of Public International Law - Diakonia' <https://www.diakonia.se/en/IHL/The-Law/International-Law1/Principles/>.

Which law should be applied has been one of the significant and crucial catchphrases in PIL. The word 'which' here denotes the law of a particular area. It has often been said that the primary task of PIL is to deal with the application of law in space.[6] Generally, the rule of any particular substantive law remains the same everywhere. For example, the rule of English contract law is that every contract, wherever made, will be supported by consideration. However, the sphere of its authority in the dimension of space is controlled by PIL.[7] Since PIL is mostly enacted domestically, therefore, every sovereign country may choose to apply the substantive law of any relevant country, as it thinks fit, to answer the question relating to any particular applicable law. Designation of substantive law occurs through the application of connecting factors – matters that connect the incident to a particular jurisdiction.

If the designated substantive law is of a different country and not of the forum (the country where the case has been heard), then it is very important for the forum judges to apply and interpret that foreign law taking the rationale and background of enacting that particular law in consideration. In such situations, the rule of law extends the area of that particular substantive law's authority. The method of such extension is not always the same. It varies with particular circumstances and depends on a number of factors. For example, English rules on contractual capacity will apply to some particular transactions effected by English citizens domiciled abroad and not to others.[8] In the words of Savigny:

> "It is this diversity of positive law which makes it necessary to mark off for each, in sharp outline, the area of its authority, to fix the limits of different positive laws in respect to one another."[9]

In this regard, it should be mentioned that only substantive governing law can be adopted from outside the territory of the forum and not procedural law. As far as the latter is concerned, it is in principle the law of the forum that applies to PIL disputes.[10]

1.2.3 The magnitude of time

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6 JHC Morris and others (eds), *Dicey and Morris on The Conflict of Laws 9th Ed* (9th edn, Stevens & Sons Ltd 1973) 39.

7 Fawcett and others 6.

8 Grusic and others 6.

9 Friedrich Carl von Savigny, *Private International Law* (William Guthrie tr, T&T Clark/Stevens & Sons 1869) 6.

10 EB Crawford, 'The Adjective and the Noun: Title and Right to Sue in International Private Law' [2000] JR 349.

Ostensibly, the time factor in PIL may seem spurious, since it is presumed that the court would consider the question of space as at the date of the action. In a broader perspective this is true, but it conceals subtle discrepancies. It is indeed a logical imperative that the court considers the problem as at the date of the action; it is, nevertheless, equally important for the court to consider the content of the governing substantive law and the choice of law rules of the forum as at that date.[11] The significance of the time factor can be expounded in three different points.

Firstly, if there is any change in the substantive or governing law selected by the PIL rules of the forum, will the law as it exists after the amendment be applied to the dispute or the law as it stood at the time of making the contract? Secondly, if there is any change in the PIL rules of the forum, will the amended PIL rule be applied to the dispute or the old one? Here, the operation of the new rule in relation to the prior acts (retrospective effect) is of significant importance. Thirdly, the constancy of the PIL variables, namely, connecting factors. In the absence of any chosen governing law, the forum is obliged to take refuge from different connecting factors in order to ascertain the governing law of the dispute. If the connecting factors of the forum's PIL rules are not constant and do change from time to time, a question may arise as to which connecting factor at which particular point of time the forum should take into consideration.[12]

The answers to the above-mentioned questions are not always static if there is less clarity in the PIL rules of the forum. Hence, in those situations, judges tend to assess the entire scenario, in order to untangle any confusion that has occurred due to the time factor.

1.3 Private international law rules and their international variety

1.3.1 International variety of private international law rules

PIL is not uniform. It varies from country to country in terms of its variety and versatility. Discussion and discourse on PIL can, therefore, never be made on a unanimous footing unlike public international law, where the discussion and discourse can lead to a certain universality with some justifications. It is, however, possible to make theoretical narratives about what the nature and features of PIL would be, in the process of its unification and harmonisation. Theoretical narratives and doctrines are often presumed to be sequels of practicality and a pragmatic stance about something. Thus, it can be said that even in the discussion of theoretical

11 Michael C Pryles, 'The Time Factor in Private International Law' (1980) 6 Monash Law Review 225.
12 Ibid 225–227.

narratives and doctrines of law, the practicality and practicability of law play a vital role. Problems lie with the variety of PIL, of how many countries' PIL will one take into consideration while discussing its nature and features, both from the theoretical and practical points of view.

Many academics tend to confine themselves to a particular jurisdiction in their discussions of PIL, and by doing this they evade the acute complexities and lengthiness of the subject as a whole. A great deal of effort and endeavour has been made in recent times, by many international organisations, towards the harmonisation and unification of PIL. Many individual attempts have also been made by different countries in order to rectify the lack of unity in the sector of PIL. Most of the developments have occurred in the West, and this has left a larger part of the world unaware of a number of issues of PIL. Be it the unification of PIL in the West, or some other parts of the world, a number of fundamental PIL issues are yet to be unravelled.

Every country has its own legal system, views and ideas about making laws, which can be similar or different compared to other countries. This lack of consistency is the major obstacle to the harmonisation of PIL. One might argue that such fickleness also exists in the case of public international law. If so, then why does it not hamper the process of its unification and widespread acknowledgement? The answer to this question would be that public international law concentrates on the welfare of the countries and their populations as a whole and not on any private relationships of people in different countries. Therefore, the versatilities of legal systems, views and ideas about making laws domestically does not impede the universal recognition of public international law. Whereas the focus of PIL is embedded in the private interactions as well as personal issues of the individuals of different jurisdictions. Hence, the makers of PIL should consider all types of legal system in all countries, especially their methods and conventions for making laws, with due diligence. Now, the question should be, to what extent should the international actors of PIL take the domestic legal systems, views, ideas, conventions and values into consideration while working towards its harmonisation?

Harmonisation of PIL is twofold. First, the coalescence of substantive law. Second, the unification of the PIL rules themselves.[13]

1.3.2 Unification of internal laws

[13] René David, 'Chapter 5: The International Unification of Private Law' in *International Encyclopedia of Comparative Law* (Martinus Nijhoff Brill 1971).

The international actors of PIL, firstly, sought to accumulate the internal laws of various different countries on as many legal issues as possible. A significant instance of such unification is the Warsaw Convention of 1929, which was later amended at The Hague Convention of 1955, and supplemented by the Guadalajara Convention of 1961. This convention entails uniform rules relating to the international carriage of persons or goods by aircraft for reward. The convention further stipulated that the action of parties purporting to alter the rules of the convention or insert any clause that is in contradiction of the rules, shall be null and void. The Berne Convention of 1886 is also of major importance in this regard. This convention was designed to safeguard artists and authors and protect their rights over their literary and artistic works.[14]

Later, UNIDROIT was established by the Italian government in Rome. The institute was assigned the task of unification of internal laws by indicating areas where further unification might be attained, by the Council of the League of Nations.[15] In conjunction with the Hague Conference 1964, UNIDROIT constructed a convention that enumerates a uniform set of rules on the international sales of goods and the formation of such sales. This convention was endorsed by a number of countries and incorporated in the Uniform Laws on International Sales Act 1967.[16] The signatories are supposed to relax the requirements of their respective PIL rules, while applying the provisions of the Convention to cross-border disputes. The successor to the 1964 Convention is the United Nations Convention on Contracts for the International Sale of Goods 1980. This convention was established by UNCITRAL, another body that works for the unification of internal laws.

Despite having a tremendous amount of success in some areas of law, such unification of internal laws seems to offer no greater prospect for the complete and ultimate aim of PIL unification. Amongst others, the most striking impediment is the incongruence between the common law and civil law jurisdictions in the process of the unification of laws.[17]

1.3.3 Unification of private international law rules

1.3.3.1 Unification at the international level

14 Grusic and others 9.
15 David 133–141.
16 As amended by the Sale and Supply of Goods Act 1994, Sch 2 and the Consumer Rights Act 2015 (Consequential Amendments Order) 2015/1726.
17 Grusic and others 9.

The patent incongruence between the national rules of different countries, resulting from the unification of internal laws, has been lessened through the initiation and instrumentalisation of the unification of PIL rules. The HCCH has made many attempts to harmonise the PIL rules. Unlike the unification of national laws, the unification of PIL focuses on the rules that indirectly affect the substantive law to be applied to cross-border litigation. The HCCH has always been willing to make PIL into a code that would be applied to the whole world, without the code being unnecessarily justified any further. Apart from the legal discussions amongst the Member States of the HCCH, diplomatic relationships amongst the states play a cardinal role in any rule-making process of the HCCH.

Prior to 1951, the sessions in the HCCH were confined to the European continental countries, and the debate generally covered the incongruence between the legal systems of civil and common law countries,[18] although the prospect of agreement between these two groups appeared unlikely. Since the seventh session, which took place in 1951, the British delegates began to attend the sessions of the HCCH as full-time members of the conference, rather than just being mere observers.[19] Other common law countries, namely, Canada, Australia and the US, have since then joined the sessions of the HCCH with the British delegates.[20]

In order to give the HCCH an undeviating official stature, a major step was taken in 1951, by drafting a charter relating to the permanent bureau of the HCCH. The charter was accepted by many countries. According to the charter, the bureau consists of a secretary-general, a deputy secretary-general, three first secretaries and a small team of legal officers drawn from different countries. The bureau is situated in The Hague and is run by the general directions of the Standing Government Commission of the Netherlands, which was established by Royal Decree in 1897 in order to promote and codify PIL.[21] One of the primary objectives of the HCCH is to be a forum for its Member States, so that they can work towards the development and unification of PIL. It also insists on mutual cooperation between the Member States and coordination between different private laws in international situations. The principal functions of the HCCH are to scrutinise and make proposals for the unification of PIL, and to maintain

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18 MH Van Hoogstraten, 'The United Kingdom Joins an Uncommon Market: The Hague Conference on Private International Law' (1963) 12 International and Comparative Law Quarterly 148, 148 <https://www.cambridge.org/core/product/identifier/S0020589300011143/type/journal_article>.

19 Ibid.

20 Kurt H Nadelmann, 'The United States Joins the Hague Conference on Private International Law: A "History" with Comments' (1965) 30 Law and Contemporary Problems 291, 291 <https://www.jstor.org/stable/1190516?origin=crossref>.

21 Grusic and others 10.

contact with the Council of Europe, the International Institute for the Unification of Private Law (UNIDROIT), the United Nations Commission on International Trade Law (UNCITRAL) and some other governmental and non-governmental organisations such as the Commonwealth Secretariat and the International Law Association.[22]

To date, the HCCH has produced over 40 conventions and instruments.[23] One of the most notable and remarkable Conventions is the most recent Convention of 2 July 2019 on the recognition and enforcement of Foreign Judgments in Civil or Commercial Matters. The HCCH has termed it as a 'game-changer'. The HCCH website states that:

> "The Secretary General of the HCCH, Dr Christophe Bernasconi, stressed that in adopting this Convention, 'an important gap in the landscape of private international law has finally been filled by the HCCH'. He also stressed, however, that with the adoption of the Convention a new chapter has opened and that the focus now shifts towards the promotion of the Convention. He invited all delegates to be 'champions of the Convention' so that 'the Convention is taken up by States. That it is implemented correctly. That it operates effectively'. Professor Paul Vlas, Chair of the 22nd Diplomatic Session, echoed this sentiment and reiterated that the fast, wide and effective uptake of the Convention by the international community is its next milestone."[24]

1.3.3.2 Unification at the regional level (EU)

As part of the regional development of PIL, its Europeanisation is of prime significance. The objective of this is to amalgamate the PIL rules into one single unit for the EU Member States.[25] The initiation of its legal development can be traced back to the Treaty of Amsterdam, Articles 61 to 67 (relating to the judicial cooperation in civil matters) which became an important matter for European Union (EU) law, rather than merely an issue of inter-governmental cooperation. Article 65 supported the actual functioning of the internal market of the EU, by ensuring judicial cooperation amongst all the Member States, eliminating impediments in the process of civil proceedings, and simplifying the rules regarding choice of law, enforcement and recognition of judgments and jurisdiction in civil and commercial matters.[26]

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22 Ibid.

23 Hague Conference on Private International Law < https://www.hcch.net/en/instruments/conventions>.

24 Hague Conference on Private International Law < https://www.hcch.net/de/news-archive/details/?varevent=687>.

25 Fawcett and others 12.

26 Grusic and others 11–12.

Subsequently, in 1998, the Vienna Action Plan was adopted by the European Council and Commission, in order to accept and implement the provisions of the Amsterdam Treaty. In 1999, a meeting organised by the European Council was held in Tampere, Finland. It introduced a programme of work for the period 1999 to 2004 that focused on the European judicial area. In 2004, a new programme named the Hague Programme was presented by the European Commission and adopted by the European Council with the objective of developing the EU Justice and Home Affairs legislative council over the period of 2005 to 2009. Likewise, in 2009, a new programme, the 'Stockholm Programme' was opted. This was subsequently replaced by the European Council's strategic guidelines in the area of freedom, security and justice. Title IV (Area of Freedom, Security and Justice) of the Treaty of Lisbon replaced the pre-existing issues such as visa, asylum and other policies relating to free movement of persons.[27] As regards judicial cooperation, it has been enunciated in Article 65 in chapter 3 of Title IV of the Lisbon Treaty that:

> "The union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States."

From the human rights point of view, the EU has also given safeguard to all EU nationals. Article 8 (right to respect for private and family life), Article 10 (freedom of expression), Article 12 (right to marry), Article 14 (prohibition of discrimination), Article 6 (right to a fair trial) of the European Convention on Human Rights (ECHR) are the most notable amongst other legal provisions.[28]

Between the period of 1960 and 2011, there had been an extraordinary as well as productive growth of PIL instruments, both at national and international level. Fifty-five countries have legislated at least sixty-one national PIL codifications, including sub-national codifications. During this period, a total of one hundred and one international instruments concerning PIL have also been made and brought into action. These include international or regional conventions, protocols, regulations, model laws and other instruments.[29]

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27 Ibid 12–13.

28 Ibid 11–13.

29 Symeon C Symeonides, 'Codification and Flexibility in Private International Law' (2011) SSRN Electronic Journal, Springer Science+Business Media 13.

As far as the regional harmonisation of PIL is concerned, the EU has, perceptibly, done a tremendous job in terms of creating uniform law, and unifying PIL amongst the EU Member States.[30] It is, however, yet to be seen how well the EU works in partnership with the HCCH in order to ensure global harmonisation of PIL.

1.4 The components of private international law

1.4.1 Jurisdiction

The meaning of the term 'jurisdiction' is manifold. Its denotation can mainly be deciphered from two different settings, that is, PIL settings and non-PIL settings.[31] As far as the former is concerned, jurisdiction means if a state court has the authority to adjudicate a dispute having any foreign element. In non-PIL settings, jurisdiction implies different legal systems of different states. The authority or jurisdiction in PIL settings is not confined to the judicial body, it also refers to the legislative body of the state. This body does have the authority to legislate any law or rule relating to PIL. On the other hand, as previously mentioned, the authority of the judicial body (court, tribunal, etc.) is to resolve the dispute that involves a foreign element. This could be recapitulated such that jurisdiction in PIL refers both to the 'power to legislate' and the 'power to adjudicate' of the states.[32]

The sense of 'power to adjudicate' will mostly be referred to in the present work. It is important to mention that both these authorities are interrelated. That is to say, the legislative body of the state bestows power on the judicial body to adjudicate or resolve any dispute having foreign elements, through the enactment of PIL rules. Question arises as to from where the legislative body of a country obtains the authority to confer the power of international jurisdiction to its domestic courts. One might answer just by terming PIL rules as domestic law, but does this eradicate confusion in the process, since there exist foreign elements in cases being handled by the national courts.

Unlike public international law, in PIL there is no constraint on the states as regards the international jurisdiction of their domestic courts unless there is a PIL convention. States do always have the freedom to confer international jurisdiction to their courts in whichever manner

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30 Peter North, *Forty Years on: The Evolution of Postwar Private International Law in Europe* (Wolters Kluwer BV Juridische Boeken en Tijdschriften 1990) 29–48.

31 Peter Hay, *Advanced Introduction to Private International Law and Procedure* (Edward Elgar Publishing 2018) 5.

32 Ibid.

they choose.[33] However, they cannot determine the jurisdiction of any foreign court. If a court does not have any jurisdiction or authority to adjudicate a matter involving a foreign element, under its own PIL rules relating to international jurisdiction of the domestic court, it will simply decline its jurisdiction over the matter in question. It does not have any authority to direct the parties to the court of another state. It will remain for the plaintiff themselves to decide which court to go to.[34]

Although countries do have the power to adjudicate international cases (cases having a foreign element), they need to be extremely cautious in the process of exercising such authority, to ensure that they do not infringe the sovereignty of any foreign country. A number of theories have tried to construct a foundation for the international jurisdiction of domestic courts in public law terms.[35] Two of those theories have had a huge impact on the international jurisdiction of domestic courts in PIL settings.[36]

The first theory is based on the relationship or bond between the ruler and its subjects or citizens. The genesis of this theory can be traced back to medieval Europe, where the lords had an inexorable duty to deliver justice to their tenants. With the passage of time, situations in Europe changed, and gave birth to the notion of evolving societies, which, subsequently, brought about the idea of state. However, the idea remained the same – that justice had to be rendered to the citizens of the state. For example, the French Civil Code grants the jurisdiction to the French court to adjudicate matters involving at least one national.

The second theory proffered the justification of the authority of domestic courts to resolve disputes involving a party or parties of another jurisdiction by exerting power over the parties. In such action, there was always a fear of infringement of the sovereignty of foreign countries. Taking this into consideration, the theory propounded that the exertion of physical power of the state on the defendant could only be justified within the territory of the forum. Stress had always been placed upon the defendant who has always been obliged to face trial in the forum, and this is still the case in modern PIL. Such focus developed the idea that the forum would

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33 Gilles Cuniberti, *Conflict of Laws: A Comparative Approach* (Edward Elgar Publishing Limited 2017) 147.

34 Ibid.

35 Arthur Taylor von Mehren, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983) 63 Boston University Law Review 279.

36 Cuniberti 148.

have to ensure the physical presence of the defendant within the territory of its country, in order to ascertain if it had the jurisdiction to hear the case.[37]

The notion of connecting factors, that is, domicile, residence or temporary presence of the defendant within the territory of the forum, could well be sensed from this second theory. Although the entire spectrum of the understanding of physical presence changed in the middle of the twentieth century in Europe and the US. Courts and scholars started to accentuate the private interests of the parties, rather than exploring and justifying the question of jurisdiction only through the lens of public law.[38]

Parties can also agree to a jurisdiction clause as to which particular forum they would like to bring the suit. However, they cannot use such choice of court clauses capriciously. For example, a dispute over real property based in country A cannot be referred to the jurisdiction of country B, although the parties may have inserted a clause bringing such dispute to the forum of country B when country A claims exclusive jurisdiction for such disputes. Courts here may look at the location (situs) of the property in the process of connecting the dispute to the apposite jurisdiction.[39] Whether or not the dispute entails a jurisdiction clause, the forum always has the outright and ultimate control over it. Connecting factors as regards the ascertainment of jurisdiction will be discussed extensively in subsequent chapters, as appropriate.

1.4.2 Applicable law

The aspiration and desire of law is to achieve justice through its application. It is the law that reflects the values and norms of a particular society or civilisation at a particular time. These can be religious, social or secular in nature.[40] As far as disputes entailing issues and parties of the same jurisdiction are concerned, there is no disparity in the application of law, since it will, supposedly, be the law of that particular jurisdiction, although there might be some exceptions to it. For example, judges might prefer to give precedence to the law of another jurisdiction considering the nature of the dispute, be bound by any international legal norm, or the law itself could be international, which has been given effect by the domestic parliament. Parties might, at times, be of different cultures and convictions, though being from the same jurisdiction.

37 Ibid.
38 Ibid 149.
39 Hay 17.
40 Ibid 6.

Nevertheless, it is expected that the law of a jurisdiction should not, at least, be incongruous with the cultural and religious beliefs of any individual of its own jurisdiction.[41]

If the dispute involves parties from multiple jurisdictions and legal systems, it becomes a difficult task to determine which particular jurisdiction's law is to apply, since there is always a fear of prioritising one jurisdiction over another. This may, in turn, give rise to bewildering anomalies.

The procedure for determining the applicable law in PIL disputes is handled by the PIL choice of law rules. As far as these rules are concerned, unlike public international law, in PIL there is not a great deal of allegiance at the international level. Although, in recent times, considerable endeavour has been given to harmonise different areas of PIL at the international level, for example, the United Nations Convention on Contracts for International Sales of Goods 1980 and despite efforts from the Hague Conference on different important areas of PIL, there are still many areas that remain untouched. Therefore, the adjudication process, especially the deduction of applicable law in such international cases, is heavily reliant on domestic laws.[42]

Today's PIL, as regards applicable law, dates back to Roman law. For example, a person's domicile, indicating the person's relation to a particular territory, revealed the 'personal law' of that person. Law of this type would answer the questions of a person's capacity to enter into any legal relationship and citizenship.[43] The law of the situs (location of a thing), on the other hand, would regulate the rights in the thing, whether movable or immovable. The enlargement of the Roman Empire and the conferral of new citizenship on the inhabitants of the newly acquired territories, until the rise of city states, did not produce any conflicting issues. Following the emergence of city states, concerns developed about which law was to be applied in conflicting cases, because of the advent of rules of territorial law. In the period of the ancient Roman Empire, different laws were applied to non-Roman citizens compared to Roman. The concept of this different law emanated from the universal, natural law principles and traditions, the *ius gentium* ('law of people', later 'law of nations'), and this subsequently gave birth to

41 Cuniberti 3.
42 Ibid.
43 Hay 6.

today's international law. Such law used to be administered by a special official, known as the *praetor peregrinus*.[44]

In the city states, disputes were classified by the application of legal rules (*statuta*), namely, 'personal' rules applicable to the citizen wherever she/he was, and 'real' rules applicable only in the territory of the enacting state. Although the modern PIL methodologies no longer follow the *statuta* approach, in many cases they still operate similar tactics in the process of adjudication. One of the most striking features of PIL has been the existence of the notion of 'territoriality'. Jurists like Ulrich Huber, the seventeenth century Dutch jurist, who is considered to be the 'father' of modern PIL by many, Carl Georg von Wächter and Friedrich Carl von Savigny in Germany, Joseph Story in America in the nineteenth century and Brainerd Currie have always stressed the notion of 'territoriality'.[45] The idea of the term territoriality was deciphered by the above-mentioned jurists from different facets. According to Huber, territorial law should be applicable to all the people of a particular territory and confined to it as well. Savigny and Story, on the other hand, accepted the concept of 'comity' as a guiding principle, which suggested that the nations should have respect for each other in the process of the adjudication of PIL disputes. This would allow nations to apply foreign law, meaning the territorial law might be used beyond the frontiers of the territory. Whereas, Savigny and Currie proposed the application of the law of the forum in most cases.[46] International law and PIL history will be extensively discussed in the next chapter.

Territoriality was used as the only deciding factor by jurists for a long time. Personal contacts and relationships between the contesting parties were often overlooked. However, modern PIL does not concentrate on any specific variable, rather it employs different geographical criteria or pointers, namely, connecting factors in the process of acquiring the best possible law or applicable law for the PIL disputes. Hessel E Yntema and Ann Arbor observed that:

> "In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce, or, in

44 Ibid.
45 Ibid.
46 Ibid 6, 7.

other words, to mediate in the questions arising from such commerce in the application of local laws."[47]

Connecting factors regarding the determination of applicable law will be discussed in the subsequent chapters, as appropriate.

1.4.3 The recognition and enforcement of foreign judgments

A judgment does have different effects. Amongst other effects, it effectuates and/or enumerates rules on the rights and obligations of the parties. Finality of the rights and obligations of the parties is ensured through the execution of the judgment.[48] A judgment recognises if a contract is or was valid, and decides on marital issues if a divorce is granted etc. It can also make orders for remedies, such as asking the parties to pay damages or imposing injunctions to perform a particular act or to abstain.[49] There is a thin line between the notions of judgment and foreign judgment. The term 'judgment' can easily be perceived as a decision of a court. The prefix 'foreign' sits before the term judgment, when the latter is to be recognised and enforced in countries other than the one where the judgment has been delivered. The recognition and enforcement of foreign judgments is the important aspect of PIL as are jurisdiction and applicable law.

The key components of PIL discussed above, namely, jurisdiction and applicable law, are primarily and exclusively dependent on the internal situation of the forum state. The recognition and enforcement of a foreign judgment in a country is the instance in which it is unequivocally understood that the finality of PIL adjudications does not always depend on the forum and remain within the frontiers of the domestic country.[50] The recognition and enforcement of foreign judgments is probably the key differentiating factor between the polemics of PIL being termed outright as a concern of a particular country or national cause and PIL being termed as a concern of international cause.[51]

The guiding principles of recognising and enforcing foreign judgments are laid down by the recognising and/or enforcing state. It has long been the case that they are based on the mutual

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47 Hessel E Yntema and Ann Arbor, 'The Objectives of Private International Law' (1957) 35 The Canadian Bar Review 721, 741.

48 Cuniberti 291.

49 Ibid.

50 Ibid 295.

51 Ibid.

respect, reciprocity and affinity amongst countries.[52] Although there is no obligation at the international level, nevertheless, according to the doctrine of comity previously mentioned, states cannot pass over each other.[53] Von Mehren and Trautman have rightly opined that:

> "The ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result, and the normal patterns of life would be disrupted."[54]

It is not always the case that countries will comport with the notion of comity. Even if some countries have adopted the notion of reciprocity, due to the absence of any legal obligation in this regard, their forums may also abstain from using the tenets of comity. The greatest example of this is the US, which has always had a predilection for applying the principles of comity in terms of the recognition and enforcement of foreign judgments. However, there are a number of instances where the US courts have denied the recognition and enforcement of foreign judgments. In the case of *Hilton*,[55] the US Supreme Court enunciated that a French judgment ought not to be recognised if the forum were satisfied that a French court would not recognise and enforce US judgments in their jurisdiction. Although such a ruling has not been followed to a great extent, there are still many states in the US, such as Massachusetts and Florida, where the recognition of foreign judgments has been denied due to the dearth of a trade-off.[56]

The US Supreme Court in the case of *Hilton*[57] further observed that:

> "'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."[58]

Other than the concept of comity, other countries have adopted alternative theories in the process of the recognition and enforcement of foreign judgments. For example, England has adopted the theory of legal obligation. This makes the procedure obligatory and not conditional, which is not the case in the application of the concept of comity.[59] Canada, on the other hand,

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52 Ibid.

53 Ibid.

54 Arthur T von Mehren and Donald T Trautman, 'Recognition of Foreign Adjudications: A Survey and a Suggested Approach' (1968) 81 Harvard Law Review 1601, 1603 <https://www.jstor.org/stable/1339492?origin=crossref>.

55 *Hilton v Guyot* (1895) 159 US 113 (The Supreme Court of the United States).

56 *Evans Cabinet Corporation v Kitchen International Inc* (2010) 593 F 3d 135, 142 (1st Cir).

57 *Hilton v Guyot*.

58 Cuniberti 293.

59 Ibid 296.

stresses the concept of international private relations, which demands the rights and obligations of the parties to be recognised across frontiers. France, initially, was reluctant to recognise foreign judgments, due to the fact that people may have different family status in different jurisdictions.[60] However, the country later started to recognise divorce decreed in foreign countries. In terms of eradicating the confusion surrounding the recognition and enforcement of foreign judgments in EU countries, a number of PIL rules have been articulated at the EU level. In modern PIL, most of the recognising and/or enforcing countries tend to require two key factors before recognising and enforcing any foreign judgment in its territory. Firstly, they have to see if the foreign court did have the jurisdiction to hear the case concerned; secondly, they have to be satisfied that the foreign judgment does not contradict public policy.[61]

The issues that the recognising and/or enforcing countries, the international arena (the Hague Conference) and the EU have taken into consideration, in order to irradicate uncertainties and ensure stability with regard to the recognition and enforcement of foreign judgments, will be examined comprehensively in subsequent chapters, as appropriate.

1.5 The bearing of culture and religion on private international law

1.5.1 Cultural identity and law

The relationships between law and culture, and law and religion are very profound. The above discussion has posited as to how the definition of law or PIL ought to be perceived. It has also mentioned that PIL is deciphered as a part of domestic law. Therefore, the jurisprudential understanding of international will not be applicable to PIL. However, the question then remains unanswered as to what would be the mindset of the domestic legislatures in the process of legislating PIL rules? Essentially, the legislature while legislating PIL rules tend to take the religious and cultural practice of its own country into consideration and not of any other country. This is exactly where the understanding of cultural and religious bearings on law and/or private international law becomes so vital, because the legislation in private international law is not supposed to be designed for people of the same cultural or religious mindset, or of a particular geographical area.

60 Ibid 296–297.
61 Ibid.

In order to embark on an examination of the bearings of culture on law, it is important to define a few terms such as culture, legal culture and legal tradition.

Cristina de Rossi, an anthropologist at Barnet and Southgate College in London, in a narrative made to Live Science mentioned that:

> "The word 'culture' derives from a French term, which in turn derives from a Latin word 'colère', which means to tend to the earth and grow, or cultivation and nurture. It shares its etymology with a number of other words related to actively fostering growth."[62]

She went on to articulate that:

> "Culture encompasses religion, food, what we wear, how we wear it, our language, marriage, music, what we believe is right or wrong, how we sit at the table, how we greet visitors, how we behave with loved ones, and a million other things."[63]

Anthony Amsterdam and Jerome Bruner, while describing the enmeshments and complexities of culture and its relationship to law, said that:

> "Cultures are marked by contest for control over perceptions of reality. In any culture, there are both canonical versions of how things really are and should be and countervailing visions about what is alternatively possible. What is alternatively possible comprises both what is desirable and beguiling and what seems disastrous and horrifying. The statutes and conventions and authorities and orthodoxies of a culture are always in a dialectical relationship with contrarian myths, dissenting fictions, and most importantly of all, the restless powers of the human imagination."[64]

Over the last two decades or so, the term 'legal culture' has been intensively discussed amongst legal academics, anthropologists and sociologists. Legal culture is one of the important constituent elements of culture that deals with issues relating to the development and making of a law. According to the widespread understanding, legal culture epitomises the cultural background of law as to why and how a law is made. The cultural background also encompasses the role of law in society, the role of legal sources, and the authority of different

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62 Stephanie Pappas and Callum McKelvie, 'What is Culture' 2022 Live Science <https://www.livescience.com/21478-what-is-culture-definition-of-culture.html>.

63 Ibid.

64 Anthony Amsterdam and Jerome Bruner, *Minding the Law* (Harvard University Press 2002) 231–2.

legal actors and institutions.[65] It is often argued that the relationship of legal culture and general culture is problematic since law is such an overarching area that involves almost all of the elements of culture. In order to eradicate this confusion, Lawrence M Friedman suggests two terms; namely, internal legal culture and external legal culture. Internal legal culture talks about the attitude of the legal actors or makers of the law towards law, whereas external legal culture describes the attitude of general people towards law.[66]

Be it legal culture or general culture, the relationship between law and culture as a whole is embedded in law. De Montesquieu postulated, in his work *Esprit des Lois* (1748), of 'the necessity for positive law to be adapted to the geographical features of the country and the cultural characteristics of its people'. Legal culture can be of different types – it could be national, continental, or international. The notion of law as a cultural accomplishment of a particular geographical area became popular in the nineteenth century, when Friedrich Carl von Savigny had European legal culture in mind while explicating law as a cultural achievement. Max Weber, on the other hand, found a considerable number of cultural differences within the frontier of Europe, namely, between civil law and common law countries.[67]

Understandably, it is the national culture that has an impact on the process of developing and making any domestic law, which includes PIL. The understanding of national culture is, therefore, of pivotal importance in order to ascertain how the national or domestic culture influences the process and making of private international law, where the latter is supposed to take not only nationals and national issues into consideration, but also the personalities and other associated issues beyond the border. It is, however, true that even within one country multiple cultural and religious values may exist. In such circumstances, the legislators of that particular country are obliged to be aware of these values and take them into consideration. It is even illogical and impractical to think that legislators in a domestic circuit would take the values of all the cultures and religions of the world into consideration while enacting laws, which, theoretically, should have been the case in the process of PIL rules' enactment.

1.5.2 The intrinsic relationship between religion and law

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65 Ralf Michaels, 'Comparative Law' in Basedow, Hopt and Zimmerman (eds), *Oxford Handbook of European Private Law* (Oxford University Press 2011) 2.

66 Ibid.

67 Ralf Michaels, 'Legal Culture' in *Oxford Handbook of European Private Law* 2.

The cultural values, religion or religious values of a particular society or country have an immense influence on its law and/or in the making of its law. In fact, the relationship between law and religion is much more delicate, since the latter involves individuals' sentimental and emotional issues. Unanimity on the issues of cultural influence on law in a particular system is comparatively easier to achieve than it is on the issues of religious influence on law. The very reason for such disparity is that culture is predisposed to the manifestation of a society or country disregarding the faith and personal beliefs of the individuals, whereas the notion of 'influence of religion' is itself bewildering, since it is not evident as to which particular religion is talked about when this notion is discussed because a society or country entails people of different religious faiths and beliefs. Despite having differences, culture and religion are concomitant to influencing law and the making of law.

Over the last few decades, thinkers, philosophers and academics from different spheres, namely, social science, anthropology, law, religion and politics, have been striving to put the category of 'religion' under rigorous critical scrutiny. A question is often raised, as to whether religion should be singled out in the law.[68] Vigorous criticism and discussions of such kind can be found in the political theory of religious freedom. Prominent political philosophers have been asking questions in this regard such as: what justifies the special treatment of religion in the law? Do legal constructions of religious freedom adequately protect all forms of religious life? And, is the special protection of religion an unfair protection granted to religious believers?[69] Political and social roots have been transformed by the philosophy into institutional modernity. Religion began as a social force and has been subsequently transformed into a philosophy that would guide the practices of the institutions by a set of principles.[70]

Though the idea of secular state was to separate religion from state and its law, interference of religion can be seen in the laws of secular states. The notion of secular state or society has failed to eradicate religious interference in making of the law, as it has been argued by some critical scholars that 'legal treatment of religion still bears the marks of the ethnocentric, western, textualist, Protestant and belief-based understandings of religion that have

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68 Cécile Laborde, 'Religion in the Law: The Disaggregation Approach' (2015) 34 Law and Philosophy 581, 1 <http://link.springer.com/10.1007/s10982-015-9236-y>.

69 Micah Schwartzman, 'What If Religion Is Not Special?' (2012) 79 The University of Chicago Law Review 1351, 1351–1427.

70 Mark Weston Janis, 'Remarks by Mark Weston Janis' (1988) 82 Proceedings of the ASIL Annual Meeting 195, 199 <https://www.cambridge.org/core/product/identifier/S0272503700073110/type/journal_article>.

accompanied the rise of the modern, secular euro-Atlantic state.'[71] It has often been observed that a religion which has the majority of followers in a country somehow has an impact on the national legislation, even if the country claims to be secular constitutionally. It can, however, be argued that if the influence of religion on law remains an issue of concern within the frontier of a country, how can it not be an issue of concern for countries in the process of enacting private international law that is invoked in disputes involving parties from different jurisdictions.

International law is also not immune from the influence of religion as Kent stated:

> "The Law of nations, so far as it is founded on the principles of natural law, is equally binding in every age, and upon all mankind. But the Christian nations of Europe, and their descendants on this side [of the] Atlantic, by the vast superiority of their attainments in arts, and science, and commerce, as well as in policy and government; and, above all, the brighter light, the more certain truths, and the more definite sanction, which Christianity has communicated to the ethical jurisprudence of the ancients, have established a law of nations peculiar to themselves. They form together a community of nations, united by religion, manners, morals, humanity, and science, and united also by mutual advantages of commercial intercourse, by the habit of forming alliances and treaties with each other, of interchanging ambassadors, and of studying and the same writers and system of public law."[72]

A question might be raised as to how the above-mentioned narration could be linked to the research question. The answer is that since the connecting factors are an integral part of PIL, which is in fact a form of domestic law, then how would it be ensured that the principles and maxims of connecting factors are overarching, both on the parts of national and foreign subjects and issues in question, without being influenced by any particular culture and/or religion.

An apt example of such an issue can be observed from the perspective of Bangladesh, where the Law Commission has drafted a bill several years ago to amend the existing Hindu Law, which originates from the colonial era. This law contains numerous discriminatory provisions as regards caste, gender, inheritance of property etc. It also lacks provision for divorce among

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71 Cécile Laborde 583-584.

72 James Kent, 'Commentaries on American Law' (1832) 1 O Halsted 572, 3–4.

Hindu married couples. Regrettably, due to the objections from the fundamentalist Hindus, the process of amendment has come to a standstill.[73]

If the religious issues and values can be a matter of concern within the system of a country, unlike culture (although there some exceptions may be found where cultural issues may also be a concern within the country) as discussed above, then how can it not be a matter of unease when the domestic legislature to set out guidelines on cross-border issues where other jurisdictions may be predisposed to a different religion and culture that, at times, might also seem extra-terrestrial to the domestic legislature. Substantiation of these issues can be seen quite evidently when a domestic court is required to apply the law of another country and/or recognise and/or execute a foreign decision.

Religion in the shape of religious law or personal law is often seen as an inextricable issue in cross-border family disputes. Judges of the European states in such cases seem to be in two minds while applying any religious law or personal law being invoked often by litigants from the minority groups, that is alien to their legal system.[74]

In an English case of *Akhter v Khan*[75] the Court of Appeal while stressing upon the point of the certainty of 'marital status' has ruled that Islamic faith marriages are considered to be 'non marriages' according to the law of England of Wales. Couples in this case had undergone the 'nikah' ceremony in the UK but did not later undergo the civil ceremony which is the formal registration of the marriage as required by the law of England and Wales. This decision might seemingly appear to be labelled as 'malevolent' by some. However, the significance of this verdict is crucial particularly in situations such as the dissolution of marriage, property division, maintenance, child custody etc., where the court faces significant challenges or may sometimes be unable to provide remedies to the parties if they are not officially registered as a married couple required by the law of the land as was the case here. It is presumed that this ruling will also prevent fraudulent marriages.

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73 Dhaka Tribune, 'Reformists Welcome HC Ruling on Rights of Hindu Women' <https://www.dhakatribune.com/bangladesh/court/311194/reformists-welcome-hc-ruling-on-rights-of-hindu>; Dhaka Tribune, 'Hindu Leaders at Loggerheads over Reforms' <https://www.dhakatribune.com/bangladesh/258636/hindu-leaders-at-loggerheads-over-reforms>.

74 Maarit Jäntera-Jareborg, 'Cross-border Family Cases and Religious Diversity: What can judges do?' (2013) Uppsala Faculty of Law Working Paper 4.

75 *Akhter v Khan* [2020] EWCA Civ 122.

Challenges confronted by the European judges in cross-border family disputes involving the issues of religion and culture have been encapsulated by Prof. Maarit Jäntera-Jareborg into four points.[76] And they are:

First, since the European judges identify themselves as secular judges and consider matters relating to any faith falling outside the ambit of their professional capacity, hence issues concerning religious provisions cause them grave disquiet. As Munby J. in the case of *Sulaiman v Juffali* uttered that 'Religion – whatever – the particular believer's faith – is no doubt something to be encouraged but it is not the business of the government or of the secular courts."[77]

Second, the courts are only obliged to adjudicate matters that have legal basis as per the *lex fori*. The courts may therefore become disinclined to adjudicate matters that are purely based on religious practices, ethos, traditions etc.

Third, cases entailing disputants having their personal laws based on religious laws being codified by their states of origin where the latter demand full compliance of their laws even where the concerned persons live in another country and the concerned persons are left with no choice but to invoke the personal laws codified by their states of origin.[78]

Fourth, there is a fair amount of risk of parallel legal or religious proceedings, if the concerned parties have different choices of jurisdiction which may lead to conflicting decisions and may worsen legal relationship between the states.

The practical solution to immune PIL rules, relevant substantive laws and PIL disputes from the influence of any particular culture or religion could be the internationalisation of legislating and adjudicating processes of PIL and PIL disputes respectively by disentangling them from the domestic legislatures and courts.

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76 Maarit Jäntera-Jareborg 4-6.

77 *Sulaiman v Juffali* [1951] 2 FCR 427, 439.

78 S. N. Ebrahani, "An Overview of the Private International Law of Iran: Theory and Practice" (2010) XII Yearbook of Private International Law 516.

Chapter 2: Historical development of private international law

2.1 Introduction

> "What you hold to be true about the world depends on what you take into account, and what you take into account depends on what you think matters."[79]

This catchphrase might seem to be out of context, however, the versatility of the manifestations of authors on a particular subject do not necessarily make such a sentence redundant. The juxtaposition of intrinsic and extrinsic elements of a particular idea or topic, what is important and relevant, along with what is being valued by the author, are deciding factors for the author to show in their writing on any topic.[80] As far as the inception and development of international law and PIL is concerned, difference of opinion amongst the academics is quite evident. With regard to international law, Professor Neff has rightly pointed out that:

> "No area of international law has been so little explored by scholars as the history of the subject. This is a remarkable state of affairs, probably without parallel in any other academic discipline (including other branches of law). Although this intellectual scandal (as it well deserves to be called) is now being remedied, we are still only in the earliest stages of the serious study of international legal history."[81]

As noted in chapter 1, there is a common perception amongst many scholars that international law deals only with issues of public international law. Such notion ostensibly becomes more manifest when it is said that the progressive expansion of international law is concerned only with public international law such as issues that are related to affairs between states,[82] or when it is said that PIL is a part of the domestic law of states and not any international instrument.[83] Such concepts have been termed as 'myths' by Professor Mills, who stated that the historical development of both PIL and public international law are intrinsic and interconnected, and should be narrated not only from the perspective of historical facts, but also from the perspective of contextual factors.[84] In fact, drawing differences between PIL and public

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79 Susan R Marks, *The Riddle of All Constitutions* (Oxford University Press 2000) 121.

80 Alex Mills, 'The Private History of International Law' (2006) 55 International and Comparative Law Quarterly 1, 2.

81 S Neff, 'A Short History of International Law' in M Evans (ed), International Law (OUP 2013) 31.

82 Malcolm N Shaw, *International Law* (5th edn, Cambridge University Press 2003) 42–7.

83 JG Castel, *Canadian Conflict of Laws* (3rd edn, Butterworths 1994) 3.

84 Mills 1–2.

international law is relatively new and did not exist prior to the nineteenth century.[85] The clandestine disquiet between the expression and characterisation of public and private became explicit in the last century, due to the escalating concern about the enforcement of contractual choice of law provisions.[86] The idea here is not just spelling out the historical background of PIL rules, but rather the inception and evolution of PIL should be understood by the exploration of the ideas and propositions of international legal theorists, academics and thinkers who, at times, might not be viewed as being connected to aspects of PIL.[87]

A question might arise as to why the topic of public international law has been brought so frequently into discussions about PIL. The answer is twofold. Firstly, to grasp the understanding of international law in its entirety. Secondly, to prevent PIL from being isolated from the domain of international law.[88]

2.1.1 Underlying inclinations towards international law: naturalism and positivism

In any international relations, it is important for people to know how they can grow relations with other people from distinct political, religious and cultural backgrounds, in a peaceful, predictable and beneficial manner. In order to answer the question of 'how', the narrative of 'silent trading' between the Carthaginians and an unnamed North African tribe in the sixth century BC, expounded by Herodotus (known as the father of history), is apparently the most apposite cradle.[89] According to Herodotus, the Carthaginians used to arrive in the ports of this unnamed North African tribe and unload their vessels or, in other words, deliver their goods in the tribe's locality without interaction. On their way back, the Carthaginians would give a smoke signal that meant they had delivered goods. The natives of the tribe would then come to the shore area to inspect and collect the goods. If satisfied, they would leave gold at the place from where they had collected the goods and would then leave. Then, the Carthaginians would return to see if gold had been left in consideration of the goods delivered, and if it represented a fair price. In these times, gold equalled consideration. If the consideration made by the tribe was not considered to be a fair price, then the Carthaginians would leave without taking it. If this occurred, the natives would return to the shore and leave more consideration. This process

85 Joel R Paul, 'The Isolation of Private International Law' (1988) 7(29) Wisconsin International Law Journal 149, 155.
86 Ibid.
87 Mills 3.
88 Paul 149–178.
89 Neff 34.

would continue unless and until both parties reached a unanimous point of being content. The entire system, according to Herodotus, was the most flawless and trustworthy system of interaction between people from different backgrounds and was immune from any kind of conflict.[90]

The notion of silent trading was, without a doubt, successful in order to accomplish relations beyond the frontiers.[91] However, different aspects of this method could not fulfil the expectations and/or serve the purpose of skilful political interactions between the states. Instead, something very precise and elaborate was called for, in terms of doing justice or merit to a term named 'international law'. And there, exactly, the complications and ambiguity regarding the inception of the term international law emerged.[92] The ambiguity, to date, leads to a great deal of scepticism as to when international law came into being. If it is understood as an assemblage of mechanisms of any relation that ensures predictability and trustworthiness, then its inception can be traced back to the above-mentioned history of silent trading. If it is interpreted as a substantive code of conduct applied to nations, then the birth of international law would be the late classical period and the Middle Ages.[93] If substantive principles applied uniquely to states are termed international law, then the seventeenth century would be its initiation period. If international law refers to a single community under a rule of law, where there is an integration of all states of the world at large, then the nineteenth century would be perceived as its commencement. However, if international law is comprehended as the enactments and judicial decisions of a world government and courts, respectively, then it could be said that the birth of international law lies somewhere in the future.[94]

Given the above-mentioned scenarios in the search for the definition of international law, three areas of Eurasia are of utmost importance. These being Mesopotamia, approximately the fourth or third millennium BC, northern India in the Vedic period after about 1600 BC, and classical Greece. They were characterised as having states with more or less the same religious, political and cultural backgrounds and a similar value system.[95] The juxtaposition of cultural unity and political fragmentation was in existence in all of these three systems. This not only helped to develop a number of fairly standard practices but created inter-state relations to a certain

90 Ibid.
91 Ibid.
92 Ibid.
93 Ibid.
94 Ibid.
95 Ibid.

extent.[96] Diplomatic relations, treaty-making and the conduct of war are the areas where the manifestation of the development of the above-mentioned three state systems were found. One of the major contributions of the Greek city-states could also be found in their usage of the arbitration of disputes.[97]

It was Jeremy Bentham who first coined the word 'international' in his book *An Introduction to the Principles of Morals and Legislation*, published in 1789.[98] The term 'international' was aligned with another term 'jurisprudence' and later was introduced as 'international law'. Initially, it was known as the law of nations or *ius gentium*, which according to Jeremy Bentham was a misleading term:[99]

> "The word international, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes under the name of the law of nations: an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence."[100]

International law has endured an identity crisis since the very onset of its birth. For the most part of its development, it has been presumed to be affiliated with natural law.[101] According to the narrative of Hugo Grotius (1583–1645), who is known as the father of the modern science of international law, this was not because it was based on the theories and traditions of natural law. In fact, such relationship between international law and natural law was in existence due to the lack of development of positive international law.[102] While the idea of positive international law was relatively less underscored by jurists across the world, the jurisprudence of natural law matured immensely in Europe for almost two millennia.[103] This jurisprudence relating to natural law is a part of *philosophia perennis* (a set of philosophical truths that are in

96 Ibid.
97 Ibid 34–35.
98 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (JH Burns and HLA Hart eds, Athlone 1970).
99 Hidemi Suganami, 'A Note on the Origin of the Word "International"' (1978) 4 British Journal of International Studies 226.
100 Bentham 296.
101 Sir Frederick Pollock, *Essays in the Law* (Macmillan 1992, 1922) 63.
102 Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 The European Journal of International Law 269, 270.
103 Ibid.

existence and accepted across all frontiers and civilisations[104]) and, therefore, may be referred to as the perennial jurisprudence of natural law.[105]

The perennial jurisprudence of natural law dominated the entire realm of law until the period of the 'European Enlightenment'. The Enlightenment or the great Age of Reason is defined as the period of rigorous scientific, political and philosophical discourse that characterised European society during the 'long' eighteenth century: from the late seventeenth century to the ending of the Napoleonic Wars in 1815. This was a period of huge change in thought and reason, which in the words of historian Roy Porter was 'decisive in the making of modernity'. Centuries of custom and tradition were brushed aside in favour of exploration, individualism, tolerance and scientific endeavour, which, in tandem with developments in industry and politics, witnessed the emergence of the 'modern world'.[106] During the time of European Enlightenment the jurisprudence of natural law was interpreted and depicted in a way that was in opposition to the perennial jurisprudence of natural law, and that was due to the tendency towards legal positivism.[107]

In this regard, it is apposite to mention the comments of Professor Stephen Hall:

> "[I]nternational law was virtually synonymous with the natural law until the nineteenth century when the new doctrine of legal positivism supplanted Enlightenment naturalism as the dominant legal philosophy. Whereas the perennial jurisprudence of the natural law had conceived of the natural law and the positive law as complementary aspects of a single juridical reality, Enlightenment naturalism rejected or underestimated the role of positive law in regulating international relations. The confusion this error caused in international law rightly discredited Enlightened naturalism. This did not, however, lead to a revival of older and more complete concepts of natural law. Austin's positivism expelled international law from the province of jurisprudence because it failed to conform to that theory's narrowly constructed definition of 'law'. Successive attempts by leading legal positivist to redeem international law for their school have led to a dilution of positivist doctrine but have not furnished a coherent account of international law's juridical character. These revisions have failed to explain the persistence of non-positive juridical phenomena in the system, which may

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104 Heinrich Albert Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy* (Liberty Fund 1936) 27–28.

105 Hall 270.

106 Mathew White, 'The Enlightenment' [2018] British Library <https://www.bl.uk/restoration-18th-century-literature/articles/the-enlightenment> 3.

107 Hall 270.

be highlighted by a detailed consideration of international law's sources. Legal positivism is having an adverse impact on the theory and practice of international human rights law."[108]

The ascendency of natural law/Roman law in international law, and how the positive law elements made their entrance in the realm of international law will be comprehensively examined in section 2.2.1 and section 2.2.2, respectively.

2.2 The origins of private international law

2.2.1 Bearings of Roman law on international law and private international law

The earliest development of PIL can be traced back to the era of Roman law. Although there was no mention of PIL in Roman law, the latter does have a great deal of influence in the gestation of PIL. The modern maturation of PIL, thus, requires an in-depth study of its origins. Savigny, in this regard, more precisely stated that 'a right understanding and criticism of modern principles and practice is only possible after a thorough examination of the doctrines of the Roman Law'.[109] The authoritarian creed of Roman law embodied the concepts of its universality and the hegemony of its realm. The Romans adopted the Greek philosophy of natural law that were closely linked with Aristotle and the Stoic school.[110] It can, therefore, be postulated that Roman law entailed two elements, one is its universality and the other is the domination of its empire. There was no issue of conflict of laws, since the Romans demanded integration of other territories as part of their empire.[111] The Romans only conceded the universalisation of their own law, without showing deference to any other law or legal system.[112]

In the latter part of the Roman Empire, the universality of Roman legal order was diluted by creating distinctions between citizens and non-citizens.[113] *Ius civile* (entirety of all legal norms) applied only to Romans and *ius gentium* (the law of people) applied to non-citizens or non-Romans.[114] *Ius gentium* is presumed to be the origin of international law, as it applied to all

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108 Ibid 269.

109 Friedrich Carl von Savigny, 'A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time' [1880] T & T Clark 435, 50.

110 JM Kelly, *A Short History of Western Legal Theory* (Clarendon Press Oxford 1992) 14.

111 M Wolff, *Private International Law* (2nd edn, Clarendon Press Oxford 1950) 20.

112 Mills 5.

113 Kelly 61.

114 Shaw 16.

humankind, whether Roman or foreigner, especially in the course of commercial relations.[115] Although *ius gentium* was handled by the Romans, nevertheless, it was not dependent on any Roman institutions.[116] The detailed application of *ius gentium* is still not clear,[117] neither is it clear if the concept of *ius gentium* derived from the natural law system, where the principles of universal legal order would be reflected.[118]

One of the most striking principles developed by the Romans was that every forum was suitable for suit, every person could sue or could be sued where he or she resided.[119] In order to universalise the Empire, the Romans gradually eradicated local laws, introducing or expanding their own instead.[120] Universalisation is the only element of Roman law that can be seen to have a great influence on the universalisation of modern PIL,[121] although it never distinguished between PIL and public international law.[122] It is important for the exponents of the universalisation of PIL to learn that it is not integration with hegemony over others, but the assimilation with other territorial laws with required respect proffered towards each other, which will ensure the materialisation of true universalisation of PIL. Would it therefore be wrong to say that in the journey to achieving such an accomplishment, we have truly been blessed by the organisation named the Hague Conference on Private International Law (HCCH)?

2.2.2 Influence of statutism

It is believed that the modern status of conflicts and the development of PIL has emerged from the medieval period.[123] The gradual collapse of the Roman Empire resulted in the rise of the importance of ethnic and tribal communities. There was no territorial map of Europe at that time, neither were the physical boundaries important to people, with the exception of the Frankish Empire.[124]

> "For several centuries following the collapse of the Roman Empire there was no territorial authority governing all persons living within a certain area.

115 Herbert Felix Jolowicz, *Roman Foundations of Modern Law* (Clarendon Press 1957) 38–39.
116 Mills 6.
117 Jolowicz 38–39.
118 Mills 6.
119 Jolowicz 40.
120 A Arthur Schiller, *Roman Law: Mechanisms of Development* (Mouton Publishers 1978) 539–541.
121 See Mills 6–7.
122 Paul 156.
123 Jolowicz 38–40.
124 Savigny 58.

> Generally, persons were subject to laws of their tribe without regard for territorial boundaries. As feudal institutions developed in the tenth through twelfth centuries, persons were subject to the rule of feudal lord. Foreign laws were disregarded, there was no idea of universal personal rights. As cities emerged, replacing fiefdoms, and commercial relations increased among traders, subject to different municipal authorities, conflicts principles evolved."[125]

In order to decipher the doctrine of Statutism, it is necessary to discuss the initial introduction of personal law, natural law and local law as well as conflicts between them in the context of the post-Roman Empire.

After the collapse of the Roman Empire, the system of social institutions started to be reflected in the legal ordering, according to which the law in any dispute used to be decided according to the personal law of the disputants, and not by the location of the court, the location of the incidence or the property.[126] The system was such that people would carry their 'personal law' with them wherever they go.[127] Prior to the development of PIL, early city-states considered that their law would be applied only to their own subjects. During the period between the end of the Roman Empire and the Renaissance, the notion of personal law was dominant.[128] Italian city-states invoked the concepts and principles of personal law beyond the frontier of Europe.[129] One example of introducing the concept of personal law was the insertion of provisions of personal law in business agreements between Italians and the Islamic states that allowed disputes between Italian traders and other Italians living in the Islamic states to be resolved under Italian law in the local courts of the Islamic states.[130] The idea of introducing such a notion beyond the frontier of the West was reflected in the system of capitulations (which at times was not reciprocal), allowing the Europeans to create their own legal community and establish their power, on the soil of a foreign state.[131]

The resurrection of natural law was brought in, in the era of the Italian renaissance, through the revival, re-adoption and reinterpretation of the classical Roman and Greek postulations.[132] It is believed that the European Middle Ages were the greatest time of natural law, where its notions

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125 GC Cheshire, *Cheshire and North's Private International Law* (10th edn, Butterworths 1979) 17–18.
126 Mills 6.
127 Yntema, 'The Comity Doctrine' (1966) 65 Michigan Law Review 9.
128 Mills 7.
129 Neff 36.
130 Antonio Cassese, *International Law* (Oxford University Press 2001) 23.
131 Ibid.
132 Kelly 82-84, 165-167.

were developed under the umbrella of religious institutions, namely, the Catholic Church. However, it has to be kept in mind that the legacy of the classical Roman and Stoic legal tradition was the idea at the onset, and not Christianity.[133] The foremost rationale of the natural law tradition was postulated by Thomas Aquinas, who was a rationalist in his ideas and thoughts. According to his postulation, the content of natural law is inclined to new discovery, and its application is based on human reason, rather than revelation.[134] It was during the Italian Renaissance that the idea emerged that natural law is not only for the natural world, but also for the human world. This subsequently reinvigorated the Roman idea of universal natural legal order.[135] The actual substantive content of Roman law was readopted through the re-initiation of the Roman idea of universal law, in which some laws were interpreted and applied directly from the authentic texts of Roman sources.[136]

The Roman concept of universal law was amended at a later stage to conform to the doctrine of Christianity. Therefore, the natural law could be seen to be a divine law emanating from the religious scriptures. On the other hand, it could also be interpreted that natural law is based on reason.[137] Yet again, it could be said that the form of natural law, which is presupposed to be closely related to the Roman concept, is the presumption of an objective sense of reason.[138] However, in order to lessen the rigid philosophical understanding of natural law, and to bring natural law to positive law, many natural law theorists asserted that the determination of natural law should not be overstressed, stating that natural law should not be expected to be a complete system of law, but rather a framework for positive law.[139]

The concept of local law emerged with the transformation of Italian towns into city-states around the time of the Italian Renaissance. This development fixed the territorial boundaries of the cities.[140] To ensure more pragmaticism in the areas of sociology and the economy of humankind and to protect the land from invaders, city-states evolved with increasing power and influence.[141] In order to create some uniformity amongst them, Roman law was adopted

133 Neff 36.
134 Ibid.
135 Mills 8.
136 Ibid.
137 Kelly 142.
138 Ibid 57-59.
139 Rommen 53-55.
140 Mills 9.
141 Jünger, 'A Historical Overview in Selected Essays on the Conflict of Laws' (Transnational Publishers 2001) 9.

and interpreted quite similarly by different city-states. This gave birth to the concept of *lex mercatoria*, which was then widely accepted across Europe.[142] However, due to the differing interpretations of Roman law in other aspects, and the legislative action of the city sovereign, the importance of local law across the territorial city-states started to emerge.[143] Although, theoretically, the origin of the laws of city-states was based on natural law and the reinterpretation of Roman law, variation and countervailing growth emerged across the European city-states. This resulted in a conflict between natural law and local law, and conflict between foreign law and local law.[144]

2.2.2.1 The clash between natural law and local law

Universality has been a unique feature of natural law since the very inception of the birth of the concept, although there have been many theoretical opinions about the nature of the universality of natural law.[145] The substance of natural law covers almost all the areas of heaven and earth, ranging from the human body to thoughts to angels in the heavens.[146] Local law, by means of its term, can be denoted as being confined to a particular area. From an etymological point of view, the difference between natural law and local law is evident. However, Aquinas, from a different perspective, characterised such a problem through the distinction of natural law and human law.[147] According to the natural law theorists, natural law rules and principles should exist everywhere objectively, in the very nature of things, and not as a product of mere human will or any convention.[148] Every legal system must follow the basic principles of natural law.[149] However, the idea of having local law was not to supplant natural law, but to supplement the broad and sometimes critical natural law principles in an elaborative manner.

2.2.2.2 The clash between foreign law and local law

With the evolution of local law in city-states, the difference and/or conflict, in terms of legal systems amongst the city-states, became apparent.[150] In the beginning, city-states used to apply

142 JH Baker, 'The Law Merchant and the Common Law before 1700' (1979) 38 Cambridge Law Journal 295.
143 Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan 1954) 41.
144 Mills 9, 10.
145 Ibid 6.
146 Neff 4.
147 Nussbaum 38.
148 Hedley Bull, 'Natural Law and International Relations' (1979) 5 British Journal of International Studies 171, 172.
149 Mills 10.
150 Ibid.

their own law to any dispute that came to their domestic courts.[151] However, as time went by, the legal relationship of city-states was not confined to their own boundaries. One of the core reasons for expanding the legal relationship of the city-states across the frontier of Europe was international trade and commerce. European city-states started to become involved in different trade routes and did business with other regions of the world, especially the Middle East. The pre-existing differences between the local laws as well as legal systems of city-states were saddled with another concern – legal systems which were entirely opposite to those of European city-states.[152] However, the miscellany of all these different legal systems was combined with an increased level of mutual respect, confined not only to the European city-states, where the legal systems were more or less influenced by the Roman law, but to the other parts of the globe, due to the broadening outlook of the world view and increased trade and commerce.[153]

The difference between the legal systems of different city-states and nation states gave birth to a new concern relating to practical and ideological differences, which transpired to be a legal problem.[154] As far as the European city-states were concerned, the legal systems of every city-state, more or less and/or directly or indirectly, were influenced by Roman law or were interpreted within the framework of Roman law. Therefore, it could well be presumed that justice would be ensured, no matter in which city-state the dispute was resolved.[155] On the other hand, when a dispute was seen to be largely involved with a foreign city-state, there had always been some concerns as to which legal system would be reasonable and/or trusted by the parties. Questions also arose as to whether the parties had any particular legal system in mind, where they would prefer their disputes to be adjudicated and how would the court resolve disputes taking into account the differences of the legal systems to which the parties belonged.[156] It is, however, presumed that the idea which helped answer all these queries is the idea of PIL,[157]

151 Max Gutzwiller, *Geschichte Des Internationalprivatrechts: Von den Anfängen bis zu den grossen Privatrechtskodifikationen* (Helbing & Lichtenhahn 1977) 292.
152 Mills 10.
153 Hessel E Yntema, 'The Historic Bases of Private International Law' (1953) 2 The American Journal of Comparative Law 297, 299.
154 Mills 10.
155 Ibid.
156 Ibid.
157 Ibid.

despite the fact that the differences between international law and municipal/local law were mostly unknown to the early international law scholars.[158]

Subsequently, PIL rules were interpreted as a part of universal natural law. This enabled diverse legal systems to determine which particular legal system, as well as positive law, would apply to a particular dispute.[159] In the late twelfth century, a famous jurisconsult from Bologna named Aldricus first argued in court that it should apply the most 'better and useful' law when the dispute involved multiple legal systems.[160] The point worth noting here is that PIL was first conceived as part of a universal (natural) international legal system, and not as part of local law which would differ from city-state to city-state.[161]

2.2.2.3 The clash between personal law and territorial law

We have already seen the two forms of law in terms of social organisation, namely, personal law and local law. The former states that the law of a person will be determined by virtue of their association with, or membership of, a particular clan, tribe or any national group. The idea of local law or territorial law is that law will always be associated with a particular region or territory. An increasing amount of tension emerged in the search for reconciliation or a meeting point between these competing ideas of legal systems.[162] The rationale of the birth of the statutist approach was to de-escalate this tension. The approach was closely associated with the natural law theorists.[163] According to this approach, every law is in association with either of the above-mentioned laws, namely, personal law and territorial or local law.[164] If a matter is inherently attached to a person, then the law that applies to the matter outside the frontier of the statutory authority is personal law. On the other hand, when a matter is attached to the land of a particular jurisdiction, then the law that applies to the matter is termed as local law.[165] In both the personalities of the parties (personal and local), the court has to be vigilant and cautious while identifying the law applicable to the dispute, in order to investigate whether the statutory authority has made any relevant personal laws and real laws of the place where the

158 David Kennedy, 'Primitive Legal Scholarship' (1986) 27 Harvard International Law Journal 1.
159 Wolff 22.
160 Ibid.
161 Mills 10.
162 Ibid.
163 Wolff 23–25.
164 Mills 11–12.
165 Ibid 12.

disputed action occurred.[166] Through the presentation of the schism between personal and local law, the statutist approach unearthed the emergent complexities of the political, economic and social order on the basis of two competing ideas of the then international order – the division of the world into peoples and the division of the world into territories.[167]

The statutist approach also talked about the conflict between foreign and local law, by initiating a well-developed and analytical way of 'natural law' thinking as to which laws had extraterritorial effect and in which circumstances, and which laws, were outright territorial.[168] It is again worth mentioning that this notion of the statutist approach is the very basis of the concept of PIL, which can be interpreted as a part of a universal and international system of law.[169]

Although the statutist approach initially looked promising, based on the contemporary social circumstances, it was not flawless.[170] The schism of statutes into two different categories became complex and challenging at the same time. In response to such challenges, a third category was introduced, namely, 'mixed-statutes'. This category was, at times, used as a third type of classification, and sometimes to cover those statutes which could neither be termed as personal nor real.[171] The process of classifying statutes was dependent on the judges' interpretation methods, which transpired to be flawed and full of uncertainties in a number of aspects. Such disorganised interpretation methods drove the process of classifying statutes into difficulty; however, the uncertainties of the interpretative method were not the only things to be blamed, but also the inherent pragmatic culture of balancing between foreign and local systems from political perspectives.[172] The excessive reliance on the approaches to interpreting statutes also caused confusion, because the interpretations made distinctions based on the form of the statutes rather than taking the substance of the legislation into consideration. In this regard, Professor Bar said that the statutist method failed because of the absence of any real substantial ground of classification.[173]

166 Ibid.
167 Jünger 13.
168 Mills 12.
169 Ibid.
170 Yntema 15.
171 Nussbaum 42.
172 Mills 12.
173 Ludwig von Bar, *The Theory and Practice of Private International Law* (GR Gillespie tr, 2nd edn, W Green & Sons 1892) 32.

Professor Bartolus de Saxoferrato once found himself into dire difficulty while infamously categorising the English rule of primogeniture, a rule which enunciated that all property was inherited by the first-born son.[174] However, he was later criticised for his inclination towards the form of wording used in the rule (which may be termed as a literal rule of statutory interpretation in modern times).[175] In order to avoid such complexities with the method of interpreting the statutes, a later statutist named De Coquille proposed a more teleological interpretative methodology that would reflect the presumed intention of the legislator, perhaps anticipating the policy analysis approaches of contemporary America.[176] It should be noted here that the resolution of de Saxoferrato in relation to the problematic approach of the interpretative method was partly supported by the argument that English law was 'odious' or extremely repulsive. Such arguments constructed not only the idea of a 'better law' approach, which was originally developed by Professor Aldricus and comparatively very recently in the United States, but also an early countenance of the notion that laws might be discounted on the grounds of public policy.[177] While making the juxtaposition of a law being 'odious' and 'favourable', Bar evinced that what is favourable for one party would be odious for the other, and vice-versa. Therefore, it could be said that both terms entail an objective and natural meaning.[178]

2.2.2.4 The augmentation of territorial state

The theory of the statutist approach was fostered further in a flourishing France,[179] where different provinces and territories as well as local laws operated under a unified crown, similar to that of the Italian cities (where there was a combination of diversity and unifying principle in existence).[180] Meanwhile, French jurist Du Moulin developed a new approach that cogitated personal law as well as the intentions of the parties as germane and, thus, to be brought into consideration, despite the existing influence of the statutist approach, especially within the French territory until the early nineteenth century.[181] Although Du Moulin used the term 'intentions of the parties' he did stress the factual scenario of the dispute from an objective point of view, rather than emphasising the subjective analysis or discussions of the intentions

174 Gutzwiller 294.
175 Jünger 11.
176 Jünger 15–16.
177 Jünger 12.
178 Yntema 14.
179 Kelly 200.
180 Wolff 20.
181 Jünger 26.

of the parties. Du Moulin also removed his focus from the unnecessary emphasis on the interpretation of law, and rather concentrated on the actual state of the dispute. The outlook of Du Moulin towards emphasising personal law gives an idea of how well both objective and subjective tests can be applied to a dispute in order to assess both the factual scenario and the intentions of the parties. Such an approach built the basic foundations of the modern proper law approach.[182] Despite the positive inclination of jurist Du Moulin towards personal law, the trend and legal theory had more proclivity for the idea of territoriality.

The development of the concept of territoriality and its systematic analysis materialised in the work of another French jurist, Jean Bodin, in the late sixteenth century.[183] The development of territoriality started to lessen feudal relationships amongst the people, developing the entire social system into an enduring territorial state.[184] Professor Nussbaum, however, argued that Bodin's emphasis on territoriality as well as absolute sovereignty had a tacit intent or agenda of centralising power in the hands of the then monarch.[185] The manifestation of Nussbaum's views can be found in the writing of jurist D'Argentré who recounted that territorial sovereignty should be taken as an important element of PIL in France in the sixteenth century. This was in patent contrast with the proposition of jurist Du Moulin.[186] D'Argentré went on to say that laws should always be perceived to be primarily territorial and personal only in exceptional circumstances.[187] The differences between these propositions of jurists Du Moulin and D'Argentré could demonstrate how the notion of PIL drifted from one of the universality and impulse of natural law towards positivism and statehood nationalism.[188]

2.2.3 The inception of private international law in Switzerland

One of the core elements of my research is to grasp the understanding and approach of common law and civil law jurisdictions towards PIL. The idea of such research inclination has been bolstered by the fact that I read law at English universities and now I am doing PhD in law at a Swiss university. My acquaintances with both English law and Swiss law urged me to focus on these two jurisdictions along with the EU jurisdiction (will be discussed later) at the regional level. The nature of PIL rules and the approach of judges in applying and interpreting their

182 Yntema 304–305.
183 Kelly 158, 175.
184 Neff 38.
185 Nussbaum 77.
186 Bar 35.
187 Jünger 14.
188 Mills 14.

respective PIL rules while adjudicating PIL matters in these jurisdictions (Switzerland, England and EU) shall be discussed in Part III.

The quest of tracing the inception of PIL in Switzerland needs to be approached from a bigger perspective. Hence, it is necessary to consider the Swiss legal tradition in its entirety. The impact of Roman law had a tremendous influence on continental Europe and in instituting civil law systems.[189] Switzerland, being a major and important part of continental Europe geographically, culturally, politically as well economically, has naturally felt the Roman influence in its legal system. Founded on 1 August 1291, Switzerland started its journey from federal state through to political settlement in 1848.[190] Due to its geographical position, Switzerland has always been influenced by and benefited from a large number of cultural influences (namely *leges barbarorum*[191]*)* that have stimulated and contributed to the evolution of the Swiss legal tradition.[192] Helvetica[193] embraced several provinces under the Roman Empire. After the demise of the occidental Roman Empire, a number of Germanic tribes started settling down in the Helvetic territory. In fact, it was during this time that multiculturalism started to be implanted within the territory of Helvetica, as a result of which three cultural tribes emanated from different areas, namely, the Burgundians in the west, the Alamanni in the north and the Lombards in the south. These areas are presently known as the French part of Switzerland, the German part of Switzerland and the Italian part of Switzerland, respectively.[194]

Subsequently, Helvetica became a part of the Holy Roman Empire of the German nation. Therefore, a healthy cultural integration occurred in different parts of Helvetica with that of the German nation.[195] The dominance of the Roman Empire on Switzerland lasted until the fourteenth century. From the fifteenth century onwards, Switzerland started to unfetter parts of its territory from the Empire, and in 1648 obtained independence through the signing of the

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189 Ibid.

190 Jean-Jacques Bouquet, *Histoire de la Suisse (Collection Que Sais-Je?)* (Paris 2004) 3.

191 René Pahud de Mortanges, *Schweizerische Rechtsgeschichte, Ein Grundriss* (Dike Verlag Zürich 2007) 21.

192 Jean-Philippe Dunand, 'The Experience of Roman Private Law in Switzerland' (2014) 20 Fundamina (Pretoria), University of South Africa Press (UNISA Press) 227, 227.

193 The Helvetii, a Celtic tribe who battled Julius Caesar, gave their name to the Swiss territory. The Latin name for the country, Helvetia, still appears on Swiss stamps. The letters CH appearing on Swiss cars and in internet addresses stand for the Latin words Confoederatio Helvetica, meaning Swiss Confederation. Helvetica is a widely used sans-serif typeface developed in Switzerland in 1957; see <https://www.swissinfo.ch/eng/did-you-know-/29050470.>.

194 Dunand 227.

195 Marco Jorio, 'Saint Empire Romain Germanique' Dictionnaire historique de la Suisse <https://hls-dhs-dss.ch/de/articles/006626/2016-04-25/>.

treaties of Westphalia.[196] It could, however, be argued that Swiss law was formed on the basis of a Germanic as much as a Roman tradition.[197] Switzerland experienced Roman law in its legal evolution differently in different eras and places of its territory.[198] The amalgamation of Roman private law in Switzerland has been narrated by Professor Laurens Winkel. He divided the entire journey of Roman law's reception in Switzerland, from its very inception until the present day, into four significant aspects. These are the reception of Roman law (thirteenth–seventeenth centuries), legal science (sixteenth–nineteenth centuries), the cantonal and federal codifications (nineteenth–twentieth centuries) and, finally, Roman law today.[199] One might raise a question as to what is the justification for elucidating the experience of Roman private law in Switzerland in the discussion of the inception of Swiss PIL? The answer is that while Swiss domestic law was being influenced by Roman law, Switzerland was also able to grasp the ideas of international law (namely, the law of nations) enshrined in Roman law. In this process, in the eighteenth century, Switzerland also made the distinction between public international law and PIL, explaining why the notion of the law of nations does not fit in PIL.[200] This can more clearly be understood in the discussions of legal science in the sixteenth to nineteenth centuries below.

2.2.3.1 Reception of Roman Law in Switzerland (thirteenth-seventeenth centuries)

Prior to the thirteenth century, to be exact during the twelfth century, Switzerland was extensively ruled by Germanic customs, in particular the Burgundian and Alemannic laws.[201] What was actually meant by the term 'reception of Roman law'? The answer is that it was the process through which the Roman way of legal thinking, Roman rules found in the *Corpus iuris civils*, as elucidated by the glossators and other commentators, became pivotal in most of the European legal systems.[202] Although Switzerland benefited from Roman law from an

196 Mortanges 55.
197 Dunand 228.
198 Pio Caroni, 'Ius Romanum in Helvetia : A Che Punto Siamo? in: Europa e Italia, Studi in Onore Di Giorgio Chittolini' Firenze University Press 55, 73.
199 Dunand 228.
200 Elisabetta Fiocchi Malaspina, 'History of International Law' in Daniel Hürlimann and Marc Thommen (eds), *Introduction to Swiss Law*, vol 2 (Carl Grossmann Publishers 2018) 66–67.
201 Dunand 228.
202 Ibid.

overall perspective, unlike other European countries, the reception of Roman law in Switzerland was inconsistent and weak.

The period when Roman law was absorbed in Switzerland can be divided into two areas, namely, pre-reception of Roman law and the complete reception of Roman law.[203] A momentous experience was gained by Switzerland through the pre-reception of Roman Law.[204] Swiss law students initially experienced this while studying in European universities at this time. Students mostly preferred to study at the University of Bologna at that time. It was reported that between 1265 and 1330, the number of Swiss students at Bologna was about 300.[205] Amongst others, Swiss students also attended universities such as Bourges, Montpellier and Pavia.[206] Some Swiss law students did have the opportunity to be taught by the famous jurist Baldo degli Ubaldi (Baldus) in Pavia.[207] Legal education at those universities was based on the Digest or the Code of Justinian, and the methodology was essentially the casuistic approach.[208] Once the students returned to Switzerland, they disseminated what they had learnt, which was Roman law.[209] Some of the students eventually obtained positions at the highest level, from where they could easily disseminate the notions of Roman legal culture in Switzerland. These positions included the highest levels of the Church, the imperial magistracy and within the local administrations, such as bishops, bailiffs, chancellors of Dukes of Austria, lawyers, prosecutors, judges, legal advisors and so on.[210]

Apart from the involvement and influence of Swiss students, the then Swiss ecclesiastic tribunal, mainly the bishoprics of Basel, Chur and Lausanne, also played a cardinal role in the pre-reception of Roman law in Switzerland.[211] Since the second half of the thirteenth century, these ecclesiastic tribunals had used Roman canonical procedure, and the basics of land law known in Roman law as *ius commune*.[212] The rules enumerated by the Bishop of Lausanne in

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203 Theodor Bühler, 'Die Methoden der Rezeption Des Römisch-Gemeinen Rechts in die Erbrechte der Schweiz' (2003) 120 eitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung 1, 4.

204 Mortanges 134.

205 Sven Stelling-Michaud, *La Diffusion du droit romain en Suisse : Étudiants Suisses à l'étranger et leur activité professionnelle ultérieure, notariat,littérature juridique, manuscrits et bibliothèques* (Mediolani : Giuffrè 1977) 7.

206 Pascal Pichonnaz, 'Die Schweiz Und Das Römische Recht, Ein Bild in groben Zügen' in Fargnoli/St. Rebenich (ed), *Das Vermächtnis der Römer* (Römisches Recht und Europa 2012) 21, 27.

207 Stelling-Michaud 29.

208 Pichonnaz 27.

209 Dunand 229.

210 Stelling-Michaud 7.

211 Dunand 229.

212 Mortanges 110.

the middle of the fourteenth century provided sombre authentication of the involvement of the local religious clerics in the process of importing Roman law into Switzerland.[213]

Just when it appeared that Switzerland had fully incorporated Roman law into its territory, the process slowed down for sociological and political reasons.[214] Two of the core reasons why Switzerland was disinclined to Roman law were, firstly, the progressive acquisition of independence from the Roman Empire of the German nation and, secondly, the willingness and desire to give more priority and precedence to local customary sources over any foreign legal source, the latter including Roman law.[215] As far as the first reason is concerned, the yearning for political independence by Switzerland stimulated the urge for an independent legal order, to achieve immunity from the Roman *ius commune*. This process had been underway for almost 150 years, since the year 1648, the year when Switzerland gained an 'exemption' from all the imperial jurisdictions by virtue of the treaties of Westphalia.[216] Concerning the second reason, Switzerland endured a vacuum in its legal system, as it was disinclined towards foreign law while not having adequate legal education in its own jurisdiction, even though the local people were being educated at Swiss universities (e.g. the University of Basel) and abroad from the fifteenth century.[217] In fact, the judges were appointed from a cohort of lay persons, who often used to be traders or artisans, and had no legal education at all.[218] Jurists were also discouraged from taking any reference from foreign law by the tribunal judges of Switzerland.

In the sixteenth century, in legal proceedings before a tribunal in Frauenfeld, a lawyer from Zürich with a doctorate in law made submissions from Roman law and an assortment of foreign scholarly references that were taken from the commentaries of Bartolus and Baldus. The president of the tribunal, while responding on the pleadings, said, 'Listen, Doctor, Bartolus, and other consulting jurists matter little to us in the Confederacy, because we have our own customs and laws.'[219] Such loathing reveals the fact that true reception of Roman law never happened in the Swiss territory.[220] However, despite all the reluctance, Switzerland could not prevent Roman law from being reflected in the local customs and statutes.[221] In fact, in some

213 Stelling-Michaud 10.
214 Mortanges 141.
215 Dunand 230.
216 Bouquet 44.
217 Dunand 230.
218 Caroni 71.
219 Dunand 231.
220 Ibid.
221 Stelling-Michaud 12.

parts of Switzerland, such as Geneva or Grisons, while giving priority to their own law, the courts used to consider Roman law as supplementary law.[222]

2.2.3.2 Legal Science (sixteenth–nineteenth centuries)

In the period of the sixteenth to the nineteenth centuries, Switzerland started to expand legal education in its territory by instituting different academies and universities such as Basel (1460), Geneva (1566), Bern (1679), Lausanne (1708), Fribourg (1763), Zürich (1883) and Neuchâtel (1840). All of these universities used to teach Roman law, despite adhering to local customs, laws and the republican spirit and were disinclined towards the scholarly and jurist approaches.[223] Such stance was certainly perplexing. Nevertheless, no matter how perplexing it is deemed to be, Switzerland contributed immensely towards the development of European legal science in so many different ways, especially to the evolution of the three legal schools namely, the humanist school, the modern school of natural law and the pandectist school (a German law institute that followed the Pandects of Justinian).[224] The University of Geneva and the University of Basel became of the cardinal bases of legal humanism[225] in the sixteenth century, and the publications on legal humanism of these universities had a tremendous impact on disseminating Roman law throughout Europe. One of the core reasons for this was the scholarship of migrant legal humanists, who were religiously persecuted in their own country.[226]

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222 George-Auguste Matile, *De l'autorité du droit romain, de La Coutume de Bourgogne et de la Caroline, dans la Principauté de Neuchâtel* (Imprimerie de Petitpierre 1838) 27.

223 Mortanges 143.

224 Dunand 232.

225 Douglas J Osler, 'To the non-specialist, the term 'legal humanism' is open to misinterpretation. The general term 'humanism' has two distinct meanings. In its modern usage humanism refers vaguely to a philosophy which lays emphasis on the material welfare of mankind in this world and is thus often contrasted to the religious outlook. In its second meaning humanism refers specifically to the study of antiquity in the period of the Renaissance. Legal humanism is used exclusively in the latter context and refers to a particular direction in the study of Roman law. The first manifestations of legal humanism can be detected in 15th century Italy, but it is not until the second half of the 16th century that the first major school is active in France. In other words, legal humanism flourishes some two centuries after the beginnings of humanism in Italy in the persons of Petrarch and Boccaccio. To compound this general disorientation in historical periodisation, the two most famous names in medieval jurisprudence, Bartolus de Saxoferrato (1314-57) and his pupil Baldus de Ubaldis (1327-1400) were contemporaries of Petrarch and Boccaccio. Thus while Europe had entered the Early Renaissance in its art and literature, its jurisprudence was at the zenith of the Middle Ages.' Max Planck Institute For European Legal History https://www.rg.mpg.de/research/legal-humanism.

226 Dunand 232.

Famous French legal humanists Francois Hottman (1524–1590) and Denis Godefroy (1549–1621) are the most notable amongst the philosophers of legal humanism who migrated to Switzerland.[227] Francois Hottman obtained a doctorate degree from the University of Basel in 1558. In *L'antitribonian* or *Discourse on the study of laws,* Professor Hottman articulated that the *Corpus Jur* of Justinianism would be obsolete, and embraced the ideas of unifying law and the integration of customary and natural law. Amongst some of the major works in the field of legal humanism and Roman law were those of Franco Gallia (1573) and Anti-Tribonian (1603).[228] Legal humanist Godfrey also contributed immensely to Genevan legal humanism. One of his famous works, the *Corpus iuris civilis* (Justinian compilation), was published in Geneva.[229] After Geneva, it was the city of Basel that became an integral part of the development of legal humanism in European legal and political theories. The most notable personalities, who contributed a great deal to the expansion of legal humanism and Roman epigraphy from Basel, were Bonifacius Amerbach (1495–1562) and his son Basile Amerbach (1533–1592).[230]

The eighteenth century was a significant period in the legal history of Switzerland. It was in that century that Switzerland, or more specifically the French speaking part of Switzerland, played the most important role in disseminating the German natural law doctrine. This was rooted in the notions of Roman law, not only in Switzerland, but in France and the Anglo-Saxon world as well.[231] As hinted above, it was also in that century that Switzerland apprehended the theories of natural law and the law of nations. The latter exclusively dealt with international law, and manufactured new ideas of international law that helped and stimulated the world's legal thinkers and philosophers to construct the tenets of the law of nations differently and develop international law accordingly.[232] The names worth mentioning in this regard are Burlamaqui (1694–1748), Emer de Vattel (1714–1767) and Jean Barbeyrac (1674–1744). The latter translated many important works of Hugo Grotius and Samuel von Pufendorf.[233] In particular, it was Emer de Vattel of Neuchâtel who brought about revolutionary changes in the precepts of international law. His treatises on *The Law of People* and *The Law*

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227 Ibid.

228 Carlos Gilly, on Francois Hotman in *Dictionnaire historique de la Suisse* <https://hls-dhs-dss.ch/ fr/ articles/016283/2006-11-16/>.

229 Dunand 232.

230 Mortanges 139.

231 Mortanges 147.

232 Malaspina 61–80.

233 Dunand 233.

of Nations, or *The Principles of Natural Law Applied to the Conduct of Affairs of Nations and Sovereigns*, were warmly welcomed by the philosophers of international law at the time and are still renowned all over the world.[234] In admiration of Vattel's work, Professor Fenwick wrote:

> "There is no more significant commentary on the growth of international law, both in precision and in comprehensiveness, than an estimate of the relative authority of the name of Vattel in the world of international relations a century ago and in that of today. A century ago not even the name of Grotius himself was more potent in its influence upon questions relating to international law than that of Vattel. Vattel's treatise on the law of nations was quoted by judicial tribunals, in speeches before legislative assemblies, and in the decrees and correspondence of executive officials. It was the manual of the student, the reference work of the statesman, and the text from which the political philosopher drew inspiration. Publicists considered it sufficient to cite the authority of Vattel to justify and give conclusiveness and force to statements as to the proper conduct of a state in its international relations."[235]

Vattel was greatly influenced by the works of his predecessors Grotius and Wolff. However, Vattel did not blindly follow his predecessors nor was he in consensus with their works. His stance was quite evident. He had his own vision and plan that he was assiduous in executing.[236] He only borrowed materials from the works of his predecessors, namely Wolff, that he amalgamated with his own thoughts. The difference between his works and those of Wolff indicate how unique and unparallel his thoughts and ideas of law were.[237] Vattel, in his treatise, *The Law of Nations*, one of the finest augmentations to the pedigree of international law, talked about the tension between the law of nature and the law of nations. He criticised his predecessors for applying only the theoretical deductions on the basis of general principles, in the making of the law of nations.[238] He divided his treatise into four books.[239] In the preface of the treatise, Vattel outlined that:

> "The law of nations is the law of sovereigns. It is principally for them and for their ministers that it ought to be written. All mankind are indeed interested in it; and, in a free country, the study of its maxims is a proper employment

234 Malaspina 66.
235 CG Fenwick, 'The Authority of Vattel' (1913) 7 American Political Science Review 395, 395.
236 Fenwick 397.
237 Ibid.
238 Malaspina 66.
239 Fenwick 397.

> for every citizen: But it would be of little consequence to impart the knowledge of it only to private individuals, who are not called to the councils of nations, and who have no influence in directing the public measures. If the conductors of states, if all those who are employed in public affairs, condescended to apply seriously to the study of a science which ought to be their law, and, as it were, the compass by which to steer their course, what happy effects might we not expect from a good treatise on the law of nations."[240]

In relation to prioritising states and their sovereignty, Vattel went on to say, 'The law of nations is the science which teaches the rights subsisting between nations or states, and the obligations corresponding to those rights'.[241]

Two notions could be determined from the above-mentioned avowals. One was the domestication of law relating to private individuals (PIL), detaching it from the concept of the law of nations. Simply put, that meant the law of nations would only deal with issues relating to the activities of the state sovereigns. The second notion was that the norms of the law of nations (international law) would be based on the tenets of both natural law and the positive law of nations. In other words, some norms would bear the principles of natural law, and some would uphold the principles of the positive law of nations.[242] In addition to the natural law of nations, Vattel brought the ideas of his mentor Wolff. Those were the three aspects of the law of nations, namely, the voluntary, the conventional and the customary.

It could, therefore, be said that although Vattel was an exponent of natural law, he also gave importance to positive law, by making it subordinate to the natural law of nations.[243] Two of the other revolutionary ideas contained in Vattel's treatise *The Law of Nations* were: first, his affirmation of state sovereignty in terms of determining the applicability of international legal rights and obligations, and, second, positing the term law of nations so uniquely, where he said the law of nations was both 'liberal' and 'pluralist'.[244] As far as the first idea is concerned, Vattel's idea of state sovereignty was the cornerstone of the modern concept of sovereignty.

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240 Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Bela Kapossy and Richard Whatmore eds, Thomas Nugent tr, Liberty Fund 2008) 18.

241 De Vattel 67.

242 Emmanuelle Jouannet, 'Emer de Vattel' in *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 1118, 1119.

243 Jouannet 1119.

244 Malaspina 67.

As regards the second, Vattel's characterisation of the law of nations as liberal and pluralist could be correlated with the contemporary situations of the European societies (European Enlightenment).[245]

The law of nations being pluralist means that every country would have their own system of state and political governance, where there would not be any external interference. On the other hand, 'liberal' gradience of the law of nations would be defining the relationships between nations. Hence, every nation would be a sovereign legal entity, each would be independent of one another, and all would be treated equally. The liberal 'slant' of the law of nations was of twofold importance. First, internally, it would give freedom to every nation to do whatever it wished, within its own territory. Second, the aspect of externality would curtail the hegemonial attitude of a state, Pope, or emperor over other states.[246] Vattel's proposition came at a time when the whole of Europe had begun to emerge from terrible religious wars. It was in dire need of stability in political and state governance. It would be worth mentioning here that Vattel's pluralist and liberal law of nations was best suited to that situation, since Vattel's propositions were based on tolerance and neutrality as regards the customs, religion and political regime of each state.[247]

Vattel's treatise *The Law of Nations* was also venerated in some of the notable English-speaking countries as well, such as England and America. In fact, the legacy of Vattel can be traced back to the founding fathers of America. Although Vattel is known as an international law scholar, his writings on state sovereignty, state politics and religion created a spark in the local and international arena as well.[248] Therefore, whilst he was criticised and called a liberal providentialist by some scholars,[249] Vattel was quite clear in his thoughts and ideas, and had a charismatic power of enticing readers with more common sense and less scholarly arguments. His frequent invocation to common sense reveals three key characteristics of his approach to law: prudence, pragmaticism and utilitarianism.[250]

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245 Jouannet 1118.
246 Ibid 1120.
247 Ibid.
248 Vincent Chetail, 'Vattel and the American Dream: An Inquiry into the Reception of the Law of Nations in the United States' in *The roots of international law = Les fondements du droit international : liber amicorum Peter Haggenmacher* (Martinus Nijhoff Publishers 2014) 253.
249 Jouannet 1120.
250 Chetail 257.

For the most part, the writings of the legal and political thinkers and philosophers are focused only on their contemporary situations and issues. Be it Socrates, Plato, Marx, Hobbes, Kelson, Wolff, Grotius or Vattel, they all were immensely influenced by their contemporary societies and the states of politics, law and religion. Vattel, from that perspective, was no exception. His work *The Law of Nations* was predominantly influenced by the contemporary state of Europe, namely the European Enlightenment. Based on the situations of his time, it could be presumed that neither PIL nor conflict of laws were in dire need of internationalisation, unlike the law of nations or public international law. Hence, as with other European countries, it was proscribed in his treatise that the issues relating to individuals or private persons would not be dealt with at the international level, but in the domestic circuit of a sovereign government.[251]

If Vattel were alive today he would certainly have repented for discarding private individuals, namely PIL, from his theory of the law of nations, given the Europeanisation and internationalisation of law relating to private individuals, and the fact that his legal approach of prudence, pragmaticism and utilitarianism is used in such situations.

In the nineteenth century, a significant and perceptible connection appeared between the German pandectist school (German university legal scholars) and Switzerland, especially in the university teachings and research. A number of Swiss professors read law at German universities and were immensely influenced by Savigny. Many pandectists happened to teach at Swiss universities as well,[252] for example, Heinrich Dernburg (1829–1907), Theodor Mommsen (1817–1903) and Ferdinand Regelsberger (1831–1911) in Zürich, Rudolf von Jhering (1818–1892) and Bernhard Windscheid (1817–1892) in Basel, and Philipp Lotmar (1850–1922) in Bern.[253] On the other hand, Swiss professors such as Johann Jakob Bachofen (1815–1887), Johann Caspar Bluntchli (1803–1881) and Friedrich Ludwig Keller (1799–1860), who are considered to be the founders of modern legal science in Switzerland, were students of Savigny.[254] In fact, Professor Kellar succeeded to the chair held by Savigny, who termed him as the Romanist in Berlin.[255] These law philosophers contributed greatly to the development of Swiss private law, as well as Swiss PIL.

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251 See Vattel.
252 Dunand 234.
253 Pio Caroni, 'Die Schweizer Romanistik Im 19 Jahrhundert' (1994) 19 ZNR 243, 251.
254 Dunand 234.
255 Caroni 76.

2.2.3.3 The Cantonal and Federal Codifications (nineteenth–twentieth centuries)

The persistent presence of pandectists, or the German Romanists, influenced the legal science of Switzerland enormously. This was reflected in the cantonal and federal codifications of Switzerland[256] and, understandably, the Federal Act on Private International Law of 18 December 1987, being a Swiss domestic law, was not absolved from the influence of Roman law. The impact of Roman law is quite evident in the countries of continental Europe to date. For example, cantonal civil codes, namely, the French Civil Code, the Austrian Civil Code and the historic school of law, were all entrenched in the *ius commune*.[257] In fact, in some areas of Swiss codes, a conspicuous similarity can be encountered, such as dispositions on original acquisition of property, easements and the general section of the Code of Obligations.[258]

2.2.3.4 Presence of Roman law

The influence of Roman law is still present in Switzerland in so many different ways. The Swiss universities still teach Roman law to their students, as they used to do before. Whenever the history of Swiss law is discussed at whichever level of research or study, the narration of the influence of Roman law in the history Switzerland is an indispensable task for the discussants.[259]

2.2.4 The inception of English private international law

It is quite surprising that the English jurists and lawyers did not find it necessary to deal with cases entailing PIL issues until a couple of centuries ago, whereas the civil lawyers and jurists of the other European countries had been nurturing the issues of conflict of laws/choice of laws/PILs and the developments of the same for centuries.[260] Such loathness of the English system was articulately described by the Russian jurisprudence expert Sack,[261] whose vindication was that:

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256 Mortanges 206.
257 Pichonnaz 33.
258 Dunand 235.
259 Ibid 237.
260 Ugljesa Grusic and others, *Cheshire, North & Fawcett Private International Law* (Paul Torresmans and James J Fawcett eds, 15th edn, Oxford University Press 2017) 17.
261 Alexander N Sack, *Conflicts of Laws in the History of the English Law, in Law: A Century of Progress, 1835-1935*, vol 3 (New York University Press 1937) 342–454.

> "The intra-national conflicts, that had long been inevitable on the Continent owing to the existence of different legal systems within the territory of a single nation, could not arise in England after the whole country had been brought under the sway of single common law. International conflicts were precluded by the rule, established at an early date, that the common law courts were unable to entertain foreign causes. This rule was the necessary result of the practice by which the members of the jury were summoned from the place where the operative facts had occurred, since their function was to decide according to their knowledge of the facts. The sheriff could scarcely summon a jury from a foreign country in which the dispute between the parties had arisen. It is true that special courts were set up to deal with cases that might contain foreign elements. The King established courts to deal with complaints made by foreigners whom he had invited to England and who were, therefore, entitled to his protection. The staple courts and the piepowder courts decided mercantile disputes. But in each of these cases the law administered was the law merchant which, at any rate in theory, was regarded as a universally binding system. There was no question of applying a foreign law at variance with the law of England."[262]

Unlike continental Europe, England opposed the influence of Roman law.[263] One of the core reasons for not accepting the Roman legal system is the reliance on the traditional jury system to adjudicate any legal problem through legal 'fictions'. For example, in a case entailing a property in Brussels, a claimant might plead and the defendant would accept that Brussels was in London, in order that a jury could be empanelled in such a scenario.[264] Traditionally, juries would be chosen from the place where the act of dispute occurred, to help judges in the process of adjudication.[265] Juries were given authority to find and apply law to cross-border disputes, but there was a lack of deliberation on their part, since juries are supposed to be lay persons. Hence, there was no genuine generation of PIL jurisprudence. The English courts, therefore, had to face problems in adjudicating cases involving cross-border elements when applying the theory of the jury especially if the incident took place outside England, due to the procedural bar and the fact that the English courts did not have the power and/or jurisdiction to employ a foreigner as a jury member.[266]

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262 Grusic and others 18.

263 Mills 14.

264 Jünger 19.

265 G Blaine Baker, 'Interstate Choice of Law and Early-American Constitutional Nationalism. An Essay On Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws' (1993) 38 454, 463.

266 Ibid.

As a result of these issues, the English legal system had to form special courts and law for the adjudication of international cases.[267] It was believed that the English legal system developed the idea of inventing special courts and law for cases entailing non-citizens following the Roman *ius gentium* or the law of nations. English judges also used to refer to Roman law in adjudicating international cases, using the term *ius gentium* or the law of nations.[268] Subsequently, the law merchant and maritime law were developed and incorporated into the law of nations.[269] The adjudicatory rules of settling cases involving an international element were gradually developed by appending the rules of *ius gentium* to the common law through reforms. It could, therefore, be said that the PIL in the UK at an early stage was based on the notion of natural law like Roman law.[270] Although the English courts explicitly showed willingness to accept or take cognisance of foreign law, they were loath to apply foreign law in similar subsequent cases for many years.[271] Rather, the English courts used to export cases entailing foreign elements to the appropriate court abroad, where cases would be heard and the English judges would only enforce the foreign judgment in England.[272]

With the growth of the British Empire, the English courts started to show obedience to different types of laws, in the mission of ensuring justice.[273] Such receptiveness of the UK led to the next phase of the PIL's development that initially took place in the Netherlands. It was believed that the UK's receptiveness was due to Scottish civil lawyers and judges.[274]

It should be noted that historically there had been some robust ties between Scotland and continental Europe.[275] However, there had also been considerable dissent as to how Scottish jurists and lawyers were influenced by the Continental theories on the conflict of laws or PIL. As per John Westlake, 'the introduction into English practice of Continental theories on the conflict of laws may have been connected with the Union with Scotch advocates to complete their legal education in Holland'.[276] Professor Beale, on the other hand, termed John Westlake's narrative as mere sophistry, stating that it was, in fact, through the writings of Story that English

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267 Mills 14.
268 Nussbaum 74.
269 Baker 463.
270 Mills 15.
271 Sack 381.
272 Grusic and others 19.
273 Ibid.
274 AE Anton, 'The Introduction into English Practice of Continental Theories on the Conflict of Laws' (1956) 5 International and Comparative Law Quarterly 534, 534.
275 Anton 536.
276 Ibid 534.

and American law were influenced by the writers of continental Europe such as Huber.[277] Professor Richard Llewelyn Davies commented that the manifestations of the influence of the writings of Continental jurists was first discovered in the case of *Robinson v Bland,*[278] in which the comity doctrine of Huber was taken into consideration by Lord Mansfield.[279] He was thought to have made the Continental assumptions of PIL or conflict of laws known to the courts of the UK.[280] The case involved discussion of a question as to whether a case entailing a contract which was valid in French law but void in English law could be sued in England. While discussing the issue Lord Mansfield expressed that:

> "The general rule, established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception when the parties at the time of making the contract had a view to a different kingdom."[281]

While amplifying the exception part of his remark Lord Mansfield further stated that:

> "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed."[282]

Lord Mansfield continued to take reference from the writing of Huber in subsequent conflict cases.[283]

However, precise and clear acknowledgment of the continental legal thinking on conflict of laws issues was lacking in English courts until the end of the eighteenth century.[284] Such averseness of the English courts was severely criticised in judicial proceedings in Scotland both before and after it had become part of the union of the United Kingdom.[285] In 1760, Lord Kames, a Scottish judge, while illustrating the English stance of reluctance, observed that:

> "What can be expected from such inconsistency, but injustice in every instance? Lucky it is for Scotland that chance, perhaps more than good

277 Joseph H Beale, *The Conflict of Laws*, vol 3 (Baker, Voorhis & Co 1935) 1904.
278 *Robinson v Bland* [1760] Burr 1077 (HL).
279 Anton 534.
280 Ibid.
281 Grusic and others 19.
282 *Robinson v Bland* [1078].
283 Kurt H Nadelman, 'The Comity Doctrine: Introduction' (1966) 65 The Michigan Law Review Association 1, 2.
284 GC Cheshire, *Private International Law* (Clarendon Press 1952) 33.
285 Anton 534.

> policy, hath appropriated foreign matters to be court Session, where they can be decided on rational principles, without being absurdly fettered, as in England, by common law."[286]

Unlike the stance of English courts, the position of Scottish courts was based on the notions of both common law and the law of equity, where the Scottish courts were at complete liberty to apply foreign law, if the situation demanded. Such inclination of the Scottish courts resulted in the development of case law relating to the matters of conflict of laws, which were compiled in *Morrison's Dictionary of the Decisions of the Court of Session* under the headings 'Foreign and Forum Competens'.[287] Lord Kames, in his book, *Principles of Equity* reiterated the fact that Scottish lawyers had always been ardent supporters of any new development, problem or solution made by Continental writers on the issue of conflict of laws.[288]

It was in the case of *Brown v Brown*[289] that the issue of PIL or conflict of laws was raised for the first time in Scotland, as well as in the UK:

> "By the law of what country the succession to a defunct's moveables was to be governed, whether by the law of the country where the moveables happen to be at the time of his death, or by the law of the country where the defunct had his domicile."[290]

In response, the defendant argued:

> "[T]he question is new in respect to the custom of Scotland, as nothing is to be found in our decisions or law-books directly determining it, recourse must be had to the laws and practice of other countries, and to the testimonies of foreign lawyers, especially as the question may not improperly be said to concern the law of nations. And the general and received doctrine of the foreign lawyers on this subject may be reduced to these propositions: Firstly, that in all countries the succession to heritage is to be governed by the *lex loci ubi res sita est*. Secondly, that *proper mobilia* are not considered *habere situm*, but to follow the law of the country where the owner has his domicile, and to which it is presumed that sooner or later he intended to transfer them. Thirdly, that the same thing is true concerning *nomina debitorum*, that these are governed by the law of the domicile of the creditor, and not of the debtor. Fourthly, that there are certain moveable subjects *quæ habentur loco immobilium*: that these propositions might be proved by multitudes of

286 Lord Kames and Henry Home, *Principles of Equity*, vol 2 (3rd edn, Liberty Fund 1760) 316.
287 Anton 535.
288 Ibid.
289 *Brown v Brown* [1744] Morisons Dict Decis 4604 (Scottish Court of Session).
290 Anton 537.

> authorities, but that it should suffice to refer to Voet, and the many authorities by him cited, Appendix to the title, *De Constitutionibus Principum*, § 11; and title *De Rerum Divisione*, § 30 where particularly with respect to nomina his words are, '*Cum ergo actiones personales, saltem, ex communi consensu, eæ quæ ad rem mobilem tendunt, mobilibus annumerari dictum sit: Consequens est, ut licet proprie nullibi situm habeant tanquam incorporales, tamen illic esse censeantur, ubi creditor, in cujus dominio et patrimonio actiones sunt, domicilium fixit*'. And as the rules are fixed *inter gentes ex comitate*, so they are founded in reason; for, how absurd would it be to suppose, that, where a man had money or effects in all the different parts of the world, his presumed will upon which the succession *ab intestato* is founded, should be held to be as different as the peculiar laws or constitutions in the several parts of the world where his effects lie or his debtors live; when, on the contrary, it is every man's presumed intention to gather in and bring home the goods or sums of money belonging to him that were thus dispersed, or sums owing to him by persons living in foreign parts."[291]

The Scottish Court of Session, while delivering judgment, showed consensus on the reasonings put forward by the defendant. It confirmed that the case would be determined by the law of nations and, accordingly, it would be the law of the deceased's domicile, in this case the law of Scotland, that would apply to the case.[292] However, contemporary English cases entailing similar facts have not paid any heed to the judgment of *Brown v Brown*, and likewise no discussion of the conflict of laws doctrines of Continental writers has been made.[293]

The above scenario changed after the Union[294] of 1707. After this date, the Continental authorities began to be taken into consideration by the House of Lords (HOL), where needed.[295] The very first appeal[296] concerning a PIL question from Scotland was reported to have been made in 1707. In fact, between 1707 and 1760, twelve appeal cases entailing issues of PIL were filed in the HOL.[297] Between 1736 and 1756, Lord Mansfield, who has already been mentioned as the most important person in the process of importation of Continental thoughts on PIL into

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291 *Brown v Brown* 4607.

292 Anton 537–538.

293 Anton 538.

294 'The Kingdom of Scotland emerged as an independent sovereign state in the European Early Middle Ages and continued to exist until 1707. By inheritance in 1603, James VI of Scotland became king of England and Ireland, thus forming a personal union of the three kingdoms. Scotland subsequently entered into a political union with England on 1 May 1707 to create the new Kingdom of Great Britain'; J and J Keay, *Collins Encyclopaedia of Scotland* (HarperCollins 1994).

295 Anton 538.

296 *Gray v Duke of Hamilton and others* (1709) 1 Robinsons Appeals 1 (HL).

297 Anton 538.

the UK, appeared as counsel in five of these twelve appeal cases, when he became Lord Chief Justice.[298] The case of *Robinson*[299] was the most significant appeal case. In the re-argument, several references were taken from the writings of Continental writers, such as Voet, Huber, Grotius and Du Moulin, and the judgment was based mainly on the issue of Huber's *Praelectiones*.

Although Lord Mansfield took account of Continental authorities in his judgments of all these appeal cases, they had little or no immediate effect in subsequent UK cases. In fact, the Continental authorities were cited in only one case, in the three decades following the case of *Robinson*.[300] This was also presided over by Lord Mansfield once again. It was rather presumed that the real influence of Continental writers on the UK legal system happened since 1790, when the case of *Bruce*[301] came before the HOL.[302] In that case the counsels from both sides were heavily reliant on the writings of Continental authors, namely, Huber, Vattel, Vinnius, J Voet, Van Leewen and Denisart. The HOL reaffirmed the decision in *Brown.*[303] Thus, the notion of the law of nations was applied to the present case, which said the intestate succession of the moveable estate would be governed by the law of the deceased's domicile.

The decision in *Bruce* was followed in a number of subsequent important cases in the UK, where the subsisting concept of domicile relating to intestate succession was even elaborated.[304] One such case was *Pottinger*[305] where the Sir S Romilly quoted from J Voet, Rodenburg, Bynkershoek, Denisart, Grivello, and Pothier and argued:

> "Of authority on this subject, in the English law, none exists…; but it has been much discussed by foreign jurists, to whose opinions (in the absence of domestic authorities) our courts are accustomed to resort, on questions which (like the present), must be decided rather by general principles of law, than by the peculiar doctrines of any local code."[306]

In the same case, the Master of the Rolls, Sir William Grant opined that:

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298 Ibid.
299 *Robinson v Bland*.
300 Anton 539.
301 *Bruce v Bruce* (1790) 3 Paton 163 [566].
302 Anton 539.
303 *Brown v Brown* [4604].
304 Anton 539–540.
305 *Pottinger v Wightman* (1817) 3 Mer 67 (HL) [67].
306 Anton 540.

> "On the subject matter of domicile there is so little to be found in our own law that we are obliged to resort to the writings of foreign jurists for the decision of most of the questions that arise concerning it …. Here the question is whether, after the death of the father, children remaining under the care of the mother, follow the domicile which she may acquire, or retain that which their father had at his death, until they are capable of gaining one by acts of their own. The weight of authority is certainly in favour of the former proposition. It has sanction both of Voet and Bynkershoek…"

Through these appeal cases to the HOL from Scottish courts, the English lawyers gained their introduction to continental theories on the issues of PIL.[307]

The UK may not feel comfortable being presented as being predisposed to Roman law, however, the above historical discussion of the inception of PIL in the UK testifies that the Roman law did exert an imperative influence in the development of the PIL in the UK. Although the early development of PIL in the UK and other common law countries was mostly underscored by different theoretical propositions, mostly made by civil lawyers and continental jurists, in the twentieth century the mantle of the theoretical analysis of PIL passed to common lawyers, in particular to the theorists of the United States of America (US), who happened to be more inclined to pragmaticism and positivism. Until recently, much of the development of PIL has come about due to the Europeanisation of legal subject matter, and efforts made by the HCCH in unifying the rules of PIL at the international level.[308] Post Brexit approach of England and Wales on PIL will be discussed in part III.

2.3 The insertion of 'positivism' in international law

2.3.1 The positivist revolution

The term 'positive law' was first used by Thomas Hobbes in his revolutionary work *Leviathan* (1651). In the Middle Ages, the expression positive law was used to refer to the man-made law of a particular state, which was the opposite of divine or religious law or natural law. It was the concept of 'positive philosophy' or 'positivism' and was added to the legal understanding of positive law in the nineteenth century. The principal advocate of this concept was the French social philosopher Auguste Comte. By positive philosophy, Comte meant a thought or thought process which was 'scientific' or 'objective' or 'empirical' as opposed to deductions,

307 Ibid.
308 Grusic and others 21.

speculation and religion.[309] The domain of positivist philosophy is confined only to matters that predominantly rely on scientific and pragmatic knowledge, and are verified by rational observation, while discarding matters of a metaphysical nature.[310]

Juridical positivism shifts such delineation into the legal sphere.[311] According to Comte, the human race went through three different historical junctures, namely, the theological (fictious), the metaphysical (abstract) and now the positive (scientific). In the theological stage, it was only the religious creeds, beliefs and ideas that had priority over anything else, and were immensely dominant. In the metaphysical era, although believing in a concrete God was abandoned, nevertheless, there was an idea that an abstract power controls and determines everything in this world. It could, therefore, be said that in the metaphysical era the religious beliefs of humans were rather empirical, and not confined to any specific religious creeds. Such tendency impacted people's legal views as well. These views were more impersonal, legalistic and jurisprudential. In the positive era, people started to obtain the immunity of liberation from all the previous superstitions and religious dogmas of the past. In this era, people were becoming more reasonable, scientific and pragmatic in their thoughts, nature and legal views.[312] The proponents of positivist philosophy, on the one hand, exclusively dealt with matters that are legal in nature, separating them from sociology, ethics and psychology. On the other hand, they would restrict their attention only within the legal sphere or legal rules controlled or enacted by the state.[313] The concept of state authority is, therefore, inevitably linked with the precepts of positivism (there is an extended discussion of this in 2.3.2 below).

It is no exaggeration to term the nineteenth century as a 'scientific era'. It is the era when the word 'scientist' was first introduced into the English language by William Whewell, that is to be exact in the year 1833. The term scientist substituted the earlier term 'natural philosopher', in order to name those who studied nature and its workings.[314] In the nineteenth century, the positivist and scientific approach was adopted by scholars of different fields. As the scientific knowledge started to expand, the Enlightenment savants became obsolete.[315] The acceptability and respectability of the scholars relied on how scientific their research and the outcomes of

309 Neff 42.
310 John Stuart Mill, *Auguste Comte and Positivism* (N Trübner 1866) 6.
311 Hans Joachim Morgenthau, 'Positivism, Functionalism and International Law' (1940) 34 The American Journal of International Law 260, 261.
312 Neff 235.
313 Morgenthau 261.
314 JM Roberts, *History of Europe* (Helicon 1996) 388.
315 Hall 277.

their research were proven to be. For example, regarding the image of science and the natural sciences:

> "The pronouncements of scientists began to influence the way men and women looked at the world as the teachings of priests had once done. It came to be as influential in this way as through its explanation and manipulation of nature. In its grossest form, such credulity has been called 'scientism' by some historians of culture. One of its expressions was a greatly increased willingness to extend the scientific method into new areas as the only sure road to truth. Saint-Simon envisaged a reconstruction of society on the basis of science and industry. Karl Marx also exemplified the wish to find a science of society, and a name for one was provided by Comte – 'sociology'. In particular, some sought to establish 'social science'."[316]

Such approach impelled other scholars of different fields as well. They started to abandon questions relating to morality, ethics and metaphysics, where conjecture paved the way for observation, and analysis became more important than estimation or evaluation.[317] Turning away from the natural law, the Enlightenment's naturalism or the reason-based naturalism, in order to have a decisive departure from the mainstream Classical, Judeo-Christian, Medieval and Enlightenment traditions, culture and ethos of Europe, was the most significant jurisprudential detour of the nineteenth century, which remained the cardinal feature of modernity. Such a detour occurred because the ideas and determinist theories of nineteenth century man and society were at severe odds with the creeds and ideologies of both the Judeo-Christian and Enlightenment traditions.[318] The nineteenth century attitude of being impervious to natural law was abhorred by scholars. As Leo Strauss (1899–1973) rightly said, 'The crisis of modernity reveals itself in the fact, or consists in the fact, that modern western man no longer knows what he wants-that he no longer believes that he can know what is good and bad, what is right and wrong'.[319] Natural law establishes that humans' inclination to obey law is its rational concordance with the common good. This could easily be summarised as follows: that according to the understanding of natural law, the authority to make law and to follow the obligations of law is by its very nature both righteous and just,[320] unlike the jurisprudence of positive law. According to positive law, men are obliged to obey law through the sense of fear,

316 Roberts 388.
317 Hall 277.
318 Hall 278.
319 John Finnis, *Acquinas: Moral, Political and Legal Theory* (Oxford University Press 1998) 297.
320 John Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980) 23–24, 359–360.

fear of violence, fear of lost liberty, or fear of being disapproved by the society.[321] On the subject of the denial of natural law, Mckinnon said:

> "The current denial of natural law is one of those strange anachronisms in human thought in which, instead of going forward with progressively clearer understanding of a doctrine, the course of thought suddenly reverses itself and turns backward toward ancient errors and discredited sophistries."[322]

Jeremy Bentham (1748–1832) and John Austin (1790–1859) are the most influential progenitors in the realm of legal positivism or classical positivism. While teaching jurisprudence and the law of nations at the University of London, Austin published *The Province of Jurisprudence* in 1832. This was a revolutionary change in the legal thinking of so many legal systems, especially the English legal system.[323] In his writing about the status of positive law, Austin patently stated that, 'The matter of jurisprudence is positive law: law, simply and strictly so called; or law set by political superiors to political inferiors.'[324] Two elements of this statement are important to understand in order decipher the notions of classical positivism. One is law, simply and strictly so-called, and the other is the legal influence of the politically superior over the politically inferior.[325] As far as the former is concerned, the concept of law, according to Austin, is nothing but a set of commands, or it could also be termed as a set of rules backed by threat. The inclusion of the word 'threat' has ever since become popular for people involved in the legal arena. According to the comprehension of positive law, law obliges people to do and/or not do something. Positive law is therefore 'contradistinguished to natural law, or to the law of nature and is law existing by position, i.e. law set by men to men'.[326]

As regards the second element of Austin's above-mentioned statement, the perception of political superiority and political inferiority is a significant addition to the regime of legal jurisprudence. This concept is inextricably linked to the idea of a sovereign state and its relationship with the evolution of legal understanding. By the term political superiority, Austin

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321 Hall 279.

322 R McKinnon, 'Natural Law and Positive Law' (1947) 1 Natural Law Institute Proceedings, Notre dame Law School 85, 86.

323 Hall 279.

324 John Austin, *The Province of Jurisprudence Determined* (Wilfred E Rumble ed, Cambridge University Press 1994) 18.

325 Hall 279.

326 Ibid.

implied 'might' or 'political might' to be exact. Inferiors in a political system would be obliged to do what they have been asked to, and this process would be conducted by political might.[327]

With its implication of the terms might, fear and force Austin's theory of positive law has been, to date, severely criticised. However, a careful inspection of his theory reveals the fact that he does not simply talk about a politically superior person who enforces the commands through might and force. Austin, in this regard, stated that:

> "The essential difference of a positive law (or the difference that serves it from a law which is not a positive law) may be stated thus. Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme."[328]

Therefore, it could be understood that the commands or the law, as it is strictly so-called, only impose so-called fear or inflict evil, but rather they emanate from a sovereign to the members of an independent political society.[329] Although Austin hinted at a systematic imposition of commands on political inferiors, nevertheless, there is still much controversy over his theory. It could be imagined that Austin was influenced by his contemporary society, hence, modern philosophers might not find his theory of positive law best suited to the current legal and political systems of the world. However, it is also true that if there is no sovereign, it would be always difficult or, it should be said, impossible, to have laws. This, in turn, means there will be no state without sovereignty and an independent political society.[330]

According to Austin, not every command comes from political superiors. There are commands which are imposed by men who are in a state of subjection to a sovereign, that is to say, those laws are imposed by the political superiors directly through their agent. Such laws are known as law properly so-called and law strictly so-called, as discussed above. The understanding of these laws belongs to the science of positive morality, which is related to jurisprudence.[331] Be it the science of law strictly or properly so-called, jurisprudence itself is the science of law.[332] Apart from these two genres of positive law, Austin also talked about laws that would be set or imposed by the general opinions of any particular class or society of person. These laws he

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327 Austin 19.
328 Ibid 165.
329 Hall 280.
330 Ibid.
331 Austin 112.
332 Hall 280.

termed as law improperly so-called.[333] This concept is basically related to the jurisprudence of international law, which will be elaborated below in 2.3.3.

Unlike Austin, Hans Kelsen, another prominent positivist philosopher, did not adopt congenial ways to describe law.[334] Rather than focusing on the generality requirement of law, Kelsen saw law in the capacity of an individual norm, a general norm, as well as precedent, that would determine and ensure the rights and obligations of the people.[335] 'Grundnorm' or the 'basic norm' was the term Kelsen used to substitute the term 'sovereignty' coined by Austin.[336] Kelsen labelled a constitution as a Grundnorm. In response to a question raised by Professor Stone as to whether a constitution or Grundnorm was itself a positive law, Kelsen replied that the appraisal of a constitution or Grundnorm should be made from the legal-logical perspective and from the positive legal sense.[337] Kelsen's reasoning for such distinction was that a constitution was not positive law since it was not posited or created by a real act of will of any legal organ, but a norm which was presumed to be in the juristic thinking.[338] He went on to express his thoughts on the issue of Grundnorm more precisely, stating that a Grundnorm was meta-legal if, by invoking the term meta-legal, it was interpreted that a Grundnorm was not a norm of positive law or a norm which was made by any law-making authority. On the other hand, a Grundnorm was legal if, by using this label, it was understood that part of its legal function was presupposed in the juristic thinking, as well as found in the objective validity of the subjective meaning of the acts of the legal organ by which the constitution of a society or country would be made.[339] Kelsen did make it clear that his concept of meta-legal did not emanate from the natural law doctrine, neither did he claim that it was positive law. He unequivocally articulated that there were differences between the Grundnorm doctrines and the doctrines of natural law.[340] Kelsen's legal theory was also unaffected by sociological and psychological investigations and morality.[341] As regards the impact of the latter in the legal

333 Austin 280.
334 RS Clark, 'Hans Kelsen's Pure Theory of Law' (1969) 22 Association of American Law Schools 170, 172.
335 Ibid.
336 Clark 184.
337 Hans Kelsen and Albert A Ehrenzwig, 'Professor Stone and the Pure Theory of Law' (1965) 17 Stanford Law Review 1128, 1141.
338 Ibid.
339 Ibid.
340 Ibid.
341 Joseph Raz, 'The Purity of the Pure Theory' (1981) 35 Revue Internationale de Philosophie 441, 442.

theory of Kelsen, as Professor Raz rightly claimed, 'the identification of the existence and content of law does not require resort to any moral argument'.[342]

Hart, another prominent legal positivist, who changed the understanding of positivism from so many different angles in the nineteenth century, extensively criticised Austin's understanding of legal positivism.[343] Although Hart was not a great proponent of morality, nevertheless, he disapproved of the negation of morality in the theory of Austin's positivism. The substantiation of his disapproval can be found in his book *The Concept of Law*, where Hart rejected the theories of both Austin and Kelsen many times.[344] Hart's understanding of law was so unique and well-organised in comparison with that of his predecessors that he brought about a revolutionary change in the realm of legal jurisprudence. Hart defined law as a union of primary rules (rules of conduct, rules of obligation) and secondary rules (empowering rules such as rules of recognition, rules of change, rules of adjudication). While defining law, Hart underscored a structure of law, and explicated legal concepts such as obligation, legal validity and sovereignty, rather than invoking the ideas of arbitrariness and power.[345] The combination of primary rules and secondary rules was the key to his understanding of law. However, he never claimed primary and secondary rules to be founded wherever there was a regime called law. He rather asserted that:

> "If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist. Not only are the specifically legal concepts with which the lawyer is professionally concerned, such as those of obligation and rights, validity and source of law, legislation and jurisdiction, and sanction, best elucidated in terms of this combination of elements. The concepts (which bestride both law and political theory) of the state, of authority, and of an official require a similar analysis if the obscurity which still lingers about them is to be dissipated."[346]

As regards morality, Hart suggested the idea of necessary interconnection between law and morals. However, his understanding of interconnection was not like that of the natural law philosophers. He claimed that the interconnection of law and morals is not based on any

342 Raz 444.
343 See HLA Hart, *The Concept of Law* (Oxford University Press 1961) 95.
344 Ibid.
345 Robert S Summers, 'HLA Hart's "Concept of Law"' (1963) Duke Law Journal 629, 632.
346 Hart 95.

definition, hence, it is not logically mandatory.[347] He termed this interconnection as a 'naturally necessary one', and asserted that the interconnection between law and morals in the sense that they both have a common core of content would only be possible as long as men wish to survive through mutual association with others – human nature and the human condition remain unaffected.[348] Due to his predilection for the moral values, Hart declared himself a soft positivist.[349] His idea of the presence of morality in the legal arena was criticised by his contemporary, the philosopher Fuller, who was a naturalist.[350] On the other hand, despite having a strong grounding in legal jurisprudence, Hart's theory of law (positivist) was later decried by other positivists such as Joseph Raj[351] and Ronald Dworkin.[352] Their reason being it placed emphasis on interpretation. Dworkin is also called an 'interpretivist'; his notions of 'interpretivism' include both natural law and positive law. For them, Hart failed to establish a particular source of sovereignty (which was present in the positivist theory of both Bentham and Austin), from where both the primary and secondary rules would emanate, which was one of the basic constituents of positivism.

Although there was dissent amongst the positivist philosophers on the elements and nature of positivism, nevertheless, in its entirety, the impact of positive law in the realm of the science of law has been enormous. The historic importance of positive law, in this regard, can be seen in four different ways.[353] First, the concept of positivism gave way to the breakdown of the great metaphysical systems that resulted in the dissipation of metaphysical jurisprudence as an established notion. Positivism attempted to save the science of law by abandoning metaphysical jurisprudence or the influence of natural law. Secondly, positivism tended to concentrate only on the issues of law, eliminating all other non-legal subjects or non-legal considerations from law. Thirdly, after differentiating between the positivist movement of philosophy and natural science, positivism understood that the scientific objectivity of law is dependent upon the comprehension created by experience and not that made by evaluation, which is the case for the jurisprudence of natural law. Finally, the codifications of the European continental countries and the statutory laws of Anglo-America found their ideas and methods of representation and interpretation in positivism. This method is said to have fulfilled the purpose

347 Summers 652.
348 Ibid.
349 Eleni Mitrophanous, 'Soft Positivism' (1997) 17 Oxford Journal of Legal Studies 621, 622.
350 Summers 653.
351 Joseph Raj, *The Authority of Law* (Clarendon Press 1979).
352 Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).
353 Morgenthau 262.

of positivism, if it has sufficiently met the social, political, economic and ethical requirements and demands of a given society or country.[354]

2.3.2 The idea of sovereignty and state practice

It has already been observed that the evolution of law from the natural law perspective to the positive law perspective is closely connected with the development of the concept of sovereignty. This basically emanated from the trend towards the territorial concept of law.[355] The factuality of the territorial concept of law and sovereignty were tremendously reflected in the procurement of independent states, the fixed boundaries between states, and the exponential powers of the local rulers over their respective territories.[356] The power of local rulers was the result of the decline of the power of the Papacy and the Holy Roman Empire. This ensured the political disintegration of Europe during and after the Thirty Year War, although it had acted as an impediment previously.[357] Later, by virtue of the theories of several renowned philosophers like Machiavelli and Hobbes, the centralisation of sovereign state power was reinforced and bolstered, not only in Europe, but also in other parts of the world.[358] The contemporary significance of the state theories of Machiavelli and Hobbes have had an impact on modern state policies. Machiavelli enunciated the modern concept of the state for the first time, which he described as 'an impersonal form of rule possessing a monopoly of coercive authority within a set territorial boundary'.[359] The contemporary society of Hobbes was associated with the political disintegration culminating in the English Civil War. This had seen him take the view that no matter how bad or oppressive a government is, it would always be 'scarce sensible, in respect of the miseries, and horrible calamities, that accompany a Civill Warre'.[360] According to the understanding of Hobbes, subjects of any sovereign state would neither wrangle the supremacy of a particular territory or state, nor would they ever rebel

354 Ibid.
355 Ibid.
356 Ibid.
357 Kelly 200.
358 Nussbaum 76.
359 Cary Nederman, 'Niccolò Machiavelli The State and the Prince: Language and Concepts' in Edward N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Summer edn 2019) 5 <https://plato.stanford.edu/archives/sum2019/entries/machiavelli/>.
360 Sharon Lloyd and Susanne Sreedhar, 'Hobbes's Moral and Political Philosophy' in Edward N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Summer edn 2019) 2; The Philosophical Project.

against the head of the state. Hobbes proposed to exhibit and validate the reciprocity between political obedience and peace, which according to him was crucial for any independent state.[361]

As regards the sovereignty issue Hobbes said that:

> "[W]hen people mutually covenant each to the others to obey a common authority, they have established what Hobbes calls 'sovereignty by institution'. When, threatened by a conqueror, they covenant for protection by promising obedience, they have established 'sovereignty by acquisition'. These are equally legitimate ways of establishing sovereignty, according to Hobbes, and their underlying motivation is the same—namely fear—whether of one's fellows or of a conqueror. The social covenant involves both the renunciation or transfer of right and the authorization of the sovereign power. Political legitimacy depends not on how a government came to power, but only on whether it can effectively protect those who have consented to obey it; political obligation ends when protection ceases."[362]

Although the concept of state sovereignty was initially explained through the personality of the head of the state,[363] as time went by the idea of state sovereignty developed whereby the acts of the sovereign personality were not seen as outright personal, but rather were deemed to be attached to the territory of the state. This provides the idea that the concept sovereignty is meant to be the 'will' of the state and not the will of the sovereign person.[364]

Here, the 'will' of the people was supposed to be reflected on the 'will' of the state. However, such notion of the state became futile in the jurisprudence of international law and/or the incorporation of any international law into an independent state mechanism.[365] In order to take the will of the people into consideration if they would want to be obliged by any particular international legal instrument, a provision of 'referendum' could be opted. The modern state policies seem to be invoking the theories of natural law in terms of justifying the accomplishment of international law. This is one area where positivism has failed to define international law.[366]

2.3.3 The insertion of the philosophy of legal positivism in international law

361 Ibid.
362 Lloyd and Sreedhar 7; Establishing Sovereign Authority.
363 Kelly 254.
364 Neff 38.
365 Mills 17.
366 Hall 281.

The accounts and observations of the positivist legal philosophers and theorists, be they Grotius, Vattel, Austin, Hobbes, Kelsen or Hart, regarding their positivist understanding of the realm of international law, have always been contingent on how states behave.[367] As outlined above, the key bases of legal positivism have always been the existence of state and the theory of its sovereignty that reflect the political, social and psychological stance of a particular country. Applying this very concept to the understanding of international law will not enable its subsistence and actuality to be determined. It is, therefore, of utmost importance to be cautious in the process of associating the tenets of legal positivism with international law, since the rudimentary elements of legal positivism will only be found and understood in the domain of international law differently. The idea of state sovereignty in international law is not comprehended the way it is understood in the context of domestic law.[368] The ideas of sovereignty in international law, therefore, had to be developed as regards how states would behave and participate in the process of the making of international law. Since states were the artificial creation of human society, and did not emanate from any natural order, a new set of rules for state behaviour were to be made. Such distinction was for the very first time given by Grotius.[369]

The understanding of Grotius regarding the distinction between general law and international law was that the perception of general law derived from the reflection of our nature and the discernment of what had been happening to humans. On the other hand, the precepts of international law, namely the law of nations, which he termed as 'voluntary law' were made by the sovereign states that did not originate from natural law.[370] Here, Grotius stressed the key factor of international law, which was the intention or will of the states in making any piece of international law, which according to him was a positive methodology.[371] The idea of *ius gentium* or the law of nations proffered by Grotius was distinct from the ideas of *ius gentium* of Roman law established by the naturalists.[372] Grotius digressed from the naturalist understanding of the law of nations. However, as stated above in the natural law section, his positivist idea of the law of nations was still inextricably linked with its original precepts,

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367 Mills 17–18.

368 David Kennedy, 'International Law and the 19th Century: History of an Illusion' (1996) 65 Nordic Journal of International Law 398.

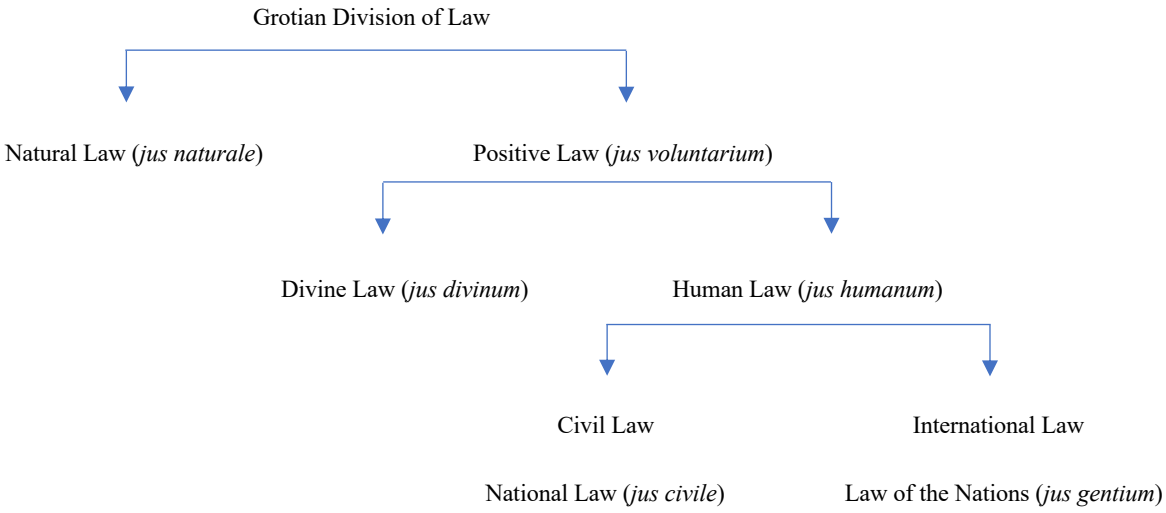
369 Nussbaum 102.

370 Hugo Grotius, *Of the Law of War and Peace* (F Kelsey tr, Carnegie Institution of Washington 1925) Prolegomena para 24.

371 Neff 37–38.

372 Grotius I Prolegomena 17.

examples of which can be found in his discussion of international law. It is, therefore, not exactly correct to say that Grotius was a positivist.[373] His attempt to segregate the law of nations from natural law was reflected for the very first time in the treaties of the Peace of Westphalia of 1648, which was labelled as the birth of modern international law.[374] Here, it is worth exemplifying the division that Grotius demonstrated in his famous treatise *On the Law of War and Peace* (*De jure belli ac pads*), 1625.[375] The understanding of Grotius as regards the division of law can be seen more clearly in the following diagram.[376]



In the process of segregation between natural law and voluntary law, Grotius provided the idea of internal sovereign law and external international law. According to Grotius, the internal law of sovereign countries reflected the natural law, and the external international law reflected the state's practice and will outright. Such trade-off between the internal affairs and issues of countries and their external relations has since been a key part of the operating system of international law.[377] In this regard, it can be observed that Grotius said the internal law of sovereigns would reflect natural law, but his understanding of internal law was impacted by the contemporary society. Hence, he did not say anything about positivist internal law. Had he established his theory in the twentieth century, his claim about the internal law of sovereign countries would certainly have been different.

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373 Mills 19.
374 Nussbaum 38.
375 Irina V Getman-Pavlova, 'The Concept of "Comity" in Ulrich Huber's *Conflict Doctrine* (Research Working Paper, The National Research University Higher School of Economics 2013) 5 <https://www.hse.ru/data/2013/03/27/1295682692/13LAW2013.pdf>.
376 Ibid.
377 Neff 42.

Another observation of the Grotian narrative of international law was that he did not want to separate voluntary law from natural law, but rather he attempted to reconcile natural law with the positivist methodology.[378] Even though people could be critical in their own way of observation, no matter how much closeness this idea of reconciliation could bring between natural law and voluntary law, the Grotian definition of international law entails great concentration on human laws or man-made law along with the divorce from natural law.[379]

Such likeliness of international law being deterred from the natural law concept came precisely from the writings of Vattel, discussed earlier in the section covering the inception of PIL in Switzerland. Vattel's positivist account of international law was only concerned with the independent actions and gestures of independent countries that were confined between the countries but not above them.[380] Such a viewpoint inspired Bentham immensely. Hence, he subsequently adopted the term 'international' law in place of the 'law of nations'.[381] Like Vattel, since the turn of the century, other internationalists with positivist assumptions in mind have started to follow the positivist methodologies and adhere to the principles of positivism whenever they dealt with international law.[382] Neither the opposition of the naturalists, Kelsen's neo-positivist criticism, nor the tacit denunciation of the legal sociologists could supress the influence of the scientific positivist approach of legal positivism on the jurisprudence of international law.[383]

With the changing times, different legal positivists of the nineteenth and twentieth centuries tried to describe the nature and morphology of international law. There had always been a conspicuous difference exhibited in the notions of international law between the Anglo-American philosophers, writers and lawyers and their continental European counterparts.[384] The idea of doctrinaire positivism, which was also called systematic philosophy, was first given by the writers of continental Europe. Two phenomenal writers were Dionisio Anzilotti from Italy who later became a notable judge of the World Court, and the German Heinrich Triepel (1868–1946). On the other hand, English language writers or writers from the English-speaking countries had always adopted an empirical outlook while defining, analysing and appraising

378 Mills 20.
379 Ibid.
380 Neff 38–42.
381 Nussbaum 136.
382 Roscoe Pound, *An Introduction the Philosophy of Law* (New Haven 1937) 57.
383 Morgenthau 264.
384 Neff 45.

international law. This dissension of intellectuality between the pragmaticism and doctrinism of international law can still be felt.[385]

Some of the dominant propositions will be discussed here. It has now been clearly depicted that the will of the states has always worked as an important instrument in the application of legal positivism in international law. However, there were a few positivists who digressed from the understanding of classical international positivism. Notably, Austin and Kelsen defined international law in a different manner. As far as the understanding of Austin was concerned, his definition of legal positivism based on independent states did not quite fit the depiction of international law, which he termed law improperly so-called, since it did not emanate from the sovereign of an independent political society.[386] In his narration on law improperly so-called or international law, some slight influence of the external international law introduced by Grotius can be felt. As regards international law, Austin remarked:

> "A few species of the laws which are set by general opinion have gotten appropriate names …There are laws which regard the conduct of independent political societies in their various relations to one another. Or, rather, there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this specie, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled the law of nations or international law."[387]

The discord between the basic positivist dogmas and the facts observed by Austin in the morphology of international law called for a reconsideration by those who adhered to the basic fundamental principles of positivism. One of these positivists was the prominent German philosopher Georg Jellinek (1851–1911).[388] Following the Hegelian conception of state, he asserted that a state would be sovereign at all times. It would always be working according to its own will and power, and no external factor would ever be able to hinder its sovereignty. The state could, however, by its own will and conscience, curtail its power on the international plane in order to achieve a better result. Such power of curtailment could also be retracted or

385 Ibid.
386 Austin 171.
387 Ibid 123.
388 Hall 282.

repelled by another act of will of the state. The rights of states to preserve themselves, according to Jellinek, was the only objective rule of international law.[389]

According to Jellinek's theory any state could extricate itself from any of its obligations on the international law plane. Hence, his narration on international law did not qualify the basic tenets of positivist jurisprudence, and could not be termed as such in a meaningful sense.[390] The idea of auto-limitation of a state's participation on the plane of international law was criticised and rejected by another German philosopher Heinrich Triepel.[391] He asserted that the common base and validity of international law would lie in the common will of the states. The manifestation of this would be reflected in the agreements made by states, such as treaties or customs. Such agreements, whether explicit or implicit, would bind all the states that participated in the making of them, and the states would be unable to repudiate such agreements and/or any provision of an agreement unilaterally.[392]

Classical legal positivists have always had trouble fitting international law into the concept and idea of positivism. On the other hand, it could be said that albeit their initial disclaimers, they later tried to annex international law. In this process, the classical legal positivists took different standpoints on sovereignty, as regards the source of all international law.[393] Hall believed that the international law, such as treaties and customs, were not binding upon states, because they gave consent to them. Rather, he considered that it was a datum that engaged the precepts *pacta sunt servanda* (agreements must be kept) which was a general principle of law. Likewise, he believed that states would not have to give any explicit consent to this rule of customary international law in order to establish the manifestation of its bindingness on the states. It was also claimed by Hall that the general principles of *ius gentium* (e.g. for states being bound by treaties, customs, etc.) had been appreciated by all the classical positivists, but they did not consent to them and did not include them in their propositions, narration and discussions of international law.[394]

In order to eradicate all the discord and confusion amongst the legal positivists regarding the morphology of international law, the notion of sovereign will should have been abandoned

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389 Sir Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Longmans 1927) 47.
390 Lauterpacht 56.
391 Hall 283.
392 Ibid.
393 Ibid 298.
394 Ibid 299.

outright. Such digression was seen in the *Pure Theory of Law* of Kelsen.[395] Discarding the will-based model of legal jurisprudence, Kelsen asserted that custom is the fundamental source of all law. Taking this into consideration, *pacta sunt servanda* would be a principle only of customary international law, and the general principles similarly would be able to find their foundations and existence in custom.[396] According to Kelsen:

> "The basic norm or Grundnorm of international law, therefore, must be a norm which countenances custom as a norm-creating fact, might be formulated as follows: The States ought to behave as they have customarily behaved. Customary international law, developed on the basis of this norm, is the first stage within the international legal order."[397]

The most important effect of positivism that became visible over the years was that it had always replaced its older, as well as teleological, depiction with what could be termed as an instrumentalist outlook.[398] Such a perspective of positivism had seen law have no innate goals of its own self; it was now in a technocratic way treated as a means of accomplishment or attainment of goals that were adopted or decided through political processes or discussions. As Neff rightly pointed out, 'Law, in short, was now seen as a servant and not as a master. It was to be a tool for practical workmen rather than a roadmap to eternal salvation.'[399]

2.3.4 Positivist international law and private international law

As mentioned previously, there has been always dissension on the fact that whether PIL should be characterised as national law or international law. The earliest prominent philosophers of law like Grotius and Vattel did not quite answer the questions of PIL, leaving a vacuum in its understanding and evolvement. Although PIL was not declared manifestly to be a part of international law, taking the circumstances of contemporary societies into account, such as the time of Grotius, PIL was tacitly conceived as forming a part of international law.[400] In fact, from a careful inspection of the very inception of international law, as discussed above in the naturalist approach of international law, it becomes quite evident that it was the issues relating to disputes or discord between people of different places, which currently fall under the regime of PIL, that gave birth to the idea of international law. In other words, the law of nation or *ius*

395 Ibid.
396 Ibid.
397 Hans Kelsen, *General Theory of Law and State* (Wedberg Anders tr, Routledge 1945) 369.
398 Neff 43.
399 Ibid.
400 Ibid.

gentium was made to resolve problems between the people of different groups or places and not problems between constituents or regions. But it was indeed a matter of regret or failure that as the regime and the jurisprudence of international law evolved with the progression of time, PIL had been almost discounted from international law by most of the earliest prominent international law philosophers, jurists, lawyers and writers.

Even though some adherents of PIL tried to find the exactitude of the PIL morphology, this was not quite possible because of the emerging dissent on the issue of whether PIL would be treated as a part of natural law (under a single legal order entailing all international law) or would be seen from a positivist point of view (state sovereign, voluntarist concepts of international law).[401] As far as the latter was concerned, there was confusion if PIL were to be treated as a national law since all the elements of the positivist viewpoint, including sovereignty, independence and the voluntary approach of states, fit better within the structure of domestic law. Such notion was further strengthened and underscored by Bentham's conceptualisation of the law of nations as international law, which characterised PIL as a part of domestic law by default.[402] On a different note, since there had never been any separate court system detached from the influence of any state to resolve PIL disputes, it would always be the domestic courts that would resolve PIL disputes. As a result, the positivist approach inserted a notion of demarcation of a state boundary and non-interference into state sovereignty that would curb the power and hinder the competencies of the domestic courts. Consequently, domestic courts would not interfere in the matter of the sovereignty of any state while in the process of adjudicating any PIL or cross-border dispute.[403]

This entire positivist account of PIL in the understanding of international law was paradoxical, because if PIL was to be treated as domestic law, then why would there be any external pressure on domestic courts in the process of adjudicating PIL disputes especially with regard to the application of substantive law? If PIL was to be treated as a domestic issue, then the state courts would be enjoying the same level of freedom in any PIL dispute adjudication, just as they would normally enjoy self-determination while resolving any domestic dispute that did not involve any foreign element. One might argue that if state sovereignty was somewhat curtailed in the public international law regime, then why would it be a problem if the freedom of the state courts was curtailed in PIL disputes? Firstly, public international law disputes were not

401 Mills 23.
402 Kennedy 409–410.
403 Mills 24.

even heard in domestic courts. Secondly, the problem here was not related to state sovereignty as such, rather it was the overlooking attitude towards the uniform and unambiguous system of PIL which would essentially include legislating PIL rules as well as adjudication of PIL disputes. If PIL was to be treated as a part of domestic law, then the domestic courts adjudicating PIL disputes would follow the normal ongoing legal process of that particular country, the process that was followed in other domestic cases, without being hindered by external factors. A healthy discussion of the separation of powers and state sovereignty could also be made in this respect. However, the similarities between states being obligated by any external factors such as a treaty or customs, and the domestic courts being directly controlled, hindered and restricted by any external factor such as foreign law were not on the same plane of discussion.

Some theories of the positivist PIL evolution are discussed below.

2.3.4.1 The Dutch School

The Dutch School of PIL was renowned in the Netherlands and also in other parts of the world (especially in the English-speaking countries) in the nineteenth century due to the huge contribution of three famous legal philosophers, namely, Paul Voet, his son John Voet and Ulrich Huber, and their predecessor Hugo Grotius.[404] The Voets albeit accepted the statutist approach (an approach of legal universalisation) of decrypting international law, however, like Grotius, they also prioritised the issue of territorial sovereignty.[405] They argued that the domestic court will only be influenced or controlled by its sovereign territorial mechanism and not by any external factor. (Although on a personal note, I found this statement erroneous from a strictly academic point of view as regards the separation of powers, since the notion of separation of powers talks about the independence of the judiciary from the government organs such as legislature and executive. But this would now bring about an altogether different discussion that might not seem to be relevant to the present work.) As a result, the domestic courts would only be able to refrain themselves from exercising their jurisdiction and applying their own law relating to a dispute entirely embodied with foreign elements, unless the state would pass such law directing the courts to abstain in the above-mentioned situations. Because such restraint could not be mandated by law, the Voets invoked the concept of 'comity', which

404 Getman-Pavlova 3.
405 Yntema 22–24.

was subsequently adopted as a principle of statutory interpretation.[406] Due to the faulty and unambiguous elements existent in the concept of comity, it was later categorised by Justice Gray in the case of *Hilton* as:

> "[N]either of matter of absolute obligation, on the one hand, nor of mere courtesy and good will on the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its citizens or of other persons who are under the protection of its laws."[407]

Such categorisation of the concept conjectured it in the artificial and uncomfortable position of defining PIL from a positive law stance in between national and international law.[408] Later, understanding the importance of national legal systems, the Voets affirmed that the domestic courts would only be applying laws of their own state, unless they had been authorised or permitted otherwise.[409] Although they wanted to universalise the ideas of PIL, it seemed rather a new trend emerged of encapsulating the ideas of PIL in domestic law.[410]

The concept of comity was also found in the theory of Huber, the most influential international law philosopher in the seventeenth century. He was immensely influenced by his predecessor Grotius. Like Grotius, Huber accepted the influence of *ius gentium* in the process of delineating PIL from a positivist standpoint.[411] However, on some points, Huber digressed from the theory of Grotius; for instance, Huber insisted on territorial sovereignty rather than on the demarcation on the internal and external policies of states.[412] Huber's formulation of PIL was based on three important points, which are as follows:

> "1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
>
> 2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects of thereof.
>
> 3. Sovereigns will act by way of comity (*comitas*) that rights acquired within the limits of a government retain their force everywhere so far as they do not

406 Bar 38.
407 *Hilton v Guyot* [163]–[164].
408 Mills 25.
409 Bar 39.
410 Mills 25.
411 Ibid.
412 Getman-Pavlova 6.

> cause prejudice to the powers or rights if such government or of their subjects."[413]

Huber's maxims were not just the ramification of the concept of territorial sovereignty, rather he hinted at a tacit consensus of the independent states on the entitlement of territorial sovereignty.[414] It could further be said that the principles of PIL given by Huber emanated from the concept of *ius gentium*, which was the result of the Roman legal tradition of natural law or universal law. However, it should also be emphasised that Huber's delineation of PIL was not different from the modality of the concept of natural law as it was understood at the time of the Roman Empire and Renaissance. Although his idea was believed to have originated from the natural or universal law concepts, his pivotal and focal concentration was the sovereignty of states.[415] With hindsight, the crucial question as to whether PIL would be understood as a part of international law or national law remained unanswered in the PIL theory of Huber.

2.3.4.2 Story's doctrine

As already stated under the previous point, the English-speaking countries of England and the US were enormously influenced by the Dutch jurists of the time. The concept that attracted countries like these was the notion of comity. Huber's explication of comity was hugely popular in the US. Albeit, Huber's notion of comity was warmly accepted by the long before the era of Joseph Story, nevertheless, the latter acknowledged Huber's idea of comity wholeheartedly in an unprecedented manner.[416] Unlike other American legal minds of his time, rather than criticising the notion of comity, Story accepted the same, and adopted it as the doctrinal base and foundation of his commentaries.[417] Story not only explained and supported the notion of comity, he defended this very notion from the critics.[418] Story's deep understanding and appreciation of Huber's doctrine could be found in his commentaries, as he articulated:

> "The doctrine of Huberus, would seem to stand upon just principles; and though, from its generality, it leaves behind grave questions as to its

413 Ibid.
414 Ibid.
415 Getman-Pavlova 7.
416 Kurt H Nadelman, 'Joseph Story's Contribution to American Conflicts Law: A Comment' (1961) 5 The American Journal of Legal History 230, 231–32.
417 Ibid 232.
418 Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* (1st edn, Hilliard Gray and Company 1834) 34.

> application, it has much to commend it in point of truth as well as simplicity."[419]

Story could be described as a natural-law-inspired positivist, though his understanding of PIL was mostly based on positivist methodologies, for example, territorial sovereignty. Many natural law elements could be found in the legal reasonings encapsulated in his seminal work *Commentaries on the Conflict of Laws, Foreign and Domestic*.[420] In keeping with the notions of territorial sovereignty and comity put forward by Huber, Story asserted that 'it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories'.[421] In line with that contention, he also argued that 'whatever force and obligation the laws of one country have in other, depends solely upon …(the latter's) own express or tacit consent.'[422] It can be again witnessed that inclusion of an abstruse concept of comity did not help Story either, in order to characterise PIL. As Mills rightly said, since there was persistent endeavour of nationalising PIL through stressing predominantly only on the issue of territorial sovereignty as well as territorial discretion of using foreign law in the national circuit, therefore, there was no uniformity in the independent sovereign state practices. As a result of which, the practice and discernment of the idea of comity ought to be understood separately or state by state.[423]

As mentioned previously, Story first coined the name 'private international law'. No book on PIL was published in the English language before the *Commentaries* of Story.[424] Story contributed a great deal in the realm of PIL understanding in English-speaking countries through his *Commentaries*. Rather than being engaged with the elementary and theoretical aspects of PIL, he developed his reasoning on the basis of his discernment, analysis and study of case law mostly derived from the American, English and Scottish courts. His legal reasoning and understanding were also based on the views of some prominent foreign authors who tried to define or characterise PIL from their own points of view.[425] Taking the nature of his work into consideration, it could be said that his discernment of PIL was utterly pragmatic. As

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419 Ibid 37.
420 Mills 27.
421 Story 20.
422 Ibid 23.
423 Mills 28.
424 Nadelman 243.
425 Ibid 246.

Professor Gutzwiller[426] stated, while acknowledging the contribution of Story in the evolvement and development of PIL:

> "With the appearance of the *Commentaries on the Conflict of Laws* by the American, Story, there begins almost a new era in the scholarly treatment of private international law, not only in America and England, but also on the Continent, a complete break with the previous method of treatment, still somehow suffering from the theory of the statutes; a work which in its composition shows a transition from an earlier to a new school; on the whole probably still a permeation with a shell, the core being formed of practical domestic considerations, to a large part already based on court decisions, and arranged according to the most important questions of law."[427]

2.3.4.3 Westlake's doctrine

It is often claimed by many that the science of international law has lost one of its unparalleled sources of international law, be it private or public, with the demise of Professor John Westlake. His exceptional work the *Treatise on Private International Law* has long been known and understood as the best and unmatched English treatment of the subject of PIL, and this remains the case today.[428] The methods or research approach used in this book were neither outright historical nor downright analytical, but the combination of both.[429] Although he was mostly considered to be inclined towards case laws, he did not, however, discard the importance of theories and principles of PIL either. In this regard, Westlake affirmed that:

> "These principles (i.e., those of private international law), too, must necessarily be arrived at by considerations external to all the several municipal laws which in any case may compete; but since this department of jurisprudence is administered by judges commissioned by human superiors, it follows that if the law of any state has expressly defined the limits of its own applicability, the judges of such state will be bound by such definition, however incorrect in principle it may appear to them to be. It is only where the municipal law is silent as to its own limits, that the jurisprudence which is the subject of this Treatise admits of judicial enforcement."[430]

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426 Gutzwiller, *Der Einfluss Savignys Auf die Entwicklung des Internationalprivatrechts* (1923) 110.

427 Nadelman 246.

428 The American Journal of International Law, 'In Memoriam: Professor John Westlake (1828-1913)' (1913) 7(4) The American Journal of International Law 582 <https://www.jstor.org/stable/2187438>.

429 JS Reeves, 'Review of Chapters on the Principles of International Law by John Westlake 1895' Sage Publications in association with the American Academy of Political and Social Science (1994) 151, 151 <https://www.jstor.org/stable/1009105>.

430 John Westlake, *A Treatise on Private International Law (2)* (2nd edn, W Maxwell 1880) iii.

One of the significant features of this approach towards the characterisation of PIL was, unlike that of Huber and Story, his stance of pedantry in the rejection of natural law, and by doing this he affirmed his position as a positivist.[431] By his subtlety in any philosophical and academic analysis and years of practice at the English Bar, Westlake brought a very trained, accomplished and pragmatic mindset to the solution of problems associated with international law.[432] As per his own assertion, students so far had become embittered with a vacant and vague concept of universal agreement while being taught PIL; the idea that he believed in, and rightly so, was derived from the writings of natural law or continental theorists.[433] Westlake digressed significantly from the PIL propositions or theories given by both Huber and Story. Without creating any penumbra if PIL were to be treated as national law or not, Westlake unhesitatingly regarded PIL as a department of domestic law.[434] He equally rejected the idea of comity being added by Huber and Story to the theory proposed by Grotius. Rather than being reliant on the concept of comity, he argued that it would be entirely at the discretion of judges to decide how a case entailing cross-border elements would be adjudicated following the domestic law of the sovereign.[435] However, it is important to mention that Westlake did not employ this categorisation of judges' discretion while defining international law, but rather he invoked the term 'society of states'. He stated that in order to understand the accomplishment of PIL, there would have to be a society, or it could also be termed a group or league, at the international level.[436]

As far as the apposite jurisdiction of the adjudication of a cross-border case is concerned, it would first have to be seen which jurisdiction or sovereign has the power to resolve the dispute.[437] However, here the question arises of how the apposite sovereign or jurisdiction would be determined? Would the determination fall outright within the ambit of domestic law, or would that be decided by what was called the 'society of States'? Westlake clearly intended an invocation of comity in the second phase of the adjudication, a phase that would come after the determination of jurisdiction. Once the jurisdiction had been decided, it would then come under the command of the sovereign who would ensure the rights of the disputants. In that adjudgment, the approval of other states would be reflected through the application of

431 Westlake 2.
432 The American Journal of International Law 583.
433 Westlake, *A Treatise on Private International Law (2)* vi.
434 Ibid iii.
435 Ibid 128.
436 Ibid.
437 Ibid 131.

comity.[438] Therefore, it could be said, even if not directly, that there was a tacit approval of the idea of comity. Albeit Westlake claimed that PIL was a part of domestic law, in the way he delineated PIL through the tacit invocation of comity it remained unclear whether his theory would help to characterise PIL as utterly as a matter of domestic law.

Although some questions might have remained unanswered about Westlake's proposition regarding the delineation and characterisation of PIL, his contribution towards PIL being inclined to positive law was immense. It is here worth mentioning that at an annual meeting of the American Society of International Law, it was attested that:

> "Professor John Westlake as a writer upon the history and philosophy of the law of nations had no superior in his time. Without largely representing his Government in public he widely influenced public opinion. Careful and temperate in statement, scholarly in method, philosophical in thought, he embodied the highest ethical and legal standards of our profession. He was calm and logical and orderly. He was learned. He was just. The influence of such a man upon the development of the law can hardly be over-estimated."[439]

2.3.4.4 Dicey's doctrine

The continental conflict of laws writers, like Huber, Savigny and Bar, had the monopoly in the eighteenth and nineteenth centuries as regards spreading their literary influence and, at the same time, being referenced across the world. As far as the English PIL writers were concerned, it was first Story whose work created a revolution in the common law world, where the judges found a new source of reference other than that of continental writers.[440] After Story, Albert Venn Dicey contributed immensely to the international law jurisprudence and constitutional law in the common law world, as well as the world at large.[441] However, between Story and Dicey, the contribution and influence of Westlake in the realm of PIL should not be seen as of any less significance. Foote, an international law theorist, believed that due to the growing reliance of both Story and Westlake on case law, sooner or later there would be a separate view

438 Ibid 154.

439 The American Journal of International Law 584.

440 Ole Lando, 'Dicey & Morris, the Conflict of Laws: Review' (1998) 47 The International and Comparative Law Quarterly 394, 394.

441 Ibid.

of PIL in the common law world that would be different to that of the continental thinking about PIL.[442]

In the previous two propositions of Story and Westlake, there was a sense of hesitation for so many reasons about the issue of whether PIL should be treated as a part of domestic law. Although Westlake verbally affirmed PIL to be a matter of sovereignty, due to ideas of comity and society of states, these affirmations did not turn out to be true. Dicey was the first philosopher to claim PIL was a part of municipal or domestic law at all events.[443] Dicey found the theory of Story to be faulty, because of the postulation that the territorial application of law, such as the application of foreign law by the court of another state, was rather a concern that fell under the idea of comity and not under obligation.[444] Whilst modestly condemning both Westlake and Foote for not highlighting this problem, Dicey rejected the notion of comity and prescribed the theory of 'vested or acquired rights' instead.[445] It is worth describing Cheatham's analysis of the doctrinal differences of Story and Dicey, as to why foreign law would be applied by the courts of another state, how it would be applied, and which foreign law would be applied.[446]

Story's perception regarding the first question was that:

> "The true foundation on which the administration of international law must rest, is that rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconvenience, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return."[447]

Dicey, on the other hand, tacitly precluded the concept of comity while responding to the question. According to Dicey, 'The application of foreign law … flows from the impossibility of otherwise determining while classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners.'[448]

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442 GW Bartholomew, 'Dicey and the Development of English Private International Law' (1959) 1 University of Tasmania Law Reveiw 240, 242.
443 Ibid 243.
444 Ibid 244.
445 Ibid.
446 Cheatham, 'American Theories of Conflict of Laws' (1945) 58 Harvard Law Review 361.
447 Joseph Story, *Commentaries on the Conflict of Laws* (William Wetmore Story ed, Little, Brown and Company 1846) 45.
448 Bartholomew 244.

As regards the second question of how foreign law would be applied by the domestic courts of another state, Story's assertation was unambiguous. According to Story, foreign law would be applied or used by the courts of another state by virtue of the precepts of comity.[449] Dicey's answer to this question was quite different compared to that of Story. Dicey took a painstaking and conventional approach to interpreting the concept of the territoriality of law and, consequently, denied the application of foreign law in domestic courts. Rather, he stated that it was one of 'recognising rights' acquired under a foreign law. His first general principle regarding acquired rights was:

> "Any right which has been duly acquired under the law of any civilised country is recognised, and, in general, enforced by English Courts, and no right which has not been duly acquired is enforced or, is general, recognised by English Courts."[450]

Dicey claimed that he derived the idea of vested or acquired rights from the PIL theory of Huber – the theory from where Story developed the concept of comity. Dicey complained that Story did not pay any heed to the principles of vested rights while developing his notion of comity.[451]

By establishing the principles of vested or acquired rights, Dicey definitely proved very strongly that he was a positivist. In the process, Dicey criticised Story and emphasised that the application of foreign law was not a matter of caprice, option or desire of any state, neither was it a matter of showing respect to other countries. However, Dicey here might have misunderstood Story's theory of comity.[452] Story never delineated his theory the way Dicey had later portrayed, rather his point of concern was that no nation at this time had the right to require absolute recognition and execution of its own laws being applied in other states. Story's concept of comity was overwhelmingly acceptable, because at the time when Story established this theory, PIL was seen more as a part of international law and quite distinct from domestic law.[453]

As far as the third question is concerned, Story did not give any indication in his theory as to which foreign law would be applied.[454] Dicey answered this question by stating that the issue

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449 Ibid.
450 Bartholomew 245.
451 Ibid.
452 Ibid.
453 Ibid.
454 Ibid.

of which foreign law would be applied could be solved by the invocation of the theory of vested or acquired rights. As per the general principle of Dicey, it was unclear as to under what local law vested rights would be acquired, as observed by Savigny even before Dicey wrote that vested rights provided the answer as to which law would be applied.[455] Here, it should be understood that the accomplishment of vested rights could be achieved by the application of foreign law. Hence, the question was, who and which law was to decide which foreign law or what vested rights were to be applied? Dicey was criticised for not mentioning this issue in his first general principle relating to vested rights.[456]

To succinctly answer the question from Dicey's point of view, as to which foreign law to apply, it would be for the judge to decide which foreign law to apply according to the domestic conflict of laws rules, and that would subsequently ensure the vested or acquired rights of the parties.

Dicey's theory gave PIL an outright positivist shape, albeit it was criticised by some scholars for some of its inaccuracies.

2.4 The Reappearance of natural law in international law (public and private)

Despite the ingenuity of positivists in terms of delineating international law (public and private) from a positivist point of view, the importance of natural law and the urge to understand it has always remained in the realm of both public and private international law.[457] In order to ensure a robust universalisation of international law, the presence of the divine base of natural law in the understanding of international law is a must. Swiss jurist Bluntschli remarked, while drawing a distinction between civilised and non-civilised people, that it was possible that international law could extend to all the people of this universe disregarding the fact of who was civilised and who was non-civilised, who was Christian and who was not, if the precepts of international law were laid on the foundation of natural law.[458] Here, it should be noted that Bluntschli was probably indicating the divinity of Christianity. According to Bluntschli, this was the only way to manifest the universalisation of international law, as he believed that in this process (basing the principles of international law on a natural law foundation), international law would not only be compatible with Christianity but with other faiths of the

455 Savigny, *System Des Heutigen-Romischen Rechts* (Guthrie tr, 1880) 147.
456 Bartholomew 246.
457 Neff 46.
458 Gustavo Gozzi, 'History of International Law and Western Civilization' [2007] Social Science Research Network 6–7 <file:///Users/mohammedhassan/Downloads/SSRN-id996239.pdf>.

world such as Buddhism, Islam or Confucianism.[459] Bluntschli was inspired and motivated by the writing of German philosopher Pufendorf, in developing his ideas of cultural and religious neutrality and openness of international law, which emanate from the foundation of natural law. Pufendorf's understanding of international law suggested that natural law was deemed to be the foundation of international law and that would extend to all confessions, regardless of religious and cultural identity.[460]

The question that subsequently came into the minds of other legal thinkers was how the divine base of natural law would be applied or impact the precepts of international law. Influenced by Leibniz, Wolff discussed the idea of moral or ideal laws (part of natural law) that could be understood by the application of human reasoning or observation or divine revelation.[461] Wolff, moreover, stressed that nations should form an international society for their own needs, where the rules would develop from the application of reason.[462] Wolff's delineation of international law, which was inclined to the natural law principles, was interpreted differently by Swiss legal philosopher Vattel. Vattel's discussion of international law was of a positivist nature, unlike Wolff. Vattel replaced the notion of the application of reason or 'quasi agreement' authored by Wolff with the voluntarist idea of the sovereign will of the nations. However, the naturalist approach of Wolff went in parallel with the positivist voluntarist approach of Vattel.[463] The idea of the application of reason was rejuvenated by Kant, who argued that in order to acquire self-fulfilment of society, rules (including moral rules) that would govern the nations by virtue of international law should derive from the application of reason.[464] The influence of natural law in international law was never halted.

In the eighteenth and nineteenth centuries, natural law survived the dominance of positivism by wearing the facade of positivist formalism,[465] or this could be characterised as 'the politicization of Enlightenment naturalism into radical political ideology'.[466] For example, international human rights law was based on the natural law principles, but this understanding was concealed behind the notion that it was a product of the voluntary will employed by the

459 Gozzi 7.
460 Ibid.
461 Mills 32.
462 Kelly 299.
463 Mills 32.
464 Heinrich Albert Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy* (Thomas R Hanley tr, 1946,1998, Liberty Fund 1946) 100.
465 Hall 273.
466 Ibid 276.

nation states.[467] The system that intersected the positive international law and natural law became an inextricable part of Western civilisation, and subsequently legitimised its colonial expansion.[468]

It has already been discussed how the principles of natural law impacted the evolution of PIL in the initial stages. However, it will now be seen how natural law played its role in the understanding of PIL in the nineteenth century. Savigny was the most important legal personality in the nineteenth century. His PIL theories were mostly related to the universalisation of PIL based on natural law reasoning.[469] Savigny was influenced by the works of Story and Huber in terms of the concept of territorial sovereignty,[470] however, though he accepted the notion of comity as a guiding principle, he disagreed robustly with them on other core traditional and contemporary elements of PIL.[471] Savigny's conception of comity was different to that of Story's and Huber's.[472] Savigny saw comity as a duty to apply foreign law by denying the necessity of any submission of one sovereign to the other.[473] In fact, he did not term choice of law as a problem of territorial sovereignty.[474] His delineation of the disassociation between private laws and sovereigns or politics is readily discerned from his comprehension of PIL wherein he asserted that the discrepancies between the private laws of sovereign states did not arise due to the clashes between the sovereign territories or politics but rather from 'an imperfect state of development'.[475] According to Savigny, public law is political hence 'uninteresting from a scientific point of view',[476] whereas private law is scientific hence 'apolitical, pure'.[477] Besides the concept of comity, Savigny also rejected the

467 Kelly 253.
468 Gozzi 8.
469 Nussbaum 192.
470 Nadelman 249.
471 Sagi Peari, 'Savigny's Theory of Choice-of-Law as a Principle of "Voluntary Submission"' (2014) 64 The University of Toronto Law Journal 106, 114; Hay 6, 7; Ralf Michaels, *Globalizing Savigny: The State in Savigny's Private International Law, and the challenge of Europeanization and Globalization,* in M Stolleis & W. Streeck (eds.), Aktuelle Fragen politischer und rechtlicher Steuerung im Kontext der Globalisierung (2007) 132.
472 Michaels, *Globalizing Savigny* 132.
473 Ibid.
474 Ibid.
475 Ibid.
476 Ibid.
477 Joachim Rückert, 'The Unrecognized Legacy: Savigny's Influence on German Jurisprudence after 1900' (1989) 37 Am. J. Comp. L. 121-137, 136.

idea of 'rights of the parties' presupposed by Huber and Story, which was later rephrased as 'vested rights' by Dicey, as discussed above.[478]

Savigny's approach of delineating PIL was that PIL rules should be common to all nations, and a part of an international community of law, emanating from the community consisting of nations.[479] Here, a keenness for natural law could be sensed in Savigny's delineation of PIL, which was in stark contrast to the positivist theories or understanding of PIL discussed above. It could, however, be understood that where the positivists discarded PIL from the realm of international law and treated it more as a part of domestic law, Savigny's enthusiasm for natural law in the concept of PIL gave us the notion of a universal system of PIL, extricating it from the domain of domestic or municipal law and putting it on the same footing as international or public international law.[480]

Savigny's paradigm of PIL was that there would be a single supreme legal authority that would foretell or decide the questions that arose, thus, invoking the idea of connecting factors as to which country (jurisdiction) had the closest connection, and which country's law (applicable law) would be applied to cross-border disputes.[481] According to Savigny, the approach in the process of deciding these important elements of PIL, namely jurisdiction and applicable law, would be objective and blindfold. It would not consider the underlying values of the national laws (choice of law), nor the cultural or religious pedigree of the states.[482] However, Savigny's theory of PIL gave the national states or forums the opportunity to participate in the process of adjudication of cross-border disputes in two possible circumstances. One was that the forum should govern the law of procedure,[483] and the second was that in exceptional circumstances the domestic courts' judges would be able to apply any mandatory law of their respective states to the dispute regardless of choice of law rules. Savigny characterised the latter as the public policy exception to the universality of PIL rules.[484] He argued that, 'It is to be expected … that these exceptional cases will gradually be diminished with the natural legal development of nations.'[485] Although Savigny stressed the global coordination of PIL, he also acknowledged

478 Savigny 147.
479 Mills 35, Yntema 309.
480 Mills 35.
481 Laura Carballo Pineiro and Xandra Kramer, 'The Role of Private International Law in Contemporary Society: Global Governance as a Challenge' (2014) 1 Erasmus Law Review 111.
482 Ibid.
483 John Westlake, *A Treatise on Private International Law (1)* (1st edn, W Maxwell 1858) 158.
484 Savigny 76.
485 Ibid 80.

the intentions of the litigants as a crucial connecting factor.[486] His acknowledgement of the intentions of the parties as a connecting factor could, in modern times, be seen as 'party autonomy'. The theory of Savigny was later endorsed and advocated by Bar and many others.[487]

Some of Savigny's practices concerning methods and strategies can be seen in application in today's world; for example, connecting factors with regard to jurisdiction and applicable law. However, the principal notion of his theory, namely, the globalisation of PIL or a single unit system of PIL, is yet to be seen in its outright manifestation.[488]

2.5 Historicism and international law (public and private)

International law has so far been calibrated in this thesis from two known perspectives, namely the natural law perspective and the positive law perspective. Apart from these well-known approaches to positing international law, there is another perspective or approach called 'historicism'[489] that defines international law differently. From a philosophical point of view, historicism could be outlined as:

> "The view that the history of anything is a sufficient explanation of it, that the values of anything can be accounted for through the discovery of its origins, that the nature of anything is entirely comprehended in its development. The doctrine which discounts the fallaciousness of the historical fallacy."[490]

As per the notion of historicism, the pragmatic and scientific approach to a better and graver understanding of politics, social life or social science, culture and law is to inspect and interpret past human histories, studies of human behaviour, conscience and thought processes and past

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486 Mills 35.

487 Bar 77.

488 Mills 37.

489 'It should be noted that "historism" is closely related to "historicism" but seems to be disappearing in English usage. For example, in the 1918 edition of James Mark Baldwin's *Dictionary of Philosophy and Psychology* (second edn, New York), "historism" appeared, but not "historicism"; while in *Dictionary of Philosophy*, edited by Dagobett D Runes (New York, 1942), the reverse is the case. Historism is a normal translation into English of the German *Historismus*, but historicism has apparently come to be preferred, even for a translation of the German, either because it seems a more natural English form, coming more easily to the tongue, or because its equivalent, *storicismo*, has become well known through its use by Benedetto Croce. Since a full explanation of historicism involves both German and Italian backgrounds, historism will be discussed as historicism on the assumption that the latter word has won out in English usage, at least for the time being'; Dwight E Lee and Robert N Beck, 'The Meaning of "Historicism"' (1954) 59 Oxford University Press on behalf of the American Historical Association 568, 568.

490 Dagobert David Runes, *Dictionary of Philosophy* (New York Philosophical Library 1942) 127.

practices.[491] To put it succinctly, the idea of historicism is to learn, assess and interpret the entire evolutionary process of a thing (namely, law, culture, social science, etc.) so as to determine how has a thing been created, what influences (social, cultural, time, space, etc.) it has borne in the process and how it has developed until the present day. The mode of interpretation in historicism is quite unique, because it rebuffs the notions of universality, fundamentality and perpetuality.[492] Thus, if someone is to assess and interpret any particular past theory, notion, idea of law, culture or social science they will have to assess and interpret that particular past theory, notion, idea of law, culture or social science from the contemporary social and cultural context, which includes the consideration of that particular time and space.

The historicist approach to international law mostly evolved in the nineteenth century. It interpreted the behavioural aspects of states and their people in the process of reaching towards the notion of ideal nation states.[493] The very inception of the historicist approach can be traced back to the time of Plato, who viewed sociability as a key element of the human condition. This view was further strengthened and manifested in the French Revolution, where the idea of nationality emerged. This can be found in the French Constitution and the Civil Code of 1804.[494] During the Napoleonic wars this concept of nationality spread all over Europe.[495] Both positivism and historicism emphasised the ideas of territoriality and sovereignty of states. However, a difference existed between positivism and historicism. Positivism conceived the notion of territoriality as the territorial expression of sovereign will whereas, on the other hand, historicism viewed sovereignty as the expression of the will of the people.[496] The notion of historicism with regard to legal regimes revolves around sociability or personal relations.

The historicist concept of territoriality was further nurtured by Hegel. As Professor Seade stated:

> "[F]or Hegel, sovereignty of the state is the ideality if its particular spheres and functions and can only be found a legal constitutional government. Sovereignty is what gives the public authority a unified character and it is because of sovereignty that each of these spheres is not independent and self-

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491 Karl Popper and EH Gombrich, 'Historicism and the Myth of Destiny' in *The Open Society and Its Enemies* (Princeton University Press 1994) 7.
492 Jeffry Kahan, 'Historicism' (1997) 50 Renaissance Quarterly 1202.
493 Mills 37.
494 Ibid.
495 Kelly 311.
496 Mills 38.

> subsisting, and that its functions become determined by and dependent on the goals and aims of the whole."[497]

Hegel did not consider the notion that sovereignty would belong to the people, rather his actualisation of sovereignty would be reflected in the working coordination between the Legislature, Executive and Crown on the points of universality (established by the legislature), particularity (referenced by the executive) and subjectivity or individuality (finally manifested or operated by the Crown).[498] Unlike positivism, where the will of the people is so individualistic, the concept of individual will or the will of the people in Hegelian theory is collective and discernible in the government or social institutions as the absolute end of the people's interest.[499]

As far as the Hegelian concept of international law is concerned, like positivism, Hegel stressed state sovereignty and made it evident that every country would have the right to the entitlement to sovereignty and independent power, and every country should be recognised as sovereign by other states.[500] Unlike the positivist concept of state, state in Hegelian terms should be perceived as people or actual persons.[501] As per the positivist notion of international law, every state is obliged to comply with the international law principles, such as to obey treaties. In this process, by the virtue of their sovereignty and constitutional power, the states can take the decision whether to be obliged or not, although they very rarely oppose following any international treaty or being obliged by any international law norm. However, in the Hegelian thesis, the approach of states towards any international law instrument is quite different. The relations between states will only be decided by their own particular wills and not by any universal will with constitutional power over them.[502] Furthermore, as the self- accomplishment of the people in a state is reflected in the state organisations (as an absolute end, as discussed earlier), therefore it could well be perceived that in Hegelian terms the individuals of the state, as a collective embodiment, play a vital role in the making of a state's will regarding any activity, which includes activities concerning conflict of states.

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497 Esperanza Duran Seade, 'State and History in Hegel's Concept of People' (1979) 40 Journal of the History of Ideas 369, 376.

498 Ibid.

499 Mills 38.

500 GWF Hegel, *Elements of the Philosophy of Right* (Cambridge University Press 1991) 366–377.

501 Hegel 367.

502 Ibid 368.

The Hegelian idea also gave birth to the moral authority of the states to interfere with matters of internal affairs of other states, which was quite a departure from the ideology of positivism.[503] The notion of moral authority or hierarchy revitalised the pre-existence of natural laws of international law.[504] The manifestation of moral authority of the states can be found in the Concert of Europe 1815, where the great powers of Europe understood that it would be morally right for them to control the internal affairs of other states, which would ultimately control the balance of power within Europe.[505] The very concept of historicism, as hinted before, unlike the positivist way of prioritising the concept of state sovereignty, stressed the connections of the individuals with the respective states.[506]

The historicist concept of individual connections with the nation state could be well understood in the PIL mechanism. One of the leading advocates who adopted a historicist account in defining the core parts of PIL was Mancini, who first claimed that it would be 'nationality' that would be taken as the foundation of the law of the nations. Mancini's idea could be interpreted in the Hegelian sense that the connection of the individuals to any particular legal system in PIL will be determined on the basis of the individuals' propinquity to any particular history and culture and not any territorial power.[507] Understanding Mancini's ideas through Hegelian legal philosophy may not be clear, because the concept of nationality in today's understanding of law and political science is inextricably linked with the positivist concept of state territoriality. In order to discover the nationality of a person being addressed in a PIL matter, one will have to see which particular country or countries that person belongs to, hence, the territorial aspect comes into play. However, one could see and understand Mancini's ideas of nationality through the Hegelian lens in the federal states, where the applicable law of the individuals of the same country differs, because every state within the federal state has its own law, unlike unitary states.

Mancini, as well as Savigny, also rejected the idea of state sovereignty, stating that it was not at the discretion of a state to recognise the national law and/or applicable law of a person in PIL litigation, rather it would be treated as a requirement of international law to give recognition to the national law of PIL litigants. To put this into PIL terms, the forum should

503 Mills 38–39.
504 Yntema 309.
505 Mills 39.
506 Ibid.
507 Mills 40.

always refrain itself from being biased and making capricious decisions in recognising applicable law.[508] According to Mancini, recognition of the national law of an individual by another country was rather a norm or requirement of international law.[509] However, Mancini, did not discard the importance of local law or the law of the forum. In fact, he made a distinction between personal law and public law, and in the process admitted the overriding priority of public law as regards public law exceptions, which was a broader explanation of public law than Savigny's public law exceptions.[510] Mancini rejected the idea of the universality of PIL. His stance was felt enormously in the pragmatic application of PIL in the nineteenth century when some countries decided to use nationality as a basis of PIL, such as the Italian Civil Code of 1865 and civil codes of other European countries,[511] while others adopted the concept of domicile.[512]

Despite many similarities between the ideas of Savigny and Mancini as regards PIL, the above discussion shows a slight difference between their ideas. Mancini promoted the idea that there would be a similar basis for PIL mechanisms, namely nationality, and rejected the single unitary system of PIL. He contributed more to the diversification of national legal systems, while Savigny advocated the single international system of PIL which would not be part of any domestic law.[513]

2.6 The evolution of private international law during the twentieth century

2.6.1 The European revolution

It has already been discussed in Chapter 1, in the section covering the unification of PIL, as to how European states have been contributing in order to unify the PIL rules. The contribution of HCCH has mostly been discussed in the unification of PIL that transcends the borders of Europe, however, it has also been made clear how the European countries or the EU initiated and contributed to the ideas and manifestation of PIL unification within Europe. In this section, the historical and chronological evolution of European PIL will be discussed. The idea of harmonising PIL rules at the European level was first raised by Pasquale Stanislao Mancini, who asserted that a comprehensive international treaty entailing the PIL rules would help create

508 Bar 2.
509 Ibid.
510 Wolff 39.
511 Bar 64.
512 Nussbaum 241–242.
513 Mills 41.

homogeneity in terms of cross-border judgments and legal rules, as well as substantive law relating to PIL.[514]

2.6.1.1 Legal basis

Over the past 50 years, Europe has changed and developed the core understandings of PIL through the founding treaties of the EU and their subsequent amendments and progression. In fact, there has been a tremendous increase of EU legislative activities as regards PIL in the last ten years.[515] As Professor Michaels observed, the European PIL is currently undergoing a revolution which has brought about three major aspects, namely, federalisation, constitutionalisation and pluralisation.[516] Although the European institutions did not have any legislative power to make PIL rules until the Amsterdam Treaty, this did not preclude the continuing development of PIL provisions that came either in the form of directives or regulations.[517] As demonstrated by Senior Lecturer Fiorini, the entire PIL evolution from the EU perspective could be classified into two distinct parts, first, cooperation between the Member States of the EU or intergovernmental cooperation and, second, measures transcending borders or the cross-border/supranational measures.[518]

As far as cooperation is concerned, one of the first manifestations of PIL legal instruments made by the European institutions can be found in Article 220 of the Rome Treaty 1957.[519] Based on this Article, many other agreements were negotiated such as the Recognition of Companies Convention 1968 and the Insolvency Convention 1995. However, amongst all the subsequent agreements that came into force it is the Brussels Convention that stands out.[520] The very onset of cooperation of the EU Member States in the field of PIL can be traced back to

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514 Marcin Czepelak, 'Would We like to Have a European Code of Private International Law' [2010] European Review of Private Law 705.

515 Aude Fiorini, 'The Evolution of European Private International Law' (2008) 57 The International and Comparative Law Quarterly 969.

516 Symeon Symeonides, 'The Amercian Revolution and the European Evolution in Choice of Law: Reciprocal Lessons' (2008) 82 Tulane Law Review 2.

517 Fiorini 970.

518 See Fiorini.

519 Art 220 (renumbered Art 293 by the Treaty of Amsterdam and repealed by the Treaty of Lisbon) provided: 'Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: … the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries,- the simplification of formalities governing the reciprocal the recognition and enforcement of judgments of courts or tribunals and of arbitration awards.'

520 Fiorini 970.

the 1970s, where the idea of cooperation emerged in the European Political Cooperation (EPC) framework.[521] European leaders, at different times, were engaged in negotiations to create a consensus on PIL rules and other associated legal discussions, such as creating common substantive law at the international level. As a result, the European countries and/or EU Member States ratified the Conventions of Luxembourg and The Hague in 1980.[522] Although the EU leaders were more inclined towards the internationalisation of PIL, in the process they were able to make some intra-EU impact by the adaptation of the European Legislation Convention 1987 and the European Maintenance Convention 1990[523] through the EPC.[524] During the period 1957 to 1993, the most significant Convention was the Rome Convention 1980,[525] although it was never treated as a European treaty provision, neither did it have any involvement from a European institution.[526]

The period 1993 to 1999 saw more EU intragovernmental cooperation on PIL. During this time, the Maastricht Treaty added two pillars to the EC, namely the Common Foreign and Security Policy and Justice and Home Affairs.[527] These stressed the idea of judicial cooperation within the frontiers of the EU. Articles K1 and K3, under the provisions of Title VI, related to intra-EU judicial cooperation in the fields of justice and home affairs.[528] The provisions of the

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521 Ibid.

522 Ibid.

523 'The 1987 Brussels Convention abolishing the legislation of documents in the Member States of the European Community, Dalloz 1992 L 278, has only entered into force between a few Member States. And, the 1990 Convention on the simplification of procedures for the recovery of maintenance claims never came into force'; Fiorini 970.

524 Fiorini 970.

525 Convention on the Law Applicable to Contractual Obligations (consolidated version), OJ C 027, 26 January 1998, 34–36.

526 Fiorini 971.

527 'The EC Treaty has been compared to a Greek temple built on three pillars – the first one being the EC Treaty (where Community institutions are empowered to exercise legislative, executive and judicial powers as conferred to them), is complemented by the second and third one (where the governance remains inter-governmental)'; Fiorini 971.

528 Article K1: 'For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: …6. Judicial cooperation in civil matters…'; Article K3 states, '2. The Council may: on the initiative of any Member State or of the Commission, in the areas referred to in Article K1 (1) to (6);… (c) without prejudice to Article 220 of the Treaty establishing the European Community, draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Unless otherwise provided by such conventions, measures implementing them shall be adopted within the Council by a majority of two-thirds if the High Contracting Parties. Such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down.'

Maastricht Treaty undoubtedly contributed to the realm of PIL in the EU.[529] However, despite all its contributions towards PIL, the Maastricht Treaty was extensively criticised for being ineffective, since it was followed by only two agreements, namely, the Service Convention 1997 and the Brussels II Convention 1998 that never came into effect.[530]

As regards supranational measures, a number of PIL rules were introduced by the EU in the shape of different directives and regulations prior to the Amsterdam Treaty in order to harmonise substantive law within the EU. However, these diverse directives and regulations were rather unfavourable for PIL because of the existing lack of coherence amongst the EU measures concerning PIL.[531] Things changed drastically in the field of PIL in the context of the EU after the Treaty of Amsterdam came into force. The Amsterdam Treaty rewrote entire aspects of the previously existing EU measures of PIL, and added new perspectives and dimensions to the EU understanding of PIL mainly by substituting the previous ideas and aims of the Maastricht Treaty with the idea[532] of 'the Union as an area freedom, security and justice, in which the free movement of persons is assured'.[533] Two other significant features that the Amsterdam Treaty brought about were the proper implementation of its goal relating to PIL measures and the transfer of judicial cooperation in civil matters from the third pillar to the first pillar, thus making the EU institutions eligible to legislate in the field of PIL, which was previously missing.[534]

Alongside the legislative aspect, the Treaty of Amsterdam also introduced new policies regarding visas, asylum, immigration, the free movement of people and, most importantly, as already mentioned in Chapter 1, it introduced and implemented measures in relation to judicial cooperation,[535] manifestation of which can be found in Article 65.[536] The new arrangements

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529 HE Hartnell, 'EUstitia: Instutionalizing Justice in the European Union' [2002] Northwestern Journal of International Law and Business 74–75.

530 J Basedow, 'The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam' [2000] Common Market Law Review 691.

531 K Kreuzer, 'Zu Stand Und Perspektiven des Europäischen Internationalen Privatrechts-Wie europäisch soll das Europäische Internationale Privatrecht sein?' [2006] Rabels Zeitschrift 13–16.

532 Article 2 EU Treaty (Amsterdam Version).

533 Ph Manin, 'The Treaty of Amsterdam' [1998] Columbia Journal of European Law 1–26.

534 Fiorini 973.

535 Ibid.

536 Article 65 EC Treaty provides: Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:
Improving and simplifying:
The system for cross-border service of judicial and extrajudicial documents
Cooperation in the taking of evidence

introduced by the Amsterdam Treaty eradicated the previously existing shortcomings of the previous EU system of dealing with PIL cases, by ensuring a broader involvement of the EU institutions as well as by increasing the adeptness and productivity of Justice and Home Affairs (JHA) cooperation.[537] Although the Treaty created many developments and amendments in ensuring proper coordination as well as unification in the PIL sector, there remained some flaws. One of the greatest exponents of the European integration in the field of PIL, Ulrich Drobnig, observed in 2000 that:

> "A great step forward – private international law recognised as Community task – has been achieved but at a high price on the technical level. Thus, on balance it has been a mixed success. One hopes that the next Revision Conference will rectify this major mistake."[538]

One of the major shortcomings of the Amsterdam Treaty was the limited power of the European Court of Justice (ECJ). Under Article 68, the ECJ had the limited power of interpretation in preliminary rulings of PIL, but that could only be requested by the highest appeal court of any Member State. However, the only exception to this is in Article 234, under which any type of national court could bring any matter relating to any particular case before the ECJ at any stage.

Another significantly complex synthesis was the coexistence of Article 220, which was later renumbered as Article 293 with previously existing Article 65. This subsequently led to a great deal of confusion and arguments as to the new competence of the Treaty.[539] Such inaccuracies and obscurities of some parts of the Amsterdam Treaty were reduced or, it could be said, eradicated by the Treaty of Nice. The most notable change was brought in Article 67,[540] which

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The recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases
Promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction
Eliminating obstacles to the good functioning of civil proceedings, if necessary, by promoting the compatibility of the rules on civil procedure applicable in Member States.

537 Fiorini 973.

538 Ulrich Drobnig, 'European Private International Law after the Treaty of Amsterdam-Perspectives Foe the next Decade' [2000] The King's College Law Journal 201.

539 Fiorini 974.

540 Article 67 (ex-Article 61 TEC and ex-Article 29 TEU):
1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.
2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

promptly altered Article 65 with the exception of issues relating to family law and introduced the procedures mentioned in Article 251. Despite the amendments brought by the Treaty of Nice, some uncertainties still remained.[541]

2.6.1.2 The advancement of European private international law policy

The most important and significant landmark in the history of EU PIL was the accession of the EU to the HCCH as a regional economic integration organisation. This took place on 3 April 2007.[542] One of the core reasons for this was the fact that after the Treaty of Amsterdam the EU attained new legislative competence.[543] However, the Treaty of Lisbon (which was previously called the Reform Treaty), that came into force on 1 December 2009, brought a remarkable change in the entire spectrum of PIL at the EU level in terms of the competences of the EU as a whole. This also included the competence of the ECJ, legislating special procedures as family matters in PIL, and the transmutation of the position of Denmark.[544]

With the enforcement of the Treaty of Lisbon 2009 the Union appeared to have curtailed and shared its competencies with the Member States. This Treaty replaced the previously existing Title IV (relating to visas, asylum, immigration and other policies) in the EC treaty with Title V (covering areas of freedom, security and justice). By virtue of Article 4 of the Treaty on the Functioning of the European Union (TFEU), the competence of the EU has been limited in the areas of freedom, security and justice. The Member States now have the authority to make and adopt measures relating to judicial cooperation between themselves, however, that is subject to the fact that the Union has ceased its competence in certain matters or has not exercised its

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.
4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

541 Fiorini 274.

542 After the Statute of Hague Conference was amended which enables the admission of a Regional Economic Integration Organization and the Council's decision from the accession of the EC to the HCCH; 2006/719/EC: Council Decision of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law OJ L 297, 26 October 2006, 1–14; Szabo 144.

543 Sarolta Szabo, 'Brief Summary of the Evolution of the EU Regulation on Private International Law' (2011) VII Iustum Aequum Salutare 143, 144.

544 See Fiorini.

competence.[545] It has also replaced Articles 61 and 65 of the EC Treaty with the Articles 67[546] and 81,[547] where the latter Articles are to be read in conjunction.[548] Ostensibly, it might appear that the competence of the Union as a whole had been curtailed by the notion of conferral, or rather the competence of the Union had been decentralised and made somewhat robust by expressly sharing its competence between the Union and its Member States.[549]

The provision of Qualified Majority Voting (QMV) in the legislative procedures was also mentioned in Article 81, apart from the field of family law.[550] In the legislative procedure for family law, the notion of *passerelle*[551] is maintained. One of the prime objectives of the Treaty of Lisbon has been to enhance the 'democratic legitimacy of the Union' that welcomes the intervention of the national parliaments[552] in the legislative procedures relating to family law undergone by the Union.

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545 Article 4:
1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6…
4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

546 Article 67 TFEU:
1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States…
4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

547 Article 81 TFEU:
1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States…
3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.
The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.
The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

548 Fiorini 975.

549 Under Declaration No 24, it has been made clear that the Union has a legal entity, however, this status does not make the Union eligible to make law or to act other than what has been conferred upon it.

550 Fiorini 976.

551 A passerelle clause is a clause that is present in the treaties of the EU, which allows the change in the legislative procedure without the need of any formal amendments of the treaty; Article 81 (3) TFEU.

552 Protocol No 1 on the role of national Parliaments in the European Union.

As a guardian, the ECJ has had a vital role to play overseeing and ensuring uniformity as far as the application of EU instruments (especially those relating to PIL) are concerned at the European level, since it has always been a difficult task for the national parliaments to follow and ensure such uniformity.[553] The enforcement of the Treaty of Lisbon has conferred full legal review competence to the ECJ in preliminary references made by the national courts of the Member States. Before the Treaty of Lisbon came into force, under Article 68 (1) of the EC Treaty the national courts could only refer a case to the ECJ in situations where they did not have any remedy for the parties against their decisions. This provision has been repealed by Article 267 TFEU (Title V). According to the new provision enshrined in the Treaty of Lisbon, every national court of the Member States may make a request to the EJC for a preliminary ruling. As claimed by De Groot, the national courts now have the amplest possibilities of addressing the ECJ in the process of availing a uniform interpretation of regulations and directives.[554]

In recent times, the evolution of PIL at the European level has been notable. Arroyo, commenting on the profound improvement of PIL at the EU level, stated:

> "Multilocation and multiconnection, speed and mobility are characteristics of the present era. This is true for States and companies, and also rich and poor … to know only what 'our' courts do and what is the content of 'our' PIL rules can hardly allow us to solve real problems in an accurate way."[555]

One of the core objectives of the EU has always been to unify, harmonise and Europeanise its laws. Taking this into consideration, the journey of the Europeanisation of PIL has been one of the greatest achievements of the EU. Such progress has gradually been making the national laws relating to PIL obsolete.[556] It has also put PIL onto a different and higher dimension of the EU map.[557]

Despite all these achievements and developments of PIL of the EU, there still remains a number of complexities and inconsistencies as well as disadvantages as regards the legislation, procedure and the unification of PIL.[558] Amongst others, lack of political will and excessive

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553 Szabo 148.

554 Gerard-Rene De Groot and Jan-Jaap Kuipers, 'The New Provisions on Private International Law in the Treaty of Lisbon' [2008] Maastricht Journal of International and Comparative Law 114.

555 Arroyo, 'Private International Law and Comparative Law: A Relationship Challenged by International and Supranational Law' [2009] Yearbook of Private International Law 63.

556 Ibid 57.

557 Szabo 150.

558 Czepelak 705–728.

diversity in values and approaches could be termed as the biggest impediments of a more refined, defined, integrated and unified PIL at the European level.[559] The question, therefore, arises as to how the EU can go into deeper integration and unification of PIL at the European level.

2.6.2 The American Revolution

While European PIL was going through a journey of evolution, American conflict of laws was rather going through a process of revolution.[560] Here, the use of the terms evolution and revolution should be noted. One might ask if these terms are being used interchangeably, and the answer would be no. The term evolution is more apposite to the EU journey of PIL, because rather than uprooting the previously existing PIL or bringing drastic changes to its regime, the Europeans identified flaws and slowly but steadily corrected them through judicial as well as legislative endeavour. Whereas American conflict of laws' development was 'grassroots scholastic'. Their intent was rebellion; hence, rather than bringing reforms to the traditional system of PIL, they annihilated the old system outright.[561] However, Michaels viewed it differently. According to him, the term 'evolution' used for European conflict of laws is incorrect, and in his assertion he stated that 'Actually, and fascinatingly, we are observing a real European conflicts revolution – in importance, radicalness, and irreversibility comparable to the twentieth-century American conflicts revolution.'[562]

American conflict of laws is one of the most unusual laws in the country's legal system. Its concept has emanated from continental Europe rather than English law.[563] In the second half of the twentieth century, a number of developments in the regime of PIL/conflict of laws occurred in the US, which has been described as the American revolution of conflict of laws.[564] While there were many impediments as regards the choice of law rules, they tended to adopt a different method of dealing with all these flaws and hindrances. Rather than adhering to the conventional choice of law rules, they took a very narrow and effective approach that required the courts to examine and analyse issues in respect of any particular substantive rules of law in

559 Ibid 728.
560 Symeonides 8.
561 Ibid.
562 Ralf Michaels, 'The New European Choice-of-Law Revolution' (2008) 82 Tulane Law Review 1607.
563 Eugene Scoles and others, *Conflict of Laws* (4th edn, West Group 2004) 18–19.
564 Grusic and others 24.

conflict as well as the policy at issue, in every individual case, and to resolve such conflict by applying choice of law rules appropriate to that conflict.[565]

In the process of revolution, American conflict of laws was briefly investigated, and the following findings were produced. At the beginning of the 1960s, the old PIL notion of *lex loci* along with the long-established ethos of choice of law was severely criticised and denounced. A different approach entailing issue-by-issue analysis of the issues existing in a case, *depecage*, became the new established terms of the conflict of laws in the US.[566] Such approach undoubtedly changed the entire spectrum of the previously existing conflict of laws and enhanced the pragmaticism of justice that prompted and acted as an incentive in the subsequent development of PIL. Such 'better law' and 'interest analysis' approach added a new dimension to the competence of the judiciary. Hence, the judges of the current era differ both methodologically and linguistically from the pre-revolutionary era of conflict of laws.[567]

2.6.2.1 American approach to conflict/choice of law

As Professor Ehrenzweig said:

> "Conflicts law, that diminutive concern of human endeavour, has shared in and has, however imperceptively, contributed its share to the eternal struggle. The late-Victorian idol of the *Restatement* has yielded to the 'realist' onslaught of 'local law' skepticims, and local-law scepticism has yielded to nihilist abstractions of 'interests' and 'relationships'. Has the pendulum swung too far? Is revolution being met by counter-revolution? If we are to answer these questions, we must decide first whether there ever a revolution was and, if there was a revolution, what the regime was that it attacked and conquered."[568]

In order to grasp an in-depth understanding of the American revolution of conflict of laws, it is important to examine the two approaches detailed below.

2.6.2.1.1 Choice between 'jurisdiction selection' and 'rule-selection' techniques

565 Ibid.
566 Symeonides 5.
567 Ibid.
568 Albert A Ehrenzweig, 'A Counter: Revolution in Conflict Law? From Beale to Cavers' (1966) 80 Harvard Law Review 377.

The American revolution regarding PIL had an inextricable link with the judiciary. One of the three juristic minds who brought about constructive and effective changes outright in the history of American PIL was Brainerd Currie. This was also known as the 'American choice of law revolution'.[569] Currie and two others, Walter W Cook and David F Cavers, initiated the scholastic choice of law revolution that subsequently escorted the judiciary as well as the judicial revolution.[570] Currie, in his short lifespan, contributed a great deal to the legal sector. In the admiration of his work, one of his contemporaries said, 'in his curtailed lifetime, Brainerd Currie's achievements were of a brilliance and variety sufficient to have conferred eminence on the lives of several men'.[571]

Rules based on 'jurisdiction selection' have been the cornerstone of the traditional PIL, which has been followed to date by continental Europe as well as the UK. As it has been stated previously, rather than bringing about stark changes to the PIL arena the European countries have still clung to some of the old traditional PIL rules and jurisdiction selection rules is an instance of that. The American revolution system was quite the contrary to that of its European counterparts. The United States of America (US) adopted the technique of 'rule selection' that places emphasis on the content of the substantive rules of law of the different relevant jurisdictions and appraises these, rather than just using the law of any particular jurisdiction chosen by the PIL rule.[572] Such approach helps the judges to appraise, compare and contrast substantive rules of law of more jurisdictions in order to uphold and ensure, as well as justify, the respective interests involved in the application of a particular substantive rule of the most apposite jurisdiction or legal system. As Cavers rightly asked:

> "Should a court in dealing with a claim that a foreign law is applicable to the case before it or to an issue in that case choose between its own and the foreign legal system or, instead choose between its own rule and the foreign rule?"[573]

The next approach would be to determine what types of conflicts are best suited to the American revolution of choice of law based on the 'rule-selection technique'. Three genres of

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569 Symeon Symeonides, 'The Choice of Law Revolution Fifty Years after Currie: An End and a Beginning' (2015) University of Illinois Law Review 2.

570 Ibid 3.

571 Lawrence Wallace, 'Amercian Assn of Law Schools, Proceedings, Part 1-Report of Committees' (1965) Report of Committees 123.

572 Grusic and others 25.

573 Ibid.

conflict have been illustrated by Currie, namely, false conflicts, true conflicts and no-interest conflicts from the perspectives of state interest or policy.[574]

2.6.2.1.2 False, true and no interest conflicts

In any PIL case there is a basic presumption that there are two distinct legal systems, both of which would have a claim to be applied. However, if it appears that only one such claim exists then this situation would be termed as a 'false conflict'. This term applies to cases where the existing laws of different jurisdictions are the same or would produce the same outcome if applied, or to a situation where despite having distinct laws of two or more different jurisdictions, only one has an interest in being applied.[575] Situations of such kind make things easier for the court, as it does not need to apply the rule-selection technique. After examining a number of cases and literature, Westen remarked that:

> "The concept of false conflicts has wide appeal and diverse meaning. In some cases, it is used to describe situations in which choice-of-law is moot. In other cases, it is used to describe the choice-of-law process itself. And in still other cases, it is used to describe situations in which choice of law has already been made. In each case, however, by characterising a choice-of-law problem as a false conflict, the courts are asserting that only one law can be rationally applied to the facts at issue. The concept of false conflicts has value for courts which are sufficiently sophisticated to engage in the kind of reasoning it presupposes. The concept is also useful in eliminating as forceful precedent those choice-of-laws cases which are found to have involved no real conflict. But it is no shibboleth for solving the problems of private international law. Rather it is a challenge to counsel and courts alike to abandon the talismans of the past by confronting the task of accommodating legitimate state interest."[576]

As far as true conflicts are concerned, cases relating to conflict of laws could be termed as true conflicts if there are distinct sets of substantive rules of different jurisdictions, and they all have a claim to be applied.[577] Situations involving 'true conflicts' invite the discussion of the rule-selection technique and are best suited to its tenets. These will be discussed extensively in the next section.

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574 Symeonides 18.

575 *Scheer v Rockne Motors Corpn* (1934) 68 Fed Report F 2d 942 (US Court of Appeals for the Second Circuit) 942.

576 PK Westen, 'False Conflicts' (1967) 55 California Law Review 74, 122.

577 Grusic and others 25.

There is another situation where the case relating to conflict of laws involves different sets of substantive rules of different jurisdictions, but neither of them has any claim or interest in being applied. Such scenarios are termed as 'no-interest conflicts'.[578] As Professor Weintraub said:

> "The classic 'no interest' case is one in which the plaintiff's state has a law favourable to the defendant and the defendant's state has a law favourable to the plaintiff …The plaintiff's state has no interest in protecting the defendant who comes from another state and the defendant's state has no reason to give the plaintiff more compensation than he would get under the law of his own state."[579]

Currie's categorisation has been one of the finest works undertaken in the conflict of laws/PIL regime. It is also useful for any analytical examination of cases involving conflict of laws issues. However, his idea of categorisation has also been criticised for being scantly narrated. Although the tripartite cataloguing of Currie is contingent on the notions of state interests or policy, the last part of his categorisation, namely no-interest conflicts, does not fall within the ambit of such tenets. Hence, this creates an impasse since neither state involved in a case has any interest to be drawn in.[580] Professor Symeonides found Currie's tagging of conflict cases to be problematic since it holds a preconceived idea of 'interest' as with 'jurisdiction-selection technique' that also prejudges the basic question of whether a state involved in a case does have any interest in its law being applied to that particular case. This is a question to which there is no constant answer. Moreover, reasonable minds would often have distinct answers to that question. Symeonides, therefore, suggested new names for the second and third of Currie's terms. These are: 'direct conflicts' instead of 'true conflicts', and 'inverse conflicts' in the place of 'no-interest conflicts'.[581]

'Direct' and 'inverse' conflicts have been described in a new manner by Symeonides. Direct conflicts have been elucidated as those cases where each state involved in a case does have a law that favours a party who is linked with the state. Inverse conflicts, on the other hand, have been explicated as those scenarios where each involved state has a law that favours the party being in affiliation with the other state. Rather than denoting the interests of the states involved,

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578 Brainerd Currie, *Selected Essays on the Conflict of Laws* (Duke University Press 1963) 152–156.

579 Russell J Weintraub, 'The Future of Choice of Laws for Torts: What Principles Should Be Preferred?' in *Contemporary Perspectives in Conflict of Laws: Essays in Honor of David F Cavers* (1977) 41 Law and Contemporary Problems 146, 153.

580 Symeonides 22.

581 Symeon C Symeonides and Wendy Collins Perdue, *Conflict of Laws: American, Comparative, International Cases and Materials* (3rd edn, West Academic Publishing 2012) 150–151.

these substitute terms accentuate the content of the sets of substantive law being involved in the case and, hence, eradicate the possibility of any 'fore judgment' on the part of the court's own categorisation based on its own interest.[582]

2.6.2.2 Rule selection technique

2.6.2.2.1 Analysis of the governmental interests

The first limb of the rule-selection technique is the exploration and consideration of the governmental interests. Currie, who was known as the father of the governmental interests approach,[583] extrapolated[584] that the court should look at the conflict of laws cases carefully. They should examine the policies existing in the rules of substantive law in any apparent conflict and assess the interests that the respective states might have in order to ensure such policies entailed in their rules have been applied, and not restricted to one state.[585] Currie delineated the term interest as '(1) a governmental policy and (2) the concurrent existence of an appropriate relationship between the state having policy and the transaction, the parties, or the litigation.'[586] The first step in interest-based analysis is to establish if there exists any true conflict or not. However, in heeding only the application of the law of the forum, this is technically equivalent to the renunciation of the internationalisation of PIL.[587] The assessment of interest analysis is also deemed to be flawed since it is only confined to the fact of whether the conflict is true or false. The weighing up of the interest being constrained only within the ambit of state interest may be an appropriate and legitimate ploy in the field of public international law, however, in cases relating to PIL, such an approach to adjudication seems incongruous and unfitting. The court dealing with PIL cases should rather concentrate on the rights and interests of the individual(s) of any particular case, since PIL is there to protect the rights and interests of the private person be it from the forum or any foreign country and not any particular country.[588]

In relation to the judges' tasks, this interest analysis assessment involving the policy issues of the country raises much controversy. The question that comes forth is whether judges should

582 Ibid.
583 *Bernhard v Harrah's Club* (1976) 546 P 2d 719 (Supreme Court of California) [722].
584 See Currie Chapter 4 and 12.
585 Grusic and others 26.
586 Currie 621.
587 *Erny v Estate of Merola* (2002) 729 2d 1208 (Supreme Court of New Jersey) [1208].
588 Grusic and others 26.

be engaged in determining the rationale of the policies in the making of any statutory rule, being inferred and/or made by the state actors?[589] The analysists have, therefore, been allowed to argue that 'in effect our method may seem shortlisted and parochial, but it is not the courts' business to second-guess a state legislature'.[590] The bigger theoretical problem lies in the application of such an interest analysis approach when judges have to perform a policy assessment of the law of another country whose legal system, law or state policy might be different to that of the USA.[591] While to gain more on the part of the state was the primary reasoning of Currie's state interest policy, it rather transpired to be controversial as well as detrimental to so many other associated interests of the state. Currie's narrow assumptions as regards the latitude of the interest policy can be succinctly understood from the findings of Symeonides who stated:[592]

> "(1) Currie did not quite cogitate about the interests of the government, as his proposition did not cover the issue of 'multistate' interest, the interest that might not emanate from the state's domestic law, however in a broader perspective, the interest might originate from the membership of the state in a broader community of states.[593]
>
> (2) The interest policy theory of Currie would only apply to the cases where the law of the state would benefit its own domiciliaries and not to the cases where the law would benefit the non-domiciliaries even if the arising situations were the same.[594] As mentioned above, such approach is clearly opposite to the tenets of PIL unification.
>
> (3) Currie's calculus of governmental interest policy de-emphasized the interests of the individuals and stressed more on the respective home states."[595]

2.6.2.2.2 Comparative impairment

In opposition to Currie's proposition of policy interest, an alternative opinion developed in the USA. According to this opinion, the court should not be willing to automatically apply the law

589 Lea Brilmayer, 'Interest Analysis and the Myth If Legislative Intent' (392AD) 78 Michigan Law Review 392.
590 Ibid.
591 JJ Fawcett, 'Is American Governmental Interest Analysis the Solution to English Tort Choice of Law Problems?' (1982) 31 The International and Comparative Law Quarterly 150, 150.
592 Symeonides 6.
593 Currie 614.
594 Currie 691–721.
595 Currie 610.

of the forum in cases of true conflicts, but rather it should be weighing and evaluating the interests that are in conflict. Such approach to evaluation known as 'comparative impairment' was first promulgated by Baxter in 1963.[596] Baxter's proposition was supported by the Supreme Court of California, which affirmed that while adjudicating the court should take the interests of the conflicting states into consideration, and a state's interests were impaired if its own policies were subordinated to the policies of another state which was in conflict.[597] In the case of *Offshore*, the premise of comparative impairment has been articulately avowed as:

> "The comparative impairment approach to the resolution of true conflicts attempts to determine the relative commitment of the respective states to the laws involved. The approach incorporates several factors for consideration: the history and current status of the state's laws: the function and purpose of those laws."[598]

The approach of comparative impairment has been criticised in comparison to the governmental interest approach of the rule-selection technique since it is not easy to accomplish such an approach. However, the comparative impairment approach is able to answer of some queries that Currie did not. One of such issues is the failure of Currie to resolve problems relating to a disinterested third state.[599]

2.6.2.2.3 Cavers' method: principles of preference

Cavers, along with Currie, was also a detractor of the jurisdiction-based approach.[600] However, he was not a detractor of the choice of law rules as opposed to Currie.[601] Currie's remark as regards the choice of law rules was, 'in the absence of federal legislation, we are better off without choice of law rules'.[602] Such statements are believed to have created a kind of crisis in American conflict of laws.[603] In that moment of crisis, the revolutionary work of Professor Cavers, *The Choice of Law Process*, came to be a blessing for people working or involved in the field of conflict of laws.[604] In early1933, Cavers urged the courts 'to develop a body of

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596 Harold W Horowitz, 'The Law of Choice of Law in California- A Restatement' (1974) 21 UCLA Law Review 748–758.
597 *Bernhard v Harrah's Club* [719].
598 *Offshore Rental Co v Continental Oil Co* (1978) 583 P 2d 721 (Supreme Court of California) [727].
599 Grusic and others 28.
600 David F Cavers, 'A Critique of the Choice of Law Problem' (1933) 47 Harvard Law Review 173, 173.
601 David F Cavers, *The Choice of Law Process* (University of Michigan Press 1965) 94.
602 Currie 177, 183.
603 Ehrenzweig 378.
604 Ibid.

rules, principles and standards of a new sort … through the workings of stare decisis and the combined efforts of courts and scholars…'.[605] Unlike Currie, Cavers developed the idea of invoking choice of law rules to resolve conflict cases, namely true conflicts.[606] Whilst he favoured the rule-based approach, he also confessed to the fact that it might be time consuming until a simple development of rule-based approach rules appeared in reality.[607]

Cavers, therefore, encouraged the courts in developing principles of preference. Cavers articulated, in his book *The Choice of Law Process*, that:

> "The court is to seek a rule for choice of law or a principle of preference which would either reflect relevant multistate policies or provide the basis for a reasonable accommodation of the laws' conflicting purposes. A principle of preference would be applicable to all cases having the same general pattern of law and fact and would identify a preferred result on choice-of-law grounds. If the case could not thus be generalised, the court should state the reasons leading it to prefer one result to the other on choice-of-law grounds. In either case it should apply the law leading to the preferred result."[608]

Cavers' notion of 'principles of preference' was admired and accepted by many contemporary academics, lawyers and judges, however, the process that he proposed was also criticised for being 'gradual'. Although his technique worked well in certain areas, namely torts, contracts and conveyancing, in other areas of law his proposition did not develop at all.[609] Cavers' rationale for introducing the concept of principles of preference was to mitigate the existing problems relating to the resolution of conflict of laws cases, as well as to fill the gap of any apposite legal instrument.[610] On a different note, since he was also a proponent of the rule-based approach, it is presumed that he expected to have a detailed set of rule-based approach rules that would cover the flaws, unpredictability and uncertainty that might exist in his notion of principles of preference. Here, it is also worth mentioning that Cavers himself sadly noted that he had been incorrectly termed as the author of the 'Cavers method of atomizing precedent in favour of rule-selection and application of justice in the individual case'.[611]

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605 Cavers, 'A Critique of the Choice of Law Problem' 173.
606 Grusic and others 28.
607 Ibid.
608 Cavers, *The Choice of Law Process* 64.
609 Grusic and others 28.
610 See Cavers, *The Choice of Law Process*.
611 Ehrenzweig 380.

2.6.2.2.4 Interpretation of forum policy

Professor Ehrenzweig, who has already been mentioned several times, while criticising the jurisdiction-selecting approaches as well as governmental interest analysis in his writings, proposed a new idea of choice of law rule.[612] Ehrenzweig emphasised the differences between the reformulation of existing law, with regard to true conflicts naturally keeping the false conflicts apart, and proposals *de lege ferenda*.[613] He focused on the rationalisation of settled law unlike the approaches of Currie's 'choice interest', Caver's 'preference' and Leflar's 'choice influencing considerations', which all accentuated only narrating desirable and future rules.[614]

Ehrenzweig thought differently. According to his proposition, while dealing with cases relating to choice of law, the court should give preference to the law of the forum. This approach was described as 'interpretation of forum policy'.[615] From a pragmatic point of view, he realised that in practice the court always had an inclination towards applying the law of the forum as an applicable law, and also conceded the fact that if the forum would need to consider any foreign law as an applicable law then it would merely be 'tolerated'.[616] That is to say, as per his thoughts and ideas of conflict of laws cases, resort to the foreign law would only be made analytically and only in the rarest circumstance. Professor Currie,[617] in his review of Ehrenzweig's *A Treatise on the Conflict of Laws*, wrote that the choice between the law of the forum and the foreign law determined by the forum would reflect the two rules below:

> "(1) Those few but important rules of choice which have been formulated by statute or precedent with sufficient clarity and consistency to be 'applied' like other rules of statute or common law;
>
> (2) The rules' derived from the actual doing of the courts."[618]

However, such rules do not have answers to all the problems relating to conflict cases. With regard to this, Ehrenzweig expressed his concern as being:

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612 See Ehrenzwig.
613 Ehrenzweig 380–381.
614 Ibid 381.
615 David F Cavers, 'Contemporary Conflicts Law in American Perspective' (1970) 131 Collected Courses of the Hague Academy of International Law 75, 150.
616 Ehrenzweig 308–309, 311.
617 Brainerd Currie, 'A Treatise on the Conflict of Laws (Review Work)' (1964) Duke Law Journal 424–25.
618 Ehrenzweig 308.

> "Where the available material does not even suffice as a basis for such answers, we shall have to be satisfied with interpreting each domestic rule as to its applicability to those foreign facts for the sake of which that rule is claimed to [be] displaced."[619]

However, he also confirmed that the method of making inquiry into the policies underlying local law should only be adopted as the last resort.[620] The law of the forum always has the advantage of being applied in conflict of laws cases easily and the technique of application is also very convenient. However, the problem starts for the forum when the law of the forum does not fit in the issue of choice of law.[621]

Ehrenzweig's notion is also very helpful for the claimants, because it helps them to sue in the country whose law is the most favourable. This process is called 'forum-shopping'. It is, therefore, perceived that this approach does not always depend on the availability of controls over jurisdictional rules.[622]

2.6.2.2.5 Choice of law factors

Choice of law or the ascertainment of applicable law in any PIL matter, has been the topic of most concern for any jurisdiction, and America is no exception. However, the other two elements of PIL, namely jurisdiction and recognition end enforecement of foreign judgements, are also of no less importance. In America, determination of an application concerning any choice of law or conflict of laws problem is based on the choice of laws factors which were first enshrined in the Second Restatement (section 6) of the Conflict of Laws made by the American Law Institute.[623] According to the principles set out in section 6,[624] the court should

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619 Ibid 308–309.

620 Ibid 353.

621 Grusic and others 29.

622 Ibid.

623 Ibid.

624 Section 6 Choice of Law Principles Text:
(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
(a) the needs of the interstate and international system,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

find the most apposite law of any state that has the closest proximity to any particular issue of a conflict case. Separate points based on the contact issue for tort and contract have also been enshrined in sections 145[625] and 188,[626] respectively.[627] As per the process, the court should first take the choice of law of its own country into consideration as a lodestar, in the absence of any relevant law in the domestic circuit. The factors relevant to determine the applicable law of any conflict of laws case are enumerated in *Cheshire, North & Fawcett's Private International Law* as follows:

> "(a) the needs of the inter-state and international system;
>
> (b) the relevant policies of the forum;
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
>
> (d) the protection of justified expectations;
>
> (e) the basic policies underlying the particular field of law;
>
> (f) certainty, predictability and the uniformity of result; and
>
> (g) ease in the determination and application of the law to be applied."[628]

These factors could be applied to conflict cases of contract, tort, marriage and property.[629] The Second Restatement certainly reflects the flexible mix of current ideas and perceptions on

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625 Section 145 The General Principle Text:
(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles states in section 6.
(2) Contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:
(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

626 Section 188 (2) In the absence of an effective choice of law by the parties (see section 187), the contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:
(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

627 Gregory E Smith, 'Choice of Law in the United States' (1987) 38 Hastings Law Journal 1041, 1045.

628 Grusic and others 29.

629 Ibid.

choice of law, whereas the First Restatement was based on 'single-contact and policy-blind rules'.[630] The difference between the First Restatement and the Second Restatement patently exposed the approach of the judges as to how they would be adjudicating conflicts relating to choice of law.

The policies and the interests to which judges adhered previously were more linked to the overall spectrum of the forum/country. However, after the instrumentalisation of the Second Restatement the approach changed. The courts began to keep to the guidelines enumerated in section 6, rather than being inclined to the forum's or country's policy and interest outlook. However, indirectly as well as pragmatically, the country's interests and policies would be reflected in its legislation. Reese, the reporter of the Second Restatement, who had been called the architect and mastermind[631] of this approach, articulated that the criteria set out in the Second Restatement was merely an 'approach' to choice of law and not a solution of any specific problem arising out of choice of law.[632] Terming it as a decisive set of rules of choice of law, Reese stated that:

> "I believe that one ultimate goal, be it ever so distant, should be the development of hard-and-fast rules of choice of law. I believe that in many instances these rules should be directed, at least initially, at a particular issue. And I believe that in the development of these rules consideration should be given to the basic objectives of choice of law, to the relevant local law rules of the potentially interested states and, of course, to the contacts of the parties and of the occurrence with these states."[633]

Like the previously mentioned approaches to conflict of laws issues, the choice of law factors' guideline cemented in the Second Restatement did not escape potential criticism. Judges purporting to invoke the guidelines of the Second Restatement often engaged in a 'contact-counting exercise', rather than posing an overall outlook of the guidelines. Moreover, sections 145 and 188, mentioned above, used to be taken into consideration at the conclusion, rather than the inception of the adjudication process of the conflict cases.[634] It is also worth mentioning that the people who drafted and supported the Second Restatement were also previously

630 Smith 1046.
631 See LM Reese; Cheatham.
632 Willis LM Reese, 'General Courses on Private International Law' (1976) 150 Collected Courses of the Hague Academy of International Law 44–65.
633 Reese 180.
634 Smith 1046.

proponents of governmental interest analysis. Therefore, the brainchild of the Second Restatement, namely 'true interest analysis' has always failed to appear in the courts.[635]

Apparently, the set of guidelines has never been fully applied.[636] In fact, the factors enumerated often point in directions that are not same and hold no measure of self-significance.[637] The other most significant flaw of the Second Restatement is the difficulty as regards the ascertainment of its 'choice influencing factors'.[638] However, Leflar, who advocated the Second Restatement, listed the choice influencing factors/considerations in his book *American Conflicts Law* as being:

> "(a) predictability of result; (b) maintenance of interstate and international order; (c) simplification of the judicial task; (d) advancement of the forum's governmental interests; (e) application of the better law."[639]

Although all the first four factors do share a similar kind of acceptance as well as criticism, the last factor, namely 'better rule of law' is entitled to be viewed differently.[640] The last factor has transpired to be the most favourable to the judges, even though in most of the cases judges have asserted that the rule of law of the forum is better, knowingly or reluctantly discarding others.[641]

2.6.2.3 Effects and consequences of the revolution

It is important to understand the difference between the scholastic choice of law revolution and judicial revolution. Scholastic revolution has basically been proposed by the academics from a more theoretical point of view rather than being overtly pragmatic. As already noted, this latter view of pragmaticism is more suitable for the American revolution. However, the American revolution of judicial pragmaticism in conflict cases was not confined only to the USA. Continental writers, namely from France, Italy, Germany and Switzerland,[642] have also been influenced by the American developments of conflict of laws.[643] Although the US has brought about many fruitful amendments in the regime of PIL/conflict of law, nevertheless, as

635 Ibid.
636 Ibid.
637 Cavers, 'Contemporary Conflicts Law in American Perspective' 145.
638 Grusic and others 30.
639 Robert Allen Leflar, *American Conflicts Law* (4th edn, Lexis Pub 1986) 277–279.
640 Grusic and others 30–31.
641 *Clark v Clark* (1966) 222 2d 205 (New Hampshire Supreme Court) [205].
642 Kurt Siehr, 'Revolution and Evolution in Conflicts Law' (2000) 60 LA LR 1353.
643 Grusic and others 31.

mentioned earlier, it was not immune from criticism. One of the robust criticisms was made in the case of *Paul*, where it was stated that:

> "Conflicts of law has become a veritable playpen for judicial policymakers … The courts are saddled with a cumbersome and unwieldy body of conflicts law that creates confusion, uncertainty and inconsistency, as well as complication of the judicial task. The approach has been like that of the misguided physician who treated a case of dandruff with nitric acid, only to discover that the malady would have been remedied with medicated shampoo. Neither the doctor nor the patient needs to have lost his head."[644]

Although the revolution contributed exponentially to the areas of tort law[645] as well as contract rules, the idea of 'interest analysis' being an impactful element of the American revolution has had very little application in the areas of family law,[646] property law and so forth. In the post-revolutionary era of American conflicts law, there emerged a few offshoots of interdisciplinary interests such as 'law and economics', 'law and science' and 'law and anthropology'.[647] Amongst all of these interdisciplinary movements, the most vital and time-consuming movement is the mixture of law and economics. As regards this combination, Michaels suggested three types of economic model, namely, the private law model, the international law model and the combined model.[648] Where the first two types would delve into the interests and welfare of the individuals as well as the states, the last would combine the first two,[649] by focusing on the regulatory competition between states, and on the role of party autonomy. This would impact on the incentivisation to pass and adopt proficient domestic substantive laws.[650] In recent times, discussion of the intersection of PIL and the global governance movement has been a pivotal interest for many.[651]

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644 *Paul v National Life* (1986) 352 SE 2d 550 (West Virginia Supreme Court) [551], [553].

645 *Mitchell v Craft* (1968) 211 2d 509 (Supreme Court of Mississippi) [509].

646 Peter M North, 'Development of Rules of Private International Law in the Field of Family Law' (1980) 166 Collected Courses of the Hague Academy of International Law 9.

647 Grusic and others 32.

648 Ralf Michaels, 'Economics of Law as Choice of Law' (2008) 71 Law and Contemporary Problems, Duke Law 73, 73.

649 Alferez, 'Regulatory Competition: A Private International Law Approach' (1999) 8 European Journal of Law and Economics 251, 251–270.

650 Grusic and others 32.

651 Muir Watt and Arroyo (eds), *Private international law and global governance* (Oxford University Press 2014) 54.

The process of intersecting the above-mentioned disciplines with the conflict of laws or PIL has been viewed by many PIL scholars as an 'intellectual style'[652] that would help to eliminate many technical problems existing in the area of conflict of laws as well as in other disciplines.

The jurisprudential journey of PIL from being seen through the lens of naturalism (prior to 18th century) to being seen through the lens of positivism (since 19th century) has been primarily discussed in this chapter. Along with the discussion of this journey, the historical background of Swiss and English PIL, the reappearance of natural law in the domain of PIL, the nuance between positivism and historicism and the evolution of PIL in Europe and America have also been highlighted. It was an essential task to look at these historical evolution of PIL jurisprudence in order to understand as to how the notion of connecting factor emerged in PIL.

While stressing the employment of theocratical writing on PIL and in the court adjudication of PIL matters, Russian researcher L. Luntz once wrote:

"reference to theoretical writings on private international law are far more relevant in court decisions than discussions by courts of any other field. In private international law the difficulties in solving a wide of range of issues and gaps in legislation of almost every nation is so great that in PIL rather than any other field of law, the study of work of legal theorists is needed and important not only theoretically but also practically."[653]

There have been differences of opinion as to whether theoretical writings on PIL should be emphasised in court room adjudication of PIL disputes. The answer to such question is both yes and no. While civil law legal systems, such as Switzerland which is fundamentally intellectualised within the framework of Roman law, give preference to the writing of legal theorists in the court room adjudication, common legal system is deterred from such invocation rather it heavily relies on the principle of judicial precedent under which the judges follow previously decided cases where the facts of the case/s are sufficiently similar to that of the case being brought to them for adjudication. Theoretical writings have long been carrying this flagship in the understanding of PIL in both civil law and common law legal systems, as has been seen that Scotland, whose legal system is typically seen as hybrid, meaning it has the influence of common law and civil law legal systems, influenced England and Wales, which

652 Ralf Michaels, 'Post-Critical Private International Law: From Politics to Technique' in Muir Watt and Arroyo (eds), *Private international law and global governance* (Oxford University Press 2014) 54.

653 Irina Getman Pavlova, 'The History of Private International Law: The Theory of Belgian Realism in the 16th Century' (2018) 2 (5) Sociology International Journal 431.

has a common law legal system, in building up of the latter's jurisprudence of PIL. England and Wales having common law legal system may have been influenced by the Scottish understanding of PIL, which actually emanated from civil law jurisdictions such as France, Netherlands, however, their PIL legislations and related case laws reveal that their approach of court adjudication of cross-border civil disputes, which of course involves their strategies of the employment of connecting factors in disputes, differ significantly with that of civil law legal systems.

Part II:

The characterisation in private international law for the purpose of connecting the subject-matter to a state

Chapter 3: The process of characterisation in private international law

3.1 Introduction

Part II shall focus on the practicability and practicality of theoretical notions as well as the historical consequences of PIL. The catchphrase of Oliver Wendell Holmes is worthwhile mentioning, 'The danger is that the able and practical minded should look with indifference or distance upon ideas with connection of which with their business is remote.'[654] At the inception of any inspection and consideration of human thought, be it in the area of philosophy, law, logic or different genres of science, hindrances always emerge. They are often unfathomable and caused by either some unsubstantiated presumptions or abstruse wordings of notions.[655] In order to lift the verbal haze, as well as the procedural complexities that arise in any focus on legal disputes, legal thinkers and writers employed the concepts of 'characterisation', 'classification' or 'qualification'[656] (this term is used in French-speaking countries).[657] In a legal problem faced by the court, the term characterisation may be delineated as 'the determination of the nature of the problem'.[658] The classification or characterisation of a case indicates that the court after assuming jurisdiction will allocate the case to the apposite legal category based on the factual scenarios of the case presented. This could either be of its own jurisdiction, other jurisdiction(s) or the combination of both.[659] The term characterisation simply means to discover the existing problem(s) in a case by assuming the jurisdiction and guide it towards resolution, by applying the correct jurisdictional PIL rules and subsequently the substantive law or applicable law to the case. This is done by assessing the legal problem in question.

Before entering into the discussion of characterisation, it is worth considering some examples relating to logic, namely the 'logical paradox'. This was used by Professor Cook in his work

654 Walter Wheeler Cook, '"Characterization" in the Conflict of Laws' (1941) 51 The Yale Law Journal 191, 191.

655 Ibid.

656 Joseph H Beale, *The Conflict of Laws*, vol 3 (Baker, Voorhis & Co 1935) 55.

657 Cook 194.

658 AH Robertson, *Characterisation in the Conflict of Laws* (Harvard University Press 1940) 135.

659 U Grusic and others, *Cheshire, North & Fawcett Private International Law* (Paul Torresmans and James J Fawcett eds, 15th edn, Oxford University Press 2017) 42.

Characterization in the Conflict of Laws.[660] The following example invites discourse on the issue of the validity of the 'orthodox theory of logic':

> "Each adjective-word has, of course, an associated adjective, which is its meaning; and it is to be presumed that this meaning will sometimes apply to the word itself, and sometimes not. Thus, 'long' is not a long word, 'bad' is not a bad word, etc., so that what these words mean does not apply to the words themselves. On the other hand, 'short' is a short word, 'good' is a good word, etc., and each of these does have a meaning which applies to it. We may, accordingly, divide all such words into *auto-logical* adjective-words, which are those whose meanings apply to them, and *heterological* adjective-words, which are those whose meanings do not. But, now, 'autological' and 'heterological' are adjective words, so that the question may be raised whether 'heterological' is heterological. If it is, it must be autological, since its meaning will apply to it, but if this is so, it must, in turn be heterological, since that is what it means for this word to be autological."[661]

This logical paradox has been used by other prominent writers as well, by mentioning that adjectives that describe themselves should be termed 'autological'. On the other hand, adjectives that do not necessarily define themselves should be termed as 'heterological'. However, Professor Bloomfield's quote below will show how a student of linguistics would label and view this entire logical paradox from the viewpoint of a broader analysis.[662]

> "The fallacy is due to misuse of linguistic terms: the phrase 'an adjective which describes itself' makes no sense in any usable terminology of linguistics; the example of *short* illustrates a situation which could be described only in a different discourse. *E.G.* We may set up, without very rigid boundaries, as to meaning, various classes of adjectives. An adjective which describes a phonetic feature of words in *morphonymic* (e.g., short, long, monosyllabic). A morphonymic adjective which describes a phonetic feature of itself is *autological*. A morphonymic adjective which is not autological is *heterological*. The adjectives *autological* and *heterological* designate meanings of adjectives and not phonetic features; hence they are not morphonymic. Contrast the following sensible discourse: A *hakab* is a word that ends in a bilabial stop (p, b). A word that is not hakab is a *coup*. The words *hakab* and *coup* are hakabs."[663]

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660 See Cook.

661 Clarence Irving Lewis and Cooper Harold Langford, *Symbolic Logic* (Century Company 1932) 449.

662 Cook 192.

663 Leonard Bloomfield, 'Linguistic Aspects of Science' (1935) 2 Philosophy of Science 499, 501.

People working in the fields of logic and mathematics are often confused about the employment of a method to decipher the meaning of the words they use. Before any analysis, it is important to understand that there is always an ancillary adjective attached to the meaning of each and every adjective. However, when words are analysed, be they adjective, noun, or verb, such a word while defining itself portrays only its 'phonetic form'.[664] The categorisation above is related to that of adjectives and tends to describe the phonetic features of words. This has been termed as 'morphonymic' adjectives. The question then arises, will the classifications explained above, namely autological and heterological, fall within the understanding and capacity of morphonymic adjectives? They will clearly not fall within the ambit of morphonymic adjectives because their task is not to explain the phonetic features of words, but are applied 'to designate meaning of adjectives'. Therefore, these classifications neither rationally nor by definition apply to the above-mentioned logic related to adjective words, hence the logical paradox disappears.[665]

Cook rightly mentioned that an offhand statement entailing some 'verbal symbols', which are insufficient and somewhat inappropriately explained, made as regards an apparent problem, may persuade even the cleverest and most meritorious students of logic and mathematics to become involved in research or discussions which are like 'idle chatter of a transcendental kind' that 'does not make sense in any usable terminology of linguistics'.[666]

As a second example, Cook took the logical paradox of the barber that was believed to have been formulated by the distinguished student of philosophy and mathematical logic, Bertrand Russell.[667] He delineated logic as:

> "[T]here exist[s] a certain village, V, and a certain barber, B, who lives in V. The barber shaves all those, and only those, who live in V and who do not shave themselves. Now, does the barber shave himself? If he does, he doesn't. If he doesn't, he does…"[668]

Again, a careful inspection of this quotation can reveal the obscurity and inadequacy of the usage of words. The delineation of Russell only talks about some particular people without the mention of any specific time or place, and that is exactly where the problems lie. Therefore, if

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664 Cook 193.
665 Ibid.
666 Ibid.
667 Ibid.
668 John Dewey, *Logic: The Theory of Enquiry* (R & W Holt 1938) 383.

any formal logic is to be used in order to justify the answer to the question being put forward, it will have to be based on some speculative assumptions. When unfounded assumptions are discarded from the scene, how different would the answer be?[669] Dewey in this regard postulated that:

> "The appearance of contradiction vanishes the moment reference of time and date (place) is introduced, and since the act of shaving is existential (and not 'conceptual' merely), such a reference must be introduced implicitly in the context or else explicitly. When the act of shaving is interpreted existentially and temporally, the command is unambiguous and there is no difficulty in determining how it is to be obeyed. If the barber (who is assumed to be a soldier who is ordered by his superior officer to shave all the men in his company who do not shave themselves) is one who has not in the past shaved himself, then he obeys the order by now shaving himself; if he has shaved in the past, he obeys the order by now abstaining from shaving himself."[670]

The above instance suggests that students who study logic, and often try to view any subject-matter from an outright formal or academic mindset, encounter problems in the process of applying the subject-matter or the notion of subject-matter to any practical problem. They are unable to solve a problem unless and until they avoid the academic or, it could be said, literal interpretation of verbal-symbol jargon and interpret the verbal symbols with reference to the situation or facts. This is how problems which previously seemed to be intricate and unfathomable can be solved with ease and precision.[671] Cook also observed that the above discussion of logical paradoxes might seem to be redundant and unconnected with a discussion of characterisation to many readers. However, many conceptual problems relating to characterisation could be solved by employing the methods of dealing with logical paradoxes shown by Bloomfield and Dewey.[672]

3.2 Methods of characterisation

As with the logical paradoxes explained above, characterisation in PIL often experiences problems. Judges, at times, have to take decisions in characterising a PIL dispute which are entirely based on unfounded assumptions. However, the solutions of the problems relating to logical paradoxes that have been explicated above, namely, expounding any particular verbal

669 Cook 193.
670 Dewey 364.
671 Cook 194.
672 Ibid.

symbol, statement or narrative with more clarity, precision, and from a broader, practical perspective, could be compared with statutory interpretation in the legal arena. The first paradox that judges face while characterising the issues and causes, as well as the nature of PIL disputes by the invocation of statutes (either of the forum or another country), is the use of words or verbal symbols with less clarity and correctness in such statutes. This ought to be capable of being overcome by the invocation of different approaches of statutory interpretation, namely the literal approach, the golden rule, or the purposive approach. Likewise, in the absence of a unitary set of rules or system of a PIL mechanism, the rules of PIL have been developed in different jurisdictions and regionally (e.g. PIL in EU) in distinct manners that often become paradoxical and troublesome for the judges. The characterisations of legal provisions are not immune from such paradoxes. For example, the word 'domicile' may have a different meaning in English-speaking countries, such as England and the USA, compared to how the term has been understood in French or German law.[673]

Every country has different sets or systems of rules for different categories of law, for example, the law of contract, tort or civil matters. A scenario which falls under the law of contract in one jurisdiction might fall under the law of tort in another. When faced with cases involving foreign elements, judges take all these factors into consideration. After careful inspection of the facts presented before them, in some cases the judges may *suo moto* advise the lawyers, the investigation officer or the law enforcing authority to inquire further into the matter in question. This normally happens in an inquisitorial legal system, when allocating the case to the correct legal category.[674]

The process of classification or characterisation does not only apply to PIL disputes but to all kinds of litigation. It is an inherent part of 'legal reasoning' and 'judicial determination'.[675] Unlike PIL disputes, it is comparatively easier, or at least less troublesome, for judges to characterise disputes that are outright domestic in nature. The problem that lies with the characterisation of a PIL dispute is the versatility of the understanding of different rules in distinct categories existing in different jurisdictions. A judge having a particular understanding of a situation that falls under a legal rule of a particular category in his own jurisdiction may find a similar situation in a PIL dispute that falls under a legal rule of a category of another

673 Ibid.

674 See Grusic 42.

675 Veronique Allarousse, 'A Comparative Approach to the Conflict of Characterization in Private International Law' (1991) 23 Western Reserve Journal of International Law 479, 479.

jurisdiction that is different to his own. In this situation, the judge must assess the whole factual scenario of the case and might have to set aside his previous understanding and decide if he ought to apply the legal rule of another jurisdiction.[676] Not only the nature of the cause of action, but discrepancies with the rules of connecting factors of different jurisdiction are also clearly present. In the article *Jhering's Jahrbücher*, published in the founding year of the Yale Law Journal, Franz Kahn opined that although the rules of private international law of different jurisdictions might appear to be the same, the outcome of individual cases might not follow the same pathway, because of dormant differences in the system and understanding of law between different jurisdictions.[677]

The process of characterisation in PIL disputes has been connoted in many different ways by different PIL scholars. Little consensus has so far been found between them in the discussion of how characterisation would be chronologically delineated.[678] It is worth mentioning that though assumption of the jurisdiction as well as characterisation of PIL disputes as regards the recognition and enforcement of foreign judgments are often discarded from the discussion of characterisation, however the stage of assumption of the jurisdiction of the court which takes place prior to the court's duties to characterise PIL disputes as regards applicable law which involves characterisation of the cause of action fall within the ambit of characterisation and can be termed as characterisation of PIL dispute as regards jurisdiction. Characterisation of PIL disputes is also an important factor for the recognition and enforcement of foreign judgments.

The process of characterisation of the subject-matters of disputes as regards applicable law can be divided into two schemes: 'classification of the cause of action' and 'classification of a rule of law'.[679] As regards the former, after the apposite jurisdiction has been assigned to a dispute entailing a cross-border or conflict of laws issue, it is the task of the forum to assess and classify the nature of the question or the cause of action. For example, the forum should ascertain whether the case is in contract or tort, or of any other nature. Unless this is indisputable, it would be impossible for the court to choose the appropriate choice of law rules as well as the applicable law.[680]

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676 Ibid.

677 Ernest G Lorenzen, 'The Qualification, Classification, or Characterization Problem in the Conflict of Laws' (1940) 50 Yale Law Journal 743, 743.

678 Ibid.

679 Grusic and others 41–42.

680 Ibid 41.

As far as the second phase of characterisation is concerned, the court shall firstly choose the PIL rules that would normally be of the forum, however, it may also opt for PIL rules of another country such as the *lex causae* depending on the nature and the substance of the cause of action.[681] Secondly, the court shall move to the fact as to which law would govern the dispute. This process should be accomplished by employing connecting factors mentioned in the PIL rules chosen by the court.[682]

The application of foreign PIL rules is basically performed by the invocation of renvoi, which will be discussed in the next chapter. In the case of *Macmillan,*[683] which has also been cited in the very recent case of *Rokken*,[684] Staughton LJ delineated a three-stage process of characterisation. The first stage concerns characterisation of the issue of the matter that has been brought before the court, such as validity of a marriage, interpretation of a contract, intestate succession of moveable property. In the second stage, the choice of law or PIL rules of a particular jurisdiction are chosen, where the connecting factor(s) for the issue in question are enumerated. Finally, it is decided which particular system of law is inextricably linked to the issue or cause of action characterised in stage one by virtue of the connecting factor(s) established in stage two. This will be the applicable law.[685]

In the case of *Raffeisen Zentralbank*, which was also cited in *Rokkan*, Mance LJ commented on the three-stage process of characterisation as follows:

> "While it is convenient to identify this three-stage process, it does not follow that courts, at the first stage, can or should ignore the effect at the second stage of characterising an issue in a particular way. The overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules at stage 2, if this is necessary to achieve the overall aim of identifying the most appropriate law."[686]

681 *Re Annesley* (1926) 5 WLUK 56 (Ch).
682 Grusic and others 41.
683 *Macmillan v Bishopsgate* 1 WLR 387.
684 *Rokkan v Rokkan & Anor* (2021) EWHC 481 (Ch).
685 *Macmillan v Bishopsgate* [391]–[392].
686 *Raffeisen Zentralbank Osterreich AG v Five Star Trading LLC* (2001) EWCA Civ 68 [27].

Characterisation in PIL disputes could also be termed as the juxtaposition between different legal systems since the outcome of the process is to find the most apt legal rules for the dispute's adjudication. This manifestation will not be possible without proper contrast or juxtaposition. As hinted above, a wide range of views proposed by different scholars of distinct jurisdictions that have been posed on the topic of characterisation, issues relating to the factual situation, legal questions based on the factual scenario, cause of action, claim, defence, rule of law, all fall within the ambit of the discussion of characterisation.[687]

3.2.1 Kahn's delineation of characterisation

Amongst all the continental writers, the initial delineation of the concept as well as the process of characterisation, classification or qualification has been proposed by Kahn and Bartin.[688] One of the prime necessities of characterisation as Kahn pointed out was the differences between the PIL rules of the countries. Three of his observations are enumerated below:

(1) Discernible discrepancies might be present between the PIL rules of two or more jurisdictions. For example, the capacity of marriage could be defined by the domicile of the person by one PIL rule of one state, whereas the PIL rule of another jurisdiction may refer the case to the nationality of the particular person.

(2) Although the PIL rules of different countries may appear to be the same, the substance of the rules may have different connotations. A connecting factor such as 'domicile' could be used in multiple jurisdictions, but how the domicile of a person is determined might not conform with that of another jurisdiction.

(3) The PIL/conflict rules, as well as the substance of the rules of multiple jurisdictions, may be identical, but the issue in question might not be defined in the same manner. For example, the significance of parental consent might fall within the ambit of the question of capacity in one jurisdiction, whereas in another it might be treated under the understanding of the question of form.[689]

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687 Allarousse 481.

688 See Robert A Pascal, 'Characterization as an Approach to the Conflict of Laws' (1940) 2 Louisiana Law Review 715.

689 Pascal 716.

The last observation of Kahn can be found in many cases relating to cross-border issues. The English case of *Ogden v Ogden*,[690] which is often cited in discussion of PIL, could be worth illustrating here. In that case, a male minor from France got married to an English woman without acquiring consent or permission from his parents beforehand, which was a requirement under the French law. In the hearing of the case, the English court considered the matter of parental consent to be a question of form and applied the English PIL rule according to which that form was governed by the law of the celebration, which was England. The English court found the French law inapplicable to this dispute and subsequently upheld the validity of the marriage. However, when the same case was adjudicated by the French court, it found the issue of consent from the parent as a question of capacity to marry. According to the French PIL rule, such parental consent fell under the regime of French internal or national law. The French court, thereafter, declared the marriage null and void. It should be observed that both England and France had the same rules for PIL, that the form would be determined by the law of the celebration, and the issue of capacity would be dealt by the law of domicile (or nationality). The only difference was the outcome of the case, which was due to the different perceptions of the courts as regards the definition of the issue in question.[691]

3.2.2 Bartin's positivist conception of characterisation

Six years after Kahn's observations about the dissimilar understanding of courts on the issues being brought before them, and the PIL rules of manifold jurisdictions, Professor Bartin came to the conclusion that such a dilemma would never go away, unless the PIL rules as well as the courts of the forums were given the utmost priority to adjudicate disputes entailing cross-border elements according to their own perception, merit and ideology.[692] In the preface of his book *Etudes de droit international privé* Bartin articulated that:

> "[T]he rules of conflict are national rules, in each country, in the same way as the institutions of internal law of which they circumscribe the field. They remain linked to them like a shadow to the body, because they are nothing other than the projection of these institutions themselves on the plane of international law."[693]

690 *Ogden v Ogden* (otherwise Philip) [46].
691 Pascal 717.
692 Ibid.
693 See Étienne Bartin, *Etudes de Droit International Privé* (A Chevalier-Marescq 1899). (Translated)

Bartin's idea was that characterisation or qualification of PIL cases should always be determined by the PIL rules of the forum.[694] He also talked about two exceptional circumstances where the foreign law, that is foreign PIL rules, could be used.[695] This will be discussed later. When considering the application of the internal law of the forum or that of another country as regards the juridical relationship of any dispute, it would be the law of the forum which would define the nature of the existing juridical relationship.[696] The idea of Bartin, in relation to how the characterisation of conflicts case would take place, is based on the basic maxim of sovereignty of the state. According to Bartin, the forum would be voluntarily curtailing its power of sovereignty if it gave authorisation to the application of any foreign law within its jurisdiction. Whenever a court is to apply the law of another country in its jurisdiction that law would delineate any juridical relationship. Hence, it would be the same foreign law that would guide or help determine the juridical relationship. Consequently, in the process, from the technical perspective, the extent of sovereignty of the forum would be measured by that piece of foreign legislation.[697] Adhering to the principles of state sovereignty, a state cannot refer to a foreign law to decide the ambit of its own judiciary. Moreover, by employing the foreign law, the court would not be meeting its obligation to define any juridical relationship with reference to the foreign sovereignty for which it has the right. Rather, the opposite would be the case, the foreign sovereignty or foreign law would determine the magnitude of such obligation in conflicts cases.[698] As a result, the forum would lose its sovereignty and might no longer be 'master of its own home'.[699]

Bartin would apply the law of the forum even where the origin of the juridical relationship had no relation with the forum. The country which had the closest relations with the juridical relationship in question would have to qualify or characterise it in a different way, in comparison with that of the forum. His inclination towards prioritising the forum at all times as regards PIL disputes reached the point where he would be deterred from taking the

694 Étienne Bartin, 'De l'imposibilité d'arriver la suppression définitive ses conflicts des Lois' (1897) 24 Journal du Droit International Privé 225, 235–240; the most comprehensive discussion of this topic in English is that by AH Robertson, *Characterisation in the Conflict of Laws* (Harvard University Press 1940). It was later introduced to English-speaking lawyers by EG Lorenzen in 1920. His article, published in that year, is reproduced in his *Selected Articles on the Conflicts of Laws* (Yale University Press 1947).

695 Pascal 718.

696 Ernest G Lorenzen, 'The Theory of Qualification and the Conflict of Laws' (1920) 20 Columbia Law Review 247, 259.

697 Ibid.

698 Ibid.

699 Bartin 236–239.

qualification procedure of another country into consideration, whether or not it approved the qualification of characterisation of the forum.[700]

The characterisation method under the law of the forum is the most important accompaniment of the PIL system that every forum or law of forum has espoused.[701] The entire continuum of PIL and/or any part or element of PIL, such as characterisation or qualification, is linked with the understanding and narrative of state sovereignty as well as self-imposed state limitation. It is the state and no other authority or source that would decide the extent of its sovereignty and limitation. Therefore, understandably, as Bartin delineated, PIL being national law is premised on state sovereignty and limitation as per the requirements of the international justice system. It would only be the national legislative body that would enunciate PIL rules, and this would naturally include how the national courts would characterise cross-border elements.[702] As a consequence, judges should be able to separate the domain of their own law from the domain of foreign law.[703]

Despite the fact that Bartin always stressed the domestic law as regards the determination of any juridical relationship, he also spelled out two exceptions to his rule of characterisation. The first was that in the ascertainment of a thing, which could also be termed as the preliminary to characterisation of the issue,[704] be it movable or immovable, the court should apply the law of where it is situated, not because it would give sovereignty to the foreign law over the soil of the forum, but because it would secure and subserve the optimum security of the matter or affected property in question.[705] The second exception was that the determination of applicable law, especially in the matter of contracts, would be left to the intention of the parties in all possible circumstances.[706] This exception, proposed by Bartin, was later observed not to be an exception, due to the fact that the forum would always characterise this issue as 'contract' as regards the intention of the parties, in order to act under the applicable law whether the law of the forum or the foreign law.[707] The point that should rather have been stressed is that the sovereignty or the sovereign will of the forum does not always necessitate the usage of only

700 Lorenzen 260.
701 Ibid.
702 Ibid.
703 Bartin 469–470.
704 Pascal 718.
705 Bartin 250–253.
706 Ibid 472.
707 Robertson 761.

the concepts of local law.[708] The second exception theorised by Bartin called for a number of counter narratives, such as if the usage of foreign concepts in the local PIL or conflict of laws rules might bring about the misapplication of the local rules of the forum, then this might be a misapplication of the foreign law.[709]

The rationale of the proposition relating to characterisation posed by Bartin was that even if the forum applies the conflict rules of another country, it might not be able to meet the requirements or decipher the law as a whole. The term sovereign meant the legislature or parliament of an independent country. As far as the applicable law in regard to conflicts cases is concerned, in the second phase of characterisation, if the conflict rule of the forum directs the use of foreign law as the applicable or substantive law, then that foreign law would be interpreted and applied as in that foreign state. Therefore, it could be said that it is quite impossible for the forum to discard any foreign connection outright, in the process of PIL adjudications.[710] Bartin's categorical mention of state sovereignty in his proposition of characterisation is made obsolete by his other view that the application of foreign law by the forum would be seen as a restraint to the idea of state sovereignty, which could also be termed as an abdication of sovereignty.[711]

As it has been highlighted above, Kahn's[712] idea of characterisation was dependent on the connecting factor, namely domicile. In his work, under the heading of 'Collisions in the Point of Contact', Kahn discussed the issues of nationality, domicile and *lex loci solutionis* in respect of both moveable and immovable property. Furthermore, under the heading of 'Latent Conflict of Laws', he included other problematic discussions relating to qualifications of juridical relations or institutions.[713] Like Bartin, Kahn also proffered the opinion that in any circumstance the matter of characterisation or qualification would be dealt with by the law of the forum as being the only competent authority.[714] By his reasoning, he had also substituted the importance of nationality with domicile.[715]

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708 Ibid 759–760.
709 Pascal 719.
710 Ibid.
711 Lorenzen 261.
712 Lorenzen 261–262.
713 Ibid.
714 Kahn, 'Gesetzeskollisionen, Ein Beitrag zur Lehre des Internationalen Privatrechts' (1890) 30 Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts 76, 91, 99.
715 Ibid 69.

Despite the confusion in the conceptualisation of the proposition, Bartin's theory of characterisation has been welcomed and adopted by many contemporary and prominent writers and professors in their respective jurisdictions, such as Arminjon[716] and Niboyet[717] in France, Cheshire[718] in England and Falconbridge[719] in Canada. In the US, as well, the characterisation theory has been adopted by Professors Lorenzen and Beale. This is reflected in their work, as Beale seems to have dissipated the problems relating to conflict of laws in the US with the statement that 'all qualifications are determined by the law of the forum'.[720] Other prominent professors and writers worth mentioning here are Buzatti, Diena, Kahn, Despagnet and Gemma.

3.2.3 Buzatti's proposition of characterisation

Buzzatti,[721] an Italian professor, agreed on most parts of Bartin's proposition, namely, the determination of connecting factors such as domicile, and other important aspects of the issue of contact, that ought to be handled by the law of the forum.[722] As far as the other problems in Bartin's proposition were concerned, Buzzatti thought that they were not due to the difference of laws of distinct countries, but rather those problems came from the fact that how the forum interpreted and applied the laws of a foreign country would often be defective. Although Buzzatti agreed with most of Bartin's points, he has changed his opinion since the time of his publication relating to characterisation.[723]

3.2.4 Diena's proposition of characterisation

Professor Diena,[724] on the other hand, accepted the maxims of Bartin's characterisation only when the law of the forum and the law of the foreign country were in conflict with each other, and not when the forum's only connection with the foreign law was because the litigation was brought to that forum. As regards the latter, according to Diena, the law of the forum would

716 Harper and Taintor, *Cases and Other Materials on Judicial Technique in Conflict of Law*s (The Bobbs-Merrill Co 1937) 258.
717 Niboyet, *Notions Sommaires de Droit International Privé* (3rd edn, Paris Sirey 1937) 121–125.
718 Cheshire, *Private International Law* (2nd edn, Oxford University Press 1938) 24–25.
719 See Falconbridge, 'Characterization in the Conflict of Laws' (1937) 53 Law Quarterly Review.
720 Lorenzen 268.
721 Ibid 261.
722 Ibid.
723 Ibid.
724 Ibid.

only be applicable if it resulted from the consensus of the foreign system regarding the issue of characterisation of legal transactions.[725]

3.2.5 Despagnet's proposition of characterisation

Despagnet[726] was probably the first amongst all the PIL scholars to have focused on the interrelation between the PIL rules and the substantive law being applied in any PIL conflict, in terms of characterisation of PIL matters as regards applicable law.[727] The rationale of his proposition was as follows. When a judge adjudicates a matter involving cross-border elements, being inspired by the PIL rules of the forum or according to the principles set out in the PIL rules of the forum, he would naturally be influenced by what the rules of the forum state. If he decides to apply the substantive law of any country other than the forum, following the PIL rules of his forum, then he ought to understand the relationship between the litigants, as well as questions of characterisation, from the perspective of the law of the forum. In the case of the application of any foreign substantive law to the litigation, he ought to take the law of the respective country into consideration in order to be cognisant of the relationship of the litigants and/or to any particular issue or question relating to characterisation. This is because if the substantive law has been determined as the law of the litigant's nationality or domicile, which is not that of the forum, and the issues relating to characterisation have been set aside as per the rules of the forum, this might lead to completely illogical consequences. For example, if one of the questions regarding characterisation was one of capacity, as viewed by the national law, it would be an outright irrational outcome to turn such question into one of form because the PIL rules of the forum so dictate. A famous example in relation to this problem was found in Article 3, Paragraph 3, of the French Civil Code, in which the capacity of foreigners would be regulated by the national law. This article would be patently breached if a case arises in which the prohibition of making a will in holographic form was considered to be a matter of form in French law, but the foreign country would term it to be a question of capacity.[728]

According to Despagnet, it is therefore important, in order to eliminate any unanticipated problem in the process of adjudication, that judges should adopt the mindset of accepting the tenets of characterisation being adopted by foreign law. By this process, the judges can ensure

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725 Ibid.
726 Lorenzen 262–263.
727 Ibid 262.
728 Despagnet and Boeck, *Précis de Droit International Privé* (5th edn, L Larose & L Tenin 1909) 357.

the conformity between the foreign substantive law and the PIL rules of the forum. This proposition was welcomed by a number of legal scholars.[729]

3.2.6 Gemma's proposition of characterisation

Gemma[730] was one of the foremost PIL writers who provided an internationalist outlook to the understanding of conflict of laws. According to this writer, the principles or maxims of PIL should not be inferred by the functions and activities of any state or judiciary, but rather the functions and activities of both the state and judiciary would be deduced by the international norms and tenets set out for the PIL. The juridical relationship as well as different state institutions, according to this PIL scholar, would need to be separated from the PIL legislation of any jurisdiction. This would be the only appropriate and possible way to avoid any bias as far as the functions of the judges in conflicts cases were concerned. Hence, the states and their respective judiciaries would adhere to the requisites of the international order relating to the PIL regime.[731] The judge, while adjudicating matters relating to cross-border elements, must at all times concentrate on the law that seems to be the most favourable to the development of a relationship regarding the characterisation of legal transactions, without being induced by any particular jurisdictional law. Gemma's conclusion, in relation to the example given above, was that a will in holographic form executed by a Dutch subject in a jurisdiction where wills of such kind are permitted should be acknowledged by the courts of other jurisdictions because, as per the international order and maxims relating to PIL, a person living abroad is entitled to execute wills in the simplest way. In this instance, a holographic will is the best answer to such prerequisites. This is not because the law of the forum considers this to be a matter of form (Bartin), nor because the national law regards such question as one of capacity (Despagnet). The ultimate contention of Gemma was that the mindset of the judges in PIL disputes should always be premised upon the principles of international requirements, else the actual synchronised system of PIL would remain a myth.[732]

3.2.7 Jitta's proposition of characterisation

729 Lorenzen 263.
730 Ibid.
731 Ibid.
732 Ibid.

Unlike the previous scholars, Jitta[733] discarded the application mechanism used to connect a PIL dispute to any particular jurisdiction from an objective point of view. (These application mechanisms can also be termed as connecting factors such as *lex fori*, the *lex domicilii*, *lex loci contractus* etc.) He rather insisted on the prerequisites of 'international social life' in a case where more than one jurisdiction is involved. According to this PIL scholar, both the choice of law and the matter of qualification in a PIL dispute would always be inclined to the sphere to which the juridical relationships were attached.[734] Therefore, questions that are pertinent in the process of characterisation of disputes involving cross-border elements, such as whether a property would be perceived as moveable or immovable, whether an individual would be understood to be a businessman or trader, would be categorised or decided by the law of the situs.[735] Having said that, Jitta has also made it clear that if it is seen that the predilections of juridical relationships are manyfold, that is to say, if the case is connected to several countries or states, then the 'international common rule' would be applied. However, in its absence the principles of international social life would be applied.[736] Jitta believed that the system he proposed would be able to abandon the conflict of characterisations by mixing the question of characterisation with the general issues of choice of law.[737]

In the case of *Macmillan*, Auld LJ, considering the ultimate objective of case adjudication, observed that:

> "Subject to what I shall say in a moment, characterisation or classification is governed by the lex fori. But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts

733 Lorenzen 263–264.
734 Ibid 263.
735 Daniël Jitta, *La méthode du Droit International Privé* (Belinfante 1890) 125.
736 Ibid 136.
737 Lorenzen 264.

a particular domestic rule under the lex fori which may not be applicable under other system."[738]

3.2.8 Autonomous method of characterisation

The notion of "autonomous method of characterisation" based on the principles of comparative law (the comparison between different legal systems of the world) proposed by Ernst Rabel, would give birth of a worldwide uniform characterisation method instead of obliging the state courts to be reliant on the lex fori outright. Though this theory would have seemed burdensome for the state courts to materialise for the purpose of characterisation at the time when this theory was unveiled, however, today in the field of contracts, Principles of European Contract Law (PECL) and the UNIDROIT Principles of International Commercial Contracts could be seen as a foundation for Rabel's theory.[739]

[738] *Macmillan v Bishopsgate* [407].
[739] Alex Metzger, 'Characterisation' (2012) Max – EuP 2. Current trends in European jurisdictions.

Chapter 4: The use of connecting factors in private international law

4.1 Introduction

Characterisation and connecting factors are inescapably linked. Connecting factors, be it of the PIL rules of the forum or of any foreign country (renvoi, this will be discussed later) help judges of the forum in the process of characterising the subject-matter of disputes and subsequently applying the applicable law to them after the assumption of jurisdiction. Finding out the closest connection that the litigation has with whichever jurisdiction is one of the primary tasks of the judges in assuming jurisdiction. The factors or elements that are used to find such connections are called connecting factors.[740]

The modern approach of invoking connecting factors, especially in common law jurisdictions such as England and Wales, is less abstract and more pragmatic than other methods. In fact, the whole characterisation of PIL cases is based on practical aspects. Hence, it could be termed as subjective. This means that the characterisation of all PIL litigation, ranging from the determination of the cause of action to the categorisation or empirical evaluation of connecting factors, is now oriented towards facts and issues. This approach is used by English courts and is often seen in cases entailing succession and/or inheritance matters.[741]

Countries in the continental Europe, on the other hand, also typically tend to rely on precise connections in most cases, however, connections could also be abstract based on the nature of the dispute as well as PIL rules.[742]

4.2 Connecting factors as regards jurisdiction

Connecting factors are typically of two types, personal and territorial or local. They apply both in the assumption of jurisdiction and the application of applicable law. Personal connecting factors include nationality, membership of any religion, sect, ethnicity, community etc. Local or territorial connecting factors on the other hand entail domicile, habitual residence, the place

740 Stephen Szaszy, 'The Basic Connecting Factor in Intrnational Cases in the Domain of Civil Procedure' (1966) 15 The International and Comparative Law Quarterly 436, 436.

741 *Rokkan v Rokkan & Anor*.

742 Kurt Siehr, 'Connecting Factors (PIL)' (2012) Max – EuP 6. Kinds of connection.

where the object is located, the place where the contract was concluded, the place of procedure which is forum etc.[743]

Connecting factors may also be of other types e.g. primary or subsidiary, objective or subjective, autonomous or accessory, mutable or immutable, cumulative or alternative, ubiquitous or singular etc. These connections are mostly highlighted in applicable law hence will be explained in the next section.[744]

The question that first arises in a PIL dispute is whether the court has the jurisdiction. The application and operation of connecting factors to the selection of jurisdiction is discussed less compared to the applicable law. The stage of the jurisdiction selection process is the sole phenomenon where the parties of cross-border litigation have the control, since they have to go to the court of any jurisdiction, and the rest of the PIL adjudication proceedings start from there. However, one problem that exists in the process is that the cause of action of a PIL dispute involving nationals of different countries can at times bring issues relating to jurisdictional complications.[745] For instance, the process might turn out to be prejudicial to the defendant, if they are absent during the trial process at the court where the plaintiff has lodged the case. It could also be the case that the plaintiff has lodged the case in a country in order to gain procedural benefits, perhaps the country of the plaintiff's domicile or where they live, although such discussion should be substantiated by evidential support.[746]

The court where the case has been lodged can either accept or reject the litigation by considering whether, based on the facts, the litigation has sufficient connection to its jurisdiction based on its own PIL rules. In this thesis, both regional and domestic PIL rules made as regards jurisdiction in the area of commercial contract will be examined in part III. The notions of connecting factors are also employed to a great extent in the second phase of the adjudication procedure of PIL litigation, namely, applicable law. Since PIL is typically presumed to be domestic law, hence, all these rules are mentioned in the national law of every country, unless there is any regional commitment of a country such as EU law, or law passed by the HCCH.

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743 Siehr, 2. Connecting factors.

744 Siehr, 6. Kinds of connection.

745 H Alberta Colclaser, 'Jurisdiction in Private International Law' (1951) 49 Michigan Law Review 1163, 1163.

746 Ibid.

4.2.1 Forum Shopping

Be it as regards the issues of jurisdiction, applicable law and the recognition and enforcement of foreign judgments, the PIL sector has experienced many convolutions and obscurities, many of which are yet to be resolved or set aside. Therefore, in order to subdue any further intricacies in cross-border disputes, it was indeed a necessity to dispose of such an ambivalent and inclusive doctrine as renvoi (will be discussed later). It could well be presumed that it was rendered obsolete by the institution of the doctrines of forum shopping or *forum non conveniens* and party autonomy.

Forum shopping is a practice of litigants to choose the jurisdiction where the case could be filed, or the other party could be sued. Since the term forum shopping could be used or understood deprecatorily, it is important to define the term correctly. The term forum shopping signifies the discretion of the claimant to bring the case in any of the potential courts which have jurisdiction.[747] The choice is based on convenience of the parties as well as the fittingness or suitability of the case.[748] Empirical inspection of judicial proceedings with a wider examination of jurisprudence[749] ignited a spark of interest in this doctrine in the minds of legal scholars and social scientists.[750] Professors Haltom and McCann said that, "it has significantly qualified if not refuted claims about mushrooming litigation … and has provided a far more reasonable portrait of our civil legal system and its workings."[751]

Globalisation and transnational interactions between private parties, and economic and social cooperation between states have long been mirrored in the PIL disputes in different jurisdictions. This has made the legislatures, as well as those who are involved in the academic and practical field of law, rethink the pre-existing impediments and resolve them by introducing easier and more convenient ways and means for persons involved in judicial administration and the parties to litigation. In the process of evaluating the aptness of the concept of forum shopping, some of its narratives may be conflated, since the whole idea and rationale of forum shopping are grounded on two basic analyses: (1) a descriptive analysis of

747 Friedrich K Juenger, 'Forum Shopping, Domestic and International' (1989) 63 Tul L Rev 553, 554.

748 Calster 8.

749 Anthony Fitzsimmons, 'Forum Shopping: A Practitioner's Perspective' (2006) 31 The Geneva Papers on Risk and Insurance 314 <https://doi.org/10.1057/palgrave.gpp.2510076>.

750 Christopher A Whytock, 'The Evolving Forum Shopping System' (2011) 96 Cornell Law Review 481, 482.

751 William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago Series in Law and Society, 1st edn, University of Chicago Press 2004) 74.

forum shopping and its consequences, and (2) a normative analysis of forum shopping. It is therefore important to keep these modes of analysis apart.[752]

The conditions that are required to be accomplished in order to avail the opportunity of forum shopping are, first, the presence of 'concurrent jurisdictions', as outlined by Bill. That means there will be multiple potential jurisdictions with the authority to resolve the matter being brought by the plaintiff.[753] The other condition is that the nature of the existing legal systems in different jurisdictions will be heterogenous.[754] The plaintiff is said to control most aspects of choosing the jurisdiction. In fact, the plaintiff has been termed as 'master of the complaint' in the American case of *Caterpillar Inc*.[755] Although plaintiffs mostly have control over choice of jurisdiction, defendants can also engage themselves in the task of choosing another jurisdiction.[756]

Despite its popularity and ubiquitous acceptance, the idea of forum shopping has been relinquished many times both by legislatures and courts of different states.[757] The propositions that have been put forward against forum shopping are entrenched in the notions of positivism[758] and formalism[759].[760] Three arguments against forum shopping were published by the Harvard Law Review Association[761] in a journal article. These are, first, forum shopping emasculates the authority of the substantive law of the state;[762] second, in the process of making the litigation process favourable, the plaintiffs at times overburden the courts and create unnecessary expenses, rather than opting for the closest and simplest forum; and third, the invocation of forum shopping may generate an adverse perception about the equity of the legal system.[763]

The escalation in the use of forum shopping, especially at the level of global trade and business, has stimulated the legislatures and judiciary to view and construe responses of their own as

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752 Harvard Law Review Note, 'Forum Shopping Reconsidered' (1990) 103 Harvard Law Review 1677, 1683–1689.
753 Andrew S Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford 2003) 5.
754 Ibid 25.
755 *Caterpillar Inc v Williams* (1987) 482 386 (US) [398]–[399].
756 Harvard Law Review 1679.
757 Harvard Law Review 1680.
758 HLA Hart, *The Concept of Law* (Oxford University Press 1961) 77–96.
759 Schauer, 'Formalism' (1988) 97 Yale Law Journal 509, 509-511.
760 Harvard Law Review 1684.
761 Ibid.
762 *Erie RR v Tompkins* (1938) 304 64 (US) [78]–[79].
763 *Hanna v Plumer* (1965) 380 460 (US) [468].

regards its necessity and significance. In the process, they have opted for intervention from the government in the shape of the incorporation of international conventions on the regulation of forums where the actions relating to cross-border disputes can be brought.[764] While some of these conventions relate to specific subject-matter connected to jurisdictions, namely, the Warsaw and Montreal Conventions that deal with claims arising from international air travel, other conventions provide comprehensive sets of jurisdictional rules, namely, the Brussels and Lugano Conventions that have established jurisdictional rules for the Member States of the EU and European Free Trade Area (EFTA).[765] Apart from both the domestic and international legislative compression of forum shopping, there also exists a jurisprudential response to it on the part of the judiciary. This relates to when the court will decline its jurisdiction in favour of another jurisdiction, and when it will oblige the subject matter of its jurisdiction not to file the case in other jurisdictions. The rationale of the jurisprudential response is based upon the maxim of *forum non conveniens*.[766] The doctrine of *forum non conveniens* can emerge in two situations. First, despite having the jurisdiction, the court considers if it will exercise its jurisdiction, and second, in litigation involving extra-territorial jurisdictions which is considered by the court as the prerequisite for deciding whether or not they have the jurisdiction to hear the case.[767]

4.2.2 Party autonomy and choice of court agreement

Though the inclusion of party autonomy in cross-border legal relationships especially in cross-border commercial contracts both in choosing jurisdiction and applicable law has become inevitable over the course of twentieth century, courts, academics and scholars just a century ago used to view party autonomy as impossible.[768]Choice of court agreement is also termed as a jurisdiction agreement or forum selection clause, where the parties submit their will to a court that will adjudicate the disputes, if arise, between the parties. Choice of court agreements can be made both in the contexts of contractual claims and non-contractual claims.[769]

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764 Fitzsimmons 317.

765 Ibid.

766 Fitzsimmons 318.

767 'In English jurisprudence, from the end of the 19th century until a change of direction in a series of cases in the 1980s, forum non-conveniens was treated as inapplicable where jurisdiction was founded territoriality but formed part of the criteria for determining whether in a particular case an extra-territorial jurisdiction existed. More recently forum non-conveniens has been held to be relevant in both circumstances'; Ibid.

768 Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press 2018) 3.

769 Ibid 175.

There are two types of choice of court agreement, they are exclusive choice of court agreement and non-exclusive choice of court agreement. An exclusive choice of court agreement manifests the intention of the parties to confer jurisdiction on a particular court over the subject-matter of the agreement. This is termed as 'prorogation'.[770] Exclusive choice of court agreement also excludes the possibility of any other potential court from exercising its jurisdiction over the covered subject-matter of the agreement, which is called 'derogation'.[771] A non-exclusive choice of court agreement, on the other hand, does also include parties' choice of a particular court, however unlike the exclusive choice of court agreement, non-exclusive choice of court does not preclude the possibility of any other court to have the jurisdiction of the same subject-matter of the agreement under the objective heads of jurisdiction.[772]

The inception of choice of court agreement can be traced back to the Roman era. During that era, the praetor peregrinus (usually competent for disputes amongst foreigners) at times used to be chosen by the Roman citizens, inversely the praetor urbanus (usually competent for disputes amongst Roman citizens) were also sometimes chosen by the foreigners. It is to be noted that consent of the praetor in this regard was not required.[773] By virtue of the feudal concept of Dingpflicht assigning individuals to the judicial power of their respective territory's sovereign, choice of court agreements in favour of a foreign court were prohibited by the IUS commune. Such prohibition had existed in Europe until very recently. Individuals in Italy and Spain were allowed to bring claims in their home country until the early 1900s.[774]

As regards the prorogation and derogation of the jurisdiction in PIL, it is to be mentioned that though PIL rules in most of the EU countries contain provisions on the prorogation of its jurisdiction, there is no mentioning of the derogation of their jurisdiction.

In modern times, choice of court agreements are recognised in almost every jurisdiction especially throughout the EU member states, however they are perceived so differently in common law and civil law countries. While in most of the civil law countries, choice of court agreements are considered as 'procedural agreements' that are capable of being enforced as a

770 Ibid 93.
771 Ibid.
772 Mills 94.
773 Martin Illmer, 'Choice of Court Agreements (PIL)' (2012) Max – EuP 2. History and the development of the law.
774 Ibid.

contractual agreement between the parties, English common law regards choice of court agreements as 'contractual agreements' like any other ordinary contract entailing rights and obligations of the parties.[775]

Despite having shortcomings, it will probably be wrong to say choice of court agreements have not really ensured predictability for the matters relating to jurisdiction in cross-border disputes across the jurisdictions. Legal developments on choice of court agreements at the European as well as international level will be discussed in part III.

4.3 Connecting factors as regards applicable law

The notions of connecting factors are employed to a great extent in the second phase of the adjudication procedure of PIL litigation, namely, applicable law. Since PIL is typically presumed to be domestic law, hence, all these rules are mentioned in the national law of every country, unless there is any regional commitment of a country such as EU law, or law passed by the HCCH.

4.3.1 Lex fori (substantive and procedural law conundrum)

Be it *lex fori* (the law of the forum) or any foreign law, the judges or adjudicators in accordance with the PIL rules of the forum would apply the law that has the closest connection (in the cases where the parties have not chosen any applicable law, or no connecting factor as regards the subject-matter of the case has been clearly enshrined in the PIL rules) with the dispute[776] or the PIL rules of other jurisdiction in case of renvoi. The issue that exists is deciding whether the application of *lex fori* should be treated as a basic rule or whether the law which has the closest connection with the case should be applied. According to Ehrenzweig, who produced several excellent studies on PIL and its different elements and issues, *lex fori* would be the basic rule and the law of any foreign jurisdiction would be applied as an exception in some cases.[777]

Ehrenzweig's proposition was not quite accepted by his contemporary and subsequent PIL scholars. In the development of PIL, the application of *lex fori* has been termed as an exception, whereas the application of the law to which the dispute and/or the disputants are in close

[775] Ibid.
[776] Szaszy 436.
[777] Albert Ehrenzweig, *A Treatise on the Conflict of Laws* (West Publishing Co 1962) 309.

connection has been designated as a basic rule.[778] Whereas the application of *lex fori* has been considered as a basic rule and the application of foreign law or law other than that of the forum has been considered to be less important and its application less significant, only in exceptional situations can the foreign law be considered as applicable.[779]

It is very important to highlight that the application of the law of the forum or *lex fori* or any foreign law means the procedural law (relating to procedures of the case) or the substantive law (relating to the substance of the case). It might at times become difficult for readers to understand whether the discussion relates to the procedural law or the substantive law, unless it is clearly labelled. In several jurisdictions, this has been made clear in the civil code, such as the Italian Civil Code 1942, the Brazilian Civil Code, the Hungarian Bill on Private International Law 1947 as well as the American Restatement on PIL. These state that matters relating to the procedural aspects of PIL litigation be governed by the law of the forum. The commentary on Article 585 of the Restatement enunciates such a wording, noting that 'matters of procedure include access to courts, the condition of or barring action, the form of proceedings in court, the method of proving a claim, the method of dealing with foreign law, and proceedings after judgment'.[780]

It has been particularly articulated in Article 584 of the Restatement that "the court of the forum determines according to its own conflict of laws rules whether a given question is one of substance or procedure." There are two commentaries regarding the understanding of the notion of differentiating between the procedural law and substantive law in PIL cases. The commentary added to Article 584 of the Restatement reads as follows:

> "In determining whether an element of a foreign transaction is one of substance or procedure, a court will examine the entire transaction which is before it. This includes the statute or other rule of law creating the alleged right or duty, and its interpretation thereof by the courts of that State. In determining the question, however, it is to be observed that in so far as the local rule of the forum is applied because the question is considered one of procedure, the result of the litigation of the parties may be changed, and therefore that references to the foreign rules are limited only because of the paramount reasons of local convenience and policy."[781]

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778 Szaszy 436.
779 Ibid.
780 Szaszy 437.
781 Ibid.

The Restatement in the introduction of Chapter 12 has avowed that:

> "One of the chief ends secured by a rational system of conflict of laws rules is that the rights and duties of parties arising from a legal situation shall not subsequently be varied because of the forum in which an action is brought to settle disputed questions arising out of the situation. International commerce, to give but one example, could hardly continue if parties were frequently exposed to the hazards and unknown requirements of foreign laws. For this reason when a case involving foreign elements is presented, the courts of all civilised States now decline the easy and obvious solution of ignoring foreign law and treating the case as a purely domestic one; instead they seek, by reference to the foreign law deemed appropriate, to protect parties against a substantial change of position because of the fortuitous circumstances that suit is brought in that particular State … If theoretically complete uniformity of right and duty were to be attained, a court having before it a case in which reference to the foreign rule of law had been appropriately made, would apply the foreign law to furnish the rule of decision for both the existence of the right or duty, and those things ordinarily thought of by lawyers as the means by which the prevailing the legal duty found to exist. Conversely, the means of compulsion against the defeated party to the action would be no more than provided by the law designated as the appropriate one to govern the transaction. The means provided for compulsion, or limitation upon the compulsion, which may be brought against the alleged wrongdoer are, in many cases, of almost equal practical importance to the declaration of the validity of a plaintiff's claim. Such all-inclusive reference to the foreign law is never made. The difficulties involved would be very great; so great as to be impossible in many instances. A heavy burden would be thrown upon the courts of the forum and orderly administration of justice there would be hampered and delayed. A limitation upon the scope of the reference to the foreign law is thus necessary. Such limitation excludes those phases of the case make administration of the foreign law by the local tribunal impracticable, inconvenient, or violative of local policy. In these instances, the local rules of the forum are applied and are classified as matters of procedure."[782]

From the above, it is possible to discern the fact that the courts of the forum would no longer be reluctant to apply foreign law in PIL disputes in order to ensure the rights and duties of the parties involved. However, as far as the procedural laws are concerned, the courts of the forum would be prone to the *lex fori*, because the application of foreign law as regards procedures and formalities of the case might hamper, disturb or go against the normal proceedings and

[782] Szaszy 437–438.

practices of the court of the forum. According to Dicey "all matters of procedure are governed wholly by the local or domestic law of the country to which a court wherein an action is brought, or other legal proceedings is taken belongs to (lex fori)."[783]

Most authors assented to the idea that the law of the forum would apply in the sphere of the law of civil procedure, however, their motives for this approbation were not the same.[784] According to some jurists and authors, namely, Gaetano Morelli, of the modern Italian school of thought, Karl Neumeyer, as well as other German authors and philosophers, there should always be *a priori*, which means that conceptually the possibility of the application of foreign civil procedural law will be debarred.[785] On the other hand, according to some legal thinkers prevailing both in the German and French doctrine of international law as well as in the Soviet Union, it was not essential to have *a priori* as regards the preclusion of any prospective leeway to apply the procedural rules of foreign countries.[786] Apart from these two points of view, people were not inclined towards the application of procedural rules other than those of the forum since it was proscribed by international law, as opined by Niederer.[787] The above could also be found in the writings of Morelli, as well as in the modern concept of Italian international law, where it was clearly described that it would be conceptually confusing not to have the preclusion of *a priori* concerning the application of foreign procedural law.[788]

Later, Anzilotti found that the notion of Morelli and his exponents was connected with the dualistic doctrine of the relations existing between domestic law and international law.[789] Here, this was compared with the nexus between domestic law and foreign law. In regard to the relations between international law and domestic law, there is in fact no relation. Both are separate and closed legal systems. Thus, the question arises, can this notion be applied in the nexus between domestic law and foreign law? Apparently, the idea of the relations between international law and domestic law might seem workable in the relationship between domestic law and foreign law, however, closer inspection tells us a different story. The author, in his elaboration, was not quite categorical as to what he really meant by foreign law; did he imply foreign law as international law or law of a different country? The term international law

783 Dicey, *Dicey's Conflict of Laws* (JHC Morris ed, 6th edn, Stevens & Sons Ltd 1949) 859.
784 Szaszy 439.
785 Ibid.
786 Ibid.
787 W Niederer, *Einführung in Die Allgemeinen Lehren Des Internationalen Privatrechts* (2nd edn, 1956) 107.
788 Szaszy 439.
789 Ibid 440.

includes many other legal instruments such as rules, norms and treaties. Since there was no such clarity, therefore, we must appraise both situations.

In the case of the first hypothesis that foreign law is indicated as being international law, it should first be understood that if international law is ratified or accepted by a country, then the law can be applied by domestic courts in an adjudication. In the process, the country may directly apply the law, as some of the EU laws are applied by EU countries without any further formal method of incorporation since the countries in the EU are bound by the EU laws. On the other hand, the country might need to incorporate international law through domestic law, whereby an actual legal relation can be found between international law and domestic law. As far as the second hypothesis is concerned, the concept of the nexus between domestic law and foreign law is completely different as compared to the first hypothesis. The forum or the domestic court can only apply the law of another country or foreign law, and there would never be any incorporation of foreign law in the domestic law of the forum. The major difference between the application of the law of another country or foreign law and international law, lies in the authority. International law does and can impose authority on independent countries in relation to its application to a certain extent, whereas the forum has no such authority to apply the foreign law unless the law of the forum itself approves such application.[790]

The application of the law of procedure fits neither hypothesis. The rationale for the abandonment of the law of procedure from the first hypothesis is that there would never be any international procedural law that ought to be applied in the domestic court system. International procedural law is made for international courts such as the International Court of Justice (ICJ), a court that only hears cases relating to public international law. The rationale of the second hypothesis, as Morelli rightly stated, is that the law of procedural relations covers public law relations, hence, it would be incongruous to apply the procedural law of one country in another jurisdiction. This is the reason, as asserted by Morelli, that no conflict rules can be found in the domain of public law and the law of procedure.[791]

Although Morelli accepted that in some exceptional cases the procedural law of a foreign country can be applied in the forum, he termed such exceptions as ‘sham’ and ‘apparent’.[792] His explanation of the non-applicability of foreign procedural law as well as foreign public law

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790 Ibid.
791 Ibid.
792 G Morelli, *Diritto Processuale Civile Internazionale* (2nd edn, 1954) 14.

was probed by Professor Szaszy. According to Szaszy, Morelli's reasoning was flawed on the ground that there could not be any conflict rules in the domain of the application of foreign public law, as well as foreign procedural law, because the conflict rules are incorporating rules and would be conceptually *a priori* precluded in the purview of the application of foreign procedural and public law in a forum. Szaszy's other finding, in the elucidation of Morelli, concerned the matter of incorporation. He found it erroneous that the forum would need to incorporate the foreign law in their domestic legal system in order to apply the same in its jurisdiction. Morelli's explanation regarding the incorporation of foreign law in the domestic legal order referred to the substantive law. However, the reality was the forum never had to incorporate the foreign law in order for it to be applied in its jurisdiction.[793] It should be noted that this particular point has already been mentioned in the second hypothesis.

Szaszy also argued that the exceptions Morelli formulated as to when the judges could apply the foreign procedural law were not the only circumstances when the judges might feel inclined to do so, or indeed had done so, in cases of any domestic legislative order. It was also not true, according to Szaszy, that the applicability of the foreign law in the domain of public law is *a priori* precluded. He observed that if there was no leeway for the judges to apply the foreign public law then they would not be able to determine the nationality of the litigants according to their national laws, nor could they apply foreign law related to currency or administration in order to verify the documents issued by any administration of that particular foreign country. In fact, the judges of the domestic courts, theoretically, would also not be able to apply foreign substantive law because constitutionally, and according to the concept and notion of a modern state, every law of an independent state emanates from its sovereign authority or delegated sovereign authority in terms of a federal system. Therefore, the application of foreign substantive law (civil law) might necessarily render void the application of foreign constitutional law in the domestic court.[794]

Morelli's elaboration of the application of foreign procedural law in the forum inspired many other scholars and jurists including Karl Neumeyer.[795] Although Neumeyer was inspired by Morelli's propositions, he articulated his own reasoning on the issue of non-applicability of foreign procedural and public law in the jurisdiction of a forum. In his opinion, the conflict rules are not incorporating in nature, but rather they delineate the power and competence

793 Szaszy 441–442.
794 Ibid 442.
795 Ibid.

relating to the legislature and judiciary of the country. Conflict rules that are not confined only to the determination of the situations or factual scenarios on the basis of which the law of the municipality or the law of any particular country shall apply, but also indicate which foreign law will be applied, have been termed 'all-sided' conflict rules. According to Neumeyer, these all-sided conflict rules can only be in the domain of substantive law. In German, this rule is called *Unstaatlichkeit der Lebensbeziehungen*. The application of substantive rules applies in a situation where the legal relations between parties remain private in nature; that is to say, the state is not involved in such legal relations, and rather the state stays above the party. However, such conflict rules are not found in the domain of procedural law or public law, where the state is always one of the parties and it cannot regulate the legal relations being handled in another jurisdiction and by another independent state else it would create international disorder, both legally and politically. Laws relating to legal procedures as well as public laws are always related to tasks confined between the state and its citizens or residents. These in no way involve the citizens or residents of another state. This domain of law is also not concerned whether the law of the municipality or country or any foreign law will apply to any legal dispute, but rather it concentrates on the fact of whether the municipal law of the land shall apply to any particular dispute.[796]

Neumeyer's proposition was also criticised for not being sufficiently precise in some of the approaches of delineation. The domain of public and civil procedural laws is also all-sided argued Szaszy. According to Szaszy, the tenets of international law never create any impediment for states in the process of the making of law in their jurisdiction, rather it leaves to the discretion of the states to make their own laws governing the administrative and procedural aspects of the country. It is true that from a practical point of law no state tries to interfere in domestic and procedural matters of another state. Nevertheless, being within the competence of maintaining public law relations with another state, states tend to recognise, as well as enforce, the judicial decisions of other jurisdictions, provided that they do not infringe international law rules, nor interfere in the policy, administration and procedural matters of other states. If the all-sided conflict rules did not exist, the state of the forum would also never be able to apply the substantive civil law of another state, because in every country the ingredients and rationale of law are subject to the validation of the constitution and legislature of that particular jurisdiction.[797] On a different note, Szaszy also stressed the fact that even if it

[796] K Neumeyer, *Internationales Verwaltungsrecht*, vol 4 (J Schweitzer 1936) 120.
[797] Szaszy 443.

is accepted that conflict rules in the domain of procedural and public law are mostly all-sided, this is not because they are *a priori* precluded, but due to the fact that the procedure and public law of one state do not speak about the interests of another state or forum.[798]

Apart from the view discussed above, that application of foreign procedural and public law are essentially *a priori* precluded, there are a number of renowned international legal jurists and scholars who consider that the non-applicability of foreign procedural and public law is, by virtue of positive law, a factual reality. Such notion was proffered by scholars including Burgundus, Rodenburg, Mevius, Riezler, Meili, Dicey, Géza Magyary, Kent, Vesque, Heyssler, Ullmann, Canstein, Menger, Foote, Holtzendorff, Wharton, Story, Savigny, Westlake, Weiss, Wheaton, Gierke, Foelix, Bayer, Wetzell, Renaud, Thöl, Boullenois, Mittermaier and others.[799] Some of them also proposed exceptions to the idea of the applicability of *lex fori* in disputes involving external elements, however, the rationale for their exceptions was only within the ambit of the application of foreign civil substantive law where they expounded the fact that from the point of view of practicability and expediency, foreign substantive law or foreign civil substantive law can be used by the forum.[800] Their disinclination in the matter of endorsing the applicability of foreign procedural and public law in the state of the forum is quite evident from their narratives.

In fact, some of the above-mentioned scholars extensively justified and endorsed the application of *lex fori* in the purview of civil procedural law in different ways. The majority of scholars, such as Mittermaier, justified the application of the forum's procedural law either by terming it the 'public law nature of civil procedure'[801] or by calling it a matter of territoriality of the law of civil procedure.[802] Some scholars even went on to say that the application of foreign civil procedural law by the judges of the forum would make them civil servants of another country, as well as an organ of the foreign law.[803] While some scholars observed and termed procedural law to be a legal act that ought to be read and acknowledged according to the law of the forum,[804] some thought as indicated above that it would be difficult to maintain the order of the court as well as of the trial process if the procedural law of a country other than

798 Ibid.
799 Ibid 444.
800 Ibid.
801 F Meili, *Das Internationale Zivilprozessrecht Auf Grund Theorie, Gesetzgebung Und Praxis* (Orell Füssli 1906) 15.
802 E Riezler, *Internationales Zivilprozessrecht und Prozessuales Fremdenrecht* (Tübingen 1949) 94.
803 Meili 15.
804 Linde, *Lehrbuch des Deutschen Gemeinen Civilprozesses* (4th edn, Adolf Marcus 1835) 41.

the forum would be applied.[805] Positivists like Niederer viewed the entire spectrum of the application of procedural law of the forum from the notion of the international positive law perspective. They compared it with the procedure for the application of the principles or rules of PIL substantive law, such as *locus regit actum*, *lex rei sitae* and *lex pro voluntate*.[806] French, English and American international law scholars, namely, Weiss[807] and Ailes[808] discerned and rationalised the application of the forum's procedural law, taking the prominence of public policy into consideration. They also thought that it would be the best possible substitute for the *ordre public* clause. On the other hand, Cheshire[809] and Ailes[810] understood and validated the point that the application of foreign procedural laws might at times seem difficult and cumbersome for the judges of the forum, and that would turn the entire process of adjudication into an impracticable matter. The nature of the unitedness of the judicial proceedings also became the pivotal reason for some scholars like Riezeler[811] and Neuner along with the prevalence of the principle of *locus regit actum*. This principle was advocated by Bar, Weiss, Bru, Garsonnet, Neumann and Fiore.[812]

The positivist propositions discussed above were also constructively criticised by Szaszy. His view was that neither of these positivist viewpoints was pragmatic nor in line with the precepts of international law. From the above propositions regarding the application of the procedural law of the forum, two most important elements, namely, public law's nature and confusion about the term territoriality, were constructively criticised by Szaszy. Each of these elements is examined below from the perspective of his evaluation.[813]

The idea of public law's nature and the statement that the state should only consider the acts, decisions and laws as well as other activities of its own organs cannot be a valid and logical reason for the application of the procedural law of the forum, because such procedural laws would not be of the nature of public law. Hence, it could not be taken as an adequate as well as satisfactory ground for the elimination of the application of foreign procedural law.[814]

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805 Szaszy 444.
806 Niederer 107.
807 André Weiss, *Traité de Droit International Privé*, vol 5 (2nd edn, L Larose & Tenin 1913) 473.
808 Ailes, 'Substance and Procedure in the Conflict of Laws' (1941) 39 Michigan Law Review 392, 393.
809 GC Cheshire, *Private International Law* (4th edn, Clarendon Press 1952) 638.
810 Ailes 393.
811 Riezler 94.
812 Szaszy 445.
813 Ibid.
814 Ibid.

According to Szaszy, the terminological embellishment of the term 'territory' has been voiced by international legal scholars in multifaceted ways for some time, in order to prove the importance and prevalence of the application of the law of the forum, and to discard the necessity of the foreign procedural laws outright.[815] The term territoriality can be illustrated in many different ways, namely, from the domestic and international points of view. Some scholars related the concept of territoriality in the area of international law with the territorial viewpoint of the rule of law. Taking this viewpoint into consideration, it could be said that all the rules of law, be they substantive or procedural, do have territorial character. The idea of territoriality was also interpreted and expounded by some international law jurists to accommodate or localise the jural relations in a dispute which is international in nature. This idea could be interpreted as applicable in PIL disputes, where this idea of territoriality would play an important role in order to localise or accommodate PIL disputes by using different connecting factors such as place of domicile or place of where the substance or matter of a cross-border case is situated. It should further be mentioned that most of these connecting factors are used in the matter of substantive law. Here, an important point could be raised as regards the substantive and procedural laws of PIL disputes that if the application of substantive law, which would often be the law of another country, could be used in notions of territoriality, why could the same not be used in the determination of procedural laws in disputes involving cross-border elements. Why would the concept of territorial exclusivity be used in regard to the application of procedural law? Why would it have to be confined to the frontier of a particular country?[816]

Application of foreign procedural law would not make the judges of the forum servants of any foreign institution, neither would it amount to undermining their own laws. In circumstances where the domestic judges would be satisfied or willing to apply the procedural law of another country this would be achieved through domestic legislation. Hence, there would be no leeway for any theoretical polemic or vacuum in relation to the sovereignty of the state. While criticising the positivist proposition of the above-mentioned scholars, Szaszy also found the application of *lex fori* and the notion of public policy to be hassle-free as well as necessary to maintain order in a trial court. Scholars who said that it would be necessary and somewhat easy to maintain order in the trial process if the procedural laws of the forum were applied did not sufficiently justify or provide proper reasoning as to why the application of foreign procedural

815 Ibid.
816 Ibid 445–446.

law would be discarded. It could be assumed that such mindset or predilection for the usage of *lex fori* in the procedural matters of cross-border litigation emanated from the idea of territorial exclusivity.[817]

As regards public policy, although it is true that every jurisdiction has some public policy issues, which they ought to preserve or maintain by whichever method they choose, not every procedural law is connected with a public policy matter. Hence, discarding the possibility of the application of foreign procedural law outright is not well-reasoned either.[818]

The application of the law of the forum or *lex fori* has been discussed in chapter 2, mostly in connection with substantive law. However, in this chapter the essence of *lex fori* is being discussed. As indicated earlier, the discussion of *lex fori* as a connecting factor involves the discussion of both procedural and substantive matters of PIL. Although there have been many localisations as well as efforts in the internationalisation of PIL rules, and these continue, the whole discussion of connecting factors and their application based on multifaceted notions in the determination of substantive and procedural law in cross-border disputes is unlikely to end anytime soon, unless the internationalisation of PIL rules is truly in place within every state.

There has always been a deep-seated mindset, or sort of doctrine, that has apparently been cemented in the minds of international law scholars, that procedural matters of PIL disputes should be decided according to the law of the forum, whereas the substantive law of the dispute can vary depending on the circumstances and facts of the case. Over the past seven centuries, lawyers and legal academics have been so inclined in establishing static substantive rights of the parties, which in turn would mean the establishment of apodictic substantive law, without concentrating too much on the procedural laws of the PIL disputes. As regards the latter, the focus has always been forum centric.[819] In relation to the procedural predicament of PIL disputes, Dicey said "a court must recognize every right which it enforces, (but) it need not enforce every right which it recognizes."[820] With greater precision and exactness, Justice Holmes stated that 'A contract valid where made is valid everywhere, but it is not necessarily enforceable everywhere'.[821]

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817 Ibid 446.
818 Ibid.
819 Ailes 392.
820 De Sloovère, 'The Local Law Theory and Its Implications in the Conflict of Laws' (1928) 41 Harvard Law Review 433.
821 *Emery v Burbank* (1895) 163 Mass 326 [327].

The substance of cross-border litigation which fell within the law of contract was further elaborated by Chief Justice Hughes, who was based in the USA. His view was that:

> "The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exits and, despite infirmities of procedure, remains binding upon the conscience of the sovereign."[822]

The theoretical and practical contest between substantive and procedural law in conflict of law disputes has been identified as an unnecessary addition by realists like Llewellyn. According to Llewellyn, the application of both procedural and substantive law would materially depend on the interest of the parties. Hence, it should easily be imported from one jurisdiction to another without any impediment.[823] He further asserted that 'the differentiation between substantive law and adjective law is an illusion, although the prevalence of this illusion (as of any other) has results in human behaviour and must be taken account of'.[824]

Professor Lorenzen, in this regard, concluded that:

> "The terms 'substance' and 'procedure' have no inherent meaning. They may mean one thing for purposes of constitutional law and another thing for other local purposes. Whatever the label that may be attached to a given matter from these two points of view, there is no reason whatsoever why such labels should be attached to conflict of laws situations. If the legal relations between parties are to be ascertained with reference to the law of State X, the rights so created should be enforced by the courts of other states, unless the local machinery would be obstructed thereby; or, in an extreme case, if the enforcement or recognition of such rights would be shocking to the local community. Whatever rules of State X bear substantially upon the rights of the parties should be recognized and enforced, subject to the two provisos above mentioned, without reference to the fact whether the particular matter for purposes of constitutional law or local law in the State of X or the State of the forum happens to be labelled 'substantive' or 'procedural'."[825]

The nature of the distinction between procedure and substance is thin or insignificant for the realists. This idea had been borne in the minds of many, especially traditionalists who, whilst

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822 *Perry v United States* (1935) 294 US 330 [354].
823 Ailes 393.
824 Karl Llewellyn, *The Bramble Bush* (Oceana Publications 1930) 82–83.
825 Ailes 393–394.

not necessarily accepting or adhering to the realists' idea of differentiation entirely, were quite convinced that there would at least be a legitimate disunion of the elements being used in a legal dispute, which would be necessary for the institutions involved in the administration of law and justice. According to the understanding of the realists, the focus on making differentiations without any valid or strong ground between these two areas of law amounts to an unwarranted and superfluous postponement of the justice system that might lead to the denial of remedies to the litigants.[826]

Professor Ailes identified a very obvious problem that has been in existence in the study of legal jurisprudence. This is the attack on recognised authorities of law who are so omnipresent in terms of their acceptability in different aspects of life. The approach of realism, as regards the distinction between procedure and substance, has been disregarded or to a certain extent disdained in modern legal jurisprudence. As Ailes observed, the result of this disdainful attitude towards the dogma of the older generation is quite evident in the spectrums of 'ethics, aesthetics and politics' where the ideas of 'expediency, opportunism, and nebulous impressionism' are being prioritised and highlighted.[827] It is questionable how accurate he was in his supposition about the actual reality in legal jurisprudence, especially in the arena of international law. Be it the division between procedural and substantive elements of laws or other issues relating to the international law, the influence of the ideas of so-called pragmaticism, opportunism and politics in the international law arena is immense. As a result, there is a search for a common will amongst international legal actors, scholars or people who are involved in the process of the unification of international law rules, especially PIL rules, to try to ensure an identical approach of every jurisdiction towards issues that do not only impact their respective jurisdictions but have an overall global impact.

There may have been discrepancies in terms of how the legal scholars have perceived the idea of realism in the distinction between procedural and substantive aspects of law, notwithstanding the erudition of their principles. The literature to date is immense. Adhering to the above principles of realism, Professor Walter Wheeler Cook stated that the terms 'procedure' and 'substance' do not have a static meaning as such, neither do they have any fixed connotation. As a result, they could be inferred differently in different circumstances.[828] In relation to the theoretical interplay between procedure and substance, Justice Holmes said,

826 Ailes 394.
827 Ibid.
828 Ibid 395.

'A word is not crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used'.[829]

An elementary problem lies in the distinction between procedure and substance. This was categorically identified and emphasised by Cook as follows:

> "If we admit that the 'substantive' shades off by imperceptible degrees into the 'procedural', and that the 'line' between them does not 'exist', to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose, we see that our problem resolves itself substantially into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?"[830]

Although Cook maintained his view on the fact that categorisation of both procedure and substance were not absolute features, he apparently tried to distance himself from so-called empiricists by adding to his proposition that the matter of categorisation of procedure and substance should not be taken lightly. In doing so, he indicated that he was not disinterested in the efficacy and utility of the classification of procedure and substance.[831]

The discussion above has revealed the fact that procedural law in cross-border disputes should be seen and prioritised in the same manner as is the case with substantive law. To date, the developments in the area of PIL have occurred mostly in the sector of substantive law. In fact, it really does not matter how passionately international law scholars and actors involved in institutions that deal with PIL work themselves or insist that every individual state should have procedural laws in its PIL rules, unless and until PIL has a separate court like the ICJ, the making and accomplishment of a separate set of procedural laws or a model to be followed by every state remains a myth. Consequently, the question arises of where lies the problem that prevents the achievement of such an accomplishment? The answer can be inferred from the above discussions. The procedural aspects of litigation in a domestic setting might not always relate only to the court and its proceedings, but to other governmental institutions and their activities in that particular jurisdiction. Although, of course, the courts can themselves be considered to be government institutions, despite the theoretical phenomenon of separation of

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829 *Towne v Einser* (1918) 245 US 418 [425].

830 Walter Wheeler Cook, '"Substance" and "Procedure" in the Conflict of Laws' (1933) 42 Yale Law Journal 343–344.

831 Ibid 357.

powers. Hence, it might amount to the contravention of sovereignty possessed by every state. The counter argument that has been touched upon in earlier discussions is that if the substantive law of another jurisdiction can be used by the forum, then theoretically there also should not be any hindrance in using the procedural law of another state, since both the procedural and substantive laws are made in the same fashion and have equal effect and importance in any jurisdiction. Both are laws of the country. If one can be used in another country, why not the other? It could, therefore, be said that the mention of both procedural and substantive aspects of law should be made in every PIL rule. With the combined effort of both legislature and the judiciary's interpretation, through the so-called precepts of connecting factors, it should be decided whether the procedural law of the forum or of another country shall apply to cross-border litigation in the same way as the determination of substantive law in cross-border litigation. However, there remains a great variance of opinion as to which law would be treated as procedural and which would be treated as substantive.

Interrelation of jurisdiction, applicable law and the recognition and enforcement of foreign judgements in the light of connecting factors is so crucial in cross-border disputes. State courts after assuming jurisdiction would endeavour to determine the applicable law as per the PIL rules of the forum or any foreign jurisdiction (in case of renvoi) to ensure the rights and obligations of the parties to the litigation, which could either be the *lex fori* or *lex loci* or others. To make the adjudication process uncomplicated and certain, judges might opt for *lex fori* both for substantive (applicable law) and procedural law. Regardless of how unequivocal this predilection for the *lex fori* in cross-border disputes might appear to the judges, it will certainly not be consistent with the ultimate aims and objectives of PIL.[832] If each country decides to apply the *lex fori* to cross-border disputes, then there would be an established precedent that any litigation involving a foreign element would entirely depend on the place where the litigation has been filed. Although a number of rules relating to jurisdictional issues of PIL have been established, both at the domestic and international level, that would ensure that the jurisdiction where the litigation has been filed is an appropriate forum, they do not qualify the fact that the applicable law or proper law, or the law relating to the substantive matters of that jurisdiction, is the most fitting in the circumstances.[833]

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832 A committee of experts appointed by the Commission of the European, 'Draft of a Convention on the Choice of Law Applicable to Contractual and Non-Contractual Obligations'.

833 Jonathan Hill and Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 211.

Apart from *lex fori*, there are a number of other connecting factors that are used in terms of finding the apposite aplicbale law. These are normally mentioned in the PIL rules of every country, however, judges can use their discretionary power to interpret them. They may also suggest new connecting factors in a dispute that have not been mentioned in the PIL rules. For the purpose of the present work, different connecting factors in the areas of contract as regards applicable law are thoroughly discussed in part III.

4.3.2 Renvoi

The 'compartmentalisation' of PIL disputes is often thought to be unnecessary and unyielding by some international law theorists. This problem becomes more prevalent when this reasoning is taught to the students at the university level.[834] Although the rules of jurisdiction, applicable law and the recognition and enforcement of foreign judgments are mentioned separately in the PIL rules, there remains a latent but strong connection between these segments of PIL, which are not often emphasised by the legal theorists as well as legal practitioners. The rules as regards applicable law mentioned in the PIL rules involve substantive law. The application of PIL rules of any jurisdiction would seem rather blinkered and inexpedient if the intentions of the parties, as well as the location of the incident, have not been taken into consideration. Although there might be dissent amongst the scholars in relation to the theoretical and academic aspects of the intentions of the parties, an empirical investigation does not remove the importance of the intention of the parties from the discourse relating to PIL. In fact, it looks less anomalous if the application of the applicable law is achieved by reference to the PIL rules of the jurisdiction or constituency that was agreed upon by the parties or of the place where the incident took place.[835]

Despite having such a deep connection between jurisdiction and applicable law, these two limbs of PIL have been seen and emphasised discretely as if there is no association between them. An examination of the doctrine of renvoi is elemental in order to divulge the relationship, if there is one, between applicable law and jurisdiction.[836]

Renvoi is a French term whose literal meaning is to send back something or return it unopened. The doctrine of renvoi exists in the study of PIL. It transcends the typical system of

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834 Adrian Briggs, 'In Praise and Defence of Renvoi' (1998) 47 The International and Comparative Law Quarterly 877, 877.

835 Ibid.

836 Briggs 878.

characterisation and allows the foreign PIL rules relating to the issue of applicable law to be applied in the litigation being handled by the law of the forum, where the substantive law would be applied under the PIL rules either of the forum or of any other country.[837] Although the primary idea of the application of renvoi is to ensure that the appropriate law applies to a PIL dispute, which typically seems to be a wise stratagem, this doctrine has been criticised by many scholars for being unnecessarily complicated to interpret. Lawyers who were involved initially found the doctrine of renvoi a part of the choice of law technique. It was used in court proceedings often hurriedly, and outwardly it looked as if something repulsive or disconcerting had appeared in front of them. Due to its intricate nature, this doctrine was initially frowned upon by lawyers in England. It was, in fact, regarded 'as a distortion of principled choice of law; as a complication to, and an unjustified subversion of, our preference of choice of law'.[838]

The term renvoi was also sarcastically described by some authors as 'a subject loved by academics, hated by students and ignored (when noticed) by practising lawyers (including judges)'.[839] The continental jurists had not endured any such hardship as they had experienced when deciphering and understanding the doctrine of renvoi.[840] The technical, as well as theoretical, problems existing in this doctrine are apparent in this hypothetical example from Professor Lorenzen. A citizen of the United States, who was formerly based in or a resident of New York, died in Italy where he was domiciled, leaving some of his personal property in New York State. In this situation, if the New York court is asked to rule on the allocation or distribution of his property in New York, how should it proceed? As seen in the above discussion, effectively the PIL rules of the forum would decide how the case should proceed and which particular substantive law should apply to such litigation. If the New York court decides to apply the law of the deceased's domicile, then Italian law will apply. The first problem, which is entwined in the doctrine of renvoi, is the question of which Italian law – the substantive law as regards succession in Italy or the Italian PIL rules. In the latter case, the New York court would apply the law of their own country since the Italian PIL rules enshrine that the *lex patria* shall apply in such cases of distribution of property. In the given circumstances, the *lex patria* is the law of New York. The New York court judges' view must bear this in

837 TR Popescu, *Private International Law* (Romfel Publishing House 1995) 71.

838 Briggs 878.

839 Davis, Ricketson and Lindell (eds), *Conflict of Laws: Commentary and Materials* (Butterworths 1997) para 7.3.1.

840 Ernest G Lorenzen, 'Renvoi Theory and the Application of Foreign Law: Renvoi in General' (Paper 4522 Faculty Scholarship Series: Yale Law School Faculty Scholarship 1910) 190.

mind, or invoke it, while applying their own law as per the PIL rules of Italy. This is acknowledged as the notion or theory of renvoi.[841]

Initially, renvoi was perceived as a 'convenient descriptive term'. This meant the judges would take and apply the substantive law as advised by the PIL rules of a country that the judges of the forum referred to, without invoking any particular legal principle or notion. The problem is not confined within the conflict between *lex patria* and *lex domicilli* per se, rather it emanates when the conflict of laws rules or PIL rules of the jurisdiction that the forum referred to are in conflict with the PIL rules of the forum itself. Lorenzen, thus, asked the question as to which kind of mindset or viewpoint and to what extent the judges of the forum should take the foreign PIL rules into consideration.[842] In the early development of conflict of laws, none of these questions had occurred to scholars or those who practised in the field of conflict of laws. In fact, incidents involving these questions were unheard of at that time. The PIL scholars used to delve only into matters relating to the application of substantive law. That is, how, in what circumstances and to what extent the applicable law is relevant (note, the terms 'choice of law', 'applicable law' and 'substantive law' are being used interchangeably). A significant question mark in their research always remained: if judges were able to act just like the judges of the foreign country, which country's substantive law would be used by the judges of the forum? This really demands a different discussion which is relevant in the discussion of renvoi. This approach of the international law theorists during these times was omnipresent in continental Europe, England as well as in the United States,[843] and continued until the French court's adoption of renvoi in the *Forgo* case[844] in 1882.[845]

The *Forgo* case involved the issue of the succession of a deceased who was from the state of Bavaria, which is also known as Bayern. He was *de facto* domiciled in France. However, although he had acquired French domicile on paper or *de jure* he remained a Bavarian national residing in Bavaria. After his death, when a petition of inheritance was filed in the French court, it had difficulty in finding the apposite applicable law. Under the French law, the *lex patria* would be applied as a governing or substantive law to the case. However, after making enquiries, the French court found that the Bavarian court in a similar situation would distribute

841 Ibid.
842 Lorenzen 190–191.
843 Lorenzen 191.
844 *Forgo Case* (1882) S 1882, I 393 (Cass) [393].
845 Ernst Otto Schreiber Jr, 'The Doctrine of the Renvoi in Anglo-American Law' (1918) 31 Harvard Law Review 523, 523.

property as per the *lex domicilii*. The French court, following the PIL rules of Bavaria, decided that the French law being the law of the deceased's *lex domicilii* would apply to the case. The notion that the French court adopted in deciding the applicable law in this case is named as 'renvoi'. This is, in fact, an instance of first degree renvoi, which will be elaborated below. Unlike continental Europe, the term 'renvoi' was used neither by English judges nor American judges prior to 1903.[846]

Renvoi has been classified into three forms: first degree renvoi, double renvoi or second degree renvoi and no renvoi.[847] As per first degree renvoi, the foreign PIL rules state that the substantive law of the forum will apply to the case handled by the court of the forum. In simple terms, the foreign law refers to the law of the forum.[848] In first degree renvoi the foreign PIL rules about renvoi are not considered.[849] As per the tenets of second renvoi, which is also termed 'complex renvoi' by some international law writers, the foreign PIL rules that has been referred to by the PIL rules of the forum, refer to the applicable law of a state other than that of the forum.[850] And this is done by the application of the foreign PIL rules about renvoi.[851] And there is no renvoi when the judge does not apply any foreign PIL rules but the PIL rules of its own jurisdiction.[852]

The whole idea of renvoi was pervasive all over Europe at this time. In fact, legal practitioners as well as continental jurists developed a predilection for this doctrine that could be seen in some of their writing of that time as regards renvoi and in a large body of case law. This scenario changed in 1900, when the notion was rejected by the Institute of International Law at Neuchâtel.[853]

There remained a genuine problem in relation to the accomplishment as well as discernment of this doctrine. The question arose as to whether, when the foreign law is referred to by the PIL rules of the forum, the term foreign law would be meant 'in its entirety'. The problem could be raised in an interrogative manner as being, when the conflict of laws rule of the forum refers a jural matter to a foreign law for a decision, is the reference to the corresponding rule of the

846 Schreiber 523.
847 Geert van Calster, *European Private International Law* (2nd edn, Hart Publishing 2016) 7.
848 Berlingher Remus Daniel, 'The Renvoi in Private International Law' (2013) 3 International Journal of Social Science and Humanity 66, 67.
849 David McClean, Veronica Ruiz, *Morris: The Conflict of Laws* (Sweet & Maxwell UK 2021) 530.
850 Macovei, *Private International Law* (2nd edn, Ars Longa 2001) 79.
851 McClean, Ruiz, 530.
852 Ibid 530.
853 Schreiber 523.

conflict of laws of that foreign law, or is the reference to the purely internal rules of law of the foreign system, that is, to the totality of the foreign law, minus its conflict of laws rules?[854] After scrutinisation and evaluation of the cases, it seems that some forum judges were comfortable referring to the foreign law in its totality, especially in those cases where they could apply their own law to the case. Most of these cases involved the clash between the precepts of *lex domicilii* and nationality along with issues relating to succession, intestate and testament.[855] No cases as regards property rights and contracts were found in France, Germany and Belgium where the concept of renvoi was used by the courts. Only cases involving issues of succession of movable and immovable property in France applied the doctrine of renvoi.[856]

The acceptance of the doctrine of renvoi can be found in the obiter dictum of the Civil Court of Tunis and the Supreme Court of Canada, namely in the case of *Ross v Ross*.[857] The reasoning for using renvoi that was given in this case was accepted by almost every country apart from England and the United States.[858] It was manifested by the court that the doctrine of renvoi would enable the forum to refer to the foreign law in its entirety in cases where conflict existed between *lex domicilii* and *lex patria*. This would ultimately enable the judges of the forum to apply their own law. In the case of *Vita Food Production Inc* involving contractual issues and handled by the Judicial Committee of the Privy Council, Lord Wright prioritised proper law over PIL rules by stating that the proper law of the contract would suffice in interpreting and constructing the express terms of the contract.[859] However, this clarified concept of renvoi found huge support amongst the jurists and legal practitioners in France and Belgium. In fact, the Court of Cassation in France reversed the original doctrine of renvoi illustrated in the case of *Forgo* in a subsequent case.[860] Apart from Germany, Switzerland, Hungary and Japan, no legislative support for the doctrine of renvoi was found elsewhere. Most of the juristic opinions, suggestions and developments had been made as regards the referral to the internal or substantive law of a foreign country exclusive of conflict of laws rules or PIL rules.[861] As the Dutch statesman and jurist Asser said:

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854 Ibid 525.
855 Lorenzen, 'Renvoi Theory and the Application of Foreign Law: Renvoi in General' 193.
856 Ibid.
857 *Ross v Ross* (1894) 25 SCR 307.
858 Ernest G Lorenzen, 'The Renvoi Theory and the Application of Foreign Law' (1910) 10 Col L Rev 327, 194.
859 Vita Food Products Inc v Unus Shipping Co Ltd [1939] UKPC 7.
860 Lorenzen, 'Renvoi Theory and the Application of Foreign Law: Renvoi in General' 194.
861 Ibid 194, 195.

> "The science of Private International Law… must designate the law applicable to each jural relationship. We have no hesitancy in declaring that in our opinion the learned jurisconsults who have opposed the system of *renvoi* have proved in an irrefutable manner that the science of Private International Law has for its aim the direct designation of the very law which is to govern the legal relationship and that its aim must not consist merely in referring to the rules governing the Conflict of Laws in such country.
>
> When the science teaches us, for example, that the status of an individual is governed by his national law, it is the national law regulating the status that is meant, and not a disposition of the national law which might declare another law, for example, that of the domicile of the individual applicable to this status.
>
> The science, in declaring applicable the national law, or the law of the situation of the property, or any other law, has been guided by considerations derived from the nature of the legal relationship in question. It is, therefore, the law itself indicated by it that must be applied, and not another law to which it refers, and which could not have been considered by science."[862]

As mentioned earlier, the notion of renvoi was assessed at the Institute of International Law at its sessions at The Hague in 1898, and at Neuchâtel in 1900. In a report by Lainé and Buzzati, the conclusion of which was encapsulated in Article I, the following question was highlighted:

> "When a legislator, laying down a rule of Private International Law, indicates a rule of foreign civil law as being directly applicable by his courts, he must not subordinate the application of this rule to the condition that it is prescribed also by the foreign legislation, of which the rule of civil law so indicated forms a part."[863]

The question in the conclusion of the report was scrutinised and debated at the session of the Institute of International Law (IIL) where a range of differences of opinion was found amongst the international law scholars, as to whether the question referred to the actual law of the foreign country or manifested to any abstract principle. Ultimately, the principle rejecting renvoi was sanctioned by a vote of 22 to 6. The words in the final resolution of the session are as follows:

862 Ibid 196.
863 Ibid.

> "When the law of State governs a conflict of laws in the matter of private law it is desirable that it should designate the rule of law to be applied in each case and not the foreign rule governing the conflict in question."[864]

The application of renvoi could only be justifiable if the judges in courts accepting the principle of renvoi consider themselves to be judges of the country whose law they had referred to. In such situations, the judges of the forum would have to follow the directions of the foreign law. When they are 'sent back' to the law of their country or *lex fori* by the rules of foreign law, this is called true renvoi (or as discussed above first degree renvoi where the foreign PIL rules about renvoi are not considered). On the other hand, when the judges of the forum are directed by the foreign law to apply the law of the state other than that of the forum, this is called transmission, or in German terms *Weiterverweisung*[865] (or as discussed above second degree renvoi where the foreign PIL rules about renvoi are considered).

The very principle of renvoi as apparent from the above discussion is to apply the law of a foreign state in its entirety. The pragmatic reasoning of the IIL as regards the impossibility of applying the renvoi principles substantiated the problem from a theoretical as well as logical point of view. The conceptual demurral of the renvoi doctrine, namely, the application of foreign law in its totality, was that the judges of the forum would have to consider themselves as judges of the country to which they referred. This would make the entire administration of justice an illogical process, providing no solution to the problem in question.[866] For example,[867] if a Danish person domiciled in Italy dies in Italy, leaving personal assets in Denmark, and the question relating to the distribution of the properties of the deceased comes in front of the Danish court, under Danish law, the judges would apply *lex domicilii*, that is, the law of Italy in its entirety. According to Italian law, it would be *lex patria* that would govern the property distribution of the deceased. Therefore, the Danish judge would logically apply the law of his country in its entirety. With regard to the above hypothesis, Prof. Lorenzen hence said that both ought to refer either to the internal/material/substantive law of the foreign country or the law of the foreign country that would include the rules of PIL.[868]

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[864] Jurists who voted against the principle of renvoi were Asser, Boiceau, Zuzzati, Catellani, Corsi, Descamps, Dupuis, Fauchille, Hitly, Holland, Kebedgy, Lehr, de Liszt, Lyon-Caen, Midosi, Renault, Rostworowski, de Roszkowski, Sacerdoti, Streit, and Vesnitch; jurists who voted in favour of the doctrine of renvoi were Bar, Brusa, Harburger, Roguin, Weiss, Westlake; Ibid 197.

[865] Ibid.

[866] Lorenzen, 'Renvoi Theory and the Application of Foreign Law: Renvoi in General' 197.

[867] Ibid 197–198.

[868] Ibid.

The tenets of Lorenzen's comment have also been encapsulated in the report of the first commission of the IIL as:

> "[O]therwise one would fall into the absurdity of having to admit that a legislative provision establishes one thing when it is applied by the national judge, and entirely different things when it is applied by a foreign judge; that a rule of international law changes its meaning, nature, function as soon as it passes the frontiers of the State in which it was promulgated."[869]

Moreover, the idea of renvoi will remain a circular argument with no definitive point to stop. *Lex fori* will refer to the PIL of the *lex causae*, whose PIL rules will re-refer to the *lex fori*, whose PIL rules will again re-refer to the *lex causae*, and theoretically it will never come to an end.[870] In order to avoid this unnecessary circle, why would one not for the sake of convenience of the administration of justice, as well as to give a definitive remedy to the parties of a dispute, consider the application of *lex fori*, while asking why we had the doctrine of renvoi in the first place, if we ought to return only for the sake of convenience of the overall justice system, to the classic maxim of PIL – that is, the application of *lex fori*. This particular reasoning against the doctrine of renvoi could be further vindicated in the case of renvoi *au second degré*, where the carousal has to be stopped arbitrarily.[871]

Distinguished Italian jurist Fiore adhered to the application of foreign law in its entirety in cases being governed by the personal law of the parties. However, following Mancini, he held that the country of which an individual becomes subject to ought to be regarded as the competent legal authority for deciding every issue affecting the individual of a dispute including the applicable law of the dispute. Such authority will still be in existence even if that individual is domiciled elsewhere. Hence, if the national legislation entails that a particular type of case shall be governed by *lex domicilii*, then such preference or discretion of national legislators will have to be protected and appreciated by others. Although Fiore's proposition would seem to be the most acceptable to a certain extent, his narrative as regards the competency of the national lawmakers has the potential for dangerous conflict with long-standing established law, theories relating to the continent that are being accepted by most jurists, as well as the notion of territoriality being omnipresent in the common law world.[872]

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869 Ibid 198.
870 Calster 8.
871 Ibid.
872 Lorenzen, 'Renvoi Theory and the Application of Foreign Law: Renvoi in General' 200.

One of the foremost problems in following the doctrine of renvoi is the discrepancy between the rules of PIL of different countries. Bar and Westlake, who took a stand in favour of renvoi in a session of the IIL at Neuchâtel, argued that *lex fori* would apply to disputes whenever any incongruity arose between the PIL rules of the countries concerned. Both Bar and Westlake were reluctant to name such differences between PIL rules as conflict, rather they termed them as a gap in the legislation that the law of the forum would be asked to fill as a subsidiary law.[873]

The above discussion as regards the stand against the doctrine of renvoi, and the ultimate direct or indirect reliance on *lex fori*, was premised on the disparities between the PIL rules of different countries. A question here that might arise in this regard is which particular issue, reason or element works as a primary as well as substantial impediment in such disparities. The answer is the enunciation of diverse 'connecting factors' by different national lawmakers. Different countries employ different connecting factors for similar situations (although similarities as regards their application between distinct jurisdictions can rarely be found). As a result, the discrepancy between PIL rules of different countries becomes obvious, especially in the employment of the renvoi doctrine. The idea behind the institution of the renvoi doctrine, as mentioned above, was to create unanimity between nations on the issue of the adjudication of PIL conflicts. However, due to the differences of connecting factors from which the overall discrepancy between PIL rules ensued, the whole idea of renvoi was disregarded and to a certain extent discarded.

Many national laws and treaties at the international level have discounted the doctrine of renvoi such as Article 20 of the Rome I Regulation[874] on the law applicable to contractual obligations, Article 24 of the Rome II Regulation[875] on the law applicable to non-contractual obligations, Article 11 of the Rome III Regulation on the law applicable to divorce and legal separation.[876] The EU law has also excluded this doctrine as a general rule in terms of ensuring legal certainty

873 Ibid.

874 Article 20 of Rome I Regulation states that the application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

875 Article 24 of Rome II Regulation states that the application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

876 A Gray, 'The Rise of Renvoi in Australia: Creating the Theoretical Framework' (2007) 30 University of New South Wales Law Journal 103–126.

mostly in commercial contracts in the EU region.[877] However, in some jurisdictions such as Switzerland[878], England and Wales[879] and Australia[880] the application of renvoi can sporadically be seen as Mr Justice Eady in the case of *Iran* as regards renvoi stated that there is no overarching, but it will be seen as a useful tool to be applied where appropriate'.[881]

4.3.3 Other avenues for the courts to establish connection

Less reliance of the judges on the concept of 'renvoi' has ultimately boosted their dependence on the connecting factors enshrined in their own PIL rules. Though connecting factors are discovered based on precise connections in discovering the applicable law, abstract connections can also be opted for by the judges in circumstances such as a) where it has been proscribed by the PIL rules (Article 117 (1) Swiss PIL Statute for the law governing contracts)[882], b) where it is understood as a subsidiary applicable rule (Article 4 (2) Rome I Regulation)[883], c) by virtue of general evasive clause or special evasive clause as mentioned in

877 A typical clause as regards the commercial contract would read: 'This agreement shall be governed by and construed and enforced in accordance with the laws of the State of (), excluding its choice of law rules'; Calster 8.

878 Article 3 (1) of the PILA states that if the applicable law refers back to Swiss law or to another foreign law, such *renvoi* shall be taken into account only if this Act provides.

879 'The role of renvoi in remaining areas of law is now somewhat limited, and in some cases not entirely clear. In can be said that renvoi will apply in the case of land situate abroad, to which the lex situs is applied by English law. In such cases, there is a pragmatic desire to apply the same law of the court in whose jurisdiction the property is located, to increase the chance that any English decision concerning the property will be effective. The balance of first instance court decisions as regards tangible movable property situate abroad is that a reference to the lex situs will not include renvoi. In family matters, there is some limited case law that the doctrine of renvoi may apply in certain circumstances, but the issue very seldom arises because English law is
generally applied in family matters'; 2.2 European Justice, European Judicial Network (in civil and commercial matters); 'Which Law Will Apply? - England and Wales' [2020] European Union <https://e-justice.europa.eu/content_which_law_will_apply-340-ew-maximizeMS_EJN-en.do?member=1#toc_2_2>.

880 *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54 (High Court of Australia).

881 *Iran v Berend* [2007] EWHC 132 (QB).

882 Article 117 (1) of the PILA states that: "In the absence of a choice of law, contracts are governed by the law of the state with which they have the closest connection."

883 Article 4 (2) of the Rome I Regulation articulates that: "Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence."

PIL rules (Article 15 (1) Swiss PIL Statute[884], Article 4 (3) Rome II Regulation 864/2007[885]).[886]

Connections as regards applicable law are generally primary and not subsidiary. It is assumed that applicable law determined on the basis of the primary connections will lead to the result (be it desirable or undesirable) rather than triggering the option of subsidiary connection. Judges may also opt for alternative connections as opposed to cumulative connections where multiple legal systems are employed to solve the legal problem in question, if they think it can lead to favourable outcome. For example, formality as regards to the validity of the contract are governed by the law governing the contract or the place where the contract was made.[887]

Connection may be made objectively if the applicable law has not been chosen by the parties to the dispute. Alternatively, connections based upon objectivity is not considered where the parties have already chosen the governing law.[888]

Connection established accessorily rather autonomously is also a mode that helps court find out the applicable law (Article 5(2) Rome II Regulation).[889]

Connection made by the judges may be termed as ubiquitous if the matter in question has effects in multiple jurisdictions but governed by the law of any of those jurisdictions (Article 5(1) Rome II Regulation)[890] or the legal consequences of certain partial aspects are

884 Article 15 (1) of the PILA states that: "As an exception, the law referred to by this Act is not applicable if, considering all the circumstances, it is apparent that the case has only a very loose connection with that law and that the case has a much closer connection with another law."

885 Article 4 (3) of the Rome II Regulation states that: "Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as contract, that is closely connected with the tort/delict in question."

886 Siehr, 6. Kinds of connection.

887 Ibid.

888 Ibid.

889 Article 5 (2) of the Rome II Regulation states that: "Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

890 Article 5 (1) of the Rome II Regulation states that: "Without prejudice to Article 4 (2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

governed by the law of the place where these partial effects occur (eg Article 8(1) Rome II Regulation)[891].[892]

4.3.4 Party autonomy and choice of law agreement

As with choice of court agreements, the notion of party autonomy is also used for choosing the law that would govern the legal relationship between litigants. This provides parties to litigation with more opportunities and possibilities in a case that the relevant legislative provisions might not provide.[893] Though party autonomy and choice of law agreement are used interchangeably, the latter may be termed as the manifestation of the former. Party autonomy is a doctrine that allows the parties to cross-border litigation of a civil nature or litigation to choose the law that shall govern their contract.[894] The idea of party autonomy was first observed in the writings of French jurist Charles Dumoulin (1500–1566) who was acclaimed as 'the father of party autonomy'.[895] Dumoulin placed great emphasis on the intention of the parties, especially as regards litigation involving contractual relationships. He said, 'the will of the parties is sovereign'.[896] According to his proposition, the intention of the parties is the decisive factor that would indicate which particular law shall govern the case.[897] Dumoulin's emphasis on party autonomy went to the level where he stated that in cases where the parties did not

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a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,
b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
c) the law of the country in which the damage occurred, if the product was marketed in that country. However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c)."

891 Article 8 (1) of the Rome II Regulation enunciates that: "The Law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed."

892 Siehr, 6. Kinds of connection.

893 Though the difference between the choice of court or forum shopping and the choice of law or as we have perceived the term party autonomy, is patent. However, the difference between jurisdiction and forum is so subtle that these two terms can at times be used interchangeably. An example can, however, in this regard eradicate confusion. In a cross-border litigation, the governing law could be the State of Colorado, the State of New York could be the jurisdiction of the case, and the forum of the litigation could be the Federal District Court in Lower Manhattan, New York; see <http://knowledgetonegotiate.blogspot.com/2013/11/applicable-law-versus-governing-law.html>; Calster 9.

894 David McClean, *Morris: The Conflict of Laws* (5th edn, Sweet & Maxwell 2000) 4–5.

895 Ernest G Lorenzen, 'Validity and Effects of Contracts in the Conflict of Laws' (1921) 30 Yale Law Journal 572–75.

896 Ernest G Lorenzen 573.

897 Ole Lando, 'Contracts, III-24' in Kurt Lipstein (ed), *International Encyclopaedia of Comparative Law* (Mohr 1971) 6.

explicitly include any choice of law clause in their contractual agreement, the court should seek the governing law as per the tacit intentions of the parties.[898] As Lorenzen said, in the absence of any explicit intention of the parties, intention must be "sought in the surrounding circumstances".[899]

The precepts of party autonomy, as Prof. Zhang articulated,[900] are premised upon two important questions. First, if parties to a suit can choose the law that would determine the legal consequences of their legal relationship, the answer to this would be not only do the parties have the freedom to choose the governing law, but they would also be bound by the applicable law.[901] The second question refers to whether the law chosen by the parties would be enforced in certain jurisdictions. This aspect is quite significant for an overall accomplishment of party autonomy. The answer here would be that the forum may accept the clause predetermined by parties and apply the same in the litigation, or may not accept the clause rather than make a judicial determination of the clause, or may accept "the clause as an element in the consideration of applicable law".[902] Although Dumoulin's fundamental understanding and notion of party autonomy as to how and which law should be adopted has remained intact in the modern study of PIL, differences can be found between the time of Dumoulin's assertion of party autonomy and how it is perceived today in the light of modern conflict of laws. The reason for such differences is that it was almost impossible for Dumoulin, centuries ago, to foresee or envisage the issues that are being faced at present by jurists and practitioners.[903]

One of the core differences between the then maxims of party autonomy and its modern understanding is that it was not possible to decipher which issues or matters would be decided by the governing law that has been chosen by the parties at the time of Dumoulin, unlike the

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898 Ibid.

899 Lorenzen, 'Validity and Effects of Contracts in the Conflict of Laws' 573.

900 Mo Zhang, 'Party Autonomy and beyond: An International Perspective of Contractual Choice of Law' (2006) 20 Emory International Law Review 511, 511–512.

901 'When it is referred to "Applicable Law" there are actually two basic types of applicable law. The first would be the laws of the jurisdiction where the work is being performed…The second type of applicable law involves requirement that the product delivered or service performed complies with the laws of locations where it will be delivered or used'; see <http://knowledgetonegotiate.blogspot.com/2013/11/applicable-law-versus-governing-law.html>; Willis LM Reese, 'Conflict of Laws and the Restatement Second' (1963) 28 Law and Contemporary Problems 679, 697.

902 Richard J Bauerfield, 'Effectiveness of Choice of Law Clauses in Contracts of Law: Party Autonomy or Objective Determination' (1982) 82 Columbia Law Review 1660.

903 Zhang 519.

method used to determine this today in the modern understanding of PIL.[904] Professor Yntema, in this regard, stated that "Dumoulin in the sixteenth century was apparently concerned, on the grounds of the intention of the parties, to ensure (sic) extra-territorial application of the law of the husband's domicile to matrimonial settlements."[905] The intention of the parties alone used to act as validation that would determine the governing law as well as the validity of the contract.[906]Although the trend of taking the rights and duties of the parties into consideration besides the validity of the contract started in the nineteenth century,[907] the overall discussion of party autonomy was based on the validity of the contract.[908]

Unlike the historic concept of party autonomy in applicable law, its idea in modern times is to ensure the rights and obligations of the parties as well as to focus on the content and wording of the contractual agreement, rather than concentrating only on the validity of contracts. In fact, the clauses relating to 'choice of law' are now being defined so as to cover "any dispute arising from or out of the contract", or "all rights and obligations of the parties" as regards litigation involving matters of contract.[909] From a logical and theoretical perspective, matters relating to validity of contract and validity of choice of law clause or the contents of the contractual agreement should be treated discretely.[910] Whilst the PIL of the modern era tends to be focused more on the contents of the agreement made by the parties, the validity of the contract ultimately decides the fate of the litigation. The contents of the agreement, namely, choice of law, is concerned only with the substantive matters of the contract. In fact, the modern idea of concentrating more on the rights and obligations of the parties will become frustrated if the contract is deemed to be invalid as per the law chosen by the parties. Since the idea of putting emphasis on rights and obligations is intertwined with the necessity for a valid contract, both should be looked at with equal importance and significance.[911]

Another important addition to the precepts of party autonomy in applicable law is the doctrine of *dépeçage* or splitting. This doctrine is also colloquially termed as 'picking-and-choosing'.[912]

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904 Ibid.
905 Hessel E Yntema, 'Autonomy in Choice of Law' (1952) 1 Am Journal Comp Law 342.
906 Zhang 519.
907 Lorenzen, 'Validity and Effects of Contracts in the Conflict of Laws' 573.
908 Albert A Ehrenzweig, 'Contracts in the Conflict of Laws: Part One: Validity' (1959) 59 Columbia Law Review 1024–1025.
909 Michael Gruson, 'Governing Law Clauses in Commercial Agreements-New York's Approach' (1980) 18 Colum J Transnatl Law 323.
910 Ibid 326.
911 Zhang 520.
912 Lando 3.

According to this doctrine, the parties may be able to designate the law to be applied to a certain part of the contract. If the doctrine of *dépeçage* is invoked successfully by the party, they may be able to choose the law of the place of contract to govern the formation of the contract, and the law of the place of performance to ascertain the performance of contract.[913] The doctrine of *dépeçage* is believed to have originated in Germany and be based upon what Savigny proposed as his 'seat' theory.[914] According to Reese:

> "*Dépeçage* can be defined broadly to cover all situations where the rules of different states are applied to govern different issues in the same case. It can be defined more narrowly to be present only when the rules of different states are applied to govern different substantive issues, and the most restrictive definition would confine the term to situations whereby applying the rules of different states to different issues a result is reached which could not be obtained by exclusive application of the law of any of the states concerned."[915]

The doctrine of *dépeçage* has become an integral part of the modern PIL approach.[916] This doctrine is not only used by the courts but is also highly recognised as well as prioritised by the parties to litigation while they determine the governing or applicable law of the litigation.[917]

It is indubitable as to how effective the doctrine of party autonomy in applicable law has been in the modern understanding of PIL. However, besides its effectiveness, the doctrine of party autonomy in applicable law does also have some limitations. The core and most significant limitation is that the freedom that the doctrine has provided to the parties of cross-border legal relationship is not absolute. The lack of absolutism is premised upon the boundaries of three foremost areas, namely the "public policy exception, the mandatory rules mandate, and the reasonable connection requirement".[918]

The limitations of both choice of court agreement (discussed above) and choice of law agreement have obliged the courts to rely on the connecting factors mentioned in the PIL rules. Significance of connecting factors does also come to the fore where the parties do not make any choice in terms of which particular law shall govern their contract. The ultimate evaluation

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913 Zhang 520.
914 Lando 3.
915 Willis LM Reese, 'Dépeçage: A Common Phenomenon in Choice of Law' (1973) 73 Columbia Law Review 58.
916 Reese 75.
917 Zhang 521.
918 Ibid 524.

of both choice of court agreement and choice of law agreement is interlaced with a logical and jurisprudential understanding of connecting factors. More instances as regards the development of choice of court agreements and choice of law agreements in cross-border litigations have been examined in part III.

4.4 Connecting factors as regards the recognition and enforcement of foreign judgments

Although it is not often highlighted, it is a prime duty for the court to establish a connection between foreign judgements and its jurisdiction in order to recognise and enforce those foreign judgements within its jurisdiction. There are many grounds that are mentioned in the domestic PIL rules as to when the court can deny to recognise and/or enforce foreign judgments within its jurisdiction e.g. Article 149 of the Swiss PIL rules,[919] which may at times be seen as technical barrier to the free movement of judgments. Issues concerning the recognition and enforcement of foreign judgments of cross-border commercial contract cases in Switzerland, England and Wales and the EU will be discussed in Part III.

The theoretical and doctrinal aspects of PIL have been discussed in Part I and Part II, which entail the emergence of connecting factors in the jurisprudence of PIL. This gives us a view of the development of PIL from the beginning till the advent of the idea of connecting factors. Court adjudication approach of three jurisdictions namely, Switzerland, England and Wales

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[919] Article 149 of the Swiss PIL enunciates that:
1. Foreign decisions relating to a claim under the law of obligations are recognised in Switzerland:
a. if they were rendered in the state of the defendant's domicile; or
b. if they were rendered in the state of the defendant's habitual residence, insofar as the claims relate to an activity carried out in such state.
2. They are also recognised:
a. if the decision relates to a contractual obligation, was rendered in the state of performance of the characteristic obligation, and the defendant was not domiciled in Switzerland;
b. if the decision relates to a claim under a contract concluded with a consumer, was rendered at the consumer's domicile or habitual residence, and the requirements provided in Article 120 paragraph 1 are met;
c. if the decision relates to a claim under an employment contract, was rendered either at the place of the establishment or at the place of work, and the employee was not domiciled in Switzerland;
d. if the decision relates to a claim arising out of the operation of an establishment and was rendered at the location of that establishment;
e. if the decision relates to unjust enrichment, was rendered at the place where the act or result occurred, and the defendant was not domiciled in Switzerland; or
f. if the decision relates to an obligation in tort, was rendered at the place where the act or the result occurred or, in the case of nuclear incidents, at the place where the nuclear installation of the operator liable is located, and the defendant was not domiciled in Switzerland.

and the EU towards cross-border contractual disputes will be examined in Part III. This will allow us to investigate the modus operandi of employing connecting factors in cross-border contractual litigations at the regional and domestic courts.

Part III:

The analysis of the connecting factors in international commercial contracts in the EU, Swiss and English laws

Chapter 5: The EU approach

5.1 Introduction

Europeanisation of PIL has already been discussed in chapter one and chapter two. Here, it will be seen as to how the EU has been endeavouring to unify PIL in the area of the law of obligation, focusing upon the notion of connecting factors. The unification of PIL rules for international commercial contracts at the EU level has been propounded by Professor Calster as:

> "Sometimes viewed as a rather musty set of doctrinal principles rooted in nineteenth century European jurisprudence, it is in fact a dynamic and rapidly evolving field of direct relevance to sophisticated lawyers working in a broad spectrum of international and transnational contexts."[920]

The ultimate harmonisation of PIL rules at the EU level as regards jurisdiction and the recognition of foreign judgments and applicable law of both contractual and non-contractual obligations is believed to have been accomplished by the Brussels I Regulation Recast (jurisdiction, the recognition and enforcement of foreign judgments) and the Rome I Regulation (applicable law). Each of these will comprehensively be analysed below.

5.2 Jurisdiction

The process of unifying rules on jurisdiction in civil and commercial matters, mutual the recognition and enforcement of judgments, started in 1960 through a Convention negotiated by the original six European Economic Community (EEC) Member States, namely, Germany, Italy, France, the Netherlands, Luxemburg and Belgium.[921] In 1968, discussions held by these six nations led to the establishment and signing of the Brussels Convention. This was expanded in the latter part of the twentieth century and, subsequently, many new Member States endorsed and adopted it.[922]

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920 D Stewart, 'Private International Law: A Dynamic and Developing Field' (2009) 30 University of Pennsylvania Journal of International Law 1121–31. Geert van Calster, *European Private International Law* (2nd edn, Hart Publishing 2016) 1.

921 Jonathan Hill and Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 59.

922 In 1978 Denmark, the United Kingdom and Ireland; in 1982 Greece; in 1989 Spain and Portugal; in 1996 Sweden, Finland and Austria; Ibid.

5.2.1 Scope of application

The Brussels Convention is typically known as the 'EEX' Convention. It is also termed a classic instrument of international law. Although it was made by the EEC, it was not a part of EEC law.[923] The Brussels Convention came into force on 1 February 1973.[924] Since the instrument was a convention rather than EEC law, there exists no EEC *travaux préparatoires.*[925] Hence, it is contingent upon the reports made by officials including national officials, agents of the European institutions such as the Council, Commission and Parliament, and legal academics. These non-Union instruments or reports are less impenetrable than EEC or EU law, as a result of which they are easy and flexible to interpret by the Court of Justice of the European Union (ECJ[926]).[927] There is an important nexus as well as continuity in the development of the legal instruments, between the Brussels Convention, the Brussels I Regulation (the 2002 Regulation) and the Brussels I Regulation Recast (the Recast). Interpretations of these reports are particularly relevant because many of the provisions of the new regulation Recast of 2012 have been derived from them. One of the significant *travaux préparatoires* that the ECJ often takes into account is the European Commission's proposals that preceded the 2002 Regulation and the Recast.[928]

The very next phase of development of the Brussels Convention occurred in 2002, when the Brussels Convention was replaced by the 2002 Regulation.[929] Its territorial scope was wider and its working latitude was greater than the Brussels Convention, since more Member States

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923 Calster 21–22.

924 Ibid 21.

925 'Travaux préparatoires are the documentary evidence of the negotiation, discussions, and drafting of a final treaty text. Travaux préparatoires my some also be referred as: (1) negotiation history, (2) drafting history, (3) preparatory documents. According to the Vienna Convention on the Law of Treaties, these documents can be used to supplement the interpretation of a treaty when the meaning is ambiguous or obscure when reading the treaty alone'; <https://dal.ca.libguides.com/c.php?g=257217&p=3894998>; Ibid 22.

926 'Since the Treaty of Lisbon, some confusion has crept in on the acronym for the European Courts. The 'Court of Justice of the European Union'—ECJ is the collective term for the EU's judicial arm (see article 19 of the Treaty on European Union), consisting of three separate courts. The predominant court of relevance to questions of EU private international law is the Court of Justice (CJ), formerly known as the European Court of Justice (ECJ), for most if not all of the relevant cases reach the ECJ via the preliminary review procedure (leading national courts to ask 'Luxembourg' for its authoritative view on the matter of interpretation). It would seem that while 'CJ' would be the most correct form of reference, the common form for some time was to continue using 'ECJ'… However, in the meantime it has become apparent that a considerable majority of scholars refer to the ECJ, even when they mean the ECJ'; Ibid.

927 Ibid.

928 Hill and Shuilleabhain 61.

929 Regulation (EC) No 44/2001, OJ 2001 L12/1; Hill and Shuilleabhain 59.

acceded to the 2002 Regulation.[930] The European Commission (EC) inserted provisions in the 2002 Regulation for reports to be made on the overall functioning of the Regulation, as well as made recommendations for amendments of the Regulation when necessary. In 2009, the EC started to review and revise the functioning of the 2002 Regulation and considered whether there was any need for amendment.[931] In 2010, the EC published a proposal for a revised Regulation which is known as 'the Recast'.[932] This was enacted in 2012 and came into effect in January 2015.[933] The Recast consists of three chapters. Chapter one deals with the scope of the Recast, detailed rules on jurisdiction have been outlined in chapter 2, and provisions for the recognition and enforcement of foreign judgments have been set out in chapter 3. Rules on the recognition and enforcement of foreign judgments will be discussed later in this chapter.

Rules on jurisdiction have been discussed below.

One of the preponderant principles of the Recast is 'mutual trust'. As the ECJ stated, in this regard, in the case of *Gasser*:

> "It must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisprudence to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on the recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction."[934]

The principal idea of the Recast is premised on the trust amongst the Member States that is earned through the comprehension of European Private International Law (EUPIL). The

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930 Slovenia, Slovakia, Malta, Poland, Latvia, Lithuania, Hungary, Estonia, Czech Republic, Cyprus in 2004; Bulgaria and Romania in 2007; Croatia in 2013; Hill and Shuilleabhain 60.

931 'Report from the Commission on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' COM (2009) 174 final; 'Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the recognition and enforcement of Judgments in Civil and Commercial Matters (Brussels I Recast Green Paper)' COM (2009) 175 final; Ibid.

932 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' (Brussels I Recast Proposal) COM (2010) 748 final; Ibid.

933 Regulation (EU) No 1215/2012, OJ 2012 L351/1.

934 Case C-116/02 *Gasser v Misat* [2003] ECR I-14693, para 72.

principles relating to trust and mutual respect, in terms of jurisdiction of PIL disputes within the EU, have been reiterated by the ECJ in many cases. Some cardinal maxims that are employed by the ECJ in the invocation of the Recast are as follows:

> "Before every invocation of the Recast, it is to be borne in mind that the drafters of the Recast aspired to expedite the recognition and enforcement of judgments by earnestly accepting the maxims and rules of the adjudication of jurisdiction.
>
> The adjudication process as well as the verdicts of the court in one Member State should not be questioned by the courts of any other States of the EU.
>
> All the rules and maxims of the Recast are subject to the 'European' interpretation."[935]

The above elements are to be maintained and followed by the courts of the Member States of the EU in order to ensure 'legal certainty' and judicial harmony between them. 'Predictability' in the course of legal advancement will ensue from such legal certainty. However, in order to maintain harmony and ensure equality in the application of EU law, the courts of the Member States would, at times, be seen not to be overly concerned with the merits of the case or would give the verdict in a restricted manner. This has caused legal practitioners and academics to differ on a large scale. The idea of keeping to the principle of abiding by the maxim is less welcomed by many practitioners, especially in common law jurisdictions. They find the rules set out by the ECJ not to be convincing in interpreting the Recast with regard to civil and commercial arguments in a PIL case.[936] In the case of *Gasser*[937] the suggestion of the UK of interpreting the Brussels Convention by taking the needs of international trade into consideration has not been entertained by the ECJ. Here, it should be mentioned that the UK is no longer a Member State of the EU.[938]

With regard to the difference between the common law understanding of PIL, including EUPIL, and the civil law or the Brussels regimes' apprehension of the same, an English judge Rix LJ stated that:

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935 Case C-341/04 *Eurofood IFSC* [2006] ECR I-03813, para 39.

936 Calster 26–27.

937 *Gasser v Misat* para 31.

938 The UK withdrew its membership from the European Union and the European Atomic Energy Community on 31 January 2020, after being inside the bloc for forty-seven years. See https://www.theguardian.com/politics/live/2020/feb/01/brexit-britain-wakes-up-to-uncertain-future-after-uk-leaves-eu-live-news-and-updates.

> "The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (and now Council Regulation No. 44/2001 ('the Regulation')) also approaches the risk of inconsistent decisions with the dislike. However, the techniques of the English common law and of the Regulation are different. The common law ultimately relies on an exercise of discretion to reach what in each case seems to the court to be the right result. The Convention and Regulation state rules designed to avoid inconsistent decisions, but if those rules fall in a particular case to avoid danger, there can be no fall-back on discretionary powers: see Erich Gasser GmbH v MISAT Srl [2004] 1 Lloyd's Rep 445, Owusu v Jackson (Case C-281/02) [2005] QB 801."[939]

With regard to the latitude of the Recast, as enunciated in Article 1, it applies to matters that are civil and/or commercial in nature. It has, however, evidently discarded its application in some areas, including social security, bankruptcy, issues relating to marriage and family relationship.[940] Amongst all of these exceptions, the non-applicability of the Recast in arbitration seems connected to matters relating to contractual and commercial relationships. The very reason for its non-applicability in arbitration is that these matters are dealt by the New York Convention 1958.[941]

The primary element of the requirements for the application of the Brussels Convention, which has later transpired in the 2002 Regulation and the Recast, is the presence of an 'international element' in the litigation in which the Convention, now the Recast, has been invoked. The international jurisdiction of the EU Member States under the Convention has been referred to in the Jenard Report, which says:

> "As is stressed in the fourth paragraph of the preamble, the Convention determines the international jurisdiction of the courts of the Contracting States.

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939 *Konkola Copper Mines v Coromin Limited* (2006) 1 EWCA Civ 410, para 27.

940 Article 1 (2) of the Recast: This Regulation shall not apply to:
(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;
(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
(c) social security;
(d) arbitration;
(e) maintenance obligations arising from a family relationship, parentage, marriage or affinity;
(f) wills and succession, including maintenance obligations arising by reason of death.

941 G Bermann, 'Reconciling European Union Law Demands with the Demands of International Arbitration' (2011) 34 Fordham International Law Journal 1196–1216.

> It alters the rules of jurisdiction in force in each Contracting State only where an international element is involved. It does not define this concept, since the international element in a legal relationship may depend on the particular facts of the proceedings of which the court is seised. Proceedings instituted in the courts of a Contracting State which involves only persons domiciled in that State will not normally be affected by the Convention; Article 2 simply refers matters back to the rules of jurisdiction in force in that State. It is possible, however, that an international element may be involved in proceedings of this type. This would be the case, for example, where the defendant was a foreign national, a situation in which the principle of equality of treatment laid down in the second paragraph of Article 2 would apply, or where the proceedings related to a matter over which the courts of another State had exclusive jurisdiction (Article 16), or where identical or related proceedings had been brought in the courts of another State (Article 21 to 23).
>
> It is clear that at the recognition and enforcement stage, the Convention governs only international legal relationships, since *ex hypothesi* it concerns the recognition and enforcement in one Contracting State of judgments given in another Contracting State."[942]

The term 'international legal relationship' used in the Jenard Report has been further elucidated by the ECJ in the case of *Andrew Owusu* by stating that:

> "[T]he international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of Article 2 of the Brussels Convention, from the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of contracting States. The involvement of a Contracting State and a non-Contracting State, for example because the claimant and one defendant are domiciled in the first State and the event at issue occurred in the second, would also the legal relationship at issue international in nature. That situation is such as to raise questions in the Contracting State, as it does in the main proceedings, relating to the determination of international jurisdiction, which is precisely one of the objectives of the Brussels Convention, according to the third recital in its preamble."[943]

To make the Convention more acceptable to the EU Member States, the interpretation of the terms such as 'international legal relationship', which has been illuminated above, and the

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942 P Jenard, 'Report by Mr P Jenard on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1979) 22 Official Journal of the European Communities C59/1, C59/8.

943 Case C-281/02 *Andrew Owusu v NB Jackson, trading as Villa Holidays Bal-Inn Villas and Others* [2005] ECR I-01383, para 26.

presence of an 'international element', used in the Report and subsequently in the Convention, required clearer clarification from the ECJ.[944] From the perspective of such obligation, the ECJ further endorsed a flexible and fitting interpretation of the presence of an international element in the case *Lindner*, where the ECJ asserted that:

> "[T]he foreign nationality of one of the parties to the proceedings is not taken into account by the rules of jurisdiction laid down by the Regulation, however … a distinction must be made between, on the one hand, the conditions under which the rules of jurisdiction pursuant to that regulation must apply and, on the other, the criteria by which international jurisdiction is determined under those rules … the foreign nationality of the defendant may raise questions relating to the determination of the international jurisdictions of the court seised. In a situation such as that in the main proceedings, the courts of the Member States of which the defendant is a national may also consider themselves to have jurisdiction even though the place in that Member State where the defendant is domiciled is unknown. In those circumstances, application of the uniform rules of jurisdiction laid down by Regulation No 44/2001 to replace those in force in the various Member States would be in accordance with the requirement of legal certainty and with the purpose of that Regulation, which is to guarantee, to the greatest extent possible, the protection of defendants who are domiciled in the European Union."[945]

Issues relating to the international legal relationship as well as the existence of an international element in terms of establishing the jurisdiction of the litigants in PIL disputes have been broadly exposed by the Recast that has been continuously upheld by the ECJ. Its interpretation in this regard is crucial in ensuring a uniform discernment of the Recast in all the Member States of the EU. The confusion in terms of the application of the Recast is mainly related to the fact that whether or not the litigant(s) are domiciled in EU Member States consequently brings the issues of international legal relationship and the presence of an international element. Although, in order to establish commonality and uniformity in the EU, the term domicile has been stressed by the Recast.[946] However, this classical EU mindset of maintaining a common connecting factor, namely, 'being domiciled in the EU', has been shunned in some

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944 Calster 28.

945 Case C-327/10 *Hypotecni banka as v Udo Mike Lindner* [2011] OJ C25, para 31 ff.

946 Article 4 of the Recast enunciates that:
1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

areas by the Recast, as apparent in Article 6,[947] Article 18(1),[948] Article 24[949] and Article 25.[950] The substance of these Articles does patently reveal that the requirement for the litigants to be domiciled in the EU does not apply at all times. Subject to certain requirements and conditions, litigants domiciled outside of the EU can also invoke the Recast.[951] In such a scenario, the justification for inserting the term 'domicile' or 'being domiciled in the EU' in the instrument as a connecting factor can be questioned, as it does not help to achieve uniformity in the sector of PIL. Such a dilemma as regards the wordings used to establish a common connecting factor,

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947 Article 6 (general provisions) of the Recast states:
1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.
2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.

948 Article 18 (1) (jurisdiction over consumer contracts) of the Recast enunciates:
A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.

949 According to Article 24 (exclusive jurisdiction) of the Recast:
The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:
(1) in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.
However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State…
(5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

950 Article 25 (prorogation of jurisdiction) of the Recast asserts that:
1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:
(a) in writing or evidenced in writing;
(b) in a form which accords with practices which the parties have established between themselves; or
(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'…
5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.
The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

951 Bonomi 184.

for example, domicile, could not be resolved unless and until a proper definition of these terms has been provided by the EU lawmakers.

As far as the impact of the Recast upon the sector of international commercial contracts is concerned, it is worthy to mention that the entire EU conflicts system in international commercial contracts focuses on two aspects: 'certainty' and 'fairness'. The idea behind the reliance upon these two elements is to ensure the equal bargaining power of the parties, and to avoid any undue complaints relating to costs and procedures being imposed upon the parties. It is also hoped by the EU lawmakers that the parties to commercial contracts would be able to act reasonably when complying with the clauses of the agreement without any unreasonable legal intervention. It is often witnessed in commercial contractual relationships that the stronger and more astute party will try to abuse their power and/or manipulate events through the incorporation of unjust clauses in the agreement that are detrimental to the other party. It is, therefore, of utmost importance for lawmakers to ensure the protection of the weaker party, and the EU lawmakers are no exception to that. Both the Brussels regime as well as the Rome Regulation aim to safeguard the weaker party legally by preventing all the unnecessary and unconscionable issues that may arise in cross-border commercial contracts.[952]

Conflict rules relating to commercial contracts (to avoid any confusion, it should be mentioned the terms 'contract' and 'commercial contract' used in this thesis have the same meaning and are used interchangeably) that are enshrined in the Recast can be dissected into two parts. One relates to the prorogation of jurisdiction that involves the choice of the parties (Articles 25–26), and the other relates to special jurisdiction (Article 7).[953]

5.2.2 Prorogation of jurisdiction

Prorogation of jurisdiction or the existence of choice of court in the agreement could also be defined as 'party autonomy'. This has already been discussed in the previous chapter. Party autonomy or the sovereignty of the parties to choose which court will have jurisdiction to hear future disputes has been meticulously outlined in Article 25. The EU conflict rules emphasise the notion of party autonomy subject to certain conditions. Although the incorporation of the competent court and applicable law clauses in the agreement might apparently seem to ensure certainty, fairness and predictability in cross-border commercial contract litigations, closer

952 Zheng Sophia Tang, 'Cross-Border Contract Litigation in the EU' in Paul Beaumont and others (eds), *Cross-border litigation in Europe*, vol 20 (Hart Publishing 2017) 623–624.

953 Ibid 623–632.

inspection reveals many difficulties with these clauses in the name of party autonomy. At times, many novel and unheard-of complexities arise in contract litigation that cannot be prevented by party autonomy. There are instances where the parties make commercial contractual agreements hastily or within a short space of time as well as orally, as a result of which the clauses that have been incorporated in the agreement might be flawed and erroneous. These might include the provisions about choice of court and law. Clauses of this type may also be incorporated by the use of forged documents.[954] The suppleness of the EU law as regards party autonomy, as well as the unusual method of making an agreement, might therefore sometimes work against the idea of party autonomy. However, since it also has many positive aspects, it has been endorsed by the Recast.[955] In fact, most laws entail some 'loopholes', but, as explained in the previous chapter, the problem as regards party autonomy is that it cannot only be questioned from the perspectives of technicality and pragmaticism, but rather the idea of party autonomy can also be interrogated from a theoretical and jurisprudential point of view. Simply, the question could be asked: how reasonable is the concept of party autonomy where often the parties who incorporate such a notion into their agreement by virtue of law are lay persons? Or, even if the agreement is made by their legal advisors, does it not seem that the task of the judge is partly done by the parties? This raises serious questions for the long-established doctrines of legal jurisprudence.

Disagreement as regards the party autonomy clause may also arise in situations where it has been inserted in a different document,[956] or where all the parties in a contract may not be aware of such clause, or give consensus on any alleged jurisdiction that has been inserted unilaterally by one party into the contractual agreement. It could also be possible that consensus on the jurisdiction is achieved by the fraudulent activities of one of the parties.[957] Problems may also arise when the invocation of a particular jurisdiction could be implicitly agreed upon by the parties, or on the basis of their previous business history.[958] One of the loopholes of the Recast is that it does not provide any guideline at all as to how the incorporation of the choice of court clause can be obtained and manifested by the parties to a contract. Instead, it focuses on the rules relating to the formalities of the jurisdiction clauses. Moreover, as per Article 25, if the

954 LF Manning, 'Choice of Law for Commercial Contracts' [1961] Boston College Law Review 241, 243.
955 Tang 624.
956 *Fosby v Ranovito* [2010] Lloyds Rep 384.
957 Case C-24/76 *Estasis Salotti v RUWA* [1976] ECR I-1831.
958 Case C-106/95 *MSG v Les Gravieres Rhenane*s [1997] ECR I-00911.

choice of court has been agreed in writing this will suffice, no matter how it has been achieved and manifested.[959]

The requirements set out in Article 25 will be met if the agreement, which should of course contain the choice of court clause, has been concluded in writing. There are a number of ECJ cases that have articulated issues relating to the standard terms and conditions that the parties ought to insert in their commercial contract agreements. As in the case of *RUWA*, the ECJ has stipulated that:

> "The mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not of itself satisfy the requirements of Article 17, since no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of Article 17 of the Convention is fulfilled only if the contract signed by both parties contains an express reference of those general conditions."[960]

Here, it should be mentioned that Article 17 of the Recast deals with the jurisdictional issues relating to consumer contracts. Although the Recast, by virtue of Article 25, has excluded the application of national laws of some countries that entail that the agreement may be concluded orally, by conduct or by the course of existing practice between the parties, it does not mention the ways in which the consent of the parties to clauses should be acquired, especially clauses entailing the mention of any particular jurisdiction.[961] In the absence of an explicit agreement, the court should examine the common commercial practice and usage to establish the consent of the parties in the matter of the chosen jurisdiction. The court shall presume that consent exists if a non-categorical clause relating to jurisdiction is compatible with the common practice between the parties as well as international usage.[962]

Many have disagreed with the provision that has discarded the application of national laws which support agreements that have been made orally or by conduct.[963] Rather, they would first see if the parties had reached a consensus between them on the issue of jurisdiction, especially

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959 Tang 625.
960 *Estasis Salotti v RUWA* paras 9 ff.
961 Case C-150/80 *Elefanten Schuh v Pierre Jacqmain* [1981] ECR 1671.
962 Case C-159/97 Transporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy [1999] ECR I-01597.
963 A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) para 7.12.

in cases where the contract was accomplished in an informal manner.[964] Even between the national laws of the EU Member States, disparities in treating the issue of jurisdiction exist. Therefore, to avoid any unequal situation, the ECJ does not allow itself to apply any national PIL rule to the issue of the existence of a jurisdiction clause.[965] The ECJ, however, has not shied away from taking the issue of consensus between the parties into consideration as a factual matter, and assessing the evidence that suggests that the parties have truly entered into a valid and legal agreement.[966] The ECJ has also not been reluctant to consider interpreting the existence of consensus in terms of assessing if the jurisdiction clause meets the requirements enumerated in Article 25(1) of the Recast.[967]

A problem arises when the jurisdiction that has been chosen by the parties falls outside the ambit of the EU. The issue of the parties choosing a court outside the EU has also not been covered by the Jenard Report.[968] In the absence of any clear guidelines, it is therefore not clear for the national courts whether they would be declining their jurisdiction in favour of a court that is not in the EU. As a result of this, this particular issue of non-EU jurisdiction leads to different interpretations as to how the Member States would react to such a quandary.[969]

As per the approach taken in the case of *Owusu*, it could be assumed that the ECJ would argue that whenever any national court of an EU Member State faces such a situation, it would endeavour to ascertain if it has any jurisdiction under any of the grounds mentioned in the Recast. If it does, it should exercise its jurisdiction in order to resolve the dispute. This is called the reflexive effect of Article 25. This particular issue was not included in the proposal of the Commission for review.[970] The ECJ has very succinctly remarked on this issue in the case of *Coreck Maritime*[971] by saying that:

> "Article 17 of the Convention does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause

964 *Estasis Salotti v RUWA* para 7.
965 Tang 625.
966 Case C-366/13 *Profit Investment Sim SpA v Stefano Ossi* [2016] OJ C282 paras 24-29.
967 *Estasis Salotti v RUWA* 1831.
968 Jenard 38.
969 Calster 115.
970 Ibid 115–116.
971 Case C-387/98 *Coreck Maritime GmBH v Handelsveem BV and others* [2000] ECR I-09337.

according to the applicable law, including conflict of laws rules, where it sits. (19, with reference to the Schloser Report)."[972]

This observation of the ECJ relates to the issue of the mention of a court, in the agreement, that is situated in a non-EU State. As Professor Calster argued, it seems that in such situations the Recast shall not apply at all, since the national laws must decide this issue. Therefore, as he went on to argue, although the invocation of Article 25 in such cases has been termed to be reflexive, pragmatically, this could hardly be termed as a 'reflexive' application of Article 25.[973] Another technical difficulty arises, as regards a court situated outside the EU, when there is a substantial amount of EU connection with the dispute in question, both from the perspectives of law and fact. Even if the court of the EU Member State declines the jurisdiction taking the jurisdiction clause of the agreement into consideration, nevertheless, will this stance be treated as a judgment under the definition of 'judgment' given by the Recast, or a mere observation?[974] Problems arising from the issue of the validity of the judgment of the reflexive effect of Article 25 have been patently highlighted in the case of *Gothaer*.[975]

The so-called reflexive effect of Article 25 could technically be questioned by a recalcitrant litigant in order to keep the jurisdiction of the case in a court of EU origin by invoking other provisions of the Recast such as Article 4 (general provisions) or Article 7 (special jurisdiction).[976] Litigants can also question the aptitude of the Recast by pointing out these contradictory provisions. The effectiveness of the idea of party autonomy or the inclusion of the designated jurisdiction, thus, becomes futile from the perspective of the regionality of the PIL rules. The Recast should make the EU stance clear and unequivocal on the issue of the incorporation of a non-EU jurisdiction clause. The practicality of this problem is one of the core downsides of party autonomy. Unless the whole world comes under the same PIL rules, the assertion of uniformity and mutual cooperation between countries by factors like party autonomy will never become a reality. This ultimately might question the rationalisation of regional PIL, such as EUPIL, if it still relies on the national PIL rules in order to hide its inadequacies.

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[972] Calster 116.
[973] Ibid.
[974] Ibid 116–118.
[975] Case C-456/11 *Gothaer Allegemeine Versicherung et al* [2012] OJ C719.
[976] Calster 118.

In a very recent case of *Ryanair*,[977] the ECJ did not take the jurisdiction clause into consideration while deciding that the assignee (a third party to the contract) was not bound by the jurisdiction clause. In this case, DelayFix was an agency that worked to claim compensation on behalf of air passengers. It claimed compensation in a legal suit against Ryanair in Warsaw on behalf of a Polish passenger. Although Ryanair contested the jurisdiction of Warsaw's court relying on a jurisdiction clause in favour of the Irish court mentioned in its general terms and conditions, the ECJ upheld the jurisdiction of the Warsaw court. This case discussed some important issues in determining the refusal of the jurisdiction clause existing in the agreement, such as whether the assignee, the collection agency (third party), should be equally bound by the same terms and conditions as stipulated in the agreement, if the jurisdiction clause was indeed valid under the Unfair Terms Directive. The ECJ, after carefully assessing all the relevant issues, ruled that:

> "Article 25 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in order to contest the jurisdiction of a court to hear and determine an action brought for compensation under Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 and against an airline, a jurisdiction clause incorporated in a contract of carriage concluded between a passenger and that airline cannot be enforced by the airline against a collection agency to which the passenger has assigned the claim, unless, under the legislation of the Member State whose courts are designated in that clause, that collection agency is the successor to all the initial contracting party's rights and obligations, which it is for the referring court to determine. Where appropriate, such a clause, incorporated, without having been subject to an individual negotiation, in a contract concluded between a consumer, that is to say, the air passenger, and a seller or supplier, that is to say, the airline, and which confers exclusive jurisdiction on the courts which have jurisdiction over the territory in which that airline is based, must be considered as being unfair within the meaning of Article 3(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts."[978]

977 Case C-519/19 *Ryanair v DelayFix* [2020] OJ C933.
978 Ibid.

Although this case is not related to a clause in favour of a non-EU jurisdiction, it can be presumed that this ECJ judgment would have negative repercussions on future civil and commercial cases on the issue of the reliability and justification of the contractual parties regarding jurisdiction clauses. If, for whatsoever reason, the jurisdiction clause can be refused or weakened by the court where the designated court is situated in the EU, then why would the court be hesitant to disregard a jurisdiction clause that is in favour of a non-EU jurisdiction, even though the case is linked with the EU and the party or parties also want to keep the litigation in the EU's jurisdiction?

A question that may arise in regard to the outcome of the *Ryanair*[979] case is: would the ruling of the case have been different if the case had been lodged by the party of the agreement himself rather than by the assignee? A similar kind of judgment has previously been given in the case of *Refcomp*.[980] The facts of the case are different to those of *Ryanair*. This case involves issues such as the transfer of ownership, a sub-buyer, privity of contract. The decision made by the ECJ in this case is similar to the judgment given in the case of *Ryanair*. The ECJ held that:

> "Article 23 of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a jurisdiction clause agreed in the contract concluded between the manufacturer of goods and the buyer thereof cannot be relied on against a sub-buyer who, in the course of a succession of contracts transferring ownership concluded between parties established in different Member States, purchased the goods and wishes to bring an action for damages against the manufacturer, unless it is established that that third party has actually consented to that clause under the conditions laid down in that article. The jurisdiction clause incorporated in a contract may, in principle, produce effects only in the relations between the parties who have given their agreement to the conclusion of that contract. In order for a third party to rely on the clause it is, in principle, necessary that the third party has given his consent to that effect."

In another recent case of *WV v Landkreis Harburg*[981] regarding maintenance, the third party, who was also a public body, was held to have jurisdiction to bring a suit against the

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979 Ibid.

980 Case C-543/10 *Refcomp v Axa Corporate Solutions assurance and Others* [2013] ECLI C/2013/62.

981 Case C-540/19 *WV v Landkreis Harburg* [2020] OJ C348.

maintenance debtor in Germany.[982] In this case, apart from the Recast, other legal instruments were invoked such as Maintenance Regulation No 4/2009 and the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. The ECJ (Third Chamber) questioned whether the public body (third party) had the jurisdiction to bring a suit against the maintenance debtor and concluded that:

> "A public body which seeks to recover, by way of an action for recovery, sums paid in place of maintenance to a maintenance creditor, and to which the claims of that maintenance creditor against the maintenance debtor have been transferred by way of subrogation, may validly invoke the jurisdiction of the court for the place where the creditor is habitually resident, as provided in Article 3 (b) of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, the recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations."[983]

This maintenance case, although of different substance, can be compared and contrasted with the previous two cases mentioned, where the third party was refused jurisdiction. If a public institute in the capacity of a third party can have jurisdiction to bring a suit in the court, then why was the compensation collecting agency Delayfix in the case of *Ryanair* and the sub-buyer in the case of *Refcomp*, both being third parties as well as private entities, not entitled to bring suit against the defendant?

5.2.3 Lis pendens

Another important provision of the Recast is the provision that relates to the notion of *lis pendens*. This provision could be termed as a legislative reaction to the judgment given in the case of *Gasser.*[984] This not only disregarded the jurisdiction clause incorporated in the contractual agreement, but also encouraged what is known as 'Italian Torpedo'.[985] The term Italian Torpedo was first used by Mario Franzosi[986] and has also been called 'Belgian Torpedo'. It is a term used in PIL to refer to the act by which litigation is lodged in a court where it suffers

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982 Anna Wysocka-Bar, 'The Court of Justice on Jurisdiction in Maintenance Claims Brought by Public Bodies' (*The EAPIL Blog*, 5 March 2021) <https://eapil.org/2021/03/05/the-court-of-justice-on-jurisdiction-in-maintenance-claims-brought-by-public-bodies/>.

983 *Landkreis Harburg*.

984 *Gasser v Misat*.

985 T Hartley, 'Choice-of-Court Agreements and the New Brussels I Regulation' (2013) 129 Law Quarterly Review 309–11.

986 Franzosi, 'Worldwide Patent Litigation and the Italian Torpedo' (1997) 19 European Intellectual Property Review 382.

tremendously from the criticality and/or the lengthiness of the judicial proceedings.[987] According to the ruling given in the case of *Gasser*,[988] a court first seised would always have the priority to give a ruling on the validity of the jurisdiction clause.[989] As a result of this, the *lis pendens* rule has been reformed in Article 31 by the Recast. This states that the court in another Member State shall stay the proceedings until the time when the court first seised has declared that it has no jurisdiction under the agreement. It also adds that any court of the EU Member States can decline its jurisdiction as soon as the jurisdiction mentioned in the agreement has been established.[990] According to Article 31, if the court first seised is not the chosen court then *lis pendens* shall not apply. It would certainly be unjustified and somewhat unfair for a party to insist that the case be heard in a jurisdiction that has not been mentioned in the jurisdiction clause of the agreement.[991] That is exactly what has happened in the case of *Ryanair*.[992] Although the name of a particular jurisdiction has been patently incorporated in the agreement, the ECJ has given a ruling against the chosen court.

5.2.4 Absence of choice of court agreement

Difficulties as regards the jurisdiction of PIL disputes become more acute where the choice of any jurisdiction has not been incorporated in the agreement in commercial contracts. In the absence of any chosen jurisdiction, the court shall determine this by virtue of Article 4 general

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987 J Wood and N Allan, 'Sinking the Italian Torpedo: The Recast Brussels Regulation' [2012] International Law Office 5.

988 *Gasser v Misat*.

989 Tang 626.

990 Article 31 of the Recast states that:
1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.
2. Without prejudice to Article26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.
3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.
4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.

991 Tang 627.

992 *Ryanair v DelayFix*.

jurisdiction (domicile)[993] and Articles 7[994] and 8[995] (special jurisdiction).[996] The rule of the Recast in regard to general jurisdiction is premised upon the maxim *actor sequitur forum rei*, which means that the claimant always leans to the jurisdiction where the subject of the litigation is located, rather than focusing upon the maxim *forum actoris* that would prioritise the jurisdiction of the claimant.[997] The drafters of the Brussels Convention opined that the idea of the Regulation is to favour the defendants more than the plaintiffs. The rationale of this particular stance is not clearly understood by many legal academics such as Calster.[998] As regards the general nature of domicile enshrined in Article 4 of the Recast, Calster remarked:

> "[T]hat the 'general' jurisdictional rule of the Regulation is not actually all that 'general', given its many exceptions and its low rank in the actual hierarchy; and that despite this low rank, its 'general' nature nevertheless reverberates throughout the Regulation, in that all exception to the general rule need to be applied strictly."[999]

The domicile of the defendant shall be prioritised as per the Recast; however, this only works in terms of discovering the jurisdiction of a particular Member State. The task of finding the court of any particular place of that ascertained Member State's jurisdiction must be determined

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993 Article 4 of the Recast enunciates that:
1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.

994 Article 7 of the Recast states that:
A person domiciled in a Member State may be sued in another Member State:
(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
(c) if point (b) does not apply then point (a) applies.

995 Article 8 of the Recast articulates that:
A person domiciled in a Member State may also be sued:
(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
(2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case.

996 Tang 627.

997 Calster 135.

998 Ibid.

999 Ibid.

by the national law of that Member State. The dilemma of finding the actual seat of the defendant arises mostly in federal states.[1000]

5.2.5 Special jurisdiction

Although the invocation of Article 4 might appear to be very straightforward in cross-border litigation, closer inspection will reveal that when the claimant lodges a cross-border suit against the defendant in another Member State, other connecting factors must be considered through the invocation of Articles 7 and 8 that have enunciated the rules for special jurisdiction.[1001]

In American law, the term 'special jurisdiction' has been termed as 'specific jurisdiction'. The maxims of special jurisdiction apply where there is an apt and close connection between the forum where the case has been lodged and the cause of action.[1002] In the American case *Walden*, the term specific jurisdiction has been explained as:

> "'Specific' or 'case-linked' jurisdiction 'depends on an affiliation between the forum and the underlying controversy' (i.e., an 'activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation'). *Goodyear Dunlop Tires Operations, SA v Brown*, 546 US (2011) (slip op, at 2). This is in contrast to 'general' or 'all purpose' jurisdiction, which permits a court to assert jurisdiction over a defendant based on a forum connection unrelated to the underlying suit (e.g., domicile)."[1003]

The notion of special jurisdiction could be termed as an upshot of *forum non conveniens*, although its argument cannot discount the notion of jurisdiction outright by the invocation of Articles 7–9 of the Recast. It is worth mentioning that the provisions appurtenant to special jurisdiction should be deciphered as 'supplementary jurisdiction'. This means the litigant may bring the case to a court of any jurisdiction subject to the provisions of special jurisdiction and, by virtue of Article 4 of the Recast, the litigant may simultaneously file the case in the jurisdiction where the defendant is domiciled.[1004] One of the special features of the Recast provisions entailing the maxims of special jurisdiction is that the provisions do not only mention the word Member State, but also specify the court where the litigant ought to bring the case. The significant feature of these provisions is that they outmanoeuvre the national civil

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1000 Ibid.
1001 Tang 627.
1002 Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I–03699.
1003 *Walden v Fiore et al* USSC (2014) 571 US 277 (United States Supreme Court) [12-574].
1004 Calster 136.

procedure rules. Furthermore, the national laws that countermand the wordings of these provisions shall be held irreconcilable with the Recast.[1005]

In order to ensure greater certainty as regards commercial contracts, an improvement has been brought in Article 7(1) (Article 5(1) of the 2002 Regulation). In its predecessor, the Brussels Convention, Article 5 (now Article 7) only comprises point (a) of Article 7 of the Recast and Article 5 of the 2002 Regulation that refers to the place of performance of the obligation in question.[1006] In Article 5(1) of the 2002 Regulation (which is now Article 7(1) of the Recast) more points covering the categorisation of the nature of commercial contracts and rules appurtenant to those contracts have been incorporated. However, albeit the Recast has ensured more certainty in commercial contracts, it still has some loopholes in some areas of commercial contracts.[1007]

It first must be determined and understood when a claim should relate to a 'contract'. The ECJ insists on imparting and upholding the European concept in this regard, rather than leaving the task to the national law. In the case of *Martin Peters*, the ECJ has articulated that:

> "Having regard to the objectives and the general scheme of the Convention, that it is important that, in order to ensure as far as possible, the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned, that concept should not be interpreted simply as referring to the national law of one or other of the States concerned. Therefore … the concept of matters relating to a contract should be regarded as an independent concept, which for the purpose of the application of the Convention, must be interpreted by reference chiefly to the system and objectives of the Convention, in order to ensure that is fully effective."[1008]

There have been many discussions as to how and under whose authority the question of whether the case will fall in the category of contract or tort will be determined. Since there have been no concrete guidelines given by EU law, the task of qualifying or characterising the nature of the case falls upon the Member States, as soon as the matter of jurisdiction has been settled on the basis of the provisions of the Recast. The task of qualification is so important in order to find out which applicable law shall apply to the case. Although the ECJ has attempted to give

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1005 Ibid.

1006 Case C-14/76 *De Bloos* [1976] ECR 1497.

1007 Tang 628.

1008 Case C-34/82 *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* [1983] ECR 987, paras 9-10.

a European definition of contract, it has not been quite successful in giving any definitive definition which will prevent any inference of the Member States.[1009] An abstract portrayal has been made in this regard in the case of *Martin Peters*, where the ECJ referred to 'close links of the same kind as those which are created between the parties to a contract'.[1010]

Problems arise when the court finds it difficult, in the absence of any uniform substantive law in the EU concerning the definitions of contract and tort, to determine whether the litigant's claim is related to contract or tort. In some cases, the ECJ has focused upon the obligations, if there are any, arising from the relationship of the parties. In the case of *Handte*, the ECJ said, 'the phrase "matters relating to a contract" as used in Article 5 (1) of the Convention, is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.'[1011]

The phrase 'obligation freely assumed' used by the ECJ in the above case does not give any convincing indication that Article 7 of the Recast should apply.[1012] The ECJ, in dealing the supplementary nature of the jurisdictional rule of tort, has first stressed the applicability of rules of contract.[1013] As regards the obligation aspect, the ECJ has evidently stated that:

> "[T]he application of the rule of special jurisdiction provided for matters relating to a contract in Article 5 (1) presupposes the establishment of a legal obligation freely consented to by one person towards another on which the claimant's action is based."[1014]

The facts in the case of *Petra Engler* and the findings of the ECJ in subsequent cases have suggested that there needs to be the presence of a 'mutual element' in the relationship of the parties in order for Article 7(1) (contract) and Article 17 (consumer contract) of the Recast to apply.[1015] In the case of *Ilsinger*, the ECJ touched upon the issue of whether a case would fall under contract or tort. It stated that in the absence of any mutual legal obligation, the relationship between the parties:

1009 Calster 137.
1010 *Martin Peters Bauunternehmung GmbH* para 13.
1011 Case C-26/91 *Jakob Handte & Co GmbH v* T*raitements Mécano-chimiques des Surfaces SA* [1992] ECR I-03967, para 15.
1012 Calster 137.
1013 Case C-27/02 *Petra Engler v Janus Versand GmbH* [2005] ECR I-00481, para 29.
1014 Ibid para 51.
1015 Calster 138.

> "[W]ould at most be liable to be classified as pre-contractual or quasi contractual and might therefore, where appropriate, be covered solely by Article 5 (1) of [the] regulation, a provision in the scheme of that regulation, a broader scope than that of Article 15 thereof."[1016]

Albeit different interpretations have been applied by the ECJ with regard to the notion of contract, there is little scope for the court to make any interpretation in relation to establishing its jurisdiction in cases that involve contractual obligations mentioned in Article 7(1) of the Recast. The ECJ articulated, in *Effer*, that in terms of accomplishing the contractual obligations by applying Article 7(1) to the dispute, the contract does not have to be in its concluding form.[1017] The issue of qualifying the case as a type of contract has remained unsettled, although it is the most important aspect for establishing the obligations of the parties that have been raised by the parties and/or identified by the judges, and subsequently for application of Article 7(1) to the dispute.[1018]

Here, it is worth mentioning that phrases used in the Recast such as 'place of delivery' or 'place where the service has been provided or ought to have been provided' shall also be treated as connecting factors since these are the determining factors as to which jurisdiction or forum will be appropriate for the case being filed.

The differentiation between contract and tort that is crucial for interpreting the term 'obligation' mentioned in Article 7(1) has not been touched upon by the Recast, neither was it highlighted in the Jenard Report. In fact, the Jenard Report has briefly covered the areas of special jurisdictions.[1019] The ECJ, while being so particular in this discussion, stated in the case of *De Bloos* that, "For the purpose of determining the place of performance within the meaning of Article 5 … the obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based."[1020] These cases evidently reveal that the insertion of any particular connecting factor(s) does not mitigate the long-existing problems of PIL in the process of establishing unification, not even at the regional level such as the EUPIL, unless there is also unified substantive law. The problem with the notional concept of contract at the

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1016 Case C-180/06 *Renate Ilsinger v Martin Dreschers* [2009] OJ C153, para 57.
1017 Case C-38/81 *Effer SpA v Hans-Joachim Kantner* [1982] ECR 825, paras 7 and 8.
1018 Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH* (HWS), [2002] ECR I-07357, para 22.
1019 Calster 139.
1020 Case C-14/76 *A De Bloos, SPRL v Société en commandite par actions Bouyer,* [1976] ECR 1497 para 13.

EU level is an instance of that. The ECJ, in the case of *Dunlop AG*, in regard to the absence of uniform substantive law, has avowed that:

> "[H]aving regard to the differences between national laws of contract and to the absence at this stage of legal development of any unification in the substantive law applicable, it does not appear possible to give any more substantial guide to the interpretation […] 'place of performance' of contractual obligations. This is all the truer since the determination of the place of performance of obligation depends on the contractual context to which these obligations belong."[1021]

There are also issues with regard to the interpretation of the provisions of sale of goods and service contracts. It has been asserted that as a primary principle the EU laws relating to jurisdiction should not be interpreted as the national laws of the EU Member States, rather there should be a separate uniform meaning and interpretation of all these schemes.[1022] It is apparently easier to characterise sale of goods cases and defining services involved in an agreement. As regards the latter, the ECJ has termed services to be when a party carries out or performs any particular activity in return for or in the expectation of remuneration. It has also ruled that a licensing agreement or contract shall not be treated as a contract for the provision of a contract enunciated in the Recast. According to the ECJ, there ought to be a 'positive activity' in order for any activity to be regarded as a service under the provisions of the Recast. In *Falco*, the licensor was not required to perform any 'positive activity', and the task of the licensor under the agreement was not to challenge the licensee's use of the IP rights.[1023] Such elucidation of the ECJ, however, has not been so helpful in cases involving facts that are complicated in nature. In order to dispel such ambiguity that may arise from its judgment, in the above case the ECJ added that where it is difficult to recognise the obligations, especially in cases entailing multiple obligations, classification shall depend on the characteristic obligation.[1024]

Problems may also be encountered in terms of understanding other important terminologies such as 'consumer'. In a recent EU case, *Personal Exchange International Limited*,[1025] the ECJ has ruled as to when an individual can be classified as a consumer. Hence, the case has set out some criteria to be met for someone to fall under the term consumer mentioned in the Recast.

1021 Case C-12/76 *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR 1497, para 14.
1022 Case C-89/91 S*hearson Lehman Hutton v TVB* [1993] I–00139.
1023 Case C-533/07 *Falco Privatstiftung and Rabitsch* [2009] OJ C141, paras 29, 31.
1024 Ibid para 54.
1025 Case C-774/19 *A B and B B v Personal Exchange International Limited* [2020] OJ C1015.

The case involved a question of whether an individual who plays poker online, and has good knowledge of the game, earns money and spends a considerable amount of time playing online, should be classified as a 'consumer' under Article 15 of the 2002 Regulation, which is now Article 17 of the Recast, or as a 'professional'. The ECJ specifically stated that none of the criteria mentioned above would be the basis to characterise an individual as either a consumer or a professional under Article 15 of the 2002 Regulation. The ECJ rather focused upon the fact that the litigant in the case did not offer any goods or services to any third parties, neither had he registered his activity officially. By relying on these criteria, the ECJ forwarded its findings and observations about the litigant's status to the national court (Slovenia), which classified him as a consumer.

The above shows how these nuances between different terminologies, such as consumer and professional, create confusion that ultimately requires courts to assess and interpret them from different angles and points of view. Although the Recast has provided some thresholds as to when someone will qualify as a consumer, situations might appear where the explication made by the Recast of consumer or any other term might be insufficient.

Apart from the terminological issues as well as complications in the classification of different terms mentioned in the provisions of the Recast with regard to special jurisdiction, problems can also be found in other areas of the provisions such as the place of delivery and performance, sales involving carriage of goods, and performance undergone in more than one country.[1026] As regards 'place of delivery and performance by delivery and agreement', albeit the term has been quite evidently mentioned in the scheme, it does not say anything about the form of the agreement being accomplished by the parties.[1027] It is, therefore, the task of the court to establish that agreement exists between the parties by which the place of delivery and performance shall be determined. It is also imperative to assess the clauses incorporated in the agreement in order to ascertain the intention of the parties.[1028]

In *Edil Centro Spa*,[1029] there was an 'ex-works' clause in a contract for the sale of goods between the Italian seller and the French buyer. As per the Incoterms (International

[1026] Tang 628–630.
[1027] Ibid 628.
[1028] Case C-381/08 *Car Trim* [2010] Oj C100 para 56.
[1029] Case C-87/10 *Electrosteel Europe SA v Edil Centro Spa* [2011] OJ C226.

Commercial Terms[1030]), 'ex-works' means the carrier is obligated to undergo all the responsibilities to transport the goods from the seller's location or place of business to the buyer's place of business. This is an implied term. The ECJ relied on this ex-works Incoterm by referring to the then Article 23(1) of the 2002 Regulation, where it was mentioned that the implied choice of court is accepted if it is believed to be implied through international commercial usage or by previous trade and commercial practice of the parties that is widely known. By this reference, the ECJ here meant to say that the phrase 'international usage or international commercial usage' can be taken into consideration to interpret other provisions of the scheme, which it indicated were the implied terms of the agreement.[1031] With regard to the place of delivery, in the same case the ECJ ruled that in order to find the 'place of delivery', the court must examine all the terms and international commercial usage including Incoterms.[1032] Incoterms have also been used in other cases such as *Roonse*[1033] and *Carbide BV*.[1034]

In *Carbide BV*, it was held that:

> "[W]hether Incoterm was actually part of the agreement between parties, could only be judged in accordance with the lex causae. The agreement was a verbal agreement, and any choice of court which one of the parties claimed had been made, had not been confirmed in writing. Reference to relevant standard terms and conditions on the invoices sent later, following execution of the agreement, could not the court held, be regarded as confirmation of the choice of court."[1035]

The implicit nature of the agreement in the case obliges the court primarily to establish if it has the jurisdiction, rather than the place where the litigant ought to have performed or shall perform. The ECJ, with regard to the above, enunciated in the case of *MSG*, that:

> "An oral agreement on the place of performance which is designed not to determine the place where the person liable is actually to perform the obligations is incumbent upon him, but solely to establish that the courts for

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1030 'Incoterms are published by the International Chamber of Commerce, these are widely used in international commercial transactions and are shorthand for a number of pre-defined contractual obligations)'; Calster 141.

1031 *Electrosteel Europe SA* para 21.

1032 *Electrosteel Europe SA* paras 22-26.

1033 *Rechtbank Rotterdam in Roonse Recyling & Services BV v BSS Heavy Machinery GmbH* [2015] ECLI/2015/5292.

1034 *Cimtrode The Electrode Company GmbH v Carbide BV at Gerechtshof's-Hertogenbosch* [2015] OJ C3396.

1035 Calster 141.

> a particular place have jurisdiction, is not governed by Article 5 (1) of the Convention, but by Article 17, and is valid only if the requirements set out therein are complied with. Whilst the parties are free to agree on a place of performance for contractual obligations which differs from that which would be determined under the law applicable to the contract, without having to comply with specific conditions as to form, they are nevertheless not entitled, having regard to the system established by the Convention, to designate, with the sole aim of specifying the courts having jurisdiction, a place of performance having no real connection with the reality of the contract at which the obligations arising under the contract could not be performed in accordance with the terms of the contract."[1036]

The above-mentioned wordings, mentioned in the provisions of the scheme, become more indiscernible due to the lack of explanation in cases where the issue of carriage of goods is involved. For example, in a case where the seller is obliged under an agreement (be it express or implied) to deliver the goods to the buyer, which particular place under Article 7(1)(b) of the scheme shall be ascertained as the place of delivery? Will it be the place where the seller hands over the goods to the carrier, which is generally the domicile of the seller? Or, will it be the place where the carrier has delivered the goods to the buyer, which is usually presumed to be the domicile of the buyer or the final destination of the goods? If the parties have agreed that the final destination of the goods shall be treated as the place of delivery then there should not be any problem in invoking Article 7(1)(b).[1037] Problems arise where the parties have not chosen the place of delivery or have not decided what place will be determined as the place of delivery. The ECJ's ruling with regard to this lack of agreement or consensus in the case of *Car Trim* was that it is, "where physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction."[1038] This has clearly distinguished between the transfer of risk and ownership and the physical transfer of goods. The whole procedure of transfer from the place of seller to the place of buyer entails two important stages; one is transfer from the seller to the carrier, and the second is transfer from the carrier to the buyer, which could also be termed as delivery. As per the ruling of the ECJ, the second stage of the transfer from the carrier to the buyer is consistent with the notion of 'place of delivery' premised by the 'origin, objectives and scheme' of the Recast.[1039] Albeit this interpretation of

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[1036] Case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* [1997] ECR I-00911 paras 35, 31.

[1037] Tang 629.

[1038] *Car Trim*.

[1039] Tang para 61.

the ECJ has dispelled ambiguity to a certain extent in regard to the issue of place of delivery, this interpretation has also been criticised for being inordinately buyer friendly.[1040]

Absence of elucidation of the term 'place of performance' mentioned in Article 7(1)(b) has also raised numerous uncertainties as to which place would be deemed as the place of performance where the litigants performed in more than one place. The ECJ clarified its stance on this by stating that the idea of the Recast provision is that rather than curtailing the jurisdiction of the court to the issue of the litigants' performance, claims arising out of the contract on the issue of performance have to be accumulated and brought to the principal place of performance.[1041] In doing so, the litigants' concurrent or similar subsequent claims and proceedings could be averted, and this will also save the litigants time and money.[1042] Notwithstanding that the centralisation of the claims relating to performance or place of performance apparently looks convenient for both the litigants and the overall justice system, there is a lacuna that the court could have filled by imparting more clarity as to which particular place should be identified as the principal place of performance.

Although the ECJ focused upon the optimum nexus or the most-closest connection of the case with a particular jurisdiction while terming 'the principal place of performance',[1043] it did not create any concrete precedent on this very issue. In another case, *Wood Floor*, the ECJ held that the place of performance shall be inferred from the terms and clauses of the agreement, and in the absence of any explicit terms and clauses, it has to be supposed from the performance of the litigants.[1044] The ECJ has also provided some guidelines from an economic point of view in two cases of *Wood Floor* and *Color Drack*, with regard to finding the apposite places or jurisdiction of sales and services contracts.[1045] The ECJ has said it would focus upon the economic criteria in finding the place of delivery in a sales contract,[1046] and as regards services contracts, where economic criteria cannot be taken into consideration, the court would emphasise the time and performance of the litigant(s) spent in various jurisdictions.[1047] The

[1040] Ibid 629.
[1041] *Color Drack GmbH* paras 37-38.
[1042] Tang 629.
[1043] *Color Drack GmbH* para 40.
[1044] Case C-19/09 *Wood Floor v Silva Trade* [2010] ECR 2121, para 40.
[1045] Tang 630.
[1046] *Color Drack GmbH* para 40.
[1047] *Wood Floor v Silva Trade* paras 41-42.

ECJ has also endorsed litigants to bring cases to any jurisdiction related to the place of delivery of the claim in question, if the principal place of delivery cannot be ascertained.[1048]

The above ruling of the ECJ has also been accepted in the case of *Rehder*[1049] because the defendant provided services in multiple jurisdictions. The agreement existing in the case between the claimant, who was an air passenger, and the airline, which was the defendant, did not entail a 'protective jurisdiction scheme', since it was a transport contract. On the other hand, the ECJ, in the case of *Wood Floor*,[1050] that involved a service contract, held that since the services were provided in different jurisdictions, and the main provision of the service could not be determined as regards the actual performance of the party, therefore the court would take 'the objectives of predictability and proximity' into consideration in order to establish the actual place of performance, which would ultimately be equivalent to the ascertainment of the actual jurisdiction.

The above discussions and different viewpoints of the ECJ with regard to invoking Article 7 in cases involving the issues of special or specific jurisdiction of commercial contracts, such as sale of goods and services, reveal that in the absence of any explicit clarification of the phrases stated in the above-mentioned provision of the Recast, its efficacy is highly questionable. Whether these wordings are to be understood from any substantive law perspective is altogether a different question. In fact, the question of understanding these terms as per the substantive law seems also unwarranted since the EU does not yet have any substantive law of contract. Moreover, as stated above, the phrases mentioned in the Recast should only be understood from the interpretations made by the ECJ, and not from any interpretation made by any national court through the application of any domestic law. Therefore, as per the instruction of the ECJ, the interpretation of the Recast cannot be deduced from any national law and/or national court ruling.

5.2.6 The Hague Choice of Court Convention

In the expectation of creating more uniformity and being enriched in terms of having more legal instruments, in 2014 the EU acceded to the 2005 Hague Choice of Court Convention

[1048] *Color Drack GmbH* para 42.
[1049] Case C-204/08 *Rehder v Air Baltic* [2009] OJ C153, para 44.
[1050] *Wood Floor v Silva Trade* paras 41-42.

(HCCC 2005).[1051] This accession was posited upon three rules of the Convention. One, the court that has been chosen by the parties must in principle hear the case (Article 5); two, the court that has not been chosen by the parties to the litigation must decline to hear the case (Article 6); three, any judgment given by the jurisdictional court that has been chosen by the litigants must be recognised and enforced in other States that have also acceded to the HCCC 2005, apart from situations that fall within the grounds of exceptions (Article 8 and Article 9).[1052] As per the declaration of the EU, the HCCC 2005 cannot be invoked in respect of insurance contracts.

The accession of the EU to the HCCC 2005 has made the relationships between the Recast, the HCCC 2005 and the Lugano Convention rather complicated.[1053] However, the EU Commission is now optimistic about broadening its outlook in terms of extending its judicial frontier. This has partially been achieved by emphasising and strengthening party autonomy in the Recast. Notwithstanding, it is now hoped that through the accession to the HCCC 2005, the approach that is undertaken for situations beyond the frontier of the EU will conform to the approach taken as regards choice of court issues within the frontier of the EU. However, there still exists some differences between the Recast, the HCCC 2005 and the Lugano Convention in terms of some of their provisions.[1054] One of the major points of conflict is that under the Recast the parties to a cross-border litigation are not authorised to choose any non-EU jurisdiction or court, whereas the HCCC 2005 endorses all the jurisdictions that have acceded to it. As per Article 26(6) of the HCCC 2005, the Convention shall not affect the rules of any 'Regional Economic Integration Organisation' such as the Recast, where neither of the parties is from any Contracting State (a country that has acceded to the HCCC 2005) and is also not a Member State of the EU. This Article also enunciated that the HCCC 2005 shall not affect the rules of the Recast in the case of the recognition and enforcement of judgments taking place between the Member States of the EU.

In a proposal, the EU Commission has also included criteria for the application of the HCCC 2005 in the EU, where it stipulates that the HCCC 2005 shall override the rules of the Recast in cases where one of the parties is from a Contracting State of the HCCC 2005. Moreover, the

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[1051] Council Decision 2014/887/EU of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements [2014] OJ L353/5; Calster 129–130.

[1052] Calster 130.

[1053] Ibid.

[1054] Ibid.

Convention will cease to apply in cases where both parties are from the EU or from any non-EU countries which are not Contracting States. With regard to the recognition and enforcement of judgments, the proposal stated that this can be sought by countries that are located in the EU.[1055] The proposal of the EU Commission suggests that the EU has limited the latitude of the application of the Recast. Consequently, as Calster said, these limitations may be accepted, since the provisions of party autonomy have now been strengthened, from which EU companies can become more flexible when entering into trade and business with non-EU countries.[1056] However, on a personal note, it purportedly appears that the accession to the HCCC 2005 has been accomplished due to the existence of imperfections in some of the provisions of the Recast. Whilst the emphasis on party autonomy has been given by the Recast, on many occasions this has tended to be insufficient, as discussed earlier. Moreover, the applicability of the HCCC 2005 alongside the Recast might become ambiguous for some EU business people who are mostly lay persons who may have difficulty knowing which one to invoke. The fewer the number of legal instruments, the easier it will be for people to understand, especially lay people involved in or invoking PIL.

5.4 Applicable law

Unlike the other branches of PIL, one of the most unique characteristics of choice of law is to create its own discipline, especially in the area of commercial contracts.[1057] The EU choice of law rules applicable to commercial contracts are currently governed by the Rome I Regulation: Regulation 592/2008 (Rome I).[1058] The predecessor of Rome I was the 1980 Rome Convention. It is worth mentioning that the consolidated version of the Rome Convention of 1980 on the law applicable to contractual obligations is [1998] OJ C27/34. The Rome Convention of 1980, in the shape of the 'Guiliano-Lagarde Report', is still being interpreted along with Rome I, as is the case with the Brussels Convention.[1059] Both the Rome I and the 1980 Rome Convention, being a significant part of the EUPIL collection, have been working to improve and strengthen the internal market of the EU being participated in by traders. As mentioned in Recital 6 of Rome I, the intention of the EU legislators for enacting the choice of law rules in the EU was to ensure more predictability as well as uniformity of the rules that would mitigate the

[1055] Ibid 130–131.
[1056] Ibid 131.
[1057] Manuel Penadés Fons, 'Commercial Choice of Law in Context: Looking beyond Rome' (2015) 78 Modern Law Review 241, 241.
[1058] Ibid.
[1059] Calster 202.

discrepancies in the outcomes of contractual disputes throughout the EU.[1060] Bearing in mind such an objective, the legislators endeavoured to provide a solid, predictable and easily understandable set of choice of law rules in the EU in the shape of Rome I. This instrument has provided ample freedom to the parties to contracts, which is called 'party autonomy'. As the Recast (discussed earlier) has focused on this element, so has Rome I. Whether or not party autonomy has really been able to mitigate the unpredictability and dilemmas in regard to the successful adjudication of commercial contracts in the EU is discussed below along with other connecting factors as regards commercial contract applicable law.

5.3.1 Scope of application

The scope of the application of Rome I has been confined to matters of commercial contracts, that is to say, this Regulation is applied to the obligations related to civil and commercial matters, and excludes those of tort, non-civil as well as non-commercial issues falling within the ambit of Rome I. The scope of the applicability and the areas of non-applicability of Rome I have been enumerated in Article 1 of the Regulation.[1061] The scope of this Regulation has been explained in the report of Professor Giuliano and Professor Lagarde, as follows:

> "Situations which involve one or more elements foreign to the internal social system of a country (for example, the fact that one or all of the parties to the contract are foreign nationals or persons habitually resident abroad, the fact that the contract was made abroad the fact that one or more of the obligations of the parties are to be performed in a foreign country, etc. thereby giving the legal systems of several countries claims to apply."[1062]

One of the most open-minded and progressive features of Rome I can be found in Article 2 of the instrument, where it has been clearly stated that 'Any law specified by this Regulation shall be applied whether or not it is the law of a Member State'. Along with the evidence of the ubiquitous applicability of this Regulation itself, this Article has manifestly ensured, under Rome I, the applicability of any relevant substantive law as regards contractual obligations in

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[1060] Fons 242.

[1061] Article 1 of the Rome I enunciates that:
1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.
It shall not apply, in particular, to revenue, customs or administrative matters.
2. The following shall be excluded from the scope of this Regulation:
(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;
(b) obligations arising out of family relationships and relation- ships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations.

[1062] Mario Giuliano and Paul Lagarde, 'Giuliano-Lagarde Report' (1980) 10.

civil and commercial matters of any country in the world, to legal matters that are civil and commercial in nature. Prior to Brexit, the English courts were bound by EU law. Hence, in the case of *Iran Continental Shelf Oil Co*, where there was a dispute between a US corporation and an Iranian company, Rome I was applied in order to establish the governing law.[1063] This has been a good example of how broad the scope of Rome I is. However, in practice, the application of Rome I can be witnessed more in cases which have a connection with an EU Member State.[1064] Under Rome I, the judges, in the absence of any chosen governing law, may also apply any substantive law of any jurisdiction by using connecting factors mentioned in the Regulation.[1065] It is worth mentioning here that unlike the Recast, which incorporates the idea of EU territoriality that the judges ought to adhere to, the judges under Rome I are not inhibited by any such condition. It certainly does show the flexibility and omnipresence of the Regulation.

Notwithstanding this, as per Article 22(2) of Rome I, the Regulations do not apply to any litigation that is intra Member State, since they are not international in nature. However, considering the widespread reach of the Regulation, EU Member States may apply it in internal conflict disputes, since the EU legislators in Article 22(1)[1066] have termed each territorial unit of a country to be a country, in identifying governing law.[1067] This typically applies to federal government systems or to states having more than one legal system. Apart from the harmonisation and Europeanisation of the choice of law rules in civil and commercial matters, this Regulation also gives a touch of internationalisation to the rules on governing law.

5.3.2 Choice of law agreement

As mentioned earlier, the party autonomy or the freedom of choice, as it has been termed in the Regulation, in choosing the applicable law has been focused upon quite robustly by the Regulation. The wording of Article 3[1068] of Rome I indicates how much flexibility has been

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1063 *Iran Continental Shelf Oil Co v IRI International Corp* 2 CLS 696.

1064 Hill and Shuilleabhain 215.

1065 Calster 211.

1066 Article 22 (1) of the Rome I states that:
1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

1067 Calster 211.

1068 Article 3 of the Rome I states that:

given to the parties in choosing the applicable law. The succinct explanation of this Article would be that the parties' chosen law is not obligated to be connected with either the parties themselves or the matter in question. The only manifest requirement that can be deciphered from this Article is that the parties have to mention the applicable law patently with clear intention and reasonable certainty. Any confusion in understanding the intention of the parties or the presence of any tacit expression of the parties as regards choosing the applicable law shall therefore make the parties to any civil or commercial matter fall short of the requirement mentioned in this Article.[1069]

The choice of court provisions made by the parties may have an influence in assuming that the parties made an implicit choice of law agreement. As stated in Recital 12 of the Regulation:

> "An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated."[1070]

The proposal of the Commission has also indicated the employment of a presumption in favour of choice of law emanating from the choice that has been made by the parties as regards jurisdiction. It states that:

> "If the parties have agreed to confer jurisdiction on one or more courts or tribunals of a Member State to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that Member State."[1071]

Freedom to choose any law was not possible under the Rome Convention. The issue of the wording of any law of any State has been thoroughly discussed in different proposals and reports of the Commission before it was finally inserted in Rome I. In a Draft Report by the

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1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.
3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement…

[1069] Hill and Shuilleabhain 217.
[1070] Calster 212.
[1071] Ibid 212.

Committee in August 2006, the issue of applicable law (that could be any law as per the Regulation) has been expounded as:

> "The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community. However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under the Regulation."[1072]

The Regulation has quite clearly mentioned the term 'any law', however, this term could be interpreted from many angles and, hence, can create uncertainty. The true meaning of any law could, therefore, be assigned to a subjective test. This means that the judges shall have to decide upon the issue of party autonomy, considering other associated elements, which would vary from case to case. It can, therefore, be said that the issue that has drawn the line between Article 3 and Articles 4–8 is not just the presence of the choice of law, rather it is the manifestation and corroboration of the existence of choice of law coupled with the clear intent of the parties.[1073] The issue of conferral upon the national courts to find the choice of law, written intelligibly coupled with proper consent of the parties, could be seen as the most noticeable threat to ensuring the invocation of the Rome I provisions, because the national courts of the Member States do not employ the same method to evaluate evidence, neither do they make their assessment based upon evidence from points of view. Hence, the uniformity across the EU region as regards the application and outcome of choice of law provisions, which has been the ultimate goal of the EU regime, becomes unattainable.[1074]

The EU law making authority has been focusing upon the difference between 'real choice' and 'hypothetical choice' or presumed choice. The former suggests that the whole or a part of the agreement of the contract has been entered into knowingly and determinedly, and the latter entails supposition as to what, in the absence of any choice, applicable law the parties would have inserted in the agreement. However, this distinction made by the EU regime can neither fill the gap of the provisions alone, nor can it meet the aims and objectives of the EU legislative body dealing with PIL in the EU. This is because 'hypothetical choice or presumed choice' might sometimes turn out to be 'an abuse of the margin of discretion' being allowed by the

[1072] Ibid 213.
[1073] Fons 245.
[1074] Ibid.

provisions to the national courts of the Member States.[1075] Due to such uncertainties, the freedom or party autonomy that has been provided by the Regulation, to choose the applicable or substantive governing law, cannot be put beyond any criticism, as is the case with the provisions of the Recast relating to party autonomy.

Courts while dealing with cases relating to contracts especially consumer contracts, should be looking at two major issues. Firstly, how to ensure predictability, and secondly, how can the rights of the weaker party be protected.[1076] Party autonomy may not be the only decisive point for the judges to find the apt applicable law for the case. That means, if there is any opacity as regards the inclusion of an applicable law provision in the agreement, or it is seen that one of the parties did not have any idea about this, or did not give any consent to such provision, or the consent has involved any trickery, deception or undue influence, the court has every right to discard the applicable law mentioned in the agreement, and decide the applicable law under the provisions of mandatory law, that is Article 6[1077] of the Regulation.[1078] In fact, under Article 10(1) of the Regulation, the judges are obliged to look into each and every matter of the case in order to ascertain if any part of the agreement is invalid. Although, in such situations, the party who did not give consent to such a provision of applicable law can rely on the law of their habitual residence under Article 10(2).

5.3.3 Absence of choice of law agreement

If the applicable law chosen by the parties is dubious, not logically consistent, or if it is not clear from the agreement which is the applicable law, in short, if the matter of the applicable

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1075 *Timothy Joseph Lawlor v Sandvik Mining & ors* 2 Lloyds Rep 98 (EWCA Civ) 98 [30].

1076 Case C-384/10 *Jan Voogsgeerd Navimer* [2011] OJ C39, para 13275.

1077 Article 6 of the Rome I articulates that:
1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
(b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.
2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

1078 Calster 214–215.

law is not resolved by parties, then the court should determine the applicable law under Article 4[1079] of the Regulation. This article deals with matters that do not fall within Articles 5 to 8 of the Regulation, which are contracts of carriage, consumer contracts, insurance and individual employment contracts. In the absence of any clear choice of law, under Article 6, the courts may apply the law that is the closest to the matter relating to consumer contract in question, as applicable law.[1080] The 'close connection' test was applied by the ECJ in the case of *Schlecker.*[1081]

The escape clauses of some of the provisions of the Regulation have given discretion to the national judges to interpret the terms they mention, such as 'all the circumstances of the case' and 'manifestly more closely connected' as elucidated by Recital 20 of Rome I. It could, therefore, be said that the Regulation has lost its overarching principle. In fact, the escape clauses have also reduced its overall weight by excluding the 'principle of proximity' from Article 4. Previously, this could work as an incentive as well as a standard in the matter of adopting objective connecting factors. The factor of 'predictability', upon which the national judges may discover the applicable law in the absence of any choice in the agreement, that has now been incorporated has very little impact on meeting the ultimate objectives of the Regulation, since the national judges may produce less uniform outcomes of the provisions of the Regulation.[1082] The non-explanatory and imprecise terms that play a major role in the adoption of objective connecting factors in cases that do not entail any explicit choice of law in the agreement, mentioned in the Regulation, has been criticised by the Financial Market Law Committee in their report, 'Article 4 should not prescribe a set of rules intended to be applicable to almost all types of contracts without clarifying the principle behind those rules.'[1083]

[1079] Article 4 of the Rome I enunciates that:
1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated

[1080] Calster 215.

[1081] Case C-64/12 *Schlecker v Melitta Josefa Boedeker* [2013] OJ C551.

[1082] Fons 246.

[1083] Financial Markets Law Committee, 'Legal Assessment of the Convention of the Rome Convention to a Community Instrument and the Provisions of the Proposed Rome I Regulations' 12.

Pragmatically, the involvement of the judges of the ECJ has also not been significant in interpreting those terms of the escape clauses that might work as a guideline for the national court judges to connect the litigation in question to a particular national law, as regards applicable law. In fact, to a certain extent, the ECJ case law involving explanations of different issues of the Regulation are inconsistent.[1084] In the case of *Intercontainer Interfrigo SC*,[1085] the ECJ rejected the approach of the Dutch court in finding the law connected to the litigation in question and concluded that law of a particular jurisdiction shall only be applicable to the litigation if that law exhibits 'genuine connecting value'. Firstly, the notion given by the ECJ did not mention the values that the national judges would need to take into consideration, therefore, the evaluation of the ECJ could be termed as 'insufficient'. Secondly, no further direction has been provided by the ECJ in regard to how the expression to connect the case to a law shall be interpreted by the national courts.[1086]

In a different matter of an employment contract, the ECJ hinted that the connecting factor 'habitual residence' mentioned in the Rome Convention would be ruled out as the last resort. In the words of the ECJ:

> "[T]he court called upon to rule in a particular case cannot automatically conclude that the rule laid down in Article 6 (2) (a) of the Rome Convention must be disregarded solely because, by dint of their number, the other relevant circumstances—apart from the actual place of work—would result in the selection of another country.
>
> Among the significant factors suggestive of a connection with a particular country, account should be taken in particular of the country in which the employee pays taxes on the income from his activity and the country in which he covered by a social security scheme and pension, sickness insurance and invalidity schemes. In addition, the national court must also take account of all the circumstances of the case, such as the parameters relating to salary determination and other working conditions."[1087]

Unlike the Recast, the term habitual residence has been defined in Article 19 of the Regulation.[1088] The applicability of habitual residence has been quite thoroughly explained by

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1084 Fons 246.

1085 Case C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenede Oosthuizen BV & MIC Operations BV (Grand Chamber)* [2009] ECR I-9687, para 60.

1086 Fons 246.

1087 *Schlecker v Melitta Josefa Boedeker*.

1088 Article 19 of the Rome I states that:

the Regulation. However, the entirety of the case should be looked at by the court as stated by the ECJ:

> "Where the habitual residence centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons which have led to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances."[1089]

The ECJ's approach that the whole context of the adjudication should be considered in order to find the appropriate habitual residence was accepted well by the English courts.[1090] However, in order to prevent any potential complications, the ECJ warned that habitual residence in one area of the case cannot be transposed into other areas.[1091] The notion of 'centre of interest' highlighted in the Article entails a 'subjective' or 'qualitative element'.[1092]

Despite the fact that Rome I involves explanations in many areas of substantial law for the better understanding and reach of the Regulation, such as consent, capacity, formal validity, habitual residence, it fails to use the same approach in other wordings of the Regulation, such as party autonomy and escape clauses, especially in consumer contracts and individual employment contracts. For such impairments, it is difficult to assert whether the Regulation has truly met its objective. However, in comparison with the Recast, the Regulation is much more overarching, compact and does involve the notion of internationalisation in so many respects.

5.4 The recognition and enforcement of foreign judgments

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.
The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.
2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

1089 Case C-90/97 *Swaddling v Adjudication Officer* [1999] ECR I–01075, para 29.
1090 *M v M* [2007] EWHC 2047 (fam) (HL).
1091 Case C-523/07 *A* ECR I–2805, para 36.
1092 Hill and Shuilleabhain 338.

With regard to the recognition and enforcement of foreign judgments under the Recast, as outlined above, one of the fundamental purposes of the Recast is to accelerate the process in the Member States of the EU.[1093] This section examines the factors mentioned in the Recast that are employed to ensure an accelerated process of recognising and enforcing judgments between the Member States. Chapter three of the Recast enumerates the rules of the recognition and enforcement of judgments. It has been premised upon the notion of mutual trust between the courts of Member States.[1094] The two major areas to be examined are, firstly, when recognition and enforcement shall take place in the jurisdictions of Member States other than the jurisdiction where the judgment has been given. Secondly, when the recognition and enforcement of judgments shall be refused in the jurisdictions of Member States other than the jurisdiction where the judgment has been given.

5.4.1 Notion of judgment

Before these issues are discussed, it is important to understand the definition of 'judgment' mentioned in the Recast. As per Article 2 (a) of the Recast:

> "'[J]udgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court. For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter."

The courts have the right to intrude into the very definition of 'judgment' given by the Recast, in terms of interpreting it. The idea behind this approach of the court is to ensure that any judicial decision that has been taken by any particular court of an EU Member State conforms to the objectives and procedures of the Recast and confirms that the rights of defence have been observed. It is especially important to adhere to such a procedure of scrutinisation before a judgment can be recognised or enforced in jurisdictions or courts other than the court of origin. The evaluation can be performed by making inquiries into the litigation proceedings.[1095]

[1093] Hill and Shuilleabhain 194.

[1094] Ibid 195.

[1095] Case C-394/07 *Marco Gambazzi v DaimlerChrysler Canada Inc and CIBC Mellon Trust Company* [2009] OJ C141, para 23.

Bot AG in the case of *Gothaer* summarised the term judgment by stating that every judgment entails three core characteristics, namely, organic, procedural and substantive. He postulated that:

> "The first criterion is organic. The judgment must emanate from a court or tribunal, that is to say, a body acted independently of other institutions of the State and impartially. … The second criterion, which cannot be separated from the first, is procedural. It requires that the rights of the defence were observed in the procedure which led up to the adoption of the judgment. … The third criterion is substantive. The judgment is characterised by the exercise of a power of assessment by the judicial body from which it emanates. That criterion means that a distinction must be drawn depending on whether the authority has a decision-making role or restricts itself to a more passive function, consisting for example in receiving the intentions of the parties to the proceedings."[1096]

According to the view of the AG in the above case, a judgment given by a court in an EU Member State, entailing that the court does not have jurisdiction, due to the fact that the court that has been chosen by the parties and its name incorporated in the agreement is not situated in the EU, is a judgment under the Recast.[1097]

There remains confusion as to whether arbitral awards fall within the ambit of the definition of judgment mentioned in Article 2(a) of the Recast. It has been articulated in the case of *Gazprom* that the Recast is not involved in proceedings for the recognition of arbitral awards that appear as an anti-suit order (under this order the litigants are not allowed to pursue proceedings in an EU Member State). It was also added in this case that the issue of the recognition of arbitral awards shall be decided by reference to the New York Convention 1958 if the EU Member State in question has implemented this Convention into their local law.[1098] To avoid the technicalities as regards if a judgment involves any element of arbitral award or if the court should take the matter in question as a principal or incidental issue, it should be assumed that if the judgment in question does not entail any issue of arbitration then it shall fall within the ambit of Article 1 of the Recast, where it has been clearly enunciated that the Regulation shall

[1096] *Gothaer Allegemeine Versicherung et al* 36ff.
[1097] Calster 191.
[1098] Case C-536/13 *Proceedings concerning Gazprom OAO* [2015] 1 WLR 4937.

not apply to arbitration. If the judgment entails elements of an arbitral award then it shall evidently fall outside the scope of Article 1 of the Recast.[1099]

It has also been stated by a new recital (12) of the Recast that a judgment that involves the validity of any arbitration clause does not fall within the ambit of the Recast.[1100] The invocation of the Recast in cases involving arbitral matters might appear to be an infiltration into the applicability of the New York Convention 1958 that solely deals with matters relating to arbitration. As a result of this, by virtue of Article 73(2) the Recast has stipulated that it shall not affect the application of the New York Convention 1958 that deals with the enforcement of arbitral agreements and arbitral awards.

The term judgment has also been defined in Article 4(1) of the HCCC. Hence, the EU Member States, being a part of the Convention, are obliged to take this into consideration as well. As per the wording of Article 4(1) of the HCCC, any decision given by the court on the basis of merits shall be termed as a judgment. This includes 'a decree, order, determination of costs or expenses by the court including the office of the court'. The provision also avers that judgments of this kind may be recognised and enforced under this Convention in any of its signatories. 'An interim measure of protection' has, however, not been termed as a judgment in this provision of the HCCC.

5.4.2 Conditions for the recognition of foreign judgments

Once it is confirmed that a judgment given by a court of a Member State of the EU meets the requirements of the definition of judgment mentioned in the Recast, it shall be presumed to be recognisable as well as enforceable in the Member States other than the court of origin. A broad explanation of 'recognition' has been proffered by Article 36[1101] of the Recast, where it has been stated that a judgment of any court in an EU Member State shall be able to move freely within the EU without any special procedure being needed. Furthermore, the party who wishes

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[1099] Hill and Shuilleabhain 197.

[1100] Camilleri, 'Recital 12 of the Recast Regulation a New Hope?' (2013) 62 International & Comparative Law Quarterly 899.

[1101] Article 36 of the Recast stipulates that:
1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
2. Any interested party may, in accordance with the procedure provided for in Subsection 2 of Section 3, apply for a decision that there are no grounds for refusal of recognition as referred to in Article 45.
3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of refusal of recognition, that court shall have jurisdiction over that question.

to invoke a judgment in another Member State shall have to meet the requirements set out in Article 37[1102] of the Recast.

Notwithstanding that is quite clear that there should not be any hesitation on the part of the court in any EU Member State where the application for recognition of a judgment is made, there are differences of opinion in this regard. It has been argued that the court situated in the EU that has been asked for the recognition of a judgment of another EU court could predict the decision given in the judgment, if the recognising court is convinced that some issues were revealed to the court that has provided the judgment.[1103] There is another line of scholarship that argues that in order to meet the objectives of the Recast or to decipher its scope, it is important to look both at the adjudication and recognition enforcement stages of the case. This view seems to be suggesting involvement of the ECJ rather than the national courts of EU members, because the proponents of this scholarship asserted that a number of ECJ judgments resulted from a preliminary review, after the national court had reviewed or assessed jurisdiction.[1104] It appears from the judgment of the ECJ in the case of *German Graphics*[1105] that this court is more inclined to the second theory. The ECJ in this case stated that:

> "[T]he court responsible for the enforcement must, before declaring that a judgment should be recognized which is not within the scope of application of Regulation No 1346/2000, in accordance with Regulation No 44/2001, determine whether the judgment at issue is within the material scope of the latter regulation."[1106]

5.4.3 Grounds for the non-recognition of foreign judgments

There are circumstances when the court is obliged not to recognise the judgment without any further consideration if it finds it falls under the scope of Article 45[1107] of the Recast. There are

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[1102] Article 37 of the Recast enunciates that:
1. A party who wishes to invoke in a Member State a judgment given in another Member State shall produce:
(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
(b) the certificate issued pursuant to Article 53…

[1103] Calster 192.

[1104] Ibid.

[1105] Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* [2009] OJ C267, para 19.

[1106] Ibid.

[1107] Article 45 of the Recast states that:
1. On the application of any interested party, the recognition of a judgment shall be refused:
(a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed;

a number of propositions in relation to the term 'public policy' as to when a judgment can be refused on the ground of public policy, mentioned in Article 45 of the Recast. Although it is presumed that a matter of public policy is one for the national courts of the Member States to define, the ECJ has articulated that it should have a degree of control over how public policy matters are handled by the Member States.[1108] It stated in the case of *Hoffmann*[1109] that public policy matters should be exercised sparingly. This clearly indicates the reluctance of the ECJ over the frequent invocation of the term public policy by national courts. However, in another case it has been held that the limitation of the invocation of the term public policy is a matter of interpretation.[1110]

5.4.4 Conditions for the enforcement of foreign judgments

After the recognition step, typically the next step would be to ensure the enforceability of the judgment. Under Article 39 of the Recast, a judgment given in a Member State shall be enforceable in other Member States provided that it is also enforceable in the Member State that has given the judgment. Furthermore, the enforcement of judgments is governed by the national law of the Member State addressed under Article 41 of the Recast. Like the refusal of recognition, refusal of enforcement may also take place under one of the grounds mentioned in Article 45 of the Recast.[1111] The Recast also contains a provision in Article 49 for the litigants to appeal against the decision made on the application for refusal of enforcement.

Although it might appear that there is no involvement of connecting factors in the area of the recognition and enforcement of foreign judgments in the EU, the above discussions do certainly show the interplay between jurisdiction, applicable law, the recognition and enforcement of foreign judgments especially the latter in the EU. This reveals the fact that the issue of the recognition and enforcement of foreign judgments is affected by the connecting factors or fastening determinants in an indirect manner. As discussed above, while recognising and

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(b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

1108 Calster 194.

1109 Case C-145/86 *Hoffmann v Kreig* [1988] ECR 00645, para 21.

1110 Case C-7/98 *Krombach* [2000] ECR I-01935, para 22.

1111 According to Article 46 of the Recast: On the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist.

enforcing foreign judgments the courts may, at times, look at the adjudication process (that could be procedural and/or substantive), where the latter involves both the jurisdiction and applicable law that naturally involves the issue of connecting factors. Apart from the connection with jurisdiction and applicable law, examination of the recognition and enforcement aspect entails some of its own connecting factors that help EU Member States to decide when and in what circumstances a foreign judgment is recognised and enforced in the domestic circuit. The rationales of such factors are sometimes in conflict and unfounded as examined. The factors regarding the recognition and enforcement of foreign judgments enshrined in the national PIL rules are even more stern. The national PIL rules of Switzerland and England and Wales will be discussed in the next chapters.

The flexible movement of the provisions relating to the recognition and enforcement of foreign judgments may also be hindered by the enforcement of foreign judgment procedure, the task of which has been given to the Member States. Stumbling blocks in the process of recognition and especially enforcement of foreign judgments could be removed someday if mechanisms like single integrated judiciary system for PIL disputes in the EU were introduced. As hinted many times, this could be the ultimate resolution of all the confusion as regards connecting factors, as well as introducing the involvement of jurisdictions of many countries in the process of ensuring so-called unification of the PIL rules.

5.4.5 Accession to the Hague Convention on the recognition and enforcement of Foreign Judgment

On 10 February 2020, the EU had intended to obtain feedback through a 'process of consultation' with the EU citizens as well as stakeholders, as to whether the EU should accede to the Hague Convention of 2 July 2019 on the recognition and enforcement of Foreign Judgments in commercial and civil matters. The EC assumed that accession to this Convention would bring better fortunes for the people of this region economically, as had been set out in the Political Guidelines for the EC (2019–2024).[1112] On 29 August 2022, the EU deposited their instrument for accession to and ratification of the Hague Judgment Convention, which shall enter into force on 1 September 2023. However, whether or not an improvement would be seen, or if conflict developed with the provisions as regards the recognition and enforcement

[1112] Marta Requejo Isidro, 'Should the EU Join the Hague Judgments Convention?' (17 February 2020) paras 1,4 <https://eapil.org/2020/02/17/should-the-eu-join-the-hague-judgments-convention/>.

of foreign judgments of the Recast, as has been the case between the HCCC and the Recast, will only become apparent after the enforcement of the Convention.

Chapter 6: The Swiss approach

6.1 Introduction

Centred at the heart of Europe, Switzerland has a well-deserved reputation as one of the major global venues and for its orthodox nature of being 'neutral'. The Swiss reputation has been apparent in the arena of international trade, commerce and business. Due to its long-established feature of judicial impartiality and independence, the actors of most international commercial businesses prefer their matters to be adjudicated through commercial arbitration as well as through commercial litigation. Be it in arbitration or litigation lodged in the courts, proceedings of civil matters in Switzerland are fast, uncomplicated and cost effective compared to other jurisdictions.[1113]

In Switzerland, PIL matters are dealt by the Federal Act on Private International Law of 18 December 1987 (PILA). This is a comprehensive codification entailing three core parts of PIL, namely, jurisdiction (of different Swiss authorities), applicable law, and the recognition and enforcement of foreign judgments. Alongside PILA, a very few of PIL are also dealt with by other Swiss legal instruments, such as Article 101 a-c of the Federal Code on Insurance Contracts. The PILA mainly consists of two parts, namely, a general part (Articles 1–32), a special part (Articles 33–194). Apart from this domestic instrument, Swiss reliance on international instruments relating to international law is also not less significant. One of such instruments that Switzerland heavily relies upon is the Convention on Jurisdiction and the recognition and enforcement of Judgments in Civil and Commercial Matters (Lugano Convention 2007). Switzerland is one of the signatories of this Convention. Other signatories include the European Community, the Kingdom of Denmark, the Kingdom of Norway and the Republic of Iceland. The Lugano Convention 2007 is the successor of the Lugano Convention 1988. It came into force in Switzerland on 1 January 2011.[1114] Unlike the broad applicability of the PILA (being the only Federal Act of the country on PIL matters), the applicability of the Lugano Convention is limited. This Convention applies only to those civil and commercial matters in relation to jurisdiction and the recognition and enforcement of foreign judgments,

[1113] Global Legal Insights, 'Litigation & Dispute Resolution' (*Global Legal Insights*) <https://www.globallegalinsights.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/switzerland>.

[1115] Federal Office of Justice, 'Private International Law (in Switzerland)' (*Official website of the Swiss Government*) <https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht.html>.

that involve at least one party from a signatory State and where the matter has been brought to any court of any signatory State.[1115] Since Switzerland is a federal country, conflicts as regards jurisdiction in litigation between residents of distinct cantons also arise. In such intra-state conflicts that involve only the residents of Switzerland, the Code on Civil Procedure applies.[1116] For the purpose of this research, only the PILA and the Lugano Convention 2007 are subject to focus.

One of the significant and unique characteristics of the PILA is that it has followed the sequence of jurisdiction, applicable law and the recognition and enforcement of foreign judgments in every chapter.[1117] The traits of the PILA of being overarching, intelligible and unambiguous have made this instrument so unique from the PIL of other jurisdictions. The manifestations of this can be witnessed when other countries follow the PILA model in order to make or improve their own PIL instruments.[1118] Unlike the PIL rules of many other jurisdictions, the PILA has mentioned multiple connecting factors. The reasoning of the Swiss legislators behind the use of different connecting factors is their intention to take into consideration the context of jurisdictional provisions as well as provisions relating to applicable law. With regard to jurisdiction, one of the main principles of the PILA is *actor sequitur forum rei* (court of the defendant's domicile). This is intended to give more protection to defendants. Hence, they must be sued at their place of domicile or habitual residence. However, modern developments in the area of civil law, both in the national and international arena, have equally provided protections to plaintiffs. Along with the provisions of the PILA, the legal decisions of Swiss judges play a vital role by providing more clarity and predictability on different PIL issues.[1119]

The PILA has defined and explained many substantive matters, such as explanations of different connecting factors. According to the PILA, the domicile of an individual is the state where they have been residing with an intention to establish permanent residency.[1120] The habitual residence of a person, on the other hand, has been indicated to be the state where they

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1115 P Grolimund and E Bachofner, 'Kommentierung von Art 5 IPRG' in H Honsell and others (eds), *Basler Kommentar Internationales Privatrecht* (3rd edn, 2013) part 5 n 8 ff.

1116 Ibid part 5 n 7.

1118 Pascal Grolimund, Anton K Schnyder and Nicolas Mosimann, *Private International Law in Switzerland* (Dike Verlag 2013) 2–3.

1119 Prof Dr Peter V Kunz, 'Dealing with International Law and European Law: Overview of the Swiss Approach' [2012] Justletter 2.

1120 Grolimund, Schnyder and Mosimann 13.

1121 Switzerland, Federal Act on Private International Law of 18 December 1987 (in effect as from 1 January 2021) 1987 Article 20 (1) (a).

have been living for a particular period of time, even if their stay in that particular state appears to be limited at the outset.[1121] In relation to any business activity, the law has been very clear in its explanation that the place of business as regards establishing connection shall be the state where the professional as well as commercial activities are located.[1122] As regards domicile, the PILA has also made it quite clear that no individual can have more than one domicile and in case no domicile can be found, the habitual residence of the person in question shall be taken into consideration. It is also worth mentioning here that the provisions of the Civil Code of Switzerland are not applicable in determining domicile and residence of any individual for the purpose of the applicability of the PILA.[1123] In the process of determining the apposite connecting factor, be it domicile or habitual residence, the judges have a very crucial role to play, because they must establish these connecting factors in court.

Along with how the nationality of the parties in the PIL cases shall be determined,[1124] the PILA has also given guidelines for matters involving the multiple nationalities of the parties. As regards the latter, the jurisdiction issues of persons having multiple nationalities are determined by reference to Swiss nationality only. This means that as soon as the Swiss court finds that it has the jurisdiction by virtue of this Act, all other nationalities of the litigants are discarded for the case that has been brought to the court.[1125] In regard to the applicable law of the case, where litigants have more than one nationality, the court shall be inclined to apply the law of the national state with which the litigants have the closest link.[1126] While dealing with the matter of the recognition and enforcement of foreign judgments in Switzerland, as per the relevant provision of the PILA, the Swiss courts have been given discretion by the Swiss legislators to take any of the nationalities of the litigants into consideration as they think fit, as per the aims and objectives of the PILA.[1127] The systematic explanation of each and every part of the PIL issues that have been covered by the PILA is truly commendable.

The understanding of international contract law within the meaning of both the PILA and the Lugano Convention 2007 is a particularly important aspect to grasp. The ingredients that an efficacious contract at the international level entails are: voluntary participation as well as the

[1122] Article 20 (1) (b) PILA.
[1123] Article 20 (1) (c) PILA.
[1124] Article 20 (2) PILA.
[1125] Article 22 states that 'The nationality of an individual is to be determined according to the law of the State whose nationality is at issue'.
[1126] Article 23 (1) PILA.
[1127] Article 23 (2) PILA.
[1128] Article 23 (3) PILA.

intention of the parties in the contractual agreement, the presence of good faith between the parties and, for certain cases, the presence of *negotiorum gestio*, the notion of which is similar to that of a quasi-contract of common law.[1128] The functions that are covered by statutory rules, as mentioned in Grolimund's writing, are:

> "a) They govern the minimum standards for a valid choice of jurisdiction or law, b) They provide for a backup rule if the parties do not stipulate a valid choice of law, c) They contain mandatory rules for the protection of socially weaker parties (e.g. consumers, employees) and, therefore, restrict the parties' free choice."[1129]

6.2 Jurisdiction

Any court or any administrative authority in Switzerland under Article 2 of the PILA shall assume to have jurisdiction of any PIL matter if the defendant's domicile appears to be in Switzerland, and if any specific provisions of the PILA do not provide otherwise. If Switzerland does not qualify for jurisdiction of a PIL matter under the provisions of the PILA, and the legal proceedings of that matter can also not be brought in any other jurisdiction, the Swiss court, or administrative authority at the place that has the closest connection with the matter in question, does have the jurisdiction to hear that matter under Article 3 of the PILA. This provision indicates how overarching the scope of the jurisdiction of a country can be. Like other international and domestic instruments of PIL, the PILA also has provisions covering party autonomy/sovereignty when adopting the jurisdiction as well as applicable law for PIL matters.

6.2.1 Choice of court agreement

The tradition of party autonomy has been robustly followed in Switzerland. It is one of the many old practices that can be witnessed in the arena of Swiss PIL. Swiss understanding of party autonomy is sophisticated and unequivocal compared to the notions of the same established by other countries.[1130] Since the nineteenth century, Switzerland has been giving effect to party autonomy in international contracts.[1131] Provisions regarding the choice of court agreement between the parties can be found both in the PILA as well as the Lugano Convention

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1129 Grolimund, Schnyder and Mosimann 24.

1130 Ibid.

1131 H Honsell, *Basler Kommentar* (3rd edn, Helbing & Lichtenhahn 2013) 994–95.

1131 Maria Hook, 'The Contractualisation of Choice of Law' in *The Choice of Law Contract* (Hart Publishing 2016) 5 <https://media.bloomsburyprofessional.com/rep/files/9781849467643sample.pdf>.

2007. The latter applies when one of the parties has his/her domicile in a contracting state of the Convention and/or the parties have chosen a court in a contracting state of Convention.[1132] It is also worth mentioning that the Code on Civil Procedure in Switzerland also includes the choice of court provisions that apply to those cases that are domestic.[1133]

Party sovereignty in choosing jurisdiction in PIL matters has been allowed by Article 5 of the PILA. This states that parties in matters that involve 'economic interest' may choose any prospective court where they would prefer to bring an action, if any dispute arises from their legal relationships. The core requirement of the applicability of this provision is the 'economic interest'. Other requirements are that the inclusion of the choice of court must be in writing, and the parties may use the modes of telegram, telex, telecopier or any other means of communication provided it gives the court enough evidence to uphold the choice of court clause incorporated in the agreement.[1134] Although email is the most viable and widely used mode of communication, it has not been mentioned specifically in the PILA. However, it could well be presumed that by stating 'any other means that is evidenced in writing', the Swiss legislators have surely included email in the provision, albeit implicitly.[1135] Although the matter of the presence of 'signature' in the agreement has not been mentioned by the PILA, in the opinions of legal scholars, signature of the written document is not mandatory.[1136] Signature by the parties is also not required if the communication between them has been made electronically such as by email or fax.[1137]

The provision of choice of court is also found in the Lugano Convention 2007. According to Article 23, "any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing." Like the PILA, the Lugano provision of choice of court also does not require the signature of the parties in the written document mentioning the choice of court clause.[1138] The approach that has been taken in the Lugano Convention is slightly more liberal than that of the PILA. Apart from the flexibility given in the matter of

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1132 Article 23 of the Lugano Convention 2007.

1133 Grolimund and Bachofner at 5 n 21.

1134 Article 5 (1) PILA.

1135 Hedinger and F Hostettler, 'Kommentar Zu Art 271-273 ZPO' in C Leuenberger, Thomas Sutter-Somm and Franz Hasenböhler (eds), *Kommentar zur Scweizerischen Zivilprozessordnung (ZPO)* (3rd edn, 2016) at 17 n 17.

1136 Ibid 17 n 17.

1137 Ibid 17 n 18.

1138 Laurent Killias, 'Kommentierung von Art 23 (Gerichtsstandsvereinbarung) und Art 24 (Einlassung) Des Lugano-Übereinkommens' in F Dasser and P Oberhammer (eds), *Kommentar des Lugano-Übereinkommens* (2nd edn, 2011) at 23 n 94.

signature and the permissibility of any electronic media as a mode of communication, the Lugano Convention has also permitted oral communication in choosing the forum that would later be confirmed and written by one party.[1139] However, it has to be shown that both the parties have agreed to the terms and conditions or any general terms that would be inserted in the choice of court clause of the agreement.[1140] This implies that notwithstanding the Convention has permitted oral communication, it stresses at the same time the fact that the parties involved in any matter must be aware of each and every element mentioned in the clauses of the agreement. The issue of establishing that the parties involved in the matter were aware of the contents of the agreement is purely a subjective test that requires circumstantial evidence.

Another important aspect of Article 23 of the Lugano Convention is that the agreement of choice of court between the parties can also be determined from the business practices that they have established between them.[1141] The most crucial element of proving any such business relationship between the parties is that it has to be reasonable and of a certain time period and concentration.[1142] The choice of court agreement through party autonomy under Article 23 of the Lugano Convention 2007 can also be deciphered where one party sends any document or bill regarding the accomplishment of the contract to the other party, and the latter does not demur.[1143] If such document entails the same choice of court clause that was used in the previous contract held between them, then it shall be assumed that the party to whom that document was sent was aware of such a clause.[1144] However, establishing a business relationship in order to validate a choice of court agreement might not work under the notion of 'every contract is a new contract'. Therefore, ascertaining if the recipient has responded to the document or contract paper sent might still be a crucial determining factor. Such importance of the ascertainment of the parties' awareness of choice of court clause through a previous and/or existing business relationship between them has also been given to the international trade and commerce form of validating a choice of court clause by the Convention, as Article 23(1)(c) states that:

> "[I]n international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade

[1139] Ibid Art 23 n 103.
[1140] Ibid Art 23 n 104.
[1141] Article 23 (1) (c) the Lugano Convention 2007.
[1142] Killias at 23 n 120.
[1143] Ibid art 23 n 121.
[1144] Ibid.

> or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."

One of the problems of the provisions relating to party autonomy of both the PILA and the Lugano Convention 2007 is that neither of these instruments has specifically used the word 'consent'. The relevant provisions of the instruments, however, indicate in so many different ways as to how it is to be perceived that both the parties have agreed to the choice of court clause inserted in their agreement. However, both the PILA and the Lugano Convention 2007 have provisions of implied consent (Article 6 of the PILA)[1145] and implied prorogation of jurisdiction (Article 24 of the Lugano Convention 2007).[1146] It could therefore be said that the issue of consent is inextricably linked with the forms mentioned in the provisions of Article 5 of the PILA and Article 23 of the Lugano Convention 2007 relating to party autonomy. Typically, it is the written document that indicates that the parties consented to the clause of choice of court.[1147]

Despite the discussion above, on occasion, in order to find or prove the intent of the parties, the interpretation of the imperative ingredients of 'contract', namely offer and acceptance, is sometimes required, since the whole procedure of the choice of court agreement is similar to that of contract. It might, therefore, at times be found that the inclusion of the choice of court clause in the agreement was accomplished by fraud or duress or by any other means that is illegal according to the law of the State where the litigation has been filed.[1148] As regards the approach taken in Article 5 of the PILA, there is dissension in the opinions of the legal scholars.[1149] Some scholars think the issue of the choice of court is subject to the *lex fori*,[1150] whereas other scholars think it should be a matter related to the *lex causae*.[1151] On the other

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[1145] Article 6 states that 'In matters involving an economic interest, a court shall have jurisdiction if the defendant proceeds on the merits without reservation, unless such court denies jurisdiction to the extent permitted by Article 5, paragraph 3.'

[1146] Article 24 of the Lugano Convention 2007 states that 'Apart from jurisdiction derived from other provisions of this Convention, a court of a State bound by this Convention before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.'

[1147] Grolimund and Bachofner at 5 n 37.

[1148] Ibid at 5 n 39.

[1149] Eliane Haas and Kevin MacCabe, 'Switzerland: Choice of Court Agreements According to the Code of Civil Procedure, the Private International Act and the Lugano Convention' in Mary Keyes (ed), *Optional Choice of Court Agreements in Private International Law* (Springer 2020) 373.

[1150] A Furrer, D Girsberger and M Müller-Chen, *Internationales Privatrecht* (3rd edn, 2013) 195.

[1151] Grolimund and Bachofner at 5 n 39.

hand, there is another opinion in this regard that adheres to the rules enunciated in Article 178(2) of the PILA:

> "As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the main contract, or if it conforms to Swiss law."

Although the provision relates to arbitration, the principles set out in the provision can also be applied in court litigation.[1152]

It is yet to be seen if the Swiss courts will take the above stances made by the legal scholars into consideration while interpreting Article 5 of the PILA. However, in one case, the Federal Supreme Court of Switzerland has asserted that it does not consider the application of *lex fori* in such matter as 'arbitrary'.[1153]

Another important aspect of the choice of court agreement is its classification, namely, the exclusive choice of court agreement and the optional choice of court agreement (which are also referred to as non-exclusive jurisdiction clauses or NJE clauses, non-exclusive choice of court or forum selection clauses, permissive forum selection clauses, imperfect choice of court agreements).[1154] In recent times, there has been a great deal of discussion as well as development regarding whether the presence of manifestly written provisions are essential in optional choice of court agreements, both in national and international PIL instruments.[1155] Notwithstanding the acknowledgment of the distinction between exclusive choice of court agreements and optional choice of court agreements that has been made in many national and international PIL instruments, such as the PILA of Switzerland, the Recast, the HCCC, and the Lugano Convention 2007, no separate provision on optional choice of court agreements has been enunciated by any of these PIL instruments. Thus, the provisions of these instruments that are applicable to exclusive choice of court agreements do apply to optional choice of court agreements as well.[1156] Typically, the choice of court agreements are presumed to be exclusive (Article 5(1) of the PILA, Article 23(1) of the Lugano Convention 2007) unless the parties to the contract wished otherwise at the time of the conclusion of their agreement. This stance on

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1152 H Reiser, *Gerichtsstandsvereinbarungen nach dem IPR-Gesetz* (1989) 66.
1153 ATF 4C.189/2001, at Cons 5 ff.
1154 Mary Keyes, 'Optional Choice of Court Agreements in Private International Law: General Report' in *Optional Choice of Court Agreements in Private International Law*, vol 37 (Springer 2020) 5.
1155 Ibid 3–50.
1156 Haas and MacCabe 376.

the effect of the agreement provides adequate manifestation at the time of concluding the contract.[1157]

If a party to a contract challenges the exclusive effect of the choice of agreement of the contract by filing a separate case in a presumptively derogated court, they need to prove that both the parties agreed to the optional effect of their choice of court agreement.[1158] The parties are not required to insert any explicit clause as regards optional effect in their contractual agreement. However, they need to show that they had a clear intention to give an optional effect to their choice of court agreement.[1159] It could, therefore, be said that either party is allowed to lodge litigation in another court (typically of a distinct jurisdiction) in addition to the court or jurisdiction designated by the law, or that another court (typically of a distinct jurisdiction) is more equally competent as the court or jurisdiction designated by law.[1160] To put it succinctly, if the parties intend to give an optional effect to their choice of court agreement, this agreement shall act as a prorogation of the court (designated by the agreement). However, this cannot derogate any other court designated by law.[1161] That means, under the optional choice of court agreement, parties to contracts are allowed to bring suit to a court chosen by the agreement or to the court designated by law. Since multiple courts may have jurisdiction to hear litigation entailing such an agreement, it is notable that in such situations the application of *lis pendens* (Article 9(1) of the PILA; Article 27 of the Lugano Convention 2007) might come into play.[1162] On the other hand, if the parties intend to give exclusive effect to their choice of court agreement, then the agreement shall operate as prorogation to the court (designated by law), as well as derogation of the court (designated by law).[1163] Unlike the optional choice of court agreement, exclusive choice of court enables the parties to bring suit only to the court designated by the agreement.[1164]

The application and/or recognition of optional choice of court agreements is not the same in Switzerland. Agreements involving presumptively weaker parties such as 'employees,

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1157 Hausmann, 'Gerichtsstands- Und Schiedsvereinbarungen' in Christoph Reithmann and Dieter Martiny (eds), *Internationales Vertragsrecht* (8th edn, Dr Otto Schmidt 2015) recital 8.113.
1158 Ibid recital 8.115.
1159 Ibid.
1160 Grolimund and Bachofner at 5 n 43a.
1161 Killias at 23 n 146.
1162 Haas and MacCabe 377–379.
1163 Killias at 23 n 145.
1164 Haas and MacCabe 377.

consumers, tenants and insureds'[1165] cannot waive the court or jurisdiction that is competent by law. However, agreements that involve stronger parties who are typically seen in commercial contracts can waive the court competent by law or jurisdiction at the time of making the contractual agreement.[1166] Disregarding the fact of whether the choice of court agreement is to be given exclusive or optional effect, the outright non-applicability of the provisions of the exclusive choice of court agreement or party autonomy set out in both the PILA and the Lugano Convention 2007 can be witnessed in certain areas such as Article 114(2) (consumer contracts)[1167] and Article 97 (real estate)[1168] of the PILA.[1169] Alternatively, it could be said that the effect of choice of court agreements accomplished between the contractual parties are to be considered as 'exclusive' unless otherwise indicated by the parties explicitly or orally at the time of concluding the agreement.[1170] Professor Killias commented on exclusive and optional choice of court agreements stating that if the choice of court agreement appears to be exclusive and involves a supposedly weaker party, then the agreement shall be exclusive only for the supposedly stronger party, and for the weaker, such choice of court agreement shall be optional. Hence, both the court designated by agreement and the court designated by law shall be deemed competent for the weaker party.[1171]

6.2.2 Absence of choice of court agreement

Apart from the factor of party autonomy or the prorogation of jurisdiction, the connecting factor mentioned in the PILA is the domicile of the defendant and, in its absence, the element of the habitual residence of the defendant shall have to be assessed to ascertain if the Swiss courts have jurisdiction.[1172] The Swiss courts may also take the defendant's place of business into consideration.[1173] Ascertainment of the jurisdiction under the Lugano Convention 2007 applies to any court of the signatory States dealing with matters involving individuals who are

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[1165] Ibid 383; Articles 8, 15, 18, of the Lugano Convention 2007; Article 114 of the PILA.

[1166] Job Kaiser, in K Spühler, L Tenchino and D Infanger (eds), *Basler Kommentar zur Zivilprozessordnung* (3rd edn, Helbing Lichtenhahn 2017) at 35 n 2.

[1167] Article 114 (2) states that: 'A consumer may not waive in advance jurisdiction at his or her domicile or habitual residence.'

[1168] Article 97 states that: 'the courts at the place where real property is located in Switzerland have exclusive jurisdiction to entertain actions relating to real property rights.'

[1169] Haas and MacCabe 374.

[1170] Haas and MacCabe 383.

[1171] Killias at 23 n 147, 149.

[1172] Article 112 (1) states that: 'Swiss courts at the domicile or, in the absence of a domicile, at the habitual residence of the defendant have jurisdiction to entertain actions arising out of a contract.'

[1173] Article 112 (2) states that: 'Swiss courts at the defendant's place of business also have jurisdiction to entertain actions relating to an obligation arising out of the operation of such place of business.'

domiciled in a State bound by this Convention.[1174] If they are domiciled in a signatory State but not a national of any signatory State, the courts dealing with such persons shall apply the rules of jurisdiction that are applicable to the nationals of that particular State. This provision of the Convention ensures equal treatment between those who are not nationals but are domiciled in the signatory State and those who are both nationals and domiciled in the signatory State. In the absence of any valid choice of court clause in the agreement between the parties, the domicile of the defendant is the jurisdiction under Article 2(1) of the Lugano Convention.[1175] The difference between the PILA and the Lugano Convention as regards the above is that the PILA has added a new connecting factor in its provision, namely, 'habitual residence', whereas the Lugano Convention 2007 still adheres only to domicile. The Lugano Convention 2007 also contains a provision establishing the defendant's place of business as another connecting factor, as does the PILA.[1176] The term 'establishment' or 'commercial establishment' from a lay person's perspective stands for any business that has been pursued by the means of any permanent business premises. The entry of such business in the commercial register of that particular jurisdiction is not mandatory.[1177]

Place of performance has also been named as a connecting factor in the process of establishing jurisdiction both in the PILA (Article 113)[1178] and the Lugano Convention 2007 (Article 5(1)(b)).[1179] The core difference between these provisions is that the PILA by virtue of Article 113 applies to all types of cases, whereas the application of the Lugano Convention 2007 is limited to cases of sale of goods or services, characteristic obligation/performance, and cases involving place of performance located in a state that is bound by the Lugano Convention 2007.[1180] The

[1175] Article 2 (1) of the Lugano Convention 2007.

[1175] Grolimund, Schnyder and Mosimann 24.

[1176] Article 5 (5) of the Lugano Convention states that: 'as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.'

[1177] Grolimund, Schnyder and Mosimann 25.

[1178] Article 113 mentions that: 'When the characteristic obligation of the contract must be performed in Switzerland, the action may also be brought before the Swiss Court at the place of performance.'

[1179] Article 5 (1) (b) of the Lugano Convention 2007 states that: 'for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
in the case of the sale of goods, the place in a State bound by this Convention where, under the contract, the goods were delivered or should have been delivered,
in the case of provision of services, the place in a State bound by this Convention where, under the contract, the services were provided or should have been provided.

[1180] Grolimund, Schnyder and Mosimann 25.

inextricable relationship between closest connection and characteristic obligation will be discussed later.

6.2.3 Lis pendens

As regards the principle of *lis pendens*, both the Lugano Convention 2007 (Article 27) and the PILA (Article 9(1)) contain the same viewpoint that the prorogued court which becomes involved with the litigation at a later stage should, as a general principle, stay the proceeding until the derogated court gives its rulings on its jurisdiction.[1181] The PILA provision in regard to the question as to how long the Swiss court should wait for the rulings of the foreign court differs from that of the Lugano Convention 2007. According to Article 27 of the Convention, the Swiss courts should stay the proceeding until the foreign court or derogated court renders its rulings on its jurisdiction.[1182] Since, according to the Convention, the litigants do not have any guarantee that the court designated by the choice of court agreement will be the first to adjudicate, hence the so-called 'torpedo lawsuits' are still possible. Under the Recast, as has been discussed above, torpedo lawsuits are not possible.[1183]

However, the Swiss court is required to stay proceedings until a reasonable time has passed that is recognisable under Article 25 of the PILA. That means if the foreign court does not rule on its jurisdiction within a reasonable time period, *foreign lis pendens* has to be ignored under the PILA, and the Swiss court must then take control of the case instantly, as mentioned in Article 9 of the PILA. As a result of this flexibility, the so-called torpedo lawsuits can be avoided.[1184]

6.2.4 Closest connection and characteristic obligation

The term 'characteristic obligation' mentioned in the PILA was first used by the Swiss Federal Tribunal.[1185] The notion of characteristic obligation is more closely related with the process of determining the applicable law, in the absence of any express or implied choice of law clause in the agreement. The term 'characteristic obligation' has been defined in the provision of

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1181 Grolimund and Bachofner at 5 n 50a.

1182 *Gasser v Misat* 73 ff.

1183 Berger, in C Oetiker and T Weibel (eds), *Basler Kommentar zum Lugano-Übereinkommen* (2nd edn, 2016) p art 23 n 58.

1184 Buhr, Gabriel and Schramm, in A Furrer, D Girsberger and M Müller-Chen (eds), *Handkommentar zum Schweizer Privatrecht, Internationales Privatrecht* (3rd edn, 2016) p art 9 n18.

1185 Kurt Lipstein, 'Characteristic Performance – a New Concept in the Conflict of Laws in Matters of Contract for the EEC' (1981) 3 Northwestern Journal of International Law & Business 402, 405.

choice of law of the PILA (Article 117 (2)(3)).[1186] However, its connection with the determination of jurisdiction under the PILA is also significant. Characteristic obligation is closely related to the notion of 'closest connection' that applies in contracts to ascertain a particular applicable law in the absence of any express or implied choice of law clause in the agreement of the contractual parties. The country that is closely connected to the contract can be found by employing the idea of characteristic obligation. A country is supposed to be connected to the contract in question if it is the one where the parties had, or ought to have, performed certain obligations that are characteristic of the contract, and where they had habitual residence at the time of concluding the contract or had their 'central administration' or 'principal place' of business, trade or any related profession.[1187] The notion of closest connection was not a new phenomenon in the common law countries, however such was not quite the case in the civil law countries.[1188] Though it may be argued that the tenets of characteristic obligation is embedded in notion of 'closest connection', there is a fundamental difference between these two, where 'closest connection' is employed as an objective factor, characteristic obligation can actually can actually be employed as a practical phenomenon in order for courts to determine if they have jurisdiction as well as to ascertain the applicable law.

The Swiss invention of characteristic obligation is the outcome of a legal development made by the Swiss court while dealing with matters relating to conflict of laws atypical to them. The combined effort of Swiss legal scholars and judges initially distinguished the law that governs the conclusion of the contract from the effects of the contract, which is known as the 'great scission'. They also made a distinction between the laws governing the performance of the parties involved in the contract.[1189] Another well-known contemporary writer, Schnitzer, remarked upon the distinctions made by the Swiss legal scholars and judges, stating that on both occasions the outright focus must be given to a particular jurisdiction or legal system, namely, the jurisdiction where the obligation characteristic of the contract as a whole had been performed.[1190] In 1952, the Swiss Federal Tribunal cast aside the notion of 'great scission' while

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1186 Grolimund, Schnyder and Mosimann 25.

1187 Draft of a Convention on the Choice of Law Applicable to Contractual and Non-Contractual Obligations 1979; Article 4 of the Draft of a Convention on the choice of Law Applicable to Contractual and Non-Contractual Obligations.

1188 *Bonython v Commonwealth of Australia* [1951] AC 201 [219].

1189 Lipstein 405.

1190 Vischer, 'The Principle of the Typical Performance in International Contracts and the Draft Convention' in Kurt Lipstein (ed), *Harmonization at Private International Law* (University of London Institute of Advanced Legal Studies 1978) 25–30.

assessing its own previous approach of distinguishment. However, while adhering to the idea of 'little scission', the Swiss court changed its approach to avoid the hindrances that were encountered while making distinctions between the governing laws of the parties' performance, by emphasising the objective factors of 'closest connection' and 'hypothetical intention' of the parties.[1191]

The objective factor or criteria subsequently became intertwined with the country where the parties were required to accomplish the 'characteristic performance or obligation'. This would ensure that a single law would govern the entire contract that would include the performance of the contract, and might also include bilateral contracts.[1192] In the process of establishing the closest connection, the Swiss Tribunal would focus upon the obligations that were incumbent on the parties to the contract; these might either be atypical to the contract in question or demonstrate the nature of the contract.[1193] The Swiss courts would maintain the notion of closest connection no matter what, and in doing so they would endeavour to take the implied choice of law of the contract in question into consideration.[1194] Subsequently, while facing new types of contract, the Swiss judges explained the scope of characteristic obligation more variedly but manifestly, the reflection of which can be witnessed in the provisions of Article 117 of the PILA.

The concept of characteristic obligation was, however, not beyond criticism. The Dutch writer H. U. Jessurun d'Oliveria criticised the concept of characteristic obligation by expressing that:

> "the principal of 'characteristic obligation/performance' is too narrow and less punctilious to be able to supplant the principles of proper law, seat of the relationship, place of performance etc.
>
> the process of choosing connecting factors for the ascertainment of characteristic performance is capricious.
>
> any particular type of obligation cannot be determined more swiftly and readily by the process of 'characteristic obligation' than it can be by the pre-existing techniques.
>
> categorisation of the legal relationship does not benefit to ascertain 'closest connection' by dint of 'characteristic obligation', since the

[1191] Lipstein 406.
[1192] Ibid 406–7.
[1193] Makarov, *Festschrift Für Lewald* (1953) 299.
[1194] Vischer, *Annuaire Suisse De Droit International* (1957) 43, 57.

> nature of contracts is not always the same, some are typical, some are complex.
>
> ascertainment of characteristic obligations cannot be accomplished only by attributing a contract to a particular group.
>
> reliance upon the essence and function of legal relationship of the parties and their obligations cannot put in conjunction, since legal relationship of the parties under a particular contract remains stagnant, whereas the obligations is mutable.
>
> the idea of corelation between the economic function and socio or sociological function for establishing closest connection through characteristic obligation, is flawed."[1195]

Characteristic obligation was also criticised for containing turgid minutiae that sometimes hide the main objective of the employment of the concept to identify a particular, as well as closely connected, legal system for the contract.[1196]

Swiss courts were not immune from the perplexities in interpreting legislative provisions of characteristic obligation, if they have the jurisdiction to adjudicate the matter brought to them. According to Article 113 of the PILA and Article 31 of the Code of Civil Procedure, the court of the place of the performance in Switzerland has the jurisdiction, if characteristic obligation is to be carried out in that place.

This provision does, however, not talk about any maximum or minimum number of characteristic obligation that a contract may entail neither does it talk about any maximum or minimum number of jurisdiction where the characteristic obligation or performance is to be carried out. It has been opined by a number of commentators in Switzerland that cases entailing several characteristic performances that have been, or would have been, or is to be carried out in several places, can establish territorial jurisdiction at the places of performance.[1197] Other commentators, however, are of the view that allowing more than more contractual performance as characteristic would pointlessly add more places of jurisdiction.[1198]

[1195] H. U. Jessurun d'Oliveira, 'Characteristic Obligation' (1977) 25 Am Journal Comp Law 303.

[1196] Lipstein 410.

[1197] Amstutz, Wang, Gohari, *Basler Kommentar, Internationales Privatrecht*, (3rd Edition 2013) N. 10-12 to Art. 113 IPRG.

[1198] Baker McKenzie, 'Swiss Federal Court: A Contract with Several Characteristic Performances can be Enforced at Each Place of Characteristics Performance' (3 June 2019) https://globallitigationnews.bakermckenzie.com/2019/06/03/swiss-federal-court-a-contract-with-several-characteristic-performances-can-be-enforced-at-each-place-of-characteristic-performance/.

Two cases, in this regard, are worthy to discuss, where distinct approaches have been taken by Swiss courts on the matter of the place of performance of characteristic obligation.

The first case is BGE 124 III 188[1199], where the Federal Supreme Court of Switzerland had to decide on the issue if the obligation that characterises the claim be into account when determining the place of performance of a claim having more than one obligation. The plaintiff imported products of the defendant from Copenhagen and distributed them in Switzerland. Problem arose when the defendant contacted another importer from Switzerland and wished its products to be distributed in Switzerland by both the plaintiff and the new importer. The plaintiff objected the decision take by the defendant and argued they had an exclusive distribution agreement between them that can only be terminated with a six months' notice. However, the defendant denied existence of such contract. As a result of which, the plaintiff, based in Dietikon, Switzerland with its registered office, sued the defendant, based in Copenhagen, Denmark with its registered office, before the Commercial Court of the Canton of Zürich for payment of CHF 150,000 plus interest as damages. On 14 July 1997, the Commercial Court, accepting the defendant's plea of lack of jurisdiction, did not intervene in the action.

The Federal Supreme Court dismissed the appeal filed by the plaintiff against this decision insofar as it was accepted. Since the Lugano Convention 1988, in particular Article 5 (1) of the Convention was applied in this case, judges while reaching their decision gave several references of how the ECJ handled cases entailing similar issues along with references of how Swiss courts previously had dealt with cases involving similar issues.

Article 5 (1) of the Lugano Convention 1988 allows the plaintiff as an alternative to the general place of domicile under Article 2, to sue the defendant before the court of the place where the obligation has been performed, or would have to be performed, or is to be performed, if a contract or claims arising from a contract form the subject matter of the dispute. It was previously decided by the Swiss court that the place of performance is not determined autonomously but depends on the law applicable to the contractual obligation.[1200] However, in another decision the Swiss court affirmed that the applicable law in turn results from the subsumption of the obligation fulfilled or to be fulfilled under the conflict of laws of the court

[1199] BGE 124 III 188 (Federal Supreme Court).
[1200] BGE 122 III 43 3a p. 45 (Federal Supreme Court).

hearing the dispute.[1201] As it is understood from the above two sentences that the matter of applicable law is not of any major help for the court to determine its jurisdiction based on the place where the obligation has been performed, or would have to be performed, or is to be performed, the Swiss court in the case being discussed, did not consider the matter of applicable law.

The Swiss court gave reference of a decision of the ECJ, stating that the ECJ in a case where the Brussels Convention (Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968; ECJ) was applied, on which the Lugano Convention was later modelled, asserted that not any obligation is to be taken into account, but only the one that corresponds to the contractual claim on which the plaintiff bases his action.[1202]

The basic difference between Article 5 (1) of the Lugano Convention 1988 and Article 113 of the PILA is that the latter talks about characteristic obligation which gives the court to assess situations from a bigger perspective, and the former does not entail the concept of characteristic obligation. Unlike Article 5 (1) of the 1988 Convention, Article 5 (1b) of the 2007 Convention explicates the term 'place of performance' in relation to contracts of sale of goods and services. Article 5 (1) (b) of the 2007 Convention, however, does not give any explanation of the term 'place of performance' as regards other types of contract which obliges the judges to look into the relevant previous decided cases of the ECJ for guidance, whenever the question of 'place of performance' is raised in contracts implicating several obligations, other than contracts of sale of goods and services. In fact, problems may arise in finding any particular apposite jurisdiction in contracts of sale of goods and services having several obligations.

Therefore, for contracts that do not fall within the ambit of Article 5(1)(b) of the Lugano Convention 2007 and/or if the place of performance is located in a country that is bound by the Convention, the Convention does not employ the notion of characteristic obligation and the place of performance shall be determined by the *lex causae*.[1203] In such cases, as per the rulings in EU case law, the courts should ascertain the obligations of the parties in the litigation. However, in this process, the court should disregard the ancillary and secondary obligations since they cannot establish the jurisdiction of the litigation.[1204] In regard to determination of the place of performance, the court must first identify the applicable law of the contract and,

[1201] BGE 122 III 298 3a p. 299 f. (Federal Supreme Court).
[1202] BGE 124 III 188 189 (Federal Supreme Court).
[1203] Grolimund, Schnyder and Mosimann 27.
[1204] Ibid.

on the basis of that, the court will establish the place of performance. If Swiss contract law is considered in the contract to be the governing substantive law, then Article 74 of the Swiss Federal Code of Obligations relating to contracts and tort will apply as it governs the place of performance; when the CIGS is invoked, then Articles 31 (delivery of the goods and handling over of documents) and 57 (payment of the price) of the CIGS shall apply.[1205]

Where in Swiss law the whole idea of place of performance is premised on the tenets of characteristic obligation, the Lugano Convention does not say anything patently as to how place of performance is to be determined since just terming *lex causae* is not sufficient. In other words, as mentioned above, where Swiss interpretations of characteristic obligation suggest that a case may have more than one characteristic obligation hence more than one place of performance, EU interpretations say that the obligation that is closely connected to the claim, will be taken into consideration which shall lead the court to find a particular place of performance of a claim. Such narrow interpretation of the ECJ on the place of performance of the obligation in question, does not fit well with contracts that entail more than one obligation, contracts that do not contain an actual performance act or where the place of performance is difficult to determine.[1206]

The Swiss court in the case being discussed, mentioned the case of *De Bloos*, where the ECJ uttered that if the plaintiff claims damages or seeks rescission of the contract on the ground that the other party is at fault, the contractual obligation whose non-performance is alleged in support of those claims must be taken into account.[1207]

Since due account must be taken of the subsequent rulings of the ECJ on the Brussels Convention and the two Conventions must be interpreted as uniformly as possible (Declaration of the Representatives of the Governments of the Signatory States of the Lugano Convention that are Members of the European Free Trade Association [SR 0.275.11])[1208] and also the fact that the Swiss court did not see any reason to opt for any different interpretation of Article 5 (1) of the Lugano Convention 1988 than that of the ECJ, the Swiss court by applying the principle set in the case of *De Bloos*, in the case being discussed stated that the defendant's obligation under the law of sale and its obligation under the law of distribution would have to be subsumed discreetly under PILA and thereby uphold the decision of the Commercial Court

[1205] Ibid.
[1206] BGE 124 III 188 190, 191 (Federal Supreme Court).
[1207] BGE 124 III 188 190 (Federal Supreme Court).
[1208] BGE 124 III 188 191 (Federal Supreme Court).

of the Canton of Zürich that said that the place of performance was therefore located at the defendant's registered office in accordance with federal law.[1209]

The second case, BGE 4A_444/2018, involving the same question as regards place of performance raised in the first case under different PIL rules though, is a recent one. In that case the Swiss Federal Supreme Court held that under the Swiss Code of Civil Procedure and PILA, a contractual dispute having several characteristic performances that have been or are to be performed in different places, can be adjudicated in each place of performance, that means the courts in all these places of performance have jurisdiction to adjudicate the contractual dispute.[1210] The above finding of the court has long been stressed upon by the Swiss scholars as discussed above. This finding, however, partially conflicts with the principles on place of performance set out by the ECJ under the Lugano Convention that, as stated above, say that the performance of a particular contractual claim cannot be carried in more than one place.

Though it is undeniable that the Lugano Convention and the PILA complement each other, the contrasting approach of the Swiss court's interpretation of place of performance and characteristics obligation in these two cases being premised on the fact that the different sets of PIL rules were applied, raises questions as to how justified it is for Swiss courts to change its perspectives on the notion of place of performance and characteristics obligation embedded in Swiss PIL due to the reason that a different set of PIL rules that differs from the Swiss understanding and interpretation of place of performance and characteristics obligation, was applied to the case.

With hindsight, a question can be raised, if the Federal Supreme Court follows the ECJ's interpretation of Article 5 of the Lugano Convention to ensure coherence and to prevent uncertainty and incongruity in its legal understanding as it is stated by the Federal Supreme Court in the case of 1998, why should the Swiss Federal Supreme Court not consider ensuring coherence and preventing uncertainty and incongruity in its own legal understanding as regards a contract involving several characteristic obligations may establish multiple jurisdictions? Does the predilection of the Federal Court for its own legal understanding of a contract involving several characteristic obligations may establish multiple jurisdictions, change because of the application of a different set of PIL rules other than the PILA? If so, are we

[1209] BGE 124 III 188 192 (Federal Supreme Court).
[1210] BGE 4A_444/2018 (Federal Supreme Court).

(Switzerland), then, not compromising with our own notion and interpretation of characteristic obligation? Though it is yet to be seen, if Swiss courts opt for the same interpretation as taken in the case of BGE 4A_444/2018, in cases where the Lugano Convention 2007 is applied.

Article 113 of the PILA does not apply to those contracts that do not contain any characteristic obligation.[1211] However, the ECJ's explication of the place of performance and the place of delivery enunciated in Article 5(1)(b) of the Lugano Convention 2007 could be considered while interpreting Article 113 of the PILA in contracts that do not entail any characteristic obligation.[1212] The ECJ's explanation as regards the place of performance and the place of delivery have been enumerated by Professor Grolimund as:

> "[P]lace of performance with regard to contracts on the sale of goods with several places of delivery: jurisdiction at the place of the main delivery; if such is missing, the claimant may choose between the courts at all places of delivery,
>
> Place of performance with regard to contracts for services with several places of delivery: jurisdiction at the place of the main delivery,
>
> Place of performance with regard to contracts on the sale of goods involving delivery by mail: jurisdiction at the place of delivery according to the contract; in the absence of such, place where purchaser actually gained or should have gained power or disposition over the goods,
>
> Place of performance with regard to contracts of carriage of airlines (i.e. services): place of departure and arrival according to the contract,
>
> Place of delivery with regard to goods in general: primarily relevant are the provisions of the respective contract; if the contract refers to the Incoterms or similar rules, these must be considered when determining the place of delivery."[1213]

6.3 Applicable law

Applicable law under PILA is ascertained through a combination of territorial principles, emphasis on party autonomy and the application of connecting factors with the aim to ensure an effective and fair resolution of PIL disputes.

[1211] Grolimund, Schnyder and Mosimann 25.
[1212] Ibid 26.
[1213] Ibid.

6.3.1 Choice of law agreement

Party autonomy as regards applicable law in commercial contracts can be found in the PILA. As mentioned in Article 116(2) of the PILA, the applicable law may be explicitly chosen by the parties to a contract, however, in the absence of any explicit clause, parties' predilection for any particular law may also be discerned from the circumstances. However, just like non-applicability of choice of court to consumer contracts, the PILA also bars the applicability of party autonomy as regards applicable law to consumer contracts.[1214] The parties to contracts normally include a choice of law clause in their contractual agreement; for example, 'This agreement shall be governed by and construed in accordance with the substantive laws of Switzerland.'[1215] A choice of law agreement between the parties can also be assumed from the reference to any particular substantive law made by the parties, from the overall context of the contract or from the proceedings of the pleadings of the litigation where the parties to contracts seem familiar with the laws that have been invoked by their legal representatives.[1216] The parties can choose any law of any jurisdiction they wish. However, it is worth mentioning that as regards choosing applicable law, the facts of the case do not need to be connected to the law chosen by the parties. Laws may also be chosen that partially apply in matters relating to limitation.[1217] The option of cumulative choice of law is also available for the parties, if it is manifest from the contractual agreement and/or from the circumstantial evidence that the parties intended the application of multiple laws to their contract.[1218]

Under Swiss law (Article 116(3) of the PILA), the parties are allowed to choose the applicable law at any time. The choice of applicable law after the contract has been agreed can also be applied to the conclusion of the contract retrospectively, unless the parties agreed otherwise. However, this will affect the rights of third parties. In this regard, the rights of third parties

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[1214] Article 120 of the PILA states that:
1. Contracts pertaining to goods or services of ordinary consumption intended for a consumer's personal or family use, provided such use is not connected with the consumer's professional or business activity, are governed by the law of the state of the consumer's habitual residence:
if the supplier received the order in that state;
if the contract was entered into after an offer or advertising in that state and if the consumer performed in that state the acts required to enter into the contract; or
if the consumer was induced by the supplier to go to a foreign state for the purpose of delivering the order.
2. No choice of law is allowed.

[1215] Grolimund, Schnyder and Mosimann 27.

[1216] Ibid 27–28.

[1217] Ibid 28.

[1218] Ibid.

getting benefit from the contract cannot be undermined or fettered by any subsequent choice of law.[1219]

6.3.2 Absence of choice of law agreement

The problem that is mostly encountered in matters relating to applicable law is when the parties do not choose the law. In the absence of any choice of law clause in the contractual agreement, the applicable law shall be decided by employing the notion of closest connection as described in Article 117 of the PILA.[1220] The above discussions of closest connection and characteristic obligation are equally relevant to the determination of the applicable law of the Swiss PIL. The ingredients that are to be assessed and taken into consideration for a clear understanding of Article 117 of the PILA are closest connection, habitual residence, place of business establishment, principal place of performance, and characteristic contractual obligation.[1221] Characteristic obligation works as a differentiator between different types of contracts and, as has been seen in the above discussion, the apprehension of characteristic obligation is inextricably linked with the habitual residence and/or the place of business of the parties.[1222] Characteristic obligation is distinct from a payment obligation that includes an employment contract, a purchase agreement, or a contract of work and service that does not create any dissension between the parties as regards payment but there is dispute about matters of obligation related to the contract such as transfer of goods, work in the shape of subordination, place of performance by contractor.[1223] The list of characteristic obligations have been provided in Article 117(3) of the PILA[1224] which is similar to Article 4(1) of the Rome I Regulation. This is also taken as a guideline in interpreting the relevant provisions of Swiss law.[1225]

1219 Ibid.

1220 Article 117 of the PILA enunciates that: 'Failing a choice of law, contracts are governed by the law of the state with which they have the closest connection.'

1221 Article 117 (2) of the PILA states that: 'Such a connection is deemed to exist with the state of the habitual residence of the party having to perform the characteristic obligation or, if the contract is entered into in the course of a professional or business activity, with the state of such party's place of business.'

1222 Grolimund, Schnyder and Mosimann 28.

1223 Ibid.

1224 Article 117 (3) of the PILA articulates that:
Characteristic obligation means in particular:
in contracts for the transfer of property: the transferor's obligation;
in contracts pertaining to the use of property or of a right: the obligation of the party conferring such use;
in contracts of mandate, contracts for work and other contracts to perform services: the service obligation;
in contracts of deposit: the obligation of the depositary;
in guarantee or suretyship agreements: the obligation of the guarantor or surety.

1225 Grolimund, Schnyder and Mosimann 29.

In the case of *Bonaldo SpA v AF* the Swiss court (canton of Valais), in regard to closest connection and absence of choice of law, stated that:

> "Article 78 CISG does not fix the rate of interest. Thus, this rate is fixed by the law applicable by virtue of private international law. According to Article 117 IPRG (Swiss private international law), if there is no choice of law, a contract is governed by the law with which it is most closely connected. There is a presumption that the country with the closest connection is the country in which the party obliged to the characteristic performance has her residence. In contracts for the sale of goods the performance of the seller is the characteristic performance. According to these rules of private international law, Italian law is applicable as to the rate of interest. Characteristic performance is the performance of delivering furniture, performance of the plaintiff having her place of business in Italy. According to Article 1284 of the Italian Codice Civile the rate of legal interest is 10%. Interest over and above this rate must be contracted to in writing. A contract of this kind is not presented; thus, the rate of interest is 10%."[1226]

The exceptions to the notion of characteristic obligation mentioned in Article 117(3) of the PILA are Article 117(1) and Article 15 of the same Act. The underlying principle of the exceptions to characteristic obligation as mentioned in Article 117(1) and Article 15 is that after making all the assumptions and hypotheses in finding the applicable law of the contractual agreement by employing characteristic obligation, if it is seen that the case has much closer connection with another law, then the latter shall be applicable to the case. In fact, any law that has been referred to by the PILA shall not be applicable if a closer connection has been found with another law. Article 15 also applies where no characteristic obligation is found in the agreement. However, neither Article 117 nor Article 15 of the PILA apply to a case where there is a clear choice of law clause in the contractual agreement as mentioned.[1227]

Under Article 118 of the PILA, contracts for the sale and purchase of goods are governed by the Hague Convention of 15 June 1955 on the law applicable to international sales of goods. The provisions of the Convention correspond to Article 116 of the PILA.[1228] In addition to the Convention, the CIGS that contains substantive uniform law shall come into play as well. This means that unless the parties to a contract explicitly mention another applicable law other than

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[1226] Case C-118/94 *Bonaldo SpA v AF* (Tribunal Cantonal Valais [Canton Appellate Court]) (1998) 17 Journal of Law and Commerce 263, 281–282.

[1227] Grolimund, Schnyder and Mosimann 29.

[1228] Ibid.

the CIGS and/or mention that the CIGS shall not be applicable to the contract in question, the CIGS shall always be applicable in contracts concerning international sale of goods.[1229]

Choice of law clauses incorporated in contracts may also be taken into consideration by the judges to interpret the scope of a jurisdiction clause incorporated in the contractual agreement of the parties. Judges sometimes encounter situations in which they have difficulty discerning the actual jurisdiction of the litigation, despite the fact that the parties incorporated a jurisdiction clause into their agreement. This may be due to a lack of clarity in the relevant clauses and/or because the parties have a disagreement about the jurisdiction clause. Such viewpoint was adopted by the Swiss Federal Supreme Court in a case[1230] involving issues of international sale of goods. The plaintiff was a Swiss public company that provided services in the airline industry; the defendant was a German limited liability company (GmbH) that provided software. As per the agreement, namely an End User License Agreement (EULA) and a Master Services Agreement (MSA), the defendant was to provide the plaintiff with software. The plaintiff claimed that the defendant did not deliver and install the software as agreed and lodged a suit against the defendant in the Commercial Court of Zürich. The Zürich court held that it did not have jurisdiction to hear the matter raised by the party since there was no jurisdiction clause in the agreement and, as per the PIL rules, the apposite forum for the matter in question would be the defendant's domicile, Germany. The plaintiff appealed this decision to the Federal Supreme Court of Switzerland.

In the appeal hearing, the parties disagreed on the matter of jurisdiction. The plaintiff claimed that the contract entailed a jurisdictional clause in addition to the EULA and the MSA agreements, and according to that additional jurisdiction clause, the Commercial Court of Zürich had the jurisdiction to adjudicate the matter. On the other hand, the defendant argued that they did not have any additional jurisdiction clause and claimed that Germany had the jurisdiction as per EULA. The court held that since there was no consensus or unanimity between the parties as regards which country had the jurisdiction to adjudicate the matter, the jurisdiction would be decided as per the applicable law that had been mentioned by the parties in their choice of law clause in the contractual agreement, which was German law. After citing more than ten cases, the Federal Court of Switzerland manifestly stated that, as per German law, it was the intention of the parties that would be conclusive as to which country or court

[1229] Ibid 29–30.
[1230] *Swisslex PA* (2013) Bundesgericht 149 [Federal Supreme Court].

had jurisdiction. Since there was no clarity in the agreement that would suggest that the parties intended to change the jurisdiction from Germany to Switzerland, the Swiss court rejected the appeal.[1231]

6.4 The recognition and enforcement of foreign judgments

The provisions appurtenant to the recognition and enforcement of foreign judgments can be found in Articles 25–31 and at the end of each chapter of the special part of the PILA. Apart from the PILA, different bilateral and multilateral treaties and conventions such as the Lugano Convention 2007 relating to the recognition and enforcement of foreign judgments are in force in Switzerland. It is worth noting that Switzerland has been cautious in entering into treaties and conventions on the recognition and enforcement of foreign judgments in order to protect the positions as well as interests of the parties domiciled or having a seat in Switzerland. However, such attitude has changed under the Lugano Convention 2007, which is overarching and broad in terms of the recognition and enforcement of judgments made by the countries of the EU and the EFTA. The UK does not fall into this group anymore, since its application to become a signatory of the Lugano Convention 2007 has been rejected. If any of the bilateral or multilateral treaties or conventions that Switzerland has entered into do not apply as regards matters of the recognition and enforcement of foreign judgments, the matters are governed by the PILA.[1232]

6.4.1 Nature of judgment

The way to recognise and enforce foreign judgments depends on the type of judgment which can be declaratory judgments, judgments determining a legal right or status, and judgments requiring the defendant to perform or refrain from a certain action.[1233] As regards the latter, the substance of the judgment varies; it could be of a negative nature that relates to omission, or of a positive nature that refers to payment of money or restitution. Judgments from any foreign jurisdiction are only to be recognised and enforced in Switzerland if they require the defendant to do any specific task that is legal as per Swiss law or if the judgment orders the defendant to refrain from any specific action. In order to enforce foreign judgments, if required, the Swiss

[1231] Ashlee Schaller, 'Interpretation of Forum Selection Clauses: A Survey of Select English- and German-Speaking Jurisdictions' (2018) 44 NCJ Intl 117, 160–162.

[1232] Dieter A Hoffmann and Oliver M Kunz, 'Getting the Deal through: Enforcement of Foreign Judgments 2018 (Switzerland)' [2018] Law Business Research Ltd 92, 92 <https://www.walderwyss.com/user_assets/publications/2212.pdf>.

[1233] Grolimund, Schnyder and Mosimann 135.

authority may also impose a threat of sanction pursuant to Article 292 of the Swiss Criminal Code.[1234] However, foreign judgments that are declaratory in nature or judgments that determine legal status do operate alone. This means that no enforcement is either needed or possible. For example, if a right of an individual is confirmed by the court, then such right can only be established or upheld by the judgment, such judgment does not involve enforcement, it can only be recognised. On the other hand, judgments that require the defendants to do something, or refrain from any particular act, must be both recognised and enforced in Switzerland. Judgments have to meet identical requirements both in order to be recognised and enforced in the Swiss jurisdiction.[1235] The recognition of foreign judgments can be incidental. A foreign judgment can also be recognised in Switzerland through the proceedings of recognition and enforcement.[1236] The basic principles for this can be summarised as *kontrollierte Wirkungserstreckung* or 'the controlled extension of effect' as articulated Professor Mosimann:

> "a) A foreign judgment may not have more effects in Switzerland than in the foreign country where it was handed down.
>
> b) A foreign judgment may not have more effects than a comparable domestic judgment."[1237]

6.4.2 Conditions for the recognition and enforcement of foreign judgments

The factors[1238] that are to be employed in the recognition and enforcement of foreign judgments in Switzerland are:

1) Jurisdiction of the foreign court: When the judgment is from a contracting state of the Lugano Convention 2007, the Swiss courts do not verify whether the country of origin of the judgment, that is the Member State of the Convention, had jurisdiction of the litigation and/or whether the Lugano Convention 2007 or the national law of that judgment providing country was invoked in the litigation proceedings. However, the Swiss court must, under this Convention, review the jurisdiction of the country that provided the judgment, in some specific cases, such as those relating to insurance or consumer contracts if the court that gave the judgment did not comply with the rules as regards exclusive jurisdiction set out in Article 22

[1234] Grolimund, Schnyder and Mosimann 135–36.
[1235] Ibid 136.
[1236] Hoffmann and Kunz 93.
[1237] Grolimund, Schnyder and Mosimann 136.
[1238] Hoffmann and Kunz 94.

of the Convention, where it ought to have.[1239] Judgments from countries other than the signatories of the Convention shall only be recognised and enforced in Switzerland if that foreign court had jurisdiction over the defendant as per the rules of the PILA.[1240]

As per the PILA, the jurisdiction of a foreign court is deemed to be valid if the name of that jurisdiction or court has been mentioned in the choice of court clause of the contractual agreement, or if the defendant proceeds with the case in that court without any objection. Foreign judgments as regards matters of the law of obligation, such as commercial contracts, shall be recognised and enforced if the domicile or habitual residence of the defendant is in the country of the foreign court that gave the decision, "insofar as the claims refer relate to an activity carried out in such state."[1241]

2) Finality of the judgment rendered: The judgment under Article 25(b) of the PILA is final if no further judicial remedy is available for the litigants in the jurisdiction of the court that rendered the judgment ('expiry of the relevant period, waiver, decision by highest judicial authority'). However, the requirement of finality of the foreign judgment is relaxed in the Lugano Convention 2007. As per the wording of Article 38(1) of the Convention, a foreign judgment shall be recognised and enforced in Switzerland, if it is shown or proven that the judgment is enforceable in the jurisdiction where it was rendered.[1242]

3) Compatibility with Swiss public policy/order: Under both instruments, the PILA (Article 27) and the Lugano Convention 2007 (Article 34(1), (2)), violation of Swiss public policy is a ground for refusal of the recognition and enforcement of foreign judgments in Switzerland. As is the case in other jurisdictions, the term 'public order' is relatively vague in the Swiss jurisdiction. It includes fairness of the foreign proceedings such as if the litigants had sufficient time and opportunity to present their case to the court. Apart from the requirement of adherence to these formal requirements, Swiss courts may also take the materials of the case judgment into consideration in order to recognise and enforce a foreign judgment. For example, Swiss courts have quite consistently refused to enforce punitive damages awarded by foreign decisions, on the ground that such damages would be contrary to Swiss public order.[1243] The Swiss courts are not allowed to review the substance of the case even if the substantive laws

[1239] Ibid.
[1240] Article 25 of the PILA.
[1241] Article 149 of the PILA.
[1242] Grolimund, Schnyder and Mosimann 138.
[1243] Hoffmann and Kunz 95.

that have been invoked in the litigation at foreign courts are not consistent with that of Switzerland.[1244]

4) Apposite notification to the defendant: One of the core requirements of the recognition and enforcement of foreign judgments in Switzerland is to ensure that the defendant was duly informed about the litigation (particularly according to the rules of the Hague Convention on the Service of Judicial Documents Abroad) and was treated appropriately and decorously so that he/she could exercise his/her rights of defence. The mere notification of the foreign proceedings to the defendant would not suffice, especially in cases where the defendant had not accepted or were disinclined to accept the foreign jurisdiction.[1245]

Under the PILA, even minor procedural flaws in the litigation will become an impediment for the judgment to be recognised and enforced in Switzerland, if the judgment was rendered in the absence of the defendant or in default of their appearance. On the other hand, the Lugano Convention 2007 is less austere in this regard. Article 34(2) of the Convention requires the defendant to be duly served with the documents entailing the proceedings of the case, or with any other important and relevant document, at a time and in such a manner that gave sufficient time and scope to the defendant to submit a defence and/or appear in court, in order for the judgment to be recognised and enforced in Switzerland. The Swiss stance on the matter of service on the defendant is very strict. Service of any judicial document relating to the foreign proceedings on the litigants must adhere to the relevant provisions of the Hague Convention. Service of the documents also requires them to be translated into the official language of the place where the service is to be performed. Any non-compliance with the Hague Convention as regards the service upon the parties in Switzerland shall make that foreign judgment invalid and, hence, unenforceable in Switzerland. Such non-compliance may also be termed an offence under Article 271 of the Swiss Penal Code.[1246]

5) Clash with the basic principles of Swiss law: If the procedures that have been followed in the adjudication were against the Swiss legal principles, such as the defendant did not have the right to be heard, then the judgment will not be recognised in Switzerland.[1247]

[1244] Article 27 (3) of the PILA, Article 36 of the Lugano Convention 2007.
[1245] Hoffmann and Kunz 94.
[1246] Ibid 95.
[1247] Ibid 94.

6) Conflicting decisions: Another ground of refusal of the recognition and enforcement of a foreign judgment is that the related litigation has not been pending erstwhile in Switzerland or has not previously been decided by any Swiss court or by any court of any jurisdiction whose judgment could be recognised in Switzerland, or there already exists a case between the same parties in regard to the same subject-matter pending before a Swiss court.[1248]

Although Swiss PIL rules, especially rules on connecting factors, are indubitably unyielding and the best suited for any cross-border commercial contract matter in comparison with other jurisdictions, inadequate enunciation of certain terms (e.g. closest connection) in the statute, as well the clash or differences between the national PIL rules (the PILA) and the PIL rules of international/regional instruments (e.g. the Lugano Convention) (e.g. characteristic obligation) raise questions with regard to the uniformity and perfectionism of the PIL rules in instances involving issues relating to place of performance and characteristic obligation as discussed above.

[1248] Article 27 (2) (c) of the PILA; Article 34 (4) of the Lugano Convention 2007, Ibid 95.

Chapter 7: The English approach

7.1 Introduction

Private international law in the UK has changed drastically following Brexit. New deals and accessions to the international instruments of PIL have taken place or are in the process of taking place in the near future, in order to maintain continuity of the applicable international and regional rules of PIL by which the country was previously bound in the capacity of an EU Member State.

The present PIL scenario in England and Wales could be summarised as follows:

The Rome Regulations (Rome I and Rome II) have been affected slightly, mostly as regards indicator terminologies with amendments made by the UK, as enunciated in part 4 of the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.). The (EU Exit) Regulations 2019 (which was further amended by the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020 continue to be the applicable law in England and Wales. The overarching basis of the Rome Regulations (as discussed above) not only govern the choice of law relationships between England and Wales and the EU Member States, but the relationships with other non-EU countries as well.[1249]

The application for accession to the HCCC has been accepted by the Hague Conference, which means that the HCCC applies to the UK (without any interruption) from the date it came into force in the UK, 1 October 2015. On 1 January 2021, the UK gave it the force of domestic law in the Private International Law (Implementation of Agreements) Act 2020, that amended the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018. The HCCC rules are applicable to civil and commercial matters that only involve the Contracting States of the HCCC. For example, Article 1(2) of the HCCC states that this convention shall not apply to consumer contracts, or to employment agreements and family law matters as mentioned in Article 2 of the HCCC. Therefore, alongside the rules of the HCCC, the common law and some other statutory instruments namely, Part 6 of the Civil Procedure Rules 1998 and sections 15B to 15E of the Civil Jurisdiction and Judgments Act

[1249] Ministry of Justice, UK, 'Guidance Cross-Border Civil and Commercial Legal Cases: Guidance for Legal Professionals' (*www.gov.uk,* 31 December 2020) <https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals>.

1982 shall also be regarded as jurisdictional rules for PIL matters where appropriate. It is worth mentioning that the Recast, the EU-Denmark Agreement, and the Lugano Convention 2007 will continue to apply to litigation where proceedings were commenced before the end of the transition period.[1250] As discussed above, both the Recast and the Lugano Convention 2007 contain rules on the recognition and enforcement of foreign judgments along with rules on jurisdiction.

As regards the recognition and enforcement of foreign judgments, the UK' application for accession to the Lugano Convention 2007 has been refused. Which means that:

1) National law rules of the recognition and enforcement of foreign judgments shall be applied in PIL ligations between the nationals of England & Wales and the EU countries and

2) National law rules of jurisdiction and the recognition and enforcement of foreign judgments shall be applied in PIL litigations between the nationals of England & Wales and the EFTA countries.

In any circumstances, in relation to the recognition and enforcement of foreign judgments, England and Wales have to rely on common law and statutes as their national law in cases where there are no applicable treaties between the UK and the originating jurisdictions. These will be judgments in case law which has requested recognition and enforcement in England and Wales.[1251] It should be noted that the UK is a party to a number of subject-matter treaties and conventions as regards different types of judgments or awards that have been incorporated into the law of the UK through different legislations, namely, the Carriage of Goods by Road Act 1965, the Merchant Shipping Act 1995 and the Civil Aviation Act 1982. The provisions of these reciprocal enforcement treaties and conventions have been modelled on the Foreign Proceedings (Reciprocal Enforcement) Act 1933 (FJA).[1252]

7.2 Jurisdiction

Traditional common law and HCCC rules regulate jurisdictional rule in contractual matters in the PIL arena in England and Wales, as has been mentioned above. In this part, only the common law rules are discussed. The HCCC rules have already been discussed in section 5.2.6.

1250 Ibid.

1251 Charles Falconer and others, 'Getting the Deal through: Enforcement of Foreign Judgments (the UK)' [2015] Law Business Research Ltd 124, 124–130.

1252 Ibid 124.

Moreover, since the UK has very recently acceded to the HCCC in its own right, it is yet to be seen how the UK courts will apply the rules mentioned in the HCCC, especially in matters relating to 'exclusive jurisdiction'. Albeit the rules of HCCC have been invoked in English courts since 2015, there is a clear distinction between the invocation of any foreign law under the obligation coming from any foreign institution (under the EU authority) and the invocation of any foreign law under the obligation proffered by its very own sovereign. No difference might apparently be encountered between these two, however, closer inspection is bound to reveal the theoretical and somewhat practical difference between the earlier invocation and present or future invocation of HCCC rules by the English judges. The term common law consists of an amalgamation of statute, common law, rules of court and judicial decisions.[1253]

7.2.1 Actions *in personam*

In English law, a distinction must be drawn between actions in *personam* and actions in *rem*. Settlement of the rights and obligations of the contractual parties are dealt with by actions *in personam*,[1254] such as claims for compensation or damages for breach of contract, actions for injunctions that typically relate to tort and actions for the possession of tangible property.[1255] Actions *in rem* in England and Wales refer to cross-border matters involving ships, cargo or anything associated with shipping.[1256] Such litigation is handled by the Admiralty Court in England, and is subject to admiralty law only.[1257] For the purpose of this research, only actions *in personam* are discussed here.

Actions *in personam* in England are entirely 'procedural' and premised upon the notion of 'service of a claim form'. This means anyone can bring actions *in personam* in English courts provided that the defendant has been served with a claim form.[1258] Apart from the matrimonial reliefs, English courts have really not been concerned with the question of whether or not a PIL dispute that has been brought into the jurisdiction of England and Wales has any connection with England and Wales.[1259] In the question of a 'connection test' the English common law

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1253 Adrian Briggs, *The Conflict of Laws* (4th edn, Oxford University Press 2019) 98.
1254 *Tyler v Judges of the Court of Registration* (1900) 175 Mass 71.
1255 James Fawcett and others, *Cheshire, North & Fawcett: Private International Law* (14th edn, Oxford University Press 2008) 353.
1256 *The Von Rocks* (1998) 2 Lloyds Rep 198 (Supreme Court of Ireland).
1257 Briggs, *The Conflict of Laws* 100.
1258 'Prior to April 1999, the defendant had to be served with a writ of summons, or its equivalent, e.g. an originating summons'; Fawcett et al 353.
1259 Ibid 354.

takes a different standpoint as compared to both the EU and the Swiss PIL. Thus, the service of a claim form may allow the English courts to proceed with litigation that may not be appropriate for the English judges to adjudicate. Such situations arise when a claim form has been served on the defendant who has only been residing in England and Wales or visiting someone in the named jurisdictions transiently and is really not connected with England and Wales, either personally or in the cause of action. However, English judges, in such scenarios, might at their discretion invoke the principle of *forum non conveniens* and refuse to proceed with the action by affirming that another jurisdiction abroad is the appropriate forum for the cause to be brought before.[1260]

The reluctance of the English judges to take the 'connection test' into consideration might create a problem in crucial circumstances, for example, the English court refuses to try the action where for the sole reason that the defendant is not physically present in England and Wales, despite the fact that the defendant is domiciled in England and/or has committed a tort in England.[1261] Here, the instance of English common law not adhering to any connecting factor could be highlighted . It is true that the implications of invoking connecting factors could have saved the English common law from ensuing criticism. However, as discussed above in the sections on EU law and Swiss law, has the usage of connecting factors in PIL disputes really been able to mitigate problems relating to jurisdiction, applicable law and the recognition and enforcement of foreign judgments? One would most probably answer this negatively.

The old approach of common law of adhering to the fact of 'the presence of defendant' in England and Wales has been negated subsequently by rule 6.20 of the Civil Procedure Rules 1998. This allows the service of a claim form upon a defendant located outside the jurisdiction of England and Wales. The Rule has enumerated the situations in which a defendant located abroad can be served with a claim form.[1262] Contrary to the old common law, the English courts now cannot refuse to deal with cases involving a defendant located abroad if the defendant willingly submitted to the jurisdiction of the English court.[1263] At present, the English courts can assume jurisdiction in actions *in personam* where (i) a claim form has been served on the defendant who is present within the jurisdiction of England and Wales, (ii) the defendant located abroad has been served with a claim form by means of rule 6.20 of the Civil Procedure

[1260] Ibid.
[1261] Ibid.
[1262] Ibid.
[1263] Ibid.

Rules, and (iii) the defendant has willingly submitted to the jurisdiction of the English court.[1264] The fundamental difference between the Recast and the English common law on the matter of the assumption of jurisdiction is that under the Recast the courts often and for the most part were inclined to assume jurisdiction, whereas under the English common law the matter of the English courts assuming jurisdiction is contingent upon the discretion of English judges. In exercising such discretion, English judges tend to make an assessment of the facts of the case that has been brought to them to reach a conclusion as to whether or not they would proceed with the action lodged.[1265]

One of the most uncertain aspects of the procedural method of the assumption of jurisdiction by English courts at common law is the lack of specificity in its approach as to the presence of the defendant within the jurisdiction of England and Wales in the matter of serving a claim form on the defendant. That is to say, it has not been disposed to making a distinction between the residence and mere presence of the defendant.[1266] Connection on the basis of territorial affiliation with the matter entailing cross-border elements, being invoked by the means of different connecting factors such as domicile, nationality or residence, has been immaterial for the English courts to assume jurisdiction in actions either in *personam* or *in rem*.[1267] The common law approach has been, 'whoever is served with the King's writ [now called a claim form] and can be compelled consequently to submit to the decree made is a person over whom the courts have jurisdiction'.[1268]

There are many instances where the English courts have not really been concerned whether the action in question that has been brought to them is connected with England and Wales. In the case of *Colt*, the Court of Appeal affirmed its position on the territorial connectivity by stating it had jurisdiction over the defendant who had been served with a claim form even though they had been in England only for a short visit and the action had no connection at all with the jurisdiction of England and Wales.[1269] The Court of Appeal maintained a similar kind of approach in the case of *HRM*, where the court assumed jurisdiction over the defendant who

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1264 Ibid.

1265 Hill and Shuilleabhain 65.

1266 'The Foreign Judgments (Reciprocal Enforcement) Act 1933, whose object it is to facilitate the enforcement in England of judgments obtained abroad, specifies the residence, not the mere presence, of the defendant in the country as one of the circumstances sufficient to find the jurisdiction of a court of that country'; Fawcett and others 355.

1267 Hill and Shuilleabhain 68.

1268 *John Russell & Co Ltd v Cayzer, Irvine & Co Ltd* (1916) 2 AC 298 (HL) [302].

1269 *Colt Industries Inc v Sarlie* (1966) 1 WLR 440.

was visiting England for Ascot races.[1270] There are also instances where the English court did not hesitate to assume jurisdiction over the defendant who had been in police custody or had come to England or Wales for the purpose of responding to a witness summons.[1271] However, the English court may not proceed with the action that has been brought to them if it finds that the defendant had been 'fraudulently and improperly'[1272] served with the claim form.[1273]

7.2.2 Service of documents to defendants in England and Wales

The methods as to how the defendant is to be served with the claim form have been articulated in Part 6 of the Civil Procedure Rules. Despite dissension on the topic of where and how the claim form had to be served upon the defendant, the fundamental principle of the English common law is that the defendant would only be served with the claim form when they are physically present within the jurisdiction of England and Wales, where the jurisdiction on the part of the plaintiff is established 'as of right'.[1274] This premise had not been altered until very recently.[1275] The Court of Appeal dissented from the old common law that the defendant shall only be served with the claim when present within the jurisdiction, and held that a defendant who was abroad fleetingly could be served with the claim form at his business place in England or Wales by virtue of rule 6.5(6) of the Civil Procedure Rules (CPR).[1276] The service of the claim form may be performed by any of the methods mentioned in part 6 of the CPR,[1277] such as serving documents personally (rule 6.4(3)), serving the defendant's solicitor with the document, provided they have been authorised by the defendant beforehand,[1278] sending or leaving documents at any of the places mentioned in rule 6.5, serving the claim form by means of 'fax or any electronic communication,[1279] through the method of exchanging documents and serving documents by first class post'.[1280]

Companies situated in England and Wales may also be served with documents under section 1139(1) of the Companies Act 2006, and in the case where the company has gone into

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1270 *HRM Maharanee Seethaderi Gaekwar of Baroda v Wildstein* (1972) 2 QB 283 (CA).
1271 *Doyle v Doyle* (1974) 52 DLR 3d 143.
1272 Fawcett and others 355.
1273 *Watkins v North American Land and Timber Co Ltd* (1904) 20 TLR 534 (HL).
1274 Briggs, *The Conflict of Laws* 99.
1275 *Bank of Swaziland v Hahn* (1986) 1 WLR 506.
1276 *City & County Properties v Kamali* (2006) 1 WLR 1219 (EWCA Civ).
1277 Fawcett and others 356.
1278 *Nanglegan v Royal Free Hampstead NHS Trust* (2002) 1 WLR 1043.
1279 *Molins plc v GD SpA* (2000) 1 WLR 1741 (CA).
1280 Fawcett and others 356.

liquidation then, with the permission of the court, the liquidator may be served with the documents under section 130(2) of the Insolvency Act 1986. As regards foreign companies, the person who is authorised by the foreign company to do official work as a representative, or from a franchise office in England and Wales, may be served with documents under section 113 (2) of the Companies Act 2006.[1281]

The submission of the defendant to the jurisdiction of the relevant English court may be done in a number of ways.[1282] The defendant may simply acknowledge service without disputing or contesting the jurisdiction of the court (rule 11(5) of the CPR),[1283] or through his solicitor, whom has been authorised accept service of the claim form (rule 6. (2) of the CPR).[1284] A defendant who intends to dispute the jurisdiction of the English court by contending that the documents served were asymmetrical, must first acknowledge that he has been served with documents.[1285] In order to dispute the jurisdiction of an English court, the defendant must make an application to the relevant court within a particular period of time from the time of service under Part 11 of the CPR.[1286] After acknowledging the service of the documents, if the defendant does not take any step with regard to disputing the jurisdiction of the English court as stipulated in Part 11 of the CPR and/or even if they have taken the initiative to do so, if the action is not relevant to a challenge of the jurisdiction of the English court,[1287] then it will be supposed that the defendant has not objected to this jurisdiction.[1288] However, if there was no subject matter of jurisdiction found, then the personal submission of the defendant to the English court will not make the jurisdiction existent.[1289]

Where disputing the jurisdiction of the English court is not an option for the defendant, they can still apply for a stay of the proceedings either on the ground of *forum non conveniens* or breach of contract (that arises where there remains a valid contract between the parties to the contract as regards which jurisdiction or courts will be preferred for the adjudication of any

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1281 Briggs, *The Conflict of Laws* 99.
1282 Fawcett and others 370.
1283 *IBS Technologies (PVT) Ltd v APM Technologies SA* [2003] Ch D (unreported).
1284 Fawcett and others 370.
1285 Briggs, *The Conflict of Laws* 100.
1286 'This procedure contesting the jurisdiction is applicable whether the case is one to which … one based on common law jurisdiction by service within the jurisdiction, or one based on common law jurisdiction by service out of the jurisdiction'; Ibid.
1287 *Zumax Nigeria v First City Monument Bank plc* [2020] EWCA Civ 567.
1288 Briggs, *The Conflict of Laws* 100.
1289 Ibid.

prospective disputes between them).[1290] As regards the former, *forum non conveniens*, albeit the English court has jurisdiction over the defendant, nonetheless, the defendant may seek to bring the suit in another jurisdiction, mentioning that England is a *forum non conveniens*. Although an application for a stay of the proceedings is not equivalent to disputing jurisdiction, in order to invoke the notion of *forum non conveniens* the defendant has to make an application under Part 11 of the CPR.[1291] The defendant is also allowed to make the application for a stay at a later stage if it is proven that the grounds or basis of the matter were not obvious at the time of service.[1292] Here, the difference between disputing the jurisdiction of the English court and making an application for a stay of the proceedings lies in the outcome of the actions. In the former, if the defendant can convince the court through the action, then there is a high possibility that the court will dismiss the action.[1293] As regards the outcome of the application on the ground of *forum non conveniens*, rather than dismissing the action, the court generally stays the action.[1294] However, the English court may dismiss the action on the ground of *forum non conveniens* if the situation arises where the stay will not allow the plaintiff to bring an action in any foreign court.[1295] The fundamental difference between disputing jurisdiction and asking for a stay of the proceedings lies in conceding the jurisdiction; in the latter the defendant actually concedes jurisdiction and then applies for a stay of the proceedings, whereas in disputing jurisdiction the defendant's right tends to deny the jurisdiction of the English court from the time of being served with the documents.[1296]

In order to prove the *forum non conveniens* of the English court, the defendant has to prove that the court in another jurisdiction is more appropriate and fitting for the litigation that has been brought to the English court. The English courts have always been vigilant in dealing with such matters. They look at each and every element of the case before coming to a conclusion about whether the foreign court is more fitting for the litigation in question.[1297] In the process, the English court assesses the issues of the case from the perspective of the plaintiff. If it is found that the foreign court is less viable for the plaintiff or there is a possibility of them being treated unfairly and unjustly in the foreign court, then the English court may refuse to stay the

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1290 Ibid 101, 106.
1291 Ibid 101.
1292 *Texan Management Ltd v Pacific Electric Wire & Cable Co Ltd* [2009] UKPC 46.
1293 Briggs, *The Conflict of Laws* 101.
1294 *The Alexandros T* (2013) 1 ER 590; UKSC 70.
1295 *Haji-Ioannou v Frangos* (1999) 2 Lloyds Rep 337 (CA).
1296 Briggs, *The Conflict of Laws* 100–101.
1297 Ibid 101.

proceedings initiated by the plaintiff in the English court.[1298] The English courts, generally, prefer to concentrate on the agreement between the parties to the contract in the process of evaluating the appropriateness of the foreign court in comparison with the jurisdiction of the courts in England. However, a problem emerges when the parties lack consensus about the jurisdiction and/or court where the litigation could be heard.[1299] On principle, in situations of such disagreements on the matter of jurisdiction, English courts tend to assess all the relevant issues of the case clearly and reach a conclusion.[1300]

The assessment of the fitting court is undertaken differently in another common law country, Australia,[1301] where rather than focusing on the 'comparative appropriateness' of the foreign court like the English courts, the courts emphasise the fact that they are patently inappropriate for the hearing and trial of the case.[1302] The Australian approach is very close to the civilian view that holds the notion that judges have been conferred power by the legislature to adjudicate matters that have been brought to them, and have not been told to assess and consider whether they have the power or if any *forum non conveniens* exists, based on which the court can deny hearing the matter.[1303] The approach of the English courts is completely different in this regard. The English courts, by virtue of their long-standing inherent power to adjudicate matters with total application of the tenets of conscience and pragmaticism, take a different posture when examining matters in the process of adjudication, both in domestic as well as cross-border disputes.[1304] The principle on which the English courts tend to base their argument on matters relating to the appropriateness of the foreign court, is known as the doctrine of 'most civilised of legal principles'[1305] developed by Lord Goff of Chieveley.[1306] Relying on this principle, the English courts accept contentions as regards the jurisdiction of the foreign court being more appropriate, and by accepting the arguments of the parties and subsequently ensuring the right and apt jurisdiction for the case, the English courts also acknowledge judicial comity between sovereigns.[1307]

1298 Ibid.
1299 Briggs, *The Conflict of Laws* 102.
1300 Ibid.
1301 Ibid.
1302 *Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 CLR 197.
1303 Briggs, *The Conflict of Laws* 102.
1304 Ibid 102–103.
1305 *Airbus Industrie GIE v Patel* (1999) 1 AC 119.
1306 Briggs, *The Conflict of Laws* 103.
1307 Ibid.

English courts may order the stay of the proceedings based on the undertakings given by the defendant to the court. However, if the undertakings given by the defendant become ineffectual, the English courts can proceed with the action by lifting the stay order.[1308]

As regards a stay of the proceedings on the basis of the contract, the English courts may order this if it is proven that the plaintiff promised the defendant to be sued in a jurisdiction other than the jurisdiction of England and Wales, for any prospective dispute. Unlike the matters relating to a stay of the proceedings, where the onus to prove the *forum non conveniens* of the English court and/or the appropriateness of the foreign court, lies on the defendant, it is the responsibility of the plaintiff to disprove the claim of breach of contract being brought by the defendant in seeking a stay of the proceedings, if the plaintiff desires the English court to allow the action to continue.[1309] English courts, in this regard, first and foremost, assess the terms and clauses of the agreement, and sometimes its entirety, to ascertain whether their true construction as regards jurisdiction would be breached if the English courts allowed the trial of the actions being brought to them.[1310]

The assessment of the jurisdictional terms and clauses of the agreement are made by reference to the law that governs the jurisdiction agreement, which is typically the law governing the substantive contract.[1311] Parties shall also have to prove the materiality of the jurisdictional clauses of the agreement in order to satisfy the English court that to proceed with an action lodged will be equivalent to a breach of contract. A problem arises where there are a number of jurisdictional agreements between the plaintiff and defendant so that the court finds it very difficult to determine which one will be taken into consideration for the matter that has been brought before them by the plaintiff.[1312] After this assessment, if the court is satisfied that to proceed with the action in the English court's jurisdiction will be a breach of contract then it may order a stay, however, this is not certain.[1313] English courts normally tend to respect the choice of court agreements made between the parties,[1314] and try to interpret the clauses in a

[1308] Ibid 105.
[1309] *Donohue v Armco Inc* (2002) 1 ER 749; UKHL 64 (2001).
[1310] Ibid.
[1311] Briggs, *The Conflict of Laws* 106.
[1312] *Bank Paribas SA v Trattamento Rifiati Metropolitani SpA* [2019] EWCA Civ 768.
[1313] *The Pioneer Container* (1994) 2 AC 324 (PC).
[1314] Briggs, *The Conflict of Laws* 108.

way that would help both the parties to bring the action in the jurisdiction or court named in the agreement.[1315]

7.2.3 Service of documents to defendants not in England

As it has already been touched upon, even if a defendant was absent from England and Wales, the English courts may assume jurisdiction over the defendant if they submitted to the court.[1316] The service of documents upon defendants who are not in England will have to be performed as per the procedure set out Part 6 of the CPR, as well as the interpretations made in previous similar decided cases.[1317] In the application made to the court for permission to serve the defendant, the plaintiff has to mention the grounds as per CPR 6.37 (1) (a). The application has to be sufficiently 'full and frank' in its wording, since it will be made in the absence of the defendant.[1318] After permission has been granted, the plaintiff is allowed to make service upon the defendant residing abroad. Once the service has been made successfully, the defendant has to acknowledge the service under Part 11 of the CPR before being able to contest the jurisdiction of the English court.[1319] The burden of proof, as to why the service has been made upon the defendant, will lie on the claimant at the hearing of the application.[1320] 'Jurisdiction based on service out' is assumed to be an excessive or unconscionable jurisdiction,[1321] as a result of which the plaintiff who wishes to invoke such a jurisdiction will have to bear the onus of persuading the court.[1322]

The plaintiff has to illustrate three points in this regard.[1323] First, they have to show that the case in question does fall within one or more of the grounds mentioned in the sub-paragraphs of paragraph 3.1 of the Practice Direction 6B to Part 6 of the CPR. The second element that the plaintiff has to establish is that 'England is the proper place to bring the claim' (CPR 6.37(3)). The third and final requirement is that the plaintiff has the belief that the claim that has been made to the English court does have a prospect of success 'on its merits' if heard by the English court (CPR 6.37(1)(b)).[1324] All three elements are separate and have to be satisfied individually.

1315 *Sabah Shipyard (Pakistan) Ltd v Pakistan* (2003) 2 Lloyds Rep 571; EWCA Civ (2002).
1316 Briggs, *The Conflict of Laws* 105.
1317 Ibid 108.
1318 Ibid 109.
1319 Ibid.
1320 Ibid.
1321 Ibid.
1322 *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, Lord Diplock [65].
1323 Briggs, *The Conflict of Laws* 109.
1324 Ibid.

If the plaintiff fails to satisfy any of these claims, then they will not be able to satisfy the English court in the process of establishing its jurisdiction,[1325] albeit the interconnection between all these three elements is yet to have a well-reasoned justification.[1326]

7.2.4 Declinature of jurisdiction (forum non conveniens)

As Professor Briggs pointed out in the recent edition of his book *The Conflict of Laws*, there are several instances where the English court ceases its jurisdiction.[1327] The English courts do not have any jurisdiction on matters where the subject-matter involves immovable property situated in a foreign land, such as matters relating to the title of the land.[1328] It is to be noted that as per the modifications made in section 30 of the Civil Jurisdiction and Judgments Act 1982, the English courts now hear tort cases that involve any foreign land, however, they must not relate to the title of the land situated in a foreign country.[1329] English courts may also, by virtue of their common law precedent, hear matters that entail personal obligations even though the subject matter of the case is foreign land.[1330] Another instance where English courts are reluctant to endorse their jurisdiction is where the matter involves 'defamation tourism' and the defendant is not from England and Wales, prior to Brexit this included the Member States of the EU. English courts are, however, allowed by section 9 of the Defamation Act 2013 to evaluate the facts of the case to ascertain whether English jurisdiction is the most appropriate and fitting jurisdiction for the case. This rule has been criticised for being brief and not transparent.[1331] It has been suggested that rather than giving half-hearted discretion to English judges, without any provision governing the subject matter of jurisdiction in regard to defamation by a defendant who is based in England and Wales, it would have been much better if the statute had manifestly given discretion to the English judges not to exercise jurisdiction.[1332]

English courts also do not get involved in matters involving non-commercial claims brought against states and diplomats.[1333] The very reason behind the resistance of the English courts is

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1325 *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* (1994) 1 AC 438.
1326 Briggs, *The Conflict of Laws* 109.
1327 Ibid 44–48.
1328 *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1979] AC 508.
1329 Briggs, *The Conflict of Laws* 44.
1330 *Penn v Baltimore* (1750) 1 Ves Sen 444.
1331 Briggs, *The Conflict of Laws* 45.
1332 Ibid.
1333 *Holland v Lampen-Wolfe* (2001) 1 WLR 1573 (HL).

that they are not allowed to rule on any act by the sovereign of another country, neither are they allowed to scrutinise foreign acts; these areas are beyond the competence of the English courts as far as PIL disputes are concerned.[1334]

Unlike any connection test or domicile or residence, the connecting factor that English courts have established at common law in assessing if they have jurisdiction over a case involving cross-border elements is the service of documents upon the defendant. This is a process that is more procedural, as discussed above. Albeit England and Wales, by virtue of their long-standing common law interpretative deportment, opt for an approach in regard to jurisdiction in PIL disputes that apparently seems to be very pragmatic, thorough, more overarching and subjective, due to a lack of straightforward common-law rules on jurisdiction, it may sometimes become arduous for foreign litigants, especially those who are from civil law jurisdictions, to decipher the rules and enter litigation proceedings in England.

7.3 Applicable law

English common law with regard to applicable law or governing law of PIL disputes has been supplanted and put on a statutory footing by the enactment of the Contracts Act (Applicable Law) Act 1990 that has implemented the Rome Regulations. As previously mentioned, the application of this statute has not been hindered in England and Wales by Brexit. Since the relevant provisions of Rome I have already been elaborately discussed section in 5.3 above, this will not be repeated here.

7.4 The recognition and enforcement of foreign judgments

The matter of enforcement of foreign judgments is typically and inextricably linked with the recognition of the same in England and Wales, like other jurisdictions. However, situations might arise where the English courts would be willing to recognise the foreign judgment without enforcing it. Such situations include where the foreign judgment goes in favour of the defendant, perhaps stating that no breach has been committed by the defendant, hence, he is immune from paying compensation. If the claimant of the same litigation wants to embark upon proceedings on the same cause of action, then the defendant can and will bring the foreign judgment into the proceedings as his defence. In such a situation, the English court shall only

[1334] Briggs, *The Conflict of Laws* 45–46.

recognise the foreign judgment. The person who wishes to obtain reliefs being rendered by any foreign court in England and Wales may be called a judgment creditor or just a claimant.[1335]

The ground on which the English judges previously used to allow litigants to ask the English courts to recognise and enforce foreign judgments was the 'ground of comity'.[1336] However, as Professor Piggot articulated, this historical ground has been unseated by 'the doctrine of obligation.'[1337] The doctrine of obligation was introduced in 1842. It holds that if a judgment of a foreign court of competent jurisdiction orders a certain sum of money to be payable to the plaintiff by the defendant, the liability or the onus for paying that certain sum of money as ordered by the foreign court becomes a legal obligation and that may be recognised and enforced in England and Wales by an action of debt.[1338] This is an underlying principle of the recognition and enforcement of foreign judgments, and has been summarised by the English court in the case of *Schibsby* as:

> "The judgment of a court of competent jurisdiction over defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce."[1339]

From a different point of view, it could also be said that by such judgment of a foreign jurisdiction 'a new right' has been vested in the judgment creditor or plaintiff and this imposes a new obligation upon the debtor or defendant.[1340] The defendant's obligation to pay was identified by Lord Esher as being premised upon implied contract.[1341] This, however, does not indicate that the enforcement of a foreign judgment is an implied contract, it could rather be said from a procedural legal point that the debtor implicitly agreed to pay the creditor.[1342] It is worth mentioning that under the Limitation Act 1980 a creditor is barred from bringing any action for the recognition and enforcement of foreign money judgments after the expiration of six years from the date when the judgment was rendered by the foreign court, whereas for English judgments the time period is twelve years.[1343]

1335 Briggs, *The Conflict of Laws* 131.
1336 Fawcett and others 514.
1337 Ibid.
1338 *Adams v Cape Industries plc* [1990] Ch 433 [552]–[553].
1339 *Schibsby v Westenholz* (1870) 6 LR QB 155 [159].
1340 *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] UKPC [13].
1341 Grant v Easton (1883) 13 QBD 302 [303].
1342 Fawcett and others 515.
1343 *Re Flynn (No 3)* (1969) 2 CH 403.

This old doctrine of obligation has been criticised for being overly theoretical and philosophical because it often emphasised only matters of state sovereignty and independence, and was not able to include policy considerations and reveal what type of foreign cases should be recognised and enforced and which ones should not.[1344] The Supreme Court of Canada considered the issue of the recognition and enforcement of foreign judgments from a more pragmatic and modern point of view and explicated the notion of comity as being affiliated with tenets of 'justice, necessity and convenience'.[1345] It has been opined in the case of *Morguard* that:

> "Comity in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[1346]

The Canadian viewpoint and consideration on the recognition and enforcement of foreign judgment has given a new basis to the common law world. The consequence of this is that all countries across the world should work on the maxim of jurisdictional reciprocity. As it has been averred in the case of *Hunt* that 'Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe.'[1347]

7.4.1 Direct enforcement of foreign judgments by statute

The recognition and enforcement in England and Wales of foreign judgments of some particular countries that have constitutional and historical relationships with the UK are governed by statutes including the Administration of Justice Act 1920 (AJA), and the FJA (mentioned above).[1348]

The AJA contains provisions with regard to the registration of judgments relating to money payable of the superior courts of some specified jurisdictions. The Act also entails provisions relating to the restrictions as to when and in what circumstances the registration of money

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[1344] Fawcett and others 515.
[1345] *Morguard Investments Ltd v De Savoye* (1991) 76 DLR 4th 256.
[1346] Ibid at 269.
[1347] *Hunt v T & N plc* (1993) 109 DLR 4th 16 (Supreme Court of Canada) [16].
[1348] Falconer and others 125.

payable is to be granted. It was originally enacted for the dominions and territories of the Commonwealth, however, the Act currently applies to "Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Botswana, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Christmas Island, Cocos (Keeling) Islands, Republic of Cyprus, Dominica, Falkland Islands, Fiji, The Gambia, Ghana, Grenada, Guyana, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Montserrat, New Zealand, Nigeria, Territory of Norfolk Island, Papua New Guinea, St Christopher and Nevis, St Helena, St Lucia, St Vincent and the Grenadines, Seychelles, Sierra Leone, Singapore, Solomon Islands, Sovereign base of Akrotiri and Dhekelia in Cyprus, Sri Lanka, Swaziland, Tanzania, Trinidad and Tobago, Turks and Caicos Islands, Tuvalu, Uganda, Zambia and Zimbabwe."[1349]

A judgment creditor from any of the above-mentioned countries can apply for the enforcement of a foreign judgment to the High Court in England within twelve months from the day the judgment was rendered under section 9 (1) of the AJA in order to register the foreign judgment in the court. Sections 9 (2) and 9 (3) have clearly articulated which foreign judgments are registrable in the English court and which are not, respectively.

As already mentioned, the FJA deals with the recognition of judgments of the jurisdictions that have reciprocal enforcement treaties or conventions with the UK. Unlike the AJA, the FJA applies only to non-penal money judgments such as those that do not impose penalties for any crime, multiple damages or exemplary damages.[1350] The countries whose judgments may be recognisable and enforceable in England and Wales, or those that offer a similar reciprocal treatment of UK judgments in their national courts include "Australia, Canada, (apart from Quebec), India, Pakistan, Bangladesh, Israel, Guernsey, Jersey, the Isle of Man, Suriname and Tongo."[1351] Judgment creditors from the above-mentioned countries can apply to the High Court in England for the enforcement of foreign judgments within six years from the day the judgment was rendered by their respective national court by virtue of section 2 of FJA. Situations have been enumerated in section 4 of the Act as to when the registration of a judgment shall be endorsed by the English courts and when not.

Recognition and enforcement within the UK means the free movement of judgments between England and Wales, Scotland and Northern Ireland. This is regulated by the Civil Jurisdiction

[1349] Ibid.
[1350] Ibid.
[1351] Ibid.

and Judgments Act 1982. Under section 18 of the Act, a judgment given in any part of the UK shall be enforced in any other part of the UK by means of registration under Schedule 6 and Schedule 7. Schedule 6 deals with money judgments and Schedule 7 deals with non-money judgments. It is, however, worth mentioning that this provision does not apply to any common law ruling.[1352]

7.4.2 The recognition and enforcement of foreign judgments at common law

Judgments of the countries that do not have any reciprocal bilateral or multilateral treaty or convention with the UK are regulated by common law. This includes the EU and EFTA countries. It should be noted that both the Recast and the Lugano Convention 2007 were incorporated in the Civil Jurisdiction and Judgments Act 1982. However, these are no longer applicable in the UK, although, as mentioned above, the provisions of these EU instruments shall apply to cases between UK and EU nationals, if the proceedings began before the expiration of the Brexit transition period.[1353]

First, the English courts look at the type of a foreign judgment, to determine if it is a judgment *in personam* or a judgment *in rem*. The former involves issues relating to a breach of contract and the commission of tort by the defendant. Judgments of such cases will either order the defendant to pay compensation or damages to the plaintiff and/or order the defendant to do or desist from doing something.[1354] A judgment *in rem*, on the other hand, involves rights of the parties over moveable property, and family matters such as the status of a person that may not only affect the litigants in the case but also third parties. The core difference between a judgment *in personam* and a judgment *is rem* has been averred in the case of *Cambridge Gas Transportation*. This stated that in a judgment *in rem*, judges determine the existence of rights over property, on the other hand, a judgment *in personam* has been characterised as the determination of the judges as regards the existence of rights against a person.[1355]

[1352] Fawcett and others 574.

[1353] Richard Gwynne, 'Enforcement of EU Judgments Post Brexit: An Exclusivity Conundrum' [2021] Lexology Enforcement of non-UK judgments prior to 1 January 2021 <https://www.lexology.com/library/detail.aspx?g=9e4f95d0-fa00-4302-b565-618968f7c42e>.

[1354] Hill and Shuilleabhain 168.

[1355] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [13].

Recognition of judgments *in personam* is discussed below, followed by examination of enforcement of foreign judgments.

7.4.2.1 The Recognition of foreign judgments in *personam*

A judgment *in personam,* as already mentioned, determines the existence of the rights of an individual over another.[1356] The first requirement for such a judgment to be recognised as well as enforced in England and Wales is that the foreign court that rendered the judgment in question had jurisdiction in the 'international sense' over the defendant. The foreign court may, according to its domestic norms and procedures, adjudicate the matter that would be binding on the defendant, and that would be absolutely fine and justifiable in the eyes of English law, unless it has been found that the judgment does not really generate any cause of action that is actionable in England and Wales. When it is to be understood and concluded that the foreign court or country did have jurisdiction over the defendant, a problem arises when the judgment has been rendered in the absence of the defendant and the defendant seems to be of the view that they owe no duty to obey the order or comply with the judgment of the foreign court or tribunal. In this regard, there exists a correlation between the rights of the tribunal or courts to issue an order and the legal obligation of the defendant to obey it.[1357] At present, the English courts work on the basis of reciprocity under common law in recognising and enforcing foreign judgments in UK territory, as discussed above. In the situation where the defendant was absent while the judgment was rendered by the foreign court, an English court could apply its own law of the court's right to summon to this situation. Subject to some exceptions conferred by the statute, English courts can only exercise the right to summon against those persons who are present in the country.[1358] Therefore, applying this understanding of English law to this situation, if the defendant was not present in the country or jurisdiction of the order or judgment rendered, then whether or not the foreign court did serve notice or applied the correct summons according to the law of its land will be irrelevant for the English courts to consider.[1359]

The elements for the English courts to consider when examining if the judgment rendered in a foreign court had jurisdiction over the defendant are: if the defendant was present in the country while the judgment was rendered, and if the defendant had any business relationship with the

[1356] Fawcett and others 508.
[1357] Fawcett and others 517.
[1358] *Employers' Liability Assurance Corp v Sedgwick, Collins & Co* [1927] AC 95 [114].
[1359] Fawcett and others 517.

jurisdiction that rendered judgment. If the answers to these two questions are negative, then even if the defendant is a citizen of that jurisdiction, they would be assumed to be exempt from the foreign jurisdiction as regards the recognition and enforcement of the foreign judgment.[1360] However, such requirements would be relaxed if the defendant voluntarily submitted to the decision made by the court.[1361] With that, the second requirement of judgments *in personam* comes to the fore – the defendant must be present in the jurisdiction of the court while judgment was rendered in order for it to be recognised and enforced in England and Wales.

The defendant does not have to be a resident of the foreign jurisdiction, mere presence of the defendant for a short period of time will be sufficient in order for the foreign court to have jurisdiction over them.[1362] This position was also endorsed by the Court of Appeal, obiter, in the case of *Adams*.[1363] However, the Court of Appeal warned, in the same case, that the presence of the defendant in the foreign jurisdiction will have to be voluntary. Hence, they should not be induced by any fraud, deceit or duress.[1364] The discretion of the English courts in regard to reaching a conclusion as to whether the mere presence of the defendant will suffice plays a vital role as well.[1365]

The criteria that need to be met in cases where any company or corporate establishment has been identified as a defendant is set out in the case of *Adams.* These are: (i) the business institution does have a fixed business place or address or a branch office in the foreign jurisdiction from where business has been carried out for more than a minimal period of time; that applies both to business corporations and representative business institutions; (ii) and the business is carried out from the place of the foreign jurisdiction; that also includes both business corporations as well as any representative or branch office.[1366]

The defendant shall be subject to the jurisdiction of the foreign court if they voluntarily submitted an appeal to the foreign court against the decision that has been served. If they do not succeed, and the English court has been requested to become involved by virtue of common law proceedings for the recognition and enforcement of judgments, then the defendant cannot

[1360] *Harris v Taylor* (1915) 2 KB 580 [589].
[1361] Ibid.
[1362] *Carrick v Hancock* (1895) 12 TLR 59.
[1363] *Adams v Cape Industries plc* [517-518].
[1364] Ibid.
[1365] Fawcett and others 518.
[1366] *Adams v Cape Industries plc* [530-531].

assert that the foreign court did not have jurisdiction.[1367] The matter of the appearance of the defendant in the foreign court appears to be confusing on many occasions, especially in situations where the defendant submitted to the court only to protest against its jurisdiction, typically by stating that the foreign court was not the *forum conveniens*. One of such appearances has been termed as submission for the purpose of coming to the conclusion that the defendant was subject to the jurisdiction of the foreign court in the case of *Henry*.[1368] The Court of Appeal, however, in the same case, kept open the question of whether the defendant's appearance would be considered as submission in the sense that the foreign court had jurisdiction.[1369] The outcome of the case was utterly unjustifiable and too incongruous to be followed by judges in subsequent case with similar facts and circumstances.[1370]

This old common law position was later supplanted by Section 33(1) of the Civil Jurisdiction and Judgments Act 1982, that enunciates that:

> "For the purpose of determining whether a judgment given by a court of an overseas country should be recognised and enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely –
>
> (a) to contest the jurisdiction of the court;
>
> (b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country;
>
> (c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings."

The above shall apply to judgments of cases which have been rendered overseas, that is outside the UK,[1371] and shall not apply to judgments intra UK.[1372] Since the provision does not differentiate as regards its application in matters relating to recognition and enforcement between common law and statute, this provision applies to both instances.[1373] Although section

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1367 *Schibsby v Westenholz* [161].
1368 *Henry v Geoprosco International Ltd* [1976] QB 726 (CA).
1369 Fawcett and others 522.
1370 Ibid.
1371 Civil Jurisdiction and Judgments Act 1982; section 50 of the Civil Jurisdiction and Judgments Act 1982.
1372 Ibid section 33 (2) of the Civil Jurisdiction and Judgments Act 1982.
1373 Fawcett and others 523.

33(1) has been followed by English judges quite prodigiously, it has also been termed a 'negative provision' and inadequate, since it does not mention anything regarding the circumstances in which the defendant would be thought of as subject to the jurisdiction of the foreign court.[1374] Hence, judges have to ultimately exercise their discretion and rely upon their reasoning and conscience in terms of reaching any conclusive decision about the submission of the defendant to the foreign court and/or the defendant being subject to the jurisdiction of the foreign court, unless they find any related precedent.

English courts are reluctant to take the domicile or nationality or political nationality of the defendant into consideration in order to assess if the defendant was subject to the jurisdiction of the foreign court.[1375] This can be looked at from both the theoretical and practical perspectives. As per the former, in the light of the proposition proffered by Dicey,[1376] if the defendant is a national of a country, then he is always bound by the commandments of the sovereign as well as of its courts. However, a counter argument has been put forward by Wolff,[1377] who said that no sovereign country is under any obligation or duty to assist the enforcement of any obligation relating to any foreign jurisdiction. This observation appears to be contradictory to the modern common law approach based on comity towards PIL, as mentioned earlier, which is heavily and quite rightfully premised upon the maxims of mutual cooperation. However, the problem rather lies with the pragmatic stance of not taking nationality or domicile into consideration while understanding the jurisdiction of a foreign court. As illustrated by Fawcett[1378], if a Korean court renders judgment against a person who was born in Korea, but just after his birth moved to England and lived there all his life, acclimatised to its culture and ethos, will it be justifiable from any angle for the English court to recognise and enforce that judgment considering the defendant's nationality? The matter of nationality or domicile is also not able to give conclusive evidence to the host, if it comes from countries like the US or Australia where there are multiple distinct legal systems and law districts.[1379]

1374 Ibid.
1375 Fawcett and others 527–528.
1376 Dicey, *Dicey's Conflict of Laws* (JHC Morris ed, 6th edn, Stevens & Sons Ltd 1949) 357.
1377 Fawcett and others 528.
1378 Ibid.
1379 Ibid.

The locality of the cause of action, especially in cases of tort,[1380] or the choice of law agreement between the parties, shall not be the deciding factor to conclude if the foreign court had jurisdiction over the defendant.[1381]

A different approach has been taken by the Supreme Court of Canada on the issue of the recognition and enforcement of foreign judgments. This is that a judgment rendered in another province can be recognised and enforced in another if (i) the judgment rendering court exercised its jurisdiction appositely in the matter; (ii) if the jurisdiction of the case is substantially and inextricably linked with the matter.[1382] The test of 'substantial connection'[1383] articulated by the Canadian court should not only apply to intra Canada judgments. La Forest J in the same case, as regards the universal application of such approach, opined that 'the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.'[1384] The PIL scholars in England and Wales have proposed the application of a substantial connection test or something similar.[1385] The English court applied this connection for the first time in a case involving the issues of the recognition of a divorce that took place abroad, at common law.[1386] However, the English judges have maintained an orthodox conservative approach in matters of examining the international jurisdiction of the foreign court in order to recognise and enforce foreign judgments in England and Wales.[1387] They also examine issues associated with natural justice and the public policy defence that might be available to the defendants, in order to ensure that the defendants had not been wrongfully or inappropriately treated by the foreign courts.[1388]

7.4.2.2 The Enforcement of foreign judgments

Foreign judgments are typically enforceable in England and Wales if the judgment is final and relates to any payment of money and is given in the presence of the defendant, during the proceedings of the case.[1389] From an orthodox point of view, it could rather be said that a

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1380 *Sirdar Gurdyal Singh v The Rajah of Faridkote* [1894] AC 670 [684].
1381 *Dunbee Ltd v Gilman & Co (Australia) Pty Ltd* (1968) 2 Lloyds Rep 394.
1382 *Morguard Investments Ltd v De Savoye*.
1383 Fawcett and others 530.
1384 *Morguard Investments Ltd v De Savoye* [269].
1385 Fawcett and others 531.
1386 *Indyka v Indyka* (1969) 1 AC 33.
1387 Fawcett and others 531.
1388 Ibid.
1389 Adrian Briggs, 'Foreign Judgments: The Common Law Flexes Its Muscles' (2011) 17 Trust & Trustees 328, 328.

foreign judgment is, was and will never be enforced under common law in the UK unless the judgment has been interpreted as a money judgment.[1390] It could also be said that only judgments *in personam* are recognisable in England and Wales subject to requirements set out at common law. Consequently, a question might arise as to how foreign money judgments are recognised and enforced in the UK under common law? To answer, one has to understand how the English legal system works. One of the central important and core pillars of the English legal system is the concept of 'Parliamentary Sovereignty'. As per its fundamental notions, in order for any international, multilateral or bilateral treaty, convention, or regulation to be applied in the UK, it has to go through the parliamentary process. This means that unless and until the incorporation of an international instrument has been sanctioned by an Act of Parliament, it cannot be enforced in the UK. As described earlier, a bilateral or multilateral treaty as regards reciprocal cooperation on the recognition and enforcement of foreign judgments between the UK and any foreign country must be incorporated into the law of the UK by legislation.[1391] It could succinctly be said that no international law or international legal instrument can be directly enforced in the UK.[1392]

Such standpoint of the UK legislature is quite similar to how the English courts enforce foreign money judgments in England and Wales in juridical proceedings. It should, however, be kept in mind that the English courts are not the law-making authority unlike the Parliament; they only interpret the statutory provisions where needed. For any foreign money judgment to be enforced in England and Wales, the claimant needs to go through a process of applying for an English money judgment as regards the debt via a writ action in the Queen's Bench Division. The result of this action would be that the English money judgment, which would 'mirror more or less faithfully, the foreign, unenforceable, one', would be enforced in England and Wales. An English money judgment would work as a basis for execution of a foreign money judgment.[1393] Hence, as Professor Briggs said, the common law and the statutory provisions are made of the same clay and act in the same disposition.[1394] The procedure at common law is that the judgment creditor has to obtain a summary judgment from an English court under Part 24 of the Civil Procedure Rules 1998 in order for a foreign money judgment to be enforced

1390 Ibid.
1391 Briggs, 'Foreign Judgments: The Common Law Flexes Its Muscles' 329.
1392 Lawrence Collins and others, *Dicey, Morris & Collins, The Conflict of Laws* (14th edn, Thomson 2006) Rule 3.
1393 Briggs, 'Foreign Judgments: The Common Law Flexes Its Muscles' 328.
1394 Ibid 329.

in England and Wales. This process works in the same manner at statutory laws namely AJA, FJA, and the Civil Jurisdiction and Judgments Act 1982.[1395] Under these statutes, the judgment creditor has to apply for registration of a qualifying foreign judgment at the High Court (England and Wales). When this is done, as per the provisions of the statutes, the foreign money judgment would have the same effect as judgments of the High Court (England and Wales) and, hence, would be recognised and enforced in England and Wales. This is the process for a judgment creditor to enforce a foreign judgment in England and Wales; they must obtain an English money judgment, either by statute or common law, in order for the foreign money judgment to be equivalent to an English judgment.[1396]

Although English courts have affirmed the enforcement only of money foreign judgments in many cases, recent case law developments in the English courts no longer testify to this avowal, as Briggs observed in the outcome of *Pattni*.[1397]

Apart from the requirements mentioned above, as regards the enforcement of foreign judgments in England and Wales, the English courts take other important issues into consideration such as the finality of the foreign judgment.[1398] In order for a foreign judgment to be deemed final and conclusive, it has to ensure that it has covered all the important facts and issues of the case as well as pointed out disagreements and controversies that were present between the litigants.[1399] The English court also ensures that nothing entailing in the foreign judgment has been changed or modified in any later proceedings of the same litigation.[1400] One of the other important issues that might come to the fore in the matter of the recognition and enforcement of foreign judgments in England is whether the application of law has been erred as regards English law by the foreign court. Two important aspects need to be considered: whether the error has occurred in the application or invocation of substantive law or in procedural aspects or was it a mistake in regard to the assumption of jurisdiction of the foreign court.[1401]

1395 *Grant v Easton*.
1396 Briggs, 'Foreign Judgments: The Common Law Flexes Its Muscles' 329.
1397 Ibid 330.
1398 Fawcett and others.
1399 *Re Riddell* (1888) 20 QBD 512 [516].
1400 Ibid.
1401 Fawcett and others 539-541.

Mistake in relation to the English law cannot be put forward by the defendant as a defence in English courts under common law.[1402] A procedural error in the case will also not prevent the English courts from recognising and enforcing a foreign judgment if it complies with the requirements of the recognition and enforcement of foreign judgments in England.[1403] Lindley LJ in regard to such an issue articulated that:

> "All that the English courts look at are the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—namely its competences to deal with the sort of case that it did deal with, and its competence to require the defendant to appear before it."[1404]

English courts, however, can refuse to recognise a foreign judgment if it is seen that the court had no power to hear the case according to the law of its jurisdiction.[1405] In the case of *Adams*[1406] the English court refused to recognise a divorce decree because it found that the judge who gave the judgment in the foreign court was not a judge *de jure*. English courts shall invoke the maxim of *estoppel per rem judicata* where required to do so, in order prevent the unsuccessful party of a foreign jurisdiction lodging any suit in an English court for a cause of action that has already been conclusively adjudicated by a foreign court.[1407] It has been patently propounded by the court in the case of *Carl Zeiss* that:

> "The rule of estoppel by *res judicata*, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, any party or privy to such litigation as against any other or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits."[1408]

The premise of this rule is that a claimant who wishes to have the foreign judgment recognised and enforced in England is only allowed to sue on the judgment rendered by the foreign court. They are not allowed to bring any proceedings against the same defendant and on the same cause of action.[1409] English courts have a strong position, like the courts of other jurisdictions,

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1402 *Goddard v Gray* (1870) 6 LRQB 139.
1403 *Pemberton v Hughes* [1899] Ch 781.
1404 Ibid at 790.
1405 *Papadopoulos v Papadopoulos* (2003) 301 AD 2d 391 (Appellate Division of the Supreme Court of the State of New York).
1406 *Adams v Adams* 188.
1407 Fawcett and others 544.
1408 *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] AC 853 [933].
1409 Case C-19/09 *Wood Floor v Silva Trade* (n 133).

as regards anything involving fraud or public policy, including foreign judgments. If it is found that any fraud or any activity contrary to the public policy of the UK has taken place in the foreign judgment, then it will not be recognised and/or enforced in England and Wales.[1410] This common law principle of *estoppel per rem judicata* has later been widely enunciated in section 34 of the Civil Jurisdiction and Judgments Act 1982 as:

> "No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland."

The jurisdiction of the adjudicating foreign court and the issue of the defendant being subject to that have been the focal point when considering factors for the English courts at common law to conclude whether a foreign judgment may be recognised and enforced in England and Wales. However, by virtue of their common law perspectives the courts have always sought other elements associated with the foreign judgment in order to ensure that the defendant has been treated fairly by the foreign court.

On the basis of the above discussion, a question may arise as to whether the English judges' efforts have sometimes become extraneous and uncertain which might frustrate foreign litigants, especially those who are not familiar with the common law system of adjudication in the PIL proceedings in England.[1411] Albeit there are several statutory instruments in place, as it has been observed from the above discussion, the application of these statutory instruments is very limited.

The key take-away from these three chapters is that connecting factors used in international commercial contracts within the aforementioned three jurisdictions do not effectively resist controversies and incoherencies as to how jurisdiction, application law have been determined as well as foreign judgments to be recognised and enforced by the state courts.

[1410] *Re Macartney* (1921) 1 Ch 522 [527].

[1411] Andrew Dickinson, 'Walking Solo: A New Path for the Conflict of Laws in England' (*Oxford Law*, 19 January 2021) <https://www.law.ox.ac.uk/business-law-blog/blog/2021/01/walking-solo-new-path-conflict-laws-england>.

Conclusion

8.1 Theoretical and practical challenges in other areas of PIL

Practical problems existing in the invocation of fastening determinants in contracts and their unwarranted ramifications in the overall PIL justice system, that have been discussed in the preceding chapters, do exist in other areas of PIL, namely tort, family law, etc. Since the nature as well as the very fundamental basis of the critical exploration of connecting factors in all areas of PIL are fundamentally similar, it would be repetition if the same analysis is carried out in other areas of PIL. However, additional complexities can be found to be prevalent in different areas of family law such as religious and cultural barriers in the recognition of marriage or transnational marriage in another jurisdiction. It is to be noted that the philosophical and theoretical impact of religion and culture on international law and PIL has been broadly discussed in chapter 1.

Family law has been considered as one of the most delicate areas of law by many renowned legal philosophers. As a result of such sensitivity, the unification of neither the PIL rules nor the substantive law in this area has been formulated in the way that it has in other areas of PIL, such as contract and tort.[1412]

One of the core practical barriers to the unification of PIL rules at the international level in family law is that its aspects are indissolubly embedded within the legal culture of their respective countries.[1413]

According to some commentators, it is not only the unification of the PIL rules and/or substantive law in the area of family law at any international or regional level, such as the EU, that is patently unfeasible from a political perspective, but also the harmonisation between the EU states in this area of law is a significant challenge. In fact, it is near to impossible for the EU actors working towards the unification and harmonisation of family law based on the long-established principle of 'united in diversity'.[1414] The problem arises for the forum to deal with

[1412] 'Draft Council report on the need to approximate Member States' legislation in civil matters' 29 October 2001, adopted on 16 November 2001, Document No 13017/01 Justciv 129 [3], where the Council states that family is 'very heavily influenced by the culture and traditions of national (or even regional) legal systems, which could create a number of difficulties in the context of harmonisation'; NA Baarsma, *The Europeanisation of International Family Law* (TMC Asser Press 2011) 3–4.

[1413] Ibid 3–4.

[1414] Ibid 4.

family law matters when it encounters the presence of any alien factor. As Professor Dr Guillaume has rightly pointed out, 'The difficulty in private international law lies in the fact that conflict of law rules must be configured in such a way as to be able to deal with foreign legal institutions unknown to Swiss substantive law.'[1415]

The ubiquitous presence of religious diversity and multiculturalism around the world, especially in the West, can be seen as both a blessing and a curse. It is a blessing in the sense that the world has become a close-knit community that gives people opportunities to learn more and gather knowledge from each other quickly and practically. Conversely, it is a curse in the sense that it sometimes leads to unpleasant dissonance and politics as regards whose ideology, religious fiats and cultural values are to subsist over others. One of the foremost substantiations of this problem can very much be found in the area of family law.

Many areas of PIL, especially family law, appear to be closely related to public law from the perspectives of politics, policy and religion. The ideological cloak that states furtively, and sometimes overtly, tend to wear are of Christianity, Judaism and Islam. The subterranean interplay between law, politics and religion at times seems so difficult to decipher.[1416] As Ferrari and Cristofori articulated:

> "Everyone today agrees on the new prominent role religions have acquired in politics, law and economics, not to mention other fields of public life. Nevertheless, we still miss the necessary instruments to decipher and understand the causes and effects of this re-enchantment of the world."[1417]

Apart from these philosophical barriers being sometimes entangled with practical aspects in the field of family law at the PIL level, such as the recognition of a marriage in a jurisdiction other than where it was held, the problems of jurisdiction, applicable law and the recognition and enforcement of foreign judgments in family law are similar to those of contract. As in contract, national and international instruments have been developed in the area of family law and tort in PIL. Hence, there is a call for a discussion of whether connecting factors, being the most powerful element of PIL, have been able to eliminate or curtail the problems of cross-border family law matters, such as which jurisdiction, governing substantive law or applicable

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[1415] Florence Guillaume, 'The Connecting Factor of the Place of Celebration of Marriage in Swiss Private International Law' (2019) 21 Yearbook of Private International Law 399, 402.

[1416] Jane Mair and Esin Örücü (eds), *The Place of Religion in Family Law: A Comparative Search* (Intersentia Ltd 2011) 359–360.

[1417] S Ferarri and R Cristofori (eds), *Law and Religion in 21st Century: Relations between States and Religious Communities* (Ashgate 2010) Preface, xvii.

law would be apposite for a particular family law matter involving cross-border elements, as well as when and in what circumstances a judgment of a jurisdiction is recognised and enforced in another jurisdiction.

8.2 Concluding assessment and recommendations

The question that emanates from the narratives of the preceding chapters is that if the employment of connecting factors in PIL serving the jurisprudential purpose of PIL dispute adjudications namely in three jurisdiction Switzerland, England and Wales and the EU. The connecting factors enunciated in the PIL rules at domestic, regional and international levels, have not been able to eliminate the controversies and intricacies regarding the jurisdiction, applicable law, and the recognition and enforcement of foreign judgments in cross-border disputes. Different definitions of the same connecting factor across jurisdictions, the adoption of heterogeneous connecting factors, as well as different and sometimes contradictory characterisations of cause of action and rule of law made by state courts, often call the adjudication procedure of cross-border disputes into question. Has the dispute been adjudicated in the appropriate jurisdiction and/or has the relevant substantive/governing law been applied in the dispute adjudication? There is currently no solution to this unavoidable issue due to the fact that there is no supranational court to judge international disputes between individuals. One could imagine that a permanent solution would be to create a supranational judicial system where all the PIL disputes would be adjudicated in a single unit justice system. Such a judiciary system could only be implemented if the power to judge private law disputes between individuals was entrusted to a court that would not be attached to any state judicial system.

It may, however, be argued whether unification of PIL rules as well as substantive law in different areas would be sufficient to eradicate the existing lack of coordination of PIL. The unification may obliterate problems relating to applicable law or governing substantive law; however, jurisdictional and judicial issues can still hinder the global unification of PIL, both legislatively and judicially. It is worth mentioning here that unification of substantive law has gradually been accomplished in the areas of contract and commercial law such as CISG, UNIDROIT. However, the unification of substantive law is yet to be seen in other areas of PIL such as family law. Even if substantive law and PIL rules were unified, firstly, there will always remain a question as to whether the jurisdiction other than that of the forum would be more appropriate to adjudicate a matter entailing cross-border elements (as has been seen in different

cases). Secondly, there would be a risk of having different interpretations of the unified substantive law provisions made by national courts, as is the case in interpretations of the unified PIL rules made by national courts as witnessed in the foregoing chapters. This has proven to be the most significant stumbling block to the harmonisation and coordination of any legal and judicial order. Thirdly, outright unhindered movement of judgments would still be an issue.

The creation of a supranational court based on ODR to judge private law disputes between individuals would offer many advantages while eliminating the use of connecting factors would remedy the difficulties associated with the international jurisdiction of state courts. Parties, regardless of their location, would be able to submit their dispute to this judicial system. There would not have to be a particular connection between the parties or the case and the court. Nor would the most appropriate forum have to be determined.

One may argue that the process of adjudication and decision of a state court on a civil dispute that does not involve any foreign element may also be questioned; does that mean state courts should also be abolished for cases that are purely domestic in nature? The answer to this would be neither the process of adjudication nor the decision of a state court on a civil dispute that does not involve any foreign element, associate with concerns regarding the appropriate jurisdiction, apposite applicable law and the recognition and enforcement of foreign judgments from a cross-border litigation perspective meaning multiple states involvement perspective. And these elements, unlike the elements in the process of adjudication and decision of a state court on a civil dispute that does not involve any foreign element, cannot be questioned through legal mechanisms such as appeal, judicial review, writ where only matters as regards error in the process of how the case has been conducted, error in the application of law, error in judgment, legality and constitutionality of the decisions of state courts etc are challenged before the court of the law. The comparison between the adjudications of a purely domestic civil dispute and a civil dispute involving foreign element would therefore be both theoretically and practically incongruous.

Moreover, unlike in the situations of dealing with domestic civil cases that do not involve any foreign element, state courts have to deal with external factors in adjudicating PIL disputes which can be questioned under the notion of state sovereignty and extra-territoriality. In fact,

judges enjoy less freedom in adjudicating PIL disputes compared to disputes that do not involve any foreign element.[1418]

If the current trajectory of PIL or the application of private law across jurisdictions is viewed to be premised upon: a) the European inclination towards the 'jurisdiction selection technique' which includes notions such as 'comity' and 'rights of parties' proposed by Huber, Story, 'vested rights' proposed by Dicey, 'society of states' (which could be seen similar to 'comity') proposed by Westlake; b) the American inclination to 'rule-selection technique' which includes notions such as 'governmental interests approach' proposed by Currie, 'comparative impairment' suggested by Baxter, 'principles of preference' proposed by Cavers, then it is quite evident that these conceptual frameworks have turned out to be futile to create harmonisation in PIL.[1419]

If the globalisation theory of Savigny is understood to be the cornerstone of today's trend of PIL, which is prominently reflected in the unification and standardisation of PIL rules at the supranational levels (e.g. EU) and international levels (e.g. HCCH), then it can be said that such ambitious unifications have also not managed to resolve the controversies surrounding PIL especially in matters concerning jurisdiction, applicable law and the recognition and enforcement of foreign judgments, thus failed to uphold Savigny's overarching theme of globalisation within PIL, as found in my research.[1420]

The idea of supranational judicial system for cross-border disputes could be related to the Savigny's conception of PIL as a part of single international system or the globalisation within PIL.[1421] Though Savigny's narration on PIL does not include any international judicial system for the cross-border disputes, however, the quintessence of his conception is similar to that of the proposed supranational judicial system. And I believe that stressing the institution of a judiciary for PIL cases at the supranational level over internationalisation of PIL rules would have taken PIL jurisprudence to an unprecedent level by solving a lot of problems implicated in PIL cases that are being frequently faced by cross-border litigants as well as state courts today.

[1418] This has been discussed in 2.3 of this thesis.
[1419] All these notions have been thoroughly discussed in chapter 2 of this thesis.
[1420] This has been highlighted in chapter 2 and part III of this thesis.
[1421] Mills 35, 37; This has been discussed in chapter of this thesis.

By establishing a single supranational court, the issues of inconsistencies in characterisation of cause of action and rule of law between state courts could be permanently banished as well. Such a judicial system would not only allow the parties to save time and money but would also safeguard them from the risk of having to defend themselves before a foreign state court and in an unfamiliar legal system. Since it is near to impossible to establish and accomplish such a supranational judicial system with the involvement of state courts, a justice system that is independent of state judicial systems must be resorted to.

One solution could be to use an online judicial system. Several countries have integrated an 'Online Dispute Resolution' (ODR) into their state judicial systems, such as China's Open Trial Network and the Canadian Civil Resolution Tribunal. In February of 2015, the UK's ODR Advisory Group (ODRAG), chaired by Prof. Richard Susskind, proposed to establish a three-stage internet-based court system in the UK, known as Her Majesty's Online Court (HMOC)[1422] According to their report, the first stage would be dedicated to the evaluation of the issues brought forth by parties, helping them avoid legal conflict and assisting them to resolve difficulties before they develop into substantial legal problems. However, if disputes cannot be resolved during this first stage, they shall be moved on to the second stage. Online facilitators would help the parties find a solution to their dispute during this stage. This second stage may involve any kind of 'Alternative Dispute Resolution' (ADR) and may also possibly involve the use of artificial intelligence. Judges shall only intervene during the third stage if no agreement has been reached between the parties over the course of the second stage. Judges shall resolve disputes between parties electronically, following a structured online pleading procedure.

Although the above-mentioned recommendation has been proposed for a state judicial system, this model can be used as a foundation to define the framework for a supranational judicial system using ODR. However, an additional step would be necessary regarding the adjudication of international disputes between individuals outside of state judicial systems. A four-stage recommendation may thus be proposed for an online supranational judicial system for cross-border disputes which could be used by any person, regardless of their nationality or the location of their residence, headquarters or place of business.

[1422] Online Dispute Resolution Advisory Board, 'Online Dispute Resolution for Low Value Civil Claims' (2015) https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf.

The first stage of this supranational judicial system would predominantly deal with the characterisation of the dispute brought forth by the parties in order to submit it to the competent team of experts. This characterisation could be carried out by human experts and/or by artificial intelligence. The second stage would implicate the use of ADR mechanisms. The experts would decide which particular ADR mechanism would be best suited to resolve the submitted dispute. The employment of ADR mechanism would be made mandatory and not optional in this supranational judicial system. If the second stage fails to resolve the issue, disputes would be sent to the third stage. During this third stage, judges would adjudicate the dispute between the parties using an online adjudication proceeding system. If the parties are unsatisfied with the judgment rendered during the third stage, they would have the possibility of referring the case to the fourth stage. This stage can also be named the 'Appeal Stage'. Like the appeal stage of state court systems, only the questions of law would be admissible during this fourth stage.

The main advantage of establishing this supranational justice system is that no disputes between the parties concerning the competent jurisdiction will arise. In addition, the use of an ODR allows parties to submit their dispute remotely, from anywhere in the world, without having to attend a physical courtroom. However, the application of substantive law can still be an issue in the proposed supranational justice system. In the absence of a unified substantive law in a particular area, the principle of 'the closest connection' which will be presumed to exist with state where characteristic obligations have been performed and/or are to be performed, could be employed in order to find the applicable substantive law, in the same way as it is used by the Swiss courts in cross-border disputes when the parties have not chosen the applicable law. If characteristic obligations have been performed and/or are to be performed in more than one state, substantive laws of multiple jurisdictions may also be taken into consideration.

Another crucial issue that arises is the recognition and enforcement of the decisions rendered by the supranational 'court'. The only effective solution to this problem would be the recognition of the supranational justice system by each state world-wide, therefore agreeing to recognise and execute all decisions rendered by the supranational 'court'. It is thus at the time of creation of such a judiciary system that all states – or at least the states participating in the supranational justice system – must agree to the recognition and to the enforcement of the decisions taken by the supranational 'court' without questioning it.

Regarding the appointment of judges and arbiters in the supranational court, individuals from any jurisdiction with a minimum of seven years of experience serving as a judge in the judiciary and/or as an arbiter in arbitration shall be eligible to apply for a judgeship and/or a position of an arbiter. The court may set additional criteria, such as experience in the field of private international law for individuals applying for a judgeship and/or seeking appointment as an arbiter at the supranational court. Through certain appointment procedures including but may not necessarily be limited to written test and/or viva will be determined by the supranational court for the selection of judges and arbiters.

Among the judges, a Chief Justice will be appointed based on an election procedure established by the court, and he/she shall be responsible for the allocation of cases among the judges and arbiters.

The question of forging (both procedurally and institutionally) and financing this supranational justice system could be discussed within international organisations, such as The Hague Conference on Private International Law where a large number of states participate.

The proposed notion of supranational judicial system might appear to be supplanting the conventional aspects of PIL, such as territoriality, state sovereignty, citizenship etc., which are often referred to as positivist aspects of PIL. However, in the light of the substantial advantages it would bring to cross-border legal disputes involving private individuals and/or private entities, this globalisation within the realm of PIL is indispensably crucial.

The foregoing thoughts are, of course, only a first outline of a system of justice that would promote the access to justice for individuals who find themselves implicated in PIL disputes. It is my firm belief that the suggested model of supranational justice system shall be best suited for all kinds of PIL disputes including family disputes, tort disputes, smart contract disputes and any other cross-border private disputes driven by technology.

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