AGENCY UNDER THE NEW DRAFT PRIVATE INTERNATIONAL LAW OF ETHIOPIA

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ACKNOWLEGEMENTS

Behind every individual event in this universe lies a complex web of cause and effect that stretches back in to infinity. Here are a few of causative agents that I would like singled out and thank for making this particular literary event possible.

Before every thing, thank you Lord! For guiding me in my life voyage, in your keenness of mercy illuminated many shadows in the recollection of my early years and has vouchsafed to preserve me until this very day. Thanks to my great advisor Ato Abebe Abebayehu for having offer me sound advice and the patience to pretend not to mind when I whinged about having to take heed of it. I am grateful to Ato Dires and his wife Seble, Tigist.Stretching further back in to the causal mists, my thanks go to Ato Solomon and W/ro Sinknesh, Wubet, Yiftu,Ato Getu and staff members of Ministry of Revenue for having the faith and to let me do and encourage this. Finally, I would like to thank my parents for teaching me to think of my self in their death. Perhaps this is also the place to apologize to those friends whose assistance have not acknowledged.

WITH LOVE AND GRATITUDE DEDICATED TO

MAHLET.N

THIS IS FOR YOU MAHI

MOLTEN WISHES

EVERY FACET OF THE SEASON
RETURN TO THE TRAIT,
TRAIT OF MOLTEN WISHES
MOIST IN THE DESIRED HEART
.....HOW FILLED WITH TEARS
.....NEVER FIND OUT
.....WHERE I HAVE BEEN LOST.
OH! BE LOVED
MY COZ!
TODAY, LET ME ACCOMPLISH
THE DESIRES IN YOUR HEART,
LITTLE SINGINGINTHE DESERT.
WHISTLED IN THE VALLEY
MINGLE WITH FRAGRANCE,
OH! BE LOVED
DREAMED OF YOU IN MOLTEN WISHES.
I WILL ALWAYS BE WITH YOU, MY LOVE,
WALKING BESIDE, LIKE THE Sky ABOVE.

YOURS.G

INTRODUCTION

Nowadays, states do not stand by themselves. They are in need of each other. The need of international as well as inter - state transactions is in escapable. There are various ways in which people can transact their affairs. They can do so by themselves or they can do so through agents. The importance of agency in international as well as national trade is quite clear. The world - wide nature of commerce makes it imperative that transaction can be made simultaneously in different states and those transnational contracts can be negotiated through the medium of agents. In the course of their interactions disputes are likely to arise. These disputes have to be solved for the security of transactions. That is why private international law rules as applicable to agency are needed.

Agency in international trade can pose the following conflict of laws situations: First, what law governs the relationship between the principal and the agent? Second, what law regulates the relationship between the principal and third party? Third, what law determines the relationship between the agent and third party, and related issues ….etc.This essay will exhaustively deal with these major questions.

This essay primarily focuses on choice of law rules on agency in light of the rules applicable to contracts in general. The essay is decided in to four chapters.

The first chapter mainly deals with a general and brief out look on agency which includes its definition, natures, features, types, formation, and

extinction. . .etc, with a purpose of serving as jumping ground to the following chapters.

Chapter- two concerned with the choice of law rules pertinent to Agency which are commonly and widely recognized rules. In this chapter, the issues as to which law governs internal as well as external relationship of agency will be addressed.

Chapter –Three is the marrow of this essay. It deals with choice of law rules as applied to agency under the new draft private international law of Ethiopia. It basically focuses on the principles of party autonomy and significant connection to the case.

Chapter- Four is the final part of the thesis. Like Chapter-Three, it is a basis for this essay. This Chapter primarily deals with the adequacy of the new draft proclamation in light of other drafts.

Finally, the conclusion and recommendation parts are incorporated serving the purposes of summarizing the theme of the essay and the ingredients of the writer in which he suggests.

CHAPTER ONE

1. AGENCY: GENERAL OVERVIEW

1.1. Preliminary Remarks:

"Let every eye negotiates for it self and trust no agent" William Shakespeare.

It is well and good for Shakespeare to counsel such caution, but the world would certainly look different place if his advice were followed; entirely different world with out groups or associations of any kind, and no companies, no governmental units.

It is the agent and the concept of agency law that permits organized groups of individuals to exist, function, and prosper "people's lives are not restricted with in the boundaries of a single state or territorial unit, as they are in constant and continuous interactions through marriage, trade, and other activities of daily life in a foreign state.[1]" Think of this way obviously no one exists totally free and independent of others.

Nowadays, in conducting business transactions, a commercial dealer may implement different mechanisms to ensure that his / hers/ its goods (services) reach the intended market. The most frequent technique used in small businesses especially in developing countries is direct selling with out going through intermediaries.Today'sbestoptionforlargetransnationalenterprisesanddealersisagenc y.[2] It's often convenient for the enterprise or individual to appoint one or more agents whose business is to effect the transaction entrusted to them. The other highly specialist form of marketing is franchising.

Many factors will be considered by the enterprise or individual dealer when taking into account which of those marketing methods to adopt: Cost, commercial convenience, legal considerations, such as the desire to avoid contractual relationships with customers (third parties) . . . etc

The essay is concerned with one type of relationship only, though a highly important one- Agency. For the lawyer, agency is a subject of never - ending fascination, subtle and complex. For the business enterprise it's a vital tool in bringing goods and services to the market. But lawyers and business people do not speak the same language. The lawyer uses the term "agent" in a fairly precisely defined way, where as in business the term is frequently used more loosely to include, for example distribution agreements under which the "agent" buys and sells for his own account on his own name.[4]

1.2 Definitions:

From the misuse and inaccurate definitions much confusion is bound to arise. So, starting with the definition of agency is a pavement and would serve as a leaping ground to address the forth coming issues.

Agency as a legal concept depends up on the existence of required factual elements, that is, the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking. There is one definition which nearly enjoys universal usage by the courts and commentators, that is, the definition set forth in the second restatement of American Laws: "Agency is a fiduciary duty relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by other so to act." [6] Ethiopian Civil code also defines agency as "Agency is a

contract where by a person, the agent, agrees with another person, the principal, to represent him and to perform on his behalf one or several legally binding acts." [7] New Encyclopedia Britannica as well defines agency as" The relationship that exists when one person on party (Principal) engages another (the agent) to act for him." The one for whom action is to be taken is principal. The one who is to act is the agent. In these definitions too much emphasis is given on "Consent"; however, it should be avoided. In many cases consent is the basis for agent's power and determines its ambit. But there are many cases (apparent and presumed authority, in which the relationship may arise irrespective of the parties, real wishes (consent) will not provide a universal criterion for determining whether there exists an agency relationship.

1.3 Nature, formation and Extent of Agency Relationships.

It is a representative relation, its fundamental maxim being, *qui facit per alium facit perse9*. Latin maxim which means the agent represents, acts for, and derives his authority from another, his principal; he is an attorney standing in the place of his employer. It's also a fiduciary relation which is one of trust and confidence.

Agency is a voluntary relationship. As a general rule it is contractual although not necessarily so, unlike other contracts element of consideration may be lacking (by operation of the law) or it may arise by subsequent ratification of an unauthorized act.[10]

The features distinguishing agency from other relation ships are representative character and derivative authority. [11] Whether as between the parties their relationship is one of agency depends on their relation as they in fact exist under the agreement or acts of the parties; and the parties can not, where the relationship is in fact one of agency, change its nature by declaring that it is not agency, make

it so when it is not so in fact [12] what ever the precise relationship between the parties may be, the relation of principal and agent does not exist between them in the absence of any essential element of such relation ship. [13]

Agents may be classified as express or implied according to the manner in which the agency is created, as actual or ostensible (apparent), with reference to their authority in fact, or as general or special with reference to the scope of their authority.[14]

Agency poses tripartite relationship of, principal - Agent, Principal - third party, agent - third party. These point of contacts usually fold into accompany of two basic relationships, that is, internal relationship of principal and agent, and external relationship of principal and agent on the one hand and third party on the other hand. It is worth briefly explaining them.

1.4 Internal Relationship

This is the base for agency relationship that may result form an agreement between the representative and the person whom supposed to be represented, or from the law. In Contract of agency parties must give their consent where as in agency resulting from the law it doesn't necessarily require the consent of the person to be represented (15). The moment the relationship exists each of them has rights and duties towards one another. For instance, the agent owes duties to the principal of loyalty, obedience, reasonable care, keeping accounts.... etc [16] and the principal owes a duty to the agent of; compensation, reimbursement, indemnity. [17] Their respective rights other than fixed by the law can be specified in their agreement (contract).

1.5 External Relationship.

External aspect is that under which the agent has powers to affect the principal's legal position in relation t third parties. The agent acting on behalf of the principal has to consent to the contract (main contract) entered in to both the agent and third party, while the third party must give his consent to be bound there to. Like in general instances of contract consent constitutes offer and acceptance. Here, one should not forget the essential elements for formation of contract in both kinds of relationships. The legal capacity of principal and third a party is required unlike the agent [18] in agency transactions, the third party has certain rights and liabilities with respect to agent and principal. Many of these rights and duties are contractual in nature. However, the agency transaction can also produce tort and criminal liability for the agent, under certain circumstances for the principal as well. The liability of agent to the third party depends up on the manner in which the transaction was conducted and the nature of the agent's acts.

Action of authorized agent of disclosed principal which includes action which though originally unauthorized was subsequently authorized (ratified by the principal, once there is an effective ratification, the original action of the agent is no longer unauthorized, Hence the principal is bound by the contract and the burden of duty and liability is on him where as the agent is free [19].

In situations where the agent's acts are unauthorized, principal has no capacity, and the agent acts for undisclosed principal, the parties to the contract are the agent and third party .[20] So the principal is not liable for the loss caused to third party. The principal may be held vicariously liable when the loss or harm occurred to third party because of him. For the security of transactions to protect the interests

of third party in good faith. Their respective rights among them can be fixed in their terms of the contract.

Viewed from agent- principal or agent - third party relation aspect, agent- third party relation aspect of agency is a matter of authority. An agent can receive authority to act for a principal in three ways. Actual authority apparent authority or authority by operation of the law. [21] Unlike unauthorized agency the rest of concepts have been dealt in the above topics directly or indirectly exhaustively. The writer would like to pinpoint some aspects of unauthorized agency very briefly.

1.6 Unauthorized Agency

This kind of agency occurs when a person undertakes fully a ware of the facts to manage another person's affairs without having been appointed as an agent, or having no authority[22]. In such cases the principal has not consented for the person's performance on behalf of him. Agent's act of representation should not have to be detrimental to principal's interest [23]. Otherwise unauthorized agent in liable for what he causes the damage or prevented from the gain of the principal. When the act is done for the interest of the principal, the law forces the principal to ratify agent's act and deemed that agent's act is with in his authority for protection of third parties [24]. The principal has the duty to indemnify, reimburse and compensate towards an un authorized agent and the agent owed a duty to principal due care and diligence; loyalty . . . etc the points I have mentioned earlier [25].

1.7 Termination of Agency

Agency relationship can be terminated in the following ways. When the agency is created for fixed period of time it is terminated when the period expires; if the relationship is constituted for the performance of certain job (task) after the fulfillment of the setting object. Agency may be terminated at the will of the parties' since it is based on mutual consent and necessity [26]. The above are by the action of the parties. By the operation of the law agency relationship ceased to exist for instance due to the death, in capacity, bankruptcy, insanity . . . etc of the parties[27]. The one who wishes to terminate must give reasonable period of notice to the other [28].

1.8 Significance of Agency in International Trade

It is clear that transnational business can only be conducted by the interposition of intermediaries between the contracting parties. As used in the General Assembly Resolution 2102 (XX) "Law of International Trade" may be defined as body of rules governing commercial the relation ships of a private law nature involving different countries. Examples of topics falling with in the scope of the law of international trade: International sale of goods, formation of contracts, agency arrangements ....etc are slices among the group [30].

Conflicts and divergences arising from the laws of different countries in matters relating to international trade constitute an obstacle to the development of world trade and security of transactions.

So as to reduce such conflicts and divergences two basic techniques have been followed, which are different but complementary. The first relates to the choice of law rules with in the framework of private international law. It is also known as "clinical method" finding the best possible solution for the case among competing substantive laws. The second relates to the progressive harmonization and unification of substantive rules preventive method - has the purpose of avoiding law conflicts.) [33]

This essay primarily and mainly focuses on the first technique, that is, the choice of law rules regarding business transactions especially for which conducted through agents with in the framework of private international law. However, it is worth mentioning some developments on the attempts on the attempts, unification and harmonization of international trade law. Conflict of laws may arise in legal relations founded in universally recognized and accepted rules which are based on uniform legislations. It is, therefore, imperative to use continually the traditional legal techniques of choice of law rules to reduce conflicts and divergences arising from different states in matters relating to international commerce [33]. Hague conference on private international law it is the renown agency in formulating the laws which resolve the conflict of laws of international trade, [34] The most successful Hague conventions pertaining to the law applicable to international sale of goods of June ,1955 and the convention of the law applicable to Agency of March 1992. In regional level there are some attempts [35].

To sum up, the idea of agency as a means for contract formation reflects the need of modern commercial inter course, in simplest terms, to divide labor and to allow market penetration. On a sale which would be difficult for the individual trader or commercial enterprise. It follows from the function of agency that relationships

those of principal - agent, agent -third party, third party - principal will often be formed and produce results beyond a single state or legal system. Given divergences in the substantive laws of these legal systems it is the task of conflicts of law to furnish the applicable raw and the need for predictable conflicts rules exists primarily with respect to agency of a commercial nature because of its tendency to product transnational effects. In the second chapter of the essay the writer will try to look in to the rules of the convention on the law in it briefly in addition to the basic rules of choice of laws in agency relationships which are choice of laws in agency relationships which are commonly recognized by different countries conflict of laws rules.

CHAPTER TWO

2. CHOICE OF LAW RULES PERTINENT TO AGENCY

The conclusion of a contract through an agent produces a three-fold relationship, corresponding with the three persons involved. In conflicts law uncouth doctrines insisted on seeing the three dimensional phenomena in two dimension, may be seen in the categories legal systems theories as follows.

Theoretical differences exist between the Anglo- American and Continental legal systems both with respect to what properly belongs to "Agency" and with regard to the law applicable to the various relation ships which arise from and agency.

2.1. Civil Law Approach

In civil law or continental legal systems the doctrinal foundation of agency is theory of "separation".[1]It is a strict separation of the mandate. In other words, the separation of the contract between the principal and the agent, from the power of the agent to contract for the principal with the third party.

In French laws it is recognized as "doctrine of mandate", [2] notably; German law developed a complex theoretical structure. It distinguished among "the abstract conferral of authority by the principal on the agent, the internal arrangement between them, the contract between agent and third party, and the relationship between third party and principal.

Under Italian and German civil code the internal relation ship does not form part of the law of agency rather it is included in general contract law.[3] This approach is also followed in some European conflict codification.[4] Further, only the agent who acts openly in the name and for the account of a specifically named principal can affect the legal relationship between the principal and a third parts .[5] The concept of undisclosed agency is unknown here.

2.2. Common Law Approach

In Anglo - American (Common Law) legal systems the doctrine of "Identity' of principal and agent is the theoretical foundation of agency [6]. It is based on the saying that the one who acts through the agent acts for himself. Unlike the continental legal systems conception of agency which [7]follows name test, here the liability test is adopted. Due to doctrine of identity, there is a unitary conception of agency and undisclosed principal is recognized. The agent who is authorized by the principal can act in his own name with out disclosing his representative capacity and his principal; this is not the case in civil law tradation.[8]

In USA the theory of incident of main contract is dominant [9]. Affecting the legal institution of the principal by the act of the agent due to the power granted by the principal regarding external relationship is a mere incident. As to the contract with the third party, is governed by according to the orthodox doctrine, by the law of the place of the making of the contract, this also covers the agent's authority.[10]

There are some theorists believed that the power of an agent to affect the rights and duties of the principal constitutes and independent institution and ought to have its own proper law, not necessarily coincided with those governing either of the two relationships. It is reflected in German and English court practice.[11]

The above theories demonstrate the divergences in conception of agency and show the difficulty in reconciling the commercial reality with these differences. In international arena, there are some attempts to cope up with these divergences in international trade specifically transactions conducted through agents.

The fact that the court of a particular country has jurisdiction to entertain a claim does not necessarily mean that its own law will govern the dispute. Jurisdiction and applicable law are entirely different and distinct questions, it is for the forum to apply its own conflict of laws rules to determine by what law the matters in issue are to be decided, and such rules may lead to the application of its own law on that of one or more foreign states.

Considering numerous international juridical acts involving agent, principal, and third parties where one or more domiciled in one country and the others in another country; requires to make an enquiry in to governing rules of private international law by means of comparative analysis which will take into consideration the results reached by foreign (different countries) jurisprudence.

The division in to the relationship between principal and agent on the one hand, and the relationship with third parties on the other, is inherent in the subject, and will be followed as a matter of course.

2.3. The Law Governing Internal Relationship between Principal and Agent (Agency Contract)

It is better to start any enquiry from the general rules of contract since this type of relationship is an instance of the general contractual relationship.

In their ceaseless quest for the Holy Grail of certainty courts and scholars have over many years shown(striven) for rules of universal application which would lead ineluctably to the appropriate law governing contractual obligation disputes. [12] Most systems have agreed that with in certain limits the parties themselves should be free to choose the law by which their rights are to be determined [13]. But where the intention of the parties has not been made manifest, the courts themselves have had the fascination of selection of the applicable law [14]. The range of option is formidable: the place of residence or business of one of the parties; the place where the contract was made; the contractual place of performance; the place having closest connection with the contract . . . etc. The spectrum of theories ranges from highly mechanical rules at one end to policy approaches at the other which are so generalized [15].

It is convenient first to consider, what law determines the interpretation and legal effects of contracts, that is, intrinsic validity of contracts (Substance of the contract), and post pone an enquiry to other matters.

2.3.1 The Law of the Place of Contracting (*Lex loci Contractus*)

Lex loci contractus, a Latin jargon which means the law of the place of contracting will govern the contract on the argument that there are apparent advantages of certainty and prdictability[15].

As Dicey pointed out in his rule, agency contract is governed by the law reference to which agency is constituted [17]. In general, the law of the country where the relationship of principal and agent is created. This principle seems sound only where principal and agent live in the same country. However, the place of contracting may be different according to different systems of law especially

where the contract is by correspondence [18]. The law of the forum determines the place of formation of the contract [19].

Today, for many legal systems this rule has little importance at least for three reasons: first, the forum could be selected fraudulently to give validity to an otherwise invalid contract; second, the forum may have no real connection with the contract (i.e. agency) in question; finally, it may be impossible to determine the law until the contract was concluded .[20]

2.3.2 The Law of the Place of Performance (*Lex loci solutionis*)

As an alternative, lex loci solutions or the law of the place performance, that is, where the agent supposed to act will govern the relationship between the agent and his principal [21]. The rationale behind this rule seems that performance has in many cases more significant in the eyes of the parties to a contract than the locality where they declare their consent (Lex *loci contractus*). I.e. the law of the place of formation of the contract. However, the place of performance may happen to be as accidental or insignificant for choice of law as any other place involved [22]. There is also difficulty in ascertaining the law when the contract is bilateral, in other words, each party to perform its/ his /hers obligation in a different country or where to perform (the place of performance) be optional, being two different countries [23]. The law of the place where the agent performs has in general less weight than the law of the place where the principal's business is carried on [24]. This is particularly true where the agent is a commercial traveler (a person who domiciled at the place where the head office of the business situated and bound to a trader by a contract of employment, who is entrusted by the trader with visiting clients and offering to them goods and services in the name and on behalf of the trader) [25]. So the place of performance is continually changing and has very little

connection with the contract. At the end of the day, the liabilities of each party may be governed by a different law due to the application of *lex loci solutions*, This consequence is inevitable in every case, it must be considered whether the parties didn't intend the whole contract to be governed by one law, namely, the law of the place of performance on the part of the agent.

By looking in to the weaknesses of previous rules: more genuine rule come into picture in most legal systems, that is, " The proper law," the next section will deal with this exhaustively as mush as possible.

2.3.3. The Proper Law

The doctrine of proper law rapidly developed based on the onslaught of ideas expounding freedom of contract [26]. Here , intention of the parties as to the law which shall govern their contract was made center - stage for the first time, It was variously and vigorously held that it is necessary to consider what the parties intended that the transaction should be governed or to what extent it is presumed that they have submitted them selves [27]. And the proper law of the contract is the law which the parties intended to apply [28]. These may result in raising questions; is proper law meant to be the law intended by the parties on the law which reasonable person in the position of the parties would presumably have intended? Determining the intention of the parties becomes difficult for the parties that had never considered this question at the stage of formation of the contract, if they had the need to resolve the issue of proper law would not arise. The proper law is now the system of law with reference to which the contract was made or that with which the transaction has its closest and most real connection. The main issue is what does the term "proper law" mean? Or what does it include, how it is determined?

A contract may be defined as "an agreement giving rise to obligations which are enforced or recognized by law. The factor which distinguishes contract from other legal obligation is that they are based on the agreement of the contracting parties. When parties agree to perform a certain obligation, such promises are intended this be legally enforceable. Generally, in deciding the nature and form of the relative obligation, the parties have framed the principles with respect to a certain system of law. It is this legal system which is referred to as the proper law of the contract.

Where the parties expressly state the system of law they wish to be governed by or where such intentions may be inferred from the circumstances, the court will in general, give effect to the choice. In many cases, however, the actual intention of the parties does not exist in this same often; neither party has turned his mind directly to the question of proper law of the contract. In such circumstances, the court maintains the legal fiction of the intention of the parties by imputing an intention to the parties from the terms of the contract and the circumstance of the case. It is the research for the imputed intention of the parties which presents the rates opportunity for uncertainty and arbitrariness [29].

Hence, it is invariably understood to refer the primarily system of law which govern most aspects of (to) the contract but it dose not imply that all the aspects of a contract are necessarily governed by the same system of law. It is open to the parties to agree. How ever, it is preferable that the proper law would be applicable to all aspects for the contract, including its formation, performance, validity, and interpretation, because it is not always easy to say with parties in different countries. Rather, it is common for courts to decide the problem before hearing the

main point of the case. One should take care in applying the proper law, that is, it must be applied as it is when the contract was made. [30].

In order of priority the proper law can be as ascertained as follows: Whether there is an express selection of the proper law by the parties to the contract choice of law clause, if not, whether there is an implied selection, If neither, with which the system of law does the transaction in question have its closest and most real connection, For the sake of convenience the writer has grouped the first two into party choice and the rule of closest and most real connection.

2.3.3.1. Party Choice

It includes express and implied selection of the parties in choosing the governing law. The saying" parties are best judges for their cases" [31] affirms that when parties express a valid choice in their contract, it will be a very heavily burden on a party claiming that the chosen law should not apply because contract is a volitional act [32].Their express free choice has to be respected. The certainty as to which law governs the agency contract is the primary advantage of express selection. Besides, it will reduce the burden of the court from the trouble of determining the proper law in relation to the contract in questions i.e. agency contract.

Is party autonomy unlimited? Except English legal system almost all in all the answer is to the negative. Through freedom of choice, it is recognized in every system, there are limitations imposed on it. The extent of restriction differs in different legal systems based on the policy behind their law. If the parties are given unlimited freedom of choice, they may exercise their choice arbitrarily[33] so as to put them selves above the law. Primarily these restrictions impose on party autonomy concerned with whether parties can establish a valid reason for selecting a system of law other than that with which the transaction has its most substantial

and real connection. Because of evasion of the law of the forum or because of lack of association express choice of law clauses can be disregarded [34]. It may be disregarded also when it is meaningless on the facts, for instance, the country chosen has ceased to exist [35].

When the intention of the contracting parties (Principal - Agent) is not expressed in the contract, their intention is to be inferred from the terms and the nature of the contract, and from the general circumstances of the case [36]. Such inferred intention determines the proper law of the agency contract.

2.1.3.2 Closest and most Real Connection.

This rule comes in to picture when the intention of the principal and agent (contracting parties) can not be asserted either from express selection (is non - existent) and can't be inferred from the circumstances. In such situation, the court has the discretion and an obligation to impute an intention or determine for the parties (Principal - Agent) what the proper law is. Which is a just and reasonable person, they should or would have intended if they had through the question when they made agency contract.

In determining the proper law all the relevant factors have to be taken in to account and weighted in context with the particular contract rather than based on presumptions in favor of pointing out one or more of the factors. In other words, the proper law can not be chosen by the court as being the system which the court thinks contract of agency has the closet connection with. In determining the closest and the most real connection, the following, among other factors are taken in to account by the court.

- The place of contracting [37]

- The place of performance [38]
- The place of business /residence/ domicile of the parties and their nationalities[39]
- Any pattern of dealing with a pervious transaction [40]
- Language and nature of the contractual documents [41]
- Terminology and format of the document [42]
- Currency in which the payment is to be made . . . etc [43]

To conclude, the proper law of the contract is the law which the parties intended to apply. Their intention will be ascertained by the intention express in the contract, if any, which will be conclusive. If no intention is expressed that will be presumed by the court from the terms of the contract and the relevant surrounding circumstances. When neither of two able to be determined, the court have had the fashion to select the law which has most significant and real connection to the contract.

2.4. The Law Governing External Relationship

There are many great approaches which have been suggested for the law applicable to the relationship between agent and principal on the one hand and the third parties on the other hand, that is, external relationship. Due to the differences in the theoretical conception of agency as well as differing concerns as to the party in need of protection through selection of a foreseeable law, the writer examined different legal system's rules which are most commonly followed. Here, despite the agent's activities, the principal remains the master of the transaction as a result of his conferral of authority [44]. Most legal systems try to resolve conflicting interests of the principal and third party by giving due consideration of security of transaction.

The rules of conflict of laws applicable in internal relationship are also applicable in the external relationship in different perspective. So, dealing with the basic nature of those rules may be redundancy. Then, the writer will deal with those rules specifically in their perspective expounding on external relationship.

When a principal is in one country contracts in another country through an agent, the rights and liabilities of the principal as regards third parties are, in general, governed by the law of such other country, i.e., the country where the contract is made. [45] In other words, the governing law is the law of the place of contracting. The rule seems wider and yet narrow concerning its scope of enquiry. The writer intention is to deal exclusively with the contract of agency from the point view of third party. The choice of law in relation to the substance of the contract [46,] that is, the existence, extent, and determination of agent's authority vis a vis the third person (party). It might goes beyond what it is expected to be. While including the question what law governs the authority of the agent, besides dealing with the contract made by an agent? That is to say, it is the problem whether the law which decides the authority of the agent Vis a Vis third party is necessarily identical with the proper law of the contract between principal and third party in general. For the sake of convenience and brevity this contract will be referred to as the "main contract or third party contract" in contrast with" contract of agency" concluded between the principal and agent.

There may be three possible situations in which the above situations are reflected (i.e.) the law of place of contracting, and whether it is the proper law or not.

The first situation is when the external relationship is created between the third party and the principal, as in the case of direct agency and in dealings with an undisclosed agent in common law [48]. When he has intervened of the third party

has considered him as principal, the contract between them is governed by its proper law.

The second possibility is when the third person contacts with the agent as in the case of indirect agency, when the place of their residence and performance[49] it's the same, it is unlikely that other law will govern their contract. Hence, the place of contracting is more significantly connected tot he case and *lex loci contractus* will be applicable as against the proper law. In this situation, the conflictual element is removed and the transaction has been transformed in to a domestic one.

The third situation arises when the third person is contracted with both the principal and the agent, as in the case in undisclosed principal generally, where the agent is with special responsibility the proper law is the agent's law [50] because in such circumstances the very important thing to consider is agent's additional liability towards the third party and a scission of laws applying to the obligations of principal and agent would be un necessary..

Thus, the above rule covers only one of the situations that have been tried to be discussed. That is the cases where the law giving the authority of the agent Vis a Vis third parties in question. It pre-supposes that the principal is domiciled in one country and the contract is concluded through an agent in another. However, it should have taken in to account possible differences between the domicile of the agent and of the third party and where the third party contract is to be performed but it did not.

The complexity and difficulty could be understood by assuming that the principal is domiciled or carries business in this country, one or more of the following elements in the case may be foreign:

- The place where the contract of agency was made.
- The place where it is to be performed.
- The place where its law is the proper law of the contract.
- The place where the third party contract was made. [51]
- The place where it is to be performed. [52]
- The domicile or place of business of the agent. [53]
- The domicile or place of business of the third person (Party). [54]

Conversely, any of these places may be this country and the domicile or place of business of the principal is foreign. It is among these possible systems that can be made applicable choice of law rules. To what extent can this consideration be gone? It helps to be made clear that this consideration can go far to the third party with out affecting the interests of the principal in the due course of exercise of the power of the agent.

In order to avoid such complexity and confusion, the probable solution would be setting the proper criterion because third party may rely on the law of one of the place specified above. Most commonly, the domicile and place of business of the two, the place of contracting, or it performance of third party, contract. [55]

In determining the applicable law it is advisable and necessary to make examination whether there should be a distinction between: first, the authority of a general and of a special agent. Secondly, the authority of a n agent dealing at a fixed place of business and that of any other agent (for example, commercial traveler), thirdly, cases where the choice of law on influenced by

the particular nature of the third - party contract, and cases lacking such specific features.[56]

Regarding the existence and extent of the agent's authority. In relation to third parties it is quoted as a follows: "whether a person is apparently authorized to perform an act for another is determined by the law of the place (state) where reliance placed up on such authorization." [57] " The law of the state (place) in which the agent in authorized on apparently authorized to act for the principal determines. Whether an act done on account of the principal or imposes contractual duty up on the principal."[58]

Some inferences or conclusion can be made from the above statement: here, third- party contract seems left unconsidered as to its governing law, in practice however, agent's authority is governed by the law applicable to third party contract. Usually the choice of law in determined in accordance with the place of contracting but there is a hundred in determining the place of contracting of a contract concluded through an intermediary (agent).

The rule can be considered to be derived from by questioning the questions implied from jurisdiction. "A State can provide for the creation of interests as a result of acts done in the state or of events which happen there." [59] under the above statements apparently the "law of reliance"[60] may be the law of the place of contracting or the law of the place of performance of the party - contracting and performance were the same? In many cases it is *lex loci solutions* prevailed.

It is possible to draw a conclusion that only when the principal contemplates that the agent will act a broad that the "law of reliance"[60] will be applied. The deriving flow is whether there has been an "act of causation"[61] by the principal,

going the agent authority or at least apparent authority to act a broad [62].But whether or not a particular act of the agent is authorized, the law of the state where the act is done determines whether the principal is bound by the contract with a third person (party)" [63]

In clarifying the previous relationships, which are pillars of agency laws. In the course of writing it is better looking in to some cases as an illustration:

The case- Chatenay Vs Brazilian Submarine Telegraph. Co.[64] it merely illustrates the rule that the position of principal with regard to third parties with whom the agent has contracted on his behalf is determined by the proper law of the contract made by the agent.

Assume that by a contract, the proper law of which is the law of Kenya, George appoints Hailu as his agent with authority to act in some other country; two entirely different questions may arise. First, questions concerning the mutual obligation of George and Hailu as, for instance, the extent of Hailu's authority and related matters, that is, questions arising between Hailu and George. These are governed by the Kenyan law as being the proper law of the contract by which the agency has been created. Secondly, questions arising out of the contract made by Hailu in some other country other than Kenya, for example, the effect of payment made by Mohammed (third party) to Hailu or to the liability of George to Mohammed if in fact Hailu has exceeded his authority. The law applicable to those questions is traditionally described as the law of the country where the act of the agent is performed, i.e., where he exercises his authority. What will happen if the agent is conferred a general authority to act abroad? In the above example George will be bound by the contract. Which in view a Kenyan law within his apparent authority (i.e., Hailu's) [65]. How can it be determined when Hailu acts with out disclosing

about George? Can George be sign up a contract with Mohammed? These two questions are determined by the law of the place where the agent acts other than Kenya.[66]

Though it is proper to identify external relationship is governed by the proper law of the contract in pursuance of agent's authority (which is the law of the place where the agent acts). It is more sound and logical to identify it with the position of agent and principal on the one hand and the third party on the other to be regulated by the law of the country with which the contract made by the agent is most substantially connected.

In the previous chapter, the writer has mentioned that it is worth mentioning about international conventions rules specifically applied on international agency. In the following section the writer jump up in to general principles in brief.

2.5. The Hague Convention on the Law Applicable to agency

The search for unification of private international law through international convention has been made a long journey but partial success. The Hague convention on the law Applicable to Agency was entered into force in 1992.

So long as the kind of relationship is of "international character" it is provided in this convention that agent and agency are defined very broadly. [67] Thus, the convention applies to any representative relationship doing business on another's' behalf. Though commercial agency is the main area of its application, it does not exclude the person acting occasionally as an agent. [68] The concepts of undisclosed agency of common law and indirect agency (mainly commission agent) of civil law are recognized and included [69].

Besides this, the subsequent ratification of the agent is adopted, [70] since revocation of an agent's authority is over, it seemed necessary to have ratification, i.e. retroactive creation of authority is recognized, as well.

2.5.1. Choice of Law Provision

The convention provides that the internal law of the state of the agent's business establishment or habitual residence governs the internal relationship of principal and agent with two exceptions [71]. The first, exception is when principal's business establishment and agent's place of acting in the same, or if he has none, habitual residence, the former's law governs. The second exception is where the principal or the agent has more than one place of business establishment. It resorts to the establishment with which the agency relationship has the most real and closest connection. Here, the convention is in good shape to accommodate and made compromise between flexibility and the predictability of the rules which is required by reasonable parties to secure their interests. Preference to agent's principal place of business over others is appropriate for the following reasons: first, most closet connections are identified with connecting factors usually it is with the party who performs the obligation. Second, it is more likely that agent's principal place of business is a connecting factor. The agent's principal place of business has an advantage of being clear and readily ascertainable. So, the above reasons justifies it is appropriate to focus primarily on agent's principal place of business.

The conventions primary focus is on respecting parts autonomy in selecting their governing law as regards their commercial dealings.

Concerning the external relationship the convention provides that the existence and extent of the agent's authority and the effects of agent's exercise of authority shall be governed by the internal law of the state where the gent had his business establishment at the time of relevant acts [72.] The rule is the same which governs international relationship. However, it further specifies and provides an alternative for the agent's place of business establishment with the law of the place of acting when the principal has his place of business establishment or domicile in the state and the agent acted in his name; the third party's place of business is in that place; the agent has no place of business. It has to be taken care when either of the parties or the agent has more than the place of business. The law of the place having significant connection with relevant acts of the agent will govern external relationship [73.] Here, third party is safe.

Unlike many legal systems, the convention provides that in the external relationship whenever the agent acts with in his authority, exceeding his authority, or has acted with out authority; the issue of authority has to be dealt separately. Principal - third party relationship is on the other scheme. Here, third type of relationship exists, i.e., a gent- third party. When there is lack of authority, there is no contractual relationship between principal and third party. Sometimes this type of relationship is governed by the law applicable to external relationship.

It has been said a lot so far about the rules of conflict of laws in commercial dealings conducted through agents. The rules governing tripartite -setting of agency are different in different legal systems but in this chapter the writer has tried to point out common rules applicable both in internal relationship and that of external relationship. The rules, covers party autonomy, significant and most real connection, generally the proper law which include different rules in

it, such as place of contracting, place of performance, place of business.... etc. The total impression of agency in private international is some what presentation of uncertainty due to the inherent flexibility of the rule proper law of the contract and the difficulty in delimiting agent's authority; it is where internal and external relationship intersects. However, Party autonomy principle simplifies the complexity and uncertainty in this regard and has been followed in a greater confidence based on the free will of the parties.

In the next chapter the writer will look into the above conflict of law rules governing agency relationships in Ethiopian draft private international law ,that is, considering had it been adopted and codified in light of comparative jurisprudence.

CHAPTER-THREEE

3. THE NEW DRAFT PRIVATE INTERNATIONAL LAW OF ETHIPIA: EXAMINING ITS RULES ON AGENCY

3.1 Evolution of the codification of conflict of laws in Ethiopia.

In most legal systems, it is observed that private international law is one part of domestic law. However, Ethiopia has not yet codified the rules on conflict of laws other than compilation of different draft rules prepared indifferent times.

The first proposed code was written in 1950s by Professor Rene David. It was a conscious and correct decision of the R.David to prepare and propose the rules on private international law to be included in the civil code during the codification[1]. In particular historical moment of resolving the tasks of preparing the full codification of the market oriented civil law: the exclusion of conflict of laws from the scope of codification resulted in postponement of having conflict of laws which in turn resulted in arbitrary decision of cases involving foreign element. The codification commission rejected it with out any good reason and it can be said that for unknown reasons.[2] Despite this, Sedler in his opinion held that the codification commission seemed to believe that it was not necessary to have conflict of laws during that time. Instead, following a more pragmatic policy oriented and a case by case approach was preferred [3]. There was also unofficial document on conflict of laws rules prepared by Robert. A. Sedler. In 1976 ministry of law and justice, short-term law Revision sub- committee- 5 prepared draft rules on private international law of Ethiopia. But none of them were signed to law. Recently, a new draft

proclamation has been prepared by Ethiopian Justice and Legal system Research Institute. Thus Ethiopian new draft proclamation on private international law has not yet become effective till today; however, it represents a four decade effort and need to be codified with some amendments.

3.2 Scope of Application

The conflict of laws situations may arise in an international plane when it involves two or more sovereign states legal systems or in a national level where the country has a federal arrangement and each of the states has legislative power of their own (Inter - state conflict).[4] However, commercial laws and foreign commerce relation regulations are in the inherent power of federal government [5]. So, inter - state conflict of commercial laws is unlikely to occur in Ethiopia Hence, the paper in concerned solely on conflict of law situations in an international plane, that is, between two or more sovereign countries'(states') legal systems.

In determining the applicable law distinction has to be made between questions relating to agency agreement or contract of an international character and questions relating to rights of parties having business with the agent.

The basic rules for ascertainment of the applicable law are contained in articles 72 and 73 of the draft, which provides that a contract shall be governed by the parties' choice. Their choice must be express [6] or demonstrated with reasonable certainty by (from) the terms of the contract of the circumstances of the case, failing which, the contract shall be governed by the law of the country with which it's significantly connected.[8]

The first step is to examine the policy to see whether the parties have, by their express terms, or by necessary implication evinced a common intention as to the system of the law by reference to which their mutual rights and obligations under it are to be ascertained. If no intention is expressed and none can be inferred then, it is necessary to seek the system of law with which the contract has significant connection.

3.3. Applicable law

As defined in the new draft proclamation, it is a system of law governing the relationship between the parties and by reference to which theirs mutual duties and rights are determined [9].

Ordinarily, agency relationship can be created by a contract between the principal and agent [10]. Though it can also emanate from the law, [11] the writer is intended and interested in the ones that evolve from the contract: the draft appears to regulate those kinds of relationships emanate from contractual agreement [12]. In the previous chapter, it has been mentioned that agency poses three conflicts of laws problems: What law governs the respective rights and duties of principal and agent, principal and third parties, and agent and third parties. It is better to follow the same pattern in discussing the draft rules in the next sections.

3.3.1 Rules Applicable to Agency Contract

It has been clearly provided that a choice of law rules applicable to contractual obligations are also applicable to the relationship of principal and agent [13].

3.3.1.1 Choice of Law by the Parties

Like most modern legal systems the draft recognizes party autonomy. Here, the manifestation of parties' choice must either clearly evident from their express selection of the governing law in their contract or implied from the circumstances [14]. It lists down the systems of laws in which parties can choose in order to govern their relationship where a contract involves a foreign element. What does this mean? It refers to a factor which connects parties of different nationality, domicile or residence (personal nature) [15], connecting factors having local nature this may pertains to the place where facts occur or juridical acts made or arises [16]., or connecting factors having a material nature, that is, the place where the property to which the juridical situation applies is situated [17].. The listing dawn of the system of laws in which the parties can choose would be considered as a limitation of party autonomy to choose any law they wish. The list includes:

- The law of nationality [18]
- The law of domicile [19]
- The law of the place where the transactions were made [20]
- The law of the place where the subject matter is situated [21]
- The law of the place where the transaction is to be performed [22]
- Or the law of the place where it is reasonably connected to the matter.[23]

The last system of law is a new addition to the previous draft rules. It looks like, its addition deemed to compensate the restriction on party autonomy by applying reasonableness standard. Still it is problematic in determining it; what is objective to the parties and out siders may be different.

Emphasis is given to freedom of contract. The parties are free to choose any of the above systems of law to govern the substance of their contract

[24]. It means, the law governing creation of agency determines the nature and scope of the relationship. As between the principal and the agent, it determines what the agent authorized to do on the principal's behalf. It like wise determines the rights and duties of the parties toward each other, as the circumstance under which either the principal or the agent can put an end to their relationship, the amount of compensation, if any, to which the agent is entitled; and the liability of the agent to the principal for unauthorized act . . . etc.

A. Express Agreement

Express stipulation of the applicable law is a true contract it self, having all the requirements of a contractual engagement, but auxiliary to the main contract [25]. Express choice of law constitutes the connecting factor. Can Mandatory rules of a local system that normally would be applicable under the conflict of laws rules of the forum be disregarded if the parties agree to apply the law of another system? This issue is left unaddressed by the draft. The question here is that, does express choice of selection constitute party reference or incorporation of foreign law? In other words, whether the freedom should be restricted to laws connected with the subject matter arises only in connection with party references. When the intention of the parties to a contract is expressed in words, this expressed intention, in general, determines the law applicable to the contract. Care must be taken when the law has been chosen, that is, it must have a reasonable connection to the case and be lawful .[26]

B. Implied Agreements

Parties may agree indirectly to the application of a particular law when their behavior shows their obligations to be intentionally connected with the private law of a certain country[27]. For example, practice in their former transactions agreed on the application of a certain law, may well be suppose to intend a similar submission in making new contract [28].

3.3.1.2 Rule in the Absence of party Agreement

Whenever parties intention is not evident from express stipulation or implied from the relevant circumstances of the case the governing law is the law of the country which has significant connection tot he transaction [29]. At this point courts have had the discretion to select the choice of law rules which regulate the relationships of the parties, that is, principal and agent.

Agency relationships may be placed in to two categories, as explained in the first chapter, in terms of their scope. The first category consists of situations where the agent is to serve the principal for a period of time and to do a number of acts on the principal's behalf (General Agency). [30] The situations where the agent is to do a single act on the principal's behalf (special agency) [31] is another. In either case, the state where performance by the agent is to take place will (shall) be given the greatest weight in the absence of party agreements, in determining what law governs the rights and duties owed each other.

In cases when the agent is authorized to do a number of acts on the principal's behalf in a single state, the law of this state will regulate and

determine the rights and duties owed each other it has significant connection to the matter than other systems of laws in the absence of party agreement [32.] But when the relevant contacts, as the place of contracting and domicile, residence, and place of business of the principal and the agent are grouped in another state, the law of that other state seems to have significant connection and has a ground to regulate the transaction.

Another possible situation arises where an agent is supposed to act primarily in one state but in the course of his duties he may enter in to a juridical act in another state. The law of the country where the agent does his majority of activities will determine the rights and duties owed by each [33] other for the acts done by the agent on the principal's behalf in another state.

There will be situations where agent's jobs are more or less divided evenly among two or more states. In such causes, little weight can be given to the place of agent's activity in determining the state of the governing law. If the states' laws have the same conflict of law rules, it will be taken as the case of agent's performance were to take place in a single state [34.]

To sum up, compared to external relationship and authority aspect of agency, it is easy to find out which law governs the relationship between principal and agent, i.e., agency contract, usually choice of law rule applicable in contract generally also applicable to the internal relationship of agency. Complexity arises when there is no express selection of the governing law and at the same time when agent's places of performances are numerous. In this case, many of the places of performance could have significant connection to the matter. Determining which one is most significant poses greater difficulty.

The next section will deal with the most import and aspect of agency relationship on the one hand and question of authority on the other; the source of conceptual (theoretical) as well as practical conflict situations compared to internal relationship.

3.3.2 Choice of Law Rules Governing External Relationship (Principal and Agent Vs Third Party)

The external relationship aspect of representation (agency) comprises two sets of contacts. Under the new draft it has been provided that the governing rules regarding the two basic sets of contact, that is, Agent vs. Third party on the one hand and Principal vs. Third party on the other hand, are schemed out in order of priority. Under Art. 80 (2) of this draft. The scope of the provision extends to the cases of unauthorized agency relationships pursuant to Art 80 (3). The rules incorporated in the provision includes like many other kinds of relationships, freedom of contract of parties is also recognized which enables them to choose the governing law concerning external relationships [35]. The other set of rule incorporated in this sub-article is when the parties fail to designate (i.e. principal and third party). The governing law is the law of the country in which the agent acted if the principal or third party has residence or domicile in that country [36]. Up on failure to satisfy the two situations above, the governing law is the law of the country which is significantly connected to the case. [37] In the subsequent sections it is better to look in to each sets of contact in light of the rules incorporated.

3.3.2.1 Principal Vs Third Party

Whether a contract between the principal and third party results from and agreement made with third party by an agent on the principal's behalf depends up on the two basic conditions first, whether the principal is bound [38] by the agent's action and if so, secondly, whether the agreement amounted to a contract under the law selected by application of the rules of Arts. 72 and 73. In other words, the effect of agency relationship upon third parties with whom the agent deals is said to be governed by the laws provided under their sequence in Art 80 (2).

A. Express Designation by Principal and Third party

The first limb of Art 80(2) Provides that the governing law shall be the law which is expressly designated by the principal and third party. This refers either there was an early contact or there is a possibility for the parties to select the applicable law after the conclusion of the contract by the agent on principal's behalf. Is there a possibility for the parties to agree later? The draft is silent is this regard. However, if it is allowed does this amount to alternation or variation of the contract? If so, what if it affects the substance of the contract, that is, most importantly the performance aspect of the contract? The law wished to give effect what the parties originally in tended, not to vary or extinguish it [39]. Incases where the principal's name is unknown but his /her existence known to third parties, how would he designate the governing law? Can agent's designation deemed to be principal's? Since the motto is there in representation, that is, one who acts through the agent acts for himself [40]. (This gives pseudo solution). Does such designation need further authorization? Need to be

answered. It depends on the factual surrounding circumstances that agent's act of designation fall under the normal course of his business (representation) or not.

B. The Law of Place of Performance

Whenever parties fail to expressly designate the governing law, as an original proposition, the question of agent's authority to bind the principal might be referred to the law of the place in which the agent acted [41]. The local law of the state where the agent deals with the third party under the circumstances stated in the rule of this provision impliedly determines such questions as, whether the agent accrued with authority or apparent authority, the scope or extent of this authority, and whether such authority had been effectively revoked prior to the agent's act or was revocable at all. This rule of the provision is applicable whether the principal was disclosed or undisclosed to the third party at the time of the agent's act. Since Ethiopian Agency Law is based on common law tradition of liability test than name test of the civil law (like France) [42], it is reasonable to consider it in the draft.

It can easily be observed that, the law of the place of performance would not automatically apply, rather such place of performance ought to be either principal's residence or domicile, or that of third parties, [43] not any other place. The restriction emanates from the presupposition that agents usually carry out their activities where third parties resided or domiciled. The condition (factor) as to principal's residence or domicile emanates from taking in to account of the agent's source of authority. In most cases agency contract or agreement concluded where the principal lives or both the agent and the principal do, which is his source of authority. In

addition, in applying the local law of the state (Place) where the agent exercises his authority impliedly presupposes that the principal has agreed that the agent should act for him in that specific country[44]. Does this mean a preliminary conflicts rule referring to the law of the principal's residence or domicile or of the place where the authority constitutes? In my opinion, the law of the principal's domicile or residence ought to determine whether the principal has declared his assent that the agent should act for him in the specific foreign country. At this juncture, it will also govern other aspects of agency contract.

A more difficult case is presented when the agency agreement is governed by the law of some state and the agent acts on principal's behalf in some other state. In this situation also the law of the state where the agent acted should be applied, unless the main (Principal) connection with the latter state is insufficient to make applicable such state's law fair and reasonable. Unfortunately, unless such place of performance or where agency is created in principal's or third party's residence or domicile, it may not be applied [45]. These kinds of situations are left uncovered by this draft Proclamation, particularly in Art. 80 (2) second alinea. To illustrate, a principal will not, with out more specifications, be held liable under the law of Kenya for an act done there on his behalf by an agent who was authorized to act in Addis Ababa.

C. The Law of the Place Having Significant Connection

Having exhaust the above two regimes on the governing law, Art. 80(2) the last limb provides, the governing law could be the law of the country in which is significantly connected tot he case at hand. It opens the door wider for courts to choose as to which is the governing law on their own

discretion. Here, the question of authority to bind the principal might be referred to the following possible laws. Firstly, to the law that governs the agreement between principal and agent, secondly, to the law that governs the contract made by the agent acted. Thirdly, the law of the place where the agent acts. The first possibility has to be discarded because of considerations of fairness to third parties. He/she/ they should not be required to look to the laws of which govern agency agreement (contract) to determine (know) the extent of the agent's authority. The second possibility must also be disregarded, at least as a general proposition, because the state whose law governs the contract made by the agent (i.e. main contract) may have little relation with the principal. There remains the law of the state (country) where agent acted. It should be noticed that, here there are no further conditions like; the place of performance should be the principal's or third party's residence or domicile so long as such connection is fair and reasonable. [46] For instance, a sufficient connection with Indian law exists if the principal has actually authorized the agent to act on his behalf on that state even though neither principal's nor third party's resided or domiciled out there. The same should be true when the principal has led a third party to reasonably believe that the agent had such authority. [47] An example of such situation should be the case in which the principal gives the agent a written statement authorizing him to act on the principal's behalf in Ethiopia and / or Eritrea while orally instructs him (the agent) not to act in Eritrea and enters in to a contact with a third party on principal's behalf. In this case, the principal didn't wish the agent to act in Asmara and indeed for bade him to do so. Yet it is fair that Eritrean law(by assuming that Eritrea has such law) should be applied to determine whether the principal is bound by the agent's acts, since the principal was responsible for making the third party to believe that the agent was acting in Asmara with his authority . In like manner it is logical and reasonable

Further problem arises when the principal in one state, for example, in Ethiopia is claimed to have ratified an act done on his behalf by the agent in Dubai. By ratifying action taken on his behalf by an agent in dealing with a third party, the principal can fairly be said to have subjected him self to the local law of the state where the agent deal with third party [56]. The first question for the forum to decide in such a case in whether what the principal did or did not do could reasonably and fairly through to amount to ratification[57]. If it is answered in the affirmative, the forum will next apply the law selected by its appropriate choice of law rules to determine whether the agent's act had in fact ratified, and if so, with what effect. Although in deciding reasonableness in the preliminary question, the forum doesn't reasonably expected to look exclusively to the law that it would ultimately apply to determine the existence of ratification, neither it will be guided solely by its local law (equity requires to do so). The mere fact, for instance, that a given act on the part of the principal would not constitute ratification under the local law of the forum will not be conclusive. To reiterate, the initial question for the forum to decide is whether the principal's action or non - action can fairly be considered ratification. Under Art. 80(3) of the new draft, it has been provided that in such situations, that is, which give rise to unauthorized agency relationship and later ratified by the principal (though not explicitly provided to this effect, it can be inferred) is governed by the same rules and have explained earlier as in the case of agent acts with authority or apparent authority [58]. It would be redundant if the writer look into the rules again in the same manner. Having said this, in making the determination, the forum will give consideration to the rules of ratification under the laws of substantial number of states will almost certainly suffice for this purpose. It is unrealistic conducting such surveys with in the frame work of current

practice, wherein the country which has no codified rules of private international law. Once the forum has decided that a reasonable basis for finding ratification exists, it will look to, in the above example, Dubai's law to determine whether the principal's conduct did in fact constitute ratification, and if so, what the effect of that ratification was. In other words, it's therefore, appropriate that the principal should be held bound by his ratification if the principal is bound under the

local law of the state. If the principal is bound under this law, the question whether there is a contract between principal and third party, and the rights created there by is determined by the law selected by application of the rules of Arts, 72 and 73 of the draft.

3.3.2.2 The Validity and Effect of the Contract

A determination that the principal is bound by the agent's act does not finally determine the question of the rights and duties as between principal and third party. It must next be decided whether the agent has made a valid contract on principal's behalf and, if so, what are the rights of the principal and third party against each other under the contract. The law that determines (governs) this latter question is resolved by application of the normal choice law rules relating to contracts (i.e. Arts, 72 and ff) [59]. It will not necessarily be the same law that determines whether the principal is bound by the agent's act.

Beside the question of authority, there is no reason why the choice of law rules that are applicable to contracts in general should not equally be applicable to contracts made by agent's (third party contract or main contract - expressed in the previous chapter) [60], the law governing the

contract made by the agent determines such questions as a part from capacity (which is governed by personal law of the party [61]. That is, contract was based on the necessarily consideration, and whether the essential formalities were observed. In general, substance of the contract and the formalities are required to meet under such law Art. 80(2) [62].

The following sections of the paper will explore on effects of the contract with due emphasis on liabilities of the parties.

3.3.2.3 Agent Vs Third Party

It is one aspect of agency relationship which is a clear concern of the relations between the agent and third party, however, impliedly it touches also principal's as well. [63] Selection of the law of governing the rights and duties owed to each other by the agent and third party with whom he deals with poses no peculiar conflict of laws problem. These should be governed by the law under which the agent purports to act or is alleged to have acted, or the law of the place where third party, and principal expressly designate it , or the law of the place in which it has significant connection to the case (though it is not clearly put in place)implicitly Art. 80(2) should be interpreted this way. [64]

Where the agent acts for a foreign principal ,or vice versa, the general rule, for instance, in USA and England, Seem to have been that there was a presumption that the agent has contracted personally (with all the consequence there from), [65] unless a contrary intention appeared plain from the contract [66]. The question whether the agent is personally liable, or had authority to make the foreign principal liable to the exclusion of his own

liability is now the question of fact depending on what the parties intended and other circumstances.

It is to be noted that the foreign principal can sue or be sued on the contract unless the privity of the contract established by the agent who had authority or apparent authority [67] is validity established it was seen that the position of principal and agent entirely depended up on the nature of the contract made by the agent and the intention of the parties in respect of privity of contract between principal and third party. That is the situation where the contract made by the agent with third party is governed by Ethiopian law even though foreign principal is involved. However, the contract of agency might not be and Ethiopian contract, or the agent may not contract, or other wise exercise his authority in accordance with Ethiopian law or the agent many perpetrate acts which could possibly involve his principal in liability, in circumstances in which Ethiopian law will not govern the right and liabilities of the parties. It is therefore, necessary to see what the Ethiopian conflict of laws says about the position of the principal, agent, and third a party in such circumstances, Unfortunately, we don't have any codified rules of conflict of law, even the draft rules are scanty in this area.

Such relationship is complicated more when an agent acts beyond the scope of his authority or with out authority given by his principal. In a proper case, both agent and principal are jointly and severally liable to third party for having falsely warranted agent's authority (in most cases the agent alone is held liable) [68.] When the agent causes harm to third party, in what category would it be identified to choose the governing law? In other words, would it fall under tort or contractual issues category? Here, the difficulty becomes apparent because extra - contractual and

contractual issues intermingled. However, this action sounds in tort because there is a fault on the part of the agent as well as the principal [69]. It results in raising extra- contractual liability issues. Under the normal choice of law rules applicable to torts, the governing law would normally (usually) be the law of the place (state) where the tort(injury) is occurred or sustained, namely the state where the third party first relied to his statement up on the false warranty [70]. But Art. 82 (1) of the new draft proclamation provides that the governing law in such situations is the law which governs the existing or alleged legal relationships from which the obligations result in, that is, and of the laws selected as per Art. 80 (2), usually the law of the place where the agent performs his duties. At this point, it ignites to call up on some discussions on vicarious liability which has common character to share with agency. The next section is devoted in dealing this matter.

3.3.2.4 Agency vs. Vicarious Liability

Agency and vicarious liability have much in common. Both involve situations in which the act of one person (agent) may create obligations on the part of a second person (principal) towards a third person (third party) [71]. Agent's act in case of agency may result in obligations running from third party to principal or vice versa. In the case of vicarious liability, on the other hand, the act may make principal liable to third party but will not give principal any rights against third party [72].

Vicarious liability is a tort doctrine [73]. Its three fold relationship may give rise to conflict of laws question of what law governs principal's rights against agent, third parties' rights against principal and/ or agent.

In all probability, principal will have a right of action against agent once he has held liable for the latter's tort [74]. Principal's usual remedy will be[75] indemnity, which is a tort action whose existence will depend up on the law that imposed vicarious liability on principal. This law is usually that which governed the tort committed by the agent. If the tortuous act is committed in Kenya, Kenyan law will determine not only whether the act was tortuous and whether the principal is liable but also whether principal has a right of indemnity against the agent as per Art. 80 (2) cum 82 (1).

In order to see appropriately third parties, right against principal, it is better to consult foreign jurisprudence requirements, that is, third parties will have a right against principal up on fulfillment of the following requirements; first, the relationship between principal and agent should make it fair and reasonable to hold the principal liable for injuries caused by the agent [76] and; secondly, where there are sufficient contacts, between principal and the state of the governing law to make it reasonable and fair to subject principal to that law. [77] Then, the forum will look to the law selected by its choice of law rules to determine whether under that law in fact principal is vicariously liable for agent's act.

Third parties will, of course, have a right of action against agent for any injuries he may have suffered account of the latter's fault (tort) [78]. Whether agent has in fact committed a tort, and if so, the extent of his liability to third party will as sated above, usually be decided by the law of his place of performances as per Art. 80 (2) which is the place of injury, in line with tort choice of law rules under Art 81 and Art. 82 (1).

Every thing has its own application and limitations. More or less, the writer has tried to look in to the applicability of the rules of the new draft private international law of Ethiopia on agency.

To sum up, the fundamental rules incorporated in the draft are party autonomy and significant connection to the case. The realization of such principles (rules) particularly, principle of party autonomy (as well as the functioning of all the conflict of laws rules) as contained in the draft may be balanced and corrected by those extra - ordinary mechanisms of private International law which are aimed at protecting the most fundamental values and principles or important legislative policies of the forum state, Two such mechanisms are: the traditional public policy exception and the relatively new institute of directly applicable rules Mandatory provisions.[79]

CHAPTER- FOUR

4. ADEQUACY OF THE NEW DRAFT PROCLAMATION ON PRIVATE INTERNALIONAL LAW OF ETHIOPIA IN GOVERNING AGENCY

4.1 Approach and General Features of the Draft Proclamation

The analysis of various legal systems demonstrates that the codification of private international law may be implemented in one of the following ways. The first approach is to enact a single legislation (statute) including provisions on most of issues of private international law, rules on the law applicable not only to civil but also to family, labor an other private law relations: provisions on recognition and enforcement of foreign judgments and arbitral awards, other rules of international civil procedure [1]. Another approach consists in the allocation of rules on various institutions of private international law among separate legislative acts in specific branches of law [2]. As a result, private international law rules may be found in the civil code, commercial code, code of civil procedure and other legislative acts of a particular country. The later is a dominant one followed by, for instance, France, whose legal system is transplanted in Ethiopian -civil code primarily. The new draft obviously is typical of the first approach. The merits of the first approach emanates from the perspective of legislative consistency and practicality. This separate enactment of the new draft is definitely preferable in this regard.

Like legal systems of France, Russia, Sweden, USA, and England . . . etc drafting of this draft is based up on solid theoretical grounds as clearly reflected in the preamble part. Having read the preamble, one can pin point

the following basic principles underlined in it. First, like all private international laws of the world, it is intended to regulate the legal relations between nationals of two or more countries (states) [3] second, contents drafted in such a way that to support general foreign policy objectives of the country [4]. In the context of current foreign policy, conflict of law rules should contribute to the progress of peaceful co- existing between countries with different socio- economic systems. Third, treaties should form the basis of a consistent international approach to conflict of law problems [5]. Fourth, because the creation of national (international) legal security is a primary objective of conflict of law rules, the formulation of clear and consistent rules through enactments is essential [6]. Fifth, those principles are reflected or designed to reflect a principled, equal treatment of all nations and individuals, avoiding legal discrimination against the citizens or applicable laws of any country (state) [7]. Sixth, the public policy defense is recognized though as a matter of principle, [8] it should not be available to frustrate the proper application of foreign law.

The Ethiopian new draft provides comprehensive coverage in all major areas of conflict of laws including, choice of law, jurisdiction, recognition and enforcement of foreign judgments and relevant procedural rules. The light flicked on the draft is that despite its complex broad coverage, it avoids casuistic regulation, providing concise (not always perfect) rules in seven chapters and ninety- seven articles. The organization of the draft follows a logical pattern; first introducing general rules in major conflict of laws areas, then establishing specific choice of law rules enunciate both the purpose and scope of the draft as well as the legal principle governing private international law relationships. The purpose of the draft is to promote the advancement of peaceful international or inter-state interactions in the areas of commercial, personal, and property

relationships among citizens [9]. The draft intended to achieve a successful compromise between predictability and reasonable flexibility by adopting principles of party autonomy and significant connection through out the draft. [10]

Having said this much, it is better to resort to specific schemes of the draft in which the paper is primarily has focused on

4.2 Scheme of the New Draft Proclamation

The importance of contractual relations for international commercial practice particularly business conducted through the medium of agents seem ignites the drafters to draft a section on contractual obligations which contains detail provisions. As it has been noted earlier, two basic principles may be taken to determine the regulation in this area, principle of party autonomy and the principle of significant connection, these are additionally counter - balanced by the mechanisms of private international law limiting the operation of foreign law of the sake of protection of vital societal concerns. [11]

It may be helpful at this point to out line the main provisions of the new draft proclamation relating to the rules applicable to contracts since agency is one kind of contractual agreements. The basic provisions incorporated in the draft are the following:

- The proposed rules apply in any kind of contracts listed under Arts. 74 - 80 and is silent about certain classes of agreement, for instance, negotiable instruments insurance contracts . . . etc (Though these are not the locus of the paper it is for the purpose of reminder). [12]

- The basic rule is that a contract is governed by the law chosen by the parties. Such choice may appears to be express or implied (Art. 72 (1) (2) [13]
- In the absence of party's express or implied choice, the contract is to be governed by the law for the country with which it is significantly connected (Art. 73) [14]
- The law governing the obligation determines the substance of the contract, that is, the conditions of performance and its formation (essential validity) . .. etc (Art. 72) [15]
- Regarding the formal validity , the governing law will be the law applicable to the contract or by the law of the place of making or performance and selected matters (Art. 79)[16]
- There are special provisions for contrast dealing with immovable property, consumers, employment, intellectual property, gratuitous - inter vivo (Arts. 74 - 78 respectively)[17]
- Art. 80 is the center of the paper which regulates agency relationship in itself or by referring other articles. [18]
- General principles like renvoi, public policy are important though not listed in this section they are provided in Arts. 35 and 37 cum 38 of the draft. [19]

4.3 The Analysis of the Substance of the Draft

In this section, the writer will try to look in to the hanging hands of the provisions governing agency relationships in light of the principles that have been discussed in the previous chapters.

In order to see the adequacy of the draft, it is better to frame some pillar issues to look in to. In the new draft proclamation, there are many things which need a great deal of discussion; however, the focus of this paper is limited only to choice of laws rules applicable to agency. Up on consideration of choice of laws rules what is reasonable is to pick up stage pillars of rules, to discuss the adequacy in this regard. It means, as incorporated under Art. 72 and the rules are party autonomy and significant connection (synonymous to proper law as in English enactments used). On the scope of these rules; who are the parties....etc. The writer would like to discuss based on the following issues which encircle the whole sub-issues on the following fashion.

4.3.1 Dichotomy of Party Autonomy

Party autonomy or the power of the parties to choose the law governing their contract is believed to be firmly established principle in most systems of law [20]. "There is no boots trap magic in a governing law clause (proper law)," [21] as one writer clearly puts in a fascinating manner. In other words, the proper law of the contract can not be taken as an adequate substitute for a clear and precise expression the parties' intent as to the particulars of the transaction, based on a careful analysis of the rules of domestic law which the transaction is so connected. Such analysis is essential to reasonable appraisal of the various alternatives of the choice and the possible effectiveness of the choice, once it has been made.

The principle of party autonomy, which underlies the present choice of law rules, raises two main problems. The first concerns with the creation of contractual relations, where the application of the appropriate law having reasonable connection (" Putative proper law") [22] is favored. It can be argued

that the application of such rule seems to represent a retreat from autonomy principle because such law may not be the same system as that chosen by the parties. The second problem is the extent to which party autonomy should be restricted. The new draft proclamation regulates this by listing down some systems of laws.

The salient question would appear to be what are in practice the reasons that may induce parties to choose a law with which their contract has no reasonable connection what so ever? The answer to this question could not be comprehensive with out fact research. The drafters never bothered to undertake such a fact research. And it is not expected from them but having in mind would be helpful.

As reflected in Arts. 72 and 73. When the rules have been carefully looked into, they have two limbs. The first limb consists in the assertion that the parties to a contract are not at liberty to choose any legal system of their own unfettered choice, but must choose a system with which the contract which they are about to conclude has some connection, Another limb seems to refine the substitute for the presumed or hypothetical intention of the parties some objective test, that is, "Significant connection"[23].

4.3.2 Single Law or De'pecage

In most countries choice of law rules it is open for the parties to choose, with in the limits of their autonomy the law(s) applicable to the contract or certain of its particular features. A single agreement thus may contain, in addition to the selection of proper law, specific provisions regarding the law applicable to certain aspects of the contract. This segregation of issues (de'pecage) [24] is not limited in practice to transactions carried out solely with in the context of

municipal law. It is also common to agreements between international and private persons [25].

There are situations in which the harmonious state of affairs may be disturbed. One instance may be; that at the time of entering in to the agreement one of the parties realize that some of its contractual commitments may be subject to limitations beyond his control and may wish to qualify corresponding obligation to perform, in fact he didn't. Other situations are far less significant. These include relationships which though they constitute a single, economic, commercial or financial package are split in to legally distinguishable components and each component is governed by its own law [26]. Examples are agency relationships in the commercial field since it's generally agreed that the relations between principal and agent are governed by their own proper law, that is, the law chosen by the parties [27] or in default of choice the law of the place which has significant connection to the case [28]. Where as those between the agent and third party and the possible liability of the principal for his agent's acts are subject to, for instance, the law chosen by principal and third party [29] or to the law of the place where the agent acts if this place is either principal's residence or domicile, or that of third party's [30] or if none, the law of the place having significant connection to the case [31]. Though the draft (new) relieved of being criticized on these matters, particularly one aspect of it, this should have been recognized (de'pecage).

4.3.3. Party Autonomy and Time Element

Time plays significant role in matters concerning the formation, performance, and termination of transnational transactions conducted through the medium of agents. At the stage of formation, the determination of the time, and indirectly the place, at which a contract should be regarded as

having been completed us a matter of considerable importance. The situation is problematic and difficult, for instance, where contracts are made by mail or telegram because of the differences among legal systems regarding such maters as to those concerning the revocability of offers and the moment at which acceptance takes effect. The draft (new) does not take into account such situation even with in the general provisions governing contracts incases of conflict. It shows longing hands of the draft to deal with difficult situations

4.3.4 Post - Formation Choice of Law

Can parties agree on choice of law rules after the conclusion of their contract(s)? It is one of the few unsettled points. The parties to a contract may not fully realize the possible impact of conflicts rules up on their rights and obligations until quite some time after the making of the contract. The new draft law is silent in this regard but it should have to be considered carefully. It is also delicate area for many other legal systems. Whether such an *ex-post facto* [32] use of party autonomy is permissible or should be denied effect is a question with regard to which there is no complete unanimity of opinion. The difference in answering such legal problem emanates from the conception of party autonomy respect ambit or boundary. In most countries a choice of law subsequent to the making of the contract in barred. [33] still few persists in arguing that if party autonomy is respected in making an initial making of the contract choice of law why not it is made later as long as it doesn't contravene public policy, of the forum and its mandatory rules [34]. The reason why the draft simply ignores such matter seems because it is a copy of dominant systems enactments.

mention should be made of the rules on characterization of legal concepts in the determination of the applicable law, [42] on the application of the law of the country with a multiplicity of legal systems, rules on renvoi [43]. on ascertainment of content of norms of foreign law. The limit of the present paper makes it impossible to consider these Provisions in detail.

Two basic principles may be said to determine the regulation in this area. These are the principle of party autonomy and significant connection [44]. They are additionally counter balanced by the mechanisms of private international law limiting the operation of foreign law for the sake of protection of vital societal concerns through escaping devise such as, public policy provision. [45] Despite this, In the draft, to some extent in its party autonomy principal tries to reflect the quality of parties in civil transactions, the free will and self-sufficiency of the parties, the freedom of contract, the inadmission of arbitrary intervention in private affairs. . . etc like many other countries legislation and the previously drafted codes.

The will of the parties as to subjecting their relationships to a particular legal system (regime) is the primary factor to be considered by the judge when determining the law governing the contract. Due to the importance of the parties will in this area or, provisions on choice of law Arts .80 (1) cum 72 and 73, and 80 (2) (3) are to some points detail when they are compared to previous drafts provisions. However, the parties to a contract may have a need to agree after the conclusion of the contract or some parts of the contract need to be governed by different laws which have economic interest for the parties. This draft also does not provide or restrict the number of agreements that the parties might reach regarding the law governing their relations.

Provisions under the section of contracts do not contain any requirement as the existence of connection between the contract and the chosen law clearly. But, impliedly seems do so by restricting the regimes of law by listing down which have connection to the contract or parties, especially the last addition of Art .72 seems have in mind "reasonably connected to the case" to require reasonableness or fairness in the connection.

The circumstances of the case become a decisive factor in determining the law applicable to contracts (i.e. agency) in principle of significant connection.This situation reflecting the desire of the drafter to achieve the maximum extent of flexibility in regulating their respective relations. This principle is also an underling base for the formulation of rigid choice of law rules for instance, on the law applicable to contract with respect to immovable property (Art. 73) significant connection principle is reflected there, the place where the property destined is the real and most Important factor in determining the applicable law that is why I am saying that it can serve as a fundamental principle underlying the formulation of rigid conflict of law rules. The drafters in this regard should be praised.

Having said this, the following case brief demonstrates the need to have private international law specifically on agency and the arbitrariness in decisions due to the lack of such law.

Case – Brief

FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA — FILE NO. 51438

DATE, 24 – 09- 97 E.C

FEDERAL FIRST INSTANCE COURT

LIDETA 9th CIVIL BENCH.

JUDGE- YIHEYIS G/TSADIK

PLAINTIFFS; 1. Mr. Zein Seid

2. Mr. Abdelah Sheik Hadji

DEFENDANTS: 1. Mr. Kemal Hassen Ibrahim

2. Mr. AWOL Ali Hamid

3. Mr. Abdurahaman Kemal Hassen

Facts

Zak Ethiopia production private limited company was formed in 1985 e.c by the plaintiffs, that is. Mr. Zein Seid, Mr. Abdelah Sehik Hadji who are foreign national and first dependent Mr. Kemal Hassen Ibrahim. In July 21, 1991 the first plaintiff give limited power of attorney to the first defendant (Mr. Kemal) In March 14, 1994 E.C they have agreed that it is possible to transfer shares among share holders. The power of attorney given is based on Kenyan law which is irrevocable but the details are on the basis of Ethiopian law. The power of attorney was revoked by the plaintiffs in 1998.

Issues

1. Whether the power of attorney given to the first defendant is revoked or not.

2. Having said it is not revoked, does the first defendant have the power to transfer chares to third parties or not?
3. If yes, whether his act of transfer of shares with in the scope his authority or not?
4. If the transfer is done beyond the scope of authority (illegally), ought the company to be dissolved or not?

Court's Ruling:

1. Concerning the first issue; the court held that in Ethiopia there is no such kind of power of attorney, that is, irrevocable. Though it is given based on Kenyan law. In the document it has been provided that it was given based on Art. 2199 of civil code of Ethiopia. Since the plaintiffs filed based on Art.2226 as to the effect of revocation the power of attorney given is revocable and hence, it's revoked.
2. &3.Even though it has been said the first defendant's power of attorney; those transfer of shares to third parties require special power based on Art. 2205 (1) in fact the defendant's authority is limited to acts of management (general power) under 2203, so, he has no such power to transfer shares and the contract made it's void.
4. Regarding the dissolution of the company the court held that the company should be dissolved. Based on Art. 22 of company's memorandum of association and 542 (1) of the commercial code any member of the company can ask the dissolution of the company since there is no consent and agreement that company can not be continued like this with out that agreement.

So, here as it can be easily observed the case was tried by the Federal First Instance Court. In the brief it has been stated that among the litigants, there are foreign nationals. Nationality is a connecting factor here [46.] There is a foreign element there. So, it involves private international law matter .Thus, according to Ethiopian Federal Courts Proclamation Law, the power to try cases involving private international law matter is reserved for Federal High Court [47.] Despite this clear law the court negligently tried the case at the first instance level; it should have referred the case to the Federal High Court in its own motion for justice and equity. Any ways, the focus of this paper is not on jurisdictional aspect of the draft private international law of Ethiopia rather on the choice of laws rules. (N.B. - translation is mine).

When the writer came back to the point, even lets assume the court did have the jurisdiction, the courts refusal not to see or consider the Kenyan law is un reasonable because the very purpose of the law is to serve the people and regulating their acts at their own will. Here the power of attorney is given under Kenyan law such explicit designation shows that the parties at the time of the conclusion of the contract gave their consent to regulate their transaction based on Kenyan law despite Ethiopian law involves in the formulation of the authority. There is one thing in this regard, judges are not duty bound to take judicial notice of an un adopted law [48.] However, total rejection of such law on the ground that it does not confirm with Ethiopian law is unreasonable and unfair. This case shows the need to have private international law so as to guide judges in deciding cases involving foreign element.

4.5 The Need to Have Private International Law Containing Rules on Agency in Ethiopia

Every country has had a vision of foreign investment participation in the countries development process. This will be accomplished mainly through the private enterprises of the individual cultivator or business man or[49] corporation. It has been seen that foreign investment takes in to different forms mainly dominated by multi - national corporations and foreign direct investment. [50] Multi national enterprises do their business through their gents and branches of the head corporation situated in different countries involving transnational business.

Here, Addis Ababa is now becoming capital of Africa and attracting many multi - national enterprises. Being the situs of different regional agencies also makes her the first royal city in Africa potentially in business. In the course of conducting business in their private capacity (concerning regional agencies and embassies), and in their normal business (companies and individuals) there might be disputes. These disputes must be solved for present and future commercial certainty. Best options for solving such contentions are of two kinds as in chapter-one mentioned. First, having had uniform laws would have made it easier for regional business interaction as well as other kinds of transaction [51]. The second one is, by having codified rules of private international law rules [52]. The latter, Despite its technical difficulties in its application, it is the best solution for the Present reality in Ethiopia (Even in Africa).

The previous case is one good instance for the expression of crisis in the judiciary to look up matters of private international law (especially on

Agency matters) as the way it is supposed to be. The blame should not only to the judiciary (i.e. judges) but also to the legislature. Due to its minimal concern, still there are no adopted rules on conflict of laws which would serve as a guiding compass for judges in deciding the case involving foreign element. Had it been adopted, do such Problems be solved completely? The writer does not think so, though it does to some extent pave the way for safe journey for courts still the problem may insist on because of the complexity of the institutions and regulatory techniques of modern private international law presupposing an active role of the courts in their application, is it really so? Only the time will answer this question after we have a codified rule on conflict of laws.

Rather than providing conclusion in this regard this essay ends with the adge like many other foreign literatures on agency under the private international law. Thus, ended another year in the life of Ethiopian conflict of laws in strivings for adoption and maturity.

II.CONCLUSION AND RECMMENDATIONS

Agency is the basic area of the law. It has two sets of relationships, that is, the internal relationship of the principal and the agent, And the external relationship of the principal and agent on the one hand, and third parties on the other hand. It may emanate from the law or the contract's termination is dependent on either party's agreement or on the conditions provided by the law

Agency in international trade as well as in inter-state trade can give rise to conflict of law situation of great complexity. It can present the following conflict of laws questions: which law governs or regulates. What rights and duties arise on account of some acts done by the agent as between;

A. The Agent and Principal,
B. The Principal and Third party,
C. The Agent and Third party and some other related issues?

The fact that the court of a particular country has jurisdiction to entertain a certain claim does not necessarily mean that its own law will govern the dispute. The following choice of laws rules are the governing laws of the External and Internal aspects of agency as incorporated in major legal systems of the world; the law of the place of contracting-which have apparent advantages of certainty and predictability; the law of the place of Performance , the rationale behind this rule seems that performance has in many cases more significant than the place of formation of the contract; the proper law of the contract is the most widely recognized rule of conflict of laws-it incorporates party autonomy and most real and significant connection principles

Under the new Draft Proclamation of Federal Rules on Private International law of Ethiopia, there are two basic choice of law rules incorporated in it, which are the principle of party autonomy and the principle of significant connection. In governing Agency relationships, particularly agency contract is determined by applying general choice of law rules applicable to contracts. Among them: Choice of law by the parties which is either express or implied clearly from the circumstances. This choice must fall in the following, the law of the place where the transactions were made, the law of the place where the subject matter is situated, the law of the place where the transaction is to be performed, or the law of the place of where it is reasonably connected to the matter. Where the parties fail to choose, the governing law. Shall be the law of the place which has significant connection. At this point courts have wide discretionary power to determine as two which place has significant connection to the matter. Except making little modification the discussed choice of law rules applicable to internal aspect of agency are also applicable to the external aspect of agency.

Usually vicarious liability and agency have common feature in their tripartite relationship and vicarious liability revolved around the relationship and vicarious nature, some times not always contractual and tort issues are intermingled. The governing law will be often reflected to the general choice of law rules applicable to contract of Agency and some times it may be referred to extra-contractual choice of law rules.

In order to protect the most fundamental rules and principles and rules ,or important legislative policies of the forum state, the application of foreign law can be limited through escaping devices of public policy and mandatory provisions of the law

It is impossible to imagine that draft laws are full-fledged and comprehensive enough to covert all the issues that they are supposed to do so. Like wise the New Draft Proclamation of Federal Rules on Private International Law of Ethiopia, as governing agency relationship has the following inadequacies:

Party autonomy dichotomy; party autonomy is restricted, it doesn't contain a single provision which allow parties to choose different law to determine different, issues of the same subject matter, it also doesn't incorporate any provision as to which permits choice of law after the conclusion of the contract. These are basic and typical inadequacies of the draft in regulating Agency relationship.

This Essay ends with the adge like many other literatures on Agency under private International law. Thus, ended another year in the life of Ethiopia conflict of laws in striving for adoption and maturity. The discussions of this paper sets out a number of areas where amendment on the draft rules is needed. The following recommendations, in the winter's judgment should be given due emphasis:

⇒ The listing dawn of the governing law rules should be avoided. Party autonomy should be granted by devising restrictive forum evasion clauses.

⇒ Post formation choice of law in contracts should also be allowed. This has to be done because so as to protect the justified expectation of the parties.

⇒ De'pecage or exposure of different choice of law rules on governing different aspects of contract i.e. agency and the main contracts, and others ought to be included so as to secure flexibility in the law.

In particular the writer would like to give emphasis on the following recommendations.

Regarding internal relationship between agent and principal instead of putting reference to the general provision of on contracts it's better to be in place this way.

The law governing Agency Agreement

1) The law chosen by the principal and the Agent shall govern the Agency relationship
2) This choice must be express or must be such that it may be inferred with reasonable certainty from the terms of the agreement between the parties and the circumstances of the case.
3) The law applicable under sub article (1) and (2) shall govern the formation and validity of the agency relationship, the obligation of the parties, the conditions of performance, the consequences of non- performance, and the extinction of those obligations. This law shall apply in particular:

a) The existence and extent of authority of the agent , its modification of termination, and the consequences of the fact that the agent has exceeded or misused his authority;
b) The right of the agent to enter in to a contract on behalf of the principal where there is a potential conflict of interests between himself and principal

4) In default of parties choice the governing law shall be the law of the place which the significant connection to the case concerning the relationships of agent and principal on the on hand third party on the other hand should have to be done separately than intermingling it with the external relationship.

Relations with Third party

As between the principal and third party, the existence and extent of the agent's authority and the effect of the agent's exercise or purported exercise of his authority to bind the principal shall be governed by,

1) The law of the country expressly designated by the principal and the agent;
2) If none is designated by the principal and third party by the law of the place where the agent acted. However, the law of the state in which the agent acted shall apply if:
    a) the principal has his business establishments or, if he has none, his habitual residence or domicile in that state or
    b) The third party has his business establishment, or if he has none, his habitual residence or domicile in that state.

c) Where the parties has more than one business establishment and agent has more, this article refers to the place having significant connection of the case.

3) If not, the law of the country which is significantly connected to the case shall apply.

III. END- NOTES

CHAPTER - ONE

1. PREAMBLE, THE NEW DRAFT, PROCLAMATION OF PRIVATE INTERNATIONAL LAW OF ETHIOPIA, Prepared by Ethiopian Legal System and Justice Research Institute (2004)
2. ROY GOODE, COMMERCIAL LAW 165 (Penguin Books ltd., 1995) (1982)
3. Ibid.
4. Id.at 167.
5. AMERICAN LAW INSTITUTE, Second Restatement of American laws On Agency 3(American Law Institute Publishers,1958)
6. CIVIL CODE OF HE EMPIRE OF ETHIOPIA, Proclamation No.165 of 196O, year 19, No. 2, Neg.- Gaz. (Extra ordinary Issue), Art. 2199.
7. ROBERT MAC HENRY, 1 THE NEW ENCYCLOPEDIA BRITANICA 145 (Encyclopedia Britannica Inc, 1993) (1768).
8. MICHAEL B. METZGER AMD JAME P.MALLDR, BUSINESS LAW AND THE REGULATORY ENVIRONMENT 778 – 779(Irwin.Inc.,8th ed.1992) (1946)
9. Ibid.
10. 2A CORPUS JURIS SECONDUM, A COMPLETE RESTATMENT OF THE ENTIRE AMERICAN LAW 554 -556 (Arnold. O. Ginnow (ed.), West publishing Co.1972).
11. Ibid.
12. Ibid.

13. Id.at 627
14. MICHAEL, *Supranote* 9,at 779 - 780
15. Id.at 783 - 786
16. Id.at 787 -788
17. *Supra note* 7, at Art. 1675
18. MICHAEL, *Supra note* 15, at 795-796
19. Id.at 796 - 798
20. 796 - 798
21. Id.at 795
22. *Supra note* 18, at Art. 2257
23. Id.at Art. 2258
24. Ibid.
25. ROY, *Supra note* 2, at 172
26. *Supra note* 11, at 719 - 725
27. *Supra note* 22, atArt.2191
28. MICHAEL, *Supra note* 19, at 791
29. CLIVE N. SHIMITTHOFF, AGENCY ININTERNATIONAL TRADE 10 (Academic Of International Law., 1970).
30. 3 EARNEST RABEL, THE CONFLICT OF LAWS, A Comparative study, 360 (ULRICH DROBIN G, University of Michigan Law School, 1960).
31. Ibid.
32. Ibid.
33. Id.at 361
32. BASIC DOCUMENTS ON INTERNATIOANL TRADE LAW 10(Chia - Jui- Cheng (ed.), Martinus Nijohoft Publishers, 1990).
33. Ibid.
34. Ibid.
35. Ibid.

21. 2 EARNEST RABEL, THE CONFLICT OF LAWS 474 (Ulrich Drobing (ed.), University of Michigan Law School, 1960)

22. Hay. P&Muller,Agency in Conflict of Laws and the 1978 Hague Convention, 27 Am.J.C.L 1, 12 (1979)

23. Id.at 16

24. Ibid

25. Material on the law of Agency (Compiled by Zekarias Kenea, Addis Ababa University, Faculty of Law, 1992).

26. DICEY, *Supra note* 17, at 691 -692

27. Ibid.

28. Ibid.

29. WEINTRAUB, *Supra note* 20, at 378.

30. Ibid.

31. Ibid

32. CIVIL CODE OF THE EMPIRE OF ETHIOPIA ,Proclamation No. 165 of 1960, YEAR 19, No. 2, Neg. Gaz. (Extra Ordinary Issue), Art 1675

33. WEINTRAUB, *Supra note* 29, at 869

34. Ibid.

35. Ibid

36.DICEY, *Supra note* 26,at 704 -705

37.Id.at 712 - 724

38. Ibid

39. Ibid

40. Ibid

41. Ibid

42. Hay. P, *Supra note* 22, at 16

43. Ibid

45. Cheatam and Reese. Agency in conflict of Laws, 20th C Comparative Law (Penthouse Publications Ltd.1968)

46. Id.at 856
47. Ibid
48. SCHIMITHOFF, *Supra note* 11, at 45
49. Ibid
50. Ibid
51. The proper law of transitional contract http. // www.global law review. com/properlaw.html/ as accessed on November 21, 2005. page 1 of 12
52. Ibid
53. Ibid
54. Ibid
55. Id. at 7
56. Ibid
57. American Law Institute, Restatement of the conflict of laws 134 (Tentative Draft)
58. Ibid
59. Hay.P., *Supra note* 42,at 46
60. Ibid
61. Ibid
63. Id. at.5
64. DICEY, *Supranote* 45, at 853
65. Ibid
66. Ibid
67. *Supra note* 6, at 658
68. Id.at 659
69. Ibid
70. Ibid
71. Ibid
72. Id.at.662.

CHAPTER-THREE

1. R.ALLEN SEDLER, THE CONFLICT OF LAWS IN ETHIOPIA 42 (The Faculty of Law Haile Sellasie I University, 1965)

2. Ibid.

3. Id.at 43

4.CONSTITUTIONOFTHEFEDERALREPUBLICOFETHIOPIA ,PROCLA MATIONNO.1of ,1995_,No .1,Fed.Neg.Gaz,.Arts.50(2)&51(12)cum(55)(2)b5. Id. At Art.55 (4)

6. THE NEW DRAFT PROCLAMATION ON FEDERAL RULESOF PRIVATE INTERNATINAL LAW OF ETHIOPIA, Prepared by Ethiopian Legal System and Justice Research Institute (2004), Art. 72(2)

7. Ibid

8. Id.atArt.73

9. Id.at.Art. 2(1)

10. CIVIL CODE OF THE EMPIRE OF ETHIOPIA, PROCLAMATION NO.165 of 1960, year 19, No.2, Neg.Gaz.(extraordinary issue),Art.2179

11. Ibid.

12. *Supra* note 6, at Art.80 (1) see alsoArts.72&73.

13. Ibid.

14. Id.at Art.72 (2).

15. Id.at Art.5 (1)

16. Id .atArt.5 (2)

17. Id.at.Art.5 (3)

18. Id.atArt.72 (1)

19. Ibid.

20. Ibid.
21. Ibid.
22. Ibid.
23. Ibid.
24. Ibid.
25. Id.at Art.72 (1) (2)
26. Id.at Art.72 cum Art.1678 of Eth.civ.c.
27. Id.at Art.72 (2)
28. Id .at Art.72 (2) see also Art.1713of Eth.civ.c.
29. Id .at Art.73.
30. *Supra note* 10, at Art.2203cum2204.
31. Id .at Art.2205.
32. *Supra note* 12, at Art.73.
33. Ibid.
34. Ibid.
35. Id. at Art.80 (2).
36. Ibid.
37. Ibid.
38. *Supra note* 30, atArt.2189 (1).
39. Id.at Art.1733.
40. Id.at Art.2189 (1).
41. *Supra note* 32, at Art.80 (1).
42. ROY GOODE, COMMERCIAL LAW 168(Penguin books ltd.,1995)
43. *Supra note* 41, at Art.80 (2).
44. *Supra note* 38, at Art.2189 (1) cum 1713.
45. *Supra note* 43, at Art. 80 (2).
46. Ibid
47. *Supra note* 44, at Art.2195(c)
48. Ibid.

22. *Supra note* 3, at Art.72 (1).

23. Id.at Art.73.

24. ALLEN.R. SEDLER, THE CONFLICT OF LAWS IN ETHIOPIA 174

(The Faculty of Law Haile Sellasie I University, 1965).

25. DELAUME, *Supra note* 21, at 15.

26. *Supra note* 22, at Art.80 (1) (2).

27. Id.at Art.72cum80 (1).

28. Id.at Art.73cum80 (1).

29. Id.at Art.80 (2).

30. Ibid.

31. Ibid.

32. Yntema, Autonomy and Choice of Law, 1 Am.J.C.L. 345 (1952).

33. Ibid.

34. Ibid.

35. *Supra note* 26, at Arts.72&73cum80.

36. Yntema, *Supra note* 32, at 348.

37. Ibid.

38. DELAUME, *Supra note* 25, at 16.

39. Ibid.

40. Ibid.

41. CIVIL CODE OF THE EMPIRE OF ETHIOPIA, PROCLAMATION NO.165, Year19, No.2, Neg.Gaz. (Extra ordinary issue), Art.1731.

42. *Supra note* 35, at Art.7.

43. Id.at Art.35.

44. Id.at, for instance see Arts.72&73.

45. Id.at Art.37.

46. Id .at Art .72(1) cum 5(1).