



## **Legislative inaction and judicial legislation under the Ethiopian private international law regime: an analysis of selected decisions of the Federal Supreme Court's Cassation Division**

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The Cassation Division of the Ethiopian Federal Supreme Court has the power to review any court decision containing a basic error of law. The interpretations of the Division reviewing such decisions are binding on all other courts. So far, the Division has rendered a handful of binding precedents pertaining to private international law. Nevertheless, the appropriateness of the Division's decisions in some private international law cases is questionable, let alone correcting errors committed by other courts. In two employment cases, the Division utterly invalidated choice of law agreements concluded by the parties. In another case, it characterized a dispute involving a foreigner as a purely domestic case. Through a critical analysis of the case laws, this Article strives to answer the question of whether the Division's decisions are consonant to the foundational principles of private international law such as party autonomy. It also examines the validity of the precedents in light of the doctrine of separation of powers. The absence of a dedicated private international law statute and the bindingness of the Division's decisions make the second question worthwhile. The Article will argue that the Division's decisions undermine some generally accepted principles such as party autonomy: the decisions involve a judicial invention of eccentric norms. Hence, they also encroach on the lawmaking power of the Legislature.

**Keywords:** private international law; Cassation Division; precedent; separation of powers; legislative inaction; judicial legislation; party autonomy; choice of law agreement; foreign element

### **A. Introduction**

Private international law rules and principles are activated whenever a court encounters a case with a foreign element. Based on these precepts, a court decides whether it has jurisdiction to hear a given dispute. The selection of the

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applicable law also rests on the choice of law rules of private international law. The third component of the law deals with the recognition and enforcement of foreign judgments. States may regulate these issues through domestic legislation or a treaty. Universally accepted principles of private international law and parties' choice of court and law agreements also play an indispensable role in the adjudication of private international law disputes.<sup>1</sup>

Excepting the provisions of its Civil Procedure Code on the execution of foreign judgments and awards,<sup>2</sup> Ethiopia does not have a dedicated private international law statute: there is no legislation applicable to jurisdictional and choice of law issues. Given the Legislature's inaction, judicial bewilderment and absurdity of decisions are common place. This is palpable from the decisions of the Federal Supreme Court's Cassation Division. Specifically, the Division's decisions in three cases presented in this Article are out of touch with the foundational principles and concepts of private international law. In two employment cases: *C.A.S-Consulting Engineers Salzgitter GMBH V. Mr. Kassahun Teweldebirhan*<sup>3</sup> and *Foundation Africa V. Mr. Alemu Taddese*,<sup>4</sup> the Division unconditionally invalidated the choice of law agreements which were concluded by the parties. In both cases, the Division did not look into the foreign laws chosen by the parties. In *Global Hotel PLC V. Mr. Nicola As Papachat Zis*,<sup>5</sup> the Division characterized a private international law dispute involving a foreigner as a purely domestic case. Based on this characterization, it ruled that the case should be adjudicated like other domestic disputes.

The greatest misfortune is that the Division's decisions make a law for future cases: according to the Federal Courts Proclamation Re-amendment Proclamation, courts at all levels – federal and state – are required to observe the decisions as they constitute binding precedents.<sup>6</sup> The non-existence of a dedicated private international law statute and the bindingness of the Division's decisions make the question of how the Division should decide private international law cases a pressing conundrum.

Judicial legislation of flawed precepts is perilous in light of the ends of private international law. Among many things, it undermines some foundational principles

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<sup>1</sup>A Mayss, *Principles of Private International Law* (Cavendish Publishing, 3rd edn, 1999), 1–2; see also JG Collier, *Conflict of Laws* (Cambridge University Press, 3rd edn, 2004), 3–4.

<sup>2</sup>Civil Procedure Code of the Empire of Ethiopia, Decree No. 52, *Negarit Gazeta*, Extraordinary Issue No. 3 of 1965, Arts. 456–61.

<sup>3</sup>*C.A.S-Consulting Engineers Salzgitter GMBH V. Kassahun Teweldebirhan*, [2010] Federal Supreme Court Cassation Division, File Number 54121, Vol. 11, pp. 545–47.

<sup>4</sup>*Foundation Africa V. Mr. Alemu Taddese*, [2010] Federal Supreme Court Cassation Division, File number 50923, Vol. 9, pp. 260–62.

<sup>5</sup>*Global Hotel PLC V. Mr. Nicola As Papachat Zis*, [2009] Federal Supreme Court Cassation Division, File No. 28883, Vol. 5, pp. 375–77.

<sup>6</sup>Art 2(1) of the Federal Courts Proclamation Re-amendment Proclamation No.454/2005, Federal *Negarit Gazeta* of the Federal Democratic Republic of Ethiopia, 11th Year No. 42 (June 2005).

of private international law that are imperative for the harmonious operation of various private international law regimes. In specific cases, the adventure defeats the legitimate expectation of parties based on generally accepted principles of private international law; adjudicating cases based on precepts invented after a dispute has arisen makes the outcome unpredictable and subject to the will of the judges. Private international law also aims to ensure “conflicts justice”. This encapsulates the elimination of unfair barriers and unfair benefits to parties involved in private international law disputes.<sup>7</sup> Deviation from the generally accepted principles of private international law may lead to one of these misfortunes.

The Judicial invention of prospectively binding precepts also encroaches upon the lawmaking power of the Legislature. The 1995 Constitution of the Federal Democratic Republic of Ethiopia allocates power among the three organs of government – the Legislature, the Executive and the Judiciary.<sup>8</sup> In light of this, the flaws of the Division’s precedents make their validity very questionable as they involve a judicial invention of new precepts applicable to a myriad of future private international law cases. Though determining the distinction between legislative and judicial functions is perplexing, judicial decisions should not supplant the Legislature’s role to regulate a given matter through prospective rules.<sup>9</sup>

The Division may not decide not to hear private international law cases stating the absence of a dedicated private international law as a reason.<sup>10</sup> Nor can the Division invent its own precepts as this will undermine the generally accepted principles of private international law and the doctrine of separation of powers. The sound option is, therefore, to hear and decide such disputes based on generally accepted principles of private international law. For instance, one of the widely accepted principles of private international law is party autonomy.<sup>11</sup> Therefore, the validity of a choice of law agreement concluded by contracting parties should be decided by taking this principle and its exceptions into account.

This Article aims to examine the merits and validity of the decisions of the Cassation Division of the Ethiopian Federal Supreme Court in three selected cases. To this end, it critically analyses the decisions in light of some generally accepted principles of private international law and the doctrine of separation of powers enshrined by the Ethiopian Constitution. Thereby, it will answer the questions of whether the decisions are apt weighed in light of private international law

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<sup>7</sup>See A Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009), 16–17.

<sup>8</sup>Constitution of the Federal Democratic Republic of Ethiopia, 1995, *Negarit Gazzeta*, 1st Year No.1, arts. 50(2), 55(1), 72(1) and 79(1).

<sup>9</sup>WH Cowles, “The Distinction between Legislative and Judicial Power” (1892) 40 *The American Law Register and Review* 433,437.

<sup>10</sup>See JG Day, “Why judges Must Make Law” (1976) 26 *Case Western Reserve Law Review* 563, 567.

<sup>11</sup>Mills, *supra* n 7, 291–95.

principles and legitimate judicial renditions in light of the doctrine of separation of powers.

The Article is divided into three sections. The first section provides an overview of the Ethiopian legal system. This section aims to acquaint readers with the basic features of the Ethiopian legal system. It will, therefore, discuss the constitutional federal arrangement, the structure of the judiciary and the division of lawmaking powers and their implication for private international law. The second section will analyse the selected cases in light of generally accepted principles of private international law. This section will argue that the decisions of the Cassation Division undermine various principles of private international law such as party autonomy. The last section examines the legitimacy of the precedents introduced by the Division in light of the doctrine of separation of powers. This section will argue that the decisions of the Division encroach on the lawmaking power of the Legislature.

## **B. An overview of the Ethiopian legal system**

The 1995 Ethiopian Constitution, as it is the supreme law of the land,<sup>12</sup> is at the core of the Ethiopian legal system. It establishes a federal republic in which power is divided between the federal government and the states.<sup>13</sup> The states, as well as the federal government, have their own Legislative, Executive and Judicial organs.<sup>14</sup> The Constitution's structure of power allocation provides three categories of powers: exclusive federal powers, shared powers and exclusive powers of the states.<sup>15</sup> Peculiarly, the power to interpret the Constitution is invested in the House of Federation which is a non-judicial organ constituted by the representatives of nations, nationalities, and peoples of the country.<sup>16</sup>

Legislative jurisdiction is constitutionally divided between the federal government and the states. Based on the area of law in question, the states, as well as the federal government, may enact their own laws.<sup>17</sup> The House of Peoples' Representatives – the Federal Legislature – has the power to enact various civil laws. This includes a commercial code, a labour code, and intellectual property laws.<sup>18</sup> The states have a residual legislative power over the remaining areas of civil laws such as family and succession.<sup>19</sup> Due to such division of powers, private international law disputes may arise in relation to the federal as well as the state private laws.

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<sup>12</sup>Ethiopian Constitution, 1995, art. 9(1).

<sup>13</sup>Ethiopian Constitution, 1995, art.1.

<sup>14</sup>Ethiopian Constitution, 1995, art. 50(2).

<sup>15</sup>Ethiopian Constitution, 1995, arts. 50, 52(1), 98, 52(2) (d).

<sup>16</sup>Ethiopian Constitution, 1995, arts. 61(1) and 62(1).

<sup>17</sup>Ethiopian Constitution, 1995, arts. 55(1), 52(2) (b).

<sup>18</sup>Ethiopian Constitution, 1995, arts. 55(3), (4) 55(2)(g).

<sup>19</sup>Ethiopian Constitution, 1995, art. 52(1).

The Constitution engenders a dual court system: federal and state.<sup>20</sup> The federal, as well as the state judiciaries, has three tiers. The federal judiciary comprises the Federal Supreme Court, the Federal High Court, and the Federal First Instance Court.<sup>21</sup> The state judiciaries likewise have three tiers: state supreme, high, and first instance courts.<sup>22</sup> The Federal Supreme Court has the final judicial authority over federal matters.<sup>23</sup> Likewise, the state supreme courts have the final judicial authority over state matters.<sup>24</sup> The federal courts exercise jurisdiction over matters that fall under federal laws and the state courts have inherent jurisdiction over matters covered by state laws. Moreover, the state high courts and supreme courts are delegated to exercise the jurisdictions of the Federal First Instance Court and that of the Federal High Court, respectively.<sup>25</sup>

According to the Federal Courts Proclamation, the Federal High Court shall have a first instance jurisdiction over private international law disputes.<sup>26</sup> This is irrespective of the amount of claim in question. The power of the Federal High Court is constitutionally delegated to state supreme courts.<sup>27</sup> Thus, the state supreme courts may adjudicate private international law disputes pertaining to federal laws through delegation. However, the Constitution also provides that the Federal Legislature may revoke this delegation by establishing the Federal High Court in the states.<sup>28</sup> Based on this constitutional provision, the House of Peoples' Representatives has established the Federal High Court in five states.<sup>29</sup> Therefore, it's only the reaming four states in which the Federal High Court has not been established that still retain the delegation. One may appeal to the Federal Supreme Court if aggrieved by the decision of the Federal High Court or that of the state supreme courts rendered based on their delegation to adjudicate federal matters.<sup>30</sup>

The Ethiopian federal structure, particularly the division of legislative and judicial powers between the federal government and the states, has a fundamental implication for the architecture and operation of private international law in Ethiopia. As mentioned above, both the federal government and the states have their own legislatures and judiciaries. The constitutional division of private law-

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<sup>20</sup>Ethiopian Constitution, 1995, art. 50(2).

<sup>21</sup>Ethiopian Constitution, 1995, art. 78(2).

<sup>22</sup>Ethiopian Constitution, 1995, art. 78(2).

<sup>23</sup>Ethiopian Constitution, 1995, art. 80(1).

<sup>24</sup>Ethiopian Constitution, 1995, art.80(2).

<sup>25</sup>Ethiopian Constitution, 1995, arts. 80(2) and 80(4).

<sup>26</sup>Federal Courts Proclamation No. 25/96, Federal *Negarit Gazeta* of the Federal Democratic Republic of Ethiopia, 2nd Year No. 13 (15 February 1996) art. 11(2)(a).

<sup>27</sup>Ethiopian Constitution, 1995, 80(2).

<sup>28</sup>Ethiopian Constitution, 1995, 78(2).

<sup>29</sup>A Proclamation to Provide for the Establishment of Federal High Court in Some Regions, Number 322/2003, Federal *Negarit Gazeta* of the Federal Democratic Republic of Ethiopia, 9th Year, Number 42 (April 2003).

<sup>30</sup>Ethiopian Constitution, 1995, art. 80(6).

making powers between the federal and state governments entails two types of private international law disputes: disputes connected to the federal private laws and disputes arising in relation to state private laws. Due to the nationwide applicability of the federal private laws, it is only international private international law disputes that may arise in relation to these laws. On the other hand, disputes connected to state private laws could be interstate or international. These types of disputes owe their existence to the establishment of separate state courts and the existence of diverse state private laws.

The Constitution allows, though impliedly, the states as well as the federal government to exercise legislative and judicial jurisdictions over private international disputes connected to their respective private laws. However, there is a widely accepted myth that the federal government wields an inherent jurisdiction over all private international law disputes – including those connected to state laws. Regrettably, the Constitution does have a full faith and credit clause which requires the states to give recognition to each other's legislative and judicial acts.<sup>31</sup>

The primary sources of laws in the Ethiopian legal system are legislative enactments such as codes and statutes. However, characterising the system as a purely civil law tradition would be misleading. In 2005 the Federal Courts Proclamation Re-amendment Proclamation No.454/2005 introduced the common law notion of precedent to the Ethiopian legal system. According to this proclamation, the decisions of the Federal Supreme Court's Cassation Division shall be binding on all other courts. Therefore, the legal system doesn't squarely fit into the civil law legal tradition category.

One of the differences between the common law and the civil law traditions is that while the former has the jury trial the latter doesn't.<sup>32</sup> In this regard, the Ethiopian legal system has opted for the civil law approach: Ethiopian courts decide both issues of fact and law. The other difference between the two traditions is the style and length of judgments. Civil law judgments are written in a more formalistic style and are shorter than common law decisions.<sup>33</sup> The decisions of Ethiopian courts, including those of the Federal Supreme Court's Cassation Division, are brief. Moreover, like other civil law traditions, judges are appointed fresh from law schools not from among experienced lawyers.<sup>34</sup> As to the sources of Ethiopian laws, the Civil Code was drafted after the French Civil Code.

Besides these conspicuous civil law elements, the Ethiopian precedent system is not congruent with the common law conception of the notion. As the precedent

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<sup>31</sup>M Setegn, "The Ethiopian Federation and Private International Law: The Contours of the Federal and the State Governments' Jurisdictions" (2019) 15 *Journal of Private International Law* 418, 440–42.

<sup>32</sup>R Wacks, *Law: A Very Short Introduction* (Oxford University Press 2008), 14.

<sup>33</sup>See generally W Tetley, "Mixed Jurisdictions: Common Law v. Civil Law (*Codified and Uncodified*)" (2000) 60 *Louisiana Law Review* 702.

<sup>34</sup>*Ibid*, 705

system is confined to the decisions of the Cassation Division of the Federal Supreme Court, even the decisions of the regular bench of the Federal Supreme Court do not constitute binding precedents for future cases. Moreover, the precedent system is not known within the state court systems: the decisions of state courts do not make a law for future cases. Therefore, with the exception of the bindingness of the decisions of the Cassation Division of the Federal Supreme Court, the Ethiopian legal system is, by and large, a civil law legal system.

One of the deficiencies of the Ethiopian legal system is that it does not have a dedicated private international law. Neither the states nor the federal government has enacted private international law rules applicable to cases connected to their respective private laws. Provisions dealing with the recognition of foreign judgments and arbitral awards have been included in the 1965 Civil Procedure Code. Though the Code has been in force long before the federal arrangement, currently it's being used by the state as well as the federal courts. Excepting these provisions, there are no rules which courts may apply to jurisdictional and choice of law issues. The proposal by the drafter of the 1960 Civil Code to include private international law rules in the Code was not accepted. A separate draft private international law was prepared for the first time in 1976. However, it has not been enacted for no known reasons.<sup>35</sup>

Due to the lamentable lacuna, the courts have dealt with private international law cases in different ways. This includes resort to the experiences of other jurisdictions and a promiscuous assertion of jurisdiction and application of Ethiopian laws.<sup>36</sup> Particularly the federal Supreme Court's Cassation Division has adopted both commendable and condemnable approaches.

Interestingly, in *Majikong Construction Limited and Engineer Mulugeta Assefa v. Tatigegn Fitamo et al.*,<sup>37</sup> the Division imparted how the courts have been dealing with private international law disputes given the absence of private international law and what the way forward shall be. The case was initially lodged before the Federal High Court and involved a question of judicial jurisdiction. The plaintiffs, now respondents, sued the defendant, now appellant, for the payment of a contractual debt. The defendants argued that the Court should not assert jurisdiction stating that one of them is a foreign firm incorporated under the law of Sudan. They further stated that the contract was concluded and performed in Sudan. The Court accepted the arguments of the defendants and dismissed the case. The plaintiffs appealed to the regular bench of the Federal Supreme Court and the Court reversed the ruling of the Federal High Court

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<sup>35</sup> Araya Kebede and Sultan Kassim, *Conflict of law in Ethiopia*, available at <https://www.abysinnialaw.com/about-us/item/407-conflict-of-laws-in-ethiopia> accessed on 18 September 2019.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Majikong Construction Limited and Engineer Mulugeta Assefa v. Tatigegn Fitamo et al.* (2017) Federal Supreme Court Cassation Division, File No. 123200, Vol. 21, pp. 197–200.

stating that the latter shall adjudicate the case. The final appeal before the Cassation Division of the Federal Supreme Court was lodged to have the decision of the regular bench of the Federal Supreme Court reversed.

The issue resolved by the Division was whether Ethiopian Courts had jurisdiction to adjudicate the case. The answer to this question illuminates the Division's position on how Ethiopian courts should handle private international law disputes in light of the non-existence of a private international law. The Division states:

Although Ethiopia does not have a dedicated private international law, it is known that private international law cases have been adjudicated based on the rich experiences of other jurisdictions and accepted principles. Based on the experiences so far, research, and writings, the question of whether the courts of a given state have judicial jurisdiction over a given dispute is answered based on the connection of the defendant with the forum such as nationality and principal residence; the connection of the cause of action, contractual or extra-contractual, with the forum; the location of the property, movable or immovable, which is the subject of the controversy and consent of the defendant. (Translation mine)

The Division found that the contract was concluded and performed in Sudan. It finally ruled that Ethiopian courts shall not adjudicate the case as there is no element which connects it with Ethiopia. Regrettably, the Division nowhere mentioned the states whose experiences may be followed.

As to the delineation of the jurisdiction of the state and federal courts over private international law cases, in *Meseret Alemayehu V. Emushet Mulugeta and Tsegaye Demeke*,<sup>38</sup> the Division erroneously ruled that the Federal High Court has an inherent jurisdiction to adjudicate a private international case connected to the state private laws.<sup>39</sup> The following section presents a detailed analysis of other three cases decided by the Division.

Lamentably, private international law is one of the areas of Ethiopian laws neglected by academia. Probably this is due to the non-existence of dedicated private international law rules which may serve as a starting point. So far there are only a handful of publications pertaining to this subject.

### **C. An appraisal of the decisions of the Cassation Division in light of private international principles: an analysis of three selected cases**

This section critically analyses three selected cases decided by the Federal Supreme Court's Cassation Division. Inter alia, the section will examine the Division's decisions in light of some generally accepted principles of private international law. To get the full picture of the repercussions of the decisions, it

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<sup>38</sup>*Meseret Alemayehu V Emushet Mulugeta and Tsegaye Demeke* (2015) Federal Supreme Court Cassation Bench, Vol. 18, File No. 100290, 330.

<sup>39</sup>For a detailed analysis of the case see M Setegn, *supra* n 31.



is important to bear in mind that they constitute binding precedents for future cases.

The Federal Courts Proclamation Re-amendment Proclamation which introduced the doctrine of *stare decisis* provides:

Interpretation of a [a]w[sic] by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional [Courts][sic] at all levels. The cassation division may, however, render a different legal interpretation some other time.<sup>40</sup>

In light of this, the Division's decisions will have sweeping and momentous effects on the adjudication of future private international law cases. Coupled with the absence of a dedicated private international law legislation, this makes the merit of the decisions highly relevant to the question of their validity.

The section has two parts. The first part presents two employment cases in which the Division unconditionally invalidated choice of law clauses in employment contracts. This part will analyse the cases in light of the principle of party autonomy. The second part will analyse the Division's decision in which it ruled that a case involving a foreigner shall be treated as a purely domestic case unless the parties are at variance as to the applicable law.

### **1. *The principle of party autonomy and parties' choice of law in employment contracts***

One of the Division's decisions pertaining to a choice of law agreement in an employment contract was rendered in *C.A.S Consulting Engineers Salzgitter GMBH V. Kassahun Teweldebirhan*.<sup>41</sup> The case involved an employment dispute which was initially lodged before the Federal First Instance Court. The plaintiff, Mr. Kassahun Teweldebirhan, had sued his employer for wrongful dismissal and claimed various payments.

The defendant raised a preliminary objection and argued that the Court does not have jurisdiction to adjudicate the case. It stated that according to the choice of law agreement concluded with the plaintiff, the dispute shall be adjudicated through the German labour law. The defendant argued that the application of this law makes their case a private international law dispute which falls under the jurisdiction of the Federal High Court, not that of the Federal First Instance Court.

The Federal First Instance Court rejected the suit on the ground of want of jurisdiction stating that the choice of law agreement concluded by the parties raises a private international law issue which, according to Article 11(2) (a) of the Federal

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<sup>40</sup> Art 2(1) of the Federal Courts Proclamation Re-amendment Proclamation No.454/2005, Federal *Negarit Gazeta* of the Federal Democratic Republic of Ethiopia, 11th Year No. 42 (June 2005).

<sup>41</sup> *C.A.S-Consulting Engineers Salzgitter GMBH*, *supra* n 3, 545–47.

Courts Proclamation, should be adjudicated by the Federal High Court. The plaintiff appealed to the Federal High Court seeking the reversal of this decision. The Federal High Court reversed the ruling of the Federal First Instance Court and remanded the case to the latter for further proceedings on the merits. The Federal High Court utterly rejected the parties' choice of law agreement and ruled that the Ethiopian labour law shall apply.

Dissatisfied with the ruling of the Federal High Court, the defendant appealed to the Cassation Division of the Federal Supreme Court. Before the Division, the appellant argued that the ruling of the Federal High Court remanding the case to the Federal First Instance Court is erroneous as the case involves a private international law question which should be adjudicated by the Federal High Court itself. The issue framed by the Cassation Division was whether the Federal High Court was correct in invalidating the choice of law agreement and remanding the case to the Federal First Instance Court.

The Division noted that the respondent (employee) is an Ethiopian and the place of work is also in Ethiopia. On the other hand, the appellant (employer) is a foreign firm registered and operating in Ethiopia. The Division also confirmed the conclusion of a choice of law agreement which provides that the parties' dispute shall be governed by the German labour law. Finally, the Division reasoned and ruled as follows:

Basically, according to Art.11/2/a of the Federal Courts Proclamation No.25/96, the Federal High Court has a first instance jurisdiction over private international law disputes. One can presuppose that the proclamation has its own rationale for this. Accordingly, the legislature has prescribed this rule so that the Federal High Court will adjudicate private international law disputes which may arise in relation to a potential private international law legislation, or given the current situation, cases brought before Ethiopian courts where one of the litigants pleads with the courts not to apply Ethiopian law or pleads for the application of the law of his country or the law of a third country. In other words, the Federal High Court shall adjudicate a given dispute based on its first instance jurisdiction where the nature of the case leads to the potential applicability of more than one legal system and a dispute arises as to the law of which jurisdiction shall be applied. Except for this situation, there is no legal ground to say that there is a private international law dispute whenever the parties have concluded an agreement which contravenes Ethiopian law and one of the litigants raises an argument that the chosen law shall be applied. In the case of the agreement at hand, in light of the aims of the Labour Proclamation and the general interest the government has in the law, there is no legal ground which makes the agreement of the parties acceptable as it renders the Ethiopian labour law inapplicable ... Therefore, the Federal High Court's decision to remand the case to the Federal First Instance Court ruling that the Ethiopian labour law shall apply to the case is apt. (Translation mine)

The second case is *Foundation Africa V. Mr. Alemu Taddese*.<sup>42</sup> This too was an employment dispute involving an Ethiopian employee and a foreign

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<sup>42</sup>*Foundation Africa, supra* n 4, 260–62.

organization. The case was initially brought before the Federal High Court. The plaintiff, Mr. *Alemu Taddese*, filed a wrongful termination lawsuit against his former employer, Foundation Africa, for the payment of various benefits such as severance. The parties had concluded a choice of law and court agreement which provided that disputes arising from the employment contract shall be subject to the laws and courts of the Netherlands. Nevertheless, the plaintiff argued that the dispute shall be adjudicated in Ethiopia stating that it is the place of employment and the defendant is also registered in Ethiopia. However, the plaintiff didn't request the application of Ethiopian law.

The trial court declared the choice of law agreement void and ruled that the Ethiopian labour law shall apply to the case. The defendant appealed to the regular bench of the Federal Supreme Court to have this decision set aside. However, the Court dismissed the appeal. Finally, it resorted to the Cassation Division of the Federal Supreme Court. The Division also affirmed the decision of the Federal High Court utterly rejecting the choice of law agreement concluded by the parties. The Division restated a verbatim copy of its reasoning and ruling in the preceding case.

The Division's decisions in the above cases have neither logical nor legal basis. Although the absence of a dedicated private international law statute is deplorable and perplexing, the Division must pay heed to and venerate generally accepted principles of private international law. It should also meticulously examine the logical underpinnings of these principles.<sup>43</sup>

One of the objectives of private international law is ensuring predictability and convenience to parties involved in multi-state transactions. In addition to the substantive laws, private international law itself has a generally accepted purpose of protecting the legitimate expectation of parties. Upholding the legitimate expectations of parties augments the effort to achieve a fair outcome. Here, it is important to note that the parties may not have a shared expectation. In such cases, it is necessary to determine whose expectation is the legitimate one. This requires applying an objective standard.<sup>44</sup> Private international law rules also allow parties to have a say in where and how their disputes should be adjudicated: the principle of party autonomy entitles parties to choose law and forum.<sup>45</sup> Party autonomy is one of the widely accepted principles of private international law. It is a well-established norm that contracting parties have the freedom to choose the forum of adjudication and the law

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<sup>43</sup>See BM Menkir, "Employment Relationship and Parties' Autonomy in Choice of Law: A Case Comment" (2016) 2 *The International Journal of Ethiopian Legal Studies* 166.

<sup>44</sup>R Hayward, *Conflict of Laws* (Cavendish Publishing, 4th edn, 2006), 5; Mills, *supra* n 7, 10.

<sup>45</sup>RA Epstein, "Consent, Not Power, as the Basis of Jurisdiction" (2001) 2001 *University of Chicago Legal Forum* 1, 1-3; Mills, *supra* n 7, 291-95.

governing their dispute.<sup>46</sup> Arguably, this is the most widely accepted principle in private international law.<sup>47</sup>

The principle of party autonomy is applicable to employment disputes as well as other areas of laws. The generally accepted norm is that contracting parties may choose the applicable law. However, there is one exceptional limitation intended to protect the interests of the weaker party – employees. Specifically, a choice of law agreement that deprives employees of the protections which would have been available under the law of the place of work will not be enforced.<sup>48</sup> This means that courts should not unconditionally invalidate a choice of law agreement in an employment contract. The best that the courts can do to better protect employees is to apply the more favourable law. If this is the law chosen by the parties, it is unreasonable to apply the law of the place of employment which gives the employee lesser protection.

Various efforts have been made to justify the normative force of the principle of party autonomy. The commonly held view is that parties' freedom to choose the law that will be applied to their dispute ensures predictability and legal certainty. Facilitating the courts' choice of law exercise has also been presented as a justification for free choice of law.<sup>49</sup> In commercial contracts, parties' freedom of choice of law facilitates international commerce. This will again benefit the states.<sup>50</sup> Justice, which is the primary foundation of private international law, also justifies the principles of party autonomy as the latter ensures consistent treatment of disputes irrespective of the forum of adjudication.<sup>51</sup> However, the most convincing justification was articulated by Professor Lehmann. In his words:

[I]t is the individuals who will feel the consequences of the application of a particular law, and it is their interests that are most directly concerned by the outcome of the dispute. If we consider the issue of conflicts in this way, it is only natural that the parties can choose the applicable law. They must be able to fashion their relationship the way they like. . . . Party autonomy means nothing more than that people can take care of their own affairs.<sup>52</sup>

In view of the non-existence of a statutory private international law rule applicable to the cases, the Division should have resorted to the principle of party

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<sup>46</sup>Mills, *supra* n 7, at 291–95; G Ruhl, “Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency”, in E Gottschalk and others (eds), *Conflict of Laws in a Globalized World* (Cambridge University Press, 2007), 153, 155–58.

<sup>47</sup>M Lehmann, “Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws” (2008) 41 *Vanderbilt Journal of Transnational Law* 381, 385.

<sup>48</sup>Ruhl, *supra* n 46, 171–72.

<sup>49</sup>Y Nishitani, “Party Autonomy in Contemporary Private International Law: The Hague Principles on Choice of Law and East Asia” (2016) 59 *Japanese Yearbook of International Law* 300, 338–39; see also Ruhl, *supra* n 46, 156; Lehmann, *supra* n 47, 385.

<sup>50</sup>Lehmann, *supra* n 47, 394.

<sup>51</sup>*Ibid*, 408.

<sup>52</sup>*Ibid*, 414.

autonomy which is manifested through the commonality of the private international law regimes of other jurisdictions. In this regard, one can easily look into the European experience. Specifically, the Rome I Regulation provides uniform choice of law rules applicable to contractual obligations. The Regulation embraces the principle of party autonomy and provides that “a contract shall be regulated by the law chosen by the parties.”<sup>53</sup> With respect to employment contracts, the Regulation provides:

An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.<sup>54</sup>

In the absence of a choice of law agreement, precedence is given to the law of the country in which or from which the employee habitually carries out his work.<sup>55</sup> Therefore, while a choice of law agreement is perfectly valid, it may not deprive the employee of protections under the mandatory provisions of the law of the place work, if such law is applicable in default of choice.

Exploring the European approach to this issue as represented by the Rome I Regulation, Briggs writes: “... An express choice of law is effective, but the choice may not deprive the employee of legal protection which would have been afforded to him by the law which would have applied if there had been no such choice ...”<sup>56</sup>

Discussing the Rome Convention on the Law Applicable to Contractual Obligations (1980), Ruhl states that the employee shall benefit from the application of the more favourable law. Though this Convention has been updated by the Rome I Regulation, her analysis is still relevant as both instruments recognize the principle of party autonomy.

In addition to consumer contracts, the Rome Convention also grants special protection to employees: according to Article 6 (1), a choice-of-law clause in an employment contract must not deprive the employee of the protection of the mandatory rules of law that would be applicable in the absence of a choice of law, that is, the law of the country where the employee habitually carries out his work. A choice-of-law clause in an employment contract, therefore, cannot strip the employee of the protective laws of the place of his employment. The employee may always rely on the mandatory rules of this place and thereby rely on whichever law is more favourable to him.<sup>57</sup>

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<sup>53</sup> Art. 3 of Council Regulation (EC) 593/2008 On the Law Applicable to Contractual Obligations [2008] OJ L177 (Rome I Regulation).

<sup>54</sup> Rome I Regulation, art. 8(1).

<sup>55</sup> Rome I Regulation, art. 8(2).

<sup>56</sup> A Briggs, *The Conflict of Laws* (Oxford University Press, 3rd edn, 2013), 247.

<sup>57</sup> Ruhl, *supra* n 46, 171–72 (footnote omitted).

Due to the legislative gap, looking into the experiences of other jurisdictions is imperative to decide private international law disputes as cogently as possible. In this regard, the EU experience in general and the rules and principles pertaining to choice of law agreements could be consulted. Resort to the EU approaches is commendable on account of candid reasons. The number of states in which the instruments are applied reinforces the normative force of the principles. The wealth of literature one could consult to easily fathom the scopes and the underpinnings of the principles are the other advantage. The accessibility of the laws and court decisions is also magnetic. Particularly, the approach to the choice of law agreement in employment contracts best strikes a balance between protecting employees and preserving freedom.

In his book, *Private International Law in Commonwealth Africa*, Richard Oppong presents what the laws of some African countries say about a choice of law made in an employment contract. Besides the European approach, the experiences of various African countries also reveal that a choice of law agreement is not utterly rejected unless it impairs the rights of the employee under the law of the place of work. Under the laws of Uganda, Botswana, Kenya, Namibia, and Zambia a choice of law agreement is deemed void only if it operates to the detriment of the employee.<sup>58</sup>

In addition to the aforementioned specific limitation applicable to employment contracts, there are also other general limitations to parties' freedom to choose the law that will be applied to their dispute. These limitations are applicable to all types of contracts including employment. The first limitation is that if parties conclude a choice of law agreement in a purely domestic case, ie a case in which the only elements relevant to the situation that are outside of one country are the choice of law agreement and any choice of court agreement, then the choice may not be respected in some countries and under Article 3 of the Rome I Regulation it is restricted by the domestic mandatory rules of the country to which the contract is connected. A sweeping limitation which requires a substantial connection between a contract and the chosen law was a limitation peculiar to the US regime. This limitation is withering as several states have relaxed the requirement of substantial connection. The choice of national law was the other requirement under both regimes.<sup>59</sup>

The other limitation to the application of foreign law is public policy: courts may refuse to apply a foreign law chosen by the parties if it offends public policy. Though this is the most ambiguous doctrine in private international law, efforts have been made to define its legitimate boundaries. This includes judicial

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<sup>58</sup>RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press, 2013), 139–40.

<sup>59</sup>Ruhl, *supra* n 46, 158–67; see also Lehmann, *supra* n 47, 388. However, the Rome I Regulation imposes specific limitations with respect to consumer contracts (Article 6(2)), insurance (Article 7(3)), and carriage of passengers (Article 5(2)).

decisions and scholarly writings. Kenny Chng, through a study of case laws, categorized substantive considerations applied by courts as public policy defences into three. The first category of justifications subsumes universally accepted moral norms. Based on these grounds, courts in the common law tradition often refuse to apply a foreign law which offends fundamental principles of “justice” or prevalent conception of “good moral” or infringes human rights. The second category encapsulates community norms reflected through forum domestic laws. Courts often refuse to apply a foreign law which is against forum law if it offends fundamental “moral” norms. This means that the public policy doctrine may not be legitimately invoked to refuse the application of foreign law solely because it is different from the forum’s law. The third category includes “moral” considerations with no clear legal basis. This aims to protect forum interests by upholding prevailing “moral” norms of the forum though these moral norms are not reflected in pre-existing laws.<sup>60</sup> Therefore, the parties are free to choose a law that will be applied to their dispute unless it violates public policy: the parties may set aside even mandatory rules.<sup>61</sup> These are rules that cannot be deviated from in purely domestic cases. Lehmann refers to these rules as “relatively mandatory” as they are absolutely binding in purely domestic contracts while parties in a multistate case may set them aside.<sup>62</sup>

It is also important to note that the choice of law agreements concluded by the parties should be valid in light of the general principles of contract formation such as the requirement of consent.<sup>63</sup> The courts should also enforce the constitutionally protected labour rights from which the parties should not be allowed to derogate.<sup>64</sup>

In light of these limitations, rather than automatically rejecting the choice of law agreements, the Division should have asked whether the cases involved foreign elements and whether the application of the foreign laws chosen by the parties, if favourable to the employees, offends any public policy. The answer to the first question is clear: the cases were not purely domestic cases since the

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<sup>60</sup>K Chng, “A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws” (2018) 14 *Journal of Private International Law* 130, 132–44.

<sup>61</sup>Lehmann, *supra* n 47, 388–89.

<sup>62</sup>*Ibid*, 419–20; *see also* Collier *supra* n 1, 197. However, while the parties may derogate from ‘relatively’ mandatory rules, under Art 9 of Rome I they cannot escape from the overriding mandatory provisions of the forum and may not be able to avoid such provisions of the law of the place of performance. These apply in very limited areas of law such as competition, but there are some divergences as to which provisions of law should be treated as ‘overriding mandatory provisions’. *See further* Laura Maria van Bochove, “Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law” (2014) 3 *Erasmus Law Review* 147, at 148 and 149–50 and M Lehmann, “Regulation, global governance and private international law: squaring the triangle” (2020) 16 *Journal of Private International Law* 1, 16 and 22.

<sup>63</sup>Lehmann, *supra* n 47, 425.

<sup>64</sup>Oppong, *supra* n 58, 140.

defendants in both cases were legal entities incorporated abroad. With respect to the second question, it would be absurd to argue that applying a law which favours employees working in Ethiopia is against Ethiopian public policy. Therefore, the Division had no reason to utterly reject the choice of law agreements without looking into the laws chosen by the parties.<sup>65</sup> Instead, the Division could have set a precedent that would allow the lower courts to protect the interest of employees by doing what is good and right.

To sum up, the principle elsewhere is that parties to an employment contract are free to choose the applicable law. Limitations on this freedom are exceptions intended to better protect employees and public policy. Therefore, an unconditional rejection of a choice of law agreement is imprudent, if not oblivious.

## **2. *The presence of a foreign element and its implications***

In *Global Hotel PLC V. Mr. Nicola As Papachat Zis*, the Division ruled that a case involving a foreigner shall be treated as a domestic case unless the parties express variance as to the applicable law. The case was initially brought before the Federal First Instance Court. The plaintiff, Global Hotel PLC, had sued Mr. *Nicola As Papachat Zis* for the payment of money due for hotel services allegedly rendered to him. The defendant had submitted an affidavit to prove his foreign nationality. As the defendant was a foreigner, the Court dismissed the case due to lack of jurisdiction and instructed the plaintiff to take its suit to the Ethiopian Federal High Court. The Court based its decision on Article 11(2) (a) of the Federal Courts Proclamation which provides that “the Federal High Court shall have jurisdiction over private international law cases.” Upon appeal, the Federal High Court affirmed the decision of the Federal First Instance Court – it upheld the dismissal.

The appellant, *Global Hotel PLC*, took its case to the Federal Supreme Court’s Cassation Division seeking the reversal of the decisions of the lower courts. The Cassation Division overturned the decisions of the lower courts and ruled that the Federal First Instance Court shall adjudicate the case like other purely domestic cases. The Division stated:

Basically, according to Art.11/2/a of the Federal Courts Proclamation No.25/96, the Federal High Court has a first instance jurisdiction over private international law disputes. One can presuppose that the proclamation has its own rationale for this. Accordingly, the legislature has prescribed this rule so that the Federal High Court will adjudicate private international law disputes which may arise in relation to a potential private international law legislation, or given the current situation, cases brought before Ethiopian courts where one of the litigants pleads with the courts not to apply Ethiopian law or pleads for the application of the law of his country or the law of a third country. In other words, the Federal High Court shall adjudicate a given dispute based on its first instance jurisdiction where the nature of the case

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<sup>65</sup>See generally A Mills, “The Dimensions of Public Policy in Private International Law” (2008) 4 *Journal of Private International Law* 201, cited in Chng, *supra* n 60, 132.



leads to the potential applicability of more than one legal system and a dispute arises as to the law of which jurisdiction shall be applied. Except for this situation, it is a fundamental error of law to say that a given dispute gives rise to a private international law question whenever one of the parties is a foreigner and no question is raised by the litigants (Translation mine).

According to the Division's reasoning, the parties' silence as to the applicable law makes a given dispute – connected with another state – a purely domestic case. This means that the Ethiopian law becomes the only applicable law. The Division's ruling entails a presumption which requires that the parties' silence as to the applicable law shall be taken as an implied choice of Ethiopian law. Even if the failure of a party relying on the application of foreign law to plead such law may ultimately lead to the application of the *lex fori*, the parties' silence as to the applicable law does not change a dispute with a foreign element to a purely domestic case. Moreover, the submission of an affidavit confirming his foreign nationality by the defendant suggests that he wanted the case to be treated as a private international law case.

The presence of one or more foreign elements sets private international law disputes apart from purely domestic cases. Foreign elements may connect a given dispute to two or more systems of laws.<sup>66</sup> If a given dispute is connected to two or more states, it is not the exclusive concern of one jurisdiction.<sup>67</sup> This makes the question of the courts of which state should hear and decide the case inevitable. The jurisdictional question will be followed by a choice of law exercise which involves determining the applicable law – forum or foreign.<sup>68</sup> Therefore, the presence of a foreign element in a given case demands contemplating the ramifications of treating it as a purely domestic case.

Foreign elements, also known as international elements,<sup>69</sup> may relate to the parties, the event from which the cause of action has arisen or the property which is the subject of controversy. If one of the parties is a foreigner or domiciled abroad, their dispute is not a purely domestic problem.<sup>70</sup> In the case of private legal entities, if one of the parties has been incorporated abroad the dispute becomes a private international law case.<sup>71</sup> Foreign elements pertaining to the nature of the cause of action may arise from transboundary transactions or

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<sup>66</sup>Collier, *supra* n 1, 3–4; see also JW Singer, "Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws" (2015) *University of Illinois Law Review* 1923, 1930.

<sup>67</sup>Mills, *supra* n 7, 12; See also BR Daniel, "The Renvoi in Private International Law" (2013) 3 *International Journal of Social Science and Humanity* 66, 66.

<sup>68</sup>Mayss, *supra* n 1, 1–2.

<sup>69</sup>A Briggs, *The Conflict of Laws* (Oxford University Press, 3rd edn, 2013), 2.

<sup>70</sup>Collier, *supra* n 1, 3–4; Nationality cannot be considered as a foreign element in the case of inter-state conflict of laws if both parties are citizens of one country. Mills, *supra* n 7, 117, n. 9.

<sup>71</sup>G Husserl "The Foreign Fact Element in Conflict of Laws. Part II: Defining and Characterizing the Fact Element in Conflict Cases" (1940) 26 *Virginia Law Review* 453,456.

wrongs. For instance, in a given contract, the place of conclusion and that of performance may differ.<sup>72</sup> Likewise, the consequences of a wrongful act committed in one jurisdiction may ensue in another jurisdiction. Finally, a property, which is the subject of controversy, may be located abroad, i.e. in a territory which is beyond the reach of the forum's jurisdiction.<sup>73</sup>

It is self-evident that the involvement of a foreigner is a foreign element which connects a given dispute with another jurisdiction.<sup>74</sup> This causes uncertainty, at least at the initial stage, as to the law of which state shall apply. Uncertainty as to the applicable law is the defining feature of private international law cases.<sup>75</sup> Once a dispute is characterized this way, it doesn't lose its private international law character due to the silence of the parties as to the applicable law. Even where a court eventually decides to apply forum law, a case containing a foreign element does not cease to be a private international law case.<sup>76</sup> "... a legal dispute which involves a foreign element, on account of this very fact gives rise to a Conflict of Laws problem; in other words, the admixture of foreign facts makes the case a Conflict of Laws case ..."<sup>77</sup>

Unlike the Division's reasoning, it is not the contention of the parties over the applicable law that makes a given dispute a private international law case; rather, it is the private international law character of the dispute that gives the parties a reason to agree or disagree over what law shall be applied to their dispute.<sup>78</sup> If a given case is not a private international law case, the parties have no reason to fight over the law of which state should apply as the law of the forum is the only applicable law.<sup>79</sup>

The two distinct questions of whether a given case is a private international dispute and whether Ethiopian or foreign law shall apply must not be conflated. The answer to the first question is contingent upon the presence or otherwise of a foreign element in the case. On the other hand, the answer to the second question turns on the forum's position on the status of foreign law and the connecting factor it chooses to employ. The forum's decision to apply its own laws does not make a given case involving a foreign element a purely domestic case unconnected to another jurisdiction. The question of what the courts shall do upon the failure of the concerned party to plead foreign law itself is decided based on private international law rules on the status of foreign law. If a given case is not a private international law case, the rule on the status of foreign law is totally irrelevant as the

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<sup>72</sup>Collier, *supra* n 1, 3–4.

<sup>73</sup>Husserl, *supra* n 71, 453–56; See also Mayss, *surpra* n 1, 3.

<sup>74</sup>Collier, *supra* n 1, 4.

<sup>75</sup>Husserl, *supra* n 71, 453.

<sup>76</sup>See *Ibid*, 458.

<sup>77</sup>G Husserl, "The Foreign Fact Element in Conflict of Laws" (1940) 26 *Virginia Law Review* 243, 244.

<sup>78</sup>See Singer, *supra* n 66, 1956.

<sup>79</sup>Ruhl, *supra* n 46, 159–60.

exclusive applicability of the law of the forum is undisputed. Therefore, a case involving a foreigner should be considered a private international case and lodged before the Federal High Court. Then, the Court may apply any law which it deems appropriate to the case – forum or foreign.

It is imperative to note that the Division's decision cannot be considered as a precedent requiring pleading foreign law. First, pleading foreign law is not the only ground which, according to the Division, makes a given dispute a private international law case; pleading with the court not to apply Ethiopian law – without pleading a specific foreign law – is also adequate to make a dispute a private international law case. Second, regarding foreign law as a fact does not change a private international law case into a purely domestic case, no matter how this may lead to the application of *lex fori*. Even if a foreign law is regarded as a fact, the courts should take the case as a private international law case and identify the applicable law based on the relevant choice of law rules and principles: it is not any law pleaded by the parties that the courts will apply.<sup>80</sup>

If the concerned party fails to plead or prove a foreign law, the court may take judicial notice of such law or apply its own domestic law. However, in most civil law jurisdictions foreign law is considered as a law and the courts are required to take judicial notice of such law. At least, the application of foreign law *ex officio* is not prohibited.<sup>81</sup> The Asian Principles of Private International Law, which was adopted in 2007 by a group of scholars of ten Asian countries to harmonize the private international law rules of the region, also requires the courts to ascertain foreign law *ex officio*. If foreign law cannot be ascertained reasonably, the courts may apply *lex fori*.<sup>82</sup> There are also situations where courts may, in the interest of justice and respect for the other state connected to the case, need to refrain from a promiscuous application of *lex fori* even where the party relying on it fails to plead foreign law.<sup>83</sup> Therefore, taking an unyielding stand against *ex officio* application of foreign law, even if the Division intended it, is unreasonable.

The Division erroneously followed the approach to the framing of issues in ordinary domestic cases. In such cases, issues of law and fact are framed from propositions made by the plaintiff and denied by the defendant. If the parties are not at variance on factual and legal propositions, no issue can be framed. On the other hand, in cases involving a foreign element, the choice of law question is an inherent issue the existence of which does not require express contention of the parties. While the parties may obviate this question through an agreement, their

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<sup>80</sup>See TC Hartley “Pleading and Proof of Foreign Law: The Major European Systems Compared” (1996) 45 *International and Comparative Law Quarterly* 271, 282–83.

<sup>81</sup>*Ibid*, 275–82.

<sup>82</sup>Chen and G Goldstein, “The Asian Principles of Private International Law: objectives, contents, structure and selected topics on choice of law” (2017)13 *Journal of Private International Law* 411, 428–30.

<sup>83</sup>Hartley, *supra* n 80, 289.

silence does not. This is true even for disputes which may appear to be based on “false conflict” at the outset. Even a “false conflict” dispute is a private international law dispute: in purely domestic cases there can be no conflict of law – false or real. Deciding whether a case involves a real or false conflict is also a painstaking private international law exercise which requires comparing and contrasting the laws of the concerned states as well as weighing their interests.<sup>84</sup>

The Division’s decision also obscures the distinction between the jurisdictions of the Federal High Court and that of the Federal First Instance Court. According to Article 11(2) (a) of the Federal Courts Proclamation, the Federal High Court has the first instance jurisdiction over private international law cases. Foreign elements are the only valid touchstones that can be used to identify cases falling within the jurisdiction of this court; a case involving a foreign element shall, therefore, be instituted to the Federal High Court. Absurdly, the Cassation division introduced an additional element – contention over the applicable law – which cannot be detected in advance. There is no way of knowing the parties’ disagreement over the applicable law unless an action is brought to the Court. This makes the Division’s decision, which dictates that the Federal High Court shall exercise its private international law jurisdiction only where the parties disagree over the applicable law, absurd. How could the Federal High Court know this unless and until it hears the case? The Division’s decision means that the Federal High Court shall accept cases with a foreign element, hear the parties, and decline jurisdiction if it does not come across a disagreement over the applicable law. By extension, the Federal First Instance Court should also entertain a case involving a foreign element until it comes across a disagreement as to the applicable law. This leads to an abrupt declining of jurisdiction and dismissal of cases by the courts.

In conclusion, treating a case containing a foreign element as a purely domestic case is a blunder which opens Pandora’s Box. A connection with another jurisdiction is a necessary and sufficient condition to characterize a given dispute as a private international law dispute; the parties’ contention over the applicable law is not a requirement; rather, it is the result of the case’s connection with two or more states.<sup>85</sup> It should be underscored that characterizing a dispute as a private international law case does not mean that Ethiopian courts can not apply Ethiopian laws to the case. Among other things, it means that the Federal High Court shall adjudicate the case.

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<sup>84</sup>See PK Westen, “False Conflicts” (1967) 55 *California Law Review* 74; See also Singer, *supra* n 66, 1939–40.

<sup>85</sup>Cf Gebrehiwot Hadush, “Jurisdiction and Pleading Foreign Law in Private International Law Matters: Case Comments on the Ruling of the Federal Cassation Division in the *Global Hotel plc Vs. Mr. Nicola Aspachit Zis*” (2013) 2 *Mekelle University Law Journal* 132.

#### D. The limits of the judicial power of the Cassation Division: an appraisal of the validity of its decisions

The Constitution of the Federal Democratic Republic of Ethiopia allocates governmental powers among the Executive, Legislative and Judicial departments.<sup>86</sup> Though the Constitution makes no mention of the principle of separation of powers, the constitutional establishment of the three organs of government and the allocation of power among these departments makes the Constitution's adherence to the principle self-evident. The doctrine of separation of powers embraced by the Constitution preserves human liberty as it circumscribes each organ's competence, thereby obviating the concentration of dangerous power in the hands of few. Division of labour and specialization are the other justifications for the allocation of governmental power among the three departments.<sup>87</sup>

One of the controversial questions of separation of powers pertains to the distinction between legislative and judicial powers.<sup>88</sup> Some commentators argue that the distinction between the two functions is that while the first involves law-making, the latter should be confined to applying existing laws.<sup>89</sup>

The distinction between a judicial and a legislative act is well defined. The one determines what the law is and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it.<sup>90</sup>

Excepting the provisions of the Civil Procedure Code<sup>91</sup> on the enforcement of foreign judgments, Ethiopia does not have private international law legislation. Heretofore, the Legislature has neglected its duty to regulate private international law matters through legislation. The Federal Supreme Court's Cassation Division

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<sup>86</sup>Ethiopian Constitution, 1995, arts. 50(2), 55(1), 72(1) and 79(1).

<sup>87</sup>MJC. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund Inc., 2nd edn, 1998), 14–17.

<sup>88</sup>Some writers refer to the controversy over the appropriateness of judicial legislation as a perpetual debate. The proponents of a strict separation of powers argue that the judicial act of the courts should be confined to declaring the normative message of existing laws. These people contend that the courts' role should be confined to finding the extant law and condemn judicial lawmaking as a usurpation of the legislature's power. On the other hand, realists defend judicial lawmaking stating that it is not possible for the legislature to foresee and perfectly regulate all future cases: adjudicating cases which do not perfectly fall within the purview of existing laws makes judicial lawmaking inexorable. Cowles, *supra* n 9, 437; Day, *supra* n 10, 563–65; See generally AN Steinman, "A Constitution for Judicial Lawmaking" (2004) 65 *University of Pittsburgh Law Review* 545.

<sup>89</sup>DF O'Scannlain, "Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation" (2015) 101 *Virginia Law Review Online* 31, 41–44; SG Calabresi and others, "The Rise and Fall of the Separation of Powers" (2012) 106 *North Western University Law Review* 527, 547–48; see also Cowles, *supra* n 9, 437.

<sup>90</sup>Field, J, dissenting, in *Sinking Fund Cases*, 99 U. S., Quoted in Cowles, *supra* n 9, 437.

<sup>91</sup>Civil Procedure Code, 1965, arts. 456–61.

has taken this legislative inaction as a blank cheque to introduce new precepts pertaining to private international law. So far, the real legislature has been indolent about the legislative endeavour of the Division.

In light of the doctrine of separation of powers and other considerations pertaining to the nature of the judiciary and private international law, it is fair to question the propriety of judicial legislation by the Cassation Division. Resolving this issue requires a thorough inquiry into numerous constitutional and private international law issues. Among other things, one should ponder the meaning and limits of the principle of *stare decisis* and the question of how the Division should deal with private international law cases given the legislature's inaction, ie the question of whether the Division may decide private international law cases without a private international law statute.

In the common law tradition, due to the doctrine of *stare decisis*, interpretations of laws rendered by superior courts set precedents for future cases. Consequently, the conclusive interpretations of these courts are referred to as judge-made laws. However, their power to set precedents in no way supplants the lawmaking power of the Legislature: courts do not make a law like the Legislature as their judgment by itself should be based on a pre-existing norm.<sup>92</sup> Likewise, the cassation power of the Ethiopian Federal Supreme Court should not be taken as a substitute for the Legislature's power to introduce previously unknown precepts. The Cassation Division should, therefore, refrain from inventing precepts which hitherto had no normative element what so ever.

The other concern, highly related to the first, is whether the Division's decisions should rest only on rules enacted by the legislature, ie the question of whether the Division may rely on other sources such as principles. This issue should be addressed to decide if the Division may legitimately decide private international law cases without a statute enacted by the legislature and consequently introduce a valid precedent with no statutory basis.

Judicial power is not limited to the mere application of only statutes. The judicial power of the courts encompasses applying established principles to concrete cases.<sup>93</sup> In the absence of a statute, courts may resort to principles of equity, reason, and justice.<sup>94</sup> Given the Legislature's inaction, the Cassation Division may adjudicate private international law disputes based on generally accepted principles of private international law. While the Division should refrain from inventing new precepts of its own, it may decide cases based on pre-existing precepts with undisputed normative force.

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<sup>92</sup>J Harrison, "Legislative Power and Judicial Power" (2016) 22 *Constitutional Commentary* 295, 299 n.7.

<sup>93</sup>Cowles, *supra* n 9, 439; See CT Kotuby Jr and LA Sobota, *General Principles of Law and International Due Process* (Oxford University Press, CILE studies; v. 6, 2017), 2.

<sup>94</sup>see R David, Cited in J Bell, *Judiciaries Within Europe: A Comparative Review* (Cambridge University Press, 2006), 69.

“[G]eneral principles primarily derive from commonalities of positive law in domestic legal orders around the world. Products of ‘international consensus,’ general principles embody ‘universal standards and rules of conduct that must always be applied.’”<sup>95</sup> These principles could be established inductively by extracting the normative elements of rules shared by domestic legal systems: the idiosyncrasies of different systems should be ignored. Once established inductively, the principles can be used to decide concrete cases through deductive reasoning.<sup>96</sup> “In order to be considered ‘general,’ a principle must possess such a heightened degree of reason that all parties *ex-ante* appreciate its normative value, whatever view they might take after a dispute has arisen.”<sup>97</sup> Therefore, the Cassation Division of the Federal Supreme Court may rely on the commonalities of various private international law regimes to ascertain the status of a given precept.

Dworkin defines a principle as “a standard that is to be followed because it is a requirement of justice or fairness or some other dimension of morality.”<sup>98</sup> He states that one of the differences between rules and principles is that rules operate in an “all – or – nothing fashion” meaning that certain or definite legal consequences will follow if the requirements of a given rule are fulfilled. In the case of principles, however, one cannot be sure about the ensuing legal consequences as principles do not set out definite legal consequences. A principle does not necessitate a particular decision; rather, it sets out reasons that argue in one direction.<sup>99</sup>

Lamentably, the Division’s decisions presented in the preceding section are not confined to a purely judicial act of interpretation and application of extant rules or principles. In the first two cases, the Division has authored its own precept which unconditionally forbids inserting a choice of law agreement in employment contracts. In the third case, the Division invented a new element which a given case must have to be treated as a private international law case. This is a clear act of judicial legislation. The doctrine of separation of powers dictates that it should be the Legislature’s exclusive province to introduce rules of general and prospective applicability over an indeterminate number of situations. On the other hand, the courts’ job is to apply these rules to specific cases.<sup>100</sup>

Judicial lawmaking undermines some of the purposes of private international law. The judicial invention of precepts after a dispute has arisen breeds uncertainty as it obliterates the legitimate expectation of parties. It is also unfair as it may cause the parties unexpected barriers. This will have a chilling effect on people and entities intending to enter into transactions with potential connections to the Ethiopian legal system

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<sup>95</sup>Kotuby Jr and Sobota, *supra* n 93, 2.

<sup>96</sup>*Ibid*, 17–20.

<sup>97</sup>*Ibid*, 19.

<sup>98</sup>RM Dworkin, “The Model of Rules” (1967) 35 *University of Chicago Law Review* 14, 23.

<sup>99</sup>*Ibid*, at 25–26.

<sup>100</sup>Cf W Friedmann, “Limits of Judicial Lawmaking and Prospective Overruling” (1966) 29 *The Modern Law Review* 593, 595–96.

[Professor Campbell] explains the vice of activism as follows. Courts may fail to apply law in accordance with its plain and stipulated meaning (“negative judicial activism”) or they may make a decision or formulate a rule which is not warranted by existing authoritative legal texts (“positive judicial activism”). Such activity is triply offensive. It is undemocratic (judges are unelected officials), it is inefficient (as, generally speaking, courts do not have the knowledge to make good law) and it undermines “rule governance” by introducing elements of arbitrariness into the legal system.<sup>101</sup>

One of the basic elements of a judicial process is decision making: courts must decide cases before them.<sup>102</sup> The Federal Supreme Court’s Cassation Division must, therefore, decide private international law cases brought to it: it may not decide not to hear such cases on the ground of the non-existence of a private international law legislation. The division’s refusal to adjudicate a case on the ground of the non-existence of a private international law statute will still make a law: if the division opts not to hear private international law cases, the lower courts must likewise refuse to adjudicate cases with a foreign element.<sup>103</sup> A viable solution to this misfortune requires underscoring two things. First, the Cassation Division may not decide not to adjudicate a private international law case stating the absence of a private international law legislation as a reason. Second, the Division should avoid introducing a new precept which encroaches upon the lawmaking power of the Legislature. Therefore, the Division should fill the gap based on existing precepts and “reason” as it may not decide not to decide a case.<sup>104</sup>

As the decision of the Division in the *Majikong* case is a binding precedent, courts adjudicating private international law disputes shall observe it and base their decisions on generally accepted principles. Although the decision of the Division lacks clarity as to the experiences of which states and what principles shall be applied, the courts should primarily rely on commonly or widely accepted approaches. This includes the principle of party autonomy, the application of forum procedural rules, forum exclusive jurisdiction over immovables, and public policy exceptions. Most of all the courts should meticulously examine the connection a given cause of action has with the Ethiopian legal system. The courts should not adjudicate a case or apply Ethiopian law unless such a connection justifies doing so. In this regard, they should check, for instance, if a given contract was concluded or to be performed in Ethiopia.

However, the lasting solution to halt the legislative endeavour of the unelected judges is the enactment of a private international law statute. The House of Peoples’ Representatives should take the initiative to address the

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<sup>101</sup>A Glass, “The Vice of Judicial Activism”, in TD Campbell and J Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (Ashgate Publishing, 2000), 355, 355 (footnote omitted).

<sup>102</sup>Day, *supra* n 10, 567.

<sup>103</sup>*Ibid*, 569–73; Steinman, *supra* n 88, 561.

<sup>104</sup>See Day, *supra* n 10, 567.



legal lacuna and enact a private international law legislation applicable to private international law disputes which arise in relation to the federal laws. The drafting should be guided by the underlying justifications of private international law. It should be noted that it would rather be another blunder to enact the current draft federal private international law without modifications as the majority of its provisions deal with disputes that arise in relation to state private laws such as family and succession laws. As mentioned in the first section, these disputes fall under the jurisdiction of the states. Until such enactment, the legislature should also take the blame for any injustice which may arise due to its inaction. The enactment of private international law will obviously kindle academic discourses and contribute to the development of Ethiopian private international law jurisprudence which is heretofore ignored. The states should also enact their own private international law rules applicable to disputes connected to their respective private laws. It should be underscored that harmonizing potential state private international law rules would make up for the nonexistence of a full faith and credit clause in the Constitution.

Rather than individual legislation, the objectives of private international law could be achieved more easily if countries were to harmonize their private international law regimes leaving room for irreconcilable differences. The conclusion of international treaties is the primary mechanism of achieving this. To benefit from efforts that have been exerted to develop private international law instruments, Ethiopia could become a party to international instruments and organizations such as the Hague Conference on Private International law.

## **E. Conclusion**

The absence of a dedicated private international law statute applicable to jurisdictional and choice of law issues has paved the way for the invention of new and flawed precepts by the Cassation Division of the Federal Supreme Court. The Division's decisions presented in this Article involve unfettered legislative endeavour. In the first two cases, the Division has established a precedent which undermines the principle of party autonomy through an unconditional rejection of choice of law agreements in employment contracts. In the last case, the Division has introduced a new and unnecessary condition which must be met to treat a given dispute as a private international law case. Due to their binding force, the flaws of the Division's precedents cannot be overlooked.

The Division's legislative venture is pernicious in light of the ends of private international law as well as the doctrine of separation of powers. Unnecessary limitation on parties' autonomy to subject their contract to the law of their choice is, not only exceedingly paternalistic, but also defeats the legitimate expectation of parties that the chosen law will be applied to their dispute. Not treating cases with foreign elements as private international law disputes undermines the foundations of private international law such as justice and comity. Encroaching

upon the lawmaking power of the legislature also carries its own omens: concentration of power and ‘judicial oligarchy’ may follow.

The absence of a private international law statute cannot be a reason not to decide, or arbitrarily decide, private international law disputes. The way forward is to follow generally accepted principles of private international law. Adjudicating disputes based on principles pertains to the legitimate jurisdiction of the Division. It will also ensure predictability and obviate the chilling effects of making decisions based on precepts invented after a dispute has arisen.

The Division may take the commonalities of the laws of various jurisdictions to ascertain whether a given precept can be considered as a principle. The Division doesn’t need to directly look into the laws of every nation for this purpose: it may resort to the works of various scholars. In addition to principles of private international law, the Division should also pay heed to general principles of law and the human rights of parties involved in private international law cases. “Reason” and “fairness” should also inform the decisions of the Division: it should meticulously examine the underlying justification of the principles and the repercussions of its decisions for future cases.

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