

COURSE GUIDE

LAW 513 CONFLICT OF LAWS II

Course Team Dr. Chegwe Emeke Nelson (Course
Writer/Developer)-NOUN
Dr. Ogwezy Micheal M. (Course Editor)- Adekunle
Ajasin University
&
Dr. Ishaya Martins (Course Coordinator)-NOUN



NATIONAL OPEN UNIVERSITY OF NIGERIA

© 2017 by NOUN Press
National Open University of Nigeria
Headquarters
University Village
Plot 91, Cadastral Zone,
Nnamdi Azikwe Expressway
Jabi, Abuja

Lagos Office
14/16 Ahmadu Bello Way
Victoria Island, Lagos

e-mail: centralinfo@nou.edu.ng
URL: www.nou.edu.ng

All rights reserved. No part of this book may be reproduced, in any form or by any means, without permission in writing from the publisher.

Printed 2017

ISBN: 978-058 -532-X

CONTENTS	PAGE
Introduction.....	iv
What you will Learn in this Course.....	iv
Course Aims.....	iv
Course Objectives.....	v
Working through this Course.....	v
Course Materials.....	vi
Study Units.....	vi
Textbooks and References.....	vi
Assignment Files.....	viii
Assessment.....	viii
Summary.....	ix

INTRODUCTION

Generally, conflict of laws is a set of procedural rules that determines which legal system and which jurisdictions applies to a given dispute. The rules typically apply when a legal dispute has a 'foreign' element such as a contract agreed to by parties located in different countries. Conflict of laws is sometimes interchangeable referred to as private international law or international private law. Whereas the term conflict of laws is primarily used in jurisdictions of the Common Law legal tradition (England, Canada, and Australia, the United States, Nigeria, etc), private international law is usually used in France, Italy, Greece, and in the Spanish and Portuguese-speaking countries.

In Germany (and German Speaking Countries such as Austria, Liechtenstein and Switzerland) as well as in Russia and Scotland, the word international private law is used. Within the federal systems (e.g. in the United States and Australia) where legal conflicts among federal states require resolution, the term conflict of laws is preferred simply because such cases do not involve an international issue. Hence, conflict of laws is a general term to refer to disparities among laws, regardless of whether the relevant legal systems are international or inter-state.

The term conflict of laws itself originates from situations where the ultimate outcome of a legal dispute depended upon which law applied, and the manner in which the court resolve the conflict between those laws. The term, however, can be misleading when it refers to resolution of conflicts between competing systems rather than "conflict" itself.

LAW 513 intends to acquaint the students of law with the rules that are applied by courts to resolve issues when laws of different countries, on the subject matter before a deciding court are in opposition to each other, or that certain laws of the same country are contradictory. When this happens to be the case, it becomes necessary to decide which law is to be obeyed. Subject to the rule of diplomatic immunity which exempts diplomats and other public ministers while in the territory of other states to which they are delegates, every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The law of every state therefore affects and binds directly all property, whether real or personal within its territory; and all persons who are resident within it, whether citizens or aliens, natives or foreigners; and also contracts made or acts done within it. Conversely, a state cannot by its law directly affect or bind property or persons out of its own territory, or persons not residing therein. This result flows from the principle that each sovereignty is perfectly independent. However, to this general rule, there

appears to be an exception which is that a nation has a right to bind its own citizens or subjects by its own law in every place, but this exception has qualifications.

WHAT YOU WILL LEARN IN THIS COURSE

This course will justify why courts depart from the rules of the country's law and apply those of another system. The justifications for this include: (i) To implement the reasonable and legitimate expectation of parties to the transaction or an occurrence e.g., if two Nigerians went and got married in another country, say France in accordance with the rules prescribed by the French law and not the formalities prescribed by the Nigerian laws, if Nigerian laws were to be applied, then the Nigerian Courts would have to treat the parties as unmarried and their children as illegitimate; (ii) To avoid grave injustices that might occur - It would be for instance possible for the courts in Nigeria to refuse to recognise or enforce a foreign judgment determining the issue between the parties, but this would cause great inconvenience and even injustice. Example, if divorce was granted in a foreign land based on foreign laws un- contemplated by the parties at the time of the marriage.

COURSE AIMS

The overall aim of this course is acquaint the students of law with the rules that are applied by courts to resolve issues when laws of different countries, on the subject matter before a deciding court are in opposition to each other, or when certain laws of the same country are contradictory.

COURSE OBJECTIVES

To achieve the aims set out above, the course sets overall objectives. In addition, each unit also has specific objectives. The unit objectives are always given at the beginning of a unit; you should read them before you start working through the unit. You may also want to refer to them during your study of the unit so as to check on your progress. You should always look at the unit objectives after completing a unit. In this way, you can be sure that you have done what was required of you by the unit.

Below are the wider objectives of the course, as a whole. By meeting these objectives, you should have achieved the aim of the course as a whole. On successful completion of the course, you should be able:

- discuss the historical background of this course

- explain the course salient words such as ‘foreign element and comity’
- explain conflict of laws and other branches of law.

WORKING THROUGH THIS COURSE

To complete this course, you are required to read the study units, recommended text books and other materials. Each unit contains self – assessment exercises and at an agreed time in the course, you are required to submit assignment for assessment purposes. At the end of the course, you are going to sit for a final examination. The course should take you 14 weeks (revision and examination inclusive) in total to complete. Below you will find listed all the components of the course, what you have to do and how you should allocate your time to each unit in order to complete the course successfully.

COURSE MATERIAL

The major materials to be used for the course are:

- Course Guide
- Study Units
- Textbooks and References
- Assignment Files
- Presentation Schedule

In addition, you must obtain the textbooks as they are not provided by NOUN. You are required to obtain them in your own responsibility. You may purchase your own copies. Your tutor will always be available should you have any challenge in obtaining the textbooks.

STUDY UNITS

There will be four modules in this course which are sub-divided into 14 units, and they will be distributed as follows:

Module 1 Introduction to Conflict of Laws

- | | |
|---------------|--|
| Unit 1 | Historical Background of Conflict of Laws |
| Unit 2 | Historical Development of Conflict of Laws |
| Unit 3 | Nigerian Conflict of Law |

Module 2 The General Principles of Conflict of Law

- Unit 1** Principles of Jurisdiction and Exception from Jurisdiction of the Courts
- Unit 2** Justification
- Unit 3** Techniques of Classification, Characterisation and Categorisation
- Unit 4** The Doctrine of Renvoi
- Unit 5** Time Factor and Incidental Question

Module 3 Personal Connecting Factors

- Unit 1** Residence
- Unit 2** Forms of Residence
- Unit 3** Domicile
- Unit 4** Forms and Rules of Domicile

Module 4 Limits of Application of Foreign Law

- Unit 1** Limits and Non-application of Foreign Law
- Unit 2** Areas Where the Indicated Foreign Laws are Excluded for Various Reasons
- Unit 3** Public Policy

Note: Most units contain a number of self test questions. These questions generally test your understanding of the topics you have just covered by requiring you to apply what you have read in some practical ways. This will definitely help you to gauge your progress and to reinforce your understanding of the materials. Together with the Tutor-Marked Assignments (TMAs), these exercises will assist you in achieving the stated learning objectives of the individual units and of the course in general.

COURSE MARKING SCHEME

The following table shows how the examination will be graded for the guidance of the student.

Continuous Assessment -	30%
Final Examination -	70%
Total -	100%

TEXTBOOKS AND REFERENCES

Some of the important materials that will be used throughout the course are listed below:

Ademola, J. Yakubu (1999). *Limits to the Application of Foreign Laws*. Maltose Law Books.

Agbede, I.O. (1989). *Themes on Conflict of Laws*. Akoka, Lagos: Shaneson C.I. Ltd.

Cheshire & North (1998). *Private International Law* (11th ed.).

David McClean & Veronica Ruiz Abou-Nigm (2012). *The Conflict of Laws* (8th ed.). Oxford, England: Sweet & Maxwell.

De Noval, R. (1966). Historical and Comparative Introduction to Conflicts of Laws *Recueil des Cours* Vol. 11.

Dicey & Morris (2000). *The Conflict of Laws* (13th ed.). Oxford, England: Sweet & Maxwell.

Harrison, T. (nd). *Jurisdiction and the Conflict of Laws* p.101.

Morris, J.H.C. (2005). *Conflict of Laws* (6th ed.). London: Sweet & Maxwell Ltd.

North, P.M. & Fawcett, J.J. (nd). *Private International Law* (13th ed.). Oxford University Press.

Pippa Rogerson (2013). *Conflict of Laws* (4th ed.). Cambridge, London: Cambridge University Press.

Savinguy, V. (nd). *The Conflict of Laws* (Guthrie's Translation).

Sykes & Pryles (1981). *International and Interstate Conflict of Laws* (2nd ed.).

Von Bar (1889). *Theory and Praxis de International on Private Trealits* (2nd ed.). cited by Dicey & Moris (1993). *Conflict of Laws* (12th ed.).

ASSIGNMENT FILE

In this file, you will find the details of the work you must submit to your tutor for marking. The marks you obtain will form part of your total score for this course. Further, information on the assignments will be found in the assignment file itself.

ASSESSMENT

There are two aspects of the assessment of this course; the Tutor-Marked Assignments and a written examination. In doing these assignments, you are expected to apply the knowledge you have acquired from the course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the assignment file. The work you submit to your tutor for assessment will count for 30% of your total score.

SUMMARY

By trying out all of the above, we are quite confident that you will not only have a sound understanding of conflict of Laws; you will also be able to pass your exams with ease. We wish you success with the course and hope that you will find it both interesting and useful.

**MAIN
CONTENT**

CONTENTS		PAGES
Module 1	Introduction to Conflict of Laws.....	1
Unit 1	Historical Background of Conflict of Laws.....	1
Unit 2	Historical Development of Conflict of Laws....	8
Unit 3	Nigerian Conflict of Law.....	23
Module 2	The General Principles of Conflict of Law....	31
Unit 1	Principles of Jurisdiction and Exception from Jurisdiction of the Courts.....	31
Unit 2	Justification.....	39
Unit 3	Techniques of Classification, Characterisation and Categorisation.....	42
Unit 4	The Doctrine of Renvoi.....	49
Unit 5	Time Factor and Incidental Question.....	57
Module 3	Personal Connecting Factors.....	63
Unit 1	Residence.....	63
Unit 2	Forms of Residence.....	66
Unit 3	Domicile.....	71
Unit 4	Forms and Rules of Domicile.....	76
Module 4	Limits of Application of Foreign Law.....	82
Unit 1	Limits and Non-application of Foreign Law.....	82
Unit 2	Areas Where the Indicated Foreign Laws are Excluded for Various Reasons.....	87
Unit 3	Public Policy.....	94

MODULE 1 INTRODUCTION TO CONFLICT OF LAWS

Unit 1	Historical Background of CONFLICT OF LAWS II
Unit 2	Historical Development of CONFLICT OF LAWS II
Unit 3	Nigerian Conflict of Law

UNIT 1 HISTORICAL BACKGROUND OF CONFLICT OF LAWS

CONTENTS

1.0	Introduction
2.0	Objectives
3.0	Main Content
3.1	Legal Basis for CONFLICT OF LAWS II
3.2	Definition of CONFLICT OF LAWS II
3.3	CONFLICT OF LAWS II Situations
3.4	Reasons for CONFLICT OF LAWS II
3.5	Private International Law Distinguished from Public International Law
4.0	Conclusion
5.0	Summary
6.0	Tutor-Marked Assignment
7.0	References/Further Reading

1.0 INTRODUCTION

The phrase conflict of law is used to signify that the laws of different countries, on the subject matter before a deciding court are in opposition to each other, or that certain laws of the same country are contradictory. When this happens to be the case, it becomes necessary to decide which law is to be obeyed.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the legal basis for CONFLICT OF LAWS II
- define conflict of laws
- list the situations in which conflict of laws arises
- state the reasons for conflict of laws.

3.0 MAIN CONTENT

3.1 Legal Basis for Conflict of Laws

Subject to the rule of diplomatic immunity which exempts diplomats and other public ministers while in the territory of other states to which they are delegates, every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The law of every state therefore affects and binds directly all property, whether real or personal within its territory; and all persons who are resident within it, whether citizens or aliens, natives or foreigners; and also contracts made or acts done within it.

Conversely, a state cannot by its law directly affect or bind property or persons out of its own territory, or persons not residing therein. This result flows from the principle that each sovereignty is perfectly independent. However, to this general rule, there appears to be an exception which is that a nation has a right to bind its own citizens or subjects by its own law in every place, but this exception has qualifications.

Whatever force or obligation the laws of one country have in another depends upon the laws and municipal regulation of the latter. That is to say, upon its own proper jurisprudence and polity or upon its own express or tacit consent. When a statute or the unwritten uncommon law of the country forbids the recognition of the foreign law, the latter is of no force whatsoever. When both are silent, then the question arises, which of the conflicting laws is to have effect? Because no nation will prefer the laws of another to interfere with her own, to the injury of her own citizens. And whether they do or not, depends on the condition of the country in which the law is sought to be enforced. In the conflict of laws, it must often be a matter of doubt which should prevail. And whenever a doubt does exist, the forum/deciding court will prefer the laws of its own country than that of the stranger.

SELF-ASSESSMENT EXERCISE

Adduce some reasons in international law why people study conflict of laws.

3.2 Definition of Conflict of Laws

Conflict of laws or private international law (the terms are used interchangeably) is the field of procedural law dealing with the choice of law rules when a legal action implicates the substantive laws of more than one jurisdiction and a court must determine which law is most

appropriate to resolve the action. It is that part of law in each state, country, or other jurisdiction that determines whether in dealing with a particular legal situation, its laws or the laws of some other jurisdiction will be applied. The term 'private international law' is widely used in Europe in preference to 'Conflict of Laws' usually used in the United States.

Oluwole Agbede in his book 'Themes on Conflict of Laws' tries to distinguish the term 'conflict of laws' from 'private international law' with these words:

"It should be added that conflicts of law arises in Nigeria not only at the international level but equally at the state level. Hence it is necessary if not for clarity to distinguish the totality of the conflict of laws situation as 'conflict of laws', and limit the term 'private international law' to problems of conflict of law of international dimension."

Following this distinction, Agbede defines conflict of law in Nigeria as the branch of law that has been developed in Nigeria as in other jurisdiction, as a result of the universal awareness of the need to do justice to all manner of people regardless of race, creed or the arbitrariness that is often involved in the choice of the court.

On the other hand, he defines private international law as a department of law which comes into play whenever an issue before the court contains a foreign element; it is its function to ascertain which of several potentially applicable legal systems must be chosen for the determination of such an issue. On its own part, Piper Rogerson, an English writer in his book 'Conflict of Laws' defines conflict of laws as a body of rules whose purpose is to assist an English Court in deciding a case which contains a foreign element. Piper interrogates the name 'conflict of laws' since the object of this law is to eliminate any conflict between two or more system of law which have competing claims to govern the issues between the deciding countries rather than provoke such a conflict as the word may suggest.

According to Rogerson, generally speaking, the English Conflict of Law is a body of rules aimed at assisting the English Court to decide a case which contains a foreign element. It consists of three main topics which concerns the following:

- (i). the jurisdiction of an English Court
- (ii). the selection of appropriate rules of a system of Law, e.g. English or foreign which it should apply in deciding a case over which it

has jurisdiction (the rules governing this selection are known as Choice of Law rules); and

- (iii). the recognition and enforcement of judgment rendered by foreign courts or awards of foreign arbitrations.

The third topic of the recognition and enforcement of foreign judgment usually arises independently of questions of the jurisdiction of the English Court and does not overlap with choice of law. A foreign judgement on the facts of a case may be raised as a defence to an action on the same facts which is being heard by the court in England. Alternatively, a person in whose favour a foreign judgement has been awarded seeks to enforce that judgement in England using the summary judgement procedure of the English Court. These are only examples.

SELF-ASSESSMENT EXERCISE

- i. Attempt a comprehensive definition of conflict of laws.
- ii. What are the distinctions between the three main concerns of the English conflict of law?

3.3 Conflict of Laws Situations

An example of a situation that might involve the different laws of two places is that of a contract signed in one state and mailed to another. Complications may arise if one of the states provides that a contract so delivered is effective once mailed, while the other state provides that it is not effective until received. The conflicts of laws rules applied by a court in this situation are commonly designed to decide a case by the law of the territory having the closest connection with the transaction. An often expressed ideal is that of making the decision the same regardless of where the case is decided.

If the case contains no foreign element, the Conflict of Laws is irrelevant. For example, if a Nigerian man and woman who are both Nigerian citizens (it is possible for two Nigerians by birth not to be Nigerian citizens), domiciled and resident in Nigeria, go through a ceremony of marriage and later, one of them while they are still domiciled and resident in Nigeria, petitions the Nigerian Court for divorce. No foreign element is involved, and problem of jurisdiction arises in relation to the validity of the marriage, or the grounds on which a divorce can be granted, as well as any procedural or evidential matters, are all governed by Nigerian Law alone. The same applies to two Ghanaians in the same circumstance, who contracts there for the sale and purchase of goods to be delivered from Kumasi to Accra with

payment in Ghana Cedi, and the seller sues the buyer and serves him with a court claim in Ghana.

But if we vary the facts and suppose in the first example at the time the wife petitions for divorce, the husband is domiciled and resident in Togo, and that the ceremony had taken place in Togo, and the husband argues that the marriage did not comply with the requirement of Togolese laws so that there is no marriage to dissolve, the conflict of laws becomes relevant. The husband's absence raises the question of the court's jurisdiction and his argument raises that of whether Nigerian law or Togolese law is to determine the validity of the marriage. Or suppose in the second situation the seller is a Ghanaian in Ghana who agrees to sell goods in Ghana to a Zambian buyer in Zambia, to be delivered in Zambia and paid for in Ghanaian Cedi to a Ghanaian bank in Zambia, the question arises as to whether the seller can invoke the jurisdiction of the Ghanaian court against the buyer who is still in Zambia, if the seller wishes to sue the buyer for breach of contract or for failure to pay the price. A further question may also arise as to which of the law, Ghanaian or Zambian, is to be applied to determine the parties' rights and obligations should the Ghanaian court accept jurisdiction. It would be seen from these examples that a question of this jurisdiction and one of choice of law may both be involved in a particular case. But they can arise independently. The court may clearly have jurisdiction as it has in the divorce case but it has to answer the choice of law question or there may be no question as to what law to apply as may be the case in the contract; example if the parties has stipulated that Ghanaian law should govern their agreement but there will be a question whether Ghanaian court has jurisdiction.

SELF-ASSESSMENT EXERCISE

What are the roles and benefits of studying conflict of laws?

3.4 Reasons for Conflict of Law

Globalisation is the reason for developing the rules of the Conflict of Laws. Globalisation being the sum total of connections and interactions in political, economic, social and cultural spheres comprises distance, increased permeability of traditional boundaries, rapid flow of goods, capital, people, ideas and information. These are the reasons behind the development of rules of Conflict of Laws. There is an increasing explosion of cross-border transactions involving the flows of people and transactions driven primarily by non-state actors that frequently operate outside the effective control of national government. Conflict of Laws principles help in training the capacity of State courts to administer justice where one or more of the elements of such justice exist outside

the forum court. International commerce would be impossible if there did not exist a law which has for its own purpose; the effort to promote international extension of human activities besides it will be incompatible with international comity to deny legal effect to a transaction or legal relation on the ground only that it took place in another jurisdiction.

SELF-ASSESSMENT EXERCISE

Explain the attributes of globalisation.

3.5 Private International Law distinguished from Public International Law

‘Private’ distinguishes the subject from ‘public’ international law or international law ‘simpliciter’. The latter is the name for the body of rules and principles which governs states and international organisations in their mutual relations. It is administered through the International Court of Justice, other international courts and arbitral tribunals, international organisations and foreign offices. Although, as part municipal or domestic law, it is also applied by that state’s court. Its sources are primarily to be found in international treaties, the practice of states in their relations (or custom) and the general principles of municipal legal system.

Private international law is concerned with the legal relations between private individuals and corporations, though also with the relations between states and governments so far as their relationships with other entities are governed by municipal law. An example is a government which contracts with individuals and corporations by raising a loan from them. In *R. v. International trustees for the protection of bond holder A/G (1973), AC 500, HL*, it was held that certain bonds issued in New York by the British government were governed by the New York laws and not international law. The sources of private international law are the same as any other branch of municipal law, e.g. principles laid down by legislations and the decisions of Nigerian courts on issues concerning conflict of laws.

4.0 CONCLUSION

We live in an age in which states and to a lesser extent; national boundary lines no longer have more significance in our everyday life. We conduct our social and business affairs without regard to them, but such lines do have legal significance. Private international law is the department of law which arises from the fact that there are in the world different territorial jurisdictions possessing different laws.

The problems involved in this course have for clarity been discussed by various writers under the headings of:

1. Private international law
2. Interstate conflict of laws; and
3. Legal pluralism or internal conflict of laws

5.0 SUMMARY

In this unit, you have learnt about the following:

- The legal basis for conflict of laws
- The definition of conflict of laws
- Different situations in which conflict of laws arises
- The reason for conflict of laws.

6.0 TUTOR-MARKED ASSIGNMENT

1. Adduce some reasons in international law why people study conflict of laws.
2. Attempt a comprehensive definition of conflict of laws.
3. What are the distinctions between the three main concerns of the English conflict of law?
4. What are the roles and benefits of studying conflict of laws?
5. Explain the attributes of globalisation.

7.0 REFERENCES/FURTHER READING

Agbede, I.O. (1989). *Themes on Conflict of Laws*. Akoka, Lagos: Shaneson C.I. Ltd.

David, McClean & Veronica Ruiz Abou-Nigm (2012). *The Conflict of Laws* (8th ed.). Oxford, England: Sweet & Maxwell.

Pippa, Rogerson (2013). *Conflict of Laws* (4th ed.). Cambridge, London: Cambridge University Press.

UNIT 2 HISTORICAL DEVELOPMENT OF CONFLICT OF LAWS

CONTENTS

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Content
 - 3.1 Development in the French School
 - 3.2 The Dutch Scholar
 - 3.3 Development in England
 - 3.4 The Development of American Conflict of Laws
 - 3.5 The Germany Scholars
 - 3.6 Contribution of Mancini to the Rules of Conflict of Laws
 - 3.7 The Role of Conventions
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

The growth of the trade between countries led to increasing numbers of disputes during the 19th and 20th Centuries. The development of trade between countries resulted to strong international movements towards harmonising the various systems of laws. It is important to note that, those different kinds of conflict of laws rules have been harmonised with each other, in spite of having a lot of differences between them. The only way to understand the process of harmonisation is to look at the historical background of private international law in the various jurisdictions such as the French School, Dutch, England and America and lastly, the contribution of the German Scholars and Mancini. As newer states emerged and older states require new forms of government, subsequent developments on the continent after the impact of the Dutch have been characterised, broadly speaking, by codification in civil law countries due mainly to manifestation of nationalism.

2.0 OBJECTIVE

At the end of this unit, you should be able to:

- explain the development of the rules of conflict of laws in some continental countries, with full historical analysis of the selected countries.

3.0 MAIN CONTENT

3.1 Development in the French School

Cheshire *et al.*, posited that, Italian scholarship declined drastically after Baldus, who outlived Bartolus by some 40 years. As a result, the statute theory was carried into France, where it was developed and refined by notable jurists like Dumoulin, D'Argentre and Gui Coquille. The presence of different province with separate systems of law called Coutume or customs in France in the 16th Century, just like the 13th Century Italy. This paved way for the launching and development of rules of conflict of laws. Despite the French Kings establishment of the Crown's Supremacy, still, the law varied from province to province/district to district. This was so because of inter-provincial trade which were in constant conflict with each other. These are the problems the conflict of laws tends to address.

Demoulin, a French scholar, like his Italian predecessors attached his principal conflicts publication to the *lex/cunctas* populous much of which could be found in Bartolous commentary. This French scholar's distinct contribution was in respect of his support of the party autonomy doctrine. He was of the notion that all cases cannot be determined by the use of local laws. He posited that parties should be given the power to stipulate the law to govern their transactions in some situations. He further stated that, the doctrine of party autonomy should cover situations where the parties had failed to specify/stipulated applicable law. This idea of a 'facit agreement' or 'an 'implied agreement"' became the forerunner of the modern idea of the 'proper law' in the conflict of laws and modern requirement of the 'closest connection' or 'most significant relationship' idea in the conflict of law.

D'Argentre played a key role in 16th Century conflict of laws emphasising territorial. He derive the Italian school's scholastic writer' and disagreed with the custom of attacking the conflict of laws to the *lex cuntos populas*. He was of the opinion that conflict of laws rules are creatives of local, rather than universal law. He recognised only a limited number of personal laws. He reduced the personal law idea to a mere exception. He found solace in the *lex reisitae* and cherished the domicile law. The importance of his approach lay in the fact that at the time he wrote, disputes about marital property and succession to immovable were the main component of wealth and the bulk of legal business. His idea favours Lex Feri Guy De Coquille a French scholar who is worth mentioning, his view was different from Dumonhi and D'Argentre. Although, he wrote in vernacular rather than in Latin, in his writing, he tried to distinguish between the Italian 'statuta' and the French 'centunes'. By this, he was able to note the essential difference

between the legal amounts in Batolus to that of coordinate jurisdiction benefit of an over-reaching common law.

In the modern times, the approach of Guy de Coquille is relevant in the sense that conflict approaches developed in Federal system such as Nigeria or US whose component states share a common legal tradition may not work in Europe where national codifications destroyed the country that the reception of Roman law once provided. He adopted the purposeful approach to the issue of classification. He was of the view that the classification of laws as personal or real should not be based 'on the mere shall of words, but on the presumed and apparent purpose of those who have enacted the statute or custom. His views made him distinguished and far from his forerunners.

SELF-ASSESSMENT EXERCISE

Identify some of the French scholars and highlight their views.

3.2 The Dutch Scholar

The 17th Century Netherland was a good ground for the development of conflict of laws. The Netherlands was organised as independent provinces but it had also become one of the major trading nations of the world. The extensive foreign commerce and political decentralisation engendered conflicts problems of national and supranational dimension.

It is important to add that, Netherlands was a cosmopolitan centre; the doctrine of territorial sovereignty propagated by Bodin in the preceding centuries and expanded by Grotius had taken root. There was a strong need to make a cause on why a foreign law had to be applied in place of the local law. This move led to coinage of the phrase "Conflict of Laws" by the Dutch jurists. As a result, it gave impression that choice of law problems are caused by the clash of sovereign commands. The Dutch jurists have different perspective; the Italian did not bother about this notion because they believed that the Justinian code made it necessary to choose between the different statutes.

Different approaches were adopted in this regard. Another scholar Redenbury, who was said to have coined the phrase "Conflict of law" tried to reconcile the application of foreign law with the idea of sovereignty by postulating a super-law derived from the "very nature of necessity" of the case, which bestowed extraterritorial effect upon local rules. Viewed critically, the explanation does not carry much weight for it does not explain in a scientific manner, the basis of the application of a foreign law in performance to a local law. Paul and Johannes Voet used the notion of 'comitas' as the basis for the application of a foreign

law. This idea is traceable to Justinian Digests. He explained further that the notion of “comitas” reflects a principle noted in enlightened self-interest and convenience.

Huber made comity the basis of theory unlike Rebenburg and the Voet who were in favour of the framework of Statutist tradition. He was against the classification of laws as personal, real and mixed. The basis of his idea of conflicts systems is characterised by two issues, sovereignty and comity. He emphasised further in his 10 page dissertation “De conflict Lagun Diversarum in Diversis Impriis sub titled in English *Origin and use of the Question*, Forensic indeed, but belonging to the International rather than Civil Law.

“The solution of the problem must be derived not exclusively from the civil law, but from convenience and the tacit consent of nations. Although the laws of one nation can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of difference in the law.”

Huber’s contribution can be premised on five distinct heads viz:

- i. He heralded the demise of the statutist theory
- ii. He emphasised the need for decisional harmony
- iii. He propagated the recognition of foreign rules on international law
- iv. He propagated the recognition of the vested rights doctrine
- v. He introduced the public policy reservation.

Huber’s points are not without criticisms. Firstly, the critique said it is difficult to reconcile the notion of sovereignty with the recognition of effects of multi –state transactions. Secondly, the idea of comity as the basis for the recognition and enforcement of foreign rule is not pungent enough as the forum state may decide not to recognise the law of a foreign state. It is common sense, to note that, there can be no decisional harmony, if each state reserves the right to disallow the application of a foreign law on the ground of public policy.

Regardless of these criticisms, it is indispensable that the contribution of Huber has had an enduring effect on this subject. Harrison, F. (1919), in *Jurisprudence and Conflict of Laws* opined of Huber’s work.

“It is all printed in five quarter pages, in the whole history of law there are probably no five pages which have been so often quoted and possibly so much read. They are distinguished by cleanness, practical judgement and a total absence of pedantry.”

Despite the comment against the book, Harrison's comment speaks volume about the preciseness and scholastic quality of the book. Huber's contribution cannot be overlooked in the study of rules and establishment of conflict of laws.

SELF-ASSESSMENT EXERCISE

Critically analyse the impact of Huber's theory or his contribution to the development of conflicts of laws

3.3 Development in England

English Private International Law. It was historical conquest of Norman in 1066 AD that led to the establishment of strong kingship in England. At this time, the political organisation, the territorial and the King's court became supreme and final over decisions of local tribunals. As a result of this development, the royal courts possessed and exercised an original jurisdiction which was co-extensive with the realm and gradually evolved out of a mass of local customs, common to the whole of the realm. It is on this perception that brought about the idea of a 'common law' of England.

During the 12th Century in England, the rules administered had become the national 'law of the land', unlike the States, Italy, France and the Netherlands where internal conflicts were unknown. At this juncture, the pertinent question which may be asked is what became of Englishman when they travelled outside England and entered into obligations or transacted business? Even though they did travel but the common law did not take cognizance of foreign cases. For example, as early as 1280, it was held that common law courts had no jurisdiction to redress a tort committed abroad. In 1308, in the case of a writ of debt upon a document executed in Bernick in Scotland, it was said that 'because it was made in Bernick, where the court has not cognizance, it was awarded that John took nothing by his writ' (see) and this situation continue till 17th Century (see *Hughle Papa v. The Merchants of Florence in London* 8 -9 Edw. 1 (1280-81)). Be that as it may, the old rule suited England as it was in accordance with its social and economic regime which was land holding, agriculture and other occupations of a local character. To remedy the anomaly in the old rule, that is, the withholding of relief in cases, with foreign elements, English lawyers resorted to arid presumption. For instance, a tort committed in Paris, France was taken that the city was situated in England. Such a fiction had to be employed to make the matter trial able by an English jury. However, a judge deciding on an instrument dated in Hamburg, Germany said in 1625.

“We take it that Hamburg is in London in order to maintain the action which otherwise would be outside our jurisdiction. And while in truth we know the date to be at Hamburg beyond the sea, as judges we do not take notice that it is beyond the sea”

He stated further that what the law had done was to invent a fiction for the furtherance of Justice and “... a fiction of law shall never be contradicted.” It was therefore not necessary for the English courts to formulate choice of law rules. Moreover, the rules of trial at common law later began to undergo substantial changes.

The jury started to decide questions not only on account of his own knowledge but also upon deposition of witnesses. The initial step was to deal with ‘mixed cases’. The other step; that of trying cases connected solely with a foreign country, was facilitated by the new division of actions into Local and transitory. This issue of transitory was clarified during the time of Lord Coke, where it was settled that the courts at Westminster could entertain all nations that were of transitory nature, such as actions for breach of contract or on bills of exchange, even if the relevant facts were connected with a foreign country. This was a radical departure from the old principle according to which the courts were administering their own law exclusively. In addition, all restrictions in respect of revenue have been removed by the Supreme Court of Judicature Act (1873). It was discovered that the common law developed to suit the legal demand of the feudal system proved inadequately insufficient to deal with international trade and commercial expansionism and maritime cases. A solution established was to be harmonised with the old principles. To this extent, commercial cases were determined by the Law of merchant which was ‘the law of nations’ and was administered in England and as such it was regarded as a law of England. The English commercial courts applied a common European *lex mercatoria* and admiralty judges drew on sources widely scattered over time and space, such as the ancient sea law of Rhodes, the Consolant De Mar, the Role d’Oleion and the laws of Wisby. The common law courts however refused to apply this law as it was considered to be foreign. The treaty of Union of 1707 which preserved the Scottish legal system facilitated the recognition of foreign laws. Scotland is a civil law jurisdiction with institutions which differ from those of England. This gave rise to an early intra-British choice of law problems. As a result, the modern legal theory concerning conflict of laws was formulated in *Robinson v. Bland* (1760) 97 ER 717 where Lord Manifested posited:

“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 expanding 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 different kingdoms.”

By the 18th Century, the seed of private international law had taken root. This can be said to mark the beginning of basic rules of Private International Law in England Dicey throughout his Treatise gave a good geographical account of the position of Private International Law in England.

3.4 The Development of American Conflict of Laws

United State of America is a federation of 52 states, being a federation made it a fertile ground for the development of Private International Law just like the medieval Italy, pre-revolutionary France and the Dutch provinces during the Golden Age. Before, the independence of America in 1776, all the states, except Louisiana, adopted the English common law. The powers accorded the constituent states to make laws and the judge – made laws further divergence after independence, this development created choice of law problems. To deal with this problem, the civilian literature that was made was at first treated with disdain. For instance, Judge Porter in *Saul V His Creditors* was the comparative research which his judgement showed spoke of the research of Livermere on European scholarship in general, as a ‘vast mass of learning,’ as it would have appeared to our own understanding.

In the book written by Livermere after losing the case, he criticises Huber and was against the Comit doctrine and pronounced the statist leaving. Despite the fact that the book is not popular, it provided a valuable, useful bibliography and compilation of civilian and common law sources in readily assessable form. This was judiciously used Story, an erudite Supreme Court Justice and Professor of law at Harvard shared Livermere’s work and regard to civilian literature. Professor Story painstakingly organised and analysed the continental literature as well as American, English and Scottish cases. Story was opposed to the unilateralist approach of Livermere and the statist writers. He preferred Huber’s anxious and the nation of comity. He was in support of unilateralist approach. His treatise has been called one of the least scientific and one of the least conclusive books and lacking a “Supreme Guiding Principle”. Indeed, it has been opined that, Bartolous commentary expected, no other work on the conflict of laws had proved

to be as influential in Anglo-American literature and except perhaps Huber's essay.

3.5 The Germany Scholars

Carl Von Wachter, an iconoclast and a legal positivist, in a German review debunked the views of the statistists, exposed the vested right theory's copulation reasoning and disparaged the doctrine of the comity watchers (1963) posited in his Essays on the "Collision of Private Laws of Different States" that "To claim absolute protection in the forum for a legal relationship created abroad according to foreign law is to argue from a premise that has not yet been established and presupposes something that still needs to be proved, namely that the legal relationship is to be judged according to foreign rather than forum. For ..., the question whether someone was in favour of the local law, and he believed that a judge in determining issues must look "no doubt to the laws to which he is subject" that is, the local law as he is instrumentally (organ) of the legislative will.

Wachter identified three "Guiding Principles" thus, the courts must follow any provisions of the *lex* that expressly designate the applicable law; deviation from such a directive, a judge faced with a conflicts problem should as a matter of fact examine whether forum law must be applied in a given case notwithstanding the foreign element contained in the issue. However, if any doubt exists on analysis of the applicable law, the judge should resolve it in favour of the *lex fori*.

At this juncture, a comparative analysis is essential between aforementioned theorists before Wachter. The approach of Wachter to the resolution of conflicts problem is forum centered whereas, Friedrich Carl Van Savigny, whose conflicts classic was published in 1848 advocated for an international approach to solving conflict problems:

- (a) His conflicts classic was published as volume eight of his system of current Roman law. The volume contains two chapters; the first chapter was devoted to the conflict of laws while the second chapter is on interpersonal conflicts.
- (b) He no doubt made a decisive break with all former approaches. Sovereignty was unmistakable theoretician, he preferred to rely in hypothetical cases rather than court reports to illuminate a point. His work was translated into English by William Guthrie in 1869. He looked beyond the statutes theory as being incomplete and ambiguous and rejected outrightly the *statistists*, *unilateralists* approach and primacy of forum law advocated by Wachter. He therefore advocated the development of general principles of choice of law by legal science, that when perfected, would assure

that the same result will be reached in all places. He was in favour of identifying all legal relationship for each and an appropriate connecting factor that would tie it to a single system.

The idea rule to savaging is that (law) which would be accepted by all states if proposed for inclusion in an international treaty, providing a 'common statute law of all nations' Savigny's approach significance lies in the fact that he suggest that each case should be decided according to the legal system to which it seems most naturally to belong: The principle of 'connecting factors' he proposed include:

- i. Domicile for the resolution of issue like capacity, succession to estate and family relations.
- ii. *Lex situs* for the determination of location of things.
- iii. *Lex loci actus* for the determination of legal transaction's like contract.
- iv. *Lex fori* for the resolution of matters relating to procedure.

Hitherto, Livermere had earlier compared the nations of the civilised world to one great society composed of many families between whom it is necessary to maintain peace and friendly intercourse, Grotius used the same thought to describe the essential unity of mankind. The approach of Savigny emphasis on 'Voluntary submission of a person to a sovereign, and his dislike of the vested rights theory and its description as 'circular' is in line with Watcher's perspective. Watcher equally used 'seat metaphor' the question – begging approach. Be that as it may, the existence of this choice of law rules since the time of Bartohus is not in doubt, but they were organised by Savigny who advanced a pragmatic consideration, rather than mere doctrinal musings in support of multilateralism.

Despite the fact that, Savigny's idea was cosmopolitan in outlook, his contribution to the subject matter –conflict of laws rules survived till today as could be seen in the formulation of the "proper law" approach or the concepts of the "Closest connection" and the "Most significant relationship". His view was so respected to the extent that in the 19th Century, some German Courts allowed his views to prevail over statutory provisions (Kegel, G. 1987). In the 20th Century, his teachings were very remarkable because it helped transform the unilateral conflicts provisions found in the original Introductory Act to the German Civil Code into a system of multilateral rules. The contribution of Savigny cannot be overemphasised to academic and particularly to solving chronic problems of conflict of laws or Private International Law. This generation and generation unborn will remain grateful to him for his concise and pragmatism in this field of law.

3.6 Contribution of Mancini to the Rules of Conflict of Laws

It is remarkable indeed that Mancini introduced the principle of the *lex patriae* when he gave his inaugural address at the University of Turin entitled “Nationality as the Basis of International Law”. His idea is on fundamental importance of the ties of allegiance that link individuals to their home countries. He utilised the singular opportunity that came his way in 1985, when he was appointed as a member of a Parliamentary commission that drafted the Conflicts rules of the Introductory provisions of Italian code. This gave him the opportunity of transferring his postulation into the code. He was of the view that all citizens should be governed by the law of the state whose citizens they are. This is otherwise known as the national law. This idea was imbibed and adopted by many in all central and Southern Europe as well as in Brazil, Japan, Germany, Polish, Italy, Swedish and many other legislations. He brought to the fore the *lex patriae* idea. Most importantly, he promoted and influenced the adoption of multilateral conflict treaties and participated in International projects pursuing that aim (Ademola J. Yakubu 1999). However, he attacked the principle of comity; he was an advocacy of the doctrine of equality of forum and foreign Laws. He emphasised the role which policy should play in the conflict of Laws. Like most scholars of his time, he made a remarkable enormous contribution to this subject.

3.7 The Role of Conventions

Another important development for conflict of law rules is conventions. First of all, it is important to evaluate the Rome Convention to better understand the importance of conflict of laws. The Rome Convention is one of the most important elements on conflict of laws, which accepted choice of laws rules. The convention is a product of the European Community. It was accepted in 1980 by the European Commission. It was signed by all of the member states in 1981. It was the first step towards unification and codification of general rules of conflict of laws in the field of civil law in the European Community; that unification would make it easier to determine the applicable law and increase legal certainty. The convention eventually received enough ratification and came into force on 1st April 1991. The Rome Convention, however, is not open for signature to the States, which are not members of the European Community. On the other hand, non-member countries can incorporate the rules of the Rome Convention into their private international law. The effect of the Rome Convention is that, if the contract made after the Convention came into force, the national law rules on contract choice of laws are replaced by the rules of the Convention. It does not have retrospective effect.

Two protocols were signed in 1988 on interpretation of the Rome Convention by the court of justice. The first one is that, the jurisdiction of the court of justice was accepted. And second one is the court of justice has a power to interpret the Rome Convention. Furthermore, the scope of the convention is described under the article 1 of the Rome Convention. According to article 1, "The rules of this convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries." There are two requirements under this article. First one is that the obligations must be contractual, and second one is that, there must be a choice of law problem.

Moreover, in the case of federal states in which each federal unit has its own rule of law, in respect of contractual obligations. Each unit is to be considered as a 'country' for the purpose of the convention. Federal states are not bound to apply the convention as a result of the conflicts between each federal unit. However, according to 1990 Act, if there is a conflict between the laws of different parts of the United Kingdom, the convention rules will be applicable between the laws of such parts.

The selection of the applicable law is the essence of the convention. There are some approaches to determine the applicable law. According to article 3 of the Rome Convention, the parties expressly choose the law. Article 3 sets out the basic principles, "a contract shall be governed by the law chosen by the parties." However, according to US principles, there must be some important connections between the law and the subject matter contract. As a result of this view, the rule of the party autonomy was accepted by the United States later on.

Contrary to American view, the Rome Convention allows the choice of law, which has no connection with the contract. And also it was supported by the case of *Egon Oldendorf v. Libera [corp]* (1961), 1 Lloyd's Rep. 380.

The second approach to determine the applicable law is identified under the last sentence of article 3[1] of the Rome Convention. It provides that, "By their choice, the parties can select the law applicable to the whole or a part only of the contract." According to article 3[1], the parties have a right to pick and choose the applicable law to the whole or a part of the contract. This allows the parties to choose the different laws for different parts of the contract. The last approach is that, according to article 4[1] of the Rome Convention, "to the extent that the law applicable to the contract has not been chosen in accordance with article 3, the contract shall be governed by the law of the country with which it is most closely connected." That means, if there is an absence choice of law, the law of the country, to which it is most closely connected, shall govern the contract.

Moreover, the Rome Convention provides special rules to protect the consumer under article 5 and individual employment under article 6 of the convention. These articles are designed to protect the weaker party. According to article 5[1], it applies to such contract which object is to supply goods or services to a person (the consumer) for a purpose, which can be regarded as being outside of his trade or profession. According to article 6 of the convention, “in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection”. However, the convention does not clearly identify the “employment”.

According to Giuliana- Lagarde report, “employment contract would include even if where the employee has failed to issue a formal employment contract.” Another important development of conflict of laws rules was made under the Brussels and Lugano Conventions. The Brussels Convention was signed by the six original members of the European Community in 1968 and came into force in 1973. The Brussels Convention is amended by the 1978, 1982 and 1989 Accession Conventions. It was also provided to be in force between United Kingdom and all the Contracting States by the 1982 Act. The purpose of the convention is to provide free circulations of judgement throughout the community.

On the other hand, the Lugano Convention was signed in 1988 by the 12 Member States of the European Community and by the 6 Member States of the European Free Trade Association (EFTA). The purpose of the convention is to provide free circulations of judgements between two groups of countries. So, it can be said that, it is the amendment of the Brussels Convention. The Convention came into force for the United Kingdom by the Civil Jurisdiction and Judgement act 1991. The 1991 Act is also amended to the 1982 Act.

However, there are some differences between them. The European Court of Justice has no jurisdiction on the Lugano Convention, because the EFTA members would not have accepted the European Court. On the other hand, under the Brussels Convention, the European Court can give a preliminary ruling to fill the gaps in the convention. As far as Brussels Convention is concerned, it is only concerned with the jurisdiction of Contracting States. So the dispute between parties has to involve a foreign element. According to article 1 of the convention, it only applies in civil and commercial matters. So, the convention does not apply to public law matters, such as revenue, customs or administrative matters. Moreover, the convention provides jurisdiction not only in the courts of contracting State, which is defendant domiciled, but also under special jurisdiction, it is permitted that the courts of more

than one Contracting State could have jurisdiction. Consumers are generally known as the weaker party of the contract.

The Brussels convention has also had protective provisions over the Consumer contract with its articles 13, 14 and 15. According to article 14 of the Brussels convention, "A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled." However, the other party of the consumer contract can only sue in the domiciled of the consumer. As far as Lugano Convention is concerned, application of the convention is the same as the Brussels Convention. In order to apply to the convention, the defendant must domicile in a Contracting States. However, if the defendant domiciled in a European Community Contracting States, the Brussels Convention would be applicable, or if he domiciled in an EFTA Contracting States, the Lugano Convention would be applicable.

Furthermore, a special commission of the Hague Conference on Private International Law recommended drawing up a multilateral convention on jurisdiction, recognition and enforcement of foreign judgements in civil and commercial matters in 1994, because, there are generally regional conventions, which are applicable by certain, member states. However, according to growth of the world trade and improving relations between countries made necessary to have multilateral convention in which includes large numbers of countries around the world. On the other hand, multilateral conventions should not conflict with other conventions, such as Lugano and Brussels Conventions. It has to reach a compromise. After accepting such multilateral convention, the other regional conventions, at the same time, should be applicable to the cases, which they were applicable before the multilateral convention came into life.

To sum up, civil and commercial matters between countries resulted to the development of conflict of laws. This process still continues to develop. In order to accommodate the requirements of international commerce, it is important to draw up the multilateral convention which includes large number of countries and which is also compromises the needs of the countries. On the other hand, as a result of the rapid development, the conflict of laws rules, which is applicable at the present, would not be enough and every time it will be necessary to adopt the conflict of laws rules to the new era.

SELF-ASSESSMENT EXERCISE

Comment on the impact of Rome Convention on early development of conflict of laws in England.

4.0 CONCLUSION

The application of rules of Private International Law/otherwise known as conflict of laws is not restricted to a particular geographical area or a continent or a state, it cut across all nations of the world. The conflict of laws in French, Dutch/Netherlands, England, America, Germany and Italy were discussed.

5.0 SUMMARY

It has been eminently rewarding in this unit to learn how the Private International Law popularly known today as conflict of laws became a worldwide concept. The contributions of great scholars and jurists from various countries of the world were discussed to buttress the crystallisation and in some cases codification of the rules of conflicts of laws.

6.0 TUTOR-MARKED ASSIGNMENT

1. Highlight the evolution of the conflict of law
2. Briefly analyse the development of the rules of Courts in all jurisdiction.
3. Comment on the impact of Rome Convention on early development of conflict of laws in England.

7.0 REFERENCES/FURTHER READING

- Ademola, J. Yakubu (1999). *Limits to the Application of Foreign Laws*. Maltose Law Books.
- Agbede, I. O. (1989). *Themes on Conflict of Laws*. Akoka, Lagos: Shaneson C.I. Ltd.
- Cheshire & North (1998). *Private International Law* (11th ed.).
- Collier, J.G. (2001). *Conflict of Laws*, (3rd ed.). London: Cambridge University Press.
- De Noval, R. (1966). Historical and Comparative Introduction to Conflicts of Laws *Recueil des Cours* Vol. 11.

Dicey & Morris (2000). *The Conflict of Laws* (13th ed.). Oxford, England: Sweet & Maxwell.

Harrison, T (nd). *Jurisdiction and the Conflict of Laws* p.101

Morris (2005). *Conflict of Laws*, (6th ed.). Oxford, England: Sweet & Maxwell.,

North, P.M. & Fawcett, J.J. (nd). *Private International Law* (13th ed.). Oxford University Press.

Savinguy, V. (nd). *The Conflict of Laws* (Guthrie's Translation).

Von Bar (1889). *Theory and Praxis de International on Private Trealits* (2nd ed.). cited by Dicey & Moris (1993). *Conflict of Laws* (12 ed.).

Sykes & Pryles (1981). *International and Interstate Conflict of Laws* (2nd ed.).

UNIT 3 NIGERIAN CONFLICT OF LAW

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Inter-state Conflict of Laws
 - 3.2 Minimising Factors
 - 3.2.1 Common Law of England
 - 3.2.2 Common Court of Appeal
 - 3.3 Influence of a Common Constitution
 - 3.4 Plurality of Laws or Internal Conflict of Laws
 - 3.5 Source of the Rules of Nigerian Conflict of Laws
 - 3.6 Treaties
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

The subject of conflict of laws assume a complexity in Nigeria not only on account of the federal form of government with its separate federal and state laws, but more so, because of the dual system of court and multiplicity of laws which exist within most of the states. The issues involved in this unit are going to be discussed more specifically under the heading of **Inter-state conflict of laws** and **Legal pluralism or internal conflict of laws**.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- discuss the unique nature of Nigerian conflict of law
- explain inter-state conflict of laws
- list and discuss the various minimising factors
- explain the plurality of laws or internal conflict of laws
- discuss the source of the rules of Nigerian conflict of laws.

3.0 MAIN CONTENT

3.1 Interstate Conflict of Laws

A discussion of inter-state conflict problems in Nigeria should ordinarily start by a brief review of a development that gave rise to these problems. In 1954, Nigeria became a federation with five constituent regions. The federal government was given power to legislate over some enumerated items. There was also the concurrent list over which the federal or the regional government could legislate. Arising from this is the development of a body of regional case law. With the attainment of republican status in 1963, the jurisdiction of the privy council as the final court of appeal for Nigeria was abolished, paving way for gradual development of uniform rules of private international law. In 1964, the Midwest region was carved out of the Western region. Again a further division of the existing region into 12 states occurred in 1967. These 12 states were further divided into 19 states in 1976 and into 21 states in 1987. Consequently, we now have in the federal republic of Nigeria 36 states and the federal capital territory, with each state government having their own laws and separate system of court. Agbede, I.O., whom we have already referred to, regretted that no effort is made to ensure uniform legislation on state matters and if this tendency is not checked, may impede inter-state commerce and inter-state relations.

SELF-ASSESSMENT

What are the challenges involved in Nigerian conflict of laws?

3.2 Minimising Factors

The problem arising from state laws in Nigeria is to some extent minimised by certain factors.

3.2.1 Common Law of England

Agbede identifies one of the factors to be that all state courts apply substantially the same the common law of England. Secondly, a majority of the people of Nigeria are subject to the primacy of customary law, at least in matters of personal relations. As shown below, the factors which connect a person with this law creates problems of its own, but such problems are not relevant to inter-state conflict of laws.

3.2.2 Common Court of Appeal

Lastly, the existence of the Court of Appeal, which is a federal court for the whole of the federation, should ensure to some extent, uniformity of law from one form to another. Inter-state conflict of laws arise whenever a court is faced with the problem of applying the law, or recognising or enforcing the judgement of a court of a sister state, or when assuming jurisdiction over persons or property located in another sister state. Strictly speaking, the legal system of one constituent state is as much a foreign system of law as the legal system of another country under the received English rules of private international law. However, under the constitution of many federations, the constituent states invariably enjoy special status in their relation to one another which affect their respective conflict rules.

3.3 Influence of a Common Constitution

In Nigeria, the totality of state laws must operate within the confine of the republican constitution which guarantees every person in Nigeria the right to a fair hearing, and which prohibits discrimination against citizens of Nigeria on grounds of their place of origin, tribe, or religious affiliation. Under a federal statute, the judgement of one state is enforceable in the other states under certain conditions, as if it were a judgement of the courts of these other states. Moreover, matters such as marriage under the act, bills of exchange and promisory notes, company and allied matters, currency and coinages, to mention but a few, are within the federal jurisdiction. This arrangement affects the conflict rules of individual states.

SELF-ASSESSMENT EXERCISE

What role does a connecting factor play in minimising the conflict of laws in Nigeria?

3.4 Plurality of Laws or Internal Conflict of Laws

We have hitherto been concerned with conflicts between laws that are territorially based, but as we have discussed, we have in Nigeria systems of general law and customary law existing side by side in every locality. This plurality of law, so to say, is by no means a peculiarity of Nigerian legal system. The problem of resolving conflicts between the general law and the local laws has aroused considerable interest for the reform and integration of laws in the various countries. But so far, no effort has been made in Nigeria towards unification of internal civil law. In *Adegbola v. Folaronmi* (1942) W.A.C.A, the deceased, a native of Oyo had contracted a customary marriage before he was taken as a slave to

the West Indies where he subsequently went through a Christian form of marriage with another woman. He later returned with his second wife to Lagos where he purchased a piece of land and built a house. On his death, the second wife continued to occupy the house until her death. She left a will by which she devised the property to the defendant. The plaintiff who was the issue of the customary marriage sought recovery of the house, claiming that she, being the only surviving issue of the deceased, was entitled to this property according to the native law. The defendant contended that as the plaintiff had contracted a Christian marriage, English law of inter-state succession should govern, and therefore since the plaintiff by her marriage has accepted the English way of life, she had no right to share in the estate. Strangely enough the court upheld the defendant's submission. Conversely, in *Goodings v. Martin (1942) W.A.C.A 108* the deceased had first contracted a Christian marriage during the course of which the plaintiff was born. After the death of the first wife the deceased married under the native law. The defendants were the children of this marriage. In a case stated, W.A.C.A was asked to decide whether defendants can have any share in the deceased's estate. The court held that the defendant had no claim. The courts have merely decided these issues in accordance with the English municipal law, excluding its conflict of law rules which would have referred the issue of legitimacy to the *lex domicilii* of the father at the time of the child's birth. In effect the issue has been decided as if the cases were before an English court where the parties were domiciled in England, and not as the English court would decide on the particular facts of this case. Compared to the case of *Bangbose v. Daniel* where the Privy Council held that under the English law the legitimacy of a child was governed by the *lex domicilii* of the father.

A striking characteristic of this conflict is that the factor which connects a person with one of these two systems, namely customary law, is according to current practice, a personal quality. It is the religion which a person professes or his membership of an ethnic group that brings about the application of the religious or customary law respectively in relation to such a person, making some authors to describe this problem as **inter-personal conflict of laws**. On the other hand, the factor which connects a person with the general law is to be found in the territory. It is the place where the person is domiciled, or where an act is done or to be done that brings about the application of the general law of that territory.

SELF-ASSESSMENT EXERCISE

What is the difference between territory and custom as connecting factors in resolving conflict of law issues?

3.5 Source of the Rules of Nigerian Conflict of Laws

We are concerned with the main spring of authority of the rules of conflict of laws operating in Nigeria today, whose validity has been sanctioned by the constitution.

The source of the rules of conflict of laws in Nigeria has been classified by Agbede, I.O., into the following headings:

- a) English Law
- b) Decisions of courts outside Nigeria
- c) Nigerian (local) legislation and case law
- d) Public international law.

3.5.1 English Law

There are three ways by which the rules of English law have gained force in Nigeria and in particular reference to conflict of laws. They are as follows:

- (i). The general reception of English rules of common law, doctrine of equity, and statutes of general application in force in England on 1st January, 1990.
- (ii). Imperial legislation past prior to the attainment of independence and expressly extended to Nigeria.
- (iii). Reception of current English law on particular topics.

3.5.2 Decisions of Courts outside Nigeria

Up to 1954, the West African Court of Appeal entertained appeals from Nigerian courts. Consequently, so much of its decisions on Nigerian conflict of laws have not been overruled by the Privy Council (and now by the Supreme Court) is part of Nigerian law on that subject. The court has made significant contribution to the resolution of conflicts between the general law and the customary law.

Furthermore, the Privy Council was the final Court of Appeal for Nigeria up to 1963 at which time the right of appeal to this body was abolished. Its decisions up to that date constitute the authoritative exposition of the Nigerian common law rules of private international law. Such decisions can, however, be overruled by the Supreme Court.

3.5.3 Nigerian (Local) Legislation and Case Law

Nigerian legislation is by far the most source of law in the country today. The local legislature can repeal any part of the English law currently in force within the jurisdiction and so also can abolish rules of

customary law. But because the Federal form of the government and the consequential division of legislative powers coupled with the rigidity of the Republican Constitution, no legislative body in Nigeria can be said, as may be said of the British Parliament, to enjoy supreme legislative powers. For instance, any law whether Federal or State which is inconsistent with any provision of the Constitution, is null and void to the extent of the inconsistency. Such provisions are bound, in one way or the other, to affect inter-state conflict practice.

Furthermore, the division of legislative powers between the Federal and the State governments is bound to affect conflict rules, for within the exclusive jurisdiction of the Federal legislature, inter-state conflict ceases to exist.

It is, however, the state legislation which provides most of the internal conflict of law rules particularly in relation to the jurisdiction of customary courts, the choice of law between systems of customary law, and between the general law and customary law.

3.5.4 Public International Law

The legislative powers of the Federal and the State governments in Nigeria are not limited, as such, by public international law except in so far as they have, by treaties, bound themselves. Nevertheless, in accordance with common law principle, Nigerian courts have always treated international 'customary' law as part of the common law of the country. Therefore, they have always conceded immunity from jurisdiction by public international law. Moreover, in formulating rules of private international law, Nigerian courts and legislatures are always aware (or must be aware) of the international context within which this department of law operates. To that extent therefore, international law is one of the sources of Nigerian rules of private international law.

3.6 Treaties

The conclusion of international treaties on behalf of Nigeria was the affair of the British government until Nigeria became independent. International treaties concluded by British government in this regard were usually brought into force in Nigeria either by Order-in-Council or by Act of British Parliament expressly enacted to take such effect. Some of such Imperial enactments are still extant.

Since independence however, Nigeria has been able to enter into international treaties in its own right. There is no doubt that Nigeria and Britain will increasingly find themselves in different international bodies. In so far as treaties of such different international organisations

will affect rules of private international law in both countries, the rules of private international law in both countries diverge.

SELF-ASSESSMENT EXERCISE

What the interconnection between the common law of England and statute as sources of conflict of law?

4.0 CONCLUSION

The point of interest from this discussion is that before the establishment of British administration, customary law was applied all over Nigeria on a territorial basis. But since then, this law has been reduced, almost completely to a personal system of law by the colonial judges and legislature in their effort to exclude European nationals from its purview. So that even among the natives themselves, customary law is now applied on personal rather than on territorial basis. The idea rests on the assumption that a Yoruba man for example, who has settled permanently in an Edo town would never wish that Edo customary law should govern his personal right. However with the increasing mobility of population, the penetration of modern education into circles formerly traditional, and the resultant gradual breakdown of ethnic and even family cohesion, a whole new situation arises which demands the formulation of new rules in the regulation of personal rights.

5.0 SUMMARY

In this unit, you have learnt the:

- unique nature of Nigerian conflict of law
- inter-state conflict of laws
- various minimising factors
- plurality of laws or internal conflict of laws
- source of the rules of Nigerian conflict of laws.

6.0 TUTOR-MARKED ASSIGNMENT

The division of legislative powers between the Federal and State governments is bound to affect conflict rules. Discuss.

7.0 REFERENCES/FURTHER READING

Agbede, I.O. (1989). *Themes on Conflict of Law*. Akoka, Lagos: Shaneson C.I. Ltd.

Dicey & Morris (2000). *The Conflict of Laws* (13th ed.). Oxford, England: Sweet & Maxwell.

Graveson (1974). *Private International Law*.

Nwabueze (1963). *Machinery of Justice in Nigeria*.

MODULE 2 THE GENERAL PRINCIPLES OF CONFLICT OF LAWS

Unit 1	Principle of Jurisdiction and Exception From Jurisdiction of the Courts
Unit 2	Justification
Unit 3	Techniques and Classification
Unit 4	The Doctrine of Revoi
Unit 5	Application of Revoi in Common Law Africa
Unit 6	Time Factor and Incidental Question

UNIT 1 PRINCIPLES OF JURISDICTION AND EXCEPTION FROM JURISDICTION OF THE COURTS

CONTENTS

1.0	Introduction
2.0	Objectives
3.0	Main Content
3.1	Principles of Jurisdiction
3.2	Distinction between Jurisdiction in Personam and Jurisdiction of the Rem Courts
3.3	Exception from Jurisdiction of the Courts
4.0	Conclusion
5.0	Summary
6.0	Tutor-Marked Assignment
7.0	References/Further Reading

1.0 INTRODUCTION

The extent of the jurisdiction of the English Courts is determined by rule of common law and statutes. These rules vary according to whether they concern 'actions in personam' or 'actions in rem'. Each judgment is evaluated only in relation to the action before the court. An action in rem gives rise to a judgment in rem, an action in personam to a judgment in personam. However, all jurisdictions are based on ideas of effectiveness deriving from a territorial and personal conception of allegiance. In this wise, an alliance may be temporary, such as the temporary allegiance owed to a foreign state by a resident, or even a visiting alien. In this case, per Lord Rusell, C. J. (as he then was) in *Carrick v. Hancock (1895) 12 TLR 59* posited that the allegiance is limited but it is sufficient to found a jurisdiction over the person concerned, as the presence of a person given rise to a personal

jurisdiction, so that of an object may give rise to jurisdiction in rem over the object and this even though the defendant to that action in rem be abroad (See *Castrique v. Imrie* (1870) LR 4 HL 414).

In these cases mentioned above, the jurisdiction is effective because the essential subject matter is within the power of the court at the same time. In other words, the effectiveness of jurisdiction is to a large extent national rather than actual (Webb, P. R. *et al.*, (1960) p.85)

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the principles of jurisdiction and its forms i.e. the jurisdiction in personam and jurisdiction in rem
- discuss the exception from the Jurisdiction of the Courts.

3.0 MAIN CONTENT

3.1 Principles of Jurisdiction

Principles of jurisdiction determine whether or not a court can hear a case. It is important they identify the country or countries whose courts can approximately deal with a matter. The issue of ‘appropriate forum’ for the resolution of a dispute is a complex one, and is understood in different ways in different legal traditions. Although, there must be limits to the jurisdiction of the courts of any country, it would be appropriate for English Court to have jurisdiction over an action arising out of a dispute involving two English students in the middle of an English city. At the same time, it would be entirely inappropriate for those courts with an action arising out of a conflict between two Chinese students in the middle of Beijing.

Another principle is the time factor, if a claim is brought against a defendant now based wholly within a single country and having assets solely in that country, it may well be appropriate to have the claim heard there. That will be true even if the underlying dispute has no connection with that country and neither party had any such connection when the dispute first arose (Morris, 2005). The principal requirement is that the foreign court should have been competent to entertain the action, a matter which the English Court, now asked to recognise the judgement, determines for itself. English private international law is, for these purposes, the touchstone of foreign jurisdiction. Moreover, in many continental states, the presence of property of the defendant within the jurisdiction empowers the court to hear suits against him. For instance,

if R in Germany has a claim arising out of business dealings against S, whose base is in England but who has stock stored in a warehouse in Hamburg; a German Court would be, appropriate/entitled to hear R's claim and make an order against S, regardless of S's participation in the proceedings or not. In this situation, a judgement so obtained in Germany, however, would not be regarded by an English Court as the decision of a Court of competent jurisdiction, if S did not participate (see *Emmanuel v. Symon* (1908) 1 KB 302) (Thomas JAC 1995).

Having stated the above, it is pertinent to note that in federal countries, and countries which have courts operating on a regional basis, similar issues may arise in deciding how cases are to be allocated between various regions. For example in the United Kingdom, many rules give jurisdiction to the courts, but it is very necessary to decide whether the case is to be heard in England, Scotland or Northern Ireland. In a similar vein, students of legal history may recall the old rules as to "venue" which identified the English country within which a trial was to be held. However, there are some rules assigning cases to particular local Courts but they are regarded as domestic rules and not part of the conflict of laws.

The concerns of the principles of jurisdiction of action can be discussed from two perspectives. That is:

- i. Jurisdiction of action in personam
- ii. Jurisdiction of action in Rem

3.2. Jurisdiction of Action in Personam and Jurisdiction of Action in Rem

3.2.1 Jurisdiction of Action in Personam

According to Morris (2005, 6th ed.) an action in personam is an action brought against a person to compel him or her to do a particular thing, e.g. the payment of a debt or of damages for breach of contract; or to compel a person not to do something, that is, when an injunction is sought. This does not include Admiralty actions in rem, probate actions, administration actions, and petitions in matrimonial cases or cases concerning guardianship or custody of children, or proceedings in bankruptcy or for the winding up of companies.

Thomas JAC (1955) emphasised that "so far as jurisdiction in personam is concerned, the principal tests for foreign as for English Courts are effectiveness and submission". It is trite law that a foreign court will be considered to have effective jurisdiction if the defendant to the action

was present in the state in which the court sits, at the time that proceedings were commenced. It was decided in *Carrick v. Hancock* 12 TLR 59, where a person domiciled in England was served with notice of proceedings against him in the Swedish Court, while he was on a short visit to Sweden. He returned back very soon to England and took no further part in the Swedish action again, in which judgment was eventually given against him. Hence, the fact of his presence in Sweden at the commencement of the action was held to ground the jurisdiction of the Swedish Court and the judgment was enforceable against him in England. Similarly, in the case of corporations, the existence of a definite place within the jurisdiction from which the corporation is doing business would suffice to constitute presence of the corporation in that particular state (where jurisdiction is sought).

Secondly, if the disputant parties choose to submit their disputes to the courts of a state other than that which would normally have jurisdiction over them, the fact remains, their submission is universally speaking, enough to vest the court concerned with authority to determine any claim. Thus, in *Feyericke v. Hubbard* (1902) 71 LJK B509, a British subject domiciled and resident in England had accepted in a contract with a Belgian company that all disputes as to the present agreement and its fulfilment shall be submitted to Belgian jurisdiction. It was held that a judgment of the Belgian court obtained by the company, in default of appearance by the English man was enforceable in England as the order of a competent court. Express submission of this type may be very rare to raise problem.

At times, jurisdiction may be implied or conferred by the conduct of the parties, upon a foreign court. However, the case would be different if, though making an appearance in the proceedings, defendant did so only to demur to the competence of the court to hear the claim.

SELF-ASSESSMENT EXERCISE

On what grounds will the Courts assume jurisdiction at common law in actions in personam?

3.2.2 Jurisdiction of Action in REM

Jurisdiction in rem is based entirely in the conception of presence or national presence of the res or quasis within the jurisdiction, and it is for this reason that it is effective. The presence of the matter (see *Castrique v. Invie* (1870) LR 4 HL. 44), an action, in rem is one in which the judgment of the court determines the title to property and the

rights of the parties, not merely as between themselves, but as against the whole world.

The English Courts have jurisdiction to entertain actions in rem in three types of cases.

- i. Jurisdiction of action to determine the title or rights to possession of movable or immovable property situated in England: *Castrique v. Imvie (Supra)*. Actions of this nature are in vein in the sense that the judgment of the court constitutes a good title against the whole world. Similarly, the mere presence in England of property does not render an absent owner personally amenable to the jurisdiction and the court is not competent to adjudicate on matters unconnected with the property: *Emmanuel v. Symon (Supra)*.
- ii. Admiralty actions: Admiralty jurisdiction exists to entertain “any claim for damage done by a ship” and may be in vein or in personam. Judicatur (consolidation) Act, 1925. The jurisdiction is wide enough to cover damage done by a ship to foreign land. The nationality of the ship is immaterial provided it is within English territorial waters.
- iii. Actions relating to status: English law regards status as a res and actions concerning it in res, binding not only the parties to it but everyone who comes into legal relations with them *per Lord Dunedin in Salvesen v. Administrator of Austrian Property*. It is very clear that English Courts have jurisdiction in matters of status when it fictitious res is situated in England. That is when England is the country of domicile (*Per Breth L. J. in Niboyet v. Niboyet, Torrance HMB 1958*).

Although, the rule relating to the *lex domicile* as governing matters of status is not absolute, for example, by Matrimonial Causes Act, 1950, divorce petitions by a deserted wife may in certain circumstances be heard on the basis of residences and a judgment in rem may be given, although the English Court is not the court of the domicile.

SELF-ASSESSMENT EXERCISE

In what circumstances does an English Court possess jurisdiction to entertain an action in rem?

3.3 Exceptions to the Jurisdiction of the Court

In certain circumstances, the power of the English Court to exercise its normal jurisdiction, whether in personam or in rem is limited either by reasons of personal capacity of one of the parties or by virtue of the privilege of sovereignty, immunity attaching to a defendant.

There are two ways by which jurisdiction of a particular court can be restricted:

- a. by reason of sovereign immunity
- b. by reason of personal capacity.

3.3.1 By Reason of Sovereign Immunity

In accordance with the theory of equality of sovereigns, it has long been a part of customary international law which forms parts of the common law of England which stipulates that the courts of one sovereign may not exercise jurisdiction over another sovereign, his property or any property he actually possesses, or his principal representatives or his consultants in a matter concerned with their official duties without the consent of the sovereign. This is purely a jurisdictional, not a substantive immunity.

In another perspective, if a foreign sovereign or his representative such as ambassador is found guilty of an offence he committed, for instance, a tort or incurs a debt, within the jurisdiction while possessed of his sovereign status of immunity, and remain with the jurisdiction for a reasonable time, after the tort or debt thus incurred (see *Magdalena Steam Navigation Co (1894) 2QB 352 CA*). The unity to be accorded a particular sovereign whether a state or person representing that state is entitled to depends upon recognition of sovereignty by the British executive.

3.3.2 By Reason of Personal Capacity

There is no incapacity imposed on alien as such (see *Porter v. Freudeuburg (1915) 1KB 857CA*) neither does the English Court – as in practice of some foreign courts – require of an alien, because he is an alien, to give security before proceeding therein as plaintiff. In contrast to some foreign country courts, the English Court will not allow an enemy alien to commence proceeding against him. The right of an enemy alien to sue is merely suspended and it receives when he loses his enemy posture/character.

4.0 CONCLUSION

This unit is a very important sub –topics in module 2 and the importance of the unit can be deduced from the discussion of jurisdiction of the courts to sit on the matter with foreign elements. There are some cases that established the jurisdiction of the courts and the determinant factors and action in vein. The limitations to this exercise by the courts were also discussed. You have a lot to benefit particularly in the area being exploited.

5.0 SUMMARY

The principle of jurisdiction of English Courts and foreign courts in matters having foreign elements are determined by rules of common law and those rules sourced from statutes. This rule equally varies according to whether such actions concerns action in personam or action in rem. Are there exceptions to these principles? Exceptions from jurisdiction of the courts were addressed from two ways through which jurisdiction of a particular court can be restricted. That is (a) by reason of sovereign immunity and (b) by reason of personal capacity.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss the determinant of jurisdiction of the courts
2. Under what circumstances does an English Court possess jurisdiction to entertain an action in rem?
3. On what grounds will the courts assume jurisdiction of common law in action in personam?
4. Are there any limitations to the exercise of jurisdiction?

7.0 REFERENCES/FURTHER READING

- Ademola, J. Yakubu (1999). *Limits to the Application of Foreign Laws*. Maltose Law Books.
- Agbede, I.O. (1989). *Themes on Conflict of Laws* (6th ed.). Akoka, Lagos: Shaneson C.I. Limited.
- Morris, J.H.C. (2005). *Conflict of Laws* (6th ed.). London: Sweet & Maxwell Ltd.
- Thomas, JAC (nd). *Private International Law*. London: Hutchinson's University Library.

Torrance, H.M.B. (1958). *Conflict of Laws*. London: Streets & Maxwell..

Webb, P.R.H. (1960).. *A Case Book on the Conflict of Laws*. Butterworth, London.

UNIT 2 JUSTIFICATION

CONTENTS

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Content
 - 3.1 International Obligations
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

The doctrine of justification in relation to conflict of laws seeks to justify why a deciding court should trouble itself with cases which are to a greater or lesser extent foreign in nature.

2.0 OBJECTIVE

At the end of this unit, you should be able to:

- discuss with applicable examples, the justification for conflict of laws.

3.0 MAIN CONTENT

3.1 International Obligations

Why should an English Court depart from its own rule of law and apply those of another system? The justification for the conflict of law can best be seen by considering what will happen if it did not exist. Theoretically, it will be possible for English Courts to close their doors to all except English litigants. 'Theoretically', a closure ignores the obligation of the United Kingdom under the EU law and international conventions; and question of general justice under the concept of public international law protecting the welfare of all those within the territory of member States. But if they did so, grave injustice would be done not only to foreigners, but to the English.

Theoretically, also, if the English Court closed its doors to all except English litigants, an English company, a party to a contract with a Scottish or French company, would be unable to enforce it in England.

If the courts of other countries adopted the same principle, the contract could not be enforced in any country in the world.

Theoretically, it would be possible for Nigerian Courts, while opening their doors to foreigners, to apply Nigerian domestic law in all cases. But if they did so, grave injustice would again be done to both foreign and Nigerian parties. For example, if two Nigerians married in Kenya in accordance with the formalities prescribed by Kenyan law, but not in accordance with the formalities prescribed by Nigerian law, the Nigerian Court, if it applied Nigerian domestic law to the case, would have to treat the parties as unmarried persons. This would have unexpected and unjust consequences in terms of matrimonial property rights and responsibility for the children of the supposed marriage. In the same vein, it would theoretically be possible for Nigerian Courts, while opening their doors to foreigners, and while ready to apply foreign law in appropriate cases, to refuse to recognise or enforce a foreign judgement determining the issue between the parties. But if they did so, grave injustice would again be inflicted on both foreign and Nigerian parties. For instance, if a divorce was granted in a foreign country, and afterwards one party remarried in Nigeria, he or she might be convicted of bigamy. Or if a Nigerian defendant was sued by a foreigner in a foreign country for damages for breach of contract or for tort, and eventually obtained a judgement in his favour, the successful claimant might find that the Nigerian defendant had surreptitiously removed all assets to Nigeria; the claimant would then have to start all over again.

4.0 CONCLUSION

It is clear that a deciding court applies foreign laws in particular context in order to do justice between the parties, not from any desire to show courtesy to those other countries, nor even in the hope of reciprocity, i.e., if Nigerian Courts apply Chinese laws in appropriate cases, Chinese Courts will be encouraged in appropriate cases to apply Nigerian laws.

5.0 SUMMARY

In this unit, you have learnt about the following justifications for conflict of law: international obligations, trade and commerce, and interpersonal and social relations within and between citizens.

6.0 TUTOR-MARKED ASSIGNMENT

Why should we depart from the rules of our own law and apply those of another system?

7.0 REFERENCES/FURTHER READING

David McClean & Veronica Ruiz Abou-Nigm (2012). . *The Conflict of Law* (8th ed.) Oxford, England: Sweet and Maxwell.

UNIT 3 TECHNIQUES OF CLASSIFICATION, CHARACTERISATION AND CATEGORISATION

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Characterisation
 - 3.2 The Subject Matter of Characterisation
 - 3.3 Various Solutions
 - 3.4 Analytical Jurisprudence and Cooperative Law Theory of Conflict of Law
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

The terms ‘classification’, ‘characterisation’ and ‘categorisation’ are used interchangeably by various writers to refer to techniques used in tackling conflict of law issues. In this unit, the term ‘characterisation’ is adopted. Students should therefore not be confused. If you are learning to drive a car, you gain little benefits from abstract instructions in matters of technique given before you can actually handle the machine. The same may be true of the conflict of laws. The following analogy has its gainful aspect, in that, once you are familiar with its workings, you will wonder why the techniques once seemed so intimidating.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- discuss the characterisation of different conflict of law rules
- explain the typical rules of conflict of laws.

3.0 MAIN CONTENT

3.1 Characterisation

Using a commercial illustration, suppose a contract is made in Italy, under which an English company will supply materials to be used by Italian party at its manufacturing plant in Belgium. The materials

supplied, it is claimed, are substandard, and the Italian company wishes to claim damages against the English supplier. Can the action be heard in the English court? What law will be applied? In tackling these questions, the conflict of law uses legal categories and 'localising elements' or 'connecting factors'.

On the fact of any giving problem(s) potential connecting factors include; to which country the party belong; where the contract was entered into; where the legal duties it created, of making and delivering goods, were to be carried out. These factors may be of different strength and may be allocated different degrees of importance. For example, in these days of easy communication, it matters less where a contract is made. But the existence of the connecting factor makes it possible to devise rules which make sense of the infinite variety of possible factual situations, and discover to which country an issue belongs. The rules will identify the legal category into which the issue falls e.g. performance of breach of contract and the connecting factor or sometimes, factors appropriate to that category.

For example, typical rules of conflict of laws states that succession to immovable is governed by the law of a country in which the property is situate, often referred to by the Lacking's expression '*lex situs*'; that the former validity of a marriage is governed by the law of the place of celebration; and that the capacity to marry is governed by the law of each parties before the marriage took place *ante nuptial domicile*. In these examples, the categories are succession to movable property, formal validity of marriage and capacity to marry. And the connecting factors are situations, place of celebration and domicile.

In the example above, the connecting factor relevant to the jurisdictional issue will be that the defendant company has its domicile in England, and that the relevant obligation under the contract was to be performed principally in Belgium. In the choice of law context, the fact that the defendant's central administration is located in England may prove determinative. You will be able to give a further answer in due course. What is important here is the way in which connecting factors are used.

It has already been explained that the techniques of law make use of legal categories; before the correct connecting factor can be identified, you need to know into which legal category the facts of the case of the particular issue are properly placed. In the international context of our subject, this process of categorisation or characterisation presents a special problem. The nature of this problem can be shown by two examples. Suppose that a person buys a ticket in London for a train journey to Edinburgh, and is injured in a railway accident in Scotland. Is

the passenger's course of action against the railway company for breach of contract or for tort, in which case Scott's law will apply? By what law, English or Scott is this question to be answered? Or suppose that a marriage is celebrated in England between two French people domiciled in France. The marriage is valid by English law but invalid by French law because neither party has the consent of his or her parents as required by French law. But if this rule of French law relates only to formality of marriage, it will not apply to a marriage celebrated in England. But if it relates to capacity to marriage, it will invalidate a marriage of the French couple. The question is, by which law, French or English, is the nature of the French rule determined? The hypothesis could be unending. This is a type of question properly belonging to the class of problems called 'characterisation'.

3.2 The Subject Matter of Characterisation

It is pertinent to ask, what exactly is it that we characterise? The answer to this question is determined by the nature of the cause of action. *Re Cohn (1945) Ch. 5 61 LQR 340* provided a good example to this argument.

“A mother and daughter, both domiciled in Germany but resident in England, were killed in an air raid on London by the same high explosive bomb. The daughter was entitled to movables under her mother's will if and only if, she survived her mother. By the English conflict rules, succession to movable is governed by the law of domicile, but questions of procedure are governed by the lex fori. By S184 of the Law of Property Act 1925, the presumption was that the elder died first, but by Article 20 of the Germany Civil Code the presumption was that the deaths were simultaneous”.

What has to be characterised is the issue in the case, i.e., the 'question in issue'. As Auld, L.J (as he then was) puts it in *Macmillan Inco v. Bishops Gate Investment Trust Plc (No3)* where the issue concerned a claim viewed as either restitutionary or proprietary.

“The proper approach is to look beyond the formulation of the claim and to identify ... 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”.

SELF-ASSESSMENT EXERCISE

Highlight with decided case(s), the main subject matter of characterisation.

3.3 Various Solutions

Prior to 20th and 21st Centuries, various compromise solutions have been advocated thus, there are theories like the *lex fori*, *lex causae*, primary and secondary classification via media, enlightened *lex fori*, autonomous theory, analytical jurisprudence and comparative law. The principal contenders according to Morris are characterisation by the *lex fori* and by the *lex causae*. All these shall be examined in the subsequent paragraphs.

It is crystal clear that, in all cases where foreign statutes of limitation have been pleaded the courts have taken a two-fold approach. First, if the particular statute merely bars access to court while the claim remains intact, the statute in question will be ignored as being part of the procedure rules of the foreign law no matter how the foreign law actually classifies it. Secondly, if the statute completely extinguishes the right of action, it will be enforced as part of the substantive law of the *lex causae* (see *Philips v. Eyre (1870) LR 6QB1*). It will be relevant to make a brief comment on the theories mentioned above.

3.3.1 The *Lex Fori*: Theory of Conflict of Law

This approach is practically conducive to legal certainty (Agbede, I. O.). The great majority of continental writers follow Kahn and Bartin in thinking that, with certain exceptions (that is, one of Britain's exceptions was the characterisation of interest in property as interests in movable or immovable, which he said must be determined by the *lex situs*), characterisation should be governed by the law of the forum, the *lex fori* (Morris, JHC). Anony (2011) posited that the theory refuting the vested rights doctrine espoused by Baale, Walter W. Cook in his *lex fori* theory of conflict of laws argued against the notion that any right, including a foreign right, can be vested.

Instead Cook contended that Courts do not 'enforce' rights created under foreign law, but rather enforce domestic rights, which they themselves choose to create and enforce (Cook, Walter W, 1942). It is implicit in Cook's theory that he was bias in favour of the law of the forum, or a "homeward trend" demonstrating a preference for the application by American Judge of local law.

The basis for relying on characterisation by the *lex fori* is that the exercise is essentially concerned with identifying the relevant legal category and so the applicable English conflicts rule leading in turn to the identification of the governing law. Any reference to potentially applicable foreign law is premature until that has been done. The continental scholars tend to base their argument in terms of characterisation of rules of law rather than issues. They asserted that, the forum should characterise rules of its own domestic law in accordance with that law and should characterise rules of foreign law in accordance with their nearest equivalents in its own domestic law. However, the main argument in favour of this view is that the foreign law were allowed to determine in what situations it is to be applied; the law of the forum would lose all control over the applicable of its own conflict rules, and would no longer be master of its own house. There is tendency for this view to break down altogether if there is no close analogy to the foreign rule of law or institution in the domestic law of the forum.

3.3.2 The *Lex Causae*: Theory of Conflicts of Law

Some continental scholars think that characterisation should be governed by no any other theory than *lex causae* that is, the appropriate foreign law. Wolf posited that “every legal rule takes its characterisation from the legal system to which it belongs”. This view was applied in *Re Maldonado* (1954) p223 where the Court of Appeal had to decide whether the Spanish Government’s claim to the movable in England of a Spain interstate who died without next of kin was a right of succession in which Spanish Government was entitled to the movable or a jus regale in which English Crown is entitled to them. It was held that this question must be decided as a matter of fact and law in accordance with Spanish Law with the outcome that the Spanish Government was entitled.

This simply means that the foreign law applies or governs, and then apply its characterisation, is tantamount to not applying it at all. This argument cannot go without criticism; it is a circular argument to conclude that the foreign law governs the process of characterisation before the process of characterisation has led to the selection of the foreign law. Secondly, argument is if there are two potentially applicable foreign laws and why should the forum adopt the characterisation of one instead of the other (Morris, J.H.C.).

Furthermore, Agbede, I. O. contended that the result of application of this concept “will not only be confusing but it will also be absurd”. Although to him, the basis of this approach is to avoid the parochialism

and injustice inherent in the *lex fori* theory. Unfortunately, this approach had not provided the desired antidote.

3.4 Analytical Jurisprudence and Cooperative Law Theory of Conflict of Law

This approach is inspired by the need to make the process of certification more enlightened and more international in its scope. Some scholars/writers think that the process of characterisation should be performed in accordance with the principles of analytical jurisprudence and comparative law. Morris said, the theory has its attractions, simply because judicial procedure in conflicts matters should be more internationalist and less insular than in domestic cases.

The argument against this view is that there are very few principles of analytical jurisprudence and cooperative law of universal application. “International agreement on analytical concept is intopia”. It is no doubt that cooperative law is capable of revealing differences between domestic laws; it is hardly capable of resolving them. However, comparative study can only yield conflicting of characterisation without providing any tool for the solution of the concrete problem.

3.4.1 The Via Media Theory of Conflict of Law

This theory is adopted to breach gap short comings bedevilling the *lex fori* and the *lex causae* theories of conflicts of law. There is a glaring weakness in the approach. For instance, in *Re Gohn (Supra)*, if the German rule has been found to be procedural then none of the potentially applicable rules will apply. This will create a ‘gap’ which may be difficult to close. Nevertheless, if the English rules were found to be procedural and the Germany rule found to be substantive, the two will be simultaneously applicable thus creating problem of ‘cumulation’.

3.4.2 The Discretionary Theory of Conflicts of Law

This approach is rigidly an interest –oriented. The ‘autonomous’ theories are probably to permit the court some flexibility so as to avoid the pitfall of rigid rules mentioned above.

In other words, where there is some kind of guidance, however good or bad the court is given some direction. To give the court a free scope under the autonomous or interest –oriented theories will lead, no matter its inherent virtues, to a chaotic assortments of irreconcilable decisions.

SELF-ASSESSMENT EXERCISE

Critically examine the concept of characterisation in Conflicts of Law

4.0 CONCLUSION

The least interesting feature of the conflict of laws is that it is concerned with every branch of private law. There is a complication in it which makes its complete understanding herculean. The particular meaning that is given to any concept is as unlimited as the number of possible solutions. You are therefore advised to study this synopsis continuously in order to acquaint yourself with the various techniques and principles discussed in this unit.

5.0 SUMMARY

In this unit, you have learnt the following:

- the techniques of characterisation of the conflict of law rules
- the typical rules of conflict of laws
- the subject of characterisation.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the typical rules of conflict of laws.
2. Critically examine the concept of characterisation in Conflicts of Law.
3. Suggest solutions to address these problems.
4. Highlight with decided case(s), the main subject matter of characterisation.
5. Critically examine the concept of characterisation in Conflicts of Law.

7.0 REFERENCES/FURTHER READING

Agbede, I.O. (1989). *Themes on Conflict of Laws*. Akoka, Lagos: Shaneson C.I. Ltd.

Morris, J.H.C. (2005). *Conflict of Laws* (6th ed.). London: Sweet & Maxwell Ltd.

Ademola, J. Yakubu (1999). *Limits to the Application of Foreign Laws*. Maltose Law Books.

UNIT 4 THE DOCTRINE OF RENVOI

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Definition of Doctrine of Renvoi
 - 3.2 Single Renvoi
 - 3.3 Double Renvoi
 - 3.4 No Renvoi
 - 3.5 The New EU Succession Law
 - 3.6 English Doctrine of Renvoi
 - 3.7 Application of Renvoi in Common Law Africa and in Nigeria
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

This unit seeks to analyse the relevance of the doctrine of 'Renvoi' and to examine its practical significance in solving conflict issues firstly from a general perspective, and in attempt to determine whether it should be adopted or rejected by the court in Nigeria.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- define Renvoi
- list the different types of Renvoi
- explain the English doctrine of Renvoi
- discuss Foreign court theory
- state the application of Renvoi in common law Africa and Nigeria.

3.0 MAIN CONTENT

3.1 Definition of Doctrine of Renvoi

The doctrine of Renvoi is a legal doctrine which applies when a court is faced with a conflict of law, and must consider the law of another state

referred to as ‘private international laws’. This can apply when considering foreign issues in succession planning and in administrations of estates. The word ‘Renvoi’ comes from the French ‘send back’ or ‘return unopened’. The doctrine of ‘Renvoi’ is the process by which the court adopts the rule of a foreign jurisdiction with respect to any conflict of law that arises. The idea behind a doctrine is that it prevents forum shopping, and the same law is applied to achieve the same outcome regardless of where the case is actually dealt with. The system of Renvoi attempts to achieve that aim.

In the case of *L’Affaire Forgo Court de Cassation. CIV. June 24 Dallo 1879*, Bavarian national who had settled in France without acquiring a legal domicile there in the French sense died interstate in France leaving movables there. The French Court referred the question of the distribution of his interstate estate to Bavarian law. It was found that under that law (Bavarian) succession to movables (interstate estate) was governed by the place of habitual residence. The French Court accepted this remission to this law and applied the French international law. The decision served to make lawyers to realise the implication of accepting or rejecting the doctrine of Renvoi. This French practice of accepting Renvoi has been given statutory expression in some jurisdiction in Japan, Hungarian, and German civil code. And most of the early English decisions relevant to the doctrine of Renvoi are consistent with this approach. Thus in *Casdagly v. Casdagly, Scruition LJ* held, “that we are ready to apply the law of nationality, but if the country of nationality chooses to remit the matter to us, we will apply the same law as we will apply to our subjects”.

The doctrine in a situation, let’s say a Ghanaian domiciled in Nigeria died interstate leaving movables in Nigeria. Upon determination of the law that will govern succession to his estate of movables in a Nigerian court, the court in applying the law of the forum (the *lex fori*) including its conflict of law rules may determine the issue be settled with his (deceased) nationality (*lex patriae*). However Ghanaian law, including its conflict of law rules may be to the effect that such an issue as to the succession of the interstate movables be governed by the law of the domicile at the time of his death. Hence, a Nigerian court is referred back to observe its own forum law. The question here therefore is which law should finally be applied? This is the problem of Renvoi.

SELF-ASSESSMENT EXERCISE

- i. Define Renvoi?
- ii. Trace the origin of the doctrine of Renvoi.
- iii. Outline a possible case scenario in which renvoi applies.

3.2 Single Renvoi

Countries such as Spain, Italy and Luxemburg operate a 'single Renvoi' system. This system refers to another jurisdiction choice of law rules. Where the matter arises in a place such as Spain, Italy or Luxemburg (A) those jurisdiction will consider whether their own domestic law is that of another jurisdiction (B) where B's rule will return the issue to A (the original forum court), the court will accept the first remission and apply its own domestic court's law. For example, when a testator, who was a French national, was habitually resident in England but domiciled in Spain, dies leaving movable property in Spain, the court may need to consider which legislative forum will apply to deal with the property under succession law. In this case, Spain being the Law of the Forum i.e., where the property is situate, applies the law of deceased nationality, namely France, and applies French law. French law observes the law of the deceased habitual residence which is England. England however examines the domicile of the deceased which is Spain. As two transfers took place (from Spain to France and from France to England), Spain operating the single Renvoi system will not accept it back. Accordingly, the Spanish court being the law of the forum will apply the law where it was last left in the chain of referral i.e., with the law of England and Wales. Where both countries operate with either no Renvoi system or single Renvoi system, there is potential problem.

SELF-ASSESSMENT EXERCISE

Outline a possible case scenario in which Renvoi applies.

3.3 Double Renvoi

Unlike Spain, some countries such as England and France currently accept Renvoi twice. However, in this system, there cannot be more than two remissions. For example let us consider the following case whereby a testator, an Irish national, habitually resident in Spain but domiciled in Italy, dies leaving movable property in France. France being the law of the forum (where the assets are situated) will examine the law of the deceased habitual residence (Spain) and applies Spanish law. Spanish law observes the law of the deceased nationality (Italy), as a jurisdiction that only operates a single Renvoi system, will not accept the double Renvoi and is likely that in this case, France will apply Italian law.

3.4 No Renvoi

Countries such as Denmark, Greece and the US do not accept Renvoi.

3.5 The New EU Succession Law

Effective from 17th August, 2015, this EU succession law attempts harmonisation of succession for all member states in determining the forum that applies to succession law. Iceland, UK and Denmark have opted out of this regulation, although interestingly, the regulation will still have an effect on how these countries will deal with the non-signatory states – in relation to the doctrine of Renvoi the regulation attempt to provide that in all EU member states (other than Ireland, UK and Denmark) the doctrine is abolished other than is the case of third party states. It also provides for testators to designate the law of their nationality as applying to the whole of their estate. The regulation will only affect deaths on or after 17 August, 2015. However, an individual may elect the law under their will now to apply after they die.

3.6 English Doctrine of Renvoi

Although there are some English decisions which are seemingly consistent with the French practice of accepting Renvoi and transmission to a third system (in *Re Trufort* (1887) 36 Ch, D. 600 and *Armitage v. A.G.* (1906) p.135. See also *Guersny v. The Imperial Bank of Canada* (1911 C.C.A.) 118 Fed.300 (cited from Lorenzen, *Selected Essays* p. 68) for transmission in matter of choice of law). However the single Renvoi theory, whether in the form of remission or transmission, has been expressly repudiated by the English Court in the case of *Re Askew* where Maugham, J. said, “...an English Court can never have anything to do with Renvoi except so far as foreign experts may expound the doctrine as being part of the *lex domicilii*”. The English applied the foreign court theory.

SELF-ASSESSMENT EXERCISE

What are the main features of English doctrine of Renvoi?

Foreign Court Theory

The early English decision on problem of Renvoi in *Collier v. Rivaz* appears to have provided the basis for the development of the foreign court theory. The issue before the court was one of former validity of a will and six codicils of a British subject who died domiciled in Belgium. The six codicils were formerly valid under Belgian internal law, but the will was not, though it complied with the formal requirements of English internal law. On receiving expert evidence that the Belgian Court would have pronounced in favour of the will, the court per Sir H. Jenner, upheld the validity of both the will and the codicils, observing

that “the court sitting here decides from the evidence of persons skilled in that law (i.e. Belgian) and decides as it would if sitting in Belgium”.

This dictum has invariably been relied on as authority for the foreign court approach. Perhaps the main reason for the development of this doctrine in English law according to Agbede, I.O., can be gathered from the suggestion of Dicey and Morris. According to these authors, the doctrine originated as a device for mitigating the rigidity of English conflict rules for the formal validity of wills.

Foreign court theory requires specific proof of domestic law rather than the choice of law rules. It is therefore recommended by two great English judges on the ground that it is ‘simple and rational’. Although, in another case after a comprehensive review of the authorities; the forum court applies the law specified by the foreign conflicts rules, including the foreign Renvoi rules, in an effort to render the decision, which the foreign court would render if it were seized of the case (Williams Tatley). The forum court as a matter of fact, may dispose of the issue as it would have been determined by the court of the *lex causae*.

This approach has been adopted in a rule of High Court decisions. It is generally considered to represent the current English practice (See *Re Ross (Supra) Kentia v. Vahas (1914) AC 403 P.C.*; *Re Duke of Wellington (1948) Ch. D 506* in the *Estate of Fuld (No 3) (1966) 2 WLR 717*).

SELF-ASSESSMENT EXERCISE

- i. What do you understand by foreign court theory?
- ii. Is there any difference between foreign court theory and Renvoi?

3.7 Application of Renvoi in Common Law Africa and in Nigeria

Which areas are regarded as Common Law Africa? How do the doctrine of English Renvoi apply to them and the modus operandi adopted by their various domestic courts? This unit seeks to analyse and examine the doctrine of Renvoi and its unities in an attempt to determine whether it should be adopted or rejected by the courts in Common Law Africa.

The Common Law African countries are the countries under the former Yoke of English Colonial rule before they gained independence. The English Common Law principles were brought to African-English

colonised territory wholesale. It is therefore very difficult or mere impossible to totally erase English legal system from theirs.

As such, the general reception of English law into common law territory in Africa has provided the courts of these countries of common legal origin with ample rules of decision in areas where rules of statutory and customary laws do not exist. This is particularly in the view of Agbede, I.O., and the position in the sphere of private international law.

It is never dreamt of by the legislative bodies of these nations to legislate on the adoption and application of the English common doctrine without having recourse to their own domestic prevailing circumstances. This is the reason why most of the 'reception-statutes' confer authority on the courts of these states to modify these rules so as to meet the requirements of local situations.

Even though the statutes have not in this circumstances conserved express authority to the courts, it is believed that the courts possesses inherent authority to effect such modifications on the foreign imported statutes based on the individual states demand. Professor Agbede, I.O. (1989) emphasised that, the authority of the court to 'create' and modify common law rules under the English law does not derive from statutes. It is as previously stated, the child of judicial tradition.

At this junction, the relevance of the doctrine of Renvoi may be explained as follows:

Where the forum court has ascertained the applicable foreign law with the aid of the appropriate rule of selection, it may do one of three things.

1. It may determine the issue under the internal law of the foreign system so ascertained excluding its conflict rules. This method is often referred to as rejecting the Renvoi or the internal law theory. This is mostly widely accepted techniques. It has been most favored by English and American jurists, judges and scholars.
2. The forum may refer the issue to the conflict rules of the *lex causae*. Such a rule may concur in the application of its internal law. Where this occurs, the internal of the *lex causae* is invariably applied. Hence, the conflict rule of the *lex causae* may at the end of the day refer the issue back to the forum law or transmit it to a third legal jurisdiction. In the just case, if forum law admits the 'remission' to it and applies its internal law, it is said to accept the classical Renvoi theory which is nowadays referred to variously as the 'partial', 'single', 'simple', 'imperfect',

‘receptible’ or ‘continental’ Renvoi doctrine. This approach has since then remained a prolific source of legal commentaries. Thus in *Casdagh v. Casdagh*, Scrutton L.J. (as he then was) held that “we are ready to apply the law of the nationality but if the country of nationality chooses to remit the matter to us, we will apply the same law as we should apply to our subject”.

3. The forum court may dispose of the issue as it would have been determined by the courts of the *lex causae*. This technique has been adopted in a number of High Court decisions and is generally considered to represent the current English practice. This approach requires the forum court to consider it nationally sitting as a judge of the *lex causae* under the particular circumstances of the cases. This means the case having begun in the forum is notionally ‘transported, lock, stock and barrel, to the foreign country and began there again’.

SELF-ASSESSMENT EXERCISE

Discuss the relevance of English ‘Renvoi’ to Common Law Africa Countries.

4.0 CONCLUSION

We have learnt that where the significant element in a case are divided between two countries, the case is a case in the conflict of laws for any court in which it is litigated. If the Nigerian Court applies Canadian law because it thinks that the Canadian elements are more significant than the Nigerian ones, it may find that a Canadian Court would apply Nigerian law because it thinks that the Nigerian elements are the more significant. There are no generally acceptable rules applicable to solving the problem of Renvoi. All that can be said in practice is that most courts will assume inherent power to apply whatever conflict rules for the convenience of the justice of a particular case in the absence of one unifying convention or the other.

5.0 SUMMARY

In this unit, you have learnt about:

- the definition of Renvoi
- the different types of Renvoi
- the English doctrine of Renvoi
- foreign court theory
- the application of Renvoi in Common Law Africa and Nigeria.

6.0 TUTOR-MARKED ASSIGNMENT

1. Define Renvoi?
2. Trace the origin of the doctrine of Renvoi.
3. Outline a possible case scenario in which Renvoi applies
4. Discuss the likeable solutions to the problems of Renvoi.
5. State conditions for the application of the doctrine Renvoi.
6. What do you understand by foreign court theory?
7. Is there any difference between foreign court theory and Renvoi?

7. REFERENCES/FURTHER READING

Torrance H.M.B. (1958). *Conflict of Laws*. London: Sweets & Maxwell Ltd.

Agbede, I.O. (1989). *Themes on Conflict of Laws*. Akoka, Lagos: Shaneson C.I. Ltd.

Ademola, J. Yakubu (1999). *Limits to the Application of Foreign Laws*. Maltose Law Books.

UNIT 5 THE TIME FACTOR AND INCIDENTAL QUESTION

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Meaning and Scope of Time Factor
 - 3.2 Changes in the Conflict of Rule of the Forum
 - 3.3 Changes in the Combination of Connecting Factors
 - 3.4 Changes in the *Lex Causae*
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment.
- 7.0 References/Further Reading

1.0 INTRODUCTION

The conflict of laws deals primarily with the application of laws in space, but problems of time cannot be ignored (David and Veronica (supra)). In the conflict of laws, the time factor is significant in various situations. The most important of these is when there is a retrospective change in the applicable law after the events has happened, which gave rise to the course of action. There is a considerable continental literature on the time factor in the conflict of laws. The English Courts have also dealt with it in a very empirical fashion. In all of this, the three different problems which have been identified by writers are as follows:

- (i). The time factor that becomes significant if there is change in the content of the conflict rule of the forum-deciding court (called *le conflit transitoare* by French writers).
- (ii). If there is change in the content of the connecting factor (which the French call *le conflit mobile*).
- (iii). And most importantly, if there is change in the content of the foreign law to which the connecting factors refer.

Should the English Court apply the law as it was when the course of action arose, or as it is at the date of the trial? These problems are discussed in this unit.

2.0 OBJECTIVES

At the end of this unit, you should be able:

- explain the essence of time in the conflict of laws
- discuss the dynamics of the application of time in the conflict of laws.

3.0 MAIN CONTENT

3.1 Meaning and Scope of Conflict of Laws

The rule of conflict of law generally deals with the application of law in terms of geography of place. As in most of the other aspects of the law, where time constitute problems, time factor as a problem cannot be overlooked in the study of conflict of laws' rule. That is, problems of time cannot be altogether ignored (as an important factor).

Various international authors, scholars and judges have identified some considerable time factor in the conflict of laws. These problems as might be expected, the English Courts have dealt with it in a somewhat empirical fashion. The continental writers have identified three different types of factors, while Professor Agbede, I.O. in his popular work on 'conflict of laws, a concise text' identified four factors.

Morris analysing the time factor may become significant if there is a change in the content of the conflict rule of the forum (known as *le conflict transitoire* by French writers), or in the content of the connecting factors (which the French call *le conflict mobile*), or most important of all, in all content of the foreign law to which the connecting factor refers.

1. Changes in the substantive law of the *lex fori* (made applicable by Renvoi)
2. Changes in the conflict rule of the *lex fori*
3. Changes in the conflict rule of the *lex causae* (made applicable by Renvoi)
4. Changes in the substantive law of the *lex causae*

3.2 Changes in the Conflict Law Rule of the Forum

The *lex fori* when changes in the conflict rule of the forum by statute does not differ from a change in any other rule of law, the temporal scope of law is usually defined by the statute itself or by judicial

interpretation of the statute into the familiar English rules of statutory interpretation and judicial precedence.

Take note that, when the changes are brought about purely by judicial decision under judge-made law, such changes operate retroactively whereas, statute law is usually prospective. This is in compliance with the English common law declaratory theory of judiciary decision.

However, very grave consequences sometimes follow from a retrospective alteration in a conflict rule of the forum by judicial or legislative action, particularly in the area of family relations. Hence, it is important to note the English conflict rule for the recognition of foreign divorces which was radically altered by judicial action in 1953, 1967 and by legislative action in 1971 and 1986. Karsten submitted in *Hornett v. Hernet* that “a man domiciled in England married in 1919, a woman domiciled before her marriage in France and England until 1924, when the wife obtained a divorce in France. The husband heard about this divorce in 1925. He then resumed cohabitation with his wife in England until 1936, when they parted. No children were born of this cohabitation. In 1969, the husband petitioned for declaration that the divorce would be recognised in England. The judge-made law declared by the House of Lords in the year 1967 made it recognised otherwise it could not have been recognised.

The consequences of this retrospective alteration of the conflict rule are startling.

- a. If children had been born of the resumed cohabitation between the parties after the divorce, they would have been legitimate when born, but bastardized by the subsequent recognition of the decree.
- b. If the husband had gone through a ceremony of marriage with another woman in 1945, and his second marriage annulled for bigamy in 1950, and his second wife had then remarried, would the result of recognising the divorce in 1917 be to invalidate the nullity decree and also the second wife's second marriage?
- c. If the husband had died intestate in 1940, and a share in his property had been distributed to his French wife as his surviving spouse, would she have had to return it when the new conflict rule declared by the House of Lords in 1967 validated her French divorce?

SELF-ASSESSMENT EXERCISE

Critically assess the retrospective rule in 3.2

3.3 Changes in the Connecting Factor

The connecting factor from our study so far is a rule of the conflict of laws which may be either constant or variable. Connecting factor may be of a kind of element/character that it necessarily refers to a specific moment of time and the changes may further require new definition to lubricate the effect of such change. For example, a conflict rule which make specific reference to the issue of capacity to make a will to the law of the testator's domicile would be meaningless unless it defined the moment of time at which the domicile was relevant.

According to Webb, P.R.H *et al.*, if one wishes to know if a marriage contracted in Austria is formally valid, the "connecting factor" is the law of the place of celebration.

That is, Austrian law in force at the moment of marriage. According to them, in a simple case such as this, there is no need "to define the time contemplated by the rule: the definition is inherent in the rule itself" in these cases, it is essential for the conflict rule to define the relevant moment of time.

Examples of varying connecting factors include the situs of a movable, the flag of a ship, and the nationality, domicile or residence of an individual. In most cases, it is a question of formulating the most convenient and just conflict rule, and the time factor, though it cannot be disregarded, is not the dominant consideration.

Conclusively, it is essential for the conflict rule to define the relevant moment of time and the change in the connecting factor as a problem of time in the conflict of laws.

3.4 Changes in the *Lex Causae*

When the law of the citing to which the English conflict rule refers has seen change

(i.e. the *lex causae*). In line with the writing of Morris, the overwhelming weight of opinion among writers is that the *lex fori* should apply the *lex causae* in its entirety including its transitional rules. This is certainly the prevailing practice of courts on the continent of Europe. This is subject to public policy reservation under the common law against retroactive penal legislation.

This concept has received more intensive juristic comments in the civil law system, unlike the position in the common law jurisdiction where it was lately receiving attention. This doctrine is practically unknown within the judicial circle in Nigeria. For instance, in *Odiase v. Odiase*,

M married D, when M was domiciled in the old Western Region of Nigeria. The Mid-Western Region was created out of Western Region. He was still in the service of Western Regional Government and resident at the capital city of the Region. The wife however, brought an action for the dissolution of the marriage in the Mid-Western Region. In this case, the court held that M was domiciled in Mid-Western Region as M was an indigene of that part of the country without giving a thought to the issue of succession rules (Agbede I. O.). This principle was illustrated further in *Starkowski v. Attorney General* by Thomas JAC in a simplified form; H and W were married in Austria in 1945; By Austria law as it then stood, the marriage was formally invalid. About a month after the marriage, a law was passed in Austria which provided for the validation of such marriages as the present one with retrospective effect. Validation was brought about by the making of an entry in a “family book” by a registrar. H and W left Austria in 1946 for England and became domiciled there. In 1949, by which time they had separated, the Austrian registrar entered their marriage in the book, thus rendering it valid by Austrian Law.

The House of Lords held that the marriage was valid, so that W was not free in 1950 to marry X, a bachelor in England. In this instance, the court was prepared to recognise the retroactive effect of the Austrian law validating a void marriage.

With the increasing division of the constituent states into small units and the fragmentation of the erstwhile Soviet Republic into smaller autonomous countries, the courts will be called upon on many occasions in future to determine the temporal scope of law.

SELF-ASSESSMENT EXERCISE

How would you have decided the Starkowski case had W married X in London before her marriage to H had been entered in the “family book” by the Austrian registrar?

4.0 CONCLUSION

This unit discuss the basic concept of time factor in relation to three functional problems. It is not often that a single connecting factor will solve the whole problem as it is the case with the caution of tort that is referred to the law of place of causation of that tort in Jane jurisdiction. The change that occurs would also attract modification in the changes that occurs.

5.0 SUMMARY

Like any other areas of the law, changes in applicable law in the conflict of laws sphere create problems of legal administration. The changes may take four different forms as enumerated above. Changes in this perspective affect the time variation in the conflict of laws' rule which can only be determined by the prevailing law in this respect.

6.0 TUTOR-MARKED ASSIGNMENT

1. Define the time factor?
2. Identify cogent elements of time factor.

7.0 REFERENCES/FURTHER READING

Ademola, J. Yakubu (1999). *Limits to the Application of Foreign Laws*. Maltose Law Books.

Agbede, I.O. (1989). *Themes on Conflict of Laws*. Akoka, Lagos: Shaneson C.I. Ltd.

Morris, J.H.C. (2005). *Conflict of Laws* (6th ed.). London: Sweet & Maxwell Ltd.

MODULE 3 PERSONAL CONNECTING FACTORS

Unit 1	Residence
Unit 2	Forms of Residence
Unit 3	Domicile
Unit 4	Forms of Domicile

UNIT 1 RESIDENCE**CONTENTS**

1.0	Introduction
2.0	Objectives
3.0	Main Content
	3.1 Physical Presence
4.0	Conclusion
5.0	Summary
6.0	Tutor-Marked Assignment
7.0	References/Further Reading

1.0 INTRODUCTION

When a Nigerian Court is faced with an issue having international element, it may use a choice of law rule to identify the system of law whose rule will determine the particular issue. Choice of law rules usually consists of two elements which are the issue and a connecting factor. Therefore, choice of law rules dealing with personal issues often has a connecting factor. Originally, this personal connecting factor was a person's domicile. But in modern times, domicile has been replaced in some choice of law rules with residence. One can therefore argue that domicile and residence are the same concept, but with slightly different rules.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- identify and appreciate the concept 'residence' as a personal connecting factor
- identify the various forms of connecting link and their legal relevance in resolving conflict of law issues.

3.0 MAIN CONTENT

In our last module, a number of examples referred to 'English' or 'French', 'Italian' or 'Nigerian' parties, and you would have understood those terms as referring to people who in some sense belong to or are connected to England, France, Italy and Nigeria. International travel means that some individuals move between countries very frequently, and while they may at all times regard themselves as English, French, Italian or Nigerian, they have connections, stronger or weaker in character, with a range of countries. An illustration will make this clearer, Carlos, is a Venezuelan businessman working in the oil industry. He has dealings with Shell which has offices in London and in the Netherlands. He flies to Europe for lengthy negotiations with Shell executives. Suppose that his aircraft is diverted from its intended direct route to Amsterdam by an incident of air turbulence to Heathrow, he stays there for 45 minutes before resuming his journey. Each variation of the basic facts indicates a link of certain strength between Carlos, a Venezuelan, and England or the Netherlands. At some point, the strength of this link may be so strong that he may no longer be thought of, by others, or even by himself, as a Venezuelan at all.

3.1 Physical Presence

The most basic link between an individual and a country is mere physical presence, even if it is for 45 minutes spent wholly in an aircraft parked on an airport apron. Though factually clear cut, it creates so limited a link as to have little or no significance in the conflict of laws. One is therefore bound to hear rather, more or 'residence'. Residence is basically a question of fact, in some contexts it means very little more than physical presence. But it does not mean something more, for a person passing through a country as a traveller, is clearly not resident there.

As was expounded in the case of *Sinclair v. Sinclair* (1968) p.189, if someone takes residence in a country, the link of residence may remain, brief periods of absence notwithstanding. The word 'residence' in relation to conflict of laws depends on the circumstance of each case. In *Fox v. Stor* (1970) 2 QB 463, university students who were in their university town for purpose of electoral registration were held to be resident there. Wadgery, L.J. pointed out that "in any seaside town in the summer, the population divides itself into the residents who live there all the year round and the visitors who merely come for a period". But the visitor's hotel keeper would expect those visitors to use a room called 'the Residents' Lodge'. In the same way, residence means different things for different legal purposes. A person will easily be held

residence in a country in the issue of the jurisdiction of that country's court, but less easily so if the context is one of residence during a physical year. There are great varieties of examples, and the result of one case cannot normally be used to judge another.

SELF-ASSESSMENT EXERCISE

What do you understand by the term 'residence'?

4.0 CONCLUSION

Apart from the realm of conflict of law, residence has significance in other areas of the law, especially revenue law. The courts have shown a willingness to borrow from the interpretation given to the concept in these other areas when deciding on their use in conflict of laws. There is some strength in the argument that they should be interpreted in the same way, especially when the same words are used in various statutes.

5.0 SUMMARY

In this unit, you have learnt:

- about 'residence' as a connecting factor
- that physical presence is the most basic link between an individual and a country
- the various ways to which the term 'residence' can apply.

6.0 TUTOR-MARKED ASSIGNMENT

1. What do you understand by the term 'residence'?
2. Where is a homeless person resident?
3. Where is home for a student who lives at the university during the academic year and spends half of the rest of the year with each parent who are now divorced?

7.0 REFERENCES/FURTHER READING

Pippa Rogerson (2013). *Conflict of Law* (4th ed.). Cambridge, London: Cambridge University Press.

UNIT 2 FORMS OF RESIDENCE

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Ordinary Residence
 - 3.2 Habitual Residence
 - 3.3 Habitual Residence of a Child
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

In this unit, the intention between discussing the various forms of residence is to simplify the identification of the connecting factors. However, it should be noted that identifying either a domicile or a habitual residence can be difficult in any but the simplest cases. For example, where is a homeless person resident? Where is home for a student who lives at the university during the academic year and spends half of the rest of the year with each parents who are now divorced? Nevertheless, the identification of the residence is vital for the personal connecting factor.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- define and explain ordinary residence
- define and explain habitual residence
- define and explain habitual residence of a child.

3.0 MAIN CONTENT

3.1 Ordinary Residence

Ordinary residence ‘connotes residence in a place with some degree of continuity and apart from accidental or temporary absence’. If it has definite meaning, it can be said to mean according to the way in which a man’s life is usually ordered. It refers to a person’s abode in a particular place or country which he has adopted voluntarily and for settled

purposes, as part of the regular order of his or her life for the time being, whether short or long duration.

Ordinary residence can be changed in a day, but there is no reason, on appropriate facts, for a person not to be held to be ordinarily resident in more than one country at the same time. Thus, in the case of *Inland Revenue Commissioners v. Lysaght* (1928) A.C. 234, a man whose home was in the Republic of Ireland, and who came into England for one week in every month for business reasons, during which time he stayed in a hotel, was held to be resident and ordinarily resident in England for income tax purposes. But clearly, he was also resident and ordinarily resident in the Republic of Ireland.

It has been said that a child of tender years 'who cannot decide for himself where to live' is ordinarily resident in his or her parents' matrimonial home, and that this ordinary residence cannot be changed by one parent without the consent of the other. If the parents are living apart and the child is, by agreement between them, living with one of them, the child is resident in the home of that parent and that ordinary residence is not changed merely because the other parent takes the child away from that home. See the case of *Re. P (G.E) (An Infant)* (1965) CH. 568, 585 – 586.

3.2 Habitual Residence

Habitual residence has long been a favourite expression of the Hague Conference on Private International Law. It appears in many Hague Conventions and therefore in English statutes giving effect to them; but it is increasingly used in other statutes as well. No definition of habitual residence has ever been included in a Hague Convention; this has been a matter of deliberate policy, the aim being to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems. The expression is not to be treated as a term of art but according to the ordinary and natural meaning of the two words it contains. However, there is a regrettable tendency of the courts, despite their insistence that they are not dealing with a term of art, to develop rules as to when habitual residence may and may not be established. The Law Commission has spoken of the 'allegedly undeveloped state' of habitual residence as a legal concept, citing, in particular, uncertainties as to the place of intention and as to the length of time required for residence to become habitual.

Although, the courts have in the past sometimes taken a different view, it seems that there is no real distinction between the two concepts of habitual residence and ordinary residence; or at least, they share 'a

common core of meaning'. So the test to be applied in the context will again be that of a person's abode in a particular country which he or she has adopted voluntarily and for settled purposes as part of the regular order of life for the time being, the burden of proof being on the party alleging the change. However, it should be noted that the House of Lords has held that habitual residence may have a different meaning in different statutes according to their context and purpose.

It is consistent with that approach to hold that habitual residence cannot be acquired in a single day, as an appreciable period of time and a settled purpose are required.

SELF-ASSESSMENT EXERCISE

- i. Can habitual residence be lost in a day?
- ii. Can habitual residence continue during temporary absence?

3.3 Habitual Residence of a Child

It is obvious that a young child will not have the necessary settled intent or purpose required of an adult but will be treated as having a habitual residence. In many cases, the habitual residence of a child whose parents do not live together will be that of whichever parent has custody of the child. In many cases, parents may share custody, and the way in which the day-to-day care of the child is shared may be more significant in such cases; though the number of cross-border cases of this type is small. The courts have regularly held that a child's habitual residence cannot be challenged by the unilateral action of one parent and remains unchanged unless circumstances arise which quite independently point to a change in its habitual residence. When the parents do have a common habitual residence, the court has also held that: "the question of habitual residence of a child is not always determinable by reference to the combined intention of the parties. It ultimately depends upon whether, in all the circumstances, it can properly and realistically be said that the child is ...habitually resident in England and Wales". However, in the case of *Greenwich LBC (2007) EWHC 820 (Fam); 2 F.L.R. 154*, three children were held to be habitually resident in England even after two years' residence in Canada since parental authority was vested in the Local Authority who placed them in foster care, not in the aunt who cared for them. As can be seen, the case law on the habitual residence of children has a tendency to be contradictory, and this contradiction can be seen in the cases that consider the habitual residence of newborn baby.

In the case of *B v. H 42 (2002) 1 F.L.R. 388 (Habitual Residence: Wardship)*:

A pregnant mother was tricked by her husband into travelling to Bangladesh where the baby was born. Eventually, the mother managed to flee back to England where she applied to the English court for her baby to be made a ward of court. Jurisdiction depends on whether the child was habitually resident in England.

Charles, J. held that the baby was habitually resident in England (where it had never lived) following the line of authority that one parent cannot unilaterally change the habitual residence of a child without the consent or acquiescence of the other parent with rights of custody, and that the mother was habitually resident in England. With regard to the habitual residence of the baby, he said:

“In the case of an infant child and a fortiori a new born baby his...abode...which has been adopted for him...voluntarily and for settled purposes is as a matter of fact that of his...parents who have parental responsibility for the child and with whom he...will live... It is the settled intentions of the parents that render that ‘residence’ of the baby habitual.”

SELF-ASSESSMENT EXERCISE

Can a baby be habitually resident in a country where he/she is resident, but where neither parent is habitually resident?

4.0 CONCLUSION

So far we have dealt with various forms of residence. In the absence of statutes, the cases referred to raised various questions.

5.0 SUMMARY

In this unit, you have learnt the following:

- ordinary residence
- habitual residence
- habitual residence of a child.

6.0 TUTOR-MARKED ASSIGNMENT

1. Can habitual residence be lost in a day?
2. Can habitual residence continue during temporary absence?
3. Is it possible for a new born baby to have a habitual residence? If so, does this habitual residence depend on the habitual residence of the parents?

7.0 REFERENCES/FURTHER READING

David McClean & Veronica Ruiz Abou-Nigm (2012). *The Conflict of Laws* (8th ed.). Oxford, England: Sweet & Maxwell

Pippa Rogerson (2013). *Conflict of Law* (4th ed.). Cambridge, London: Cambridge University Press.

UNIT 3 DOMICILE

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Meaning of Domicile
 - 3.2 Application of Domicile
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

According to Agbede, I.O., in his essay titled ‘Lec Domiciloo in Contemporary Nigeria: etc’ it wasn’t until the beginning of the 19th Century that ‘domicile’ began to be recognised as the basis for the application of personal law. However, as a result of the rise of nationalism in the mid-19th Century, some European countries adopted nationality in preference to domicile as a connecting factor for the ascertainment of personal laws. He asserted that since then, some countries have somehow combined the two criteria. For most common law countries however, domicile appears to have been generally accepted. He continued that in Nigeria, the adoption of domicile can be justified on ground of practical necessity, as Nigerian nationality covers a number of independent legal systems.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- discuss the rules of domicile as contained in the received English law
- explain how these rules ought to be, have been, modified in order to suit Nigerian local conditions.

3.0 MAIN CONTENT

3.1 Meaning of Domicile

According to David and Veronica, the term ‘domicile’ is more easily illustrated than defined. The practical idea underlying the concept of domicile is that of permanent home. According to Lord Crownwalt in

Bell v. Kennedy (1868) LR 1 SC. & Div. 307 @ 320 Westbury, “by domicile we may mean home, the permanent home. And if you do not understand your permanent home, I am afraid that no illustration drawn from writers or foreign language will very much help you to it”. The notion of home or of permanent home is derived from the circumstances of the case. An English woman aged 70 years, left a widow after living all her life in Summerset, goes to New Zealand to live with her married daughter; although that move may be, in practical terms, irreversible, is she not likely to regard England as her home country? Infact, domicile cannot be equated with home. As we shall see, a person may be domiciled in a country which is not and never has been his home; a person may have two homes, but only have one domicile, a person may be homeless, but he/she must have a domicile.

According to Sir George Jasel in the case of *Ducet v. Joe Ghegan (1878) LR 9 Ch.D 441 @ 456*, the term ‘domicile’ is impossible to define. Nevertheless, it is clear from decided cases that acquire a domicile in a country according to the received (English) law. It is necessary to establish residence and an intention to remain there permanently or indefinitely. A domicile can only be acquired by the matrimony of these two factors. However, an intention of indefinite residence is not equivalent to permanent residence if it is contingent upon uncertain events. Thus, in *Moore House v Lord* it was held

“the recent intention of making a place a person’s permanent home exists only where he has no other idea than to continue there without looking forward to any event, certain or uncertain which might induce him to change his residence. If he has in his contemplation some events upon the happening of which his residence will ceases, it is not correct to call this event a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent.”

This rule may no longer be contemporarily relevant because of increased mobility of modern society, few things in human affairs can be certain, least of all is one’s intention. In Graveson’s view, this definition no longer fits the complexity, movement and sophistication of modern life. Rather curiously, this long time unsatisfactory definition of the English concept of domicile has been adopted in Nigeria without qualifications. For example, in *Funsica v. Pasmén*, Thomas J. held that:

“to establish a domicile in Nigeria, the mere factum of residence here is not sufficient...there

must be unequivocal evidence of animos manendi or intention to remain permanently”.

More curiously, according to Agbede, is the failure of the Nigerian judges to distinguish between interstate and international situations. For instance, in *Udom v. Udom*, Coker, J. who was concerned with an interstate conflict problem said,

“the subject must not only change his residence to that of a new domicile but also must have settled and resided in the new territory cum animo manendi. The residence in the new territory must be with the intention of remaining there permanently. The animos is the fixed and settled intention permanently to reside. The factum is the actual residence.”

This dictum appears to ignore the warning of Bell that the circumstances of life in a country must have great weight on the judge in determining the meaning of domicile. American judges are equally conscious of the inconvenience that will result from adopting the English rigid definition of domicile. Thus, Parker, J. held in *Putnam v. Johnson* 10 Mass 448, 501 (1818),

“in this new and enterprising country, it is doubtful whether one-half of all the young men, at the time of their emancipation, fit themselves in any town with an intention of always staying there. They settle in a place by way of experiment, to see whether it would suit their view of business and advance in life, and with an intention of removing to some more advantageous position, if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain.”

SELF-ASSESSMENT EXERCISE

1. What factors make the definitional process of domicile’ a tortuous enterprise?
2. Account for the different approaches of British and American courts in the determination of a person’s domicile.

3.2 Application of Domicile

- (i). Interstate situations: According to Agbede, under the received law, the *lex domicilii* governs most matters of family relations and family property. These include essential validity of a marriage, jurisdiction to grant a divorce, or a nullity decree; mutual rights of husbands and wife, parent and child, guardian and ward; legitimacy and legitimation; effect of marriage on property right of husband and wife; validity of wills of movable and succession to movables. Furthermore, domicile is the basis for liability to certain personal taxes. One of the main objections against the function of the English doctrine of domicile is that it is utilised for a multitude of different purposes. The scope of domicile is not as wide under the Nigerian law as it is under the English law. In the first place, domicile is irrelevant in Nigeria, particularly at the interstate level, for purpose of taxation (taxation is based on residence in Nigeria). Secondly, all natives of Nigeria who have not contracted monogamous marriages are governed with regard to most matters of their personal relations, by their appropriate customary law (with regard to those who profess Islam) by Islamic law.
- (ii). International situations: The scope of domicile at the international level, under the Nigerian law, does not appear to be identical with its scope under the English law. This is because the courts take no account of domicile in determining most matters governed by foreign customary law. For example, a Ghanaian who is domiciled in Nigeria will still be governed by his particular Ghanaian customary law as regard those matters normally regulated under the customary laws in Nigeria.

SELF-ASSESSMENT EXERCISE

What conflict of law rules will a Nigerian Court apply when administering the personality of a Cameroonian resident in Nigeria who has died interstate without a child and a wife?

4.0 CONCLUSION

The judicial practice under the received English law is based on characterising or defining domicile in accordance with the *lex fori*. This approach is not only logically sound; it is also convenient in practice. If the issue had been submitted to the *lex causae* it would have been impossible to ascertain the personal law of people who have established their homes in countries which adopt nationality as the basis of personal

law. Besides, to define domicile according to the legal system that has yet to be ascertained involves a logical fallacy. It is therefore hoped that Nigerian courts will preserve the judicial practice under the received law.

5.0 SUMMARY

In this unit, we have considered the meaning of domicile within the context of English law, and its application in Nigeria. We have considered the rules of domicile as contained in the received English law. We have also shown how these rules have been, or ought to be modified in order to suit Nigerian local conditions. Lastly, we have considered the scope of domicile in interstate situations, in relation to family relations and family property, and the scope of domicile in international situations.

6.0 TUTOR-MARKED ASSIGNMENT

1. The meaning as well as function of domicile varies widely as between different systems of law. Discuss.
2. What factors make the definitional process of domicile a tortuous enterprise?
3. Account for the different approaches of British and American Courts in the determination of a person's domicile.
4. What conflict of law rules will a Nigerian Court apply when administering the personality of a Cameroonian resident in Nigeria who has died interstate without a child and a wife?

7.0 REFERENCES/FURTHER READING

Agbede, I.O. (1989). *Themes on Conflict of Laws*. Akoka, Lagos: Shaneson C.I. Ltd.

David McClean & Veronica Ruiz Abou-Nigm (2012). *The Conflict of Laws* (8th ed.). Oxford, England: Sweet & Maxwell.

Pippa Rogerson (2013). *Conflict of Laws* (4th ed.). Cambridge, London: Cambridge University Press,

UNIT 4 FORMS AND RULES OF DOMICILE

CONTENTS

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Content
 - 3.1 Domicile of Origin
 - 3.2 Domicile of Choice
 - 3.3 Domicile of Dependence
 - 3.4 Unity of Domicile
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

No person can be without a domicile. A domicile is ascribed to a person by law as domicile of origin or of dependence, while domicile of choice is acquired independently of law but by the person's own will. However, anyone over the age of 16 can acquire a domicile of choice. This gives birth to another form of domicile defined in relation to its acquisition. As will be seen in due course, each form of domicile instigates separate legal relationships.

2.0 OBJECTIVES

At the end of this unit, you should be able:

- explain the various forms of domicile.

3.0 MAIN CONTENTS

3.1 Domicile of Origin

A domicile is the only means of ascertaining a person's personal law under the English law; it is invariable that English law requires that you must have a domicile. In order to achieve this, the law assigns to everyone a domicile at birth which is known as the domicile of origin. According to this rule, a legitimate takes the domicile of its father, and illegitimate or posthumous child takes the domicile of its mother. A family takes the domicile of the country where it is found. With regards to the operation of this rule in Nigeria, unlike England where you have a unit family structure, in Nigeria family according to Agbede, 'often

includes collaterals' of the 3rd or 4th degree in relationships, so that the death of the father does not invariably transfer to the mother the responsibility for the care and maintenance of the child. The father's brother or other male relations often steps into his shoes. The following analysis provided by Agbede will drive home my point: H, a Yoruba man temporarily stationed in Delta State, marries W an Itsekiri girl. During this period, assume that H dies in Delta State six months before a child, K, of the marriage is born. Assume also that H's brother, Y, takes W, shortly after the death of H, to H's hometown, and that he looks after her until the child is born and weaned. W therefore returns to her hometown. Under the received English law, W reverts to her Delta State domicile (of origin) on the death of H and retains this domicile during her temporary stay in H's hometown. Consequently, K acquires W domicile at birth as his domicile of origin. This is because K was born posthumous in English law. Whereas K in most cases will remain attached to the family of H throughout his life, nevertheless, he will never be able to rid himself of the Delta domicile until his death. It is no exaggeration to say that this rule is most absurd. It is suggested therefore, that a posthumous child should be presumed to take the domicile of the head of its family.

SELF-ASSESSMENT EXERCISE

- i. Define the term 'domicile'.
- ii. What factors determine the origin of a child whose mother died 7 months before he or she was born?

3.2 Domicile of Choice

- (i). Differences from domicile of origin: Domicile of origin and domicile of choice can be distinguished in three ways. First the domicile of origin is ascribed to a person by law and does not depend on his or her own acts or intentions; a domicile of choice is acquired if a person goes to live in a country with the intention of remaining there permanently. Secondly, it is more tenacious than a domicile of choice. A domicile of origin can only be lost by intentional acquisition of another one, but a domicile of choice can be lost simply by leaving the relevant country intending not to return as an inhabitant. If that should happen, then unless another domicile of choice is acquired, the domicile of origin revives. This, the 'revival' of the domicile of origin, is a third distinguishing feature.
- (ii). Acquisition: Anyone over the age of 16 can acquire a domicile of choice. Up to that point a minor has either a domicile of origin which continues, or a domicile of dependency following the

requisite parent which has supplanted the domicile of origin. A domicile of choice is acquired by a combination of two things, the actual presence or residence in a country, and the requisite intention. The two must coincide. If a person goes to a country and then leaves it, but later wishes to return there for good without actually returning, a domicile of choice is not acquired. However, provided the necessary intention exists, even a stay of a few hours will be enough to gain a domicile of choice.

The chief problems in this area concern the definition of the requisite intention and the proof of its existence in the particular case. The requisition intention may be defined as that of permanent or indefinite residence; the person must intend, at the relevant time, to reside in a country for good, or at least for an unlimited period. If the person does so, it does not matter that he or she has a later change of mind, so long as the person does not actually cease to reside in the country.

If, however, the person intends to reside in a country for a fixed time, say five years, or for an indefinite time but thinks that he or she will leave someday, then a domicile of choice is not acquired in that country. Also, if a person is only residing in a country for a limited purpose such as employment, or if the possibility of departing is in the person's mind, however, that possibility must be a real and not a fanciful contingency (such as a lottery win), nor one which is too vague.

SELF-ASSESSMENT EXERCISE

What factor determines the capacity of a person to acquire domicile by choice?

3.3 Domicile of Dependence

Either because he or she is an infant, their physical dependence on others or for lack of mental capacity, and certain persons are deemed under the received English law to be incapable of acquiring a domicile of choice. This category of persons includes infants, married women, and persons of unsound mind.

- a) Married women: The position of married women under the received English rule is the most intolerable aspect of domicile. According to Agbede, quoting Blackburn, by marriage, the husband and wife are one person in law. The legal existence of the wife is superseded during the marriage or least incorporated

and consolidated in that of the husband. In England, until 1st January, 1974, as matter of law, a married woman automatically possessed the domicile of her husband, even if he and she lived apart, and even though they were judicially separated. According to this rule, a wife takes the domicile of her husband in marriage in Nigeria, and continues to do so until the marriage is terminated by death or divorce. Moreover, a widow retains her late husband's domicile until she changes it. Neither desertion by the husband, nor an order of judicial separation affects this rule. However, under the Domicile and Matrimonial Proceedings Act 1973, from and after 1st January, 1974, the domicile of a married woman in England was ascertained in the same way as that of an adult male. But this rule applied to women who were married either before or after that date. If, immediately before then a woman was married, and had her husband's domicile by dependence, she is to be regarded as domiciled by choice. Notwithstanding this change in the UK, the Nigerian situation remains the same. The hardship of the rule in Nigeria is underpinned where a deserted wife seeks a divorce as divorce jurisdiction is generally exercised by the court of the husband's domicile, the wife is reduced to following the husband all over the world should the husband decide to change his home from place to place and by establishing himself in a State where the wife's ground for divorce is not recognised, it could deprive her of her action.

- b) Infants: In Nigeria an infant's domicile is dependent on that of his father until the infant attains the age of 21 (statutorily reduced to 16 in England). However, this rule does not apply to illegitimate infants. Note that a child can be legitimated by acknowledgement in Nigeria, and also, that the status of illegitimacy is very rare. In any event, the English rule which assigns the mother's domicile to an illegitimate child is fairly satisfactory. A change of the father's domicile correspondingly changes that of the infant, even if the father had deserted the infant, and even if the father's whereabouts or the infant's whereabouts are unknown, and notwithstanding the fact that the marriage has been dissolved, and that the custody of the infant has been awarded to the mother, the fact that a male infant has himself gotten married does not affect this position. However, a female infant takes, on marriage, the domicile of her husband. Upon the death of her father, the infant acquires, subject to certain exceptions, the mother's domicile.

- c) **Mental patients:** The domicile of a mentally disordered person can be changed by the person's own act, since he or she is incapable of forming the requisite intention. Thus, that person retains the domicile he or she had on becoming insane. Although the Mental health Act of 1983 and the Mental Capacity Act of 2005 both in England, made provisions for dealing with the residence, property and affairs of someone with a mental disorder, there are none dealing with change in the person's domicile. There is authority for the proposition that if a person becomes insane during that person's minority and the insanity continues, the domicile of dependence can be changed by an alteration of the domicile of the parents upon whom that person is dependent even if this takes place after he or she attains majority. However, if that person becomes insane after he or she attains majority, the domicile cannot be changed.

SELF-ASSESSMENT EXERCISE

What class of people can acquire domicile of dependence?

3.4 Unity of Domicile

The rule here is that a person cannot have more than one domicile at a time. Thus a person can only be domiciled in Nigeria or Ghana but not both. The application of this rule in Nigeria has provoked controversy and two school of thought, one in favour of state domicile and the other in favour of federal (Agbede, I.O.). The reason for this controversy is because matters of domicile are shared between the federal and state governments, since the domicile in a federation will not be adequate to connect a person with the law of a particular state, and since the rule of English law prescribes that a person cannot have more than one domicile, the state school of thought argued that only state domicile was feasible. The federal school on the other hand argued that at least for purposes of those matters within the jurisdiction of the Federal Legislature, domicile should be based on residency anywhere in Nigeria with an intention to remain in Nigeria permanently.

The adoption of a federal domicile for matrimonial causes according to Agbede is not so much a denial of the English doctrine of unity of domicile, as it is a direct consequence of the division of legislative powers in Nigeria. Domicile as previously stated, is a means to an end, and not an end in itself. It is the chain of connection between a person and a particular legal system which is relevant for the determination of his personal rights.

SELF-ASSESSMENT EXERCISE

Discuss the peculiar problem that is posed by a federal state like Nigeria to the concept of English unity of domicile.

4.0 CONCLUSION

The issue of identifying a person's domicile at common law is generally important for the purpose of the personal connecting factor for choice of law. Although, different meanings of domicile are used in cases from different jurisdiction, the general meaning of domicile is 'permanent home'. This seems clear enough, and aligns itself to the traditional view which states the rule ascribing domicile to a person are the same regardless of the context, so that one's domicile for taxation purposes would also be one's domicile for choice of law.

5.0 SUMMARY

In this unit, you have learnt the various forms of domicile and unity of domicile

6.0 TUTOR-MARKED ASSIGNMENT

1. What factors determine the origin of a child whose mother died seven months before he or she was born?
2. What factor determines the capacity of a person to acquire domicile by choice?
3. What class of people can acquire domicile of dependence?
4. Discuss the peculiar problem that is posed by a federal State like Nigeria to the concept of English unity of domicile.

7.0 REFERENCES/FURTHER READING

Agbede, I.O. (1989). *Themes on Conflict of Laws*. Akoka, Lagos: Shaneson C.I. Ltd.

MODULE 4 LIMITS OF APPLICATION OF FOREIGN LAW

Unit 1	Limits and Non-Application of Foreign Laws
Unit 2	Areas Where the Indicated Foreign Laws are Excluded for Various Reasons
Unit 3	Public Policy

UNIT 1 LIMITS AND NON-APPLICATION OF FOREIGN LAWS

CONTENTS

1.0	Introduction
2.0	Objective
3.0	Main Content
3.1	Divorce, Nullity, Separation and Maintenance Proceedings
3.2	Guardianship, Custody and Adoption Case
3.3	Procedure
4.0	Conclusion
5.0	Summary
6.0	Tutor-Marked Assignment
7.0	References/Further Reading

1.0 INTRODUCTION

In any legal system of the conflict of laws, and the Nigerian system is no exception, the courts retain an overriding power to refuse to enforce, and sometimes even to refuse to recognise rights acquired under foreign law. Infact, practically all systems of law impose certain limitations on the recognition and enforcement within the jurisdiction of foreign institutions and laws. In this unit, we shall discuss areas where foreign laws are totally excluded from application.

2.0 OBJECTIVE

At the end of this unit, you should be able to:

- discuss the areas where foreign laws are totally excluded from application.

3.0 MAIN CONTENT

3.1 Divorce, Nullity, Separation and Maintenance Proceedings

The Privy Council decided in the *Le Mesurier v. Le Mesurier* 3 that only the court of the domicile was the competent tribunal to grant a divorce decree and that this decision has since then crystallised into a rigid rule of choice of jurisdiction. Naturally, the question of choice of law became submerged under the issue of jurisdiction with the consequence that the English courts have never consciously developed choice of law rules in divorce cases. The application of English domestic law in all cases where the English court was properly seised of jurisdiction has also been extended to analogous proceedings such as nullity, separation and maintenance.

Although the English courts assumed jurisdiction in these areas on grounds other than domicile, nevertheless, in a 'remarkable insularity of approach' they assumed that no law but that of England should be applied and blissfully ignored any possible problem of private international law.

This sweeping disregard of foreign law has received statutory blessing such as minimum age, prohibited degree of relationship, reality of consent of parties, in all cases where the marriage in issue has been celebrated in England.

Fortunately, the question of choice of law in divorce and similar proceedings is irrelevant in Nigeria. At least in the interstate situation where there is unity of laws on these matters. On the international plane however, Agbede prefers an approach which takes an account of the personal law of the parties, along the line suggested in English draft code which provides as follows:

- (i). the personal law or laws of both parties recognise as sufficient grounds for divorce or nullity of marriage, a ground substantially similar to that on which a divorce sought in England, or;
- (ii). the personal law or laws of both parties would in the circumstances of the case permit the petitioner to obtain a divorce on some other grounds.

In addition, the draft code proposes that the English court should assume divorce jurisdiction and apply English law in respect of marriage citizens of the UK who are domiciled in those countries,

which would refer these matters exclusively to the national law of the parties. the adoption of this recommendations at the international level in Nigeria would reduce ‘the incidence of limping marriages’ and would bring the received English law into line with the practice under the customary laws, as well as with the practice in many jurisdictions.

SELF-ASSESSMENT EXERCISE

Give reasons why the English court would not apply foreign law on divorce, nullity, separation and maintenance proceedings.

3.2 Guardianship, Custody and Adoption Case

English Courts have evolved to a large extent, choice of law rules in this area, which are based on the paramountcy of the welfare of the infant. A party who has the right of custody or guardianship under a foreign law may be disappointed, if in the view of English court it would not be in the interest of the infant to recognise or enforce such foreign claim. But if giving effect to the claim will be consistent with the welfare principle, the court would not hesitate to do so. This approach, in Agbede’s view, is sound and should be preserved in Nigeria. Problems of adoption in the English conflict of law has been resolved on jurisdictional basis, but under the English Adoption Act of 1968, the courts are not permitted to make any adoption order if it would not be recognised by the internal laws of the countries of nationalities concerned. An adoption order cannot be made in favour of a foreigner domiciled in Nigeria under the Eastern States Adoption laws.

SELF-ASSESSMENT EXERCISE

The English Court, in very rare cases would apply foreign law in respect of guardianship custody and adoption cases if that foreign law satisfies a particular condition. What could this condition be?

3.3 Admiralty Cases

The English would only assume jurisdiction in admiralty actions if the ship over which the present course of action has arisen is present in British harbour. Once jurisdiction is assumed, the issue is determined solely under the English general maritime law without regard to the law of the place where the course of action arose.

SELF-ASSESSMENT EXERCISE

What is the justification for excluding foreign procedural law?

3.4 Procedure

Under received English law, all questions of procedure are governed by the *lex fori*. This rule is based on the precept of procedural convenience and appears to have universal application. To adopt any other approach may lead to a breakdown of the judicial machinery, as procedure is probably the most technical and distinguishing part of any legal system, and comprises many rules that would be unintelligible to a foreign judge. Agbede makes an analogy that it would be inconvenient, if not impracticable, for a Nigerian judge to arrange a jury trial for a citizen of the UK defending a civil suit in Nigeria. Consideration of practicability and convenience does require that a forum operates with its basic structure of procedural rules and institutions.

4.0 CONCLUSION

Foreign laws are not by any means, indiscriminately applied in all cases in which a transaction. Practically all system of law imposes certain limitations on the recognition and enforcement, within their jurisdiction, of foreign institutions and laws respectively. The extent to which foreign laws are applicable in Nigeria under the received English law in unit has been discussed particularly with reference to areas where foreign laws are positively excluded.

5.0 SUMMARY

In this unit, you have learnt the various areas where foreign laws are totally excluded from application.

6.0 TUTOR-MARKED ASSIGNMENT

1. Give reasons why the English Court would not apply foreign law on divorce, nullity, separation and maintenance proceedings.
2. The English Court, in very rare cases would apply foreign law in respect of guardianship custody and adoption cases if that foreign law satisfies a particular condition. What could this condition be?
3. What is the justification for excluding foreign procedural law?

7.0 REFERENCES/FURTHER READING

Agbede, I.O. (1989). *Themes on Conflict of Laws*. Akoka, Lagos: Shaneson C.I. Ltd.

UNIT 2 AREAS WHERE THE INDICATED FOREIGN LAWS ARE EXCLUDED FOR VARIOUS REASONS

CONTENTS

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Content
 - 3.1 Penal Laws
 - 3.2 Displacement of Foreign Law for Failure to Plead it
 - 3.3 Revenue Laws
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

In this unit, it is intended to discuss specific areas of foreign law that will be excluded by Nigerian conflict rules for various reasons. It may be that the enforcement of such law would extremely be inconvenient and impracticable, or would violate Nigeria's bilateral or protocol agreement with its neighbours.

2.0 OBJECTIVE

At the end of this unit, you should be able to:

- discuss the specific areas of law that will be excluded by Nigerian conflict rules for various reasons.

3.0 MAIN CONTENT

3.1 Penal Laws

It is well settled that Nigerian and English Courts would not directly or indirectly enforce a foreign penal law: 'no country executes the penal laws of another' said Chief Justice Marshall of the US. The reason has been thus explained by the Privy Council:

"The rule has its foundation in the well-recognised principle that crime, including in that term all breaches of public law punishable in the

country where they are committed. Accordingly, no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the courts of any other country.”

Although, this principle is almost universally accepted, modern state practice requires some qualification of its more expansive formulations. There is a growing number of international treaties under which states, including the UK, provide mutual assistance in the conduct of criminal prosecutions. For example, compulsory measures available under the law of one state may be exercised at the request of foreign state to search and seize evidence, or to freeze and confiscate the profits of drug-trafficking. International practice is reflected in English law in legislation such as Crime (International Cooperation) Act 2003.

In *Ademuluyi v. Adebayo and Attorney General of Western state*, where an official of the former civilian government of that state challenged the validity of an edict of the Western state government which purportedly divested him of the ownership in his immovable situated in Lagos state. Taylor, C.J. raised the very pertinent question when he said,

“can one state in the federation of Nigeria, by edict deal with the property of a person resident or domiciled in that state when such property lies in another state? The Chief Judge went further to say that this question was the crux of the matter with which he had to deal. But the only answer he gave was that “this court...which is now part and parcel of the High Court, are bound by the decree of the national military government, and will not hold itself bound by the provision of an edict passed in another state purporting to have extraterritorial effect in Lagos state if it in any way derogates from the aforesaid decree.”

One would have thought that a situation such as this is unlikely to arise in interstate conflict. Agbede suggested with respect, that this statement of the learned Justice was unhelpful. According to him, an edict of a state government is not invalid simply because it derogates from a decree of the federal legislature in any federal structure, provided the edict does not transgress its constitutional boundary.

Finally, in relation to penal law, the attitude of courts has been applauded by Agbede for showing respect to the penal laws of other states by seeking to exert itself through the device of extradition.

SELF-ASSESSMENT EXERCISE

- i. Give reasons why the breach of criminal law is not punishable other than in the country which they are committed.
- ii. What is extradition, and how can it be used to escape the rigours of the penal law principle in conflict of law rules?

3.2 Displacement of Foreign Law for Failure to Plead it

It is a pre-requisite for the application of foreign laws under the received law that they should be provided to the satisfaction of the court. This rule appears to have been based on considerations of practical convenience as no judge can possibly be proficient in, or have easy access to the laws of all other jurisdictions.

The rule that foreign law must be pleaded would appear hard to justify. If the conflict rule of the forum clearly indicates the application of the law of State Y, for example, it is hardly a sound rule that it should be ignored simply because it has not been expressly pleaded. Of course, the rule is not likely to work injustice (in practice) in a country like UK as nearly all litigations are conducted there by legal practitioners. The occasion will be rare indeed when a lawyer will, in error, fail to plead foreign laws.

There appears to be no basis for the adoption of either of these rules in Nigeria particularly at the interstate level. First, most Nigerian judges have been, and hopefully all future judges will be, trained in Nigerian Law. The statutes and Law Report of the constituent states are easily accessible.

It is not surprising therefore that the judge of state courts are, by statute, obliged to take judicial notice of the laws of other sister states. Therefore, the rule that foreign law must be proved has no application to inter-state conflict problems in Nigeria.

Secondly, it is commonly the case in Nigeria today that litigation is frequently conducted in the lower court and occasionally in the High Court without legal representation. To adhere to the English rule which requires that foreign laws must be pleaded under this condition is to invite unnecessary hardship and injustice. If this view were accepted, it would be difficult to justify the decision of the Supreme Court in

Amanambu v. Okafor (1996) 1 A11 N.L.R. 205 where the plaintiff's claim was dismissed on the ground that the appropriate foreign (sister-state) law has not been pleaded. Fortunately, the same court held in *Benson v. Ashiru* (1967) N.M.L.R. 363, that failure to plead the law of a sister-state cannot operate to exclude its application in appropriate situations. Curiously enough, the Supreme Court did not consider it necessary to overrule its earlier unsatisfactory decision in *Amanambu v. Okafor*.

As the law now stands, the view may be ventured that the rules of English law under discussion have no application to inter-state conflict problems in Nigeria. There is no doubt, however, that the courts will normally observe them for purposes of international conflict problems.

SELF-ASSESSMENT EXERCISE

What is the main disadvantage of the requirement to plead foreign law before a Nigerian court?

3.3 Revenue Laws

'No country ever takes notice of the revenue laws of another,' said Lord Mansfield in *Holman v. Johnson*, it has ever since been assumed by English lawyers that foreign revenues laws will not be enforced in England. Authority for this more limited preposition was scanty until the decision of the House of Lords in *Government of India v. Taylor* placed the matter beyond doubt. The reason for non-enforcement was that 'the tax-gathering was not a matter of contract but of authority and administration as between the state and those within its administration. A foreign revenue law is a law requiring a non- contractual payment of some money to the state or some department or sub- division thereof. It includes income tax, capital tax, custom duty, death duties, local rates or council taxes or compulsory contribution to a state insurance scheme and a profit levy.

English Courts will not enforce foreign revenue laws whether directly or indirectly. Direct enforcement occurs when a foreign state or its nominee seeks to recover the tax by action in England. Indirect enforcement occurs, for example, where a company in liquidation seeks to recover from one of its director's assets under the director's control which liquidator would use to pay foreign taxes due from the company or where the debtor pleads that the debt has been attached by a foreign garnishee order obtained by a foreign state claiming a tax. But where neither direct nor indirect enforcement arises, foreign revenue laws are freely recognised. Thus, Lord Mansfield's proposition that "no country

ever takes notice of the revenue laws of another” is seen to be too widely stated. The difference between enforcement and recognition was explained by Lord Simonds in *Regazzoni v. K.C. Sethia Ltd.*:

“It does not follow from the fact that today the court will not enforce a revenue law at the suit of a foreign State, that today it will enforce a contract which requires the doing of an act in a foreign country which violates the revenue law of that country. The two things are not complementary or co-extensive. This may be seen if for revenue law, penal law is substituted. For an English court will not enforce a penal law at the suit of a foreign State, yet it would be surprising if it would enforce a contract which required the commission of a crime in that State”.

According to Agbede, the rule was borne of an age of ‘continental despotism’ during which time the common law was dominated by ideas of economic and political liberalism with governmental activities at a minimum (see Dicey & Maurice, *Conflict of Law*, 7th ed. p. 21). Viewed against this background, the decision of Lord Hardwick in *Butcher v. Lawson (1735) Cas Temp. Hard 85*, which is probably the first case on this issue, is understandable if not justifiable. The issue before determination was an action in contract against the master of a Portuguese ship in London harbour for the delivery of certain gold bars at a time when export of gold from Portugal was forbidden by statute. Lord Hardwick held that the Portuguese prohibition was not a sufficient defence to the action. It was however the decision of Lord Mansfield in *Holman v. Johnson (supra)* that has come to represent the *locus clausus*. Agbede interrogates Lord Mansfield’s decision in the following words,

“if any principle can be deduced from this decision, it seems to be that any contract which is legal in the place where it has been concluded and performed is not rendered illegal just because one of the parties has some future illegal acts in his mind, even if the other party is aware of such an intention. The case has nothing to do with foreign revenue law. But Lord Mansfield took the opportunity to make an extravagant observation that; “...no country ever takes notice of the revenue laws of another country.””

He continued,

“surely, the only revenue law involved was that of England. So far, as this dictum has any meaningful content, it must either be an assumption as to what French law was or a statement that French law must be assumed to be the same as English law. The former view is unwarranted as no evidence of French law offered.”

However in *Biggs v. Lawrence (1789) 3 T.R. 454*, a similar contract was held invalid, but the *dictum* in Holman’s case was distinguished on the ground that the parties in the present case were British subjects, and are subject to British revenue laws.

The reason for the foreign revenue law in the conflict of laws can be shared amongst the following:

- (i). That it is a product of the conflicting interest of foreign, and to some extent, hostile countries, i.e. a child of the commercial necessity of an insular economy.
- (ii). That the enforcement of revenue laws rest not in consent but on force and authority. No State will be willing to expend its resources and exert its institutions for the benefit of another except one with mutual interest.
- (iii). That the rule is based on the need to avoid the difficulties inherent in investigating the complexity of a foreign revenue system. The process of enforcement could be so intricate and prolonged that it would be a remarkable committee if a State were to allow the time of its courts to be expended in the collection of foreign taxes.

Agbede condemns the attitude of courts for showing disrespect to the laws of other states, in that while the criminal seeks to exert itself through the device of extradition, there is virtually no means of reaching an absconding tax defaulter. The ease with which citizens can cross State boundaries in some of the African states renders the application of this rule absurdly unreal in these States. One may add that the unscrupulous attitude of courts in this regard is encouraged by the economic need to hold on to ill-gotten finances of other states acquired by their subjects in the territory of the foreign state.

SELF-ASSESSMENT EXERCISE

What is the historical justification for the foreign revenue law in the conflicts of law?

4.0 CONCLUSION

Originally, the English Court viewed the basis of recognising a foreign law or enforcing a foreign judgement to be a matter of comity or reciprocity. A foreign sovereign's court decision were to be accorded the same effect as an English decision because the law of nations required court of its country to assist each other. Those ideas were quickly supplanted with the theory of obligation. The decision of foreign courts is then treated as conclusive unless there is a defence. Canadian Courts consider that foreign judgement should be enforced, not as a matter of obligation, but because of comity – as recognition of another sovereign's judicial act, 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. All these have given way to the advantage of the more fixed rules of conflict of laws of each jurisdiction. All the same, parties can now predict and plan their activities so that they are not subject to likely foreign judgement as a result of the somewhat fixity of these rules.

5.0 SUMMARY

In this unit, you learnt the specific areas of law that has been excluded by Nigerian conflict rules for various reasons.

6.0 TUTOR-MARKED ASSIGNMENT

1. Give reasons why the breach of law is not punishable other than in the country which they are committed.
2. What is the main disadvantage of the requirement to plead foreign law before a Nigerian Court?
3. What is extradition, and how can it be used to escape the rigours of the penal law principle in conflict of law rules?
4. What is the historical justification for the foreign revenue law in the conflicts of law?
5. Write a brief essay on the doctrine of the exclusion of foreign as a principle of conflict of law.

7. REFERENCES/FURTHER READING

Agbede, I.O. (1989). *Themes on Conflict of Laws*. Akoka, Lagos: Shaneson C.I. Ltd.

David McClean & Veronica Ruiz Abou-Nigm (2012). *The Conflict of Laws* (8th ed.). Oxford, England: Sweet & Maxwell.

UNIT 3 PUBLIC POLICY

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Public Policy
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

In any system of conflict of law, the court retains an overriding power to refuse to enforce, and sometimes even to refuse to recognise, rights acquired under foreign law on grounds of public policy. This notion is related to that of mandatory rules of exclusion which we considered in the first unit of this module. Whereas mandatory rules operate in priority to the normal conflict process, public policy operates when that process has led to an unacceptable result. In the English conflict of laws, we need to consider first the general doctrine of public policy, which is necessarily somewhat vague, and secondly, some more specific applications of it.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- define public policy
- examine the application of the public policy concept in some areas of law.

3.0 MAIN CONTENT

3.1 Public Policy

The nature and scope of public policy doctrine was fully examined by Lord Nicholas of Birkenhead, in *Kuwait Airways Corp v. Iraqi Airways Co. (No 4 & 5)(2002) UKHL, 19;(2002) 2 A.C. 883*. The case concerned the seizure by the Iraqi, in the immediate aftermath of the Iraqi invasion of Kuwait in 1990, of aircraft belonging to a claimant company, and the effect of an Iraqi government resolution transferring the ownership of the aircraft to the defendant. Lord Nicholas affirmed the normal

application of laws of another country even though those laws are different from the law of the forum, and rejected blind adherence to foreign law which can never be required of an English Court when it would lead to a result wholly alien to fundamental requirement of justice as administered by the English Court. In English domestic law, it is now settled that the doctrine of public policy should not only be invoked in clear cases in which the harm to the public is evidently incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. In the conflict of laws, it is even more necessary that the doctrine should be kept within proper limit; otherwise the whole basis of the system is likely to be frustrated.

Owing to this carefulness, the doctrine of public policy has continued to assume far less prominence in English conflict of law, as the cases in which foreign law is regarded contrary to English foreign policy are getting slimmer and slimmer. The combined effect of all these is that the use of policy has become somewhat sporadic without regard to any pattern or principle. In order to check this certainty, one may usefully adopt Cheshire's suggested heads of public policy as a basis for discussion (see Agbede. I.O. *et al.*, p.121).

In Cheshire's view the use of foreign policy must be limited to the following situations:

- (i). **Where the fundamental conceptions of English justice are disregarded:** This rule is usually invoked in two situations and appears to be particularly relevant to questions of recognition and enforcement of foreign judgement. One of these situations arises when a person has participated in the adjudication of a legal dispute in which he himself is a party. The other arises whenever a person has been judged without being heard. Foreign judgements procured by means of any of such proceedings will not be recognised or enforced by the English Courts on grounds of public policy.
- (ii). **Where the English concept of morality is infringed:** An example of this is given as any transaction whose object is to promote sexual immorality. For instance, in *Robinson v. Bland* 2 Burr 1007 (1960) WM. BL. 256 (Wilment, J.), it was held that though an action could be maintained in many countries by a 'courtesan' for the price of her prostitution, English Courts could not entertain such an action on grounds of public policy.
- (iii). **Where a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers:** An

example of the first view is the prohibition of intercourse with enemy aliens. Support for the second view is based on cases in which the courts have refused to enforce contracts whose object was to further revolt in a friendly country or to break its laws.

- (iv). **Where a foreign rule offends the English conception of human liberty or freedom of action:** Instances cited include disqualifications arising from 'slavery', 'excommunication', 'heresy', 'infamy', 'civil death', 'popish recusancy' and 'non-conformity'.

Cheshire went on to condemn the modern judicial practice which tends to transcend these stipulated heads of public policy. He saw in this tendency an attempt to override choice of law rules by indefinable direction.

At what stage, if one may ask, will a rule of foreign law cease to be acceptable to English conception of morality? One would have thought that the range and variability of moral ideas are so enormous that this concept alone can be invoked in nearly all the cases to achieve the desired end. To seek to limit the discretion of judges to specific heads of public policy when some of these heads have no defined limit can hardly produce the desired certainty. Besides, Cheshire's formulations are, with a few exceptions, aimed at rules, rather than results.

In Agbede's view, neither the judges nor the writers appear to have given sufficient guidance as to when public policy should be applied, because the subject does not readily lend itself to national analysis, it depends on sensibilities.

While some writers have approached the issue of public policy in respect of their relativity to time, relativity to place and relativity to contact, it is sufficient to merely examine the application of the public policy concept in some areas of law.

- (i). **Foreign policy rules in relation to repugnancy:** It is this notion of public policy that has provided the basis for the exclusion of colonial discriminatory, confiscatory and penal laws. The forum policies that are being sought to advance in some of these areas are misplaced. But outside these misplaced areas however, one writer is doubtful whether the court would refuse to apply the indicated foreign laws on grounds of its mere repugnant nature regardless of the consequence of its application in the particular case. A rule of foreign law cannot by its nature have adverse

effect on the interest of the foreign state. It is the consequence of its application or recognition that can have such a result.

- (ii). **Foreign transactions (and contracts) in public policy:** The English Court will refuse to apply a covenant in restraint of trade had it been enforceable under the law governing the contract. In *Grell v. Levy (1864) 10 CB (NS) 73*, the English court refused to enforce champertous contract, contract entered into under duress, and in *Koufman v. Gerson (1904) 1 KB 591*, the English refused to enforce a contract because of the principle of cohesion. Contracts involving collusive and corrupt arrangement for a divorce was refused in the case of *Hope v. Hope (1857) 8 DM & G 731*, and trading with the enemy in *Dynamite A/G v. Rio Tinto Co. (1918) A.C. 260*, or breaking the laws of a friendly country in *Foska v. Driscoll (1929) 1KB 470*; *Regazzoni v. K. Cetia (1958) A.C. 301* (in both of which the contracts were governed by English law). On the other hand, the enforced contract for the loan of money to be spent on gambling abroad in *Saxby v. Fulton (1909) 2 KB 208*, and for foreign loans which contravene the English Money Lenders Act in *Schrichand v. Lacon (1906) 22 TLR 245*.
- (iii). **Foreign statute (or institution):** English Courts will not give effect to the result of a statute existing under a foreign law which is penal, i.e. discriminatory. Examples are the status of slavery or civil death, and the disabilities or incapacities which may be imposed on priests, nuns, Protestants, Jews, persons of alien nationality, persons of certain ethnic groups, and divorced persons. Some of these disabilities referred to above are obviously imposed as a punishment, e.g. the inability under some systems of law of person divorced for adultery to remarry while the innocent spouse remains single, or the disabilities imposed on Jews by the Nazi regime in Germany. Others equally obviously are not, e.g. the inability under the laws of some Catholic countries of priests and nuns to marry at all. None of these disabilities will be recognised in England, the true reason being that recognition would be contrary to English public policy.

The treatment of ‘prodigals’ in civil law system has sometimes been treated by the English Courts as contrary to public policy, but it is arguable that the limitation of a person’s normal powers of dealing with property to prevent being dissipated is protective in nature not penal.

The remark in *Hyde v. Hyde* by their Lordship that the institution of polygamous marriage is 'revolting' has been described by Agbede as 'showing both manifestations of the syndrome of parochialism, and the lack of sense of reality towards polygamous marriage. According to him,

“the policy that is being advanced by this refusal is the foreign statute or institution policy that the court will not give effect to a statute which is, by international consensus, deemed to be immoral, such as polygamous or incestuous marriage, or which is positively prohibited by public law of England from motive of policy, or which is of penal nature, or which has no counterpart in English law. It is clear that such an approach is unfortunate.”

Agbede's anger is now misplaced because English Courts do recognise the validity of polygamous marriages and of marriages within the prohibited degrees of English law as it was the case in *Re. Bozzelli's Settlement case (1902) 1 Ch. 751*, concerning a marriage in 1880 with deceased brother's widow; *Re. Pozot's Settlement Trust (1952) 1 ALL E.R. 1707 @ 1109*, involving marriage with step-daughter, and *Chenney v. Chenny (1965) p. 85*, involving marriage between uncle and niece, provided of course they are valid under the applicable foreign law. But they might refuse to recognise a marriage between persons so closely related that sexual intercourse between them would amount to incest by English criminal as in *Brook v. Brook (1861)* and *Cheney v. Chenny (1965)*, both supra, or with a child below the age of puberty as in *Alhaji Muhammed v. Knott (1969) 1QB 1*, where such a marriage was recognised. The mere fact that a foreign statute or relationship is unknown to English domestic law is no longer a ground for refusing to recognise it. Thus, legitimisation by subsequent marriage was recognised and given effect to in England long before it became part of English domestic law. The recognition of polygamous marriage is another example.

- (iv). **Natural justice (judgement) and foreign policy:** The English Court will not give effect to a foreign government which has been procured by fraud or which is lacking in the fundamentals of natural justice. The defendant must have been served with the document instituting proceedings in sufficient time, and in such a way as to enable the defendant to arrange a defence to the claim. If the defendant was not so served, and then a judgement is given

in default, the defendant can raise this defence against the recognition and enforcement of the judgement in another member state. In *Orams v. Apostolites*, the English Court was faced with a judgement from the Republic of Cyprus court over land in the Turkish Republic of Cyprus. Jack, J. held that, what was sufficient time depended upon the circumstances, including any special difficulties that the defendant might face. It decided in this case that 13 days including two weekends between the service of the document and the hearing was probably not enough time for the defendant to arrange their defence. They did not speak Greek or Turkish, and they would have had to find a Greek Cypriot lawyer from the Turkish Cyprus side of the border. It is the enforcing court, i.e. England in this case, that determines whether or not the service was effected and whether there was reasonable time for the defendant to arrange for the defence.

SELF-ASSESSMENT EXERCISE

- i. Will a contract of polygamy be annulled on grounds of conflict of law alone?
- ii. On what ground would a Nigerian Court refuse to recognise a judgement of a US court between two same sex litigants, public policy, contract or statute? Give reasons for your answer.

4.0 CONCLUSION

Owing to the generality of conflict rules, public policy reservation serves as a corrective to the ordinary rules of choice of law in particular situations. The mere hardness or repugnancy of a foreign rule, institution, transaction or judgement, whose recognition or enforcement will not in any way affect the interest of the forum state should not call for the application of the forum public policy. On the contrary, where the enforcement of the foreign rule or transaction will have harmful repercussions within the forum, the foreign character of the rule or transaction can hardly deter intervention by the foreign. Agbede concludes that “nevertheless, it is important to know that foreign law is normally applied in order to achieve substantial justice in certain cases, as no state possesses a monopoly of justice.

5.0 SUMMARY

In this unit, you have learnt the definition of public policy and the application of the public policy concept in some areas of law.

6.0 TUTOR-MARKED ASSIGNMENT

1. Will a contract of polygamy be annulled on grounds of conflict of law alone?
2. On what ground would a Nigerian Court refuse to recognise a judgement of a US court between two same sex litigants, public policy, contract or statute? Give reasons for your answer.

7.0 REFERENCES/FURTHER READING

Agbede, I.O. (1989). *Themes on Conflict of Laws*. Akoka, Lagos: Shaneson C.I. Ltd.

Cheshire, (1974). *Private International Law* (7th ed.).

Goodrich & Scoles (1964). *Conflict of Laws* .

Wolff, M. (1950). *Private International Law* (2nd ed.).