SOME REFLECTIONS ON THE THEORY OF RENVOI, AS FOUND IN WRITINGS, CASE LAW, LEGISLATION AND INTERNATIONAL CONVENTIONS.

Thesis Submitted For The Degree Of Master of Laws (L.L.M.)

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In the Name of God, Most Gracious, Most Merciful.

We glorify Allah and ask blessings and salutations of peace for the noble prophet (peace be upon him) and his companions and those who follow him in upholding the cause of right religion.

To the memory of Martyrs who died to liberate Algeria from the French colonialism.

To my father, mother
and grand mother.

" Certainly, renvoi is an imperfect remedy, but is not Private International Law an imperfect law, as long as conflict rules are not unified? The problem of renvoi disappears when conflict rules become uniform..."

Alfred. E. Von Overbeck.

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ABBREVIATIONS

A.C.	Appeal Cases- English Law Reports.
ALL E.R.	All England Law Reports
Amer. J. Comp. L.	American Journal of Comparative Law.
Annuaire	Annuaire de L'Institut de Droit International.
App. cas.	Appeal case.
Brit. Y.B. Int. L.	British Yearbook of International Law
Can. B. Rev.	Canadian Bar Review.
Cass. civ.	Arrêt de la chambre civile de la cour de cassation (Fr.). Cassation chambre civile.(Fr.)
Cass. req.	Arrêt de la chambre des requêtes de la cour de cassation.(Fr.)
Civ.	Arrêt de la chambre civile de la cour de cassation(Fr.)
CL.	Clunet.
Clunet	Journal du droit international privé, fondé par E. Clunet en 1874, continué à partir de 1915 sous le titre Journal du droit international.
Cambridge. L. J.	Cambridge Law Journal.
Ch.	Chancery Division, English Law Report
Ch. D.	Law Reports, Chancery Division.
Cmd, Cmnd	Command Papers
Col. Law. Rev.	Columbia Law Review
Disp. Prel.	Disposizioni Preliminari Del Codice Civile (Italy)
D.P.	Dalloz Périodique.
D.S.	Recuiel Dalloz- Sirey, depuis 1965

EGBGB	Introductory Act to the German Civil code (Einfuhrungsgesetz Zum Burgerlichen Cesetzbuch)
Fam	Law Reports: Family Division
F.2d	Federal Reporter, Second Series. (U.S.A)
Gaz. Pal	La Gazette du Palais (Fr.)
Gaz. Trib.	Gazette des Tribunaux.
Harv. L. Rev	Harvard Law Review
Int' l & Comp. L. Q	International Law Quarterly
J.C.P.	Juris-classeur périodique- la Semaine Juridique, Paris, depuis 1927.
J.O.	Journal Officiel
Jur.Rev	Juridical Review(Scot)
L.J.Ch	Law Journal Reports, New Series.
L.J.P.	Law Journal Reports, New Series, Probate, Divorce, Admiralty.
Law Quar. Rev	Law Quarterly Review.
Mod. L. R.	Modern Law Review.
N.E. 2d	North Eastern Reporter, Second Series.(U.S.A).
N.Y.2d	New York Court of Appeals Reports, Second Series
N.Y.S.2d	New York Supplement Reporter, Second Series
O.P.U.	Office des Publications Universitaires (Alger).
P.	Law Reports Probate, Divorce & Admiralty Division
P.C.	Probate Court.
P.D.	Law reports, Probate, Divorce and Admiralty Division

Q.B.	Queen's Bench Division
Recueil des Cours	Recueil des Cours de l'Académie de Droit International
Re. crit. dr. intl. priv.	Revue critique de Droit International Privé(Fr.)
R.I.D.C.	Revue international de droit comparé
S.	Recueil Sirey.(Fr.)
S.C.	Session Cases (Scot.)
S.L.T.	Scots Law Times Reports.
Temp. L. Q.	Temple Law Quarterly (U.S.A.).
Trav. Comité, Français. dr. in. privé	Travaux du Comité Français de droit international privé
Trib. Gr Inst.	Tribunal de Grande Instance. (France)
Trib.civ.	Tribunal civil(Fr.)
T.L.R.	Times Law Reports
Tul. L. Rev.	Tulane Law Review
UNCITRAL	United Nations Commission on International Trade Law
U. Pa. L. Rev.	University of Pennssylvania Law Review
Vand. L. Rev.	Vanderbilt Law Review.
W.L.R.	Weekly Law Reports
Yale.L.J.	Yale Law Journal.

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Summary

Although renvoi has been discussed over a long period its difficulty makes such reflection not only interesting but also necessary. In fact, this discussion leads to clarify a doubt on whether renvoi is really an inevitability of private international law or represents only a process that can be solved and eliminated from this discipline, i.e., whether it is a necessary process or only a temporary device.

Moreover, renvoi is a difficult problem in the field of private international law which has divided scholars, jurisprudence, legal systems and International Conventions. For this and other reasons the present writer would like to show the difficulties that have been found not only by judges but also by scholars and students.

Further, if universal solution to the problem of renvoi is the aim intended by theorists and International Institutions, it will be useful to tackle the renvoi analysis both theoretically and practically and discuss its mechanism in both legislation and International Conventions.

On this basis the writer has tried to analyse the renvoi issue by dividing this work into four chapters.

The first chapter, which is an introductory chapter, tries to show the importance of the history of private international law in order to understand the renvoi phenomenon. In truth, the reason for which renvoi is discussed from historical point of view is that it represents an issue which is related to its history and cannot, according to the writer, be understood without it.

Further, as renvoi represents a controversial problem its mechanism should not be isolated from other issues, such as, the problem of characterization. As a matter of fact the correlation between the two problems is strong and clear in that the latter represents one of the causes for the emergence of renvoi.

Additionally, to understand the evolution of the renvoi pheneomenon the discussion, in this chapter, does not start from the famous cases, such as the Affair *Forgo* and *Re Annesley* but will rather refer to its roots before the nineteenth Century.

In the second chapter, both the causes and forms of renvoi are taken into consideration with a special emphasis upon the former. Concerning the causes of renvoi this treatment is based upon the renvoi problem seen through the divergence between the two connecting factors, i.e., domicile and nationality. It means that if the problem of domicile contra nationality remains the fundamental issue, such treatment will prove and show whether renvoi is useful to reconcile those two principles.

Further, this chapter includes both the dogmatic and pragmatic conceptions that have been expressed on the renvoi issue and tries to evaluate to what extent those justifications are correct. The discussion also intends to show whether renvoi can be used as a useful device or ruse and finds out if it is a principle of a general application or only an exception. The writer uses in this discussion both diagrams and sarcasm techniques. Concerning the latter this is a means by way of metaphor to understand the renvoi whether you call it by its name, surname or nickname. The discussion of different points through the method of diagrams also intends to clarify the renvoi theory as much as possible and makes it easier for the reader to comprehend its process.

The third chapter concerns the application of the process of renvoi in legal systems and the position of International Conventions in this matter. Concerning the former the renvoi issue has been analized with regard to the two different legal systems, i.e., renvoi in Common law countries and Civil law countries. In fact, the work deals with legal systems which accept the doctrine of renvoi, such as, France and Great Britain. It also refers to those legal systems which do not adopt its process, such as Algeria, and those who reject it expressly. Further, this chapter is a contribution which intends to clarify the limitations of renvoi and tries to locate the areas where its working has been excluded. With regard to

International Conventions, these have also taken different positions towards the mechanism of renvoi in that there are those which accept its mechanism whereas others reject it. In fact, this is the case with both bilateral and multilateral Conventions starting from Geneva Conventions via the Hague Conventions to Rome Conventions.

The last chapter is a general conclusion about the mechanism of renvoi and its future in the field of private international law with some suggestions by the writer on the subject.

CHAPTER ONE
Introduction

Section 1:- Aims of the work and its scope

Through the discussion of scholars' controversies on the renvoi process as well as the consideration of the position of legal systems, jurisprudence and International Conventions, many important points have been clarified within four main chapters.

The first chapter emphasises the fact that the discussion of the development of private international law, throughout different ages, represents the key to understanding the need and the necessity of the emergence of renvoi. In this respect, the purpose of this historical review should not be considered as an elementary introduction to private international law but a contribution of stressing that the history of this discipline is very important in order to clarify certain phenomenons, such as, the application of the theory of renvoi. In fact, this chapter tries to show that the history of private international law is the key of understanding phenomenons and one of the means of clarifying ambiguities.

Additionally, the writer also would like to stress the fact that renvoi is a problem but not a unique problem of private international law and is not isolated from other issues that overshadow this field. In other words, renvoi is a problem which coexists and is also related to different issues, such as, characterization, preliminary questions, acquired right theory, and so on.

More important, different cases in both Common law and Continental countries have been discussed in chronological order for the simple reason that the Affair *Forgo* in France and *Re Annesley* in England should not be considered as the first cases which illustrate the appearance of renvoi phenomenon.

In chapter two the discussion of the causes of renvoi tries to show that if the clash between nationality and domicile is the basic problem, scholars' logic

and arguments will demonstrate whether renvoi represents a mediator, ruse or a solution by itself.

In this chapter, the writer also tries to confront different approaches and solutions on renvoi in order to comprehend the aims and the dimensions of the many theories on the subject. In fact, by examinig both hostile and favourable arguments, this part tries to show that the phenomenon of renvoi represents a difficult issue for students and a subject that tests judges and jurists' wisdom for either rejecting or accepting renvoi.

Besides, for the sake of simplifying the analysis of renvoi two techniques are used in this chapter. The first one is the way of explaining the mechanism of renvoi by diagrams. The purpose of this method is to prove that if renvoi is a difficult problem and might seems ambiguous for some, it can be, however, understood easily through such technique. The second one is the use of sarcasm in order to show that there are dimensions for introducing this technique in private international law. As a mattter of fact, the efficiency of the sarcasm shows that its use by scholars makes the reader and the student more dynamic, more confident of understanding its process.

Concerning the third chapter, the discussion tries to indicate that the theoretical considerations of renvoi in the second chapter will be incomplete if it does not deal with its mechanism pragmatically. In fact, the controversies upon the rejection and the acceptance of renvoi do not concern only scholars but also case law and International Conventions. It should be noted that the aim of relying mainly upon division of legal systems between nationality and domicile is to know whether renvoi can really be useful to concilate those two diverted connecting factors which has been considered as the most important contrast in comparative law.[1] Another reason for discussing renvoi in both legal systems is to indicate that the same legal issue may be resolved differrently in both the country of domicile and that of nationality depending, of course, on the position on renvoi of the court seized of the legal issue. Three legal systems, therefore, are discussed thoroughly. These are France, Great Britain and Algeria. The first

1- See Batiffol, H., " Principes de Droit International Privé" *Recueil des cours*, Volume 97, Tome II, (1959), p 478.

one is an example of a country which adopts the nationality principle and accepts renvoi. The second one is an illustration of a country which adopts a theory of a unilateral application but is a legal system which adheres to the principle of domicile. The third country is an example of a legal system which adopts the nationality principle but is considered as hostile to its process. In fact, Algeria has been taken as a sample in order to indicate that the rejection of renvoi in this country will avoid applying Algerian family law to foreigners, i.e., Islamic religion principles. It must be borne in mind that the reflection on those diverse legal systems does not deal with all the cases that involve renvoi nor all the countries which either accept or reject its mechanism.

Furthermore, the scope of renvoi is discussed in both Civil and Common law countries in order to show that the field of renvoi operation has been restricted. Besides, the imposed restrictions expression used in the third chapter does not mean the total rejection of renvoi in those fields by all countries or in all fields by those countries. It means, however, that those restrictions could contribute to the failure of its process in future!

Further, the reasons for the discussion of renvoi theory through International Conventions is threefold. First, to indicate that the controversies upon its process have attracted even the concern of International Institutions which have tried to find out a proper solution that will be accepted by its member States. Second, to show that renvoi is suffering not only from an internal illness but also from an external challenge. In other words, if the renvoi exceptions are an example of the former the hostility of Conventional rules to renvoi, as a contemporary tendency is an illustration of the latter. Third, if legal systems reject explicitly or are silent on renvoi, this situation can also be found in international Conventions in that there are those which reject renvoi explecitly whereas others reject it implicitly. The writer, however, would like to restrict his discussion upon some of the Conventions which seems important and controversial, such as, the Hague Convention of 15 June 1955 known as Renvoi Convention, Geneva Conventions concerning bills of exchange and promissory notes of 1930-1931, the Hague Convention on the Conflict of Laws relating to the

forms of testamentary dispositions concluded on 5th October 1961 and finally the Rome Convention on the applicable law to contractual obligation of June 19, 1980. Concerning bilateral Conventions two of them have been cited. Selected for particular consideration are the Convention between France and Yugoslavia of 18 May 1971, which concerns, the competence and the applicable law in the field of personal and family law. Second, the Convention between France and Morocco on 10 August 1981 concerning the personal and family status and the Judiciary Co-operation.

If the introductory chapter shows that the history of private international law is very important to understand renvoi, the last chapter tries to find out whether the emergence of renvoi is inevitable or can be eliminated from this discipline. It deals also with the future of the process of renvoi and comprises,,. the author' s own view on this matter.

Section2:- Preliminary notions

It might be easy to answer what renvoi is and what does it represent but it is too difficult to predict how it should be. This difficulty which represents a characteristic of its mechanism, therefore, should not be discussed in isolation from the difficulty that faces the discipline of private international law itself.[2]

It is true that each country has its peculiar system of private international law. The question that should be asked, in this respect, is how and when did private international law appear in order to know where and why it has been developed. Therefore, this reasoning will lead to consider the different approaches that have been proposed in this issue and to analyse the influence of the different schools and conceptions that still play part in different legal systems. In fact, there is a reason to suppose that this discipline represents a battlefield of different conceptions and this is best stated in F.K. Juenger' s point of view in which he maintains that "...the outstanding characteristic of conflict of laws is the lack of consensus on the discipline's goals and Methods...the subject remains mired in confusion...one reason of this is the very surfeit theories that bedevil the conflict of law."[3] This is why the writer believe that renvoi does not represent a complexity by itself but what makes it a difficult issue are the emergence of the different approaches and conceptions that have been adopted by scholars in different legal systems.

Accordingly, it is worth examining the development of private international law because renvoi, that will be later discussed, is thoroughly related to the history of private international law. It should be noted, in this context, that to understand when and why the problem of renvoi did appear in private

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2- It is well known that the dispute in private international law starts from the first page. In fact, if the terminology of international law should be related to the Roman expression *ius gentium* which was translated to mean "lois des gens" or law of nations, Dutch school has contributed directly or indirectly to the emergence of the controversies about the suitable title of this discipline. Conflict of laws, *private international law* or choice of law rules. For discussion, see Rigaux, F., *Droit International Privé*, Bruxelles, Maison Ferdinand Larcier,1968, pp 38-39.

3- Juenger, F.K., "General Course on Private International Law "*Recueil des cours* , Volume IV, Tome 193, (1985) p 131.

international law it must be looked to the different elements that have contributed to its appearance. For this reason the reference to the nineteenth Century, where the renvoi theory is said to be discovered, should not be isolated from the previous Centuries that have contributed and prepared directly or indirectly its emergence. Thus, the discussion of renvoi leads undoubtedly to the discussion of the conflict of law rules for the simple reason that renvoi means the reference to the foreign law as a whole including its conflict of law rules. From that point of view the conflict rules of the nineteenth and the twentieth Centuries should not be discussed in isolation from the previous Centuries because this analysis will contribute in clarifying why renvoi theory has been considered as a product of the nineteenth Century and not before. It is worth, therefore, analysing the development of the conflict of laws from different conceptions and throughout different stages because it has been pointed out that " It is difficult to study a subject without at any rate a slight acquaintance with the historical development of the earlier and current trends of thought ".[4]

In addition, as renvoi is not a regional phenomenon, the discussion of the history of private international law is not peculiar to one conception and will not be limited to one legal system otherwise any suggestions, in this context, might be unsuccessful. and the outcome of such reflection could be incomplete. It must be also remembered that if the renvoi theory represents a product of a precise Century it is worth discussing the situation before that time otherwise the usefulness of any comparative study might be denied.

Accordingly, the reference to the history of private international law is useful in order to comprehend the evolution of this discipline, because it is not by chance that private international law has been considered as a compass that indicates the direction and tendency of each approach.[5]

Moreover, the discussion in this chapter of some issues, such as, the law of contract, the rule of *locus regit actum* and law of tort throughout their history is

4- Cheshire and North, *Private International Law* by North P.M., (ed.,), 11th edition, London, Butterworths, 1987, p 2.

5- See .Gutzwiller, M., "Le Développement Historique du Droit .International Privé " *Recueil des cours*, Volume IV, Tome 29, (1929), p 293.

based mainly on three main points which are; when, where, and how and this will clarify later why renvoi is excluded in some areas, such as, the law of contract.[6]

Finally, the writer believes that the history of private international law is not only renvoi, but renvoi is the history.

Sub-section1:-Some consideration about the history of private international law.

I)-Historical survey about the situation in the antiquity.

Concerning the principles of territoriality or personality in in the antiquity, the question which calls for consideration first of all is whether conflict of laws existed in Greece. Although scholars deny such claim there are who think that there are indications which prove the existence of such conflicts in the antiquity. The reason for such claim is the historical discovery of the papyrus in an Egyptian crocodile grave which contained edict that concerns matter of jurisdiction. According to this point of view a conflict rule was discovered because that edict means the recognition of an implied choice of law rule.[7] Besides, it has been maintained that conflict of law was resolved indirectly by the jurisdictional competence, i.e., by the language used in the contract the applicable law could be selected indirectly.[8] The common view, however, is that there was no need for conflict of laws at that time.[9]

The second point is whether there was a need for a conflict rules in the Roman Empire.[10] There was no need for the conflict rule problems in the

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6- See *Infra.*, Chapter 3, Section1, pp 169-170.

7- for discussion Juenger, F.K., *Loc.cit.*, pp 136-137.

8- The legislative competence is indirectly determined because the competence of either Greek or Egyptian courts depends on the language by which the contract was written. see in this context Mayer, P., *Droit international privé* , Deuxième édition, Paris, Editions Montchrestien, 1983, p 9; Issad, M., *Droit international privé*, Volume 1, Alger, O.P.U., 1986, pp 29-31; Juenger, F.K.,*Ibid.*, p 137.

9- Juenger, F.K.,*Ibid.*

10-The basis of law as a territorial or personal during the ancient Roman law, i.e., the coexistence of two laws in Roman law, explains the nature of the diversity of law that might arise at that time. In fact during the fall of the Roman Empire in the sixth to the tenth

Roman Empire in that no Roman conflict laws system can be found.[11] In addition, it has been claimed that Roman law knew the coexistence of two laws; *Jus civile* and *Jus gentium*. The latter avoids the emergence of conflict of laws because it is universal and also its rules are substantive rules and not rules of private international law.[12]

II-Historical formation of conflict of laws

1)-The bases of different schools in private international law. It may be useful to look back at recent development of the conflict rules throughout the different schools in order to know the bases of each school and also to deduce the value of their contribution to the field of Private International law. In a general way, this analysis tries to confront the different schools' conceptions with the legal thought of the contemporary age especially with that of the American conflicts revolution. Accordingly, three schools are worth discussing:-

a)-First, concerning the Italian school, scholars began to analyse and discuss the Roman law, this happened in the glossators time in the 11th century and was followed by the commentators or *post glossators*. Among the work of the latter appeared the eminent Jurist Bartolus of Saxoferatto (1314-1357)[13] who contributed to the development of the conflict of law by his theory of statute[14]. In fact, this school contributed to the field of private international law by creating the rule of *locus regit actum* but the main difference of its application between now and during that time, is that before it was applied to both the form and substance.[15]

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centuries the principle of personality substituted for the principle of territoriality. In the tenth century, however, there was a substitution of territoriality of law for personality of law. See Cheshire and North, *Op.cit.*, pp 16-17.

11- See Issad, M., Volume I, *Op.cit.*, pp 38-39.

12- See Mayer, P., *Op.cit.*, P9; F.K. Juenger, F.K., *Loc.cit.*, p 167.

13-.Cheshire and North ,*Op cit.*, p 17.

14- See for example, Graveson, R.H.,*The Conflict of Laws, Private International Law*, 7th edition, London, Sweet & Maxwell, 1974, pp 31-32.

15- Soulaiman, A.A., *Notes on Algerian Private International Law*, Alger, O.P.U, 1984, p 28.

b)-Secondly, the statute theory was developed in France by eminent jurists in the sixteenth Century, such as, Dumoulin(1500-1566) and D'Argentré(1519-1590). Concerning the field of contract, it should not be forgotten that Dumoulin was the first who supported the application of the law chosen by the parties and then contributed to the appearance and the development of the principle of the party autonomy.[16] In addition, this scholar was also the first who discovered the qualification concept.[17] D'Argentré (1519-1590), however, was known by his theory of territoriality[18] by which he considered the application of territoriality as a principle and the application of the foreign law as an exception. More important, D'Argentré personal feeling influenced his conception in that he maintains that matters of personal law are subject to a domicile and not to nationality and here is the influence of the territoriality principle.[19]

c)-Third, throughout the Dutch school, the statutist theory was developed in the seventeenth Century by eminent scholars among them is Ulric Huber(1636-1694) who has influenced Americans and English scholars by his conception which is based on the principle of sovereignty, i.e., the territoriality principle.[20] Besides, the characteristic of the Dutch school, in comparison with the previous statutist scholars, is the search for the basis of the application of foreign law and Huber's adoption of the comity principle is a case in point. It menas that Dutch scholars are well known for introducing international courtesy conception in the field of private international law. In fact, Huber reliance on

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16-.Cheshire and North, *Op.cit.*, pp 19-20. Concerning the principle of party autonomy see *Infra.*, Chapter 3, Section 1, pp 167-172.

17- Soulaiman, A.A., *Op cit.*, pp 28-29. For Characterization see *Infra.*, Section 1, pp 26-27.

18- In fact his theory"reflects his strong feudal tradition."See Graveson, R.H., *Op cit.*, pp 32-33.

19- Soulaiman, A.A., *Op cit.*, pp 29-30. This is why domicile is said to be territorial whereas nationality is personal. For more details concerning the clash of the two principles in relation to renvoi see *Infra.*, Chapter 2, Section1, pp 64-66.

20- It must be noted that the influence of the French scholars, such as the territoriality theory of D'Argentré, is obvious. in this context. Cheshire and North, *Op cit.*, pp 20-22; Ulric Huber's influence is also clear in English conflict rules.See Dicey & Morris, The Conflict of Laws, by Larence Collins, 11th edition, London, Stevens & Sons Limited, 1987, p 8.

international courtesy as a basis of the application of foreign law means that its application is not compulsory.[21]

What is of special interest in discussing those different scholars is to emphasise the contribution of each school in the construction of the whole conception of private international law. In other words, by referring to the French school the notion of qualification could be noticed and considered. Dutch school, however, indicates the concern of its scholars' reflections on the basis of the application of foreign law.[22]

2)-Emergence of the different conceptions in the contemporary age. It is important to bear in mind that reflection on private international law should not be looked from one side but it must cover all tendencies that have contributed to the development of this discipline. In other words, the history of private international law is not only the study of the past but it is the analysis of both recent and current conceptions. In fact, the emergence of renvoi mechanism, theoretically and practically , does not concern one specific area but instead leads to consider the roots of the whole conception of this discipline. In this context, it would be better to refer in this discussion to both continental and Anglo-saxon scholars.

a)-In the nineteenth Century a contribution in the development of conflict of laws had been noticed by the emergence of two German scholars Carl Von Wächter and Friedrich Carl Von Savigny, the former, by its criticism in his article of the different theories. The latter, however, published his work in 1849 with an opposite tendency to the former. The main difference between the two scholars is that Savigny adopts the universality principle whereas Wachter adopts the unilateralist approach. In fact, Savigny's approach is obvious, in that, it refutes and rejects the unilateralist approach of Wächter and the primacy of the *lex fori*.[23] Moreover, the work of Savigny should not be neglected because

21- See Mayer, P., *Op cit.*, p 48; For discussion see Lipstein, K.," The General Principles of Private International Law " *Recueil des cours*, Volume I, Tome 135, (1972), pp 121-123.

22- Loussouarn, Y et Bourel, P., *Droit International Privé*, 2eme édition, Paris, Dalloz, 1980, p 85.

23-The same approach, seems to be adopted by Currie. In fact, in F.K. Juenger's opinion

of his important contribution in the evolution of this discipline and also of his influence on both Common law and Civil law countries. Accordingly, two points are worthy of discussion. First, Savigny disagrees totally with his predecessors especially the Dutch and American scholars who relied upon the concept of comity and respect of the state sovereignty as a basis of the application of foreign law. Instead, Savigny thinks about the possibility of reaching the uniformity of decisions and of the universality of private international law. In fact, he believes that this universality leads undoubtedly to the stage where multi-state problems will be treated in the same way.[24] In other words, the striking feature of Savigny's conception is his belief in the universal codification of private international law.[25] More important, it has been recognized that Savigny was the first who formulated the international harmony of laws principle.[26] The writer would like to stress, in this context, the importance of Savigny's view in the achievement of the harmony of decision because reflection on such concept will prove whether renvoi,practically, can accomplish this task.[27] Besides, the influence of Savigny is obvious by his adoption of the domicile principle which represents the connecting factor of Common law countries,[28] and also by his theory of the seat which has inspired other conceptions.[29]

"...like Currie , Wächter emphasised local 'policies ' and 'interest'...", *Loc. cit.*, pp 158-161.at 159.

24- See Mayer, P., *Op cit.*, PP59-62; Cheshire and North, *Op.cit.*, pp 21-22; De Maekelt, T., " General Rules of Private International Law in the Americas. New Approach" *Recueil des cours*, Volume IV, Tome 177, (1982), p 206.

25- Lewald, H., " La Théorie du Renvoi", *Recueil des cours*, Volume IV, Tome 29 (1929) p 616.

26- Van Hecke, G., "Principes et Méthodes de Solution des Conflits de lois", *Recueil des cours*, Volume I, Tome 126., (1969), p 437.

27- See *Infra.*, Chapter 2, Section 3, pp 101-102

28- Savigny's conception concerning persons is based upon domicile. In other words, capacity of person is subject to domicile principle and not to nationality. Juenger, F.K., *Loc. cit.*, p 161; Gutzwiller, M., *Loc.cit.*, pp 356-357. See *Infra.*, Chapter 2, Section 1, pp 58-61.

29- It seems that modern legal thought owes more to Savigny concerning his theory of the seat. In fact, Westlake approach known as" the most closely connected" does not differ from the "local seat" of Savigny. Audit, B.,"Le Caractère Fonctionnel de la Règle de Conflit" *Recueil des cours*, Volume III, Tome 186,(1984) p 238; Wolff, M.,*Private International Law*, 2nd edition, Oxford, The Clarendon Press, 1950, pp 34-38; Cheshire an North, 11th edition,*O p*

b)-The next scholar, who is worth discussing, is the Italian lawyer and statesman Pasquale Stanislao Mancini because, historically and chronologically, Savigny's universalist approach was followed by Mancini's universalism. As a matter of fact, It has been pointed out that "Private International Law owes its development during the nineteenth Century mainly to three men, an American judge, a German professor, and an Italian statesman".[30] It must also be remembered that the success of Mancini's approach can be seen on both national and international scales. An illustration of the latter is , for instance, the Hague Conventions which were inspired by his nationalist approach.[31]

If Savigny and Story prefer the use of the domicile principle, Mancini, however, advocates the application of the nationality principle and believes that this principle represents a basis of private international law. His claim, In fact, at the University of Turin has been considered as an explicit refutation of Saviny's domicile approach.[32] Accordingly, the emergence of the *lex patriae* as an opposite conception to the *lex domicilii* has led to the division of countries into two families of legal systems: First, legal systems that are based upon the nationality principle, and second, those which are based upon domicile principle.[33] It should be noted that dispite Mancini and Savigny adopt different principles both, however, have contributed to the creation of the choice of law Conventions.[34]

After all, different problems have resulted from the coexistence of the nationality and domicile principles, and renvoi is an example of their divergence.[35]

c)- It remains to consider now the development of private international law in English law and in the United States of America.

i)-First of all, the analysis of the modern theory, known as the vested right

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cit., pp 22-23. Emphasise added.

30- Wolff,M.,*Ibid.*, p 38.

31- Mayer, P.,*Op cit.*, pp 63-64.

32- See *Infra.*, Chapter 2, Section 1, pp 61-64.

33- Juenger, F.K., *Loc. cit.*, pp 164-165; See also Wolff, M., *Op.cit.*, pp 39-40.

34- Juenger, F.K., *Ibid.*, 281.

35- See *Infra.*, Chapter 2 Section 1, pp 64-66.

theory,[36] finds its origin in the Dutch school, especially throughout the eminent scholar Huber which later has been advocated by both English,[37] and American scholars.[38] Following the development of private international law it can be seen that in common law countries there has been a substitution of the theory of the acquired right for the doctrine of comity.[39] In fact, Dicey who adopts the theory of the acquired right, rejected the theory of comity.[40] It has been said, in this context, that although comity principle might be found in some English judgements, English courts, however, do not base its application of foreign law upon courtesy but in doing justice.[41] In other words, justice represents a strong basis of the application of foreign law.[42] Accordingly, this theory has been criticized on the ground that "comity provides an inadequate and unsatisfactory basis of the modern conflict of law".[43]

In reality, the basis of the application of foreign law might differ from one country to another and so are the justifications. For this reason, it is important to know these bases in order to understand the reasoning of judges and the outcome of the judgement. It is worth stressing, therefore, that the different approaches that have tried to justify the application of foreign law have a close

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36- The vested right theory is a conception which is related to the territoriality principle. Graveson, R.H., *Op.cit.*, p 40; Cheshire and North, 11th edition, *Op.cit.*, p 27. Despite its simplicity it has been criticized , however, on the ground that the judge might create a right that did not exist before. Mayer, P., *Op.cit.*, pp 94-96.

37-It has been pointed out that historically the notion of the vested right was indicated, for the first time, by the judge William Scott and definited by professor Holland and then developed by Dicey. See Arminjon, P., " La Notion des Droits Acquis en Droit International Privé" *Recueil des cours*, Volume II, Tome, 44 (1933) pp 29-30; Lipstein, K., *Loc.cit.*, pp 135-136.

38- Cheshire and North, *Op.cit.*, p 27; See also.Anton, A.E., *PrivateInternational Law*, A Treatise from the Standpoint of Scots Law, Edinburgh, W. green & Sons L.T.D. 1967, p 22.

39- Graveson, R.H., *Op.cit.*, p 40.

40- Cheshire &North, *Op.cit.*, pp 20-21; See also Audit, B , *Loc.cit.*, p 238.

41- See the case of *Amin Rasheed Shipping Corp.*v. *Kuwait Insurance* Co. [1984] A.C. 50, 65; For discussion see Dicey & Morris, *Op.cit.*,p 6; For more details see Jaffey, A. J. E. *Introduction to the Conflict of Laws*, London, Edinburgh, Butterworths, 1988, pp 274-278, For more details concerning the rejection of renvoi in this case see *Infra.*, Chapter 3, Section 1, Sub-section 2, pp 171-172.

42- Cheshire &North, *Op.cit.*, p 4.

43- See Graveson R.H , *Op.cit.*, p 8.

link with renvoi theory. As a matter of fact, by referring to the scholars' controversies upon the doctrine of renvoi it can be noticed that the pro-renvoiists have tried to justify the application of renvoi by using different conceptions, such as, the protection of acquired rights, harmony of decisions, international courtesy and so on.[44]

ii)-Second, as stressed before, it might be useful to look back at recent development of private international law in European countries but it seems essential to analyse the new methods and conceptions that have emerged outside the European countries.

To accomplish this task, it is useful to examine the new tendencies and conceptions that have appeared in the United States of America and, then, deduce the influence of such conflict rules revolution in both the United States and the European countries.

Starting by Story this scholar was influenced by the statutist especially the Dutch school in which he recognizes the foreign law as a fact and considers its application as based upon international comity.[45]

The influence of Dicey by Professor T.H. Holland, led afterwards to the introduction of the vested right theory by Beale in the first Restatement(1934).[46] Moreover Beale, who supports the theory of the acquired right, emphasises the application of the municipal law, where a right was created, without its conflict rules.[47] In other words, by analysing his philosophy this scholar can be considered as one of those who are against the conflict of laws and relies ,instead, upon the analysis of the substantive rules.[48]

44- .See *Infra.*, Chapter 2, Section 3, pp 81-98.

45- See De Maekelt, T., *Loc.cit.*, p 241; Wolff, M., *Op cit.*, pp 33-34. Throughout Story's work both the principle of *comitas* and the principle of justice can be noticed. .See Schwind, F., "Aspects et Sens du Droit International Privé" *Recueil des cours*, Volume IV, Tome 118,(1984) p 52; Evrigenis, D., "Tendances Doctrinales Actuelles en Droit International Privé" *Recueil des cours* Volume II, Tome 118 (1966), pp 326-327; Mayer, P.,*Op.cit.*, p 56.

46-De Maekelt, T., *Ibid.*, p 249; Juenger, F.K., *Op cit.*, pp 179,193, 208-209; Audit, B., *Loc.cit.*, p 241; Kegel, G.,"The Crisis of Conflict of Laws "*Recueil des cours*, Volume II, Tome 112, (1961), pp 105-106. See also *Infra.*, Chapter 3, Section 1, Sub-section 1, p 180.

47.- Cheshire & North, *Op.cit.*, pp 28-29.

48- Audit, B., *Loc. cit.*, pp 244-245. The assumption of Beale has been criticised on the ground that the reference is not only to the domestic law but also to the conflict of the foreign

It seems to the writer that the reference to this scholar is necessary in order to know why the first Restatement takes a negative position over renvoi and also to find out whether Beale, as an opponent of renvoi, rejects renvoi in all cases?[49]

Another approach has appeared in the United States known as The Governmental interest analysis[50] which is advocated by Currie.[51] In fact, Currie is another American scholar, of the contemporary age, who has tried to demonstrate the inadequacy of the traditional solution of conflict of laws [52] This is why Currie is said to be against the conflict rule technique and advocates its elimination.[53] In his own words, this scholar states that "...It seems clear that the problem of the renvoi would have no place at all in the analysis that has been suggested...".[54] The question remains what is the resemblance and difference between the governmental interest analysis and the unilateralist approach. In a nutshell, it is clear that both approaches agree in asking how the law of the forum is applied.[55]

Thus, scholars still wonder whether there has been a shift from the

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law where the right is created., See Cheshire & North, *Ibid.*

49- See *Infra.*, Chapter 2, Section 3, p 105 footnotes 291; See also Chapter 3, section1, sub-section 2, p 180.

50-The interest analysis approach can be divided into two types of conflicts, true conflicts and false conflicts. The former occurs when the two concerned states have an interest in applying their own laws. The latter, however, means that one of the state has no interest in the application of its law. Egnal, John D., " The ' EssentiaII ' Role of Modern Renvoi in the Governmental Interest Analysis Approach to Choice of Law " 2 *Temp. L. Q* ., (1981), p239.

51-The main criticism of his theory is, first, it requires an effort from the judge to examine the interest and policy of the substantive laws which is not an easy task. Second, this theory is applicable in interstate conflict and not in International conflicts. See Cheshire & North, *Op.cit.*, p 33

52- See Evarigenis, D., *Loc.cit.*, pp 355, 359, 369; Lipstein, K., *Loc.cit.*, pp 157-158, 161-162.

53-See Ferrer-Correia, A., "Les Problèmes de Codification en Droit International Privé" *Recueil des cours*, Volume II, Tome 145, (1975), pp 78, 81.

54- Currie,B., *Selected Essays on the Conflict of Laws*, Durham, N.C., University Press, 1963, p 184; Egnal, John D., *Loc.cit.*, p 252; See *Infra.*, Chapter 3, Section 1, sub-section2, pp178-179.

55-In fact, throughout Currie's approach the law of the forum is applicable by a process of analysing the governmental interest case per case. See Vitta, E., *Cours Général de Droit International Privé, Recueil des cours*, Volume I, Tome 162, (1979), p 164.

universal approach, i.e., the *lex locus delicti*, to the interest analysis approach. Such doubt may well be illustrated by the case of *Babcok*.v. *Jackson*.[56]

In solving the true conflict, another American scholar has suggested an approach known as the principles of preference.[57] It is believed, in fact, that Cavers calls the rules that he proposed principles of preference and not conflict rules[58] and like Currie, he refers to the substantive law.[59]

Among the American scholars who have contributed to the development of private International law is Cook's approach known as the local law theory which is opposed to the vested right theory.[60] According to an opinion the American Scholar, Cook "...has little need of the renvoi..."[61] In other words, Cook is Considered as an opponent of the conflict rule methode in which he considers that there is no place of any form of renvoi in this context.[62]

Generally, the American development and its conflict rules resolution has led to believe that "...this ' Softening of Concepts ' process taking the form of substitutions of ' soft ' for ' hard ' and of ' flexible ' for ' regid ' connecting factors, has been considered the dominant feature of contemporary private international law." [63]

The question that should be asked, therefore, is what is the success of the

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56.12 N.Y. 2d 473; 191 N.E. 2 d 279; 240 N.Y.S. 2d 743(1963). For more details see *Infra.*, Chapter 3, Section 1, sub-section2, p 179.

57- David, John D., *Loc.cit.*, p 242.

58- Dimitrios Evrigenis, *Op cit.*, p 346.

59- In selecting the suitable law Cavers relies in his choice on the better law that in order to do justice whereas Curries bases his selection upon the analysis of the governmental analysis and policy. .See Lipstein, K., *Loc.cit.*, pp 157-158, 161-162; Cheshire & North, *Op.cit.*, p34.

60- Falconbridge, J.D.,*Essays on the conflict of laws*, Toronto, Book Company L.T.d.,1947 p32. See for discussion Schwind, F., *Op.cit.*, p 54; Rigaux, F., *Ibid.*, pp 208-209.

61- Von Mehren, A.T., "The Renvoi and its Relationa to Various Approaches to the Choice -of -Law Problem" *in XX Century Comparative Law and Conflicts Law, Legal Essays in Honor of Hessel E.Yntema*, A.W. Sythoff. Leyden, (1961), p 386; Rigaux, F., *La Théorie des Qualifications en Droit International Privé*,1956, pp 208-209.

62- Audit, B.,*Loc. cit.*, p 337.

63- See Kahn-Freund,O.," *General Problems of Private International Law" Recueil des cours*, Volume III, Tome 143, (1974), p 406 Originally emphasised.; Vitta, E., " The ' Impact in Europe of the American ' Conflicts Revolution' " 30 *Amer J. Comp L.*, (1982), p 15. .

American approaches and theories in the contemporary age. In this respect scholars' opinions are divided into two groups. There are those who think that the American approaches will be impracticable if they are shifted to the International scale.[64] Others, however, think that interest analysis approach, for instance, has received attention even outside the United States of America[65] and the best evidence of such influence is to be found within the Anglo American countries themselves such as the case of *Boys* v. *Chaplin*[66]

III)-Problem of methodologies in private international law:- It has been stressed Conflict of laws is in its Crisis[67] but to understand what have contributed to the emergence of such crisis, it is worth analyzing the emergence of the different methods in order to comprehend its dimensions and consequences.

Following the development of private international law it can be noticed that the discipline has known the coexistence of three main approaches which are, the substantive law approach, unilateral law approach and multilateral law approach.[68] To understand the consequences of such pluralism of methods, a flash back to its history and its application in different legal systems seems necessary in order to comprehend the emergence of some phenomena in this discipline, such as, renvoi. Otherwise, how can the player achieve success if he does not know both the strength and the weakness of his adversary? Accordingly, three points are worthy of note.

64-It has been pointed out that the American decisions concern the interstate conflicts and not International conflicts. See Evrigenuis, D.J., *Loc.cit.*, pp 385-386, 388; It has also been stressed that the influence of the American approaches in recent laws or law projects are rather weak. See Von Overbeck, A.E., " Les Questions Général du Droit International Privé À la Lumière des Codifications et Projets Recents, Cours Général de Droit International Privé" *Recueil des cours*, Volume III, Tome 176 (1982), pp 28-29.

65- Ehrenzweig, A.E., *Private International Law: A Comparative Treatise on American International Conflict Laws Including the Law of Admiralty* , Leyden, A.W. Sijthoff, 1967, p 62.

66- (1969), 2 All ER. 1085; (1971) A.C. 356; For more details of this case see *Infra.*, Chapter 3, Section 1, sub-section 2, pp 179-180.

67- Discussion of this crisis is well illustrated and analysed by Professor Kegel in the Hague Academy. Kegel, G., *Loc.cit.*, pp 95-221; See especially Audit, B., *Loc.cit.*, p 231.

68- Juenger, F.K *Loc.cit.*, p 168.

1)-The unilateralism and multilateralism:-[69]

As it has been indicated, the discussion of the development of the conflict of laws in Continental countries should, chronollogically, be followed by the analysis of the contribution of the American's scholars , i.e., the revolution in the courts.[70] In fact, the best example of such revolution is the unilateralist approach of Currie, which leads him to the rejection of all choice of law rules by maintaining that "...We would be better off without choice of law rules."[71] Currie's theory like Watcher's are related to the court sovereignty which leads undoubtedly to the application and to the primacy of the *lex fori.* Accordingly, the application of Currie's conception means the predominance of the unilateralist approach and the exclusion of multilateralism.[72] It should be noted that the case of *Babcock* v *Jackson* has caused legal consequences, such as, the doubt about whether the court applied the traditional approach, i.e., the *lex loci delicti* or governmental interest analysis approach. In other words, which of those methods have really been followed by the American courts, is it the unilateralist or the multilateralist approaches. According to the fact in to the case of *Babcok* v *Jackson*, it can be said that the judge Fuld applied the New York law to this case[73] and had relied upon both approaches, i.e., the proper law and the governmental interest analysis.[74] According to F.K Juenger both approaches, interest analysis and the *lex loci delicti*, had been applied in the latest federal court decision in a tort case.[75]

69- Unilateralism approach, which is considered as a means of advocating the application of the law of the forum, is opposed to "Savignisme" approach. See for example Gothot, P.," le Renouveau de la Tendance Unilateralist en Droit International Privé" *Re.crit.dr.intl.priv.*, (1971) p 34.

70- See Juenger, F.K.,*Loc.cit.*, pp 215-218.

71- Currie, B.,*Op.cit.*, p 183; For discussion see also Juenger, F.K.,*Ibid.*

72- If Currie represents a unilateralist scholar of the Common law Countries Wachter, however, is considered as a unilateralist continental's scholar. See Juenger, F.K., *Ibid.*

73- 12 N.Y.2d 473; 191 N.E. 2d 279 (1963); 240 N.Y.S. 2d 743 (1963).

74- Loussouarn, Y. et Bourel P., *Droit International Privé* 2eme edition, Paris, Dalloz, 1980, pp 168, 184, 186; Juenger, F.K., "General Course on Private International Law"*Loc. cit.*, p283; For more details see *Infra.*, Chapter 3, Section 1, pp 178-179.

75- *O' Rourke* v *Eastern Airlines*, Inc, 730 F. 2d 842 (2d Cir. 1984). See the discussion of

It follows that, American courts have followed many approaches concerning matter of choice of laws.but they might rely on one approach or apply them by combination.[76]

Concerning the shift of tendency in choice of laws F.K. Juenger has stressed that "In recent times both in the United States and in Europe, there are trends away from rigid multilateralism choice of law rules and the revival of Unilateralism."[77] With regard to the consequences of such multilateralism it may be useful to quote once more his opinion, in which , he considers that " The existing confusion may, in part be due to a tendency to gloss over the deficiencies of the multilateralism approach, of which the renvoi problem is a symptom."[78]

On this basis, the question that might arise is whether the universalist approach of Savigny will be achieved. It has been presumed that the decisional harmony, which represents the aim of Savigny' s conception, is incapable of being achieved, because if such multilateralism will lead to the achievement of the uniformity of result, how can the appearance of problems, such as characterization and renvoi be justified.[79]

On the whole it has been admitted that the doctrines which favour the analysis of the laws and rejects the conflict rule method have no place of the renvoi mechanism.[80]

2)-Conflictive and substantive rule methods :- It is not only the conflict rules that exist in both national and international scale, but there are also the differences among nations, i.e., in both cases the rules are contained in International Conventions and positive laws. It should be noted, in this context, that if in cases concerning rules of immediate application judge applies the *lex*

this case in Juenger, F.K.,*Ibid.*, pp 220-222.

76- In fact, better law, principle of preference, the most significant relationship and governmental analysis are different and opposite approaches which are said to be included in the second Restatment (1974). See Juenger, F.K.,*Ibid.*, pp 219-220, 243, 245.

77- *Ibid.*, p 168.

78- *Ibid.*, p 199.

79- *Ibid.*, pp 199, 205-206.

80- See Audit., B.,*Loc.cit.*, p 339.

fori, whereas in the conflictive method he has to choose between different laws, this is not the case in substantive law method.[81] In other words, judge in the last approach, applies neither *the lex fori* nor chooses between different laws, but instead he has to refer to the substantive rules that will resolve directly the issue.

Additionally, both conflict rules and substantive private international law, which are found in International Conventions, are known as uniform rules, and it is well known that it is the Hague Conference of 1883 in the Netherlands which represents an important contribution that has led to the elaboration of Conventions for the unification of conflict rules.[82] It is clear that International Conventions may include either conflict rules or substantive rules, and the best example of the former is the Hague Convention on the conflict of laws relating to the form of testamentary dispositions.[83] Conerning the Conventional substantive rules, however, Geneva Conventions of 1930 and 1931 can be cited as an example which adopt uniform rules in the field of bills of exchange and promissory notes.[84]

Before discussing the two different types of substantive rules, it is worth noting that this method is not a new one but there are indications that it had been used before, especially in the antiquity where the *Jus Gentium* prevailed.

From the point of view of their sources, substantive rules are divided into two types, International substantive rules and national substantive rules. An illustration of the former are Conventions concerning carriage by air, sea and trade.[85] Substantive rules of national origin, however, are illustrated by the

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81- Those rules are also labelled by different names, such as, substantive private international law, direct rules, and substantive rules.

82. The movement of the codification is twofold: unification of conflict rules and unification of substantive rules. See Loussouarn, Y et Bourel P.,*Op cit.*, p 27.

83-.See Article 6 of that Convention which was concluded in 5 june1961. For discussion see Rigaux, F., *Droit International Privé,Op.cit.*, PP97-99; See also the uniform conflict rules of the Rome Convention of 19 june1980. Von Overbeck, A.E., *Loc.cit.*, PP41-42; For more details see *Infra.*, Chapter 3, Section 2, pp 183-184, 196, 199.

84-See Batiffol, H., *le Pluralisme des Méthodes en Droit International Privé, Recueil des cours*, Volume II, Tome 139, (1973), p 113; See *Infra.*, Chapter 3, Section 2, pp 184-192-193.

85- Vienna Convention of 11 April 1980 on international sale of goods contracts;

famous Czechoslovakian international commercial code of 4 December 1964.[86]

Furthermore, the field of International trade knows a body of substantive laws known as new law merchant which consist of custom, arbitrary sentences and Type-Contracts.[87] In fact, it hs been recognized that the substantive law approach "...has attracted renewed attention...by the advocate of the *new law merchant*, who argue that supranational rules of decision are preferable to choice of law rules."[88]

3)-Do the substantive rules method represent a threat to the conflictive method? The discussion of such pluralism of methods leads to the question which is whether or not the conflict rules are safe from any threat? Whatever might be the answer, the fact is, that conflict rules are receiving a concurrence from the substantive rules.[89] Concerning the latter it has been recognised that the harmonization of substantive law of different states represents one of the means which avoids conflict of laws.[90] Furthermore, the conflictive method has received many attacks from outside and an illustration of this is the appearance of what has been called the *new law merchant* or "le droit spontane".[91]

As a result of such pluralism of methods, it must be remembered that scholars too are divided upon the nature of the competition of both the substantive and conflictive methods.[92]

Convention of Chicago of carriage by air. See Von Overbeck, A.E., *Loc.cit.*, pp 67-73; Isaad, M., Volume I, *Op.cit.*, pp 101-104; Battifol, H., *Ibid.*, pp 113-121.

86- See article 3 of that code which contains in all seven hundred and twenty six articles. Von Overbeck, A.E., *Ibid.*, PP67-73; Vitta, E., "Cours Général de Droit International Privé" *Loc.cit.*, pp 130-131; Battifol, H.,*Ibid.*, pp 107-113; Mayer, P., *Op.cit.*, P16; Audit, B., *Loc.cit.*, pp 255-258.

87- See Audit, B., *Ibid.*, P258; Von Overbeck, A.E.,*Ibid.*, p 27; Lipstein, K., *Loc.cit.*, p 127.

88- Juenger, F.K.,*Loc.cit.*, p 254.

89- For discussion see Von Overbeck, A.E., *Ibid.*, pp 25-26.

90- Diamond, A.L., "Harmonization of private International Law Relating to Contractual Obligations", *Recueil des cours*, Volume IV, Tome 199, (1986), p 242.

91- Loussouran,Y et Bourel, P.,*Op.cit.*, p 60 Originally emphasised. There are , however, who think that the *lex mercatoria*does not represent an element of the crisis of conflict of laws. See in this context, Audit, B., *Op.cit.*, p 258.

92- Loussouarn, Y et Bourel P., *Ibid.*, p 58.

Concerning the Czechoslovakian commercial code it is generally accepted that the conflictive method is not excluded from this code, and this can be justified by the existence of a conflict rule in the code itself.[93]

Furthermore, according to Yvon Lousouarn and Pierre Bourel, Conventional uniform laws do not exclude the conflictive method, due to the fact the substantive rules are applied between the contracting States and is not of a universal application. In other words, conflict of laws still exists between non contracting States.[94]

It is well known that Conventions may also contain a mixture of substantive and conflictive rules when the contracting states themselves cannot reach an agreement in one or two points.[95]

It is clear that scholars have been concerned with the emergence of different approaches and methods in the field of private international law. On this basis, a prediction of the future of private international law should be based on fact and reality, because the fact indicates that the domination of the substantive rules is not only in commercial law but also in private international law. In reality, however, it must be realized that what has been known as a Conventional substantive rules, are rules which are all dealing with International commerce.[96] From that reasoning it can be asked whether substantive rules represents, really, an exception to the conflictive method. The answer to such question is taken verbatim from Yon Loussouarn and Pierre Bourel who claim that "Le droit International connait donc un pluralisme de méthode, la méthode conflictuelle demeurant la toile de fond sur laquelle se detachent les règles materielles qui ne sont encore que des exceptions fort rare, sauf dans le domaine

93- SeeArticle 3. for more discussion see Yvon Loussouarn and Pierre Bourel, *Ibid.*, p66.

94-*Ibid.*, pp 68-70.

95- The contracting States may reach an agreement in establishing uniform substantive rules by the process of the unification which is believed to be reached only between them. Conflict rules, however,will still exist between those contracting States and a third one. See for example Yvon Loussouarn, Y et Bourel, P., *Ibid.*, Vitta, E., "Cours Général de Droit International Privé" *Loc. cit.*, pp 142-143.

96- Loussouarn, Y et Bourel, P., *Ibid.*, pp 73-74.

du commerce International." [97]

With regard to the coexistence of the various methods in the discipline another question remains, will conflict of laws be eliminated by the uniform substantive rules throughout International Conventions? François Rigaux argues that even if the uniformity of law does not eliminate the conflict of laws, at least it reduces it.[98]

Sub-section2:- Opposition of conflict rules to substantive rules.

In this context two points are worthy of note. First, the discussion of the opposition of the conflict rules to the substantive rules, and second, some consideration behind the making of the conflict rules.

I)-In the field of private international law one should realise the difference between substantive rules and conflict rules[99],i.e., every system has two types of norms, conflictive and substantive rules.[100] The latter regulates directly the legal issue between the concerned parties whereas the former indicates and selects only the competent law and the legal system that might resolve the dispute[101] In other words conflict rules do not give a direct solution or regulation[102] to the legal issue as is the case with the substantive rules. Despite such differences it has been maintained that the combination between the two kind of rules contributes to the final solution.[103]

II)- The discussion of the opposition of the choice rules to the substantive rules leads first, to the analysis of the former and then, deduce the purposes and dimensions that might have been taken into account in making such rules. As a matter of fact to comprehend the aims and the reasons of any legislation or bill,

97- *Ibid.*, p 76.

98- Rigaux, F.,*Ibid.*, For further discussion see Vitta, E., " Cours Général de Droit International Privé"*Loc.cit.*, pp 155-189.

99- See Graveson, R.H., *Op.cit.*, p 3.

100-See Rigaux, F., *Le Droit International Privé, Op.cit.*, p 26.

101- Isaad, M.,Volume I, *Op.cit.*, p 23-24.

102- Anton, A.E., *Op.cit.*, p 6;. Salcedo, J.A.C., *Loc.cit* , p 204; Maury, J.," Règles Générales des Conflits de Lois" *Recueil des cours*, Volume III, Tome 57,(1936) p 458.

103- Philip, A.," General Course on Private International Law" *Recueil des cours*, Volume III, Tome 160, (1978), p 18.

it is necessary to refer to the preparatory works to clarify ambiguities of certain rules.[104]

The writer restrict his discussion, in this context, only upon the clash between the two principles nationality and domicile. If the fact of the matter is that connecting factors and conflict rules differ from one legal system to another.it is necessary, therefore, to go to the root of such differences. in order to understand the divergence between the two principles. In other words, if the conflict rules of one country adopt the nationality principle whereas the other prefer the domicile principle it must be kept in mind that the policies and the aims of the law makers in adopting this principle, and not the other one, are the causes of such split. As a matter of fact, the adoption of the two principles is not isolated from the legal policy[105] of any country and whatever are the reasons, historical or demographic,[106] they have, therefore, contributed directley or indirectley to the emergence of the problem of renvoi.

Overall, if the conflict of laws rules are opposite to the substantive rule, practically, the former might be found throughou modern codifications especially in the introductory part of the civil codes as other general notions.[107] For example, the conflict rules of Democratic Republic of Germany are divided as follow: the first four articles contain general principles whereas the other twenty fifth articles regulate the legal issue of the conflict rules.[108] Moreover, the first twenty four articles of the Algerian civile code represent a conflict rules and are cited in the introductory part of that code.[109]

Sub-section 3: The structure and interpretation of conflict rules.

To understand the causes of renvoi, which are differences in connecting factors and differences in qualifications, it might be necessary to refer first and foremost

104- *Ibid.*, p 30.

105.-Audit, B., *Loc.cit.*, p 239.

106.- See *Infra.*, Chapter 2, Section 1, pp 59-60.

107- See Audit, B., *Loc.cit.*, p 249.

108- The law of 5 December 1975; for discussion see Von Overbeck, A.E., *Loc.cit.*, p 30.

109- See Order N° 75-78 of 26 September 1975 which concerns the Algerian Civil Code.

to the conflict rules themselves, i.e., to their structure and interpretation. In fact, this sub-section, in which the talk is divided into two main points, is merely a contribution to the latter discussion[110].

I)-Structure of the conflict rule. The existence of what has been labelled as operative facts, points of contact, element of introduction and categories, means that private international law contains different substantive laws which may be grouped into one or different categories, such as, marriage, succession, moveables and so on.[111] Thus, each category will have one or more connecting factors, such as, domicile, nationality, habitual residence, intention of parties, place of wrong and so on.[112] From judges via lectures down to the students, structure of the conflict rules is analyzed from two main points; its categories and connecting factors. The former determines the latter which in its turn leads to the selection of the applicable law.

Besides, each legal system has different rules to resolve multistate problems, and choosing any rule will be done after using intellectual efforts by judges which will lead, of course, to the application of the proper law. Between the two stages the judge is restricted by the coexistence of various road signs and these connecting factors will show him the direction.

After this double consideration of the structure of the conflict rules the relevant point, therefore, is why conflict rules in many countries may contain one connecting factor whereas others may have more than one. Whatever is the answer, there is a reason to suppose that if in the international scale the Hague Convention on the conflict of laws relating to the form of testamentary dispositions uses five connecting factors, this is due to the fact that there is a legal policy behind making such rules.[113] In addition, if the *lex patriae* is the

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110- See *Infra.*, Chapter2. Section 1, pp 66-75.

111- See Roberts`lon, A.H., *Characterization in the Conflict of Laws*, Cambridge, Massachussetts, Harvard University Press, 1940, p 92.

112- See Lipstein, K., *Loc. cit.*, pp 195-196.

113-See article 1 of the Convention concluded in 5 October 1961. Conférence de la Haye de Droit International Privé, *Receuil des Conventions de la Haye*, (1951-1977) Edité par le Bureau Permanent de la Conférence de la Hayc, Pays Bas, Martinus Nijhoff, p 49; See Rigaux, F., *Droit International Privé, Op. cit.*, pp 112-114; For more discussion of the problem of renvoi in this context see*Infra.*, Chapter 3, Section 1, sub-section 2, pp 172-173. and Section 2, p 246.

connecting factor in Civil law countries, Common law countries, however, favour the use of the *lex domicilii.*[114]

Furthermore, if renvoi appears as a consequences of the divergence between nationality and domicile, it does not mean that they are the only connecting factors that govern the personal law. The emergence of the habitual residence, however, should not be neglected from the discussion of renvoi, due to its penetration even in International Conventions.[115]

II)-Interpretation of the conflict rules. In the interpretation of the conflict rules many issues emerge such as Characterization,[116] renvoi, preliminary question and public policy.[117] Concerning the application of either forum or foreign law, which contains a foreign element, judges refer obviously to two techniques which are used, practically, in chronological order.[118] It means that, the application of the proper law is not the first stage but it is preceded by a preliminary process, which is characterization.[119] One cannot deny, therefore, the importance of the process of characterization in private international law, in fact, according to Yvon Loussouarn and Pierre Bourel "...qualification command the solution of conflict of law".[120]

Further, if characterization represents an earlier stage before renvoi mechanism, it has known ,however, many doctrines such as characterization of the *lex fori*, characterization to the *lex causae*, Primary and secondary

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114- Dicey & Morris, *Op .cit.*, pp 29-30.

115. See for instance, article 5 of the Hague Convention of 15 juin 1955 for the determination of the conflict between the national law and the law of domicile. See *Infra.*, Chapter 3, Section 2, pp 191-192.

116- It is well known that the question of characterization emerged throughout the work of Contínrntal scholarss, such as, the German Kahn and the French Bartin by their articles. The former in 1891 and the latter in 1897. The emergence of such process is due to the movement of the "particularisme" in the 19th Century and the nationalism approach. See Salcedo, J.A.C., *Loc.cit.*, p 189; Maury, J., *Loc.cit.*, pp 461-462; Ehrenzweing, A.A., *Op.cit.*, p 113; Dicey and Morris, *Op.cit.*, pp 34-35; Mayer, P., *Op.cit.*, p 134.

117- See for example, Vitta, E., "Cours Général de Droit International Privé" *Loc.cit.*, p 60.

118- Concerning the connecting factors these are determined after the accomplishement of the first stage, .i.e, after the characterization process.

119- See De Maekelt, T., *Loc.cit.*, p 262.

120- .Loussouarn, Y et Bourel, P., *Op.cit.*, p 241.

characterization and analytical jurisprudence principle and comparative law.[121] It can be deduced from such pluralism of theories that, the divergence does not concern only the problem of terminology[122] but it is also a matter of methods.[123] In other words, irrespective of differences in terminology, the real problem in this context is the conflict of qualification and the classical *Bartholo*' s decision[124] is an illustration of such conflict.[125]

It is well known, therefore, that the process of characterization, which is used to select the applicable law, leads undoubtedly to the emergence of the conflict of laws between different States. The reason of such conflict is that each judge may classify the legal issue under one category whereas the other one may classify the same issue under a different category. For instance , what can be considered as a matter of formalities in one country may be considered as a matter of substance in a different country. Accordingly, the question that should be asked is whether this process , i.e., characterization, affects directly or indirectly the emergence of renvoi.[126] To answer this question it is necessary to refer first, to the different theories that have been adopted to explain the emergence of renvoi and, then, to look for the correlation between renvoi and characterization.

1)-First of all, the discussion of the conflict rules interpretation leads automatically to the examination of the emergence of the different types of conflicts, such as, latent and patent conflicts. In this context, it has been stressed that the emergence of the patent conflict of conflict rules is due to the fact that

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121- If the *lex fori* is the favourable tendency in positive laws in different legal systems, the usefulness of the *lex causae* approach must not be forgotten, although, both have been criticized. See Issad, M.., Volume 1, *Op.cit* ., pp 142-147; Wolff, M., *Op.cit.*, p 40.

122- From terminological standpoint, it can be said that various names have been used by scholars in all over the world. For instance, there are who prefer the word of classification such as Beckett, others use characterization, such as, Falconbridge and a third group advocates the qualification terminology, such as, Lorezen. For more details see Roberston, A.H., *Op.cit.*, pp 23-24.

123- *Ibid.*, p 25.

124- Alger, 24 Décembre 1889, *Clunet*, 1891, 1171.

125- See in this context, Rigaux, F., *Droit International Privé,Op. cit.*, pp 149-154.

126- See in this context, *Infra.*, Chapter 2 Section 1, pp 66-70.

for the same legal issue the conflict rule of the forum may use the nationality principle whereas the foreign country may prefer the domicile principle, i.e., the conflict rules of the two countries are not identical. The latent conflict, however, occurs in the first and second stages. It should be noted in this latter conflict that although the conflict rules of the two concerned countries are alike in that they use the same connecting factors both, however, differ in the characterization process.[127] As it will be shown later, both patent and latent conflict rules contribute to the appearance of renvoi.[128] In fact, it has been claimed, that the emergence of renvoi can be well noticed in the patent conflict. The latent conflict, however, may also lead to the problem of renvoi.[129]

If some scholars rely on three stages to solve a conflict of laws cases, there are, however , who think that those stages are not threefold[130] but fourfold.[131] According to the later assumption, the court during the first stage will be dealing with the primary characterization ,i.e., the characterization of the issue. In the second stage, however, the court proceeds to the characterization of the connecting factors in order to determine the connecting factor. In the third stage, which represents the stage of the selection of the proper law, the renvoi problem arises. Concerning the fourth stage, it has been stressed that the primary characterization in the first stage leads to the secondary characterization during the fourth stage, which represent a period of the application of the proper law.[132] As it has been shown, the problem of renvoi arises during the stage of the selection of the proper law and after the determination of the connecting factor.[133]

127-In the first stage, i.e., in the latent conflict, although the conflict rules of the two countries are the same, by using identical connecting factors, the same issue may have different sense because of the divergence in the process of characterization. Additionally, in the latent conflict of the conflict of laws the same cconnecting factor might be used, such as, domicile, but the divergence arises in the characterization of that domicile.

128- See Falconbridge, J. D., *Op.cit.*, P 159. For more details in this context see *Infra.*, Chapter 2 Section 1, pp 68-70.

129- Falconbridge, J.D., *Ibid.*, pp 159, 167,184-185.

130- See for example, Philip, A., *Loc.cit.*, p 141.

131- See Roberston, A.H., *Op.cit.*, pp 92-95.

132- *Ibid.*

133- *Ibid.*, p 96.

2)- Secondly, concerning the relation between renvoi and characterization it should be kept in mind that the process of characterization is not the last step but it represents a primary phase before applying any substantive rule. In other words, the close link that exists between renvoi and characterization is due to the fact that the former occurs after the latter. in fact, the selection of the proper law presupposes that the task of localizing the connecting factors and the primary characterization have already been achieved.[134] The main reason for this claim is that characterization cannot work by itself and the application of the proper law is not done automatically. Renvoi, therefore, does not occur in isolation from other process but it is preceded by previous stages which are characterization of the matter, the selection of the proper law and finally the application of forum or foreign substantive rules.[135] To be more pragmatic, the writer should draw the attention that in legal matters an appeal presuppose a previous judgment.

On this basis, it can be said that the analysis of both characterization and renvoi is important because of their correlation and also both of them represent a difficulty that faces judges scholars and students. Concerning the importance of those two issues ,it is worth quoting, therefore, Rodolfo de Nova's point of view in which he says that "...the troublesome problem of 'renvoi'surfaced from the...acknowledgment of the plurality and variety of conflicts systems. And soon afterwards the problem of 'qualification' came up to vie with renvoi as the main worry of conflicts scholars."[136]

The fact of the matter, is that scholars differ in their view on the suitable solution that should be applied to the characterization issue. The truth, however, is that characterization on the whole has affected the renvoi mechanism. Furthermore, the divergence between primary and secondary

134- After the judge finishes the process of characterization by including the legal relation under its adequate system, he has to find out, therefore, the applicable law to this relation. see for example, Roberston, A.H., *Ibid.*, p 102; See also Soulaiman, A.,*Op.cit.*, p 45.

135- Falconbridge, J.D., *Op.cit.*, pp 159-160.

136- De Nova, R., "Historical and Comparative Introduction to Conflict of Laws"*Recueil des cours* Volume II, Tome 118, (1966) pp 478-479. Originally emphasised.

characterization[137] leads straight to the point which is, if primary characterization is governed by the *the lex fori*[138] should characterization after renvoi be done according to the *lex fori* or the *lex causae*. To say it differently, the question is whether or not the forum judge must rely on the foreign determination of connecting factors, such as, domicile. To avoid any repetition this point will be discussed simultaneously with the coming section concerning the conditions of renvoi.[139]

Section 3:-The historical discovery of renvoi. It should be noted that the above discussion of the history of private international law is not isolated from the analysis of renvoi as a phenomenon or as a theory. It means that if private international law represents a mixture of theories by the contribution of different tendencies, renvoi also is not peculiar, for instance, to German, English or French jurisprudence but it concerns the whole conception of private international law. .

On this basis, the historical background of renvoi leads to the following questions. First, assuming that renvoi represents a product of the nineteenth Century does it mean that the previous centuries ignored it totally? Second, with regard to the various cases of renvoi, what are the main reasons for which *L'Affaire Forgo* has been considered as a torch of the theory of renvoi.

To answer these questions, the discussion in this section will not be based upon which of the different types of renvoi that have been applied by English and French courts. It would rather emphasise upon the renvoi from the first time it was considered till 1882, i.e., the time when the theory was established. Given this data, one might ask what is the renvoi theory? The answer, however, might differ if the question is what is renvoi. The reason for such belief is that

137- It must be noted that this theory is said to be first abondonned. Secondly the distinction between primary and secondary characterization has been considered as artificial. See This view in Dicey & Morris, *Op.cit.*, pp 40-41.

138- It has been said that if primary characterization is governed by the *lex fori* subject to exceptions, *lex causae*, however, governs the secondary characterization. Roberston, A.H., *Op.cit.*, pp 75-78, 130-134; See also Falconbridge, J.D., *Op.cit.*, pp 98-101.

139- See *Infra.*, Chapter 2 , Section 1, pp 70-75.

the theory of renvoi seems to be quite different from the appearance of renvoi phenomenon

Sub-section1:-Origin of renvoi. It is possible to understand the renvoi theory at first degree by referring to the famous *Forgo* 's case, but it is not easy to start from *Re Annesley*[140] case to analyse the concept of English law concerning renvoi. In fact, to understand the idea of renvoi principle in English law the discussion should start from the earliest reasoning in the previous cases which preceded *Re Annesley.*[141] Further, to comprehend the controversies between scholars on the appearance of renvoi before 1882, it must be remembered that the discussion of the emergence of renvoi between the seventeenth and the nineteenth Centuries, will not be successful unless the decision of the court in both Continental and Common law countries are taken into consideration.

Noting that the analysis of renvoi within these three Centuries is done in chronological order and includes only some of the selected cases.

I)-By referring to the history of private international law, it can be deduced that renvoi was known in the seventeenth Century.[142] In fact, a reasoning of a lawyer at that time might be considered as an example and sign which proves that renvoi was not ignored in the earliest lawyer' s thought.

The whole idea on Carue' s defence,[143] who pleaded the brother against the claim of their sisters on the equal right of succession, is that the judge of Normandy must respect the disposition of the conflict rules. In other words, in applying the custom of Mainz, the judge must respect the conflict rules of Mainz which refer matter of succession to the law of domicile, i.e., to the law of Normandy where the sisters are excluded from the right of succession.[144] In

140- [1926] I Ch. 692.

141- *C.f.*Vitta, E., "Cours Général de Droit International Privé"*Loc.cit.*, p 64.

142. Wolff, M., *Op.cit.*, pp 189-190.

143- The facts of this annonymous Affair are cited by Meijers, E.M. " La Question du Renvoi " 38 *Bulletin de l'Institut Juridique International* (1938), pp 197-198.

144-The Normandian deceased, who posseded an annuties on property situated in Mainz, died survived by sisters and brothers as relatives. The problem that arose before the court was

order to prove the existence and the use of renvoi idea and terminology at that time, it is worth quoting the whole speech of that barrister who says in his defence:[145]

> "que suivant la jurisprudence des arrêts du parlement de Paris, dans le ressort duquel etoit la Mayne, les rentes, constituées se régloient par la coutume du domicile du creancier; que la succession dont il s'agissoit etoit ouverte en Normandie; que suivant le coutume de cette province les rentes de cette nature etoient soumises a la coutume des lieux ou les debiteurs avoient leurs biens; que celles en question etoit dues sur des fonds du Maine, dont pour consequent l'usage renvoyait le partage en question a la coutume de Normandi, qui axcluoit les femelles des successions quand il y avoit des males."

Throughout the decision of the parliament of Rouen in February 21st 1652 it has been emphasized, however, that the law of the domicile of the creditor was applicable because of the custom of Normandy accepted such rule, in case immovables are outside Normandy, and not because of order from the custom of Mainz.[146]

II)-Views differ between scholars on whether or not *Collier* v. *Rivaz*[147] represents an authority that favours the application of renvoi. It is true that this case has been criticized but the analogy and analysis of the earliest judges which have contributed to the adoption of total renvoi by English Judges in later cases must not be forgotten. Besides, if renvoi problem leads to consider whether the reference is to the whole conflict rules or only to its substantive rules, this has led

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the difference between the custom of Mainz and that of Normandy with regard to the right of succession. According to the former the sisters have the same right as their brothers and succession is subject to the law of the domicile of the creditor. In the latter, however, the brother excluded the sisters from succession and such annuities are governed by the law where the Mortgaged property are situated. For discussion See, Meijers, E.M., *Ibid.*

145- *Ibid.*, My emphasise

146- *Ibid.*, p 198.

147- (1842) 2 curt 855 ; 163 E.R. Full Rep 608.

some scholars to believe that this reasoning was raised for the first time in England before it emerged in Continental countries.[148]

The facts in this case concern the formalities of wills made by a British citizen who died in 1829 domiciled in Belgium in view of English law, but in view of Belgian law he had never acquired a domicile in Belgium due to the fact that he did not receive an authorization for that.[149] The question that arose was whether the four codicils that had not complied with the formalities of Belgian internal law should probate as well as the will and the two codicils which had complied with internal Belgian law? From the reasoning of an English judge all of them were considered as formally valid.[150] In fact, Judge Herbert Jenner reached this solution by an astonishing reasoning[151] that the court sitting in England would decide the case of the formal validity of wills in the same way as if it was sitting in Belgium. [152] It can be said, therefore, that the reasoning of Sir Herbert Jenner, in upholding the will and codicils, means that his reference was interpreted as a reference to both conflict and substantive rules of the domicile.[153]

It must be noted, however, that there is a considerable controversy on whether or not *Collier* v *Rivaz* represents a case of renvoi and also whether it is an illustration of the foreign court theory.[154] An essential point clarified by some scholars is that this case cannot be considered as an authority which

148- Westlake, J., *Treatise on Private International Law*, by Bentwich Norman (ed.,), 7th edition, London, Sweet & Maxwell, Limited, 1925, p 35.

149- Mr Ryan did not receive a king authorization according to article 13 of the French civil code which was in force in Belgium at that time. See Falconbridge, J. D., *Op.cit.*, p 122.

150- This reasonning led him to validate the testaments after hearing the view of both the Dutch and Belge experts. Meijers, E.M., *Loc.cit.*, p 201.

151- His reasoning can be found in *Collier* v *Rivaz* (1841) via *Maltas v Maltas* (1844) to *Frere* v *Frere*a bit later in (1847).

152- Graveson, R.H., *Op.cit.*, p 67; Cheshire & North, *Op.cit.*, p 66.

153- In fact, his reasoning led to the validation and probation of the four codicils, by referring to the conflict rule of domicile, and also to the validation of the will and the two codicils by referring to the Belgian internal law. Falconbridge, J. D.," Renvoi in New York and Elswhere" 6 *Vauderbilt Law Review*, (1953), p 712; Falconbridge, J. D., *Essays on The Conflict of Laws, Op.cit.*, p 122; Graveson, R.H., "Le Renvoi dans le Droit Anglais Actuel" 57. *Re.crit.dr.intl.priv*, (1968), p 260.

154- For more details see *Infra.*, Chapter 3, Section 1, pp 135, 147 footnotes 149.

favours the doctrine of renvoi as a general principle because the reference from English private international law to the law of the domicile "...was interpreted as a rule of alternative reference either to the domestic rules or to the conflict rules of the law of the domicile..." [155] This is said to contredict with the renvoi theory which does not mean the reference to the substantive rule of the chosen law.[156] This is, in fact, what Sir Herbert Jenner did when he admitted the formal validity of wills if they complied with either the substantive or private international rules of the foreign legal system.[157] Accordingly, his reasoning has been crirticized on the ground that the reference to the foreign system is either to its substantive or private international rules and not both.

It should be noted that the division between scholars concerning the case of *Collier* v *Rivaz*, is clear in that there are who advocate it as a renvoi case[158] whereas others denied it.[159] Although there has been doubt about the application of renvoi doctrine before *Forgo* 's case, it can be inferred between the lines of Dicey and Morris's comment that renvoi was applied before that case. In fact this can be noticed from the scope of the doctrine where it has been argued that " The English renvoi doctrine has been applied to the formal and intrinstic validity of wills and...to the law of the domicile".[160]

It may be difficult to prove the obsolete advocacy of renvoi in*Collier* v

155- Dicey & Morris, *Op.cit.*, p 77.

156- *Ibid.*

157- Cheshire & North, *Op.cit.*, p 66.

158- Among authors who consider *Collier* v *Rivaz* as a renvoi case is Anton who says that the English court and more precisely Sir Herbert Jenner was facing a problerm of renvoi for the first time in 1841. See Anton, A.E., *Op.cit.*, p 64 ; Meijers also goes in supporting the view that the first application of renvoi in jurisprudence was in England through the case of*Collier* v *Rivaz*. Meijers, E.M., *Loc.cit.*, p 201. According to Lewald, the court knew and admitted renvoi before *Forgo* case, but its admittion by the court was"unconscious" in *Collier* v *Rivaz*. Lewald, H.,"La Question de Droit International des Successions" *Recueil des cours*, Volume IV, Tome 9 (1925), p 28.

159- Some scholars do not consider *Collier* v *Rivaz* as a precedent, in fact, they emphasise, that from the reasonnig of the judge Herbert jenner there is no doubt that evidences given by Dutch experts had misled him. Mendelssohn-Bartholdy, A.,*Renvoi in Modern English Law*, by Cheshire, G.C., (ed.,), Oxford, The Clarendon Press, 1937, PP63-64; From Abbot's point of view the decision of *Collier* v *Rivaz* denies any involvement of renvoi. Abbot, E.H.,"Is The Renvoi Part of the Common Law?" 24 *Law Quar. Rev.*, (1908), P 143.

160- Dicey & Morris, *Op.cit.*, PP 81-82, Notes 37, 40.

Rivaz but it is illogical to deny its influence and contribution in the outcome of the British conception of renvoi. In fact as Elizabeth Edinger points out "Ironically *Collier* v *Rivaz* is the Seminal case for the foreign court theory and yet is explicable only as a use of renvoi as an alternative validating rule."[161]

Moreover, by supporting the fact that total renvoi owes its origin to the nineteenth Century, J. D. Falconbridge claims that " This formula originated in English law in 1841 in the case of *Collier* v *Rivaz*, but when that case was decided the theory of total renvoi had not been thought of."[162] This scholar goes on to confirm that "...This formula became the basis of judgments in subsequent cases of a different kind...".[163]

To show the contribution of the reasoning of Sir Herbert Jenner in the outcome of the renvoi process in English legal system R.H. Graveson has also stressed that "Taking *Collier* v *Rivaz* as a precedent, English courts in 1926 began to develop a refinement of what has aptly been called the foreign court theory".[164] The question of whether or not *Collier* v *Rivaz* represents a renvoi case can, therefore, be better explained by Rodolfo de nova's point of view concerning the reasoning of Sir Herbert Jenner: In fact this scholar maintains that :[165]

> " the trouble is that he was not choosing between belgian"internal" or "municipal" rules at all. He was playing renvoi, even though he did not know it, as often happens to pioneers...The rule on which the English court based its decision in the *Collier* case, therefore, was discovered by a detour over a foreign rule of International conflict of laws. And this is renvoi !"

On the whole the finger print of Herbert Jenner's reasoning which has contributed to the adoption of a mechanism that has inspired the total renvoi

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161- Elizabeth, E., "Renvoi in Canada: Form and Availability", 14 *Manitoba Law Journal* (1984) p 41.

162- Falconbridge, J.D., "Renvoi in New York and Elswhere", *Loc.cit.*, p 717.

163- Falconbridge, J. D., *Essays on the Conflict of Laws, Op.cit.*, p 211.

164- Graveson, R.H., *Conflict of Laws. Private International Law, Op.cit.*, p 68.

165- De Nova, R., *Loc.cit.*, p 505.

theory should not be denied.[166] In other words, the technique used by Sir Herbert Jenner represents an inspiration for a later cases especially in *Re Annesley* and in the decision of judge luxmoore in *Re Ross*.[167]

III)-It is also believed that six years after the decision of *Collier* v *Rivaz*, Sir Herbert Jenner applied renvoi in the case of *Frere* v *Frere*.[168] The legal matter in this case was a question of the formal validity of will made in English form by a British citizen domiciled in Malta. The decision of the court advocated the validity of the will because according to the law of Malta, a person who is domiciled in Malta and makes a will outside Malta will be considered as formally valid if it is done according to the forms required by the *lex loci actus*.[169] According to experts the court of Justice in Malta would recognize the validity of will made outside Malta if it was made in accordance with *the lex locis locus*. In other words English conflict rules applied the *lex loci domicilii* whereas Maltese private international law, according to experts, applied the *lex loci actus*.[170] Althought the will should be attested by five witnesses according to Maltese law it was held that the will of movables or immovables made by a Maltese subject will be held as valid in Malta if it was made according to the place of its execution.[171]

According to the reasoning of judge Herbert Jenner Fust, it can be said that the case of *Frere* v *Frere* advocates the application of renvoi.[172]

IV)-Chronologically, before the discussion of the French *cour de cassation* previous cases must, therefore, be not be discussed.[173] In fact, one cannot deny

166- See Cheshire & North, *Op.cit.*, p 66.

167- [1930] 1 Ch. 377; See Falconbridge, J .D., *Essays on the Conflict of Laws, Op.cit.*, p 145.

168- (1847) 5 N.C. 593; Cheshire & North, *Op.cit.*, p 67.

169- Sir Herbert Jenner, in the Prerogative court of Cantebury, uphold the will made in 1826 by J. Hookham. See Bate, J.P., *Notes on the Doctrine of Renvoi in Private International Law*, London, Stevens & Sons, Limited, 1904, p 11; Falconbridge, J.D., *Essays on the Conflict of Laws, Op.cit.*, pp 147-148.

170- See Mendelssohn- Bartholdy, A., *Op.cit.*, pp 67-69.

171-In his will, however, he was attested by three witnesses. See Schreiber, E. O., " The Doctrine of the Renvoi in Anglo -American Law" 31 *Harv. L. Rev.*, (1917-1918), pp 541-542.

172- Falconbridge, J.D., *Essays on the Conflict of Laws, Op.cit.*, p 147; See Mendelssohn-Bartholdy, A., *Op.cit.*, pp 67-69; See *Infra.*, Chapter 3, Section 1, p 136.

173- Maury, J., *Loc.cit.*, P 519, Note 4.

decisions of renvoi before *Forgo*'s case during the nineteenth Century and more precisely in Continental countries. As a matter of fact it has been indicated that in those countries renvoi from Prussian law to the law of Holland was refused by the court of Guelderland in 1856. A bite later, in 1861, came the case of Lübeck court.[174] It has been claimed, in this context, that if renvoi means the reference to the whole law of the foreign country and not only to its substantive rules, there are indications which prove that taking foreign conflict rules into account did not start from *Forgo*'s case but it can also be found in the decision of 21 Mars 1861.[175] In this case the supreme tribunal of Germany, which had its headquarter in Lübeck, applied the law which was indicated by conflict rules.[176] In fact, throught the judgment of Lübeck court in *Krebs* v.*Rosalino*[177] the court decided that the case should be resolved exactly as if it had been resolved by the law of the domicile of the deceased. It means that if the conflict rules of the forum refers to the *lex domicilii* this reference must be considered as a whole reference, i.e., a *Gesamtverweisung*.[178] Besides, the Appelate court said that if there is a reference from Mainz choice of law rules, as a last domicile of the decedent, to Frankfurt law, as the law of his nationality, the court should, therefore, accept and respect this reference and not refuse it. [179]

It is not necessary to go into details but it is worthy to quote some of the reasoning of the Lübeck court at that time in which he states:[180]

174- O.A.G. Lübeck, 21 Mars 1861; See in this context Bate, J.P., *Op.cit.*, p 24

175- *Krebs* v. *Rosalino*, Appeal Court of Lübeck, 1861, *Seuffert' s Archiv.* 14, N`º 107.

176- Vitta, E., " Cours Général de Droit International Privé" *Loc.cit.*, p 203, Note133.

177- Here are the fact; the so called *Krebs*who are brothers claimed, according to the law of Mainz, where their mother is said to be domiciled at the time of her death, a part of her estate. Frankfurt law, however, claims the application of its law because their mother did not receive an authorization for that and also she did not loose her citizenship, which means that she is still considered as a national of Frankfurt. For more details see De Nova, R., *Loc.cit.*, p491.

178- Graveson also believes that the Lübeck court of appeal was dealing in *Krebs* v *Rosalino* with problem of renvoi. Graveson, R.H., *Conflict of Laws. Private International Law, Op.cit.*, p 65.

179- See Juenger, F.K., *Loc.cit.*, p 197

180- As quoted from De Nova, R., *Loc.cit.*, pp 492-493, My emphasise.

"If the court is ordered to decide a case of succession according to the laws in force at the domicile of the decedent, the reason for this rule can only be that it is considered right to apply those legal provisions to which the estate of the decedent was subject when he died...likewise, a court, when it has to apply a foreign law, must also take into account the fact that law exempts from the impact of its own rules on succession a given class of persons, namely those who, although domiciled in that country, are foreigners, and directs that they be judged according to their national law. If the principle whereby the *lex domicilii* applies, is followed faithfully, as it should be, the law which in force at the domicile of the deceased should be applied in its totality, and the said succession should consequently be treated as it would have been if it had fallen to the courts of the domicile to deal with."

What the writer finds more remarkable, first of all, is the divergence of the law between Mainz and Frankfurt which is a difference of the conflict rules concerning succession. In fact, Frankfurt law, which represents a German Common law, applies the law of domicile of the deceased whereas the law of Mainz, which is of a French origin, applies the national law of the deceased who has a domicile of fact.[181] Secondly, the last sentence of the Lübeck court can remind the reader of an earliest reasoning used by an English judge in the case of *Collier* v. *Rivaz*.[182]

V)-*Goods of Lacroix*[183] has also been considered as a renvoi case in that it ignored *Bremer* v. *Freeman* decision and returned, however, to *Frere* v. *Frere*.[184] This case is also dealing with the formal validity of will but the difference is that this case occurred after the passing of Lord Kingsdown's Act in 1861, which allows and recognizes many forms.[185] Due to the fact that *Bonis Lacroix* came after the passing of Lord Kingsdown Act both wills made in

181- *Ibid.*, pp 491-492.

182- *Ibid.*, P 496. In discussing the double renvoi theory Mr Wolff refers first to the reasoning of Sir Herbert Jenner and then to the appeal lûbeck court. Wolff, M., *Op.cit.*, p 195, Note 7.

183- (1877) 2. P.D.94

184- Mendelssohn-Bartholdy, A., *Op.cit.*, pp 71-72, 75.

185- Falconbridge, J .D.,*Renvoi in New York and Elswhere, Loc.cit.*, pp 712-713.

France by British subject were admitted to probate.[186] The reasons for such recognition is that the will and a codicil were allowed probation in England because they were made in English form according to French conflict rules. The holographic codicil, however, was allowed probation because it was made according to French substantive law.[187]

Besides, it has been stated that in the case of *Goods of Lacroix* the reference to the law of domicile means the application of both its internal and private international law as it happened in the case of *Collier* v *Rivaz.*[188] According to others this case represents a renvoi case and the meaning of the word French law in the judgment should be interpreted as French private international law.[189] This leads Albrecht Mendelsohn to presume that " In the *Goods of Lacroix* is another decision in favour of renvoi, but...does not give any reasons for it, ignoring *Bremer* v *Freeman.*"[190]

VI)- The appearance of renvoi in the nineteenth Century is not isolated from the existence of different legal systems which differ not only in their substantive rules but also in their choice of law rules. This is what happened, indeed, in France before the French *cour de cassation.*[191] According to the facts of the famous *Forgo*' s case[192] *François Xavier Forgo* the Bavarian child ,who was illegitimate, died intestate at the age of 68 years old leaving moveables succession to which were a matter of dispute between collaterals of his mother and the French treasury. The former claim the right of succession under

186- The decceased made two wills one according to French form and the other according to English form . The latter was admitted to probate because it was made according to the *lex loci actus*, i.e., the place where it was made. See Dicey & Morris, *Op.cit.*, p 78; Morris, J.H.C., *The Conflict of Laws*, 3rd edition, London, Stevens & Sons 1984, p 472. For the required formalities according to this Act See *Infra.*, Chapter 3 Section 1 p 205 footnotes 540.

187- Falconbridge, J.D.," Renvoi in New York and Elswhere" *Loc.cit.*, p 713

188- Cheshire & North, *Op.cit.*, p 66, note 15.

189- Mendelssohn-Bartholdy, A., *Op.cit.*, pp 71-72.

190- *Ibid.*, p 75.

191- Cheshire & North, *Op.cit.*, p 60.

192- *Heritiers Forgo*, v. *Administration Des Domaines.*[1875] Dalloz 1.343 (note); [1875] Sirey 1.409 (note); *Administration des Domaines* v. *Heritiers Forgo.*[1879] Dalloz 1. 56 (note), [1878] Sirey 1.429 (note); *Heritiers Forgo Dichtel* v. *Administration Des Domaines* [1882] Dalloz 1.301 (note); [1882] Sirey 1.393 (note Labbé).

Bavarian law because *Forgo* did not acquire a legal domicile according to article 13 of the French civil code.[193] To be more specific the controversies of his succession was between the Bavarian law and the code of Napoleon , i.e., whether his succession should be distributed in accordance with the law designed by Bavarian system of private international law.[194] Furthermore, the French *cour de cassation* had also to find out whether the natural child was domiciled in France legally or in fact. The consequence of that is important because applying the French domestic law as the law of the domicile of the deceased will deprive *Forgo*'s natural sister and brother from succession.[195] The application of the domestic law of the domicile, however, leads to the rejection of the French Treasury claim to be entitled to his succession. Due to the fact that this case knew different judgments throughout different stages from 1874 to 1882, the discussion of those decisions, therefore, will be cited chronologicala order.

1)-The court of Pau dismissed the action of plaintiff, who claimed the right of successions under Internal Bavarian law that gives the same right to both legitimate and illegitimate child in succession. In fact, this court decided in 11 Mars 1874 that French law was applicable on the ground that moveables succession are governed by the law of the domicile of the *cujus*..This decision, however, was quashed by the *cour de cassation* in 5 May 1875[196] on the ground that *Forgo* has never had a legal domicile in France and Bavarian law, therefore, should be applied as the law of his domicile.

2)-The Bordeaux court of appeal decided in 24 May 1876 that internal

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193- Anton, A.E., *Op.cit.*, p 56.

194- See Francescakis, P.H., *La Théorie du Renvoi et les Conflits de Systèmes en Droit International Privé*, Paris, Sirey,1958, p 3.

195- The reason for that is French law at that time,i.e., before the law of 3/1/1972, did not recongnize a right of succession of an illegitimate child if he is not a mother, brother or a father. See Soulaiman, A.A., *Op.cit.*, p 47.

196- *Clunet*, 1875. 357; Cass.civ., 5 Mai 1875, S., 1875, 1. 409; D. P. 1875, 1. 343; The decision of the French *cour de cassation* was that *Forgo*,who died intestate leaving moveable in France, was not legally domiciled in France because he did not receive a governmental authorization according to article 13 of the French civil code. The distribution of his estate, therefore, should be done according to his domicile of origin ,i.e., Bavarian law.

Bavarian law was applicable as the law of domicil of origin by which it gave the right of succession to the plaintiff, i.e., the collaterals. The decision was quashed for the second time by the *cour de cassation* in 24 June 1878[197] because the court applied Bavarian internal law and not its conflict rules which refer the matter to French law as a law of the domicil of fact of the deceased.

3)-The matter was referred to the Appeal court of Toulouse which accepted the process of renvoi and applied French law in its decision of 22 May 1880.[198]

4)-The last step of *Forgo*' s case was by the refusal of the *chambre de requêtes* in 22 February 1882 of Forgo collaterals' claim that the Toulouse Appeal court applied Bavarian conflict rules without consulting its internal rules.[199]

It can be seen in this case that both countries used the same connecting factors but they differ in their results.[200] The outcome of that was the acceptance of the French *cour the cassation* of renvoi from Bavarian law. On the whole the nine years of struggle of the French *cour de cassation* led to the adoption of renvoi by French legal system which represents a constant of the French jurisprudence.[201]

As indicated above, view of scholars differ upon the origin of renvoi appearance. There are, in fact, those who believe that the application of renvoi started from *Forgo's* case whereas others refer to previous cases.[202]

197- Cour de Bordeaux, 24 Mai 1876, S. 1877, 2. 109; Cass.civ., 24 Juin 1878, S. 1878, 1. 429, D.P.1879, 1. 56. The decision of the French *cour de cassation* in June 24, 1878 contredicted the above decision supporting the claim of the French treasury that French law is applicable to his succession because from Bavarian law point of view succession of moveable is governed by the law of the domicile in fact of the deceased or by his habitual residence.

198- S.1880,2. 294; D.P.1881, 2. 93.

199- S. 1882, 1. 393, note Labbée; D.P. 1882, 1 304.

200- Munro,C.R., "The Magic Roundabout of Conflict of Laws", *The Jur. Rev.*, Part 1, (1978),. p .66 See in this context *Infra.*, Chapter 2, Section 1, pp 68-69, footnotes 81.

201- For discussion of the different steps of the French court in *Forgo* case. See Derruppé, J., "Etude Théorique du Renvoi", Fasc. 532-A, 1984, *Juris-Classeur de Droit International Privé* (1987). p 3; See also Maury, J., *Loc.cit.*, pp 519-521; Falconbridge, J.D., *Essays on the Conflict of Laws, Op.cit.*, pp 136-138; Soulaiman, A.A.,*Op.cit.*, pp 47-48.

202- In fact Mayer Believes that renvoi at first degree was accepted for the first time in

Sub-section 2:-Different elements that have contributed to the emergence and the development of renvoi. It has been claimed that renvoi represents a product of the nineteenth Century.[203] The question which calls for consideration, first of all is why scholars have considered the renvoi theory as a product of a precise Century and not a process that might have been arisen since the manifestation of private international law itself. Bearing in mind that renvoi is a vague issue and may arise in many areas of private international law, and more important it concerns the whole conception of private international law. In fact, Mr Hans Lewald' s view, in this context, is worth quoting in which he considers renvoi as "...un sujet qui... touche aux bases même de notre science influe et s' etend sur toutes les matières speciales...comment se fait-il alors que les siècles précédents aient presque totalement ignoré ce problème."[204]

1)-To understand the reasons for the emergence of renvoi the reference must not be only restricted to the two different legal systems but more important it should include the movement of codifications that have started since the eighteenth Century.

A more precise answer to the previous question is well stated by John Pawley Bate who assumes that "In the earlier days of the science, however, the rules of private international law were, in theory at any rate, uniform; they were conceived of as constituting universal law adopted by all individual systems *ex comitate*."[205] This scholar goes on to admit that " in such circumstances there could be no renvoi question."[206]

As indicated above, although conceptions and methods of private international law differ from one school to another they had one common element which is the claim of the universality of the conflict rules. In fact,

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Forgo case. Mayer, P., *Op.cit.*, p 191; De Nova, R., *Loc.cit.*, p 486.

203- Ehrenzweig, A.A.,1967, *Op.cit.*, p 141.

204- Lewald, H., " La Théorie du Renvoi" , *Loc.cit.*, p 519.

205- Bate , J.P., *Op.cit.*, p 3.

206- *Ibid.*

scholars of the different schools tried to give solutions of universal application, i.e., to establish a universal doctrine of conflict rules which should be applied irrespective of the place where the dispute might arise.

In the nineteenth Century, however, uniformity is said to be "...impossible ... even as an ideal. Fundamental conceptions began to diverge...domicile ceased to be the universal criterion, Nationality being, adopted by many systems". The outcome of such divergence, therefore, ".. made the renvoi question possible."[207]

It can be said that the hope of the universality of the conflict rules received a revolution from the movement of the codification by which conflict of laws were nationalized by the process of legislation and States, therefore, began to establish their own code of conflict rules.

Concerning the movement of codification, it should be noted that this movement did not start in the nineteenth Century but there is indication which proves that it took place before that time. Chronologically, the reference will be to the earliest legislative conflict rules included in the *Codex maximilianeus Bavaricus civilis* of 1756, and soon after that code came the Prussian general code in 1794.[208] Down to 1804 there was a promulgation of the famous French civil code followed by the Austrian civil code of 1811 and so on.[209]

From that time the revolution of the codification began to expand to other countries by the influence of the French civil code, such as, the Netherlands code of 1829, the Italian code of 1856 renewed by codes of 1938 and1942 and the civil code of Germany of 1896. In the twentieth Century many countries have started the promulgation of their civil codes by reserving articles which deal with private international law, such as, the civil code of Czechoslovakia in 10 April 1948 and the Algerian civil code of 1975. In Common law countries, such as, Great Britain it can be referred to the promulgation of statutes[210] which

207- Bate, J.P., *Op.cit.*, pp 3-4.

208- The Prussian civil code, which contains many paragraphs concerning Private International Law in its introductory part, represents the first continental civil code. See Gutzwiller, M., *Loc.cit.*, p 333.

209-*Ibid.*

210-Wills Act of Lord Kingsdown of 1861, Marriage (Scotland) Act 1977, British Nationality Act1981, Family Law Act 1986.

contain rules of private international law. In the United States of America these rules can be found in the so called Restatements which are considered as an alternative to a civil code.[211]

It is important, therefore, to relate the discussion of renvoi, for instance, to article 13 of the French civil code. In fact , the content of that article, which allowed the foreigners to enjoy all civil rights if they had received an authorization from the government , and later from the King to establish their domicile in France, created a problem which had faced courts at that time.[212] This problem is well clarified by both Continental and Common law cases, such as, *L'Affaire Forgo, Collier* v *Rivaz.* and others. Concerning the former case the French civil code in its article 768[213] with article 13, which are both opposed to the *codex Maximilianeus Bavaricus civilus* of 1756, are a pure example of this movement. [214]

To answer the question why the nineteenth Century represents the time where the manifestation of renvoi was possible it should be borne in mind that this is due to the fact that the divergence between the law of different countries was bigger. For instance, in matter of personal law succession was not subject to the same rule, i.e., some countries use the nationality principle whereas others, prefer the application of the domicile as the case of *Forgo illustates* it.[215]

Generally, it can be indicated that the emergence of renvoi should not be discussed in isolation from the movement of the codification of private international law which is, in fact, an important element that contributed to the appearance of the renvoi theory.[216]

211.- First Restatment 1934 and the second Restatment of 1973. See Wolff, M.,*Op.cit.*, pp42-46.

212- Falconbridge, J.D., *Essays on the Conflict of Laws, Op.cit.*, p 117.

215- This article gives right to the French treasury.

214- The dispositions of *codex Maximilianeus Bavaricus* was applied by the French *cour de casation* thorough this case. See Schwind, F., *Loc.cit.*, p 94; Lewald, H., "Droit International des Successions" *Loc.cit.*, p 28.

215- Renvoi appeared in a moment where a divergence between the two legal system began to extend. More important, the French civil code contributed directly to that stage by the substitution of nationality principle for the Domicile in article 3 of the code of 1804. For further discussion see. Meijers, E.M., "La Question du Renvoi" *Loc.cit.*, p 202.

216- Professor E.M. Meijers has pointed out that in order that the renvoi issue might

2)-In answering why renvoi has been considered as a product of the nineteenth Century the contribution of literature must also be taken into consideration to comprehend its developments. It can be said, in this context, that what makes the torch of the theory of renvoi are the many discussions that have emerged between scholars in different legal systems, and more important is the division among scholars themselves into two camps; pro-renvoiists and anti-renvoiists. In fact, the decision of the French *cour de cassation* in *Forgo's* case led to the emergence of controversies on renvoi theory in that a huge literature has been noticed to discuss renvoi just after its discovery.[217] As a matter of fact, statistics show that only in 1913 the number of scholars who treated renvoi exceeded two hundred writers.[218] Concerning the Continental contribution , this is well illustrated by Labbe's article who started the discussion of renvoi in *Forgo*'s case and in other articles.[219] Moreover, if Meijers's conclusion indicates that renvoi was less treated because it appeared rarely and also its advocates were few in its earlier stage.[220]

As will be discussed later renvoi have led to the division of authors and lawyers into two camps [221] In fact soon after the last decision of the French *cour de cassation* renvoi have found acceptance among scholars and was advocated by lawyers not only in France but also outside Europe. In a general way renvoi imposed its idea and conception through the pro-renvoiists camps which afterwards led to its introduction into the statutory private international law where it appears for the first time in Hungarian legislation[222] and then in

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arise there should be the existence of two legislative systems that have different rules of laws by which the same issue is resolved differently. *Ibid*.,p 193.

217 Derrupé, J., "Etude Théorique du Renvoi", *Loc.cit*., p 3

218- Lewald, H., "La Question du Droit International des Succesions", *Loc.cit*., p 27.

219- Labbé, *Du Conflit Entre la Loi Nationale du Juge saisi et une Loi Etranger Relativement determination de la loi applicable a la Cause* (1882) 12 *Clunet* 5; See also Philonenko, M.,"L'Affaire Forgo (1874-1882)- Contribution à l' etude des Sources du Droit International Privé" 59 *Clunet*, (1932), p 281. Meijers, E.M.," La Question du Renvoi" *Loc.cit*., p203.

220- Meijers, E.M., *Ibid*., p 200.

221- See *Infra*., Chapter 2, Section 3, pp 81-108.

222- See Article 108 of the Hungarian law of December the 9th 1894.

Art 27 of the German civil code of 1896.[223]

Overall, the literature was not the last element which have contributed to the development of renvoi but there is also the concern of International Conventions which show the deep divergence between their members concerning its mechanism.[224]

Section 4:- Renvoi and the conflict of conflict laws.

Sub-section 1:-Types of conflict that result from the conflict of conflict rules. If the conflict rules are opposed to the substantive rules, the former , however, can be divided into three types which are unilateral conflict rules, bilateral conflict rules and multilateral conflict rules.

First, the technique known as the unilateral rules means the application of the *lex fori* ,i.e., the legislature may determine , in this context, the field of the application of its own law.[225] In fact, in Continental countries, for example, articles 10 and 13 of the Algerian civil code[226] and article 3 of the French civil code of 1804 are cases in point. In common law countries, however, unilateral conflict rules can be found in some English and Scottish statutes, such as, the Marriage (Scotland) Act of 1977.

Second, the bilaterality of the conflict rules, however, means the application of either the *lex fori* or foreign law, such as, Article 11 of the Algerian civil code.[227]

As an example of the third type, however, is the English wills Act of 1963 which provides several multilateral conflict rules. [228]

This distinction between unilateral and bilateral conflict rules seems to be

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223- See De Nova, R., *Op.cit.*, p 511.

226- See *Infra.*, Chapter 2, Section 3, pp 125-126, footnotes 340-341.

225- See Gothot, P., *Loc.cit.*, p 1.

228- For instance article 13 states that "...Si l' un des deux conjoints est Algérien, au moment de la conclusion du mariage, la loi algérienne est seule applicable, sauf en ce qui concerne la capacité de se marier."

227- According to this aricle" les conditions relatives à la validité du mariage sont régies par la loi nationale de chacun des deux conjoints."

228- For discussion see Dicey & Morris, *Op.cit.*, pp 15-18. For discussion of this Act see *Infra.*, Chapter 3, Section 1, pp 173-174.

very important, on the ground that while those types of conflict can be found in the conflict of laws, it has been maintained that in conflict rules of jurisdiction the rules are only unilateral. [229] It can be asked, therefore, if in conflict of laws, conflict rules are opposite to the substantive rule, does the former exists in the conflict of jurisdiction?[230] Scholars' views are also divided, in this context. Generally it has been claimed that if renvoi is accepted in conflict of laws issues its application concerning judicial competence, however, has been rejected by both doctrine and jurisprudence. [231] This has been justified by the fact that the conflict rule does not give a Judicial competence but a legislative competence.[232] In other words, renvoi is said to have no relation with judicial competence for the simple reason that the state is competent not because of renvoi from another state but for public order consideration to avoid any deny of justice.[233] From that reasoning it can be said that whether renvoi is peculiar to the conflict of conflict laws or it may emerge also in the conflict of jurisdiction is a controversial issue.[234]

Furthermore, it has been shown above that different countries have different conflict rules and use different connecting factors, such as, nationality and domicile. İn other words, as private international rules are not identical differences between different legal systems lead automatically to the emergence of two types of conflict; positive conflict and negative conflict.[235] In the former, of course, the judge applies its own law ,i.e., the preference of the *lex fori* when both the forum and the foreign laws claim competence in the application of their own laws. The solution in the positive conflict is related to the principle of

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229- Isaad, M., Volume I, *Op.cit.*, pp 23-24.

230- See Loussouarn, Y et Bourel, P., *Op.cit.*, p 553.

231- Potu, E., *La Question du Renvoi en Droit International Privé*, Paris, Juris-Classeurs,1913, p 269.

232- Mayer, P., *Op.cit.*, p.194.

233- Fragistas, Ch.N.,"la Compétence Internationale en Droit Privé,"*Recueil des cours* Volume III , Tome 104, (1961), pp 190-191.

234- See for instance Scholars' controversies upon the case of *Re Trufort* (1887) 36 Ch.D. 600,*Infra.*, Chapter 3 Section 1, p 137 and Section 2, p 202.

235- Lewald, H.," La Théorie du Renvoi" *Loc.cit.*, p 27.

sovereignty in that French judge, for instance, should ignore the foreign law and apply French law if he is seized of the matter. If an English judge, however, is seized of the matter he has to ignore French law and applies English law. In the latter, however, i.e., a negative conflict the diversity of the connecting factors of each law leads to the attribution of competence from one legal system to another.[236] In fact, the negative conflict has been interpreted as a conflict of systems in which the forum system may refer to the foreign one which in its turn will refer back the competence to the forum or to a third system.[237]

Sub-section2: Relationship between negative conflict and renvoi. The question that may arise, therefore, is why renvoi is related to the negative and not to the positive conflict? . This has been suggested by the fact that the attitude of the two jurisdictions in the latter conflict is positive whereas in the former it is negative [238]and renvoi application in this kind of conflict is to resolve such conflict.[239] Accordingly, the correlation between the negative conflict and renvoi is clear[240]in that the consensus of scholars is that renvoi appears in the negative conflict because it is this kind of conflict that gave birth to renvoi.[241]

Section 5:- The concept and the meaning of the theory of renvoi.

Sub-section1: Definition. There are two important questions that must be asked concerning the reference to the foreign law. The first is what should the judge do when he is referred to a foreign law. The Second one is why there is a reference to foreign conflict rules. The latter , however, will be discussed later.[242] Concerning the former question, should the judge apply only the

236- Munro, C.R., *Loc.cit.*,p 67.

237- Francescakis, P.h., *Op.cit.*, pp 79, 81-82.

238- Munro, Colin. R., *Loc.cit.*, p 67.

239- *Ibid.*, p 84.

240- Derruppé, J., *Loc..cit.*, p 2.

241- Lewald, H.," La Théorie du Renvoi" *Loc.cit.*, P 27.; See also Ferrer-Corria, A., *Loc.cit*, p 145; Von Overbeck., A., *Loc.cit.*, pp 169-170.

242- See *Infra.*, Chapter 2. Section 1, sub-section1, p 55 and sub-section 2, pp 82-98.

foreign internal law or should he refer to the whole law of the foreign country. In other words, what is the meaning of the law of the country in view of the forum law. Does it mean foreign domestic law or foreign conflict rules? If the Latter one is taken into consideration, it can be said that the case is dealing with renvoi.[243] The former, however, means the exclusion of any form of renvoi. Furthermore, conflict rules of the forum may refer to the conflict rules of the foreign law which in its turn may refer the solution to the legal issue backward to the forum or forward to a third country.[244]

Renvoi can be defined, therefore, as a theory that means the reference to the foreign law by applying its private international rules.[245] From this legal definition, it seems to the writer that renvoi represents a mechanism that works in Presence of two or more states. Its engine operates by the power of the conflict rules and stops by the brake of the substantive rules.

Sub-section2:- Problem of terminology. It must be noticed, in this context, that the difficulty and the complexity of private internationl law is general and extends to its whole body. For example, expressions that are used to label the issue of characterization are not uniform. Even the title of this discipline has not escaped from this clash of vocabulary, which means that there is not a universal consensus on terminology.[246] Renvoi itself knows this pluralism of vocabulary between English, French, Italian, German and Arab scholars. If the dispute, as indicated above, starts from the first page it can also be said that the ambiguitiy of renvoi mechanism extends even to its vocabulary. F.K Juenger 's remark, in fact, is clear enough to justify the fact that "...Words such as Renvoi,...Characterization hardly facilitate discourse...Worse yet, the expression used to describe these phenomena are neither uniform nor consistent."[247]

243- Castel, J.C., *Conflict of Laws, Cases. Notes and Materials*, 3rd edition, Toronto, Butterworths, 1974, pp 42-44.

244- See *Infra.*, Chapter 2, Section 1, sub-section 2, pp 75-78

245- See Soulaiman, A.A., *Op.cit.*, p 49. See *Infra.*, Chapter 2, Section 1, sub-section 1, pp55-56.

246- Juenger, F.K., *Loc.cit.*, pp 134-135, See *Supra.*, p 5 footnotes 2.

247- Juenger, F.K., *Ibid.*, p 134.

Besides, to analyse Bernard Audit's point of view that renvoi has been considered as a universal term,[248] and to know to what extent this claim is true, it is useful, therefore, to refer not only to Continental countries but also to Common law countries.

More precisely, the application of renvoi or its rejection is legally called in German terminology as *Gesamtverweisung* or *Sachnorwenverweisung*. The former means the application of the whole law of the foreign system whereas the latter means the application only of its internal law.[249]

The terminology, therefore, might be divided into two groups. The first group includes conceptions, such as, single or partial renvoi, remission, transmission, renvoi at first degree, renvoi at second degree, imperfect renvoi, respective renvoi , renvoi remittal *Ruckverweizung*, *Weiterverweizung*, *Verwijzing* , *Rinvio indietro*, *Rinvio altrove*[250] and *El ihala el Ouhadia.*[251] The second group, however, contains conceptions, such as, double renvoi, foreign court theory, total renvoi, total reference, integral renvoi, perfect renvoi, true renvoi, ping pong doctrine,[252] and *El ihala el Mouzdawija.*[253]

As you can see, the different names proposed to label renvoi have led scholars to distinguish between renvoi as a part of each legal system. In fact Rodolfo de nova has pointed out that "The two types of renvoi are also labelled...' English' renvoi as against 'continental' renvoi."[254]

It is clear that from *Collier* v *Rivaz* down to *Forgo*' s case, renvoi use has

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248- Audit, B., *Loc.cit.*, p 234.

249- Meijers, E.M., *Loc.cit.*, p 192; *Gesamterverwisung* in its turn is divided into two types, *Ruckverweizung* which means remission to the law of the forum and *Weiterverweisung* which means transmission to a third law. See Ago, R., " Règles Générales des Conflits de Lois" *Recueil des cours*, Volume IV, Tome 58, (1936), p 382. See *Infra.*, Chapter 2 Section 2, sub-section 2, pp 75 -78.

250- Falconbridge, J.D., *Renvoi in New York and Elswhere, Loc.cit.*, p 717; Rigaux, F., *Op.cit.*, p 301, note 1; Von Overbeck, A., *Loc.cit.*, p 127; P.H. Francescakis, *Op.cit.*, p 80, note 1; Falconbridge, J.D., *Essays on the Conflict of Laws, Op.cit.*, p 167; Derruppé, J., *Loc.cit.*, p 3; See Maury, J., *Loc.cit*, p 521.

251- This is the arabic meaning of single renvoi.

252- See for example Castel, J.C *Op.cit.*, p 44; See also Wolff, M., *Op.cit.*, p 195.

253- This arabic translation connotes the double renvoi theory.

254- De Nova, R., *Loc.cit.*, p 502. Originally emphasised.

spread from French jurisprudence to other legal systems and civil codes. But also the term of renvoi as a French terminology has been adopted by English and American scholars.

It should also be noted that renvoi is renvoi but the mechanism differs. In fact, courts in both Continental and Common law countries agree on the existence of single renvoi and double renvoi and fortunately not treble renvoi. Thus, the mechanism is within the two.

To sum up renvoi has been considered as a universal phenomenon that was discovered by jurisprudence and since that time its mechanism and terminology have been used by many courts and introduced in different civil codes. Whatever is the conception and the terminology chosen by the court renvoi is renvoi. In fact, whatever is the tendency used there is still a mechanism of references and contra references. To put it briefly driving on the left or on the right does not prevent from going backward or forward.

Sub-section 3: Some preliminary examples. Before discussing the theory of renvoi and its controversies in different legal systems it may be useful to give some preliminary and hypothetical examples which will be later followed by factual cases.

A)- Assuming that the same scenario of *Re O' Keefe*' s case arises before an English court with a slight differences concerning the countries involved. Supposing, therefore that English court is seized of matter concerning succession of a British citizen who died intestate in Algeria leaving assets situated in England. Taking into consideration that X is a British deceased whose domicile of origin is in Scotland. It follows that as far as Algeria repudiates the renvoi theory, the applicable law will be undoubtedly the law of Scotland if the court accepts the survival of the deceased' s domicil of origin.

Supposing now that the country of domicile, which has been chosen to be Algeria, will change its position and accepts the theory of renvoi(which is not the case at the moment). The result will be the application of the Algerian law as the law of the last domicile of the deceased. Is it acceptable to say that this change of

position will have a negative consequences upon foreigners, who die domiciled in a moslem country, on the ground that succession in this country is considered as a matter of family law and is governed mainly by Islamic religious principles?[255]

B)- Assuming that in matter of contract X and Y choose expressly the law of a country Z to govern their contract bearing in mind that renvoi in contractual obligation is excluded. The question that arises is if the internal law of the country Z must be applied without its conflict rules, is it logical that the interest of the contracting parties is protected only in contractual obligations by excluding any form of renvoi in this field[256] whereas its mechanism is still adopted in other matters, such as, family law and succession? It may, however, that the cases are significantly different.

255- See *Infra.*, Chapter 3, Section 1, sub-section 2, pp 161-165.

256- For more details see *Infra.*, Chapter 3, Section 1, sub-section 1, pp 167-172.

Remarks:-

1)-Before concluding this chapter it should be noted that the reference to the controversies among scholars concerning the nature of private international law, i.e., whether private international law is national or supranational is very important to understand the emergence of renvoi and its future in this discipline. As a matter of fact, it has been remarked that if conflict rules are considered as supranational rules, i.e., above all juridical norms, the consequences is that renvoi will be excluded according to this legal thought.[257]

2)-The difference of conceptions and tendencies in different legal systems, or within one legal system, have led to the adoption of the unilateralist[258] and multilateralist approaches. As a result, it might be asked which of these approaches has predominance and whether the preference should be given to multilateralism, unilateralism or the substantive law approach?

A more remarkable concern about the emergence of the substantive law approach is best illustrated by Juenger, F. K, who has argued that "...What could we teach and write about once the entire field of multistate transactions disappears into the black hole of substantive law."[259]

It can be noticed that the consequences of multilateralism, practically, can be seen through the emergence of certain problems in private international law. In this context, it seems worth quoting F.K. Juenger' s view in which he emphasises that "..The conceptual predicaments of renvoi, characterizatio...are but symptoms of the inability of multilateralism to achieve its objectives...Unilateralism does no better...neither of the two orthodox approaches guarantee predictability and consistency in the adjudication of multistate

257-. See for example, Meijers, E.M.*Loc.cit.*, pp 207-208.

258- Among the various unilateralist approaches there are, for example,"lois de police" and "mandatory rules" which may be found even in International Conventions. See in this context article 7 of the E.E.C. Convention on the applicable law in contract, Rome 19 june 1980; See also the Hague Convention on the law applicable to Agency. Audit, B., *Loc. cit.*, p 249; For discussion see Von Overbeck, A.E., *Loc. cit.*, pp 177-185; For the overriding statutes, see Dicey and Morris, *Op.cit.*, pp 21-25; Loussouarn, Y., " La Règle de Conflit est-elle une Règle Neutre"*Trav. Comité, Français. dr. in. privé*, Années 1980-1981, Tome 2, (1983), pp 57-59.

259- Juenger, F.K. *Loc.cit.*, p 320.

disputes." [260]

3)- Another important matter which should be considered is that the discussion of renvoi issue must differentiate at least between the idea of renvoi or its phenomenon and that of the theory of renvoi. According to the history of private international law, *Forgo* and *Re Annesley* are an illustration of the renvoi theory. The use of renvoi idea, however, does not start from such cases but it can be noticed in various reasoning before those cases.

4)-The writer would like to draw attention that though the controversy about the origin of renvoi in English jurisprudence has been traced to *Collier* v. *Rivaz*there are, however, those who think that the question of renvoi was raised before that time in *Balfour* v. *Scott*, a case before the House of Lords.[261] In fact, Emile potu considers this case as an origin of renvoi which illustrates the idea that an English judge had to decide as the foreign judge would do, i.e., he had to apply the law of domicil as a whole including its rules of private international law.[262]

260- This scholars also believes that "...We have to leave...with a 'pluralism of method' " *Ibid.*, pp 202, 257.

261-(1793) 6 Brown' s Parliamentary Cases,. 534.

262- Potu, E.,*Op.cit.*,pp 122-123.

CHAPTER TWO

Theoretical Analysis of the Doctrine of Renvoi

Section 1:- Renvoi theory, its conditions and forms.

Sub-section 1:- When does renvoi appear ?

As explained above renvoi arises because of lack of harmony between different conflict rules[1] and occurs as a result of the negative conflict.[2] This chapter, however, will consider the question of how the process of renvoi could technically arises. In other words, this discussion leaves the point of what type of conflict does renvoi appear to examine the question when and how its mechanism occurs?

I)- Global reference to foreign law As indicated at the outset[3] the adoption or repudiation of renvoi mechanism is explained according to German terminology by the situation of either a *Sachnormverweisung* or a *Gesamtverweisung*.

In fact, two possibilities are followed in the interpretation of private international rules. First, the forum may apply either the *Gesamtverweisung* conception, i.e, taking into account the whole foreign law and respecting any form of renvoi made by this choice of law rules to either the forum or a third law. Secondly, he might, however, apply directly the *Sachnormverweisung* conception which leads him to the application of the foreign substantive rules.[4] It follows that the inquiry is whether a reference should be considered as a

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1- See Isaad, M.,*Doit International Privé,* Volume I, Alger, O.P.U. ,1986 , p 164.

2-*See Supra.*, Chapter 1, Section 3 Sub- Section 3, pp 42-43 and Section 4 Sub-section p 48.

3-See *Supra.*, Chapter 1.Section 5 Sub-section 2.

4- Sperduti, G., "Théorie du Droit International Privé", *Recueil des cours*, III, Part 122, (1967) p 224. See also Audit, B., "Le Caractère Fonctionnel de la Règle de Conflit (Sur la ' Crise ' des Conflits de Lois", *Recueil des cours*, III, Part 186, (1984), p 328.

global reference to a foreign law or merely to its domestic law and by maintaining only the former concept that the renvoi issue could arise.[5]

In other words, to confirm the general rule of renvoi which says that both the internal and the conflict rules of the foreign country form the whole law of that system[6] it is only the *Gesamtverweisung* conception which means such global reference.[7]

It should be noted, however, that some scholars are doubtful about the use of the term the "whole law of the country" which in their view cannot, practically, be achieved. According to them the result will be therefore, the application of either the internal or the foreign conflict rules and not both. This is the view approved by Mr Thomas. A. Cowan who has pointed out that there must be a choice between either the foreign conflict rules or its internal laws because the application of each one leads to different results. The reason for such claim is that the application of X internal law does not have the same result as if its conflict rules will have been applied because the latter may lead to the application of either the law of the country X or Y.[8]

II)-Difference in the connecting factors.

A)-Renvoi as a result of the diversity of the conflict rules. As already clarified in the previous chapter[9] renvoi arises because of the diversity of the choice of law rules in different jurisdictions. This is, in fact, the position of

5- See in this context Kahn-Freund, O., "General Problems of Private International Law", *Recueil des cours*, III, Part 143, (1974),p 431.

6- See Westlake,J.,*A Treatise On Private International Law*, by Norman Bentwich, (ed.,), 7 edition, London, Sweet & Maxwell Limited, 1925, P. 28.; Nouveau Répertoire de Droit, Mise A Jour (1980-1987) Jurisprudence Générale Dalloz, Paris (1987), .p 928.

7-The *Gesamtverweisung* concept has been qualified as representing a direct and immediate reference to the whole foreign law in which the judge should consider that law as one and indivisible; Derruppé, J., "Etude Théorique du Renvoi", Fasc. 532-A, 1984, *Juris-Classeur de Droit International*, 7., (1987). Paris, Editions Techniques, p 3 , Sperduti, G., *Loc.cit.*, p 228

8- Cowan, T.A., "Renvoi Does not Involve a Logical Fallacy", 87 *U. Pa. L. Rev.*, (1938-1939). p 39. See Graveson, R.H., *Conflict of Laws, Private International Law*, 7th edition, London, Sweet & Maxwell, 1974, pp 64-65.

9- See *Supra.*, Chapter 1, Section 3 Sub-section 2

many scholars who believe that "...if the choice of law rules of all jurisdictions were identical...the renvoi problem could never arise."[10] In fact, renvoi is due to the diversity of the conflict rules in different legal systems where one legal system may adopt the principle of nationality in personal law whereas the other one favours the use of the domicile principle. As a result of this diversity it has been held that the appearance of the renvoi mechanism represents in itself a conflict of connecting factors[11], i.e., nationality contra domicile and vice versa.

B)-Division of the two contemporary systems between nationality and domicile. As discussed above each category has one or more connecting factors[12] and it is not by chance that the same issue, such as, personal status is governed by different connecting factors, i.e., either domicile or nationality.[13] The general consensus among scholars' views is that in comparative law the division of legal systems, concerning the personal law, between domicile and nationality is the most important divergence.[14] Here it is enough to say that both jurists and legal systems differ widely upon an important question which consists on the suitable connecting factor that regulates best matters of capacity, status of persons and succession. Is it nationality or domicile?[15]

It should be remembred that legal systems in all over the world are divided, according to the principle adopted, into two main camps. This diversity in the connecting factors, therefore, can well be clarified by comparing the two legal systems. Those who adopt nationality as a principle of personal status[16]

10- Von Mehren, A.T., "The Renvoi and its Relation to Various Approaches to the Choice - of- Law Problem", in *XXth Century Comparative and Conflicts Law, Legal Essays in Honor of Hessel E. YNTEMA*, by Nadelmann, Kurt, H., *et al* (ed.,), Leyden, A.W. Sythoff, (1961), p 380.

11- Derruppé, J., *Loc.cit.*, p 2.

12- See *Supra.*, Chapter 1 Section 2 Sub-section3, pp 25-26.

13- Maridakis, G.S.,"Introduction au Droit International Privé", *Recueil,des cours*, Volume I, Tome 105 , (1962), pp.392-393.

14- Batiffol, H., "Principes de Droit International Privé, *Recueil des cours*, Volume II, Tome 97 (1959), p 478.

15- Wolff, M., *Private International law*, 2nd edition, Oxford, the Clarendon Press,1950. p 100.

16- If a person's "civil status" is related to domicile principle, "a political status", however, is indicated by nationality,.i.e., a political link between a citizen and the country that

and those who favour domicile as an opposite connecting factor.[17] As a matter of fact, domicile is the connecting factor of the common law countries[18] whereas nationality, represents the favorite principle for the civil legal systems.

1)-Advantages of the use of domicile principle As personal law is governed by two different principles domicile and nationality, it should be borne in mind that if in common law countries the question is mainly where the person permanent home is[19] in the country of nationality, however, the question is to which state this person (X) belongs politically.[20] To say it differently, in common law countries the personal law of the subject X is the law of his domicile whereas in civil law countries it is based on the citizenship criteria, i.e., the country that X is a citizen.[21] This is why, it is thought, that the adoption of the domicile means the localization of person within the state's territorial Jurisdiction[22] whereas nationality has a political character.[23]

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he has its nationality Cheshire and North, *Private International Law*, by North, P.M., (ed.,), 11th edition, London, Butterworths,1987, p 168; See also Isaad, M., Volume II *Op.cit.*, p 92. my emphasise.

17- If the personal status which is governed in France, for example, by nationality in England, however, it is subject to another criterion which is domicile.See for instance, See Francescakis, P.h., *La Théorie du Renvoi et les Conflits de Syst`emes en Droit International Privé*, Paris, Sirey, 1958. pp 86-87; Derruppé, J., *Loc.cit.*, P16; Nadelmann, K.H., "Mancini's Nationality Rule and Non-Unified Legal Systems, Nationality Versus Domicile", 17 *Amer. J. Comp. L.*, (1969), p 418; Batiffol, H., *Loc.cit.*, pp 488,498. For more details see also Westlake, J., *Op.cit.*, p .23.

18- Domicile is adopted by Anglo Saxon, Scandanivian and Latino American countries.See Graveson, R.H., *Op.cit.*, p 62; Isaad, M.,*Op.cit.*, Volume I, p 134; Nadelmann, Kurt..H., *Conflict of laws: International and Interstate , Selected Essays* by Cavers, D.F., *et al*,, The Hague, Martinus Nijhoff, 1972, p 49.

19- Domicile in English and American conception is said to have the meaning of a legal home. See in this context Graveson, R.H.," The Comparative Evolution of Principles of the Conflict of Laws in England and the U.S.A." *Recueil des cours*, VolumeI, Tome 99.(1960), p 43

20-Anton, A.E., *Private International Law, A Treatise from the Standpoint of Scots Laws*, Edinburgh, W. Green & Son L.T.D, 1967, p 156.

21-See Jaffey,A.J.E.,*Introduction to the Conflict of Laws*, London, Edinburgh, Butterworths, 1988. p 7

22- In addition to using domicile as a connecting factor in conflict of laws, it has also been used "...in some contexts as a jurisdictional link..." See Carter, P.B., "Domicile: The Case for Radical Reform in the United Kingdom," 36 *Int' & Comp. L. Q.*, (1987), p. 714.

23- Francescakis, P.h., *Op.cit.*, p 142.

Isn't it clear enough, therefore, to affirm that the division between the two legal systems occurred not only because of the difference in connecting factors but more important there are other policies that have been taken into consideration. It means that practical and political considerations are taken into account by legislators and the law makers.[24]

For the sake of simplicity and clarity of those considerations domicile principle, therefore, will be discusses in relation to both immigrant countries and non unified systems.

First, if nationality is applicable for a political consideration domicile, however, may be based on economic considerations in order to facilitate the incorporations of the immigrants into the social background of the immigration countries.[25] This is clear enough to maintain that the use of domicile principle by immigrant countries,[26] such as the United States of America and the United Kingdom, represents an advantage for those countries.[27]

It must be noted that the political interest can be seen from both emigrant and immigrant countries. The former, of course, try to keep the link between its citizen and their countries by the nationality principle although they may no longer live in their country of nationality.[28] The latter has as well an interest in that it tries to keep those who came to live or work in its land.[29] From this there has arisen a belief that the application of domicile to personal law by the immigration States and nationality by emigrant States is inevitable.[30]

24- If the conflict rules refer to nationality or domicile concerning matters of personal status their should be definitely a legal poliocy from adopting one of the two connecting factors. See.Lewald, H., "La Théorie du Renvoi" *Recueil des cours*, Volume IV, Tome 29 (1929), p610.

25- See Rabel, E., *The Conflict of Laws, A Comparative study*, 2nd edition, Volume 1, Ann Anbor, University of Michigan,, 1958, pp 162-163.

26- Although France has been considered as an Immigration country it has, however, adopted the nationality principle to govern personal status for political reasons. See Batiffol, H.,*Loc.cit.*, p 441; .Lewald, H.,*Loc.cit.*, p 605.

27- Batiffol, H.,*Ibid.*, pp 509, 511; Wolfff, M.,*Op.cit.*, p 104.

28-The main purpose is to maintain the permanent link between the mother country and its citizen. See Wolff, M., *Ibid.*

29- Maridakis, G.S., *Loc.cit.*, pp 503-504.

30- Batiffol, H.,*Loc.cit.*, p 440.

Secondly, other countries have an interest to adopt the domicile principle known as the countries of a non unified legislation.[31] This is the case, for instance, in the United States of America which consists of different federal States where each State has its own system of law. Great Britain which is composed by Scotland and England too has different system of laws.[32]

Much more important is that nationality has never been introduced in most composite countries.[33] In this context, a major problem arises concerning the determination of the nationality of person who is considered as a citizen of a composite system. The question that might arise before the court is what is the person nationality? This is, in fact, another legal problem that must be solved by judges. As O Kahn-Freund puts it " This...is not where the trouble ends, but where it begins."[34] The general view, however, is that nationality breaks down when the person is said to be a national of a political units.[35] In other words, the national law of a Canadian or a British subjects is "meaningless" in these political units.[36]

While it would seem that, practically, domicile and nationality might be easily determined and applied they, however, represent a problem for judges through the process of renvoi. This is the case when the law of the domicile designs the country of nationality as the applicable law whereas the latter may be a country with a composite systems where the principle of nationality does not work and breaks down. The judge, therefore, must find out the national law of a citizen within this plurilegislative system. As a mater of fact the ambiguities of nationality in non unified systems is not easy or simple to be determined when the country X, for instance, refers the legal matter to the United States of America where there are Fifty one American federal laws.[37] Effectively, British

31-The non unified systems, which have different municipal laws also benefit also from the use of domicile. Wolff, M., *Op.cit.*, p 105.

32- Batiffol, H., *Loc.cit.*, p 509.

33- Kahn-Freund, O., *Loc.cit.*, p 313.

34- *Ibid.*

35-Cheshire & North , *Op.cit.*, p 170.

36- *Ibid.*, p 169. My emphasise.

37- See .Kahn-Freund, O., *Loc.cit.*, p 390

judges, for instance, will be confronting this problem when the process of renvoi leads to the application of the foreign conflict rules which refers the legal issue to a person's nationality. According to their inquiry they have to find out what is the view of that foreign law and then determine the person nationality through the foreign expert witnesses. Their solutions, therefore, will be the substitution of the domicile for nationality.[38]

The question whether the superiority of domicile of origin to nationality is true will be discussed later in relation to the judge judicial inquiry on how to find out the national law of the British subject.[39] By referring to the case of *Re o' Keefe* the solution adopted by the Hague Convention on the conflict of laws relating to the form of testamentary dispositions should be taken into consideration.[40] This Convention which has been ratified by the United Kingdom has not used domicile or habitual residence conception to deal with the national law of non unified system but instead it adopts a new approach known as the most real connection as a connecting factor to determine the law of the testator' s nationality.[41]

2)- Pasquale Mancini and the triumph of the nationality principle As has already been said[42] until the beginning of the nineteenth Century domicile was the universal connecting factor that governed personal law.[43] This principle has been retained by the Common law countries whereas

38-It has been confirmed that domicile is superior to nationality in a country of a non unified systems. If, however, the division in those systems is based on religion or race it will be the superiority of nationality over domicile. Batiffol, H., *Loc.cit.*, pp 529-530.

39- See *Infra.*, Chapter 3, Section 1 Sub-section 1, pp 157-158.

40-Concluded in October 5, 1961.

41- Article 1 (e) says "...if a national law consists of a non unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, by the most real connexion which the testator had with any one of the various laws within that system. See Conférnce de la Haye de Droit International Privé, *Receuil des Conventions* , Edité par le Bureau Permanent de la Conférence, (1951-1977),La Haye, Pays Bas, Martinus Nijhoff, p49.; For discussion see Nadelmann, K.H.," Mancini' s Nationality Rule and Non-Unified Legal Systems, Nationality Versus Domicile"*Loc.cit.*, pp 443,446-447; See also Lalive, P., " Tendances et Méthodes du Droit International Privé (Cours Général)", *Recueil des cours*, Volume II, Tome 155, (1977) p 303.

42- See *Supra.*, Chapter 1, Section sub-section 1, pp 10-11.

43- Historically domicile was the connecting factor admitted universally at the

in the continental countries there was a shift[44] from domicile to nationality.[45]

The adoption of nationality[46] as a principle that determines the personal law of person during the nineteenth century should be related first to article 3 paragraph 3 of the Napoleon code and, then, to the scholar Mancini.[47]

It has generally been agreed that the doctrine of the national law should be referred to Mr Pasquale Mancini the Italian statesman and teacher of Torino University who called for the adoption of nationality as a basis of both private and public international law and considers the personality of law as the principle of the former in personal law and succession.[48] This scholar, in fact, is said to be the primarily responsible for the switch in the connecting factor from domicile to nationality in which the latter governs matters of family law, succession, status and capacity.[49] As a result of the shift from one connecting factor to another

beginning of the XIX Century. Nationality as a connecting factor appeared for the first time in article 3 of the code of Napoleon. See Van Hecke, G., "Principes et Méthodes de Solution des Conflits de Lois", *Recueil des Cours* (1969), Vol I, Tome 126. (1969). p. 532.

44-A switch from domicile to nationality occured, for instance, in the new German civil code.and also in France. Nadelmann,K.H.," Mancini's Nationality Rule and Non-Unified Legal Systems, Nationality Versus Domicile" *Loc.cit.*, p 440

45- Graveson, R.H., *Conflict of laws, Private International Law, Op.cit.*, p 187.

46- If domicile can be divided into domicile of origin and domicile of choice nationality can also be divided into nationality of origin and acquired nationality. Concerning the nationality of origin this is based upon two creterion, the *jus sangunius*,i.e.,the person will have the nationality of his father and *Jus solis* which means that the person obtains the nationality of the place or the territory where he was born. See Soulaiman, A.A.,*Notes en Algerian Private International Law"* Alger, O.P.U., 1984, p 185.

47- The penetration of nationality principle into positive laws can be , of course, justified by the influence of both the Napoleon code and Mancini' s conception. For example the conception of Mancini that person should be governed by the law of his nation has affected the Italian and other civil codes. See in this context Ehrenzweweig, A.A., "Specific Principles of Private Transnational Law", *Recueil des cours*, VolumeII, Tome 124 (1968), pp354-355; See also Rabel, E., *Op.cit.*, pp 120-121.

48- In 22 January 1851, Pasquale Stanislao Mancini gave his famous speech at Turin University where he maintained that the nationality principle should be considered as a basis of the law of nations (international law). See His discourse which was published in *Diritto Internazionale* (Naples, 1873), pp 1-64 ; Gutzwiller, M., "Le Développement Historique du Droit International Privé", *Recueil des cours*, Volume IV, Part 29(1929), p 365; Anton, A.E., *Op.cit.*, pp 26,158; Wolff, M., *Op.cit.*, p 38; Nadelmann, K.H., "Conflict of Laws: International and Interstate" *Op. cit.*, pp 49,51; Batiffol, H., *Loc.cit.*, pp 500-501.

49- See Lewald, H., *Loc.cit.*, p 606; Nadelmann, K.H., "Mancini's Nationality Rule and

conflict between different legal systems has increased.[50]

More important Mancini considers nationality as a principle which is not peculiar to Italian civil code but an idea that should be recognized everywhere.[51] Although he held that nationality governs a person's status capacity and family relations he gave, however, domicile a subsidiary application[52] when the person belongs to a country where there is a coexistence of several legal systems , such as, the the United States of America or if a person is a stateless or has a double nationality.[53]

It is generally admitted that the nationalism triumphal referred to Mancini[54] has led to the penetration of the national law principle in many legislations in Europe and outside Europe[55] and his conception of nationality has

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Non-Unified Legal Systems, Nationality Versus Domicile" *Loc.cit.*, p 418; See also Nadelmann, K.H., *Conflict of Laws: International and Interstate, Selected Essays, Ibid.*,p 49.

50- Nadelmann, K.H., "Mancini's Nationality Rule and Non-Unified Legal Systems, Nationality Versus Domicile" *Ibid.*, p 421.

51- Kahn-Freund, O., *Loc.cit.*, p 432.

52- According to him the principle of nationality should have its own scope. In fact he recognizes the territoriality of law as an exception to the principle of the personality of law. Among those exceptions are the rules of Public Law which are territorial, the rule *of locus regit actum* , criminal law , *lois de polis*and the law chosen by the parties where nationality should be eliminated. See Isaad, M.,.*Op.cit.*, Volume I, PP 64-65; Soulaiman, A.A., *Op.cit.*, pp 33-34.

53- Nadelmann, K.H., " Mancini Nationality Rule and Non-Unified Legal Systems, Nationality Versus Domicile" *Loc.cit.*,.pp 418,420,424-425; See also Graveson, R.H., *Comparative Conflict of Laws, Selected Essays*, Vol I, Amsterdam, New York, Oxford, North Holland, Publishing Company, 1977, p 359.

54- The so called nationalism movement contributed to the adoption by many continental countries of nationality as a basis of personal law and has influenced some American State Laws and, is favoured by Moslem and Arabe countries. Graveson, R.H., *Conflict of Laws, Private International Laws, Op.cit.*, p 190; Nadelmann, K.H., *Ibid.*, pp 420-421; Soulaiman, A.A., *Op.cit.*, pp 173-175.

55- His influence can be noticed in its early days, for instance, in the Italian civil code of 1865 and the code of 1942 and has affected , then, the Spanish civil code of 1889 and the German civil code of 1896 which were based upon the doctrine of nationality. For the adoption of nationality as connecting factor in other civil laws countries. See, for instance, the new Algerian code of nationality established by ordonnance N 70.86 in 15 December 1970. Batiffol, H., *Loc.cit.*, pp 500-501; Gutzwiller, M., *Loc.cit.*, p 369; Isaad, M., *Op.cit.*, Volume I and II, pp 65-66, 129.

been advocated by eminent scholars, such as, Andre and Bartin.[56]

It must be noted that the adoption of nationality in personal status, for example, did not affect only the Italian or the French civil code but it has been applied as a principle on the worldwide scale.[57] In fact, Mancini' s success can clearly be seen through the adoption and the penetration of nationalism in International Conventions. From historical point of view these are; first, the Hague Convention of 1896. Second, the adoption of the third Hague Conference of two Conventions which are based on nationality as a primary connecting factor.[58]

C)- Clash between nationality and domicile principle

1)- Clash between nationality and domicile represents the main occasion of the renvoi mechanism. The application of the theory of renvoi is chiefly due to the clash between the two principles, nationality and domicile[59], i.e., in most cases which involve renvoi the domicile contra nationality is the controversial issue[60] that has to be regulated by courts.[61]

The reason why the clash between nationality and domicile represents the main occasion of the renvoi mechanism the fact that those two principles are the main connecting factors used by different legal systems.[62] This is why the clash between the nationality countries and that of the domicile represents the "...most important topic of international disputes and negotiations in Private International Law..."[63]

56- Rabel, E., *Op.cit.*, pp 10-11.

57- *Ibid.*, P74; Kahn-Freund, O., *Loc.cit.*, pp 312-313.

58- See the Hague Convention on the conclusion of marriage and the Convention on divorce and separation of 12 June 1902. P.M. North, "Development of Rules of Private International Law",*Recueil des cours* Volume I, Tome 166(1980), pp 91-92; Wolff, M., *Op.cit.*, p47; Isaad, M, *Op.cit.*, Volume 1, p 66

59- Graveson, R.H.,*Conflict of Laws, Private International Law, Op.cit.*, p 76.

60-In a legal relation that concerns a person X there might be a reference from the law of his nationality to the law of his domicile or vice versa.

61-See Sperduti, G., *Loc.cit.*, p 218.

62- Graveson, R.H., *Conflict of Laws, Private International Law,Op.cit.*, p 62.

63- Ehrenzweing, A.A., *Loc.cit.*, p 355.

2)- Renvoi and the conciliation of the two principles By examining the different cases on renvoi, it can be noticed that the clash between the nationality countries and those who adhere to domicile occurs most of the time in personal laws and succession.[64]

If the fact of the matter is that the world is divided into two different and contradictory systems Ernst, Rabel himself said that although renvoi is not the only one it represents, however, one of the best means to reach a certain kind of *modus vivendi*.[65] According to another view the clash between nationality and domicile can be solved by the process of renvoi[66] on the basis that its mechanism represents a way of creating a kind of conciliation between the two contradictory principles.[67] In other words, renvoi has been considered as a useful means to conciliate only the two diverted connecting factors, i.e., nationality and domicile.[68]

It has been pointed out, however, that the admission of renvoi makes the conciliation between nationality and domicile impossible because one of the obstacles to this conciliation is that capacity and state of person are governed by different principles.[69] For those who adhere to this view the divergence between connecting factors indicates that the theory of renvoi cannot delete this clash but it multiplies Judges' difficulties.[70]

Furthermore, it must be remembered that renvoi does not occur only as a result of the divergence of domicile and nationality. The aim of relying mostly

64- See Von Overbeck, A.E., "Les Questions Général du Droit International Privé, À la Lumière de Codifications et Projets Recents, Cours Général de Droit International Privé", *Recueil des cours*, Volume III, Tome,176 (1982), p 153. Baxter, I an, F.G.,*Essays on Private International Law*, Canada, University of Toronto Press, 1966, pp 50, 58.

65- Renvoi mechanism has been considered as the " most effective means..." to achieve this *modus vivendis* between nationality and domicile principles. Rabel, E., *Op.cit.*, pp 82,168.

66- See Maridakis, G.S., "Le Renvoi en Droit International Privé ", *Annuaire* , Session de Salzbourg, Volume 49, Tome II, (1961) p 276..

67-.Baxter, Ian F.G.,*Op.cit.*, pp 58.

68- Von Overbeck, A.E., *Loc.cit.*, p 167.

69- Lcwald, H., *Loc.cit.*, p 581.

70- Maridakis, G.S., "Les Principaux Traits de la Reécente Codifiaction Hellénique Touchant le Droit International Privé", *Recueil des cours*, Volume I, Tome 85, (1954), p 169.

upon these two principles is to prove that renvoi mechanism occurs most of the time when the case leads to the emergence of controversies about nationality and domicile. In fact, there are situations where renvoi occurs also when a reference is made from the *lex loci actus* to the national law as the case of *Goods of Lacroix* illustrates it.[71]

III)- Difference in qualification If renvoi occurs as a result of the diversity of the two principles of nationality and domicile, the different meaning of the latter should also be considered as an aspect of the renvoi controversy.[72] It means that if domicile and nationality are the main connecting factors the former, however, leads to the problem of interpretation in which the conception of domicile in English law differs from that of American and Continental conceptions.[73] For example, if domicile in English law is subject to two criteria in France, however, domicile has a different meaning.[74] Despite these differences, succession to movables in both countries is governed by the law of the deceased' s last domicile.

As renvoi is a universal phenomenon, it is therefore, necessary and important to examine the qualification process not only in Common law countries but also in Civil law countries and across the spectrum of legal concepts.

71- (1877) 2 P. D. 94,96,97. In that case there was renvoi from the *lex loci actus* to a national law of the deceased which led to the validity of the will. See in this context Wolff, M., *Op.cit.*, pp 188, 190; For more details on this case see *Infra.*, Chapter 3., Section 1, p 136

72- Renvoi is not only the outcome of the difference in connecting factors but it is also a result of differences in characterization. It is apparent, therefore, that domicile may be defined differently, i.e., can be considered as a domicile of origin from the point of view of the country X whereas the country Y may define it as a domicile of choice or the last domicile. Von Mehren, A.T., *Loc.cit.*, p 380.; See Ehrenzweing, A.A.,*Private International Law a Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty, Op.cit.*, p139.

73-See for example, Graveson, R.H., *Conflict of Laws, Private International Law, Op.cit.*, p 63

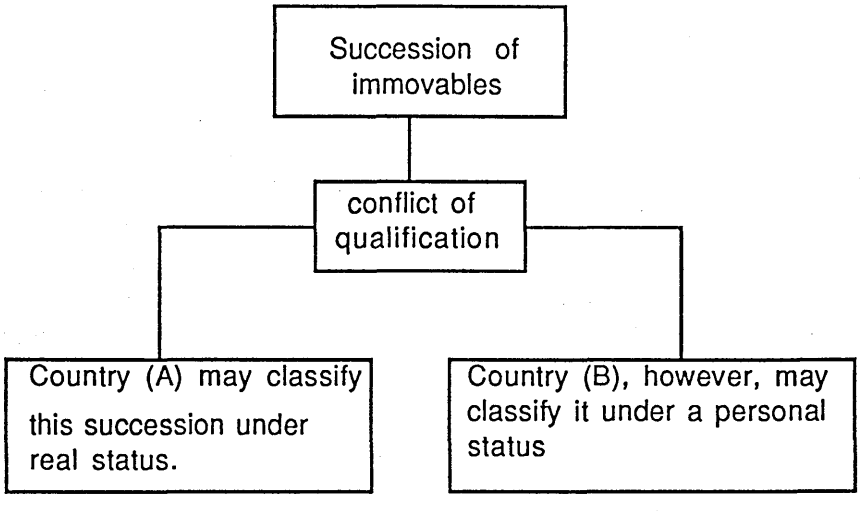
74- In order to claim having a French domicile, the person concerned had to obtain an authorization for that purpose according to article 13 of the French civil code. After 1927, succession of movable, however, has been governed by the domicile " de fait ". See Kahn-Freund, O.,*Loc.cit.*, pp 392-393.

A)-Conflict of qualification and renvoi Although the two legal systems may have the same conflict rules, i.e., they are identical the same legal issue, however, may be subject to different categories. An illustration of such conflict is that the country X may consider one issue as a personal law whereas the country Y may consider it as a matter of form or succession.[75]

The question here is to what extent the process of qualification affects the process of renvoi? To this question it has been replied that a conflict of qualification transforms to a renvoi. In fact, in P.h. Francescakis own words "le conflit de qualification est donc convertible en conflit de renvoi."[76]

In order to justify this claim the writer would like to take the same example stated by the P.h Francescakis which concerns the distribution of immovable situated in a county B that belongs to the succession of X a national of the country A and siscuss it through diagrams. In this example which represents a negative conflict it will be proved that such conflict can be analyzed as either a conflict of qualification (see diagram A) or as a conflict of connecting factors (see diagram B).[77]

Diagram A

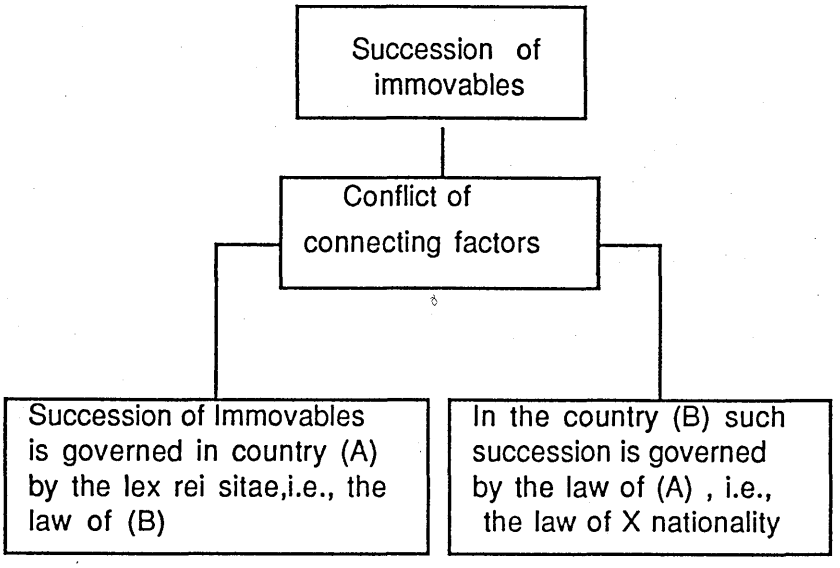


75- Potu, E.,*La Question du Renvoi en Droit International Privé*, Paris , Juris- Classeurs, 1913. p 10.

76- Francescakis, P.h.,*Op.cit.*,. p 85.

77- *Ibid.*

Diagram (B)



If renvoi arises because of the clash between domicile and nationality it does not, however, result only from the clash between those two main connecting factors. Effectively, it can also arise because of the "...hidden differences in classification.or from hidden differences in interpreting connecting factors, of which domicil is the most important...".[78] To say it differently, if the renvoi mechanism is the consequence of the diversity of the connecting factors, i.e., a patent conflict where the two involved countries use nationality and domicile for the same legal issue[79] it does not mean that it is the only case of renvoi appearance. The latent conflict of conflict rules, however, may also lead to the emergence of renvoi.[80] In this context, the way in which such conflict occurs is best seen by discussing a French and English cases.

First, in *Forgo*'s case domicile was the issue to be interpreted between the French and the Bavarian laws. In fact, the two countries agreed upon the view

78- Kahn-Freund, O., *Loc.cit.*, p 435.

79- It may happen that two countries use for the same issue, such as, succession of movables, different connecting factors, i.e., either domicile or nationality. See for instance the case of *Re Ross* [1930] 1 Ch. 377 ; Castel, J.G.,*Conflict of Laws, Cases Notes and Materials*, 3 rd edition, Toronto, Butterworths, 1974, p 43.

80- In this typet of conflict of conflict rules the same connecting factors can be used but the difference is in its definition..Kahn-Freund, O.,*Loc.cit.*, P 393; Anton, A.E., *Op.cit.*, pp56-57.

that domicile is the connecting factor which governs the succession of *Forgo* but they disagree on the meaning and the interpretation of that domicile.[81] It is to be remarked that in view of others, however, *Forgo* case represents only a divergence in the concept of connecting factor, i.e., domicile and not a conflict of qualification.[82]

Secondly, in *Re Annesley* the same connecting factor was used, which is the last domicile of the deceased, but the difference is that French law considers her to be domiciled in England whereas English law considers the deceased as domiciled in France.[83]

In Fact, Mr O Kahn-Freund' s view is clear in which he says that: [84]

> "...what is remarkable...is that both in France and in England the leading judicial decisions dealing with this problem of renvoi arose from situations in which the connecting factors were seemingly identical, but actually different. Both M. *Forgo* and Mrs. Annesley have achieved immortality by providing for future generations textbook of examples of the conflict of seemingly identical connecting concepts....Hence it is only the facts of the *Annesley* case and not the reasoning of the judge which provide an example for the ' hidden renvoi'..."

On the whole, it has been accepted that the patent conflict of conflict rules

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81- What happened, in fact, in the French *cour de cassation* is that both Bavaria and France differ upon the qualification of Forgo' s domicile and the question was whether *Forgo* had obtained a legal domicile in France. In other words, although succession to movables is governed by the domicile of the deceased in both France and Bavaria the former, however, considers him not legally domiciled in France according to article 13 whereas the conflict rules of the latter refer the distribution of his succession to French law as his domicile of fact. See Munro, C.R., "The Magic Roundabout of Conflict of Laws", *The Jur. Rev.*, Part 1,(1978) p.66; BAXTER, Ian, F.G., *Op.cit.*, pp 50-51; Isaad, M., Volume I,*Op.cit.*,p 166; See *Supra.*, Chapter 1 Section 3, Sub-section 1, pp 39-41.

82- Derruppé, J et Agostini, E.," Le Renvoi dans la Jurisprudence Française" Fasc, 532-B,1985, *Juris-Classeur de Droit International*, 7, (1987), Paris, Editions Techniques, pp 16-17.

83-In *Re Annesley* both the *lex causae* and the *lex fori* use the same connecting factor, i.e., domicile, but differ on its interpretation. [1926] Ch. 692; See Collier, J.G., *Conflict of Laws*, Cambridge University Press, 1987 P21; For more details see *Infra.*, Chapter 3., Section1, Sub-section1, pp 141-142.

84- Kahn-Freund, O., *Loc.cit.*, pp 393-394.

leads to the emergence of renvoi whereas there is still dispute upon the question whether the latent conflict of conflict rules leads to the emergence of the problem of characterization or renvoi.[85]

Having examined renvoi in relation to conflict of qualification it should also be remembred that renvoi can result from the difference of connecting factors without the emergence of differences in qualification.[86] Here it is enough to say that if the fact is that renvoi is due also to a problem of differences in qualification chronologically the conflict of qualification leads to a negative conflict and then to a renvoi.[87]

B)- Qualification by the *lex fori* or the *lex causae* and the process of renvoi. As explained above if the process of qualification occurs before the mechanism of renvoi[88], this chapter, however, intends to discuss and examine by which law the connecting factor, such as domicile and nationality, should be characterized through the process of renvoi. The practical cases which will serve as a basis of this discussion and provide an answer to that situation are both taken from civil and common law countries.

The first decision worth discussing, in this respect, is the decision of the court of appeal of Monaco in 1972.[89] This case concerns succession of movables of a Belgian citizen who was domiciled in Monaco. Her succession is governed by the law of her nationality according to the conflict rule of Monaco.[90]

The problem which arose before the court of appeal is that according to Belgian law *dame de Jonge*, the heiress of *demoiselle Kengiaert* de *Ghelievelt*

85- Dicey & Morris, *The Conflict of Laws*, by Lawrence Collins, 11edition , Volume 1, London, Stevens & Sons Limited, 1987, p 35.

86- According to this view the problem of renvoi can be seen only in conflict of connecting factors and not in the conflict of qualification. Derruppé, J., et Agostin, E., *Loc.cit.*, pp 16-17.

87- *Ibid.*, p 17.

88-See *Supra.*, Chapter 1, section 2, Sub-section, pp 26-30.

89- *Administration des Domaines* C. *dame Rouffignac et autres*. Cour d' appel de Monaco- 17 Avril 1972, 63 *Re.crit.dr.intl.priv*, (1974). pp 76-82. Note Yvon Loussouarn.

90- The Deceased, *demoiselle kengiaert de Gheluvlet* who is a Belgian national was said to continue living in Monte -carlo., *Ibid.*, p 79.

in the 6 degree, cannot claim such succession whereas according to the law of Monaco the heiress can be a successor of her relative.[91] This led *dame de jonge* to call upon the application of the law of Monaco whereas the administration *des domaines* invoked the application of Belgian law.[92] In other words, the question which arose before the judges of Monaco is that when the conflict rules of Monaco refer to Belgian law, as the law of nationality, does this reference mean the application Belgian private international law or only its internal law. The solution reached, in this respect, was that the reference means the consideration of Belgian private international law by which the court of Appeal admitted renvoi from Belgian law.[93]

Besides, from Monaco court of appeal' s point of view the determination and the definition of the deceased' s domicile should be done according to Belgian law and not to the law of Monaco on the ground that the domicile of the deceased was taken into consideration only after the process of renvoi from Belgian law.[94] The court, then, held that *la dame de jonge* could not claim the succession of movables unless it is admitted that the deceased was domiciled in Monaco at the time of her death. It means that the determination of her domicile should be done according to Belgian law.[95] The court of appeal, therefore, took a positive position when it had considered the deceased as domiciled in Monaco although she had never been admitted to domicile in the principality of Monaco. In other words, by referring to Belgian law by which the deceased' s domicile was defined, the judges of Monaco held that the succession should be governed by the law of Monaco.[96]

91- It can be noticed that this case is similar to the *Forgo* Affair in that the application of Belgian law (in contrast to Bavaria) will not allow *Dame de Jonge* (see also the collateral of *Forgo*'s mother) to be a successor of that moveables which goes instead to the administration des domaines (see also the French Treasury), *Ibid.*, pp 78-79.

92- *Ibid.*, p 79.

93- *Ibid.*, pp 79-81.

94- *Ibid.*, pp 76, 81.

95- In fact the definition of domicile according to the law of Monaco differs from that of Belgian law. According to the former, in order to be legally domiciled in Monaco you should be admitted to domicile in that principality whereas domicile in Belgian is based upon the principal establishment. Article 102 of the civil code, See *Ibid.*, pp 78, 81.

96- *Ibid.*, p 81.

It follows, that if the process of characterization can be achieved either according to the *lex fori* or the *lex causea* the former, however, is subject to exceptions in which characterization in those cases escape from the *lex fori* principle.[97] In this context, it has been pointed out that once the problem concerns the interpretation of the rule of renvoi, there is a consensus among the majority of Authors and Jurisprudence of the civilian tradition that characterization after renvoi could not be done according to the *lex fori.*[98] It means that if characterization, normally, can be done according to the *lex fori* other exceptions, however, must be taken into consideration among them is the qualification after the process of. renvoi which in their view concerns the *lex causea.*[99]

Secondly, in Common law countries, however, the general consensus among scholars is that the determination of the connecting factor should be done according to the *lex fori.* It seems, therefore, worth referring to this rule[100] by examining the case of *Re Annesley* [101]and *Re O' Keefe.*[102] According to the former case the deceased had been considered as acquiring domicile of choice in France.whereas under that law she was domiciled in England. More important, although *Re Annesley* declared in the clause 8 that she did not have any intention to abandon her domicile of origin, which is England, on the ground that she had not made an application to obtain a French domicile according to article

97- Loussouarn, Y et Bourel, P., *Droit International Privé*, 2eme édition, Paris, Dalloz, 1980. p.255; It has been said that qualification of property as movables or immovables, for instance, concerns the *lex causae* and not the *lex fori.* See in this context Isaad, M., Volume I, *Op.cit.*, pp 162-163.

98- Loussoaurn, Y et Bourel, P.,*Ibid.*, P 258.; Isaad, M.,*Ibid.*, p 163.

99- See Isaad, M., *Ibid.*, p 163.

100- According to this rule for the purpose of an English conflict rule, the determination of the connecting factor must be done according to the *lex fori* .It means that the determination of the meaning of the connecting factor, such as, domicile and the inquiry of whether a person is domiciled in England or in a foreign country should be done according to the *lex fori*,i.e., English law . See Dicey & Morris, *Op.cit.*, pp 30-32, footnotes 60.

101- [1926] Ch. 692.

102- [1940] Ch. 124.

13 of the French civil code. The judge Russell. J., however, considers her as domiciled in France.[103] In his view , France was her domicile of choice because her intention was to reside there continuously for an unlimited time. In other words, not to comply with the formalities required by article 13 are irrelevant here as far as both factors, residence and the intention of remaining, are being satisfied according to English Law.[104]In this context, it is worth quoting Mr Russell's reasoning in which he says.[105]

> "...to follow my own view, I would prefer to follow...the true view...that the question whether a person is or is not domiciled in a foreign country is to be determined in accordance with the requirements of English law as to domicile, irrespective of the question whether the person in question has or has not acquired a domicil in the foreign country in the eyes of the law of that country."

According to his view the identification of the connecting factor and the determination of its constituent elements are matters for the forum.[106]

It has been claimed, however, that if the determination of the connecting factors should be done according to the *lex fori* nationality is an exception to that rule. It means that if the law of the country X refers , for example, matters of succession or marriage to the law of nationality it only gives a definition and the meaning of that nationality. It cannot, however, say that the person involved is a national or a citizen of the country X or Z. Claiming the citizenship of

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103- Mrs *Syhil Annesley*died on January 16th 1924 in France at the Chateau de Quille bandy at orthez, that she bought in 1897 where she resided continously until 1924 the time of her death. Castel, J.G.,*Op.cit.*, pp .51-53; For more details, see *Infra.*, Chapter 3. Section 1, Sub-section 1, pp 141-142.

104- There are indications according to her daughter 's claim that Mrs *Annesley* desired to reside in France until her death and also to be buried there. Castel, J., *Ibid.*, pp 52-53, 56.

105- [1926} Ch.692. 705; See in this context Mendelssohn-Bartholdy, A., Renvoi in Modern English Law, By Cheshire, G.C.,(ed.,), Oxford, The Clarendon Press, 1937. p 36; Wolff, M., *Op.cit.*, p 136. See Castel, J.G., *Ibid.*, p .56.

106- See in this context, Collier, J.G., *Op.cit.*, p 14.

the involved person to either the country Y or Z should be done only by those two countries.[107] In this context, the English reasoning concerning the definition of domicile, in the case of *Re O' Keefe*, has been criticized and refuted. In fact, from Kahn- Freund' s point of view the English judge in *Re O' Keefe* had to consider the law governing the issue, i.e., Italian law as a matter of fact and not as a question of English law. In other words he had to hear the view of experts on what law should be applied by an Italian judge in case of citizen who is a national of a composite legal system.[108] This scholar goes on to stress that the view of the English judge that "...Italian lawyers cannot say what is the meaning of the law of the nationality, when there is more than one system of law of nationality"[109] is in fact a mistake. The reason, acoording to this scholar, is that the only lawyers who can give the meaning of nationality are Italians because it concerns the definition of nationality as a connecting factor in Italian private international law.[110] Another exception can be cited which concerns the Civil Jurisdiction and Judgment Act 1982. According to this Act, in order to determine the domicile of a person, who is not domiciled in England but in another contracting State, English court will have to apply the law of the state where he is considered as having his domicile.[111]

Furthermore, R.H. Graveson stresses that in order to know whether X is domiciled in England or in France this domicile will be defined according to the English conception although the foreign country may have a different view. To define, however, whether X is domiciled not in England but in France or in Germany he states an exception according to the Act of 1971[112] saying that

107- According to the stated exception tion the *lex fori* can define the meaning of nationality but cannot say or claim that X is a national of that country Z. This is the duty of the law of the foreign State. See , for instance, Kahn-Freund, O., *Loc.cit.*, p 389; Rabel, E., *Op.cit.*, p146.

108- Kahn-Freund, O.,*Loc.cit.*, p 390.

109- [1940] 124 at 129.

110-Kahn-Freund, O., *Loc.cit.*, p 390. For more details concerning this case see *Infra.*, Chapter 3 Section1, pp 154-157.

111-Dicey & Morris, *Op.cit.*, pp 31-32, See also Rule 24.1(c) pp 278-279, 282

112- See the Recognition of divorce and legal separation Act SS 3 (2) and 5 (2). See also Rule 81. 1(b), *Ibid.*, p 690.

English court must accept the foreign conception or definition of domicile. The result of this is that the forum has to determine the domicile of spouses according to the law of the foreign country on domicile.[113] However, the 1971 Act was repealed in toto by the family Law Act 1986 which by S.46(5) allows refernce to "domicile" either in the foreign or in " home sense".

Sub-section2: Forms of renvoi.

It is generally accepted that there are two forms of renvoi, single or partial renvoi and double renvoi.[114] In fact, renvoi from the foreign law to the *lex fori* is known as *Ruckverweisung* whereas transmission is known as *weiterverweisung*.[115]

I)-Renvoi at the first and second degree

A)-Remission and the *lex fori* principle Following the process of this form it has been said that its adoption by French law, for instance, is used as a means of allowing only the competence of French law.[116] In fact, Mr Jaque Foyer is doubtful about such form of renvoi and asks whether this is not a kind of unilateralism.[117] Effectively, applying and favoring this nationalism principle[118] means automatically the application of the forum's substantive law. Further, this form of renvoi, which is qualified as a simple method, has not only been adopted in France but it is also followed in other legal systems.[119]

It is understandable, therefore, why scholars characterize renvoi remission as a *lex fori* principle. As a matter of fact such nationalism or the national

113- See Graveson, R.H., *Conflict of Laws, Private International law, Op.cit.*, pp 63-64; North, P.M., *The Private International law of Matrimonial Causes in the British Isles and the Republic of Ireland*, Volume 1, North Holland, 1977, p 8.

114- Jaffey, A.J.E., *Op.cit.*, p 259; Mayer, P., *Droit International Privé*, 2ème édition, Paris, Editions Montchrestien, 1983, p 191.

115- Potu, E.,*Op.cit.*, p. 179.

116- See the comment of Soulaiman, A.A., *Op.cit.*, p.51.

117- See the view of Mr Foyer, J., " Requiem pour le Renvoi?" Séance du 14 Juin 1980, *Trav. Comité, Français. dr. in. privé*, (1979-1980), p.127.

118- This nationalist principle is said to represent the base of renvoi at first degree. Potu, Emile, *Op.cit.*, p 16.

119- See Von Overbeck, A.E., *Loc.cit.*, pp 134-135. Sperduti, G., *Loc.cit.*, p 213; See *Infra.*, Chapter 3, Section 1, p128.

feelings can be well illustrated by the attitude and the reasoning of both the French scholar Batiffol and the report of *conseiller* Mr Denis. The latter, in fact, was clear when he considers French law as better than the foreign law in the case of *Soulier* before *la chambre de requête*According to his view "...j'aime mieux que les tribunaux Français...Jugent d' après la loi Française que d' après une loi etrangère qu'ils ne connaissent pas. J' aime mieux la loi Française que la loi etrangère."[120] Another scholar has noticed, therefore, that "...in practice the reference back to the *lex fori* is a strong temptation to follow the ' homeward trend ', as can be seen from the dictum quoted above."[121]

Thus, it is true to affirm that the advantage of the renvoi remission if accepted is that it leads automatically to the application of the internal law of the forum[122] which can be interpreted as kind of *lex fori* preference.[123] In fact, Mr Batiffol' s advocacy of renvoi theory in the Institute of International law led him to maintain that if there is a remission from the foreign conflict rule to the *lex fori* isn' t it, practically, a good choice that the judge applies its own law on the ground that his law is the best known.[124]

One should also remember that the adoption of renvoi remission by the French *cour de cassation* is not based only upon the view that the *lex fori* must be applied because Bavarian conflict rules refer to French internal law. The true reason, however, is that French law advocates the application of its own law because it wants also to protect its national interest.[125]

Furthermore, the application of renvoi remission has been related to

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120- See Cass. req. Mars 1910, D.P. 1912. 1. 262., For discussion on this case see Kahn-Freund, O.,*Loc.cit.*, p 426. See Potu, E., *Op.cit.*, p. 317. For an English example of this point see the case of *H*. v. *H* [1954], p. 259, 4.

121- Kahn-Freund, O., *Ibid.*, pp 431-432. Originally emphasised.

122- See Munro, C.R., *Loc.cit.*, p 69.

123- Derruppé, J.,"Etude Théorique du Renvoi" *Loc.cit.*, pp 20- 21;. Baxter, Ian F.G., *Op.cit.*, pp 55-56.

124- Von Overbeck, A.E., "Renvoi in the Institute of International Law", 12 *Amer. J. Comp. L.*, p 546; Sadekh, H.A.,*Op.cit.*, p 81.

125- This in fact allowed the French treasury to get its hand on the property and exclude *Forgo*'s collateral claim as successors. See Sadekh, H.A., *Ibid.*, pp 79-80; Rabel, E., *Op.cit.*, p 78. Notes 13. See *Supra.*, Chapter 1, Section, Sub-section 2, pp 39-41.

another practical issue, which is the nature of the foreign law. According to that view the application of the *lex fori*, i.e., the French substantive rules by the renvoi process can be justified by the position of the French law and jurisprudence towards the foreign law. It is well known that French law considers the foreign law as a matter of fact and not as a law[126] and this means that with regard to the practical difficulty of finding out the content of the foreign law it is not the judge who must prove that law but it is the burden of the parties to do it.[127] By referring to English jurisprudence two cases can be cited in his context. The first one is the case of the*Duke of Wellington* in which it has ben stated that "The task of an English judge...is...finding as a 'fact' what is the relevant foreign law..."[128] *Re Askew* is the second case in which Maugham J. applied German law by considering the deposition given by Doctor Hellmut Rost as proving as a fact.[129]

Generally, the tendency of applying the *lex fori* approach has been criticized on the ground that it diminishes the possibilities of the application of foreign law in favour of the forum law.[130] Besides, if the application of the *lex fori* favors the forum shopping this has led others to claim that the nationalism

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126- Both Lerebours-Pigeonnière and Battifol consider the application of foreign law as matter of fact. According to the former this is due to a practical difficulty,i.e., it is a very difficult task for a judge to know all different laws in the world. The latter considers the foreign law as a fact which prohibits the judge from applying foreign law or finding out its content willingly because its application is not obligatory. See Souliaman, A.A., *Op.cit.*, p 147; Sadekh, H.A.,*Ibid.*, pp 100-101, 105.

127- In France it is for the parties to prove the content of the foreign law and not the judge. This can be done by the certificate *de coutume* or by any other means of proof. In England this can be done by the expert witnesses. Failure of proving the foreign law by the parties leads undoubtedly the judge to apply its own law. See Soulaiman, A.A., *Ibid.*, pp 137-139; Collier, J.G., *Op.cit.*, pp 36-37; Kahn-Freund, O., *Loc.cit.*, p 306; Jaffey, A.J.E., *Op.cit.*, p. 6; Mayer, P., *Op.cit.*, pp 161-165. See the Scottish cases of of *Pryde* v. *Proctor and Gamble. L.td.* 1971. S.L.T notes 18; *Bonnor* v. *Balfour Kilpatrick. Ltd*, 1974. S.L.T. 187, notes 3.

128-[1947], 1 Ch. 506, 515, per Wynn Parry J , emphasise added; See in this context Baxter, Ian, F.G.,*Op.cit.*, p 54; For more informations see *Infra.*, Section 3, Sub-section1, pp 139-141.

129- *Re Askew*, [1930] 2 Ch. pp 266-267, 275-276. See Castel, J.C., *Op.cit.*, pp 60-61. For further details see *Infra.*, Chapter 3. Section 1, p143.

130- This has been considered as a sign of advocating the territorilaity principle. See Sadekh, H.A., *Op.cit.*, p 81.

of the *lex fori* is a disadvantage because it affects another important principle which is the harmony of solutions.[131]

B)-Transmission cases Renvoi at the second degree means that the foreign conflict rules does not refer back to the *lex fori* but a reference could be to a third or a fourth law. For example, if the forum law chooses X conflict rules to be competent to deal with the legal matter, those conflict rules according to the mechanism of transmission might refer the matter not to the *lex fori*but to a third law Y.[132]

Theoretically, renvoi at the second degree is not the last step. There might be renvoi at a third or fourth degree.[133] Practically, however, the connecting factors that govern some legal matters are limited and not numerous and can be an obstacle to the supposition of a fourth and a fifth renvoi.

II)- The unilateral application of the foreign court theory.

Leaving the previous question of when renvoi was first introduced in English law[134] the analysis, in this respect, considers the point of how the process of the foreign court theory works? A close examination of the foreign court theory mechanism clearly indicates that the forum judge, who else than the English judge, must make an inquiry asking about the way how the case would be solved by the foreign court.[135] In this respect Professor de Nova states that "...the English judges ' impersonates' the foreign judge, seeking to act precisely as he would have acted."[136]

The peculiarity of the foreign court theory, therefore, is that the English court has to respect the position of the foreign court on renvoi whatever is this

131- Mayer, P., *Op.cit.*, p 200; For further discussion on renvoi and the principle of harmony of solutions see *Infra.*, Section 3. pp 85-90.

132- Loussouarn, Y et Bourel, P., *Droit International Privé*, 2ème édition, Paris, Dalloz. 1980, p .262.

133- Mayer, P.,*Op.cit.*, p 193.

134- See *Supra.*, Chapter 1 Section 3, pp 32-36.

135- See Edinger, E., "Renvoi in Canada-Form and Availability", 14 *Manitoba Law Journal*, (1984). p 38. For the basis of the application of the foreign court theory see *Infra.*, Section 3, pp 95-96.

136- See in this context Kahn-Freund, O.,*Loc.cit.*, p 434. Originally emphasised.

view a positive or negative one and there will be an impasse if the foreign court could be thought to be playing the same game.

On the whole, the unilateral application of this approach means that the foreign court theory works only if the other country rejects it, i.e., if its application is not generalized.[137]

Section 2:- Possible solutions that can be adopted by courts

Renvoi is said to be either accepted or rejected. The former has been called the total reference principle in contrast to the substantive law reference principle of the latter.[138]

On the whole, the judge will be faced with three solutions, either to apply the internal law theory or simple and partial renvoi or double renvoi theory.[139] These possible solutions which mean the application of either the substantive law or the foreign conflict rules by courts and legal systems[140] have led some scholars to confirm that whatever is the solution adopted, rejection or acceptance of renvoi, this choice or preference should not be isolated from the legal policy of the legislature.[141]

Sub-section1:- Rejection of renvoi It is well known that the rejection of renvoi means that the foreign conflict rules are not taken into consideration.[142] In fact, as indicated above when the reference is only to the substantive rules of the foreign law this must be interpreted as a case of

137- Batiffol, H., *Loc.cit.*,, p 485. For the conequences of the foreign court theory see *Infra.*, Section 3, pp 127-129.

138- Pagenslecher, M., "Renvoi in the United State: A Proposal", 29 *Tul. L. Rev.*, (1954-1955), p 382.

139- See for discussion, Cowan, T.A., "Renvoi does not Involve a Logical Fallacy" 87*University of Pennsylvania Law Review*, (1938), pp 37-38; Dicey & Morris, *Op.cit.*,.pp 74-76; Falconbridge, J.D., "Renvoi in New York and Elswhere" 6 *Vand. L. Rev.*, (1953), p 716-717; .Kahn-Freund, O.,*Loc.cit.*, p 432. Cheshire & North, *Op.cit.*, p 58.

140- See for insatnce Wolff, M.,*Op.cit.*, p 186.

141- See the Observations de Hans, Kelsen in "Le Renvoi en Droit International Privé" *Annuaire*, Vingt Troisième Commission, Session d'Amsterdam, Volume 47, Tome II,(1957) p121.

142- See for instance, Castel, J.G., *Op.cit.*, p 43.

Sachnormverweisung.[143] It means that according to the internal law theory conception the reference backward to the *lex fori* or forward to a third law should not be accepted. The solution, therefore, is the application only of the foreign internal Law.[144] It follows from the non consideration of the whole foreign law that in this approach the proof concerns only the foreign internal law and not its conflict rules.[145]

Sub-Section2:-Acceptance of renvoi.

The second solution that can be followed by court is the adoption of renvoi remission or renvoi transmission, i.e., either *Ruckverweisung* or *Weiterverweisung*. It has been claimed, in this context, that in renvoi transmission or renvoi remission the reference to the foreign law is a reference to the whole law without its rules on renvoi in that the forum court will not considers which type of renvoi is applied by the conflict rules of the foreign country.[146] In other words, in partial or single renvoi, it is only the foreign conflict rules which require proof and not its conflict rules on renvoi.[147]

Concerning the English version of the theory of renvoi known as the foreign court theory, however, an English judge must not ignore the point of view of the foreign court on renvoi. As a matter of fact English court must take into consideration not only Y conflict rule but also the position of the country Y on the theory of renvoi and this information with regard to any third country involved.[148] To put it in different manner, the English court has to find out whether or not the country Y accepts the renvoi theory and if so what type of renvoi it adopts.[149]

143- See J Deruppé, J.,*Loc.cit.*, p 3. See *Supra.*, Chapter 2 Section 1, Sub-section 1, pp 55-56.

144- Kahn-Freund, O.,*Loc.cit.*, p 432; See Munro, C.R., *Loc.cit.*, pp 68-69.

145- Dicey & Morris, *Op.cit.*, p 75.

146- Kahn-Freund, O., *Loc.cit.*, pp 432-434; Castel, J.G., *Op.cit.*, p 44.

147- Dicey &Morris, *Op.cit.*, p 75.

148- See Falconbridge, *Loc.cit.*, P 717; Jaffey A.J.E., *Op.cit.*, p 260; .Munro, C.R.,*Loc.cit.*, p70; Derruppé, J.," Etude Théorique du Renvoi" *Loc.cit.*, p 3.

149- Concerning the total renvoi the proof are required in both foreign conflict rules and its rules on renvoi. Dicey & Morrris, *Op.cit.*, p 76.

Section 3:- Renvoi between acceptance and rejection.

Sub-section1:- legal bases of the advocates and the opponents of renvoi. The basic feature of the doctrine of renvoi is the fact that it is a controversial issue. In fact, the controversies which have emerged on renvoi issue is said to be "...The most famous dispute in conflicts law, a classical example of violently prejudiced literature confronting naively consistent practice..."[150] In this chapter, therfore, the discussion will cover the different conceptions that have emerged to deal with the mechanism of renvoi from both sides. Its positive and negative aspects. Further, the distinction that will be drawn between the arguments of the two different camps seems to make a perfect sense in that it attempts to clarify certain conceptions and, then, to prove which of the discussed arguments can be considered as logical and acceptable.

Before dealing with this point it must be admitted that the division on renvoi problem does not concern only scholars but also jurisprudence and legal systems.[151]

I)- Analysis of arguments that favour the renvoi theory.

Those writers who favour renvoi are, therefore, cited in order to show that the pro-renvoiists' arguments should be considered as an important tendency of renvoi justification and not merely as a contradictory camp to the anti-renvoiists.

Chronologically, it can be said that the support came first from the German Von Bar, although it has been stressed that he does not defend renvoi, then, Rolin from Belgium in 1893 followed by Fiore from Italy.[152] Other scholars have been considered as sympathetic to renvoi, such as, Bentwich, Dicey, Westlake, Abbot, Holland, Lorenzen Dean Griswold, Professor Rabel, Lerebours-Pigeonnière, Batiffol and Jean Derruppé.[153]

150- Rabel, E.,*Op.cit.*, pp 75-76.

151- See Issad, M., Volume I, *Op.cit.*, p 164; See *Infra.*, Chapter 3.

152-.Meijers. E. M ," La Question du Renvoi" 38 *Bulletin de l'Institut Juridique International*, (1938), pp 203-204

153- See Potu, E., *Op.cit.*, pp 198-201; Von Mehren, A.T. and Donald Tautman, D.T., *The Law of Multistate Problems, Cases and Materials on Conflict of Laws*, Boston, Toronto, Little Brown and Compagny, 1965, p. 512; Griswold, E.N., "Renvoi Revisited", 51 *Har. L. R.*, (1937-1938) 1165; See Von Mehren, A.T., *Loc.cit.*, .p 382; Rabel, E., *Op.cit.*, p. 89; Cheatham, E., "Problems and

It should be pointed out that accepting or rejecting the renvoi theory has a close link with the nature of the law as whole. In fact, those who favour renvoi, naturally refer to the indivisibility of the conflict rules and substantive rules on the ground that such indivisibility makes the renvoi process possible.[154] According to them as far as each state is free to apply the foreign law, it must apply it as a whole because of its indivisibility. In other words, it is illogical to apply a foreign internal law whereas its conflict rules does not accept such legislative competence.[155]

Furthermore, with regard to the conception of westlake of the indissolubility of substantive and private international rules it has been maintained[156] that concerning the basis of renvoi theories it is not possible from a legal point of view to apply a foreign substantive rule without the consent of private international rules of that foreign state. It means, that if the forum applies foreign substantive law this, however, must be done with the agreement of private international law of that state and not against its will.[157]

In order to justify why the reference should be to the conflict rule of this or that country, scholars have given different views and explanations to support and defend the possibility of renvoi.[158] It should be noted, in this context, that for the sake of clarity it seems worth explaining scholars' examples and justifications by diagrams.

1)- From renvoi advocates' standpoint, when rules of private international laws refer to foreign law this means the reference to the whole law and not only to its internal law otherwise there will be a kind of distortion to foreign law.[159]

Methods in Conflict of Laws" *Recueil des cours* Volume I, Tome 99, p 337. Notes 5; Audit, B., *Loc.cit.*, p 337; Foyer, J.,"*Loc.cit.*, p 106.

154- Meijers E. M. *Loc.cit.*, p 210.

155- Soulaiman, A.A., *Op.cit.*, p .50; Sadekh, H.A., *Op.cit.*, p 66.

156- See Maury, J., "Règles Générales des Conflits de Lois," *Recueil des cours* , VolumeIII, Tome 57.(1936) pp 329-563 especially at 526.

157- For more details see Lalive, P., *Loc.cit.*, p 263.

158- See Batiffol, H., *Loc.cit.*, p 468.

159- According to them there is no justification which allow the application of the foreign internal law whereas its conflict rules decline the competence. Isaad, M., Volume I, *Op.cit.*, p 170. See Munro, C.R., *Loc.cit.*, p. 78.

2)- Concerning the difficulty that could arise from applying only the foreign internal law, the pro-renvoiists defend their positions by relying on a practical example. They stress that if the country X applies only the internal law of Y this will put the forum judge in a big difficulty on how to find out the internal law of the subject Z who belongs, for instance, to a plurilegislative system that contains different statute laws as it is the case in the United Kingdom and the United States of America.[160]

3)- To justify the mechanism of renvoi its advocates refer to the validity of certain acts and take as an illustration of that a question concerning the validity of marriage. In their view, it may occur that the legal matter will be considered as null by virtue of the application of the foreign internal law of the country X whereas the application of its conflict rules may validate such act. It means that if the forum conflict rules refer directly to the internal law of the country X, as the law of the common nationality , for instance, such marriage may be considered as void according to X law. This marriage, however, would be considered as valid if X conflict rules were applied which might refer either to the law of the domicile or the *lex loci celebrationis*.[161] To defend the principle of renvoi Leo Raape justifies his argument by a marriage case in which a Swiss husband got married with his niece in Russia where they were domiciled. In his example the marriage is said to be void according to Swiss internal law [162] and valid according to Russian law. Considering that later on the spouses establish their domicil in Hambourg where the husband brought before a German court an action asking for the nullity of the marriage.[163] If the judge interprets the national law of the spouses as merely a switzerland substantive law the marriage, therefore, will be held void. If however, he refers to switzerland private international law[164] ,then, renvoi from Swiss law to the Soviet law as the

160- See Soulaiman, A.A., *Op.cit.*, p 50.

161- P.h. Francescakis, *Op.cit.*, p 153.

162- Article 120 alinea 3 of the Swiss civil code.

163- See Maury, J., *Loc.cit.*, p 532.

164- The result according to article 7 of the Federal Law on 25 June 1891 is that Marriage celebrated in a foreign country according to the rules of that country will be held valid in Switzerland. Raape, *L.*,"Les Rapports Juridiques Entre Parents et Enfants Comme Point de

lex loci celebrationis will validate the marriage.[165] On the whole the facts given in this example try to justify that under both Swiss and Russia law this marriage will be considered as valid by the use of the mechanism of renvoi.[166]

4)- With regard to the argument of sovereignty in relation to renvoi it has been claimed that rejecting renvoi by the application only of the internal law affects the sovereignty of the state. It means that applying foreign law, which does not accept the application of its law, is somehow maintaining the superiority of the forum to the foreign sovereignty[167] whereas in single renvoi at least the forum is bowing to the foreign court' s conflict view of things.

5)- In addition to that, the pro-renvoiists have drawn scholars' attention to another positive result of the mechanism of renvoi which is the connection between renvoi and the extra-territorial effect of judgments. According to this view, applying the recommendation of the foreign conflict rules will facilitate the execution of the judgment. Refusing renvoi mechanism, however, would have a negative consequences upon the exequatur of the court decisions. For instance, the foreign state Y whose law has been applied will refuse the execution of this judgment because the competent court X did not act in her judgment according to Y conflict rules.[168] According to another hypothetical example, if three countries are involved in which the law of the country A does not apply the law of the country B, its judgment cannot obtain exequatur in the country C.[169]

To support their claim its advocates have stressed that the decision of the French *cour de cassation*, in the Affair *Forgo*,would be executed in Bavaria on the ground that French law applied the recommendation of the Bavarian conflict rules.[170]

Depart d'une Explication Pratique d'Anciens et de Nouveaux Problèmes Fondamentaux du Droit International Privé", *Receuil des Cours*, Volume IV, Tome 50 (1934) p. 413, notes 2.

165-Lalive, P., *Loc.cit.*, pp 274-275.

166- Sperduti, G., *Loc.cit.*, PP. 261-262; Batiffol, H., *Loc.cit.*, p 477.

167- Audit, B.,*Loc.cit.*, p 329.

168- See Sadekh, H.A., *Op.cit.*, pp 69-70.

169- Bate, J.P., *Notes on the Doctrine of Renvoi in Private International Law*, London, Stevens and Sons , 1904. p 30.

170- See Soulaiman, A.A., *Op.cit.*, p 50.

6)- Other scholars have based their suggestions upon the use of renvoi upon two main principles nationalist and internationalist. The former can be seen through the *lex fori* principle[171] whereas in the latter tendency they maintain that the international harmony and the coordination of systems between involved States could be achieved through the mechanism of renvoi.[172] According to this view, these two principles can both be satisfied through renvoi and should not be considered as contradictory.[173] It should be borne in mind, therefore, that among the strongest arguments which defend the use of renvoi is that of the harmony of decision. [174] , i.e., identical decisions will be reached by different courts in the same case through the mechanism of renvoi.

In fact, to justify their claim the pro-renvoiists have given an example concerning the testamentary capacity of X a Dane aged 19 domiciled in Italy.[175] From their point of view if there is no renvoi in this case Italian court will consider him as an incapable whereas he has a capacity according to Danish court[176] (See Diagram C). The pro-renvoiists, however, admit that if renvoi is accepted by the Italian court (which, of course, is not the case at present time) X will be considered capable by both courts (see Diagram D).

171- Those sympathetic to renvoi stress upon the advantage of the renvoi of first degree by claiming that such form allows the forum court to aplly its own internal law and then the danger of any mistakes are diminished. Loussouarn, Y et Bourel, P., *Op.cit.*, p 270.

172- The reason why renvoi at second degree , for instance, is said to achieve the international principle is that the possible connecting factors are , in fact, restricted and limited. It menas that the fear of a second, third or a fourth renvoi will be soon over. See Von Overbeck, A.E., " Les Questions Générales du Droit International Privé: À la Lumière des Codifications et Projets Recents: Cour Général de Droit International Privé" *Loc.cit.*, pp 153-157; Mayer, P., *Op.cit.*, p 193.

173- Harmony of decision and coordination of systems have been considered as a positive result of renvoi which justifies strongly its mechanism in both remission and transmission forms. See for instance, Von Overbeck, A.E., *Ibid.*, p 134; See also Derruppé, J., *Loc.cit.*, p 22.

174- The advocates of renvoi have stressed that harmony of decision principle, which represents the main aim of private international law can be achieved by the process of renvoi, although not in all cases Derruppé, J., *Ibid.*, p 19.

175- In Italian law, which adopts nationality, this capacity begins at the age of 18 whereas in Danish law, which adopts domicile, such capacity begins at the age of 21.

176- Bate, J.P., *Op.cit.*, p 28; For the opposite view see *Infra.*, Diagram I, p 102.

Diagram C

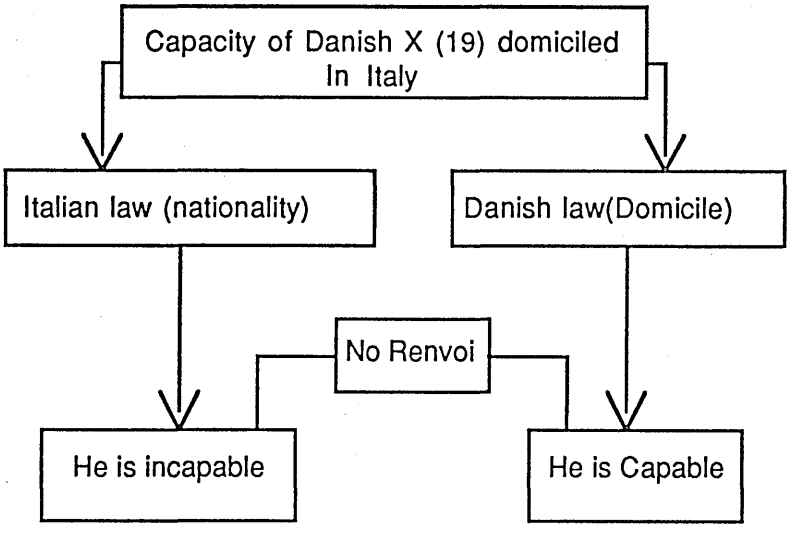
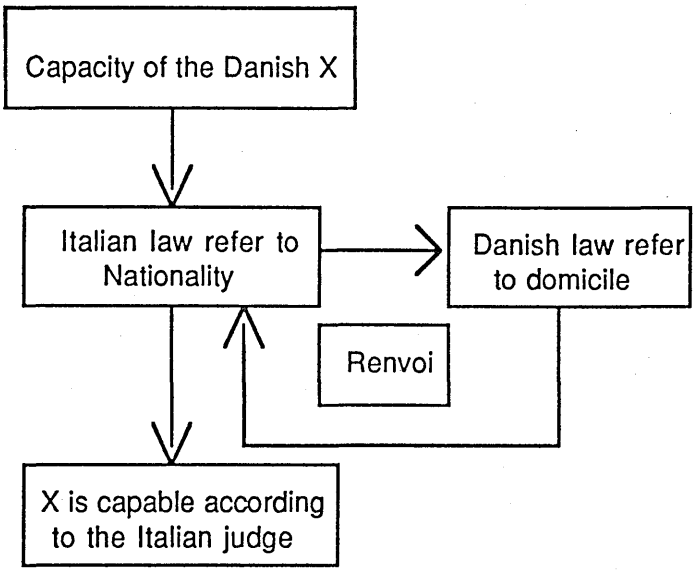


Diagram D



Furthermore, in his article, colin R. Munro states six possibilities on whether uniformity of decisions is achievable when the case involves two countries.[177] These possibilities, therfore, can be explained into two main points. First the

177- The Author considers only partial renvoi in the form of remission. He neither claims uniformity or diversity when the case involves two countries adopting the total renvoi theory. Munro, C.R., *Loc.cit.*, pp 78-79.

adoption of the same theory by both countries.(See Diagram E). Second, the adoption of different theories by both countries. (SeeDiagram F)

Diagram E

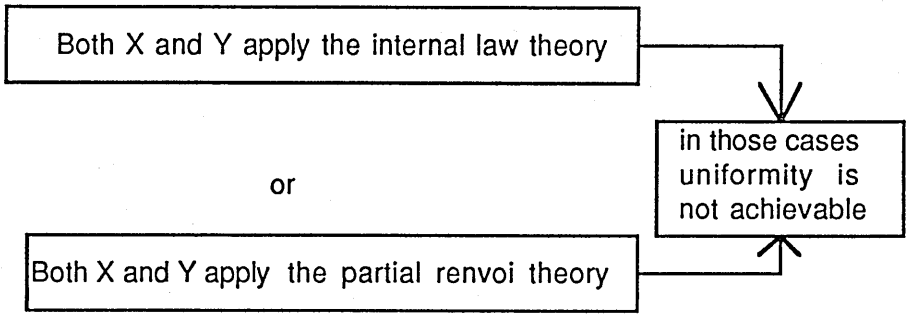
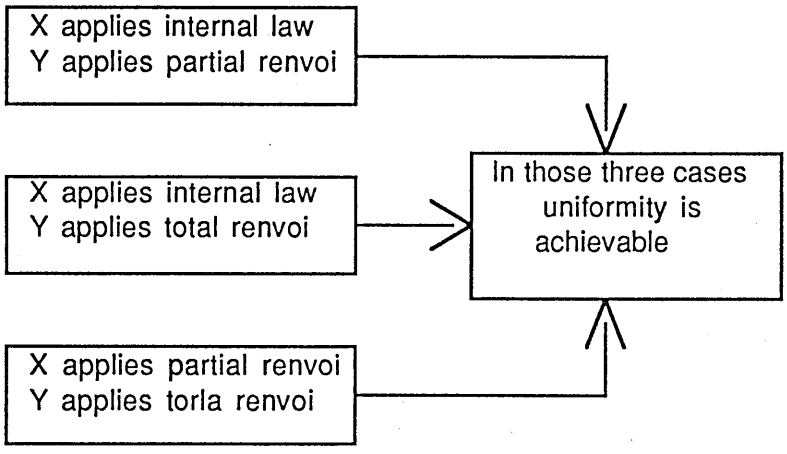


Diagram F



For further evidence on whether harmony of decision is achievable it is important to refer to the German scholar Martin Wolff who claims that this harmony can be achieved in three possible ways.

a)- Harmony of decision is achievable if only the country x adopts renvoi remission while the country Y applies the internal law theory. Accordingly, both X and Y apply in this case the law of X.[178]

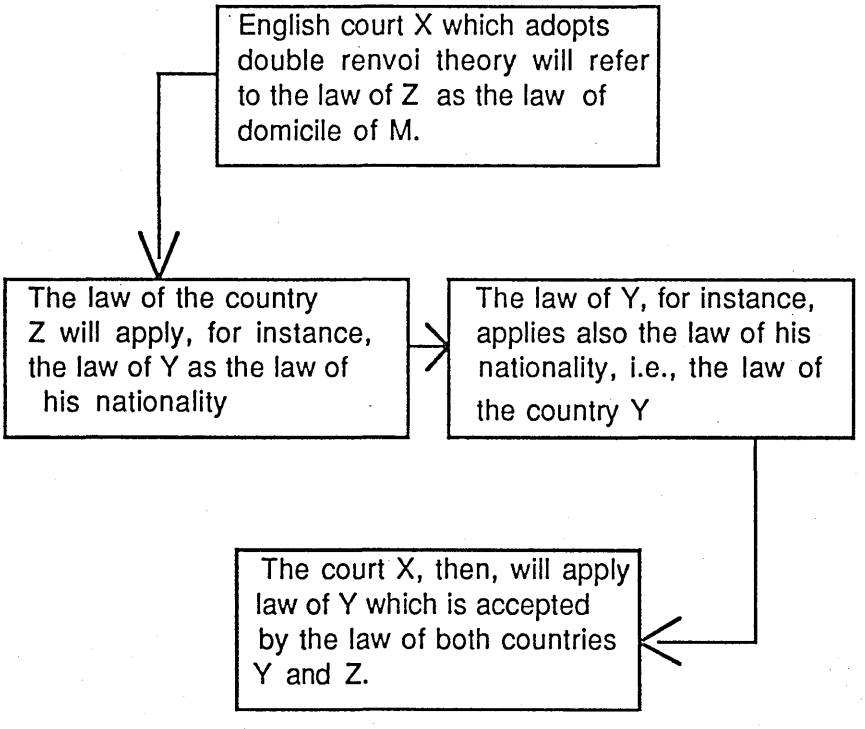
b)- Harmony is achievable if the country X adopts renvoi remission while Y adopts the double renvoi theory.[179]

178- Wolff, M., *Op.cit.*, p 202.

179- *Ibid.*

c)- Transmission to the law of a third country can lead to the harmony of decision between three countries X, Y and Z. This occurs if the country Y and Z, through a transmission process, agree to apply one internal law, i.e., either the law of Z or that of Y and taking into account that the court of X adopts a double renvoi theory.[180] This can be illustrated by an example concerning the position of an English court X in which it has to determine the succession of M a national of the country Y who died domiciled in the country Z (See Diagram G)

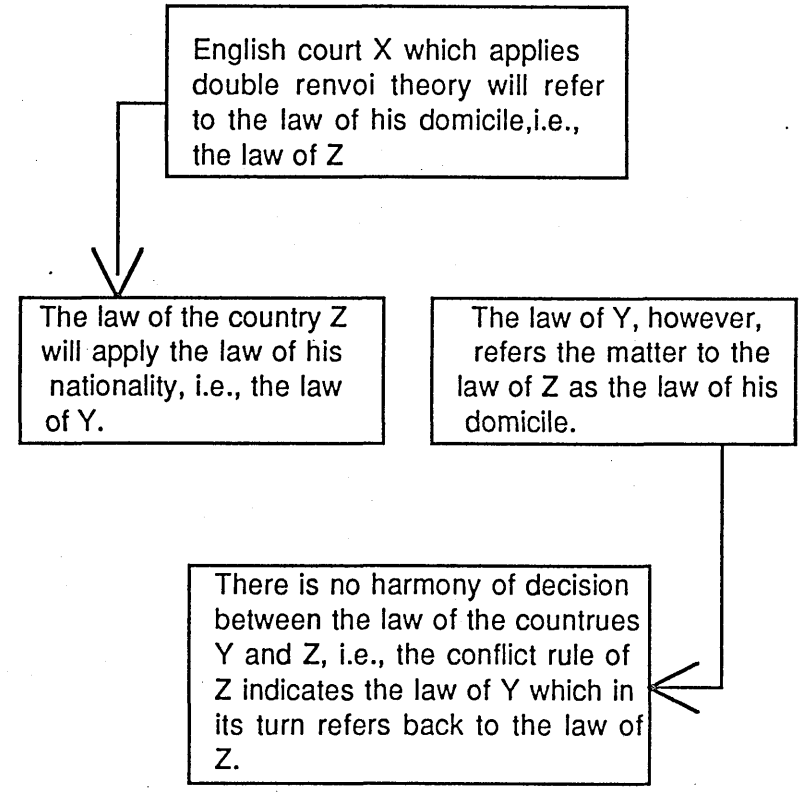
Diagram G



If, however, both countries Y and Z disagree on the application of the same law, harmony of decision cannot be obtained.(Diagram H)

180- *Cf.*, Morris, J.H.C. *The Conflict of Laws*, 3rd edition, London, Stevens & Sons, 1984, p477.

Diagram H



As a matter of fact, it has been held that the use of renvoi in the essential validity of marriage,[181] for instance, led to the uniformity of the status of the husband by three countries. It means that his remarriage was considered as void not only by English law but also by the law of his domicile, i.e., Switzerland, and that of Italy as a law of his nationality.[182]

Generally, in order to know how the position of different legal systems on the theory of renvoi can practically achieve uniformity of decision it is important, therefore, to discuss this problem in both sides, i.e, countries which reject renvoi

181- See the case of *Regina* v. *Brentwood Superintendent Registrar Registrar of Marriages Exparte Arias*[1968] 2 Q. B. 956; [1968] 3 All ER. 279; See also *Infra.*, Chapter 3. Section 1 Sub-section1, pp 137-138, 149-150.

182- According to the pro of renvoi the uniformity of the status of the husband in the case of *Regina* v. *Brentwood Suprintendent Marriage Registrar* was achieved, i.e., the husband lacks capacity to remarry not only in England but also in Switzerland and Italy. Jaffey, A.J.E., *Op.cit.*, .pp 262-263. See now 1986 Family Law Act, Section 50. which serves to break a knot. Thus it can be seen in *Brentwood Suprintendent Marriage Registrar* that the unusual effect of the Swiss conflict rules was to deny the validity of the Swiss consistorial decree.

and those who adopt it. Concerning renvoi at first degree, it has been claimed that this form can achieve harmony of decision provided it is not adopted by the two involved countries. For example, harmony of decision is achievable between France and Italy concerning the succession of movables of a French citizen domiciled in Italy. In this case both France and Italy will apply French Internal Law due to the fact that the former accepts renvoi from the law of Italy, as the law of the last domicile of the deceased, which rejects renvoi.[183] If, however, the both involved countries apply renvoi at first degree then "...Renvoi turns the negative conflict into a positive conflict, each country applying its own law."[184] This is the case with France in relation to Germany in which both accept renvoi at first degree from each other. In fact, if the French national, for instance, is domiciled in Germany, his movables succession will lead the French court, if it is seized, to accept renvoi from the law of Germany, as the law of the last domicile of the deceased, to the French law as the law of his nationality. If, however, German law is seized of the matter it will accept renvoi from the law of his nationality, i.e, French law to the law of his last domicile which is Germany.[185]

In addition to that, pro-renvoiists have also related the uniformity of decision with double renvoi. According to their arguments, among the reasons of adopting this theory is the desire for the English courts to do justice[186] and because this form has an advantage which is the contribution of making positive decisions.[187] It means that if the courts X or Y were seized of a legal matter, their decisions would be identical to that given by an English court.[188]

8)- Albert Ehrenzweig, however, rejects international harmony of solution and the risk of distortion as a justification of renvoi. In his view the only justification is the principle of deference to foreign sovereign. In fact, as

183- .Kahn-Freund, O.,*Op.cit.*, pp 432-433.

184-*Ibid.*, p 433.

185-*Id.*

186- Graveson, R.H., *Conflict of Laws, Private International law*, 7th edition, London, Sweet & Maxwell, 1974, pp 74-75.

187- See, for example, *Re Askew* where English court recognized to M its legitimacy. [1930] 2 Ch 259; Graveson, R.H.,*Ibid.*, p 75.

188- Mayer, P., *Op.cit.*, p 194.

Ehrenzweing puts it : "...Nor can a general principle of acceptance of renvoi be based on such policy reasons as the desirability of the uniformity of decision...or the danger of distortion...The only policy which will occasionally require renvoi is deference to a foreign sovereign"[189] The whole idea of his view, therfore, is that both the ideal of uniformity of decision and the distortion risk cannot be considered as a justification of a general principle of renvoi.[190]

What Ehrenzweing has indicated on the distortion danger argument[191] is said to be based upon a well known American case, which is *Babcock* v. *Jackson.*[192] According to this view if the New york court refused to apply the Ontario guest statute because that law is said to be inapplicable if the assured is domiciled in New York and also if the insurance company is from New York. It follows that the Ontario law would be subject to a distortion if the New york court applied it.[193]

9)- As will be discussed later the opponents of the renvoi theory have offered a strong argument against its use. This position, however, has led some to say that "...There is no reason to reject renvoi altogether."[194] Some scholars, such as, Cowan has arrived to prove that from the point of view of logic renvoi is possible.[195] Others have advocated the usefulness of the renvoi theory provided its use is not mechanical.[196] Even Mr Jacque Foyer' s answer to his colleague

189- Ehrenzweig, A., "Specific Principles of Private International Law", *Loc.cit.*, p 240.

190- *Ibid.*, pp .242 -271.

191- He is said to have supported his argument of the deference to a foreign sovereign as the only policy of renvoi justification by referring to Switzerland private international law dispositions. In his view those rules which take into considerations foreign private international law are, in fact, based upon the idea of the deference to a foreign sovereign policy, such as, article 28 of the Swiss Federal statute. L.R.D.C. of 1891. See in this context Lalive, P., *Loc.cit.*, p 271.

192- 12 N.Y. 2d 473; 191 N.E. 2d 279; N.Y.S. 2d 743 (1963). For more detail on this case see *Infra.*, Chapter 3. Section 1, Sub-section 2, p 179.

193- Lalive, P.,*Loc.cit.*, p 273

194- Edinger, E., *Loc.cit.*, p 49.

195- See Cowan, T.A.,*Loc.cit.*, PP 34-49; Rabel, E.,*Op.cit.*, p 89.

196- Philip, A., General Course on Private International Law", *Recueil des cours* Volume I, Tome 160, (1978)., p 48.

intervention during renvoi debate has shown his fascination by renvoi. More than that he believes that it will be a shame to desert it.[197] In the debate, Mr Loussouarn, however, disagrees totally with the term"Requiem?" given as a title by J. Foyer. The former, in fact, is doubtful about such requiem by drawing the line upon the question mark made in the title and , then, says, that renvoi currently does not deserve such Requiem.[198]

Overall, the truth which cannot be denied is that those who favour renvoi, however, recognize the differences between its forms.[199] In other words, although they favour renvoi theory they differ on the type of renvoi that may be the most acceptable.[200] Moreover, they also recognize some exceptions to the mechanism of renvoi in certain matters, such as, form of acts and the proper law of contract.[201]

II)- Different ways of the renvoi interpretation Due to the unconvincing arguments given by the renvoi advocates others conceptions have been proposed to explain the mechanism of renvoi. In fact, it was the duty of the theorists who advocate its mechanism to find out arguments to justify it and gives it a legal, theoretical or rational bases.[202]

A- Classical interpretation of the renvoi theory

The first classical conception of renvoi interpretation is that of the renvoi delegation.[203] The general idea of this conception is that when X conflict rule indicates the foreign law Y as competent, this must be interpreted as a matter of delegation of competence given by the forum law to the whole foreign law. This law, then, must be considered as one and indivisible.[204] In other words, its

197- See Foyer, J., *Loc.cit.*, p 130.

198- *Ibid.*, p 123. Originally emphasised.

199- Edinger, E.,*Loc.cit.*, pp 37-38.

200- Within the pro-renvoiists camp there are division about the application of the suitable form of renvoi. There are who favor only the adoptin of renvoi remission as an oappropriate form whereas others prefer the renvoi transmission. See Soulaiman, A.A., *Op.cit.*, pp 50-51; See also Sadekh, H.A., *Op.cit.*, pp 81-82.

201- See Sadekh, H.A., *Ibid.*, pp 83-86; For more details see *Infra.*, Chapter 3, Section1 Sub-section 2, p 166-172.

202- Lewald, H., *Loc.cit.*, p 583.

203- Issad, M., Volume I, *Op.cit.*, p 171.

204- The renvoi delegation conception is based on the undivisibility of the foreign

advocates claim that there is a delegation from the forum to the foreign legislator by which the former gives the latter the right and power to select the substantial applicable law.[205] If, however, both the forum and the foreign conflict rules are not harmonized, the result is that the delegation will lead to a substitution of the foreign solution for the home one, i.e., the solution of the foreign conflict rules should be respected whether it leads to a remission or a transmission.[206] This conception is said to be the oldest interpretation of renvoi theory

B)- Modern conceptions of the renvoi theory As a result of criticism over the classical interpretation of renvoi, scholars have tried to justify its mechanism by offering a new arguments with a scientific bases.[207]It means that other theories have been proposed in order to give renvoi a new base and maintains its result, i.e., supporting the view that a reference to a foreign law is a *Gesamtverweisung*.[208]

1)- It has been accepted that the theory of Lerebours-Pigeonnière known as the theory of subsidiary regulation finds its origin in the desistance conception in which the English scholar Westlake referred to it in 1900 when he discussed the renvoi issue in the Institute of International Law.[209] This conception was proposed by Lerebours- Pigeonnière in 1924 in which he maintains that the competence of foreign law does not mean that French private international law shows its desinterest.[210] As French private international law does not disinterest[211] another law should be designed by a subsidiary conflict rule if it

competent law, i.e., the reference to foreign law should include both its internal and conflict rules. Derruppé, J., *Loc.cit.*, p 5.

205- Mayer, P., *Op.cit.*,p 195.

206- This theory, then, leads to the application of either French internal law or a third law by a way of renvoi from foreign private international law. Loussouarn, Y et Bourel, P., *Op.cit.*, pp 275- 286.

207- Sadekh, H.A., *Op.cit.*, p 70.

208- See Derruppé, J., *Loc.cit.*, P.10; Maridakis, G.S.,"Le Renvoi en Droit International Privé". Volume 47,*Loc.cit.*, p 33; Lewald, H., *Loc.cit.*, pp 599-600.

209- Derruppé, J., *Ibid.*, p 10.

210- According to him when the judge refers to foreign conflict rule because those rules are stated by its own conflict rules. Here he shows its support that renvoi does not mean the abandonement of the forum conflict rule. Batiffol, H., *Loc.cit.*, p 468.

211- Its advocates believe that if there is a refusal, there will be always a second conflict

appears that foreign private international law is inapplicable.[212] In other words, the meaning of Lerebours- Pigeonnière' s theory is that if the principal connecting factor refers the competence to the law of Y the result will be that the substantive law of that law must be applied. If, however, the law of the country Y refuses this competence, it means that the law of the country X is applicable by the intervention of the *lex fori* and according to the subsidiary connecting factor of the country X.[213] It would also be noticed that according to this scholar either the *lex fori* or foreign law will be applied, for instance, the law of domicile will be applied instead of nationality by a subsidiary rule of the forum.[214]

According to those who favor the renvoi *règlement subsidiaire,* this theory is quite different from the renvoi delegation conception in that the former eliminates the complication of the mechanism of renvoi, such as, renvoi at first and second degree.[215] Jacques Foyer, however, has maintained that the true renvoi is that of renvoi delegation and not the renvoi *règlement subsidiaire* theory.[216]

2)-Niboyet, another French scholar, has offered a conception which interprets renvoi by the public policy approach. According to his theory there is a substitution of the *lex fori* for foreign law if the latter refuses the competence given by the forum conflict's rules.[217] The main justification of his theory is to avoid a legal relationship being stateless.[218] His justification is that when the foreign law refuses competence the forum law must assume this competence by the name of public policy intervention which does not allow a legal relationship, which is connected to France, to be without regulation.[219] It means

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rule that contains a subsidiary connecting factor. Mayer, P.,*Op.cit.*, p 196.

212- Loussouarn, Y. et Bourel, P., *Op.cit.*, p 276.

213- Sadekh, H.A.,*Op.cit.*, p 71.

214- Derruppé, J., *Loc.cit.*, p 4.

215- Francescakis, P.H., *Op.cit.*, p 100.

216- Foyer, J., *Loc.cit.*, p.127.

217- According to Niboyet's theory, the only subsidiary connecting factor is the *lex fori*.See Francescakis, P.h., *Op.cit.*,p 188.

218- See Loussouarn, Y., *Loc.cit.*, p 378.

219- Loussouarn, Y et Bourel, P., *Op.cit.*, p 280.

that when the foreign conflict rules refuses the competence the law of the *lex fori*, automatically, intervenes[220] in the name of the public policy reservation.[221] Concerning the similarities between Niboyet and Lerebours-Pigeonnière 's theories is that both scholars agree that you should not oblige the foreign law to be competent if it refuses such competence.[222] The two conceptions, however, differ in that despite both scholars taking into consideration foreign conflict rule they differ on the reason for the application of the law of the forum, i.e., public policy reservation of Niboyet contra Lerebours-Pigeonnière' s subsidiary conflict rule.[223]

3)-After discussing how the foreign court theory works,[224] another element which justifies its mechanism, should also be examined. The inquiry in this context, therfore, is to find out the basis of the application of the mechanism of the total renvoi. As a matter of fact, English lawyers have justified the mechanism of renvoi by an approach which is different and opposed to the continental renvoi and which has been considered as peculiar to English law. An explanation of the theory of renvoi in the English Jurisprudence has related this theory to the so called international competence.[225] According to Emile Potu the decisions given by courts which are internationally competent will be considered

220- In his theory Niboyet suggests that when the legal relationship is said to be statless there should be a return to the territoriality of law principle by which the forum can apply its own law. Soulaiman, A.A., *Op.cit.*, pp 53-54.

221- To avoid criticism to his theory Niboyet admits that there should be an objection to the application of the law of the *lex fori* when the legal issue has no link with France. Derruppé, J.,*Loc.cit.*, pp 11-13.; See also Isaad, M., Volume I, *Op.cit.*, p 171.

222- According to Lerebours-Pigeonnière and Niboyet a subsidiary conflict rule must be found in order to avoid the legislative emptiness when both the forum principal conflict rule and the foeign conflict rule refuse to be applied. See Issad, M.,*Ibid.*, Sadekh, H.A., *Op.cit.*, p 74 .

223- Derruppé, J., *Loc.cit.*, p 4

224- See *Supra.*, Chapter 2 Section 1, pp 78-79.

225-Whilhelm Wengler stresses that "...The foreign court theory presupposes the there is a concurrent jurisdiction for the English court and the foreign court, but that the foreign court, indicated by the English conflict rule , has some kind of better jurisdiction. Wengler, W.,"The General Principles of Private International Law," *Recueil des cours*, Volume III, Tome 104, (1961) p 381.

as valid irrespective of the fact that it is given by an English or a foreign court provided, of course, that they don' t hurt the English public policy. He, then, goes to point out that although a foreign judge may be internationally competent this does not prevent an English judge to rule on the case. To do that an English judge must decide the case as the foreign judge will do . Again Emile potu would draw the line arguing that this can be considered as the origin of the renvoi in the English jurisprudence[226], i.e., this type of reasoning is said to be the basis of English private international law. [227]

4)- The eminent French scholar Batiffol has used a different approach to justify the use of renvoi. His reasoning is that, if you want to reach the harmonization between different legal systems of private international law this negative conflict, should be resolved by certain coordination [228] of both French and foreign conflict rule.[229] Concerning the advantage of this conception it has been held that although renvoi does not lead to the unification of solutions[230] It can, however, achieve the coordination of different systems.[231] Accordingly, it has been recognized that the strong basis of his theory makes it far away from the vicious circle criticism. [232]

From the point of view of similarities between Lerebours-Pigeonnière and Batiffol' s conceptions the general view is that both have in mind this harmonization of private international law and try to avoid the criticism of the abandonment of sovereignty that has been said against the classical conception of renvoi.[233] In fact, to support his claim Mr Batiffol underlines that the conflict

226- Potu, E.,*Op.cit.*, p 122.

229- *Ibid.*, p 135.

228- The purpose of of Mr Batiffol' s theory which accepts renvoi is the coordination of different conflict systems, i.e, renvoi in his view has a coordinator role. See Maridakis, G.S.," Le Renvoi en Droit International Privé ", Volume 49, *Loc.cit.*, p 277. Derruppé, J.,*Loc.cit.*, pp 21-22.

229- Loussouarn, Y. et Bourel, P., *Op.cit.*, p 281.

230- This has led to believe that such coordination leads to the achievement of International harmony of solutions. .Mayer, P., *Op.cit.*, p 198.

231- Derruppé, J., *Loc.cit.*, p .22.

232- *Ibid.*

233- Loussouarn, Y. et Bourel, P.,*Op.cit.*, p 282.

rule does not work by itself but it enters into the process because it is designed by the French conflict rule.[234] Concerning their dissimilarity the two conceptions, however, differ first on the basis of the application of the lex fori.[235] They also differ on the possible form that can be applied in that if in Batiffol' s conception the renvoi at second degree is possible[236] it is, however, excluded by Lerebours-pigeonnière' s conception.[237] More important, Batiffol maintains that renvoi is simply an exception because the principle is that each judge applies its own conflict rule and allows the application of foreign conflict rule only in certain cases.[238]

5)-Another technique known as the desistance theory has been advanced by Westlake.[239] The idea of this English scholar is said to be repeated in France first by Ambroise Colin and then by Lerebours-Pigeonnière.[240]

The question that must be asked is what the forum should do to respect the basis of such theory? To do that he has to be sure that the foreign system does not show its disinterest and, then, find out whether it applies its internal law. If, however, such disinterest is confirmed the *lex fori* ,i.e., the law of the forum will be applied.[241] For example, if French judge applies French law because English legislature shows its disinterest and not because of renvoi from English law.[242] In his words Westlake maintains: "...Why the French judge will

234- According to his conception there is no abandonment of the French conflict rules to the profit of the foreign rule. See Mayer, P., *Op.cit.*, p197; Loussouarn, Y. et Bourel, P., *Ibid.*

235- If Battifol thinks that the application of *the lex fori* is made according to the reference to the foerign conflict rule which refuses competence, Lerebours-pigeonniere, however, stresses that it is the subsidiary connecting factor that leads to the application of the *lex fori.* Sadekh, H.A., *Op.cit.*, p 76.

236- If according to lerebours-Pigeonniere renvoi at first degree must be applied by the application of the subsidiary conflict rules, Battifol's conception, however, leads even to the application of renvoi transmission. See Isaad, M., Volume I, *Op.cit.*, p 172; Sadekh, H.A., *Ibid.*, pp 78;79.

237- Loussouarn, Y. et Bourel, P., *Op.cit.*, p 282.

288- Batiffol, H., *Loc.cit.*, p 472.

239- Griswold, E.N.,*Loc.cit.*, p 1168.

240- See Francescakis, P.h., *Op.cit.*, p 136.

241- Edinger, E.,*Loc.cit.*, p 37.

242- See Lewald, H., *Loc.cit.*, p 601.

apply French law is, not because the English law maker refers the matter to him, but because the English law-maker pronounces the matter outside his interest. *La loi anglaise ne renvoie pas;elle ne fait que se désintéresse...*"[243]

With regard to the form of renvoi it has been held that this theory leads only to renvoi remission and there is no possibility for renvoi transmission.[244] In other words, the desistance theory has been considered as partial renvoi, i.e., renvoi *Ruckverweisung*.[245] According to another view, however, among the reasons why the theory of desistance cannot be considered as a true renvoi is due to the fact that there is no remission or transmission from the foreign conflict rules.[246] Another difference between the theory of desistance and that of renvoi is that if the lawn tennis is inevitable in the proper renvoi this, however, cannot occurs in the theory of Westlake and Von Bar.[247]

Furthermore, Mrs Elizabeth Edinger goes on to consider such desistance to be found within the English reasoning in the case of *Re Askew*. Although she cited the reasoning of the judge Maugham in that case she considers, however, that "...the desistance has never become part of the common law."[248]

III)- Arguments against the renvoi theory

A)- Refutation of renvoi advocates' arguments Those who oppose renvoi have given various arguments which deny the utility of renvoi mechanism. These arguments are not cited according to their degree of importance but are rather discussed in respect of the previous justifications of renvoi advocates.

1)- According to the anti-renvoiists claiming the indivisibility of the foreign law is totally wrong.[249] In their view if the forum law applies the foreign law Y

243- As quoted from Bate, J.P.,*Op.cit.*, p 68.

244- See the view of Wolff, M., *Op.cit.*, pp 198-199.

245- The main reason that makes scholars believe that the declinature or desistment theory is identical to renvoi is that both refer to the foreign conflict rules. Bate, J.P., *Op.cit.*, p74 ; Edinger, E., *Loc.cit..*, p 37.

246- Edinger, E., *Ibid.*

247- See for instance Bate, J.P., *Op.cit.*, p 74.

248- *Re Askew*, [1930]. 2. Ch. D., p 269..See Edinger, E.,*Loc.cit.*, p 38.

249- If the pro-renvoiists insist that the application of foreign law must be considered as

as an indivisible and that law will refer back to the forum law the latter should also be considered in its turn as one and indivisible. It means that the reference made by the forum conflict rules to the law of Y must also be respected and, then, the vicious circle is inevitable.[250] In fact Kahn has pinted out that "...The consequence is that in virtue of the foreign law ours is applied in its totality and in virtue of ours the foreign law is again applied in its totality and so on and so on: a logical 'cabinet of mirrors'... "[251] Georges S. Maridakis too concluded in his definitive report during the session of Amsterdam that the so called *Gesamtverweisung*, i.e., a global reference to foreign law, has no basis or foundation in doctrine.[252]

2)- The cons of renvoi stresses that the process of renvoi can, practically, cause problems to judges and also will have a negative effects on the rights of subjects especially when the conflict rules of the country X refer to a plurilegislative systems Y of either territorial or personal law.[253] In fact this represents one of the problems that face judges who try to find out the nationality of a person who belongs to this non unified system.[254] This occurs in situation when, for instance, the conflict rules of a country refer to a person's nationality which could be the United States of America , Canada or the United Kingdom.[255] In this context, it has been stressed that " ...the existence of different legal systems within the United Kingdom may still cause complications, and sometimes any solutions adopted will appear unreal...".[256] To show the

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all homogeneous including both the substantive and conflict rules the opponent camp, however, claims that such belief leads to the lawn tennis or an infinite circle. Potu, E., *Op.cit.*,pp .227-228.

250- Derruppé, J., *Loc.cit.*, P 6.

251- As quoted from Bate, J.P., *Op.cit.*, p 50.

252- Maridakis, G.S., " Le Renvoi en Droit International Privé" Volume 47, *Loc.cit.*, p 15.

253- This type of renvoi has been called by some scholars as internal renvoi. In their view the country X will not decline competence to another law but it will define the applicable internal law among the different existing laws. See for that Sadekh, H.A., *Op.cit.*, pp 89-90.

254-The difficulty occurs when the judge proceed to the definition of the connecting factor in order to find out whether X is a natioanl of a composite legal system. See Cheshire & North, *Op.cit.*, pp 63-64.

255- Munro, C.R., *Loc.cit.*, pp 72-73.

256-*Ibid.*, P 73; For more details on this case see *Infra.*, Chapter3, Section 1, SubSection1,

uselessness of renvoi process, when the reference is made to a plurilegislative country of several unit laws, the opponent camp, therefore, considers *Re O' Keefe*.as a best case which illustrates that fact.[257]

3)- The anti-renvoiists claim that taking into account a foreign conflict rules affect undoubtedly the sovereignty of the forum.[258] In their view referring to the foreign conflict rules is a kind of surrender or capitulation of the forum rules to the foreign conflict rules.[259] Avoiding such inconvenient, i.e., the abandonment of sovereignty, renvoi opponents say that it is the forum private international law which should determine the competent internal foreign law otherwise the forum private international law will bow down to Foreign private international law.[260] In fact, Cheshire' s point of view is clear when he stresses that "...the doctrine involves nothing less than a substitution of the foreign for the English choice-of-law rules..." [261]

4)- Claiming that renvoi facilitates the exequatur of judgments presupposes that its execution takes place in the countries which the court has applied and respected its conflict rules through the process of renvoi. This is, however, is not always the case because it may happen that the judgement will be executed in another country.[262] It follows that renvoi will be considered as an obstacle to the execution of that judgment in the country B if the law applied by

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pp 153-158.

257- [1940] Ch. 124, [1940] 1 All ER. 216, See Jaffey, A.J.E., *Op.cit.*, P..262;. Collier, J.G., *Op.cit.*, pp 25-26..

258- The application of foreign conflict rules has been objected on the ground that it allows the forum to leave the decision to the court and the law of a foreign State Cheatham, E.E., *Loc.cit.*, pp 337-338.

259- Munro, C.R.,*Loc.cit.*, pp 74-75.

260- Loussouarn, Y et Bourel, P., *Op.cit.*, pp 264-265.

261- See Cheshire's *Private International Law*, by North P.M. (ed.,), 9th edition,, London, Butterworths, 1974, p 64.

262- It may happen that the judgment could be executed in the country X, i.e., *the lex fori* and not in the foreign country Y. This execution may also take place in the same country which prounounced the judgment or in a third country and not forcely in the country that made the reference to the forum law. Sadekh, H.A., *Op.cit.*, p 70; Soulaiman, A.A., *Op.cit.*, p 52.

the process of renvoi is not the law which will be selected and applied by that country.[263] Moreover, claiming that by renvoi the country B will exequatur the judgment given by the country A is not easy to confirm for the simple reason that in order to implement this decision, the former must look to other important elements, such as, whether the country A is in fact competent .[264] According to their opinion in the case of *Armitage* v.*Attorney General*,[265] which concerns the recognition of foreign judgment, there is no renvoi in this situation but only a consideration of foreign private international law.[266] Their basic view, therefore, is that there is no need of renvoi pretext to recognize a foreign judgment pronounced according to a law chosen by its own conflict rule.[267]

5)- Concerning the question on whether the theory of renvoi may achieve uniformity of decision, it should be borne in mind that this uniformity is one of the most serious objections to renvoi by the anti-renvoiists. According to them arguments related to the uniformity principle are not strong to justify the renvoi use because uniformity cannot be achieved suddenly and totally in the worldwide scale.[268] It means that if the uniformity is one of the objects of renvoi theory it does not mean, however, that it can be achieved in all areas.[269] Moreover, the anti-renvoiists have examined the cases given above [270] and,

263- Derruppé,J., *Loc.cit.*, p 18.

264- Bate, J.P., *Op.cit.*, pp 30-31.

265- [1906] p 136.

266-This situation was compared to renvoi because in the view of English courts the divorce judgment pronounced by a foreign country, which is the State of south Dakota, should be recognized because it is also recognized by the State of New York as the State of domicile. See Lalive, P., *Loc.cit.*, p 307. See *Infra.*, Chapter 3 Section 1 Sub-section 1, pp 148-149, 202.

267- See Von Overbeck, A.E., "Les Questions Général du Droit International Privé, À la Lumière de Codifications et Projets Recents, Cours Général de Droit International Privé" *Loc.cit.*, p 164.

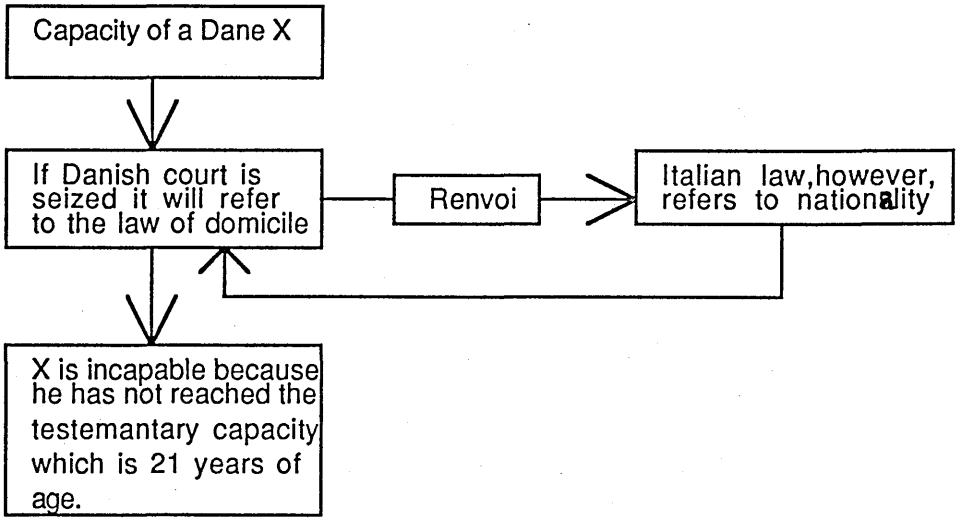
268- Uniformity of decisions, however, is said to be achievable only if the country X adopts renvoi mechanism whereas the country Y rejects it. Besides, harmony of solutions also cannot be achieved if renvoi is accepted by all countries. See Francescakis, P.h., *Op.cit.*, p 172. *C.f.*, Cheshire & North, 11th edition, *Op.cit.*, p 62.

269- Edinger, E., *Loc.cit.*, p 47.

270- See *Supra.*, Diagram D, p 86.

then, rejected the view that if renvoi was applied Danish judge would have also admitted to X its capacity.[271] It can be deduced from such refutation, therefore, that identical decisions is not achievable because X is incapable according to Danish law.(see Diagram I)_

Diagram I



Furthermore, it has been pointed out that admission of renvoi does not lead to the legal harmony but it leads to negative consequences. In other words, this theory causes incertitudes and doubts and should be considered as a misleading and fallacious doctrine.[272] In Emile potu' s point of view uniformity becomes impossible if more than two legislations are in conflicts and all decisions of the court involved will be, therefore, contradictory.[273]

6)-The view that draws the distinction between principal and subsidiary regulation is untrue according to the anti-renvoiists and renvoi *règlement subsidiaire* is, then, an artificial hypothesis which has no relation with positive law.[274] Their belief is that there is a unitary conflict rule[275] and the subsidiary

271- Bate, J.P.,*Op.cit.*, p 28.

272- Lewald, H., *Loc.cit.*, pp 615, 571-572.

273- Potu, E., *Op.cit.*, p 221.

274- It has been held that Lerebours-Pigeonnière' s theory is based on international courtoisie conception, a principle that can not be considered as the bases of private international law because of its insufficiency. See Derruppé, J., *Loc.cit.*, p 10.

275- Loussouarn, Y. et Bourel, P., *Op.cit.*, pp 278-280.

connecting factor stated by Lerebours-Pigeonnière is not true. It is a wrong and unfounded hypothesis which does not prove that each connecting factor, practically, has a subsidiary one.[276]

7)- If the Pro-renvoiists consider Niboyet' s conception as simple because it avoids and cancel renvoi transmission,i.e., renvoi at second degree. This conception, however, has been considered to be based upon an abstract reasoning[277] that leads to an immediate and automatic competence of the *lex fori* and can not lead to the harmonization of solutions.[278] Besides, the non application of foreign law on the ground that it refuses the competence is a wrong analysis because this leads automatically to believe that the basis of the application of foreign law is international courtesy.[279]

8)- To affirm the uselessness of Batiffol' s arguments which make the coordination of private international law in different countries possible by the process of renvoi, George S. Maridakis stresses that such conception force both judge and parties in making a hard effort which is not more than waste of time.[280] Francescakis, however, considers the theory of Batiffol as an insufficient for the justification of renvoi. In his view this theory represents merely a kind of applying the mechanism of the classical theory of renvoi delegation.[281]. From a practical point of view, It has been maintained that if the coordination of the conflict rules could be fulfilled by the mechanism of renvoi in personal law and succession this is due to fact that the connecting factors used in this area are not numerous. This, however, is not the case in other areas, such as, the legal

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276- See Sadekh, H.A., *Op.cit.*, p 73.

277- The idea that makes Niboyet believes that a legal relation can be without a country is rejected on the ground that it is unlikely that all legal systems will refuse their competence. *Ibid.*, pp 74-75.

278- Loussouarn, Y. et Bourel, P., *Op.cit.*, pp 280-281.

279- Sadekh, H.A., *Op.cit.*, p 75

280- Maridakis, G.S., " Le Renvoi en Droit International Privé ",Volume, 47, *Loc.cit.*, p 15.

281- Francescakis, P.h.,*Op.cit.*, p 224; For discussion see Derruppé, J., *Loc.cit.*, p 22.

matrimonial property regime.[282]

9)- According to the opponent camp the important thing to bear in mind concerning the desistance theory is that it is based on a false imagination. It means, that if the foreign state was really asked about the jurisdiction it would accept it and not decline it.[283]

10)- Those who oppose renvoi refer to another difficult issue which is the proof of foreign law. From their point of view it is not easy for all judges to know the real position of the foreign court about renvoi.[284] This led them to maintain that if the application of the foreign internal law is not easy the application of the foreign conflict rules, however, are much more difficult to be known defined and applied.[285] As a matter of fact the case of *Re Duke of Wellington* is said to be far enough to show the difficulty that faced an English judge in his judgement. To use Wynn- Parry' s reasoning :"...It would be difficult to imagine a harder task than that which faces me, namely of expounding for the first time...the relevant law of Spain [on renvoi] as it would be expounded by the supreme court of Spain, which up to the present time has made no pronouncement on the subject..."[286]

The point to be emphasised, therefore, is that although the mechanism of renvoi has been adopted by courts and defended by its advocates in Civil and Common law countries a big number of writers, however, have rejected its mechanism.[287] As those opponents are numerous the writer, however, would like to cite the well known scholars from both Civil and Common law countries.

282- The possible connecting factors used in this area are, for instance, the national law, the law of the matrimonial domicile, the implicit intention of the parties and so on. For more discussion see Aldroze, G., "Regimes Matrimoniaux en Droit International Privé", *Recueil des cours*, Volume III, Part 143, (1974), pp 118, 122-123.

283- Munro, C.R., *Loc.cit.*, p 71.

284- See Anton, A.E.,*Op.cit.*, p .59 .

285- Cheatham, E.E., *Loc.cit.*, p 338.; Wolff, M.,*Op.cit.*, p 198.

286- In this case the judge recognizes that it is difficult to find out whether renvoi is adopted by Spanish law due to the diffrences of both writers and court decisions on renvoi. [1947] Ch. 506. at 515. Originally emphasised. See also Maugham ' s view in *Re Askew* [1930] 2 Ch. 259 at p. 276. See in this context Munro, C.R., *Op.cit.*, pp 71-72; Collier, J.G., *Op.cit.*, p 25; For more details on those cases see *Infra.*, Chapter 3. Section 1 Sub-section 1, pp 139-141, 143.

287- See Collier, J.G., *Ibid.*, P. 22; Batiffol, H.,*Loc.cit.*, p 467.

These are, for instance, the Italian Buzzati[288] the French Bartin [289] Pillet,[290], the American Beale[291] and the English scholar Cheshire[292].

The anti-renvoiists have also rejected renvoi in International Conventions by their tough position against its mechanism.[293] This is, for instance, the position of Mr Asser form Netherlands, the French Lainé,[294] and the Dutch George S. Maridakis.[295]

288- Lewald, H., *Loc.cit.*, P. 574; Potu, E.,*Op.cit.*, pp 198-201.

289- Francescakis, P.h.,*Op.cit.*, p 98.

290- His basic argument against renvoi is that in Private International law there is a limitation of sovereignty. Meijers E. M. *Loc.cit.*, p 213.

291- Although he rejects the renvoi theory he admits its mechanism in exceptional cases., i.e., he is in favour of a limited application of the partial renvoi in matter of the validity of divorce decrees and of title of land. See Beale, J.H., *A Treatise on the Conflict of Laws*, New York, 1935 § 7.3, pp 56-57.; Von Mehren, A.T., *Loc.cit.*, p 382; See also Von Mehren, A.T., and Tautman, D.T., *Op.cit.*, pp 509-510; Levontin, A.V., *Choice of Law and Conflict of Laws*,Leyden, A.W. Sijthoff, 1976. p 54.

292- According to his view the application of the foreign substantive law is the correct and desirable solution. Although Cheshire objects renvoi as a principle he, however, admits its mechanism in exceptional cases. Cheshire & North, 11th edition, *Op.cit.*, p 59; Anton, A.E., *Op.cit.*, pp 60-61, notes 89.

293- Lewald, H., *Loc.cit.*, p 584

294- During the three Hague Conferences on Marriage in 1893, 1894 and 1900 those two delegates and others have shown their opponancy to renvoi. Potu, E.,*Op.cit.*, p 159.

295- During the session of Amsterdam George S. Maridakis presented his definitif report concerning the theory of renvoi during the 23th commision,which was created in 1952. In his report he estimated that the Institute would maintain the resolution and the expression of 1900 in the session of Neuchâtel in which the vote within the Institute of International Law shows a massive condemnation of renvoi as a principle by a majority of twenty one scholars against six. Among the opponents who formed the majority are Asser, Buzzati and Holland. Those who were in favour are Von Bar and Westlake. According to Mr George S. Maridakis, the refernce to the foreign law should be only to the internal law of that country and not to its rules of private international law. Latter, however, he admitted that the institute should reject renvoi as a general principle but allowing certain exceptions, i.e., returning to the Neuchâtel resolution by adding other exceptions. This solution was accepted and shared by other scholars such as Mr Cheshire himself. See, Maridakis, G.S., " Le Renvoi en Droit International Privé "Volume 47, *Loc.cit.*, pp 1, 7, 16-17, 53, 62; Maridakis, G.S., Le *Renvoi en Droit International Privé*" *Annuaire*, Quatrième Séance Plénière, Session de Varsovie, Volume 51, Tome II,(1965) pp 147-148, 150, 155; Marisdakis, G.S., "Introduction au Droit International Privé" *Loc.cit.*, p 422; Von Overbeck, A.E.," Renvoi in the Institute of International Law" *Loc.cit.*,

Finally after confronting arguments of the two camps it must be noted that even the anti-renvoiists camp admits certain exceptions to the rejection of renvoi as a general principle.

B)- Evidence that justifies the uselessness of renvoi.

1)-Evidence that concerns the consequences of the foreign court theory application.

It has been indicated that the idea of sitting in England and deciding the case at the same way as it would be decided by foreign court is only a fictitious idea.[296] In fact the process of the foreign court theory will be blocked if both the *lex fori* and the *lex causae*show their interest of applying it at the same time.[297] In other words, the application of its reasoning by both courts means that both judges will spend the time asking each other mutually.[298]

In addition to the principal objection that it is based on an imaginary reasoning the foreign court theory has been considered as exceptional because it is not of a general application.[299] In fact Martin Wolff has observed that "...should, however, the English renvoi system become universal it would break down entirely and result in an endless circle...for the time being the English solution works well."[300] Max Pagenstecher too stresses that if American court adopted the foreign court theory the result would be that "...Uniformity of decision that exists at present between England and the United States would be destroyed."[301] To be pragmatic no decision will be made or reached.[302] It means that, practically, uniformity could not be achieved if the so called total reference principle is adopted by the two involved countries or applied by all

p544; Sperduti, G.,*Loc.cit.*, p 233; Westlake, J., *Op.cit.*, p 34.

296- See Wolff, M., *Op.cit.*,p 200; Isaad, M., Volume I, *Op.cit.*, p 168.

297- See Wolff, M.,*Ibid.*, p 201.

298- Loussouarn, Y. et Bourel, P., *Op.cit.*, p 290

399- This theory is only of a unilateral application which cannot be generalizaed and applied outside England. Loussouarn, Y., *Loc.cit.*, p 282; Sperduti, G., *Loc.cit.*, p 214; See also Derruppé, J., *Loc.cit.*, p 6.

300- Wolff, M., *Op.cit.*, pp 201-202.

301- Pagenstecher, M., *Loc.cit.*, p 394.

302- *Ibid.*, p 387.

States. [303]

On the whole the anti-renvoiists reject totally the idea of imitating the foreign court.[304] In their view this idea is wrong on the basis that the forum judge, in his judgment is only bound by its own legislature and not by the foreign one.[305] This has led to the opinion that the foreign court theory leads to the fact that there is a substitution of the foreign for the forum conflict rules.[306]

The main critical point which is worth emphasizing through the anti-renvoiists' arguments, therefore, reads as follows. What is the usefulness of this theory which can work unless it is adopted by one and only one side? [307]

2)- Evidence against the partial renvoi use. According to the opponents camp the uselessness of the perfect renvoi can be seen in its two forms, remission and transmission.

a)- In the former if both countries X and Y apply renvoi at first degree, there will be no harmony of solution. In fact, if X is seized of the matter it will apply its own internal law by a renvoi from y conflict rules. If it is Y that is seized of the matter it will apply its own internal law by a renvoi from X conflict rules.

If, however, both countries refuse renvoi it has been confirmed that X will apply Y internal law whereas Y will apply X internal law. Following such fact it has been said that there will be a harmony of solutions only without renvoi. [308] Moreover, there are who believe that renvoi remission does not lead to the achievement of international harmony but it satisfies mainly the interest of the forum.[309]

303- *Ibid.*, p 385.

304- According to them this form of renvoi is absurd because its mechanism obliges the forum judge to imitate totally the foreign legal solution from the supposed foreign court. Francescakis, P.h., *Op.cit.*, pp 106-107.

305- See Sadekh, H.A., *Op.cit.*, p 69.

306- Cheshire & North, 11th edition, *Op.cit.*, p 63.

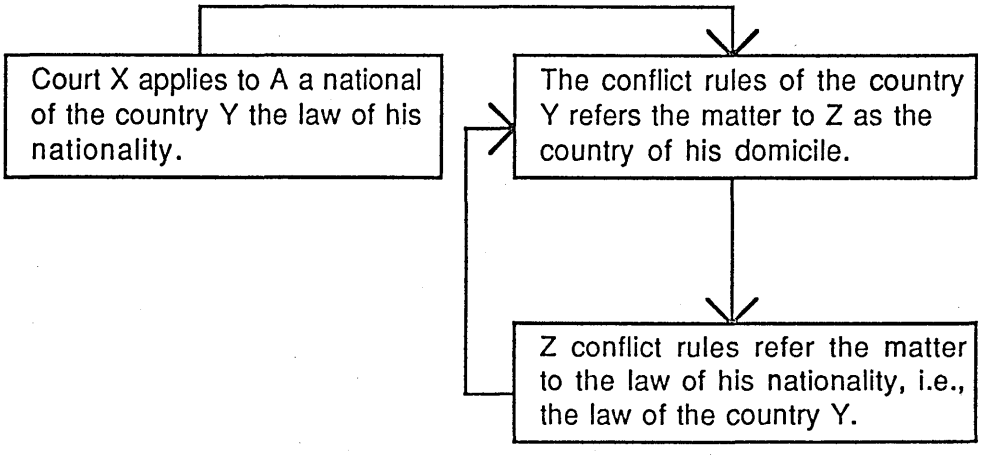
307- This theory is said to be useless on the ground that a theory that is applicable only from one side is inacceptable and its value will be lost when two countries adopt it at the same time. See Falconbridge, J.D., *Loc.cit.*, p 717; Soulaiman, A.A., *Op.cit.*, p 55. Despite such unilateral conception and its double reasoning there are who consider goes to consider this imperfect renvoi as a sophisticated version of the renvoi theory Philip, A., *Loc.cit.*, p. 48.

308- Loussouarn, Y. et Bourel, P., *Op.cit.*, PP 265-266.

309- This is the view of M. Vekas, For that see Von. Overbeck, A.E., " Les Questions

b)- The latter form can also lead to an impasse. This might happen when the conflict rule of the third law Z designed through the process of transmission refuses such competence and would rather refer the matter back to the country Y which is the country that has already been chosen by the conflict rule of forum X. Accordingly, it has been stressed that renvoi at second degree leads to a vicious circle and the *ping pong* game could not be broken or ended.[310] From another point of view renvoi at the second degree will not work if it is adopted by all systems.[311] In a nutshell these hostile arguments try to justify that renvoi at the second degree is, then, jammed. [312] (see diagram J)

DiagramJ



Générales du Droit International Privé, À la Lumière des Codifications et Projets Recents. Cours Général de Droit International Privé", *Loc.cit.*, p 136. Concerning the apllication of the *lex fori* Emile Potu , however, claims that if we accept that the native law is the best and the only just law why don' t we return to the principle of the territoriality of law. According to him if French law is the best for French this is not the case for other individuals who are different by their civilisations and traditions. Potu, E., *Op.cit.*, p 226.

310- This vicious circle is said to occur when we are in presence of the so called le "renvoi toupie", i.e., in the situation where the renvoi mechanism refers back to a country that had already refused the competence or to the law that was consulted the first. See Batiffol, H., *Loc.cit.*, p 479; Derruppé, J. et Agostini, E., *Loc.cit.*, p 10 ; Isaad, M., Volume I, *Op.cit.*, p 169.

311- Lalive, P.,*Loc.cit.*, p 270.

312- Loussouarn, Y. et Bourel, P., *Op.cit.*, p 266.

Sub-section2: Sarcasm as a technique in treating the renvoi problem.

I)- Justifications of scholars' arguments through sarcasm.

Generally, renvoi has been seen through different ways and sides and labelled by different nicknames. Of course the imagination of scholars differ on this issue in that each scholar has got its own imagination on the process of renvoi. As a matter of fact, there are who compare it to a " logical 'cabinet of mirrors' (spiegelkabinett)" such as Kahn[313] and to the game of a "Lawn tennis International" by Buzzati [314] and to *l' animal qui mange ses pattes* Catoblepas by Bartin[315] and Marry-go-round by Ehrwin N. Griswold.[316]

Besides, the tendency of accepting or rejecting the theory of renvoi has been interpreted as follows: Renvoi represents a game that you can either play or refuse to play.[317]

In order to differentiate between the mechanism of total renvoi and that of partial renvoi the imagination of some scholars led them to set up a certain rules for the renvoi game. According to them the regulations will be as follow :" ...I will play if you agree not to play in may way...I shall put the ball into my pocket and go."[318]

With regard to the circulus inextricabilis, Martin Wolff has explained this endless reference by an amusing example. In this context, he points out that: "In an old German comedy, *Die deutschen Kleinstadter*by Katzbue, some over polite

313- Griswold, E.N., *Loc.cit.*, P 1167, Notes 8; Originally emphasised; Derruppé, J., *Loc.cit.*, P 6; Sperduti, G., *Loc.cit.*, p 238; Francescakis, P.h.,*Op.cit.*, p 96.

314- Buzzati, G.C *Renvoi en Droit International Privé* , Milan, 1898, P 77; Derruppé, J., *Ibid.*, Sperduti, G., *Ibid.*, Originally emphasised; Françescakis, P.h., *Ibid.*, Isaad , M., Volume I,, *Op.cit.*, p 169.

315- Sperduti, G.,*Ibid.*

316- Griswold, E.N.,*Loc.cit.*, p 1167, notes 8.

317- Egnal, J. D., "The ' Essential' Role of Modern Renvoi in the Governmental Interest Analysis Approach to Choice of Law", 54*Temp. L. Q.*, (1981), p 246.

318- The first rule refers to the total renvoi whereas the latter is an indication to the partial renvoi. As quoted from, Baxter, Ian, F.G., *Op.cit.*, p 55; See also Munro, C.R., *Loc.cit.*, pp70-71.

provincials stand before an open door bowing and inviting each other to take precedence until the curtain falls, and when the curtain rises for the next act they are still standing in the same place."[319] Is there any solution for this amusing show? Effectively an answer has been proposed in which "...Alphonse and Gaston would never get through the door unless we could find some other way to help them out."[320] According to Bruce Welling and Richard Hoffman "...The usual technique is to injecte an irrational wild card into the process in the hope that it will confuse everyone...There is no better, no more irrational wild card than ' la danse macabre d'Alphonse et Gaston'...".[321]

Additionally, renvoi is said to represent a flagpole of private international law. An example has been proposed to illustrate this symbol which says that if you really want to to help an ignorant student in an exams just ask him a simple and a brief question. What is renvoi?[322] Another important and well chosen metaphor, in this context, is that given by Colin R. Munro that considers renvoi as "...the bête noire of conflict of laws".[323] Besides M. Malaurie refers to the moments spent in the faculty of law claiming that when he left this faculty he had forgotten everything except the renvoi image. [324]

Furthermore, to show the importance and the difficulty of the mechanism of renvoi another view relates it to the jurists themselves from a psychological standpoint. This view, in fact, maintains that renvoi can excite and provoke even the mind of the quiet scholars. [325] It means that the mechanism of renvoi leads not only to a physical game , such as, the *ping pong* game or the international lawn tennis but also to a kind of "mental Gymnastics" as Colin Munro calls it [326]

319- See Wolff, M.,*Op.cit.*, p 203.; Munro, C.R., *Ibid.*, p 76

320- See Griswold, E.N., *Loc.cit.*, p 1169 .

321-Welling, B. and Hoffman, R.," 'The Law of'in Choice of Law Rules: 'Renvoi' Comme Nostalgie de la Boue" 23 *University of Western Ontario Law Review*, (1985), p 80. Originally emphasised.

322- Von Overbeck, A.E.," Les Questions Générales du Droit International Privé, À la Lumière des Codifications et Projets Recents. Cours Général de Droit International Privé", *Loc.cit.*, p 127.

323- Munro, C.R.,*Loc.cit.*, p 65.

324- Foyer, J., *Loc.cit.*, p 128.

325- Meijers E.M., *Loc.cit.*, p 207.

326- Munro, C.R., *Loc.cit.*, p 70; See Batc, J.P., *Op.cit.*, p 54;. Maridakis, G.S.," Le Renvoi en

Concerning the condemnation of renvoi and the restrictions made upon its field another fascinating metaphor has been given by the French scholar Jacques Foyer.who claims a sorte of requiem for renvoi in response to Derruppé who takes a positive position by calling for a plea for renvoi.[327] It must be borne in mind that the funeral term used by Jacque Foyer is not chosen by chance.[328] According to his view, we cannot innovate or create a new idea to the classical arguments given by the two different camps. He believes, however, that to open the renvoi trial there must be a new argument for that. He goes on to support that it is the illness [329] of the renvoi which represents a new phenomenon. [330] To prove his claim Jacques Foyer considers renvoi not as a normal illness but as a pernicious one and, then, suggested for that a diagnostic followed by a forecast [331] In other words he suggests that before any prediction of the future of the renvoi illness its symptoms have to be analysed.[332] After such Diagnostic one has the right to ask the "Doctor" Jaques Foyer to identify the illness that renvoi is suffering from. In fact, this scholar reaches a conclusion that renvoi until 1980 suffers from an anemia and paralysis which has extended and stretched to its whole body. [333] Additionally among the best metaphor which must be cited to indicate the negative position of scholars is that of Cheshire who wishes that Mr *Forgo* was never born or came to life. Unfortunately as the birth of Mr Forgo did occur, Cheshire wishes that at least his personality should be buried for ever.[334]

Droit International Privé" Volume 49, *Loc.cit.*, p 274.

327- Jacques Foyer considers that a plea for renvoi presumes an accused that committed an offence which in his view is an exageration. See Foyer, J., *Loc.cit.*, pp 105-106.

328- Jacques Foyer have found a title to his speech which reminds the reader undoubtedly to a deceased person. See Foyer, J., *Ibid.*, p 105.

329-Mr Baxter too is "...concerned with the raison d'être of the renvoi, which is a symptom of an underlying disease. Baxter, Ian G.,*Op.cit.*, p 50.

330- Foyer, J.,*Loc.cit.*, P 106.

331- Foyer, J., *Ibid.*, p 107; See also 70 *Re.crit.dr.intl.priv* (1981), notes P. Bellet. p 210.

332- Foyer, J.,*Ibid.*

333- Legally this means that the field of renvoi application is restricted from two sides, internal conflict rules and International Conventions. Jacques Foyer, *Ibid.*, pp 107-114; My emphasise. *See Infra.*, Chapter3, pp 166-183, 193-200.

334- Maridakis, G.S., "Le Renvoi en Droit International Privé", Volume 49, *Loc.cit.*, p 289.

After such reflection on the penetration of the sarcasm technique in private international law and by taking into consideration, as well, the positive and negative aspects of renvoi the writer would like to add, despite what has already been said, that renvoi is a trip which is also subjects to the notion of the single or return ticket. It leads, effectively, to visit at least three main places, the stadium before taking off and either the slaughterhouse or the hairdresser after the landing. [335]

II)- Its dimensions and consequences. If the previous analysis have tried to show some of the difficulties that erupted from the renvoi mechanism the writer, however, believes that this academic way of analyzing is not enough to interpret and discuss the mechanism of renvoi. It requires, therefore, other technique which can make its mechanism much more clear to the reader, commentator and students. In other words, scholars feel that the normal and classical analysis of treating other legal issues is not sufficient for the discussion of renvoi mechanism. To cope with the insufficiency of such classical method and to overcome it they have, therefore, relied on sarcasm as a new and relevant technique. In a nutshell, sarcasm can be considered as a kind of compensation that shows the failure of doctrine, legal systems and jurisprudence to find a united solution to deal with this important phenomenon.

Moreover, if the renvoi opponents consider its mechanism as a *ping- pong* game, in which each player refers the ball to the other side, the reason for this comparison is to show that such references and contra references may take long and leads to a *vicious circle*.[336] Furthermore, using metaphors, such as, the mirror cabinet can also justify the consequences of the renvoi process which is the *circulis inextricabilis* and shows the strong refutation of renvoi by the anti-renvoiists.[337] In fact, if in the foreign court theory the English judge will bow to the foreign one and vice versa one thing is possible which is that its mechanism

335- The first place is an example of the controversial arguments of both camps on the mechanism of renvoi. The second place means the refutation of renvoi by the anti -renvoiists. The last place is an example of the acceptance of renvoi but subject to exceptions.

336- See for instance, Sadekh, H.A.,*Op.cit.*, p 67.

337- Rabel, E., *Op.cit.*, p 80.

leads to an "*endless oscillation.*" [338]

It should also be noted that the question of whether sarcasm is a positive or a negative technique is not important. What is worth underlying, however, is to what extent can scholars, students and lawyers benefit from such technique. To this it could be replied that whatever is the answer, positive or negative, the fact of the matter is that renvoi can be understood with and without sarcasm but cannot be analyzed without it.

What does appear relatively clear from using the sarcasm technique is that renvoi is not only a difficult issue but also a peculiar and an important issue. It is suggested, in this context, that sacarsm is used as a mystifiying device in a mysterious and formidable area.

Above all the writer' s answer would be in favor of the application of the sarcasm as a technique. Effectively, it is reasonable that you may understand an overseas film provided you either know or speak its language. You might not, however, fully comprehend the same movie for the first time if there is neither a sub-title nor you comprehend the language of the movie.

Sub-section 3:- To what extent those arguments are true.

As shown above each camp gives its own arguments and tries to refute those given by their opponents. The discussion in this context, however, tries to find out not only whether those justifications are true or wrong arguments but more important to decide whether they are really acceptable and convincing. Accordingly, this reflection will show up the real purposes behind the use of the theory of renvoi and clarify whether it is used as a ruse or as a necessity and also indicate whether renvoi must be applied as a general principle or only as an exception.

1)-It is true that if the conflict rules and the internal rules are considered as indivisible the problem of renvoi automatically arises.[339] It is also true that renvoi means the application of foreign law in its totality and not merely its

338- Wolff, M., *Op.cit.*, p 201.

339-See Meijers.E.M., *Loc.cit.*, p 210.

internal rules. This claim, has been clarified by opposing the two methods *Sachnormenverweisung* and *Gesamtverweisung* which clearly correspond with the arguments given by both the pro and anti-renvoiists. In fact, the method of *Sachnorwenverweisung* can be matched to the arguments given by the renvoi opponents whereas the pro-renvoiists favour the application of the so called *Gesmaterweisung*, which means the possibility of renvoi.

2)- Scholars differ widely on the basis of the application of the theory of renvoi by supporting different conceptions that maintain its result. What is true is that whenever the judge applies the theory of renvoi he will have the opportunity to apply its own law which might be inapplicable if he refutes the renvoi theory.[340]

3)- The reality is that renvoi have received a criticism from all over the world as a useless theory, and practically, a dangerous mechanism.[341] Its principle is said to be unable to ensure a modern and rational conception of private international law. [342]

4)- To those who think that renvoi achieve international harmony of solution it can be replied that if the mechanism of renvoi really can achieve this principle why it has not been adopted by all legal systems. It can be maintained, therefore, that the repudiation of renvoi by the anti-renvoiists' movement means one thing that it is wrong to say that only renvoi can achieve this principle.[343] In other words, uniformity argument should not overshadow the scholars justifications because they are not the only reasons[344] for applying the renvoi mechanism.

Concerning the view which say that renvoi may achieve international harmony of solutions so long as it is not applied by all countries it can be replied to such argument that this reasoning is not different from that of the unilateralist

340- *Ibid.*, p 219.

341- Potu, E., *Op.cit.*, p 267.

342- Sperduti, G., *Loc.cit.*, p 236.

343- According to Lalive it is not only renvoi which should be taken into account but it must be considered as one among other means which could achieve in the international scale a suitable solution. Lalive, P.,*Loc.cit.*, p 277.

344- Anton, A.E., *Op.cit.*, p 58.

application of the foreign court theory. In fact, although the two may lead to different consequences they, however, start from the same basis which is the argument of if and only if. It should be noted, therefore, that it is still doubtful how the international harmony principle can be achieved only if renvoi is applied by a few countries and will not be achieved if it is excluded by all countries?

Additionally, it seems that harmony of decisions and unity of solutions, practically, may loose much of its force when a reader realizes that although such unity or uniformity might be achieved by the so called renvoi Convention this, however, has not been yet ratified.[345] Do these scholars, however, realize that this uniformity has been considered as an ideal[346] of private international law and even the work of international Conventions is still going on to reach this purpose. This of course remind the reader of the legal harmony advocated by Savigny. Is it really achievable? In this context, H. Lewald's point of view is that although the conflict rules divergence might be eliminated the realization of the legal harmony might not be achieved in all legal relations. Concerning the possibilities of a general and a complete uniformity of law Haroldo Valladao argues that "...Universal uniformity of the positive law is an utopia."[347] This scholar, then, goes on to consider that " the legislative uniformity, when completely realized entails the disappearance of Private International Law." [348]

Overall, whether renvoi can really achieve unity of solution will be illustrated by a hypothetical case in which three countries are involved. (See diagram K)

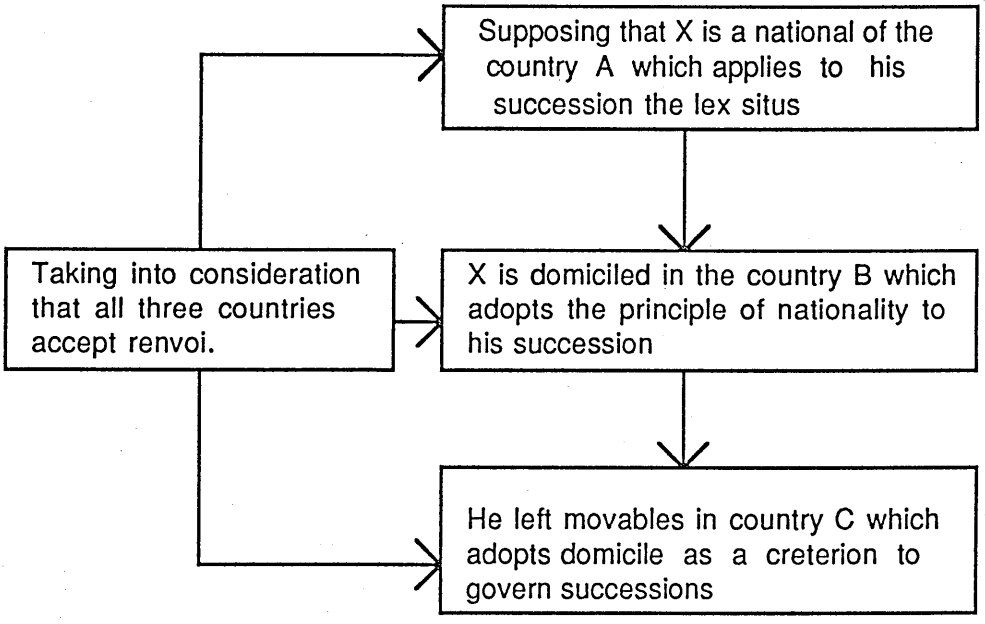
345- See Convention de la Haye Pour Régler les Conflits entre la Loi Nationale et la Loi du Domicile, Conclue en 15 Juin 1955; For further informations see *Infra.*, Chapter 3. Section 2, Sub-section 2, p 192.

346- See in this context Philip, A., *Loc.cit.*, p 33

347- Valladào, H., "Private International Law, Uniform Law and Comparative Law", in *XXth Century Comparative and Conflicts Law, Legal Essays in Honor of Hessel E.Yntema*, by Nadelmann K.H *et al*, (ed.,), Leyden, A.W. Sythoff (1961), p 99.

348- *Ibid.*, p 102

Diagram (K)



i)- If the country C is seized of the matter it will apply its internal law after a transmission from A

ii)-If the country B is seized, however, it will apply its internal law after a transmission from the country C.

iii)- Lastly, if the legal issue arises before the country A this will apply its internal law after a transmission from the country B

It follows from this hypothesis that the three involved countries A, B and C will distribute the succession of X according to their own internal law. So where is the unity of solutions?

5)-Theoretically, renvoi at first, second, third and fourth degree might arise. Practically, however, this series of *ping pong* will be over soon and will not extend to a renvoi at a third or a fourth degree because the most common and adopted connecting factors are chiefly nationality and domicile.[349] In fact, the comparative study has proved that positive law and jurisprudence in different legal systems have adopted either renvoi of first degree or stopped to a renvoi at second degree.[350]

349- Isaad, M., Volume I,*Op.cit.*, p 167

350- Sadekh, H.A., *Op.cit.*, p 71.

6)- The *circulus inextricabilis* argument also loses much of its value as far as no case has proved that the foreign court theory was applied by both countries. It can, therefore, be maintained that this argument is legally exaggerating on the basis that practically this situation has not occured.[351]

It seems that the English theory based on the hypothesis of if the court X yes and the court Y no, although it is theoretically supported, is neither logical nor rational. Will these judges and scholars understand that it is possible to take Z place and follow his policy and tendency but it does not mean you are really Z himself. This fact shows that the fictions of pretending all possible reactions and belief of Z may get you access to everything except the control and the possession of Z mind. If this argument is not true could those who refute it prove that other legal systems are totally wrong because of not accepting this unilateral conception. Could those scholars, as well, justify why the foreign court theory has been considered as a part of the English legal system and not part of American legal system and other Common law countries. Accordingly, the writer would like to share the view of those who says that this theory "...is by no means a universal key to the renvoi problem..."[352]

7)- The question that should also be asked is whether there are any justifications for not contributing into the discussion and the writing on renvoi issue? An answer has been given by O .Kahn- Freund's who claims that "...It is difficult to believe that anyone could produce any argument which has not already been advanced."[353] Besides, from Pierre Lalive' s standpoint it is much better for the jurist' s reflex to keep quiet on hackneyed and well known subject such as renvoi rather than to add further comments.[354] The present writer, therefore, might agree with Pierre Lalive' s observation if it means only a certain lull or a pause for a jurist. There will be a disagreement, however, if the meaning is to abandon or give up any comments on renvoi controversies. In fact, if the former is normal and could be acceptable the latter, however, is

351- Dicey & Morris, 1987, *Op.cit.*, p 88.

352- Anton, A.E., *Op.cit.*, P 66.

353- Kahn-Freund, O., *Loc.cit.*, p 431.

354- Lalive, P., *Loc.cit.*, pp 266-267

neither recommended nor logical because it stands against the development of private international law itself and also because the rigidity of private international law should not be supported.

8)- From the point of view of analyzing the nature of renvoi it is of great importance to confirm whether renvoi represents an over complex or merely a difficult issue. Concerning the complexity of renvoi, there are, in fact, who thinks that "...Generations of students have been conditioned against its study by forewarning of complexity"[355] Others believe that the so called *ping pong* doctrine is "...somewhat complicated theory..."[356] Furthermore, M Malaurie, does not like renvoi because of its complexity and its unpredictable consequences.[357]

It seems that it is the view which support the difficulty of renvoi[358] that is acceptable and not that which maintains its complexity. In fact, the former aspect is the accurate answer for different reasons.

First, the analysis of renvoi differs from judges, scholars and students due to the fact that each side looks to the problem from different sides. Effectively, if one considers only the point of view of one side renvoi analysis becomes incomplete. This, therefore, may lead to the assumption that renvoi represents a complex issue which practically is not the case.

Second, renvoi difficulty which is due to internal and external elements can be resolved and comprehended. Admitting its undue complexity, however, means that this is a characteristic which have been established since its discovery. That also is not true.

Third, renvoi can not be considered as a complex issue despite the huge contribution of scholars into its difficulty by their different justifications and approaches.[359] Those who think differently, i.e., they support the complexity argument, should remember that if the complexity of private international law is one among other characteristics to this field,[360] this is because it is a

355- See Munro, C.R., *Loc.cit.*, p 65.

366- See this view in Wolff, M., *Op.cit.*, p 195.

357- Foyer, J., *Loc.cit.*, p 128.

358- See Wolff, M., *Op.cit.*, p 198.

359- See Lalive, P., *Loc.cit.*, pp 77-79.

360- For more details see Cheatham, E.E., *Loc.cit.*, pp 240, 308, 347; Loussouarn, Y.,*Loc.cit.*,

complexity by nature.[361] In fact, if in their views renvoi has such characteristic all issues, fields and theories in private international law, therefore, should be considered as complex without any exceptions!

Fourth, it has been admitted that private international law as other fields includes a part of the so called game mind by which lawyers also want and like to play. It follows that the comparison of renvoi with various games has not been done by chance or mistake[362] but there are reasons for that. Among them is the fact that renvoi is a flexible issue and can easily be understood by making its mechanism less difficult to the lawyer and student through the sarcasm technique.

9)- The question what arguments are true, the pro or anti-renvoiists is irrelevant if other important elements related to renvoi are ignored. In this case it must be remembered that lawyers, legislators, judges should not care only about the usefulness of renvoi merely because it achieves those desirable private international law principles. The important question is whether the substantive law which will be applicable at the end of the renvoi process is really effective[363] and does not abuse the right and expectation of the involved parties.

10)- Through the theoretical discussion of renvoi in the Institut of International Law and with regard to both favourable and unfavorable positions of scholars' observations on Georges S. Maridakis' s report, it can be said that three tendencies have emerged.[364]

First, the absolute rejection of renvoi.[365]

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p 275.

361- Lalive, P.,*Loc.cit.*, p 77.

362- *Ibid.*

363- In this context see especially the view of Mr Sperduti, G., *Loc.cit.*, p 237

364- See Derruppé, J., *Loc.cit.*, p 22.

365- This is the view of both Professors Ago and Cheshire despite the latter was in favour of making an exception concerning the possibilities of referring to private international rules of the *situs* of movables and immovables. See Von Overbeck, A.E., " Renvoi in the Institute of International Law", *Loc.cit.*, p 546; See Maridakis, G.S., " Le Renvoi en Droit International Privé" Volume, 49, *Loc.cit.*, pp 286, 289.

Second, the rejection of renvoi as a general principle but admitting certain exceptions.[366]

Third, the acceptance of renvoi as a general principle but certain exceptions should be made.[367]

11)- Through renvoi controversies it can be seen that there is no general consensus on the accuracy of either a general repudiation or acceptance of its mechanism. It means the question of whether renvoi should be accepted as a general principle or only as an exception has received different and contradictory answers. This is, in fact , the view approved by certain scholars such as J D. Falconbridge who draws the line arguing that " In my view the doctrine should be neither rejected nor accepted in toto."[368] Moreover, P. Lalive maintains that there should be no general principle which either rejects or adopts renvoi.[369] Jacques Foyer, however, believes that renvoi is not a general principle but can be considered as an exception.[370] In view of others the internal law theory can be useful if it is adopted in special situations but not as a general principle.[371]

12)- If the divergence between the two camps is much wider, practically, it has led to the application of the whole foreign law in some areas and the internal law only in other specific areas.[372] As a matter of fact if J. Derruppé, through his speech in 1966, affirms the safety of renvoi, Jacques Foyer, however,

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366- Professor Makarov's view concerning those exceptions was supported by Professor Wengler. See Von Overbeck, A.E., *Ibid.*, See also Maridakis, G.S.,*Ibid.*, pp 279-280, 283, 312; Makarov, A.., " Le Renvoi en Droit International Privé" *Annuaire*, Vingt Troisième Commission, Session de Varsovie, Volume 51, Tome I, (1965), pp 344-345.

367- Professor Batiffol is said to be sharing this opinion in which he considers that renvoi should not be excluded mainly because of its illogicality, Von Overbeck, A.E.,*Ibid.*, See Maridakis, G.S., " Le Renvoi en Droit International Privé" Volume 49, *Loc.cit.*, pp 282, 305-307; See also Makarov, A., *Ibid.*, p 343.

368- Falconbridge, J.D., *Loc.cit.*, p 708.

369- Lalive, P., *Loc.cit.*, p 275.

370- Foyer, J., *Loc.cit.*, P 130.

371- This is the view of Anton who maintains that although the internal law theory is simple "...it is not a solution to the problem of renvoi in more than a few cases." Anton, A.E., *Op.cit.*, pp 61-62.

372- See Munro, C.R., *Loc.cit.*, p 80.

claims that from that period the field of renvoi application has decreased and that this can be seen from the cases.[373]

13)-If Emile Potu' s Survey in 1913 shows that 54 authors were in favor of renvoi whereas 134 were against it[374] his survey indicates that this huge numbers in both camps does not prove that their arguments and suggestions are true one hundred percent. As an illustration of this Elliot E. Cheatham's remark is important and clear enough to prove that these different answers "...range from unwise, absurd, logically impossible, to appropriate, obvious, necessary."[375] Ernst Rabel too has stressed that "In the course of the debate, many wrong arguments, ' logical' and ' practical ', were advanced on either side."[376] If this claim is supported because many elements have contributed to such contradictory arguments among them is the use of renvoi as a ruse.

14)- The question whether sarcasm can be justified as a technique in interpreting renvoi should be related to another important characteristic of private international law which is the language used in that field. One might think that the question whether sarcasm can be unsuitable for discussing renvoi is the same as whether scholars can discuss and analyse private international law problems without using technical terms and expressions, such as, seat, renvoi and qualification.[377] It is, therefore, neither funny nor impossible to advocate the sarcasm technique in interpreting renvoi for a simple logical reason that the discipline of private international law, as A. Philip has remarked, "...offers a rich opportunity for intellectual exercise".[378]

In reply to those who seems to forget everything except the image of renvoi when they left the faculty of law[379] the present writer, however, would like to stress that he has not forgotten the important issues in private

373- Foyer, J., *Loc.cit.*, p 107.

374- Potu , E.,*Op.cit.*, p 201.

375- Cheatham, E.E.,*Loc.cit.*, p 335.

376- Rabel, E., *Op.cit.*, p 77.

377- Lalive, P., *Loc.cit.*, p 82.

378- Philip, A., *Loc.cit.*, p 9.

379- See *Supra.*, p 110.

international law but he does not remember how many times he received contradictory answers and unanswered questions about renvoi. The writer remembers, however, that once upon a time a lot of inks had been used to draw in different styles the portrait of a new born star called *Forgo*.

Remarks

1)-Although Common law and Civil law countries favour domicile to nationality or vice versa both principles, however, have positive and negative points. If the latter represents a problem in plurilegislative legal system, the former[380] might have different meanings, such as, domicile of origin and that of choice and so on.[381] The fact is that generally it is easier to know and discover the nationality of X than his domicile.[382] It should also be borne in mind that those countries who adhere to the nationality principle take into account domicile as a connecting factor in some legal matters, such as, the question of stateless and refugees. Nationality too is taken into consideration by the countries of domicile.[383]

2)-If the pro-renvoiists relate the validity of a legal act to the mechanism of renvoi, practically, in both legislation and International Conventions such validity can be achieved without the process of renvoi.[384] To say it differently, if renvoi really maintains such validity why have International Conventions and positive laws established in this context alternative conflict rules?

3)- It is well to bear in mind that though the discussion of the clash

380-Although domicile is considered more difficult to be identified than nationality it has, however, an advantage over the latter in that each person must have only one domicile "...at the same time for the same purpose...". Graveson, R.H., *Conflict of Laws, Private International Law, Op.cit.*, p 190.

381- Nationality is said to be clear, simple concept, more stable and has a strong link than domicile. Its stability means that it cannot be changed only by intention and changing a person home. Baxter, Ian F.G *Op.cit.*, pp 58-59; Rabel, E., *Op.cit.*, p 166; Maridakis, G.S., "Introduction au Droit International Privé",*Loc.cit.*, P 503; Anton, A.E., *Op.cit.*, p 160; Batiffol, H., *Loc.cit.*, p 503

382- North, P.M., *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland, Op.cit.*, p 9

383- Ehrenzwing, A.A.," Specific Principles of Private Transnational Law", *Loc.cit.*, p355; Batiffol, H., *Ibid.*, .PP 504-505. See, for instance, the English Will Act of 1963 which refers as well to the law of nationality. Dicey &Morris, 1987, *Op.cit.*, rule 140, section 6 (a) and (b) .p1011; *Cf.*, Adoption (Sc.) Act, 1978.

384-See for instance, Convention On The Conflicts of Laws to the Form of Testamentary Dispositions of 5 October 1961. Article 1; See also the English Act of 1961; For more details see *Infra.*, Chapter 3, Section1, Sub-section 2, pp 172-174 and Section 2 Sub-section 3, p 196.

between the two camps is important it must not be forgotten that the analysis of exceptions to renvoi are also important. The writer, therfore, thinks that the question is not what are the exceptions to renvoi but what will happen when these exceptions multiply in the future?

4)- Finally any scholar can be asked this question. Which way do you want to follow; to be a pro-renvoiists or an opponent to renvoi? Whatever might be their answers this, however, should neither be considered as a rule to deal with renvoi nor a rule to be followed. In fact, failure to choose one way will not render the scholar liable to any kind of fine or imprisonment and also because it is not a pride to be a pro or anti-renvoiists. More important, however, is the failure to give a reasonable justification of renvoi as a phenomenon, theory and process. If the writer will have the opportunity to answer this question he might choose the method of logic (which rejects any dogmatic arguments, e. g.,where there will be infringement of the expectation of the parties involved, or the use of renvoi as a ruse to cover the failure of scholars' arguments).

CHAPTER THREE

Renvoi Mechanism in Legislation, Case Law and International Conventions.

Section 1: Renvoi mechanism in legislation and case law.

While it is interesting to examine the controversy upon renvoi from a theoretical point of view, it is equally important to analyse them practically and see their repercussion on different legal systems and through the courts' decisions. It means that theoretical controversies on renvoi might have no practical value if discussed without considering the position of the courts, legislations and International conventions concerning its mechanism. In this context, it seems worth referring to O. Kahn-Freund who emphasises that "...Whatever attitude to this problem academic writers may adopt, its solution does not depend on the acceptance or rejection of any a prior principle it is advisable to approach the problem pragmatically rather than dogmatically."[1]

Sub-Section 1: Discussion of renvoi mechanism into the two diverted legal systems. It is important, therefore to refer to renvoi in both countries, i.e.; those which adopts nationality and others which favour domicile as a connecting factors. The consideration of those two legal systems is necessary because persons who live either in a continental or common law countries[2] will be subject to different law systems and their cases might be decided in different ways depending on the court before which the case is brought. It could be a country which adheres to nationality or a country which

1- Kahn- Freund, O., "General Problems of Private International Law" *Recueil des cours*, Vol III, Part 143 (1974), p 436.

2- It was discovered that in 1909 that 500 millions of men lived in domicil countries whereas 460 millions were governed by the law of nationality. See in this context, Wolff, M., *Private International Law*, Oxford, the Clarendon Press, 1950, p 105.

adopts domicil.

I)- Some of the countries which are in favour of renvoi mechanism The discussion in this context is based mainly upon two countries; France and Great Britain. The former is an example of the admission of renvoi in a Civil law country whereas the latter illustrates the admission of renvoi in a Common law country. Before this it seems worth referring to the acceptance of renvoi in other countries whether they are countries which adopt the principle of nationality or domicile. This will support the above arguments that renvoi mechanism has been used for different purposes not only by nationality countries but also by domicil countries.

Accordingly, it would be worthwhile to refer to some countries which are in favour of renvoi in Europe and outside Europe. In the former these are, for instance, west Germany[3], Yugoslavia[4], Spain[5]. Outside Europe its mechanism has been adopted in Austria[6] and the United Arab Emirates[7].

3- This country has been considered as the first one to have issued legislation on renvoi mechanism. See in this context the introductory law of the German civil code of 1896 that came into force in 1900. Renvoi remission and transmission is said to be maintained by the West German project of E G B G B in article 27. See also Article 4 in the law of 25 july 1986 supporting reform of the German private international law. 76 *Re. crit dr. intl. priv.*, (1987), p171; See for instance, Von Overbeck, A.E., "Les Questions Générales du Droit International Privé À la Lumière des Codifications et Projets Recents, Cours Général du Droit International Privé", *Recueil des cours*, Vol III, Tome 176,(1982), pp 135.,137; T.M.C.Asser Institutut, *Les Législations de Droit International Privé*, Oslo, Universitetsforlaget, (1971), p 76; De Nova, R., "Historical and Comparative Introduction to conflict of Laws", *Recueil des cours* Vol II, Tome 118, (1966) pp 511-516; Francescakis, P.h., *La Théorie du Renvoi et les Conflits de Systems en Droit International Privé*, Paris, Sirey, 1958, p 265.

4- Yugoslavia is a State which admits not only remission but also transmission in its article 6. See Aranguren, G.P., "General Course of Private International, Law : Selected Problems",*Recueil des cours*,Vol III , Tome 210 , (1988) p 82.

5- Spain is among the country of nationality which accept renvoi in Its article 12, Para. 2 of the Spanish civil code. See Aranguren, G.P., *Ibid.*, P 81, Von Overbeck, A.E., *Loc.cit.*, p 154. notes 574; loussouarn, Y et Bourel, P., *Droit international Privé*, 2eme édition, Paris, Dalloz, 1980, p 274: Siehr, K. G., " Domestic Relations in Europe: European Equivalents to American Evolutions" 30 *Amer. J. Comp. L.*, (1982), p 65.

6- Renvoi in its two forms remission and transmission is said to be accepted by Austrian law. See § 5 (1) and (2) of the federal statute of 15 june 1978 on private international law. See in this context, Palmer, E., "The Austrian Codification of Conflicts of Law", 28 *Amer. J. Comp. L*,, (1980) pp 209-210, 222.

7-In Article 26. Para. 2. See in this context, Aranguren, G.P., *Loc.cit.*, p 81.

Renvoi is said to be adopted also in most Latin American countries[8] and has also been used in Canada[9].

A)- France as an example of legal system which adheres to nationality France has been taken as an example of a Civil law country which admits renvoi mechanism. This is one reason for this analysis. The second one is that it represents the country which dealt with the controversy of *L'Affaire Forgo* which many scholars believe represents the origin of the theory of renvoi.[10]

The discussion of the admission of renvoi in this issue will be based only on the field of the application of renvoi by the French case law and legislation. Some of the scope of this theory in this country will be, however, discussed later separately.[11]

1)-Development of renvoi in French case law. Renvoi application in French jurisprudence is not absolute. In fact, following the development of French decisions it can be said that besides the many cases which have admitted renvoi there are other cases which reject it. As a matter of fact Emile Potu's view is that from 1878 to 1913 seven decisions were in favour of renvoi and only five of them were against it[12] Besides, the statistic given by Maury and Derruppé indicate that the French courts used renvoi in 30 cases. among 31 cases.[13] This led to confirm that the majority of decisions have pronounced in favour of renvoi with some restrictions whereas the minority are in favour of the rejection of renvoi in all cases.[14].

8- *Ibid.*, p 82.

9- It has been applied, for instance to matters of formal validity of a will, legitimacy, recognition of foreign divorce decree and capacity to marry. See Edinger, E., "Renvoi in Canada-Form and Availability" , 14 *Manitoba Law Journal*, (1984), p 45.

10- See *Supra.*, Chapter 1, Section 2, Sub-section 1, pp 39-41.

11- See *Infra.*, Section 1, Sub-section 2, pp 176-177, 183.

12- Potu, E., *La Question du Renvoi en Droit International Privé* Paris, Juris Classeurs, 1913, p 65.

13-See Foyer, J., "Requiem Pour le Renvoi?" Séance du 4 Juin 1980, *Trav. Comité, Français. dr.in.privé.*, (1979- 1980), pp 106, 129.

14- Potu, E., *Op cit.*, pp 65-66, 75-76.

2)- The use of different approaches of renvoi in France. First of all the French legislation has been considered as admitting renvoi in its two forms. From historical point of view, article 2284 of the French civil code of 1804 states that the foreign conflict rules are taken into account whenever they lead to the application of either French internal law or the internal law of another state which accepts this reference.[15] Later on, the French project of 1967 admits renvoi remission and also admits the application of renvoi to a law that accepts jurisdiction.[16] This has led, therefore, to maintain that renvoi at first degree is accepted as a principle by French law.[17]

Secondly, by referring to the French case law it has been indicated that renvoi at first degree was applied by the French court in the case of *Forgo*,[18] In which the French conflict rule referred to the Bavarian law as the law of domicile which in its turn referred back to French law as the the law of the domicile of fact.[19] The justification of the use of renvoi at first degree can also be noticed in the decision of Soulier.[20] Renvoi transmission had also been used by Paris court in 1967 in the Affaire *Banque Ottomane*[21] and in the case of *Patino*.[22]

On the whole the application of renvoi remission and transmission has been confirmed whereas the double renvoi theory is ignored by French law.[23]

15-See T.M.C. Asser *Institut, Op.cit.*, p 60; Von Overbec, A.E.," *Loc.cit.*, p 135.

16- See article 2281, al.1. See Von Overbeck, A.E., *Ibid.*, p 138.

17- Mayer, P., *Droit International Privé*, Deuxi`eme édition, Paris, Editions Monchrestien, 1983 , p 203.

18- D. P. 1879, 1. 56; S. 1878, 1. 429.

19- Mayer, P., *Op cit.*, pp 191-192.; For more details see. Cowan, T.A.," Renvoi Does not Involve a Logical Fallacy", 87*U. Pa. L. Rev..*, (1938- 1939) p 38.

20- See *the cour de cassation* in which the application of French law has been advocated. Cass. req. Mars 1910, D. P. 1912, I. 262, S. 1913. I. 105, *Clunet*, 1910. 888.; See, for instance, Mayer, P., *Op cit.*, p 199; See *Supra.*, Chapter 2, Section1, Sub-section 2 p 76.

21- Paris, 19 Mars 1965, *Clunet*, (1966). 118, note Goldman, 56 *Re. crit. dr. intl. priv.*, (1967). 85, note P. Lagarde; See loussouarn, Y et Bourel, P ,*Op.cit.*, pp 271, 294; For more details See Derruppé, J et Agostini, E., "Le Renvoi Dans la Jurisprudence Française", Fasc. 532-B, 1983, *Juris-Classeur de Droit International*, 7, (1987), Paris, Editions Techniques, pp 9-10; See *Infra.*, p 132.

22- Cass.Civ,I, 15 Mai 1963, *Re. crit. dr. intl priv.*,(1964), p 532, note Lagarde; 90 *Clunet*, (1963), p 1016, note Malaurie; *J.G.P.* (1963) II. 13 65 note Motulsky. See for instance Mayer, P., *Op cit.*, p 193; Loussouarn, Y et Bourel, P., *Op.cit.*,p 271.

23- Mayer, P., *Ibid.*, p 191.

3)- Fields where renvoi has been applied.

Due to the fact that the field of renvoi mechanism is numerous or vague the reference, in this context, however, will be to those different areas but the discussion will cover only some of the cases. Generally, renvoi has been applied mostly in personal status[24]

Concerning the field of succession it is obvious and clear that *Forgo*' s case is an illustration of renvoi application in the field of movables succession.[25] Later on the Tribunal *de la Seine* admitted renvoi in order to distribute moveable succession of an English intestate who died settled in France. According to French judge the succession of *Henry Oppenheimer*[26] should be governed by French law on the basis that the law of his nationality, i.e., English law, refers to French law as the law of his domicile.[27]

With regard to immovable succession renvoi mechanism has been used by the tribunal *d' instance de* Lille,[28] which held that the succession of immovables of the French deceased, who died in France, should be governed by Spanish law as the law of the *lex rei sitae.* Spanish conflict rules, however, refer the hereditary devolution of such immovables to the law of his nationality, i.e., French law. Renvoi from Spanish law to French law, therefore, was accepted.[29]

Divorce is another field where the mechanism of renvoi has been applied.[30] For instance, in the case of *Sieur Patino* c. *Dame Patino* the French court held that *Patino*'s petition on 16 April in which he asked for divorce was inadmissible.[31] His wife claimed that their national law, i.e., Bolivia, did not

24- Nouveau Répertoire de Droit, Mise A Jour (1980 à 1987), Jurisprudence Generale Dalloz, Paris, (1987), p 928.

25- Potu, E., *Op.cit.*,p 71, See *Supra.*, Chapter 1, Section 3 Sub-section 1 pp 39-41.

26- 3. civ., Seine, 4 Décembre 1899. *Cl.*,(1900), 368.

27- See Potu, E.,*Op.cit.*, pp 38-39.

28- *Consorts Vandeville* 28 Mars 1980.

29-See in this context, Lequette, Y., (case note) 70 *Re. crit. dr. intl. priv.*, (1981), pp 289-290, 293.

30- See the decision of the supreme court in the case of *Birchall*.c. *Birchall*, (ch. Req), 10 Mai 1939, S. 1949. 1. 73, note Niboyct, *Clunet*, (1940- 1945). p 107.

31- See the tribunal civil de la Seine. 28 Juin 1950. 79 *Clunet*, (1952) p 175, notes Philonenko. M.

allow such divorce to occur in accordance with the *lex locis celebrationis*'s point of view, i.e., Madrid.[32] This is the way by which the use of partial renvoi led to he refusal of the divorce. By referring to Bolivian law, which should decide the questions of the status of Bolivian citizens, the French court found that according to the provision of article 24 of Bolivian law there was a reference to a third legislation, i.e., Spain as the law of the place where the marriage was celebrated.[33] In its turn, the *cour de cassation* on 15 May 1963 admitted[34] a partial renvoi from the law of the spouses' nationality to Spanish law.[35]

The use of renvoi mechanism can also be noticed in matters that concern forms of marriage. In fact, *Dame Moatti* c. *dame Zagha*[36] is an illustration of that application in which renvoi from Italian to Syrian law is said to be used for the first time with clearness in forms of acts. In this case the marriage of 1924 which was celebrated in Italy according to the forms of the spouses nationality, i.e., Syria , was held valid on the ground that Italian law which was designed by French Conflict rules refuses this competence and would have referred to syria as the law of the spouses common nationality.[37] In order to declare the validity

32- The husband and wife Antenor patino and Marie christine de Bourbon got married on April the 8 th 1931 in Madrid in a church following the religious ceremony of the place of celebration. Castel, J.G., *Conflict of Laws, Cases ,Notes and Materials* 3rd edition, Toronto, Butterworths, 1974, pp 48-51.

33- This article states that " A marriage celebrated abroad may be dissolved in the Republic on the condition that the law of the country in which it was celebrated recognizes the dissolution of the marriage tie. " See, *Ibid.*, pp 50-51.

34- Cass. civ., I 15 May 1963, *Re. crit.dr. intl. priv.*, (1964), p 532, note Lagarde; 90 *Clunet*, (1963), p 1016, note Malaurie, P.h.

35- The reason of such reference is to know whether it is possible to divorce them; For more details See Derruppé, J et Agostini, E., *Loc.cit.*, p 9; Mayer, P., *Op.cit.*,p 193.

36- Cour d'Appel d'Aix en provence. 21 Janvier 1981.

37-The spouses *David Zagha* and *Adele Abadie* residant in Great Britain of Syrian nationality but of Jewish confession got married in Italy in 12 october 1924 following the mosaic law before the chief Rabbi of Milan and in 20 May 1955 obtained a French nationality. In 8 May 1968, the husband *Zahga* obtained a divorce sentence from his wife Mrs *Abadie* from a Paris tribunal and later in 12 juin 1973 got married with Mrs *Maddy Moatti* in palestine according to the Mosaic law. In 26 Mai 1977 Mrs *Maddy Moatti* declared that her marriage with Mr *David Zagha* on 12 Juin 1973 is valid whereas the first marriage of 12 October 1924 was nul and void. According to her claim the law of the place of celebration, i.e., Italy forbade during that time the occurence of a religious marriage before the celebration of a civil one. See Legier, G. et Mestre, J., (case note), 71*Re. crit. dr. intl. priv.*, (1982) , pp 297-298,

of the marriage of *David* and Mrs *Adele Abadie* the court of Aix had to discuss an important issue which is the rule *locus regit actum*and see whether it is an imperative or facultative rule. The court held, therefore, that the marriage of12 October 1924 was valid because it was celebrated according to the national law of the spouses. This means that *David* and Mrs *Adele Abadie* were not obliged to observe the Italian rules.because the rule *locus regit actum* was facultative and also Italian law referred the issue to Syrian law. It has been added that the religious marriage was, therefore, admitted by Syrian law and would be admitted as well in France.[38] This has led to confirm that renvoi in *favorem* can be justified if the marriage is considered as null according to X local law whereas that law refuses the competence and would refer the issue to a third law.[39] The *cour de cassation* too admitted renvoi term and confirmed the validity of a marriage of 1924.[40]

In the same field, i.e., forms of Act, renvoi has also been applied , for instance, in forms of will but led to the negative result. In this matter the civil tribunal *de la seine*[41] admitted renvoi concerning the form of wills from American law to French law.[42] According to the tribunal American law as the law of nationality is applicable to the succession of *Sanchez* an American citizen. In view of American law, however, French law is applicable as the law of the domicile of the deceased at the time of his death. The holograph will, therefore, was annulled through the process of renvoi because it was made in France according to American forms.[43]

Renvoi mechanism has also been admitted in the field of company. In fact,

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309-310.

38- ALthough Italian law required a civil celbration before a religious one their marriage is considered valid because the rule *Locus regit actum* at that time is said to be facultative concerning the foreigners who get married in a third country. *Ibid.*, pp 298, 300, 302-304.

39- This is the tendency of the court of Aix which has been considered as using renvoi in order to confirm the validity of marriage. See Gerard Legier, *Ibid.*, pp 311-312: See also Derruppé, J et Agostini, E., *Lo.cit.*, pp 15-16.

40- Première chambre civile- 15 juin 1982. Robert, L., 110, *Clunet*,(1983), pp 596-600.

41- *Succession de Sanchez*, trib. Seine, 13 Juillet. 1910. Gaz. tri., 12 Oct. *Cl.*, (1911), 912, note L. D; Potu, E., *Op.cit.*, p 72. note 5.

42- Potu, E., *Ibid.*, p 62.

43- *Ibid.*, p 62, See also Francescakis, P.h., *Op.cit.*, p 251.

the *Banque Ottomane Affaire* can be cited as an illustration of renvoi transmission in this field.[44] Concerning this matter, the Paris court of Appeal in 19 mars 1964 admitted renvoi from English law, as the law of the real seat, to Turkish law as the law of the incorporation of the company.[45] Furthermore, in the judgment of 19 October the *tribunal de commerce de Paris* held that according to judges' reasoning French conflict rule refers to England as the real seat of the company which was in London. English conflict rules, however, refers the matter to Turkish law as the law of the place of incorporation. The point to be considered is that Turkish law is inapplicable to the activities of the Banque outside Turkish territories. The applicable law according to Turkish private international law is, then, the law of the real seat. French court applied, therefore, the law of the real seat, i.e., English law.[46]

Furthermore, the French jurisprudence admitted renvoi also in matters of the recognition of a natural child[47] and extends its application into the field of property regimes.[48]

B-Admission of renvoi in Great Britain.

1)-The judicial controversies of the renvoi application in English courts.

(i)-Different forms of renvoi which are used by English courts.

As shown in the first chapter the discussion of renvoi in English jurisprudence is to clarify whether the origin of renvoi should be considered from *Re Annesley* case or before it.[49] The analysis in this section, however, will be based upon the different forms that are said to be used by English judges, i.e., whether it is

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44- See Loussouarn, y et Bourel, P., *Op.cit.*, pp 271,.294.

45- See *Bakalian et Hadjithomas* c. *Banque Ottomane*, Cour d' appel de Paris, 3e chambre. 93 Clunet, (1966); p 118, note Goldman, B; 56 *Re.crit. dr..intl.priv.*, (1967), p 85, note Lagarde, P; See in this context Derruppé,J et Agostini, E., *Loc.cit.*, pp 9-10.

46- 73 *Re. crit. dr. intl. priv.*, *Loc.cit.*, pp 93-94, 103.

47- *Dame K.* c. *L...*Trib. civ. (1er Ch) Seine, 18 Nov. 1958, *J. C. P.*, (1959). II. 11. 258, note Bellet, 48 *Re. crit. dr. intl. priv.*, (1959). 672, note Mezger, E., See Potu, E., *Op .cit.*, p 71.

48- Trib.civ. Orleans 27 Fev. 1951, *Re. crit. dr. intl. priv.*,(1954), 358, note Batiffol, H.,: Nouveau Répertoire de Droit, *loc.cit.*, p 928 See Francescakis. Ph *Op.cit.*, pp 242-243.

49- See *Supra.*, Chapter 1. Section 1, pp 32-36, 38-40.

renvoi remission, renvoi transmission or the foreign court theory. As a matter of fact English court are said to have followed different ways or approaches in order to define the meaning of the law of a country X., i.e., the internal law theory, partial or single renvoi and double renvoi.[50] The following discussion, therefore, represents merely an exposition of scholars' ideas which prove that different approaches have been used by English courts in relation to the definition of the meaning of the foreign law.

a)- Concerning the first approach which tends to apply only the internal law of the foreign country. Different cases have been cited as an example to maintain this view. It has been claimed that by referring to the nineteenth Century *Bremer* v. *Freeman* can be cited as an English decision which is hostile to renvoi. This has been justified by the fact that if in *Collier* v *Rivaz* the judge upheld the will and codicils, the case of *Bremer* v. *Freeman* contradicts the previous cases[51] in that from the Privy Council point of view the will was formally invalid.[52] According to the reasoning of the English court the deceased who was domiciled in France from English point of view[53] and in England from French point of view,[54] made a will of movable in France in French form which is invalid from the point of view of French law.[55] In fact the Privy Council did not accept renvoi from the law of domicile , i.e., French private international law,

50- Graveson, R.H. *Conflict of Laws, Private International Law*, 7th edition, London, Sweet & Maxwell, 1974, pp 65-66.

51- It has been claimed that the case of *Collier* v. *Rivaz* was overruled by the Privy Council' s decision in *Bremer* v. *Freeman*. See in this context, Morris, J.H.C." The Law of the Domicil" *Briti.Y.B.Int.L.*, XVIII, (1937), p 44; Morris, J.H.C. *The Conflict of Laws*, 3rd edition, London, Stevens & Sons, 1984, p 472.

52- The Privy Council Considered the will made by a British citizen in France, in English form, as void because it did not comply with French law.(1857) 10 Moo P. C. 306, 359, 374; 14 Eng. Rep 508. See Graveson, R.H., *Op.cit.*, p 67; Cheshire & North, *Private International Law,* 11th edition, London, Butterworths, 1987, p 67.

53- At that time, i.e., before the Wills Act of 1861, the testator's domicile at death governed the formal validity of his will. Graveson, R.H. *Ibid.*, p 66; Wolff, M., *Op.cit.*, p 193.

54- Although the British subject was considered as domiciled in France according to English law, French law, however, considered him not domiciled in France because he did not obtain an authorization for this in accordancee with article 13 of the French civile code. See Falconbridge, J..D, *"Renvoi in New york and Elswhere"*, 6 *Vand. L. Rev.*,(1953) p 712.

55- For discussion see Abbot , E.H., "Is the Renvoi Part of the Common law?" 24 *Law Quar. Rev.*, London (1908) p 144.

to the *lex locis actus*, but instead it applied directly the French municipal law to the validity of a will.[56] It should be noted, however, that there is a considerable controversy among scholars on whether *Bremer* v. *Freeman* represents a renvoi case due to the ambiguity of the reasoning in this case. As a matter of fact, some consider it as a case which accepts renvoi whereas others refute such claim.[57] According to the former group it has been claimed that "...the Privy Council...held that the will was invalid because it did not comply with French conflict rules and it obviously did not comply with the domestic French law, so that on the basis of this explanation the decision is favourable, rather than unfavorable, to the renvoi...".[58]

Among the latter group, however, is Martin Wolff who maintains that the decision of the Privy Council is hostile to renvoi „i.e., the reference to French law as the law of the domicile should be interpreted as a reference to the French internal law and not to its private international rules.[59] Albrecht Mendelssohn-Bartholdy also has pointed out that "*Bremer v Freeman* is a case against remission a fortiori against transmission." [60]

Additionally, *Hamilton* v. *Dallas*[61] has not been considered as a case of renvoi in which English court seems to have applied the foreign internal law from the beginning.[62] *Goods of Luigi Bianchi*[63] and *Abdl-ul Messih* v.

56- *Bremer* v *Freeman* , however, is said to be rejected in *Goods of Lacroix.* (1877) 2 P. D. 94, 96, 97. See Wolff, M., *Op.cit.*, p 193.

57- See in this context, Schreiber, E.O., " The Doctrine of the Renvoi in Anglo-American Law", 31 *Harv. L. Rev.*,(1917-1918), p 542; Dicey & Morris, *The Conflict of Laws*, Volume 1, 11th edition, by Lawrence Collins, London, Stevens & Sons Limited, 1987, p 77.

58- See Falconbridge, J D.," Renvoi in New York and Elswhere ", *Loc. cit.*, p 712. It has benn presumed that even if renvoi did not arise in this case it was, however, advocated indirectly by referring not only to French substantive rules but also to its conflict rules. Falconbridge, J D.,*Essays on the Conflict of Laws,* 1st edition, Toronto, Canada, Law Book Campany Limited, 1947, p 124.

59- Wolff, M., *Op. cit.*, p 193.

60- Mendelssohn-Bartholdy, A., " Renvoi in Modern English Law, by Cheshire G.C. (ed.,), Oxford, The Clarendon Press, 1937, p 75.

61-(1875) 1 Ch. D. 257.

62- Morris, J.H.C. " The Law of the Domicil" *Loc.cit.*, p 45.

63- (1862), 3 S.w. & Tr. p 16.

Farra[64] have also been considered as unfavorable to the renvoi theory but only by an *obiter dictum.*[65]

Concerning the twenteeth Century the writer thinks that there is no doubt that the recent case of *Amin Rasheed Shipping Corp.* can be considered as a case in which the internal law theory has been applied.[66]

b)-With regard to renvoi at first degree different cases have been cited as examples to indicate that this form of renvoi has also been used by English judges. Among them is first of all *Collier* v *Rivaz*[67] in which English municipal law was applied through the process of remission.[68] In this case the English judge had to inquire upon the validity of a will made in Belgium by a British national. According to English conflict rules the deceased's domicile was applicable, i.e., Belgian law. Through Sir Herbert Jenner' s reasoning English law as the deceased's national law would have been applied if Belgian law was seized of the issue.[69] In other words, the reasoning of Sir Herbert Jenner led to the view that according to Belgian law the will made by a foreigner had to be determined by the law of his nationality.[70] In this respect, it has been stressed that if the English judge applied only the Belgian domestic law which is applicable to Belgian citizens without taking into account the private international rules of that country "...The result in *Collier* v. *Rivaz* could not have been arrived...".[71]

Besides, there are who support the view that *Maltass* v. *Maltass*[72] represents a case in which renvoi was approved by *obiter dictum* and should,

64- (1888), 13 App. cas., p 431.

65- For discussion see Bate, J.P., *Notes on The Doctrine of Renvoi in Private International Law*,London, Stevens & Sons, Limited, 1904, pp 14-18, 108.

66- See *Infra.*, Section 1, Sub-section2., pp 171-172.

67- (1841) 2 Curt 855 (per Sir Herbert Jenner).

68- See the view of Wolff, M., *Op.cit.*, p 194.

69- *Ibid.*, pp 189-190.

70- According to him Belgian law is applicable only to wills wchich are made by a Belgian citizen. See Graveson, R.H. *Op.cit.*, p 67.

71- Hoyle, M.S.W., *Private Internationa Law : Cases and Materials*, 1st edition, London,The Laureate Press , 1982 p 19.

72- The matter in this case was about the formal validity of a will made by a British citizen, in accordance with English internal law. (1844), 1 Rob. Eccl. 67.

therefore, be considered as a case of remission.[73]

The case of *Frere* v. *Frere*[74] has also been cited as an example where renvoi remission was recognised and led to the application of English internal law. In this case English judge referred to Maltese law as the law of the deceased's domicile to govern his will. Maltese conflict rule, however, referred back to the place of the execution of the will, i.e., English law.[75] According to Albrecht Mendelssohn Bartholdy, although the case of *Frere* v. *Frere* does not give reasons it "...is a case for remission or transmission".[76]

Goods of Lacroix[77] is an illustration of a fourth case in which renvoi remission is said to be recognized and English internal law was applied through that process.[78] From the judge's point of view, therefore, renvoi from French conflict of laws to English law, is accepted.[79] In other words, the judge accepts the reference or renvoi from the law of the *lex loci actus,* to the national law.[80]

In his view, R.H. Graveson considers the case of *Re Johnson*[81] as an example of the application of the renvoi remission. According to him English internal law was applicable after a remission from X conflict rules to English law.[82] The admition of the mechanism of renvoi in this case has been justified by the reasoning of Farwell, J. He is said to admit that Baden law, as the law of the *lex domicili*, declines competence and would rather refer the movable succession to the law of the State that the deceased was its subject at the time of his death.[83]

73-See the view of Wolff, M., *Op. cit.*, P194.

74- (1847), 5 Notes of Cases, 593 (per endemn Jud).

75- Wolff, M., *Op.cit.*, p 190; Mendelssohn-Bartholdy, A., *Op.cit.*, p 68.

76- Mendelssohn-Bartholdy, A., *Ibid.*, p 75. My emphasise. This case, however has also been cited as an example in which Sir Herbert Jenner Fust applied the total renvoi theory. See Cheshire & North ,*Op.cit.*, p 67.

77- (1887) 2 P.D. 94, 96, 97 (per Sir P. Hannen), (1887) Ch. D.., 1, 257.

78- Wolff, M., *Op.cit.*, p 194.

79- Potu, E., *Op.cit.*, p 127; Wolff, M., *Ibid.*, p 188.

80- Wolff, M.,*Ibid.*, p 188.

81- [1903] 1 Ch. 821.

82- Graveson, R.H., *Op.cit.*, p 67.

83- Concerning the deceased, who had a Maltese domicile of origin, died intestate domiciled in Baden.See Potu, E.,*Op cit.*, pp 129-130.

C)-Renvoi transmission has also been considered as the second form used by English judges. The firts case which has been cited as an example of renvoi Weiterverweisung is that of *Re Trufort*.[84] In this case, which concerns the distribution of movable property of a Swiss national,[85] English court referred to the law of France as the law of the deceased's domicile. French law. however, refers to the law of Switzerland as the law of his nationality.[86] In other words, the reference from French law to Swiss law was accepted. It has been held, however, that English court applied the law of a third country but without taking into consideration that the foreign court might accept renvoi from English law.[87] From another point of view *Re Trufort*, is an authority of renvoi in the sense of *Weiterverweisung* in a Jurisdictional issue. According to that view English law accepted the transmission from French law to Swiss law as to jurisdiction,. i.e, French conflict rules referred jurisdiction to Swiss courts according to the treaty.[88]

Re Anchillopoulos[89] is said to represent another example of renvoi transmission in which the English court held that the Greek internal law is applicable to the succession of the deceased who is a Greek citizen. According to its reasoning if Egypt was the deceased's domicile Egyptian private international rules would transmit the issue to Greek law.[90]

Regina v. *Brentwood Superintendent Registrar of Marriages Exparte*

84-(1887) 36 Ch. D. 600. See Wolff, M., *Op.cit.*, p 194; Graveson, R.H., *Op.cit.*, p 68; Raeburn, W., " The ' Open Offer' Formula and the Renvoi in Private International Law". *Brit. Y. B. Int. L*, XXV, (1948) p 233; Bate, J.P.,*Op.cit.*, pp 16, 112-115; See also this view in Lorenzen, E.G., " The Renvoi Theory and the Application of Foreign Law", 10 *Col. Law. Rev.*, (1910), p 334. Potu, E., *Ibid.*, p 135.

85-It should be noted that according to the treaty of 1869 between France and Switzerland, it is the law of Switzerland which should determine the claim of X that he has the right to the estate of the deceased if the latter is a Swiss national died domiciled in France. It means that the movable succession of the citizen of either switzerland or France should be governed by the law of the nationality. Bate, J. P., *Ibid.*

86- Wolff, M., *Op.cit.*, p 194, Graveson,R.H., *Op.cit.*, p 68.

87-See Morris, J.H.C, *The Conflict of Laws, Op.cit.*, p 472.

88- Schreiber, E. O., *Loc.cit.*, pp 551-553. See in this context Abbot, E.H., *Loc.cit.*,p 142.

89- [1928] 1Ch. 433, 443 (per Tomlin, J.).

90- Wolff, M., *Op.cit.*, p 194.

Arias[91] is a third case which is cited as an example of renvoi transmission.[92] According to the reasoning of the English court the judge referred to Switzerland, as the law of the domicile, which in its turn would have referred him to Italy as the law of the nationality. Italian law which applies the law of nationality concerning the capacity to contract marriage is said, therefore, to apply its own law.[93]

d)-Concerning the foreign court theory it should be stressed that it might be difficult to confirm by the absolute majority of scholars that this form of renvoi had not been influenced by cases before 1926. It should be borne in mind, however, that for the sake of clarity and avoiding any repetition the discussion will start from the classical case of *Re Annesley.*

Due to the fact that the reported cases where the foreign court theory has been applied are numerous the discussion, therefore, will include only some of the cases and the analysis will be divided into two main points. In this context, the reference should be to some cases in which the total renvoi mechanism refers the judge to a country which adopts a partial renvoi and, then, to a country which rejects the mechanism of renvoi.

According to the latter, three cases are cited chronologically to illustrate this fact. The first one is *Re Ross*[94]. In this case the judge, Luxmoore J., applied English internal law[95] to both the movables and also the land situated in Italy of a British subject of English domicile of origin who died domiciled in Italy. To maintain the validity of the will Luxmoore.J. proceeded by the following

91- [1968] 2 Q.B. 956; [1968] 3 All E.R. 279.

92- Morris, J.H.C., *The Conflict of Laws, Op.cit.*, p 477 ; Jaffey, A.J. E., *Introduction to the Conflict of Laws*, London-Edinburgh, Butterworths,1988, p 261.

93- In this case *Galli* was considered as having no capacity to contract a marriage with *Arias* according to Italian Law. See Welling, B and Hoffman, R.," ' The Law of' in Choice of Law Rules: ' Renvoi' Comme Nostalgie de la Boue" 23 *University of Western Ontario Law Review* (1985) pp 94-95. For more details see *Infra.*, pp 149-150

94-[1930] 1Ch. 377, 389; *Clunet*, 1930, p 1092. It must be noted that the internal law theory which was advocated in *Re Annesley* by *obiter dictu.m* was rejected in *Re Ross.* [1926] Ch. 692, 708. See Morris, J.H.C., *The Conflict of Laws, Op.cit.*, p 469.

95- The important consequence of applying English domestic law is the validity of the deceased's will. See in this context, Collier, J., Conflict of Laws, Cambridge University Press, Cambridge, 1987, p 24.

reasoning. According to Italian law, which rejects the theory of renvoi, succession to movables is governed by English law as the national law of the *testarix*. The internal law of the testatrix, therefore, should be applied on the ground that English conflict rules which referred the matter to Italy would accept the reference from Italian conflict rules. With regard to to immovables successions Luxmoore. J.' s view is that the reason for applying English domestic law is that English conflict rules referred the matter to Italy as the *lex rei sitae*. Italian law, however, rejects the theory of renvoi and would have referred the issue to English law as the national law of the *testarix*.[96] Mr Justice Luxmoore's reasoning led to the application of English internal law and, then, the son's action[97] to be entitled by Italian law and his claim of having a legal rights to this assets was dismissed.[98]

The second case is that of *Re O' Keefe*.[99] in which Crossman.J. applied, the law of Eire through the process of the double renvoi, to the immovable succession of movable succession of a British subject who died intestate domiciled in Italy. According to English conflict rules the succession of movables situated in England is governed by the law of the deceased' s domicile at death, i.e., Italy. Italian conflict rules, however, do not accept renvoi and would referred such matter to the law of her nationality which was according to an English judge the law of Eire as the law of her domicile of origin.[100]

The third case, in this context, is that of *Duke of Wellington*.[101] In this case

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96- Falconbridge, J.D., *Loc.cit.*, pp 720-721; Mayer, P., *Op.cit.*, p 194; Wolff, M., *Op.cit.*, p196.

97- The deceased left an Italian and English Wills and had made no provisions for her son. The deceaased's property in England was given to her niece by her English will whereas her property in Italy was given to her Grand nephew by her Italian will. The plaintiff who is the son of *Janet Anne Ross*, claims that he is entitled as to one moiety of her immovables left in Italy according to Italian law.. *Re Ross* v. *Waterfield* [1930] 1Ch. at p 387.

98- See in this context Cheshire & North, *Op.cit.*, p 68; Anto, A.E., *Private International Law, ATreatise From the Standpint of Scots Law*, Edinburgh,W. Green & Son L.T.D.,1967 p 65; Mendelssohn-Bartholdy, A., *Op.cit.*, p 13; Hoyle, M.S.W., *Op.cit.*,p 16.

99-[1940] Ch. 124, [1940] 1 All ER. 216.

100- See Falconbridge, J. D. " Renvoi in New York and Elswhere" *Loc.cit.*, p 721; See *Infra.*, pp 154-158.

101- [1947] 1 Ch. 506.

Wynn Parry J. applied English domestic law[102] concerning the devolution of land property in Spain of a British testator domiciled in England who made Spanish and English wills.[103] It appeared thereafter that none of the qualifications stated in the two wills were satisfied. The court reasoning in this case was to decide exactly as the Spanish court would do. Following the mechanism of total renvoi and the reasoning of Wynn-Parry, J. Spanish conflict rule is entitled to govern such dispute. According to Spanish code, irrespective of the country where the property is located, the deceased's national law should determine both testate and intestate succession. After considering whether Spanish law would accept remission from English law to the *lex situs* the judge held that Spanish court would not accept such remission from the law of the deceased' s nationality.[104]

There seems to be a controversy, however, upon the authority relied in this case. In fact, *Re Duke of Wellington*' s decision is said to rely on the *dictum* of the Privy Council as an authority for the application of the theory of renvoi.[105] In this context, there are who claim that the Privy Council statement in *Kotia* v. *Nahas* confuses between double and partial renvoi theory.[106] According to others the case of *Kotia* v. *Nahas*[107] is an example which is related to the double renvoi theory.[108] To put end to this controversies it has been claimed that the judge Wynn Parry applied in the case of *Duke of Wellington* the theory

102- According to English internal law the land would be transferred or given to the next *Duke of Wellington.*

103- By his Spanish will, the movable of land in Spain would be given to the person who fulfilled two qualifications whereas by his English will the reste of his property would belong to a person who fulfil one of the qualifications.

104- See in this context, Morris, J.H.C. & North, P.M. *Cases and Materials on Private International Law,* London, Butterworths, 1984, pp 70-71; Briggs, E.W., " ' Renvoi' in the Succession to Tangibles: a False Issue Based on Faulty Analysis, 64 *Yale. L. J..,* (1954-1955), p 211; Morris,J.H.C. *The Conflict of Laws, Op.cit.,* p 473; Falconbridge, J.D " Renvoi in New York and Elswhere" *Loc.cit.,* p 721.

105- *Kotia* v. *Nahas* was cited in *Wellington* as an authoritative precedent.[1947] 1Ch. 506, *aff'd,* [1948] 1 Ch. 118; [1941] A.C. 403. Dicey & Morris, *Op.cit.,* pp 79-80; For more details see Briggs, E.W., *Loc.cit.,* pp 207-208, 210.

106- Dicey & Morris, *Ibid.,* p 79

107- [1941] AC. 403; [1941] 3 All E.R. 20.

108- It should be noted that the Case is an example of an Appeal from the supreme court of Palestine to the Privy Council wchich was sitting in England. Cheshire & North, *Op.cit.,* pp69-70.

of double renvoi despite his reliance on a *dictum* that enunciates the single renvoi theory. In fact, his inquiry upon whether spanish law would accept any renvoi from English private international law has been considered as a proof of the application of the former theory.[109]

Concerning English cases in which the judge refers to a country which adopts a partial renvoi, two cases can be cited as an example of this group. The first one is *Re Annesley*[110] in which English court applied the French domestic law concerning the validity of will to a *testarix* who was considered domiciled in France in view of English law whereas in French point of view she did not establish her domicile in France due to the lack of receiving a governmental authorization.[111] In his decision Russell, J. used the foreign court theory by the following reasoning. French law is the applicable law as the law of the testarix' s domicile. French law, however, applies English law as the law of the testarix's nationality on the ground that the testarix was not legally domiciled in France. French internal law, therefore, is applicable due to the fact that French law adopts a partial renvoi and would accept a reference from English law.[112] In fact, by admitting that the deceased' s movables had to be distributed according to French internal law, Russell J., threfore, came to the conclusion that the testarix power is to dispose only one third of her will.[113]

It should be noted that the controversy of the word internal law and also the expression used by the judge led some scholars to doubt about the

109- See in this context, Morris, J.H.C. *The Conflict of Laws, Op.cit.*, p 474.

110-*In Re Annesley Davidson* v. *Annesley*. Chancery Division. [1926] Ch. 692; 95.L. J. Ch. 404; 42 T. L. R. 584.

111- Experts' evidences prove that the testatrix did not have a domicile in French accordingto article 13 of the French civil code. See Mendelssohn-Bartholdy, A., *Op.cit.*, pp7-11; See also Falconbridge, J.D., " Renvoi in New York and Elswhere, *Loc.cit.*, p 720.

112- [1926] Ch. pp 706-707. See also Anton. A.E, *Op.cit.*, p 65; See Falconbridge. J .D, *Ibid.*, Martin, W., *Op.cit.*, pp 195-196.

113- According to English Law the will is valid but according to French law the Testarix could dispose only one third of her moveable property and not all of her property because she left two children surviving her. [1926] Ch. p 708. See also article 913 of the French civil code. Morris. J.H.C, *Cases on Private International Law*, 4th edition, Oxford, at the Clarendon Press, 1968, pp 8-9.

application of the foreign court theory in this case and considers the judge' s reasoning as unclear.[114] As a matter of fact Russell J. said that he preferred to apply directly French internal without using the renvoi mechanism.[115] In his view the application of the internal law theory is "...simple and rational solution..."[116], and wished to reach the same solution without involving any question of renvoi.[117] Furthermore, his expression in which he supported the view that applying French municipal law is a rational solution has been considered as a declaration that renvoi theory should be avoided.[118] In fact, J. D. Falconbridge underlines that the judge Russell's reasoning in this case "...reached the same conclusion as if there had been no doctrine of the renvoi..." This scholar goes on to stress that "...the internal law of the domicil should be applied, declared by way of *obiter dictum* his personal disapproval of the doctrine..."[119] From another point of view Russell. J. preferred to apply the internal law directly but without supporting his claim with any authority.[120]

The opposite view, however, maintains that the use of the term internal law[121] should be taken to connote "...evidently a slip for' French private international law' "[122] This has led to stress that although the judge's decision meant the reference to the internal law of a foreign country his preference was the use of the double renvoi theory.[123]

On the whole, Russel J. is said to have introduced this form in the case of *Re Annesley* despite the fact that he did not give any authorities or justified his reasoning by giving reasons for using the foreign court theory.[124]

114- Cheshire & North, *Op.cit.*, p 67.

115- Morris, J.H.C. *The Conflict of Laws, Op.cit.*, p 472.

116- [1926] Ch. 692, at pp 708-709.

117- Morris J.H.C, *Cases on Private International Law, Op.cit.*, p 9.

118- Hoyle, Mark, S.H., (ed.,), *Op.cit.*, pp 20-21.

119- Flaconbridge, J. D." Renvoi and Succession to Movables" 47*Law. Quar. Rev..*, London (1931) p 287.

120- See in this context Dicey & Morris, *Op.cit.*, p 78;

121- The Judge found that according to French internal law the law of the person nationality should be applied if a person is a foreigner not legally domiciled in France.

122- See MorrisJ.H.C, *Cases on Private International Law, Op.cit.*, p 7 notes 1

123- Cheshire & North, *Op.cit.*, p 67.

124- Morris. J.H.C., *The Conflict of Laws, Op.cit.*, p 472; Dicey & Morris, *Op.cit.*, p78.

The second case of the former group is *Re Askew* in which judge Maugham J. applied German municipal law and, then, held the child as legitimated.[125] In his view, German law as the father' s domicile refers the matter of legitimacy to the father's nationality, i.e., English law. If, however, German court was seized of the matter it would have accepted a remission from English private international law to German internal law.[126] According to an opinion, however, if renvoi was not used the concerned party would be considered as a bastard on the ground that according to the legitimacy Act of 1926 an adulterinus could not be legitimated.[127]

It must be noted that the judge based his argument which is in favour of renvoi upon the acquired right theory. In his view English law refers to foreign domicil in order to know whether right had been acquired under that law.[128] In fact, the consideration of the acquired right theory by Maugham J. in *John Doe* led him to maintain that by applying German, law as the law of the *lex domicili*, *Margaret Askew* had acquired the status of legitimacy under that law.[129] The Judge's reasoning, therefore, indicates that there is a close link between the theory of acquired right and the total renvoi theory. One view is that the former theory support the use of the latter.[130] It means that *Re Askew* has been considered as a legal source which indicates that the foreign court theory is based on the acquired right theory.[131]

125- *In Re Askew; Marjiribanks* v. *Askew*, Chancery Division. [1930] 2.Ch. 259; [1930] All E. R. 174; 99 L.J. Ch. 466; 46 T. L. R. 539. Collier J G, *Op.cit.*, p 27; Cheshire & North, *Op.cit.*, p 69.

126- See Graveson R.H., *Op.cit.*, p 70, Wolff, M., *Op.cit.*, p 196; Falconbridge J. D, " Renvoi in New York and Elswhere" *Loc.cit.*, P 720; Mayer, P., *Op.cit.*, p 194.

127- Collier J. G,*Op.cit.*, p 27.

128- Wolff, M., *Op.cit.*, p 196.

129- According to the whole law of the *lex domicili*, i.e., German law, *Margaret Askew* child of the husband *John Bertram* and his second wife *Anna Wengels* was legitimated by this subsequent marriage, in April 1912, although the child was born(January 30, 1911) before the divorce was final (July, 1911). See for instance Castel J. G, *Op.cit.*, pp 58-61; Mendelssohn-Bartholdy, A.,*Op.cit.*, p 20.

130- Edinger, E., *Loc.cit.*, p 46.

131-*Ibid.*, p 38. notes 19; For more details concerning the acquired right theory in relation to the foreign court theory, see Falconbridge, J. D *Essays on the Conflict of Laws*, 2nd edition, Toronto, Ontario, Canada, Law Book Company limited, 1954, p 195.

(ii)-Scholars' point of views upon the recent and current renvoi approaches used by English courts. It seems that judges' decisions and reasonings upon the acceptance or the rejection of renvoi by English courts will be an insufficient analysis if it is not completed and confronted with scholars' opinions on this issue. In addition, if the above discussion tries to clarify whether the reference to foreign law means its internal or private international rules, the analysis in this context, however, is based upon the question of how often English judges referred to the whole foreign law and find out from the cases which of the theories represent part of English law and jurisprudence.

In this respect, it should be kept in mind that the problem which faces English judges upon the application of foreign law concerns the interpretation and the meaning of that law.[132] In fact, the ambiguity of the foreign law has been interpreted in different ways and scholars' views, in this matter, differ. On the one hand there are those who maintain that in the majority of English cases the tendency of English judges on the interpretation of foreign law has been considered as a reference to the internal law of that foreign system and not as a global reference. According to this view the few cases, however, in which the interpretation of English judges has been considered as a global reference are said to represent exceptional cases.[133] In other words, the reference from English private international law to a foreign country Y generally means its domestic rules and not its private international rules but a number of exceptions have to be recognized to this general principle.[134] Besides, it has been claimed that there are many cases in which the reference to foreign law means the domestic law of that law without referring to its private international rules. This has led to believe that "...There is...no...justification for generalising the few English cases on renvoi into a general rule that a reference to foreign ' law ' always means the conflict rules of the foreign country..."[135]

132- Maugham, J. for instance, in the case of *Re Askew* was wondering whether the law of Utiopia means the whole law of the lex domicilii or merely its domestic rules. [1930] 2 Ch. 259. See in this context Collier J. G ,*Op.cit.*, p 22.

133- Morris J.H.C, *The Conflict of Laws*, *Op.cit.*, p 12; See also the view of De Nova, R., *Loc.cit.*, p 510.

134- Cheshire & North, *Op.cit.*, p 72.

135- Dicey & Morris,*Op.cit.*, p 83; Morris J. H. C., *The Conflict of Laws*, *Op.cit.*,4, p 475,

On the other hand there are those who claim that when English private international law rules refer the issue to the foreign country this reference is interpreted "sometimes" as a reference to the whole law of that country including its Conflict rules.[136] The question which arises, therefore, is whether the reference to the foreign domestic law means usually or only sometimes? The general view in this context is that the law of the foreign country X "...means, when applied to any foreign country, ' usually ' the domestic law of that country, ' sometimes ' any domestic law which the courts of that country would apply to the decision of the case..."[137] According to this rule it can be seen that the foreign law, such as, France means usually French internal law. However, the term "sometimes" which is used in this structure allows the possibility of the application of any system of law that the French court would apply to the case.[138]

Despite the peculiarity of the foreign court theory and its differences from renvoi conception in the continent there is still doubt about the real tendency of the English legal system on renvoi. Is English tendency in favour of renvoi in one or in its different forms or is hostile completely to the admission of its mechanism? In other words, which of these approaches is the real conception adopted by English law and jurisprudence. Is it the internal law theory or the *Gesamtverweisung*? Concerning the former approach it has been maintained that this has been recommended by two judges because of its simplicity and rationality.[139] Concerning the partial or single renvoi this form is said not to represent to be the current theory of the courts in England.[140] Another view, however, has claimed that renvoi is neither adopted nor rejected in English law.[141] This claim has been illustrated by the reasoning of Maugham J. in the

originally emphasised.

136-Morris J.H.C & North P.M. , *Op.cit.*, p 655, emphasise added.

137- See Rule 1, Dicey & Morris, *Op.cit.*, p 73, emphasise added.

138- *Ibid.*, p 74.

139- *Re Annesley* [1926] Ch. 692, 708- 709. [1930] 2 Ch. 259, 278. This solution, however, is said to be rejected in *Re Ross* [1930] 1Ch. 377, 402. See *Ibid.*, p 75.

140- See Dicey & Morris, *Ibid.*; Morris J.H.C , *The Conflict of Laws, Op.cit.*, p 470.

141- Levontin A. V., *Choice of Law and Conflict of Laws*, Leyden, A.W. Sijthoff, 1976, p 52.

case of *Re Askew* in which he states that "...if I 'am right an English court can never have anything to do with it except so far as foreign experts may expound the doctrine as being part of the *lex domicilii*" [142]

Concerning the double renvoi theory it seems also important to highlight Rodolfo De Nova's view in which he stresses that "...One must never forget that the ' *foreign court* ' theory ' *is a judicial discovery and a judicial tool* ,' not a general theory presented by scholars nor a general principle declared by the legislator..." .[143] This reasoning, therefore, leads, to the point which concerns the prospect of the foreign court theory in English private international law! Rodolfo De Nova examined the matter and has remarked that "...How far it goes and how far it may go in English law in future, is hard to state and hard to foretell".[144]

It should be noted as well that whether English courts are generally in favour of the internal law theory or has accepted renvoi in its different forms is an issue which does not concern only scholars ' opinions but this controversies must be resolved by English courts themselves. In fact, it has been indicated that "...There is no case which prevents the court of appeal...from reviewing the whole problem, and it is submitted that such a review is long overdue."[145] According to another point of view "...until the matter is reviewed by a higher court it must be taken that the theory of double or total renvoi is the doctrine of the English courts in the situations in which they are willing to refer to the conflict rules of the foreign law."[146] Scott. A. is also certain that the double renvoi theory"... is part of English private international law. Nevertheless it is open to the House of Lords to reject it and this would...be welcome..."[147]

Generally, it can be pointed out that the foreign court theory is not the only form used by English Judges.[148]

142- [1930] 2 Ch. 259; [1930] All E.R. 174.

143- De Nova, R., *Loc.cit.*, p 508.

144- *Ibid.*, p 509.

145- Morris, J.H.C., *The Conflict of Laws*, *Op.cit.*, p 480.

146- Dicey & Morris, *Op.cit.*, p 81.

147- Scott, A.W., *Private International Law*,2nd edition, Macdonald & Evans L.t.d. 1979, p45.

148- See especially Edinger. E., *Loc.cit.*, p 38.

2)- Field of application of renvoi in English case law. The renvoi theory in English jurisprudence, whether it is a remission, transmission or double renvoi, has been applied to different matters. Its mechanism has been used to the formal[149] and intrinstic or essential validity of wills[150] In this context, it should be noted that among the reason which have contributed to the recognition of renvoi in English law is the tendency of favoring and upholding wills which are formally invalid. It means that renvoi has been used as a means of allowing wills to probate although they are not considered as formally valid according to the internal law of the country of domicile.[151] This can be illustrated by the fact in *Collier* v. *Rivaz*[152] in which Sir Herbert Jenner allowed the will and two codicils made according to Belgian form and also the four codicils made in English form to probate.[153] In *Frere* v. *Frere* the use of renvoi allowed the will to probate although it was void according to Maltese internal law.[154]

Its mechanism has also been applied to intestate succession[155] and legitimation by subsequent marriage.[156]

In relation to the lex *loci actus*[157] its mechanism has been accepted when English Conflict rule refers to the place where the will was made.[158]

In the field of immovable succession it mechanism has been admitted

149- See For instance *Collier* v. *Rivaz* (1841) 2 Curt. 855; *Goods of Lacroix* (1877) 2 P. D. 94; *Frere* v. *Frere* (1847) 5 Notes of Cases 593; *In the Estate of Fuld* (N°3) [1968], p 675.

150- See for instance *Re Annesley* [1926] Ch. 692; *Re Ross* [1930] 1Ch. 377; *Re Trufort* (1887) 36 Ch.D. 600.

151- Dicey & Morris, *Op.cit.*, p 76; Morris J.H.C., *The Conflict of Laws*, *Op.cit.*, p 471; Wolff, M., *Op.cit.*, p 194.

152- (1841) 2 Curt . 855.

153- Dicey & Morris, *Op.cit.*, pp 76-77; *In Bremer* v. *Freeman*, however, English court refused to probate the will made in English form. (1857) 10 Moore P.C. 306. See Westlake, J., *A Treatise on Private International Law*, By Bentwich, N., (ed.,), 7th edition, London, Sweet & Maxwell, Limited, 1925 p 36.

154- See Potu, E., *Op.cit.*, p 124.

155- See for instance, *Re Johnson* [1903] 1 Ch. 821; *Re O' Keefe* [1940] Ch. 124, [1940] 1 All ER 216.

156- *Re Askew* [1930] 2 Ch. 259; Graveson, R.H., *Op.cit.*, p 75.

157- *In Bonis Lacroix* (1877) 2 P. D. 94.

158- See in this context Dicey & Morris, *Op.cit.*, pp 81-82; Morris J.H.C., *Conflict of Laws*, *Op.cit.*, p 475.

when English conflict rule refer to the *lex situs.*[159]

In family law there has been doubts upon the application of renvoi in marriage and divorce. Concerning the latter issue, the mechanism of renvoi is said to be applied even in choice of jurisdiction, i.e., in matter of the validity of a divorce decree. *Armitage* v. *Attorney General*[160] has been cited as an illustration to indicate that the validity of divorce decree of South Dakota was recognised. This led to maintain that the subsequent English marriage of an English woman who married an English man, after obtaining a divorce from her American husband by the South Dakota court, is valid.[161] It can be noticed that the positive answer given by the courts was based on the ground that the New York court allowed the married woman to have her separate domicile in order to sue for divorce and would also recognize the validity of her Dakota divorce and enforce it.[162] It means that if a decree is valid according to the private international law of the domicile it will be recognized in England.[163]

More important although the word renvoi had not been used by the court it has been claimed that the reasoning of the court assume the use of renvoi in order to reach this solution. In fact, Sir Corell Barnes maintains that in order to reach the result that would be reached by a New York court if it was confronted with the case, English court, therefore, had to put itself in the position of that court.[164] From another point of views "...English...court...looked to New York court regarded the south Dakota decree as valid, accepted this onward transmission and itself recognized the validity of the divorce decree..."[165]

159- See for instance *Re Duke of Wellington* [1947] 1 Ch. 506.; *Re Ross* [1930] 1Ch. 377.

160- [1906] P 135; 75 L. J. P. 42; 94 L. T. 614; 22 T. L. R. 9 Prob., Divorce, & adm. Div.). This case has been considered as an English case which admits *Witerverweisung*, i.e., renvoi transmission. See Potu, E., *Op.cit.*, p 135.

161- See in this context,. Griswold, E.N.," Renvoi Rivisited " 51 *Harv. L. Rev.*, (1937-1938) p1203.

162- See in this context Schreiber, E.O., *Loc.cit.*, p 560.

163- Se Rabel, E.,*The Conflict of Laws, A Comparative Study* , Volume 1, Second edition, Ann Anbor, University of Michigan Law School, 1958 , p 551; Lorenzen, E.G.,*Loc.cit.*, P 335; Graveson, R. H., *Op.cit.*, pp 74-75; Potu, E., *Op.cit.*, p 131.

164- [1906] P 141, See also Schreiber, E.O., *Loc.cit.*, pp 560- 561

165- Graveson, R. H., *Op.cit.*, p 68; But one should refer no further to *Mounbattenv.Mountbatten* [1959] P.43; [1959] 2 W.L.R. 128; [1959] 1 All.E.R. 99.

Additionally, the outcome of the reasoning of the court, led to believe that renvoi has been used as an alternative rule of validation.[166]

In the former issue, i.e., in marriage there has been a doubt upon whether renvoi might be applied in both formal validity of marriage and capacity to marry.[167] Concerning the essential validity of marriage *Regina* v. *Brentwood Superintendent Registrar of Marriages Exparte Arias*[168] has been considered as the only English case where the mechanism of renvoi, in its transmission forms has been used in this context.[169] This led to confirm that *Brentwood Superintendent Registrar of Marriages Exparte Arias* is a case complicated by the mechanism of renvoi.[170] What happened in this case is that the validity of the Swiss divorce, which represents the incidental question,[171] was decided not by the *lex fori* but by the *lex causae*, i.e., by Italian law which led to the fact that the husband cannot remarry in England because of lacking the capacity to remarry according to Italian law.[172] Accordingly, English court applied Italian conflict rules to decide both the incidental and the main question through the doctrine of renvoi.[173] It has been confirmed, however, that the case of *Brentwood Superintendent Registrar of Marriages* is overruled and according to a recent case *Lawrence* v. *Lawrence*[174] the incidental case in this area, will be decided according to the *lex fori* and not the *lex cuasae*.[175] In other words, the

166- Edinger, E., *Lo.cit.*, pp 42-43.

167- Dicey & Morris, *Op.cit.*, pp 81-82; Morris, J. H. C., *The Conflict of Laws*, *Op.cit.*, p 475; Jaffey, A. J. E. *Op.cit.*, p 261.

168- [1968] 2 Q B 956, [1968] 3 All E.R. 279.

169- Jaffey, A.J. E., *Op.cit.*, p 49.

170- Collier, J. G., *Op.cit.*, pp 31 notes 85 and 266 notes 73.

171- The preliminary question in this case is the recognition of the foreign divorce decree whereas the capacity to marry is the main issue.

172- The Divisional court maintained that the husband cannot remarry again in England. This is due to the fact that according to Swiss conflict rule, where he was domiciled, the reference is made to his national law, i.e., Italy, which does not recognize his divorce on the ground that he lacks capacity to remarry under that law. See Jaffey, A.J. E., *Op.cit.*, p 34; Collier, J. G, *Op.cit.*, pp 30-32.

173- Dicey & Morris, *Op.cit.*, p 54; Cheshire & North, *Op.cit.*, p 55.

174- [1985] Fam 106; [1985] 1 All ER. 506; [1985] 2 All ER. 733.

175- See section.7 of the Recognition of Divorce and legal Separation Act (1971). See also Section 50 of the Family Law Act (1986), Jaffey, A. J. E., *Op.cit.*, pp 34-35.

court of Appeal recognised to the wife the freedom to remarry although that capacity is denied by the law of her domicile.[176]

It should be noted that analogy has been made in this respect which maintains that the same solution should be adopted for both the essential and the formal validity of marriage in relation to the use of the doctrine of renvoi.[177] As a matter of fact, it has been recommended that the reference to the *lex loxi celebrationis* should mean the reference to the whole law of the country where the marriage was celebrated and not only to its domestic rules.[178] Although there is no English case which maintains that the marriage is formally valid if it complies with the law that the *lex celebrationis* would apply it has been stressed that in case of formal validity of marriage the reference to the *lex loci celebrationis* should be considered as "...an alternative reference to either its conflict rules or its domestic rules..."[179]

There must be, therefore, justifications for applying the renvoi mechanism in the formal validity of marriage. This situation, in fact, can be explained by two facts. According to the first one the application of whatever law the *lex loci celebrationis* would apply is merely an inference or a deduction from the case of *Taczanoska* v. *Taczanowski.*[180] This case concerns the formal validity of marriage of two polish nationals who went through a ceremony of marriage according to the rites of the Roman catholic church in Rome in 1946.[181] From the court of appeal' s point of view the Marriage in *Taczanowska* v.

176-The difference between *Lawrence* v. *Lawrence* and *Brentwood Superintendent Registrar Marriages* is that in the former case the remarriage took place abroad. See Collier, J. G., *Op. cit.*, p 32.

177- The Law Commission working Paper N° 89 and the Scottish Law Commission Consultative Memorandum N°64, *Private International Law, Choice of Law Rules in Marriage*, London, Her Mejesty's Stationery Office, 1985, p 96; See the later report of the Scottish Law Commission, Discussion Paper N° 85, *Family LAw, Pre-Consolidation Reforms*, 1990, pp 114-115.

178- The Law Commission working Paper N° 89,*Ibid.*, p 35; See Collier J. G. *Op.cit.*, p 273.

179- Dicey & Morris , *Op.cit.*, p 85; See Morris, J.H.C. *The Conflict of Laws, Op.cit.*, p 477.

180- This case has been considered as an indication that renvoi may be applicable to the forms of marriage.[1957] P.301, 305, 318, [1956] 3All ER 457, [1957] 3 W. L. R. 141.

181- [1957] 3 W.L.R. 141, See Carter P. B., " Decisions of British Courts During 1956-1957 involving Questions of Public or Private International Law, *Brit. Y. B. Int. L.*, XXXIII, (1957), p332.

*Tackzanowski*was held formally invalid[182] according to both Polish and Italian law.[183] According to the court of Appeal' s point of view the marriage will be held valid from English point of view if it is formally valid as well in polish law.[184] In other words, if the marriage is formally valid according to the conflict rules of the country of the celebration this could be considered enough despite its formal invalidity according to the domestic rules of that country.[185]

Due to the fact that *Tackzanoska* v. *Taczanowski* has been considered an Authority that supports the application of renvoi in the formal validity of marriage[186] it has been held therefore that the marriage can be considered as formally valid if it is done according to the conflict of laws of the *lex loci celebrationis,* and not to its domestic law.[187] Furthermore, it is through the *dicta* in the case of *Taczanowska* v. *TAczanowski* which led to stress that the reference to the law of the *lex loci celebrationis* should be considered as a reference to either its internal rules or its conflict rules.[188]

The second fact, however, is justified by using the renvoi as a means to upheld the formal validity of marriage celebrated abroad as an analogy to the use of renvoi in the formal validity of wills. It must be noticed that the analysis

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182- The marriage, however, is said to be upheld because it was considered as agood common law marriage. [1957] P.301. See Collier, J.G., *Op.cit.*, p 29; Dicey & Morris, *Op.cit.*, p 91 notes 99.

183- For discussion see also Carter, P. B., " Decisions of British Courts During 1959- 1960 Involving Questions of Public or Private International Law, *Brit. Y. B. Int. L.*, XXXVI, (1960), p416. notes 2

184- The problem wich emerged is that the Polish spouses celebrated their marriage in Italy wchich was considered as void according to Italian internal law because it was a marriage without a civil celebration. According to Italian Conflict rules, however, Marriage will be considered as formally valid if it respect the requiremants of the law of the Parties' nationality. [1957] P 301; [1957] 2 All ER 563.

185- Jaffey, A. J. E., *Op.cit.*, pp 50, 261.

186- Cheshire & North,*Op.cit.*, p 73.

187- North, P. M., *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland*, Volume 1, North- Holland , 1977 p 138, notes 3.

188- Dicey, Conflict of Laws, 7th edition, by Morris, J.H., (ed.,), London, Stevens & Sons Limited, 1958, p 76; For discussion see also Carter, P. B., " Decisions of British Courts During 1959-1960- Involving Questions of public or private International Law" *Loc.cit.*, p 416. See Morris, J.H.C. *The Conflict of Laws, Op.cit.*, p 477.

in this context requires the writer to relate this justification with the rule of *locus regit actum.* As a matter of fact this rule, with regard to the formal validity of marriage, is imperative and not optional in English law whereas in Italy, for instance, it is facultative.[189] It has been claimed in this context that in England, where the *locus regit actum* is an imperative rule, the use of the doctrine of renvoi is practically needed. According to Lennart Pålsson it is the acceptance of renvoi which "...will tend to relax the imperative nature of the rule *Locus regit actum* and...bring...a certain *rapprochement* to those countries whose conflicts systems admit a choice between the *lex loci* and the personal law..."[190] This means that the application of only the *lex locis celebrationis* as stated by the Rule 70, is a rigid rule whereas the flexibility in the continental countries takes into consideration either the *lex loci celebrationis* or the parties' personal law.[191]

As can be seen there is a tendency which supports the view that the reference should be either to the domestic rules of the *lex loci celebrationis* or whatever system of domestic law is referred to by the conflict rules of the country of celebration. It means that the marriage will be held as formally valid if it complies with the formalities stated either by the law selected by the conflict rules of the *lex loci celebrationis* or simply by the internal law of thecountry of celebration.[192] This led to maintain that the use of renvoi mechanism is only to validate a marriage from point of view of form and not invalidate it.[193] In other words the application of renvoi in the formal validity of marriage has been justified by the fact that the predominant views of English writers is that the use

189- Dicey & Morris,*Op.cit.*, P 599; Morris J.H.C., *Ibid.*, p 150; See also Loussouarn, Y. et Bourel, P.,*Op.cit.*, p 469.

190- Pålsson, L., "Marriage and Divorce", *International Encyclopedia of Comparative Law*, by Lipstein, Kurt., Vol III, Chapter 16, Chapter 16, (1978) p 30. See also Pålsson,L.,*Marriage and Divorce in Comparative Conflict of Laws*, Leiden, A. W. Sijthoff, 1974, p 304.

191- Dicey & Morris, *Op.cit.*, pp 84-85.

192- Pålsson, L., *Marriage and Divorce in Compartrive Conflict of Laws, Op.cit.*,pp 304-305.

193- See the Law Commission working paper N° 89 and the Scottish Law Commision Consultative Memorandum N° 64, *Op.cit.*, p 35.

of renvoi in this field should be admitted in order to uphold a marriage and not to annul it.[194] In fact , there are those who think that English court would be prepared to apply foreign conflict rules if it appears that this would lead to the validation of marriage.[195] Additionally, the application of renvoi in the formal validity of marriage is said to represent a way of preventing a limping marriage between the law of the forum and that of the country of the *lex loci celebrationis*.[196]

On the whole, it has been claimed that by the process of renvoi the marriage will be held valid in England even if it is formally invalid by the domestic law of the *lex loci celebrationis* but formally valid by the law chosen by the conflict rules of the place of celebration.[197] Moreover, there are indications that the marriage of a British subject should comply with the requirements of Common law of England if it appears that it is impossible to confirm with the local forms of the country X.[198] It means, that the marriage will be held as formally valid if it is celebrated in the country X according to the requirements of English Common law whereas it appears that it is impossible to use the local forms of the country X.[199]

3)- Renvoi and domicile of origin of a British subject.

a)- Controversies on how to find out the national law of a British subject The question on how to interpret the meaning of the law of the subject who belongs to a Plurilegislative territorial or personal unit is a vague question. The discussion in this context, however, will be based only on

194- Pålsson,L., *Marriage and Divorce in Compartrive conflict of Laws*, *Op.cit.*, pp 304-305.

195- *Ibid.*, p 303.

196- The Law Commision Working Paper N° 89 and the Scottish Law Commission Consultative Memorandum N° 64, *Op.cit.*, p 34.

197- Morris, J.H.C., *The Conflict of Laws*, *Op.cit.*, p 151.

198- See in this context Cheshire, G.C., *Private International Law*, 5th edition, Oxford, at the Clarendon Press, p 329 see also Carter P.B., "Decisions of British Courts During 1956-1957 involving Questions of Public or Private International Law", *Loc.cit.*, p 333.

199- If it seems impossible for the parties to use the local form of a country, such as, a marriage in Moslim country which does not provide a Christian form. Their marriage , however, is said to be held valid despite the fact that it did not comply with the local form of the *lex locis celebrationis*. See Dicey & Morris , *Op.cit.*, Rule 70(2) , pp 597, 605.

the question of how to find out the national law of a British subject when the foreign conflict rule indicates the application of a national law of a British national X. Does this mean the application of English law or scots law? Thus, the inquiry will be as follow: by which law the word "national law" should be interpreted; is it by the forum or foreign law? For that purpose some of the English cases will be cited to illustrate this situation. These are as follows: *Re Ross*[200], *Re Askew*,[201] and *Re O' Keefe*.[202]

In *Re Ross*the question was how the Italian courts would determine the national law of X. This has been answered by Italian witnesses which claim that "...The English law applicable is that part of the law which would be applicable to an English national domiciled in England."[203] In his view Falconbridge J. .D., however, claims that the Italian witnesses explained what is the meaning of the national law of an English national and not that of a British national.[204]

In *Re Askew* too the German witness' reasoning is said to be unsatisfactory in that it did not succeed to interpret the meaning of the national law of a British subject.[205]

Concerning the case of *Re O' Keefe*[206] the deceased who died a spinster and intestate in Italy, where she resided for forty seven years, had been considered by Crossman as having a British nationality. Eire in Southern Ireland was considered as her domicil of origin although she spent most of her life in India and died domiciled in Italy.[207] Crossman reached his solution by using the

200- [1930] 1 Ch. 377.

201- [1930] 2 Ch. 259.

202-[1940] Ch. 124.

203- [1930] 1 Ch. 377.

204- Falconbridge, J.D., " Renvoi in New York and Elswhere " *Loc.cit.*, p 723.

205- According to German witness "...*John Betram Askew* was an Englishman. Therefore English law would be applied by the German court in deciding the question." [1930] 2 Ch. 259; See *Ibid.*, pp 723-724.

206- *Re O' Keefe* (deceased); *Poingdestre* v. *Shuman*. [1940] Ch. 124; [1940] 1 All E.R. 216; 109 l. L. J. Ch. 86; 162 L. T.

207- Eire is the country of the domicile of origin of her father.Besides the *de cujus*visited Ireland with her father when she was a child. Falconbridge," Renvoi in New York and Elswhere" *Loc.cit.*, p 724; Graveson, R. H., *Comparative Conflict of Laws, Selected Essays*, Volume 1, Amsterdam, New York, Oxford, North Holland, Publishing Compagny, 1977,

mechanism of the double renvoi theory. In fact, the reasoning starts by admitting that the deceased who died intestate acquired a domicile of choice in Italy. According to the evidence given by the affidavit art 8 of the preliminary dispositions of the Italian civil code of 1865 the law of the deceased nationality should govern her succession. The question, therefore, which faces the court is the meaning of the British nationality. To resolve this situation Crossman, J. claims that according to experts evidences the succession of the deceased would be distributed by the law of the country "...to which the intestate belonged and belonged, I think at the time of her death" [208] He goes on to emphasises that the applicable law to is the "... the part of the British empire to which the intestate can be said to have belonged...". He, then, come to the point that "...in the circumstances, is the part from which she originated..."[209], i.e.,the law of Eire was considered as the only part from which the deceased originated.[210] In other words the court held that although the deceased acquired domicile of choice, in Italy she had never acquired Italian nationality.[211] Accordingly, the deceased' s movables succession was distributed according to the internal law of Eire through the process of renvoi.[212]

In this regard, it is important to keep in mind that scholars' views differ as well concerning the application of domicile of origin in the case of *Re O' Keefe* Starting with the view of Anton A. E., this scholar maintains that the rule will be as follow: "...if we must find the national law" of persons belonging to a state with two or more territorial systems of internal law, Crossman J' S approach is the only practicable one".[213] According to another view, however, when the question of what is the national law of a British national arises before the court, this will apply the most closely connected conception.[214] It means that the court

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p 331.

208- [1940] Ch. 124, 126.

209- *Ibid.*, at p 130.

210-Castel, J. G., *Op.cit.*, pp 63-64

211- Hoyle, M S.W., (ed.),*Op.cit.*, p 25.

212- See Morris, J. H. C., *The Conflict of Laws, Op.cit.*, pp 478- 479.

213-Anton, A.E., *Op.cit.*, p 67.

214- Wolff, M., *Op.cit.*, p 132.

has to choose the law that is most closely connected to the deceased.[215]

The first critical remark which has been made upon Crossman' s reasoning reads as follows. Although the judge applied the law of Eire by basing his reasoning upon Italian experts, this law, however, is said to be neither the law which would be applied by Italian courts for movables situated in Italy nor the law of the deceased's last domicile designed by English Conflict rule.[216] In other words, the legal system by which the parties' rights were determined in this case is "... neither the national law nor the law of the domicil as envisaged by the English rule for choice of law" This is what makes the judge' s comment "...surely superflous" [217] Among other criticisms which have been said towards the use of the domicile of origin is that there was no evidence which prove that the national law of the British citizen means the law of his domicile of origin. According to this view the assumption of the English court to decide how the foreign court would determine the national law of a British subject is not necessarily accurate.[218] Furthermore, it is thought that if the English interpretation maintained that Italian law substitutes nationality for domicile in case of a non unified system the more acceptable solution would be the application of Italian law as the deceased domicile.[219] Moreover, there are those who consider the solution reached by Crossman, J., in *Re O' Keefe* as absurd.[220] This is the view approved by Morris in which he emphasizes that "...if the evidence of foreign law is misleading or inadequate" the consequences will be, therefore, " English court may reach a result which is unreal or unjust to the point of absurdity..."[221] The same argument has been made to justify that the application of domicile of origin leads also to "...some bizarre results..."[222]

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215. See in this context Nadelman, H., " Mancini's Nationality Rule and non Unified Legal Systems, Nationality Versus Domicile, 17 *Amer. J. Comp. L*, (1969) p 446.

216- Flaconbridge, J. D., " Renvoi in New York and Elswhere" *Loc.cit.*, p 724.

217- Cheshire & North , *Op.cit.*, p 65.

218- Dicey & Morris, *Op.cit.*, p 87.

219- Batiffol, H., " Principes de Droit International Privé"., *Recueil des cours*. Vol. II, Tome 97, (1959) p 529.

220- See Falconbridge, J.D., " Renvoi and the Law of Domicile" 19 *Can. B. Rev.*, (1941) 324, 326; See also Rabel, E., *Op.cit.*, p 142.

221- Morris, J.H.C., *The Conflict of Laws*, *Op.cit.*, p 478.

222- Carter, P. B., " Domicil: The Case for Radical Reform in the United Kingdom", 36 *Int' l*

Additionally, it has been maintained that if Italian court had been asked to express their view upon the country where "...the intestate ' belonged ' at the time of her death?... the answer might very well have been Italy..."[223] Another basic argument, in this respect, is that Italian courts nowadays interpret the national law of a British citizen domiciled in Italy to mean Italian law and not his domicile of origin.[224] If this belief is accurate an important point must be taken into consideration which is "...the case of *Re Ross and Re O' Keefe* are no longer reliable guides."[225]

b)- Substitution of domicile for nationality as a connecting factor. It is obvious that the substitution of domicile for nationality is the case in a composite or non unified system, such as, the situation in Great Britain. In other words, the only solution to solve the problem when a reference is to a composite system is the renounciation of nationality and the return to domicile.[226] This is why Rodolfo De Nova, for example, has remarked that the nationality in this context fails as a connecting factor and the person would be considered as stateless. Following this view *Re O' Keefe* estate, therefore, should be distributed according to Italian law as the law of her last residence.[227] According to this scholar if the person is in the situation of *Re O Keefe* his status should be governed by the law of domicile and will be, therefore, considered as stateless.[228]

It is not astonishing, to indicate that the use of the domicile of origin[229] has

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& Comp. L. Q.,(1987), pp 716, 722.

223- Inglis, B. D., " The Judicial Process in the Conflict of Laws " 74 *Law. Quar Rev.*, (1958) p 498. Originally emphasised.

224- Dicey & Morris, *Op.cit.*, p 87.

225- *Ibid.*, p 88.

226- Batiffol, H., *Loc.cit.*, pp 527- 529.

227- De Nova, R., *Lo.cit.*, pp 549, 555.

228- De Nova, R.," Les Systèmes Juridiques Complexes en Droit International Privé" 44 *Re. crit. dr. int. priv.*, (1955), pp1, 14; See in this context Nadelmann, K.H., *Loc.cit.*, p 444; Kahn-Freund, O., *Loc. cit.*, p 390.

229- As a matter of fact domicile of origin is too difficult to be changed that domicile of choice. This, in fact, led to believe that the conception of English domicile of origin is similar to the nationality conception in civil law countries. Furthermore, *La raison d' être* of this form of domile is to allow everyone at every time having a domicile. See. Graveson, R.H., *Conflict of Laws: Private International Law, Op.cit.*, pp 48, 198; Graveson, R.H., *Comparative Conflict of*

been interpreted as an important defence used by English judges against the application of laws to British citizens that might be different from English conceptions.[230] In fact as E. M. Meijers puts it "...countries accepting the principle of domicile have only two ways of escape: Public Policy or the introduction of a domicil of origin..."[231]

It should also be observed that the artificiality of the doctrine of revival of the domicile of origin led to admit the undesirability of this doctrine. Accordingly, a tendency for a switch from this doctrine to the rule of continuance ,.i.e, the continuity of a person's domicile until another one is acquired, has been advocated.[232] In fact, the case of *Ramsay* v. *Liverpool Royal Infirmary*[233], in which the House of Lords adhered to the domicile of origin, has been considered as the principal cause for the recent tendency in English law which calls for the change of domicile and the rejection of the domicile of origin.[234]

4)- <u>What is the Scots Judicial view on the doctrine of renvoi.</u>

Although Scots Courts have not been seized yet of the issue it will be better to refer to scholars views in this matter. In fact, the question that should be asked is what tendency will be favoured by the Scots courts. Is it the internal law

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LAws, Selected Essays, Op.cit., p 245;. Collier, J.G., *Op cit*, .p 41.

230- Batiffol, H., " Principes de Droit International Privé, *Lo.cit.*, pp 512-513.

231- Meijers, E. M., " The Benelux Convention on Private Internationla Law ", 2 *Amer. J. Comp. L.*,(1953) p 2.

232- The Recommendation of the English and Scottish Law Commison was that the revival of the domicile of origin rule sould be abolished. See the first report of Private International Committee (1954) Cmd. 9068, Para. 14., See in this context The Law Commission Working Paper N° 88 and the Scottish Law Commission Consultative Memorandum N° 63, *Private International Law. The Law of Domicile.* London, Her Majestey's Stationery Office, 1985, pp 57-60; See also the Law Commission and the Scottish Law Commission (Law Com N° 168) (Scot. Law Com. N° 107), *Private International Law, The Law of Domicile,* London, Her Majestey's Stationery Office, 1987, p 44; See Dicey & Morris, *The Conflict of Laws,*Third Cumultative Supplement to the Eleventh Edition, by Lawrence Collins , London, Stevens & Sons, 1989, pp 12,14.

233- His Scots domicile was retained altthough he lived in Liverpool for many years without the intention of returning in Scotland.(1930) A.C. 588.

234- Graveson, R.H., " The Comparative Evolution of Principles of the Conflict of Laws in England and the U.S.A", *Recueil des Cours*, Vol I, Tome 99 (1960),p 48; Graveson, R. H., *Comparative Conflict of Laws, Selected Essays, Op.cit.*, p 245.

theory, renvoi remission, transmission or the double renvoi theory? It can be deduced from the reasoning of some scholars that a court in Scotland might adopt the total renvoi although this, practically, leads to a negative consequences if the other legal system will be England, i.e., the *circulus inextrecabilis* becomes inevitable. As a matter of fact, Falconbridge maintains that : [235]

> "...A court in Scotland...would not be strictly bound to follow the series of decisions of single Judges supporting the theory of total renvoi in English law, but might adopt the theory of total renvoi if the necessity arose...of defining exactly what theory of the renvoi Prevails or should prevail there..."

According to anther opinion, however, Scottish court should accept remission from foreign conflict rules if it is seized of the case. In this context A.E. Anton points out that:[236]

> "...From a practical standpoint there is a case of common sense in the view that a Scottish court should not necessarily refuse to apply its own law when the chosen system refers a question back to it...while, as yet, the courts in this country have not given practical effect to this approach, it is thought that it should not be entirely discounted"

Above all, Scots courts can be classified among other legal systems which have not taken position on the renvoi issue. Does this judicial and legal emptiness means the implicit rejection of renvoi? Although this might be supported theoretically, Practically, however, there is no evidence which justifies this claim.

II)- <u>Repudiation of renvoi in the two different legal systems.</u>

The repudiation of renvoi in both Civil and Common law countries has been divided into three main points : rejection of renvoi in legal systems which are silent on the renvoi matter, those which reject its mechanism expressly and special reference to Algerian law in this respect.

235- See Falconbridge, J. D. " Renvoi in New York and Elswhere,*Loc.cit.*, p 719.

236- Anton, A.E., *Op.cit.*, p 64.

A)- Legislative systems which are silent on renvoi.

Starting from the Latin American countries, among the legislative systems which do use renvoi are, for instance, Argentina[237] Colombia and Uruguay.[238] This position has been justified by the fact that historically, the codes of those countries date before the development of the renvoi theory.[239] In addition , the rejection of renvoi by the jurisprudence of those stated Latin American countries has been justified by the fact that rules for the application of renvoi do not exist.[240]

In the Arab world Lebanon[241] and Tunisia[242] can be cited as an example of States which reject renvoi without any statutory provisions.[243]

B)- Rejection of renvoi by legislation and court decisions. In Europe many of the statutory legislative systems are against renvoi. In fact, Italy which adopts nationality principle rejects the mechanism of renvoi.[244]. Greece is another country which adopts nationality and also rejects the renvoi mechanism.[245] Among the countries which adopt the principle of domicile,

237- The Argentinian project does not contain rules on renvoi. Von Overbeck, A.E., *Loc.cit.*, P 133; See Rabel, E., *The Conflict of Laws, A Comparative Study*, 2nd edition, Volume 2, Ann Anbor, University of Michigan Law School, 1960, pp 514-515.

238- De Maekelt, T. B., " General Rules of Private International Law in the Americas. New Approach " *Recueil des cours*, Vol IV, Part 177, (1982) p 276.

239- *Ibid.*

240- *Id.*

241- Although there is no legislative Disposition wchich reject expressley renvoi , Lebanese jurisprudence tend to reject renvoi from the law of personal status. in fact its mechanism is rejected by the majority of the courts' decisions. See Sadekh, H.A., *Cours de Droit International Privé*, Beirut,(N.D.) p.87; Benattar, R.," Problèmes Relatifs au Droit International Privé de la Famille dans les Pays de Droit Personnel" , *Recueil des cours*, Vol II, Tome 121, (1967) p 35.

242- Despite the fact that in Tunisia there is no legislative disposition which rejects renvoi its mechanism, however, is siad to be rejected by the Tunisian *cour de cassation*. See, in this context Benattar, R., *Ibid.*

243- See in this context, Pålsson, L.,*Marriage and Divorce in Comparative Conflict of Laws*, *Op.cit.*, p 111,footnotes 239.

244- See the Italian civil code of 16 Mars (1942). Disp. Prel. art. 30; T. M. C. Asser Institut, *Op.cit.*, p 125.; Rabel, E.,*The Conflict of Laws A Comparative Study*, 1958, *Op.cit.*, pp 88, 142 notes 123; Francescakis, P.h., *Op.cit.*, p 268; See also Siehr, K.G.,*Loc.cit.*, p 65.

245- See article 32 of the Greek civil code. T. M. C. Asser Institut, *Ibid.*, P. 140. Francescakis, P.h *Ibid.*, P 267; Pålsson, L., *Marriage and Divorce in Comparative Conflict of*

however, and reject renvoi are, for instance, Norway and Denmark.[246]

With regard to the Arab countries which have a Moslem majority, these have been considered as ignoring the renvoi theory.[247] As a matter of fact, renvoi is rejected expressly by the civil codes of Egypt,[248] Irak,[249] Syria, [250] and libya.[251]

C)- Repudiation of renvoi by the Algerian legal system.

1)- The silence of the Algerian legislature on renvoi. It should be noted that despite the fact that Algeria is considered as a moslem country it is, however, classified into a civil legal system.[252] Concerning the theory of renvoi Algeria, as other Moslem countries, do not contain rules on this issue[253] ,i.e., renvoi is not regulated by the Algerian civil code. According to an Algerian scholar Algerian Jurisprudence has not yet been seized of the renvoi question.[254] Due to the fact the law of this country does not give a solution to the renvoi issue it has been claimed, therfore, that the silence of the Algerian legislature means

Laws, *Op.cit.*, p 111, notes 237; Siehr, K.G.,*Ibid.*, P 65; See also Von Overbeck., A.E., *Loc.cit.*, p157.

246- Schwind, F.," Aspects et Sens du Droit International Privé", *Recueil des cours*, Vol IV, Tome 187, (1984) p 75; Von Overbeck, A.E., *Ibid.*, p 156.

247- Isaad, M., *Droit International Privé*, Volume I, Alger, O.P.U.,1986, P 175; Mayer, P., *Op.cit.*, p 192.

248- See Art 27 0f the Egyptian civil code of 29 July 1948, See Journal Officiel du Gouvernement Egyptian, N° extraordinaire du 29 Juillet 1948, N° 108 bis " A "; Francescakis, Ph. *Op.cit.*, p 266; Anton, A.E., *Op cit*, p 61, note 90; Maridakis, G.S., " Le Renvoi en Droit International Privé, *Annuaire*, *Vingt Troisi`eme Commision*, Volume 50, Tome I, Session de Bruxelles, (1963) pp 501-502; Lalive, P.," Tendances et Méthodes en Droit International Privé (Cours Général)", *Recueil des cours*, Vol II, Tome 155, (1977) P 268; Sadekh, H.A.,*Op.cit.*, P 86.

249- See article 31 para 1 of the Iraky civil code; See in this context Peyrard, G., " La Solution des Conflits de Lois en Algérie ", 66 *Re. crit. dr intl. priv.*, (1977) p 386; Benattar, R.," *Loc.cit.*, p 34; Charfi, M., " L' Influence de la Religion dans le Droit International Privé des Pays Musulmans ", *Recueil des cours.*, Vol III, Tome 203, (1987) p 401; Pålsson, L *Marriage and Divorce in Comparative Conflict of Laws*, *Op.cit.*, p 111, notes 239.

250- See article 29 of the civil code of 16 May 1949. Journal Officiel of 31 May 1949. See Levontin, A.V., *Op.cit.*, P 52; Francescakis, P.h., *Op.cit.*, pp 225, 270; Maridakis, G.S., *Loc.cit.*, pp501-502; Charfi, M.,*Ibid.*, Peyard, G., *Ibid.*

251- See article 27 of the libyan civil code, Pålsson, L., *Marriage and Divorce in Comparative Conflict of Laws*,*Op.cit.*, p 111, notes 239.

252- Amin, S H., " Classification of Legal System in the Moslem Countries ", *Islamic & Comparative Law Quarterly*, Vol VII, N° 2, (1987) p 94.

253- Von Overbeck, A.E.,*Loc.cit.*, p 133.

254- Isaad, M.,Volume 1, *Op.cit.*, p 175.

that renvoi is excluded by the Algerian private international law.[255]

One commentator has remarked that it is astonishing that the Algerian civil code has not referred to the renvoi problem in that it has neither accepted or rejected it by legislation disposition.[256] He wishes that the Algerian civil code had accepted renvoi remission in matters of personal status. This scholar has justified his argument by relying on two main points. First, Algeria is a country which imports foreigners many of whom are of Anglo Saxon origin and their countries adopt domicile as a connecting factors in matters of personal status. According to him rejecting renvoi means the application of the law of the foreigners which are numerous and unfamiliar to him and might cause problem for the Algerian courts to find out its rules[257], i.e., it might require the ascertainment of foreign domestic law. Secondly, the application of foreign substantive law means the restriction of the field of Algerian law.[258] It can be replied to this that none of the justifications can be considered as an excuse for accepting renvoi by the Algerian court. First, because the difficulties which this scholar refers to seems irrelevant in the contemporary age where the foreign law can be known and understood through different means, such as conferences periodicals, case books and comparative law. Second, does this scholar understand that the application of renvoi at first degree in Algeria could represent a risk for the non Algerian citizens. It should also be noted that if his suggestion is accurate this requires a disestablishment of the religion from the state which is not the case now in Algeria. Third, widening the field of the application of Algerian law by accepting renvoi is a kind of advocating the previous conceptions of the territoriality principle and the preference of the forum law.

There is ,however, a considerable controversies about article 23 of the Algerian civil code on whether it involves the renvoi issue.[259] Concerning this

255- Peyard, G., *Loc.cit.*, p 386.

256- Soulaiman, A.A.,*Notes on Algerian Private International Law*, Alger, O.P.U, 1984, p49.

257- *Ibid.*, pp 55-56.

258- *Ibid.*, p 56.

259- According to its disposition " Lorsque les dispositions qui precèdent renvoient au

matter, it has been claimed that article 23 of the Algerian civil code has nothing to do with renvoi at first degree or second degree. According to this view the purpose of this article is only to indicate to the Algerian judge that when the Algerian Conflict rules refer to a foreign country which is a composite legal system he should, therefore, refer to the internal law of that country which will indicateto him the applicable law system to the legal problem. It means that if the Algerian judge is seized of the legal issue which might refer him, for instance, to the United States of America he must, therefore, refer to the American Federal law in order to know which law is applicable. Is it the law of Dallas, California, or that of new york?[260] In this context, it has been accepted that legally when the forum law refers to a composite state of territorial bases such as as the United States of America, where there are more than fifty federal States, the reference should be, therefore, to the internal conflict rule of those federal States.[261]

It should be noted that there are some scholars who have interpreted article 23 as an example of the so called *Necessaire*, internal renvoi or the delegation conception which means that the forum makes a sort of delegation to a foreign law in order to indicate the internal applicable law. This internal renvoi, however, has been considered by others as having no similarities with the true renvoi because the latter leads to the application of the law of a foreign country which declines its competence and would rather have referred the matter to the forum or another law. Practically, this is not the case with the internal renvoi in which the law of the composite states does not decline its competence to a foreign law but it only indicates the applicable system according to the internal conflict rules of the different law systems.[262]

Generally it has been argued that the absolute rejection of renvoi should be maintained in article 23 when the Algerian conflict rule refers to a non unified

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droit d'un Etat dans lequel existent plusieurs systèmes juridiques, le système à appliquer est determiné par le droit interne de cet Etat " *C.f.*, the dispositions of article 26 of the Egyptain civil code.

260- Isaad, M., *Op.cit.*, p 175.

261- Loussouarn, Y., & Bourel, P., *Op.cit.*, p 136.

262- Soulaiman, A.A., *Op.cit.*, pp 62-63, Sadekh, H.A., *Op.cit.*, p 90.

system. This has been justified by the fact that it is too difficult to think that the Algerian judge, in this context, will accept a competence to its own law through the process of renvoi.[263] It has also been admitted that, as a rule, the Algerian judge will apply the substantive law of the foreign State and not its conflict rules if is seized of the matter.[264]

2)- The legislative policy of the Algerian legislature.

There must be a reason for excluding renvoi in Algeria. In fact, the general view of scholars is that in Algeria as in other moslem countries, such as, Egypt, family law is subject to islamic principles.[265] It means that the law of the personal status in Algeria is based upon Islamic law[266] which makes the situation difficult to apply Algerian law to foreigners.[267] In this context, an Algerian scholar goes on to stress that there will be a risk for an American or an Englishman if the Algerian law is applied. The risk is that they might become polygamous if this application occurs.[268] Furthermore, accepting renvoi from foreign law to Algerian law, which is not the case now in Algeria, will undoubtedly lead to the application of Islamic religious principles to a foreigners if the case, for instance, concerns the distribution of succession, brought before an Algerian court of a British subject who died domiciled in Algiers.[269] If the Algerian court is seized of the matter it will held that in family law succession is subject to the law of the *de cujus*' s nationality, i.e., English law. Evidence will shows that English law adopts the last domicile of the deceased as a connecting factor to govern matters of succession. The law of the last domicile in this context is Algeria. The application of renvoi, in this context, is against the

263- Peyrard, G., *Loc.cit.*, p 386.

264- Soulaiman, A. A., *Op.cit.*, p 56.

265- Sadekh, H.A., *Op.cit.*,p 85.

266- See the Algerian family code wchich was adopted in june 1984, Loi 84-11, *Journal Officiel de la Republique Algeriènne*, N° 24 du 12 Juin 1984, p 612 et s; See also Borrmaus, M., " le Nouveau Code Algérien de la Famille dans l' Ensemble des Codes Musulmans de Statut Personnel, Principalement dans les Pays Arabes, *R. I .D. C.*, (1986) p 133.

267- Isaad, M.,Volume I, *Op.cit.*, p 176.

268- *Ibid.*

269-According to article 16 of the Algerian civil code" les successions, testaments et autres dispositions à cause de mort, sont régis par la loi nationale du de cujus, du testateur ou du disposant au moment du décès".

expectation of parties in that it leads to apply on foreigners dispositions or norms which might be unknown to them.[270]

By maintaining the rejection of renvoi byAlgerian legal system, however, this is the way an Algerian judge will decide the case. He will apply to the succession dispute English substantive rules if the deceased is an Englishman and avoiding any reference back to Algerian law.

Moreover, the discussion of the renvoi refusal in Algeria has been also related to the principle of nationality adopted by Algerian legal system. It has been said, in this context, that the advantage of nationality principle is that if the person is Algerian national, family law, i. e., Islamic principles will be applicable to him even if he is emigrant. This law, however, is said to be not applicable to a foreigner even if his national law refers to Algeria as the law of his domicile.[271]

Additionally, article 15 of the Algerian civil code has been considered as an evidence which indicates the rejection of renvoi. This article states that the substantive rules as regard guardanship and other institutions of protecting the incapable are determined by the national law of the person in protection.[272] The law of nationality, therefore, has been taken to connote the substantive rules of that law.

Above all, it has been recognized that the admission of renvoi in Algeria seems, practically, impossible as far as the law of personal status in this country is not laicized[273],.i.e., a non separation of the religion from the state.

Sub-section 2:- Some observations upon the imposed restrictions on renvoi mechanism.

The analysis of renvoi in the countries which are in favour of renvoi might

270- It must be noted that the distribution of succesion is regulated by the new A;lgerian family law according to Islamic law.

271- Peyard, G., *Loc.cit.*, p 386.

272- " Les règles de fonds en matière d àdministration légale, de curatelle et autres institutions de protection des incapables et des absents, sont determiées par la loi national de la personne à protéger ". Code civile, ordonnance n° 75-58 du 26 septembre 1975 portant le code civil.

273- Isaad, M.,Volume 1,.*Op.cit.*, p 176.

be incomplete if it is not followed by the different decisions that have repudiated its mechanism in those countries. Of course, it is necessary to discuss the cases that illustrate the field of renvoi application but it is also important to show that this application is not absolute but restricted. However, it should be noted that the word restriction covers neither all the issues nor all countries in which renvoi has been rejected. This reflection, instead, deals only with the few important and main fields where the mechanism of renvoi has been rejected or might be rejected.

Generally, the purpose of this section is to state that if renvoi still exists in private international law, the reality is that its field of application has been decreased.[274]

I- The principle of *locus regit actum* and renvoi.

A)- The exclusion of renvoi in matters relating to forms of acts.

Forms of acts have been claimed as representing an exception to the renvoi mechanism[275] ,i.e., its mechanism will be excluded in relation to the *locus regit actum* rule.[276] In this respect, it has been maintained that if a legal act corresponds with the form prescribed by the law of the place where it was made, i.e., *locus regit actum*, there is no pretext, however, to consider it as invalid on the ground that it did not respect the form of the law indicated by the conflict rules of the *locus regit actum.*[277] The question that might be asked is what happens if the Act is invalid by the *locus*? Can reference be made to the conflict rules of the *locus*? In fact,, this was the origin of the development of renvoi thinking in English law concerning the formal validity of wills

By referring to English law, for instance, the will Act of 1963 has been considered as an evidence that renvoi is excluded in matters of forms in that the reference made by this will has been interpreted to mean the internal law of the applicable law.[278]

274- See Communication de Foyer, J., " Requiem pour le Renvoi ? " Séance du 4 juin 1980, *Trav. Comité, Français. dr.in.privé*,, (1979-1980), p 107.

275- Sadekh, H.A., *Op.cit.*,p 83.

276- Isaad, M.,Volume 1, *Op.cit*, p 177.

277- Sadekh., H.A.,*Op.cit*, p 84.

278- Graveson, R.H., *Conflict of Laws, Private International Law, Op.cit.*, p 484. For more

B)- The reasons for the incompatibility of renvoi with form of acts Different reasons have been cited for excluding renvoi from the form of acts. First, it might be difficult for the contracting parties to know the disposition of the law of the country other than the country of the performance.[279] According to this view the law of the place where the legal act was written is better known to the parties.[280] From another point of view renvoi from the local law to another law is against the rule. In other words, the law of *locus regit actum*, which is respected by the parties, is the law which they think it confirms the formal validity of their act.[281] Second, the use of renvoi in this context could designate a law which might nullify the parties' act from point of view of forms.[282] Alternatively, it might find a will-or a marriage- valid.

II)- Renvoi in the field of contract.

A)- Renvoi is Incompatible with the autonomy law. It has been admitted that the majority of writers agree on the rejection of renvoi in the law of contract.[283] As a rule[284] it has been recognized that the parties are free to choose the law that govern their contract.[285] This means that the party autonomy to choose their contract is recognized unanimously[286] and accepted

details on the English Wills Act in relation to the alternative connecting factors. See *Infra.*, pp173-174.

279- Sadekh, H.A., *Op.cit.*, p 84.

280- Isaad, M., Volume 1,*Op.cit.*, p 177.

281- Batiffol, H., *Loc.cit.*, p 482.

282- Loussouarn, Y et Bourel, P., *Op.cit.*, pp 294-295; Issad, M.,Volume 1 *Op.cit.*, p 177.

283- See Spiro,E.," The Proper Law of Contract and Renvoi: Further Comments on the Amin Rasheed Shipping Case" 33 *Int.' l & Comp. L. Q.*, (1984), P 201; See also the view of Anton, A.E., *Op.cit.*, p 198; Cheshire & North, *Private International Law*, by North, P.M., (ed.),10th edition, London, Butterworths,1979, p 198.; Batiffol, H.,*Loc.cit.*, P 480; Hoyle,Mark, S.W.,(ed.,), *Op.cit.*, p 24, notes 8.

284- The discussion of this rule from historical point of view should be related to the seventeenth Century when the Dutch scholar Huber stated that the *lex loci contractus* could not be applied if the contracting parties would have the intention of the application of the law of another place. See Morris, J.H.C., *Op.cit.*, p 167; See also Llewelyn Davies, D.J., " The Influence of Huber's *De Conflictu Legum*on English Private International Law" 18 *Brit.Y.B. Int.L*(1937), p 49.

285- Hambro, E., " The Relations Between International Law and conflict Law", *Recueil des cours.*, Vol I, Tome 105, (1962), p 56; Diamond, A.L., " Harmonization of Private International Law, Relating to Contractual Obligations " *Recueil des cours*, Vol IV, Tome 199, (1986), p 254.

286- Pelichet, M.," La Vente International De Marchandises et le Conflit de Lois", *Recueil*

by states all over the world and International Conventions.[287] As an example of the latter article 3 alinea 1 of the Rome convention June,1980 on the law applicable to contractual transaction states that the contract is governed by the law chosen by the parties.[288]

The application of the law chosen by the parties leads, effectively, to the discussion of the proper law of the contract which is still a controversial issue. The general view, in this context, is that the proper law of the contract is considered as either the law chosen by the parties or the law which is most closely connected to the contract.[289] It is believed that adopting either the express or implied intention of the parties or the law which is most closely connected to the contract, the reference to the applicable law should be considered merely to its substantive rules.[290] It means, that the intention of parties has been considered as a reference to the internal law of the parties' chosen law and not to its conflict rules and "...the connection with a given legal system is a connection with substantive legal rules and not with conflict rules...".[291] According to the advocates of this view in absence of evidence to the contrary the parties' intention is to refer only to the domestic rules of their chosen system.[292] By referring to the United States of America, for instance, it

des cours, Vol I, Tome 201, (1987), pp 107-108.

287- It must be noted, however, that there are limitations upon the party autonomy to choose their proper law. This is the case, for instance with certain mondatory provisions of the *lex fori*, ceratin mondatory provisions of a foreign proper law and certain mondatoy provisions of a third State. See in this context article 7 of the E.E.C. Convention on the Law Applicable to Contractual Obligations of 19 June 1980. For more details see Sandrock, Otto., "Choice of Law and Choice of Forum in Civil and Common Law Jurisdictions" in *Drafting and Enforcing Contracts in Civil and Common Law Jurisdiction*, Kojo Yelpaola *et al.*(ed.,), Deevnter, Antwerp, London, Frankfurt, Boston, New York, KLuwer Law and Taxation Publishers, (1986)., pp170-179.

288- .See also article 2 of the Hague Sales Convention, Article 5 of the Hague Convention on Agency See in this context Weintraub, R.J., " Functional Developments in Choice of Law for Contracts", *Recueil des cours*, Vol IV, Tome 187, (1984), p 279 ; Sandrock, O.,*Ibid.*, pp 154, 155, 196.; Diamond, A.L., *Loc. cit.*, pp 254, 309, notes 3; Pelichet, M.,*Ibid.*, pp 109-110.

289- Dicey & Morris, 1987, *Op.cit.*, p 82.

290- Kahn-Freund, O.,*Loc.cit.*, P 436; Carter, P.B., " Decisions of British Courts During 1983 Involving Questions of Public or Private International Law" L I V *Brit. Y. B. Int. L*.(1983), p309.

291- Morris, J.H.C., *The Conflict of Laws*, *Op.cit.*, p 270.

292- Morris, J.H.C., *Ibid.*, See also Spiro, E., *Loc.cit.*, p 201.

can be seen that the second Restatement also states that in the absence of the contrary indication of intention the reference to the law of a State should be considered as a reference to local law of that State and not to its choice of law rules.[293]

On the whole, it can be said that the autonomy is very important in the field of contract and when the contracting parties choose the law of the country X to govern their contract they intend to refer directly to its domestic rules.[294] This indicates one think that renvoi is incompatible with the autonomy law.

B)- Motives for objecting to the admission of renvoi in the field of contract.

Different arguments have been stated to indicate the exclusion of renvoi in the field of contract. As a matter of fact renvoi is said to be incompatible with the autonomy law because its process may lead to the application of law that was not chosen by the parties. i.e., there will be incompatibility of renvoi mechanism with the parties freedom. From another point of view, it is unwise to apply the renvoi mechanism in the field of contract because it is presumed that when the parties choose a law of a particular state they intend to refer only to its local law.[295] Accordingly, there should be no renvoi in matters of contract where the parties autonomy in choosing the law prevails and is strong.[296] Another justification concerning the incompatibility of renvoi with the autonomy law stresses that when the parties indicate implicitly or explicitly that the law of the country X is applicable, this makes the mechanism of renvoi unacceptable because it does not follow the expectations of the parties.[297] To prove this it has

293- See the Restatment of the conflict of Laws, Second (1971), Sec. 187 (3), See in this context, Spiro, E.,*Ibid.*

294- The internal dispositions of that country has been interpreted as representing parts of their contract and, then, becomes a tacit clauses. See Castel, J. G., " Comment" 39 *Can B. Rev.*,(1961) pp 97- 98.

295- Cavers, D.F.," Re-Restating the Conflict of Laws : The Chapter On Contracts", in *XXth Century Comparative and Conflicts Law, Legal Essays in Honor of Hessele E.Yntema*, by Nadelmann, Kurt H.,*et al.*, (ed.,), Leyden, A.W. Sythoff, (1961), p 363; Falconbridge, J.D., "Renvoi in New York and Elswhere" *Loc.cit.*, p 715.

296- Von Overbeck, A.E.,*Loc.cit.*,pp 146-147.

297- Loussouarn, Y et Bourel, P., *Op.cit.*, p 293.

been claimed that renvoi is incompatible, for instance, with the construction of wills because the testator' s expectation in this respect is the application of the internal rules of his domicile.[298]

Generally, the conflict rules which are based on the autonomy law are said to be incompatible with the use of renvoi because of the drawbacks of its mechanism.[299]

C)- Cases that illustrate the determination of the applicable law by party autonomy.

By referring to England it can be noticed that there is a divergence upon the meaning of the proper law of the contract. In fact, some scholars think that the proper law means the freedom of the parties to choose the law that governs their contract. According to westlake and Cheshire, however, it means the law which is most closely connected with the contract.[300] It might be said that it is only if there is no express choice of law that the argument between inferred intention and closest connection comes into play. It is the latter meaning, i.e., the law of the closest connection, which was adopted by the House of lords in the Case of *Re United Railways of Havana and ReglaWarehouses*[301] in which the court admits, although *obiter,* the rejection of renvoi from the field of contract.[302] In fact, the court of appeal makes its position clear towards its mechanism when it has said unanimously that " the principle of renvoi finds no place in the field of contract."[303] Furthermore, it has been stressed that if the parties had chosen Cuban law as the proper law of the contract the reference to this law should mean internal Cuban law without its private international

298- See Rule 144, Dicey & Morris,1987, *Op.cit.*, p 1022.

299- Von Overbeck, A.E.,*Loc.cit.*, p 160; See also Weiderkehr, G., *Clunet*,(1981), p 583.

300- Morris, J. H. C., *The Conflict of Laws, Op.cit.*, pp 268-269.

301-[1961] A. C. 1007, See in this context the view of Lords Denning and Morris at pp 1068, 1081.

302- See for instance Spiro, E.,*Loc.cit.*, p 200; Munro, C.R.," The Magic Rounabout of Conflict of Laws" *The Jur. Rev.*, Part 1,(1978) p 84, notes 60; Graveson, R. H., *Comparative Conflict of Laws, Selected Essays,Op.cit.*, p 71; Morris, J. H. C., *The Conflict of Laws, Op.cit.*, p475.

303- [1960] Ch. 52, 96- 97; [1959] 1 All ER 214 (court of appeal); [1959] 2 W.L.R. 251 at 277 (per Jenkins L. J.).

rules.[304] More important, although *Vita Food Products* v. *Unus Shipping Co Ltd.* has been cited as a case where renvoi was suggested in the field of contract[305] the court of Appeal in *Re United Railways of Havana and Regla Warehouses*, however, disapproved and rejected the declaration given by Lord wright in the former case.[306]

The second recent case which should be cited as an example of the exclusion of renvoi from the field of contract is *Amin Rasheed Shipping Corp.* v. *Kuwait Insurance Co.*[307] In this case the House of Lords as well applied English law as the system of law with which the contract has its most real connection.[308] According to Lord Diplock the meaning of the proper law of the contract with regard to English conflict rules is the substantive law of the country that the parties have chosen excluding any kinds of remission or transmission that might be applied by the court of their chosen country if it was seized of the Affair.[309] Lord Diplock' s reasoning, therefore, has been considered as an illustration that renvoi is rejected from the field of contract In English jurisprudence.[310]

It can be concluded,through the discussion of English cases, that renvoi is not accepted when the parties agree expressly or implicitly that the law of the country X will govern their contract.[311]

304- See Morris, J. H. C & North, P. M., *Op.cit.*, p 665.

305- English court said that " English rules relating to the conflict of laws must be applied" (1939), A. C..277, 292.

306- Cheatham, E.E., " Problems and Methods in Conflict of Laws" *Recueil des cours* Vol I, Tome 99, (1960) p 345; Graveson, R. H., " The Comparative Evolution of Principles of the Conflict of Laws in England and the U.S.A." *Loc.cit.*, p 94; Graveson, R. H., *Comparative Conflict of Laws, Selected Essays, Op.cit.*, p 287; Morris, J. H. C., *The Conflict of Laws, Op.cit.*, p 270, notes 26; Edinger, E., *Loc.cit.*, p 36.

307- [1983] 2 All ER 884; [1983] 3 WLR 241 (House of Lords); [1984] A.C. 50.

308- Morris, J. H. C., *The Conflict of Laws,Op. cit.*, p 270.

309- The judgment given by the House of Lords, however, did not quote an Authority which either rejects or accept the exclusion of the renvoi mechanism in relation to the proper law of the contract, Spiro, E., *Loc.cit.*, pp 199-200, 202; Morris, J. H. C., & North, P. M., *Op.cit.*, pp 665-666; Carter, P. B.," Decisions of British Courts During 1983 Involving Questions of Public or Private International Law" *Loc.cit.*, p 308.

310- Cheshire & North, 11th edition, *Op.cit.*, P 72; Jaffey, A. J. E., *Op.cit.*, P 262; Lipstein, K., " Conflict of Laws 1921- 1971, The way Ahead" 31 *Cambridge. L. J.*, (1972) , p 83.

311- See Wolff M., *Op.cit.*, p 197.

III)- Renvoi and the alternative connecting factors method.

To refute the claim of the pro-renvoiists that renvoi maintains the validity of Acts another method, practically, has been used to maintain such validity without using any forms of renvoi. This is the case, for instance, with the alternative or optional conflict rules where there is coexistence of two connecting factors or more to govern the same legal issue.[312]

A)- Reasons that justify the exclusion of renvoi in alternative conflict rules.

The reason for the exclusion of renvoi from the alternative connecting factors is simple in that admitting its mechanism might be against the substantive aim of those connecting factors.[313] In other words, the alternative connecting factors are used for achieving a determined purpose and using renvoi, however, might be against the achievement of this purpose.[314] From another point of view, if the conflict alternative rules design a law this reference should be taken as reference to its internal dispositions and not to its conflict rules on the ground that the latter has no interest to be applied.[315]

Practically, the reasons for the emergence of the alternative conflict rules in private international law, is of course, to maintain the validity of legal act if this corresponds with the internal law of one of the various stated laws.[316] To say it differntly, under this method the application of one of the different connecting factors, i.e., one selected law leads to the validity of a legal act. This fact, therefore, led some to believe that renvoi is not a good means to assure the validity of act.[317]

B)-Discussion of the English Act relating to the formal validity of wills. The best example which can be cited concerning alternative conflict rules is the Wills Act of 1963 which has been established in order to save wills

312- See Derruppé, J., " Etude Théorique du Renvoi ", Fasc. 532-A, 1984, *Juris Classeur de Droit International*, 7,(1987), Paris, Editions Techniques, p 17.

313- Von. Overbeck., A.E., *Loc.cit.*, p 148.

314- *Ibid.*, p 131.

315- Foyer., J., *Loc.cit.*, p 118.

316- Francescakis, P. h., *Op.cit.*, p 221.

317- Derruppé, J.," Etude Théorique du Renvoi " *Loc. cit.*, p 17

from the formal invalidity.[318] As a matter of fact the exclusion of renvoi from the Wills Act of 1963 has been related to the *Favor testamenti* principle.[319]

By referring to its disposition, it can be noticed that the act gives the court the possibility of choosing the law of different legal systems.[320] This is the case, for instance, with sections 1 and 2 (b) which tend to obviate renvoi in matters that concern the execution of wills whether it is related to moveable or immovable. In fact, section 1 allows the testator to choose between the internal laws of either the law in force of the territory of its execution, the law of the testator domicile, the law of his habitual residence or with the law of the country of his nationality.[321] A strong argument has been made that since the English wills Act of 1963 provides many internal law systems by which the testator' s formal validity of wills might be tested, the renvoi mechanism, therefore, should be considered as excluded in this context.[322] It means that the rules stated by the wills Act of 1963 are considered as domestic rules.[323]

Concerning the execution of wills relating to immovables, it can be seen that section 2 (b) as well provides that its execution may conform with the internal law of the territory where this immovable is situated.[324] In this issue it should be noted that although there is support for the application of renvoi in title to land situated abroad on the ground that the country of *lex situs* has control over this land[325] it has been claimed, however, that according to the Wills Act of

318- Morris, J.H.C., " The Wills Act, 1963 ", 13 *Int' l. and. Comp. L. Q.*,(1964) p 685.

319- Castel, J. G., *Conflict of Laws, Cases Notes and Materials*, *Op.cit.*, P 66; Contrast early development of renvoi which operarted to uphold wills.

320- See in this context, Edinger, E., "*Loc.cit.*, p 41.

321- Section 1 states that " a will shall be trested as properly executed if its execution conformed to the internal law in force in the territory where it was executed or in the territory where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a state of which at either of those times, he was a national" see in this context, Graveson, R.H., *Comparative Conflict of Laws, Selected Essays*, *Op.cit.*, pp 200, 205; For more details see especially, Anton, A.E., *Op.cit.*, pp 521-525 at 523.

322- Cheshire & North, 11th edition, *Op.cit.*, p 67.

323- Collier, J. G., *Op.cit.*, p 28.

324- See Anton, A.E., *Op.cit*, pp 521- 525 at 523; See Rule 141, Dicey & Morris, *Op cit*, 11th edition, p 1017.

325-This argument is said to be not convenient with the title to movables situated abroad

1963 renvoi is excluded from the formal validity of will of immovables.[326] To say it differently, admitting that the Wills Act of 1963 refers to the internal law of the various systems of laws renvoi exclusion should be maintained even in relation to immovable property.[327] This repudiation has also been justified has also been justified by the fact of achieving *favor testamentary* in relation to the *lex situs*.[328] The question which remains is when the conflict rules of the *lex situs* refer to a system of law of X or Y and the will of immovables is said to comply with those systems, shall this be considered as formally valid or not? According go Dicey & Morris this is not clear.[329]

IV)-Renvoi and the *lex rei sitae*. View are divided as well in relation to immovables. There are those who admit that if the forum considers that the transfer of property is governed by the law of the *situs* whereas private international rules of the State of the *situs* refers the capacity of property transfer to the national law it is preposterous that the forum applies the substantive rules of immovables situation.[330] In this context O Kahn-Freund states that "...effective control is in the hands of the authorities of the country where the land is..."[331] Another opinion has indicated that it is better to refer directly to the requirement of the *lex rei sita*rather than introducing renvoi in this context.[332]

By referring to English jurisprudence, it can be seen that three years after the *Torrey Grant*[333] Affair the English Supreme court of Egypt rejected renvoi in 1910 in the *Dale* Affair.[334] Although the former Affair was invoked the supreme court, however, rejected renvoi from the law of nationality to the *lex*

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because the foreign court might have no jurisdiction on the movables. See Dicey & Morris, 1987, *Op. cit.*, p 84.

326- *Ibid.*, pp 83-84.

327- Morris, J. H. C.," The wills Act ,1963", *Loc.cit.*, pp 685, 688; Jaffey, A. J. E., *Op.cit.*, p 205; Morris, J. H. C., *The Conflict of Laws*, *Op.cit.*, p 476.

328- Kahn-Freund, O., " Wills Act 1963", 27 *Mod. L. R.*, (1964), P 58.

329- Dicey & Morris, 1987, *Op.cit.*, p 1017.

330- See Lalive., P., *Loc.cit.*, p 272.

331- Kahn-Freund, O.,*Loc.cit.*, p 436.

332- Von. Overbeck, A.E.,*Loc.cit.*, p 160.

333- *Law Magazine and Rev.*, 1909, 297; *Cl.*, 1911, 320.

334- *Cl.*, 1912, 726.

rei sitae concerning the validity of will of immovables. According to the justifications given by the court Egyptian civil code allowed English people to dispose their immovables according to English internal law.[335]

V)-Condemnation of renvoi in matrimonial property regimes.

A)-The incompatibility of renvoi in the field of matrimonial property regimes. It has been said that if renvoi may coordinate the conflict rules in matters, such as, succession and personal status where the connecting factors are not numerous this, however, is not the case in matrimonial property regime.[336] According to this view the spouses' need is to know their legal situation in a particular country. Admitting the mechanism of renvoi, however, is inadequate to their needs.[337] This means that the autonomy law of the parties recognized in matrimonial property regime is incompatible with renvoi.[338] This is why, it is thought, that there should be no renvoi in the field of property regimes where the autonomy of parties in choosing the law prevails and is strong.[339]

B)-Evidence that justifies this condemnation.

The exclusion of the mechanism of renvoi in principle in this field has been advocated by the French jurisprudence.[340] This hostility, in fact, can be seen through the discussion of three French cases.

The first case which illustrates this hostility is the decision of *Dame Gouthertz* c. *Gouthertz*[341] where the French court of Appeal decided that French spouses, who got married in Russia, established their first matrimonial domicil there and should, therefore, be considered as married under the legal

335- Potu., E., *Op.cit.*, p 132.

336- Droz, G.A.L.," Les Regimes Matrimoniaux en Droit International Privé Comparé" *Recueil des cours.* , Vol III, Tome 143, (1974), pp 122-123.

337- *Ibid.*

338- See Audit, B.," Le Caracère Fonctionnel de la Règle de Conflit(Sur la ' Crise 'des Conflits de Lois) " ,*Recueil des cours.* Vol III, Tome 186, (1984), p 333.

339- Von. Overbeck, A.E., *Loc. cit*, pp 146-147.

340- See for instance, Derrppé, J et Agostini, E.,*Loc.cit.*, p 12.

341- Civ. 1ere, 1er Février 1972; J. C.P. 1972. II. 170, 96, Concl. Av. Gén. Gegout; 61 *Re. crit.dr. intl priv.*, (1972) p 644, note Wiederkehr, Georges.; 99 *Clunet*, (1972) p 594, note Ph. Kahn.

regime of the property separation which is in force in Russia.[342] The court of Appeal, then, held that the choice of the regime depends upon the express or implicit intention of the spouses. Accordingly, the court deduce that the spouses intend to refer to the Internal Russian law by excluding its conflict rules.[343] Concerning the position of the French *cour de cassation* this also held that the applicable law would be the substantive rules chosen by the parties on the ground that the renvoi mechanism cannot work especially in the field where the autonomy law prevails.[344] It has been claimed, therofore, that the incompatibility of renvoi with the autonomy law led the French judge to apply Russian internal law by excluding its conflict rules.[345]

Secondly, the case of Sideny *Edward Liss* c./ *Dame Liliane Zaiong*[346] has also been considered as a decision where the French court of Appeal rejected the mechanism of renvoi in matrimonial property regime[347]

Later on in *Mari* c. *Coutier*[348] the *cour de cassation* held that the spouses[349] intentions were to localise their money interest in Italy and to be bound by Italian law. This meant the application of the Italian legal regime of the properties separation without taking into consideration Italian conflict rules.[350] In fact, the exclusion of renvoi occurred in that case despite the fact that the spouses had pronounced for the application of the French law to their

342- In 25 October 1915 *Casimir Gouthertz* a French national married in Odessa *Nathalie Riabimine* a Russian. In 1916 the former left Russia to France to do his military service and then in 1921 both spouses came to install in France. See 61 *Re .cri.t dr.int.priv.,Ibid.*, pp 644-646.

343- See *Ibid.*, pp 644-645; Foyer, J., *Loc.cit.*, pp 108-109; Audit, B.,*Loc. cit.*, p 333.

344-.Droz, G.A.L., *Loc.cit.*, p 34.

345- Loussoaurn, Y et Bourel, P., *Op.cit.*, p 294; Bellet, P., 70 *Re .cri.t dr..int..priv*, (1981), P210.

346- Paris 3 déc. 1980, 108 *Clunet*,(1981), P578, notes G. Wiederkehr; *Re .cri.t dr..int..priv.*,(1981) p 501, notes H. Gaudemet.

347- See 108 *Clunet,Ibid.*, pp 578, 581, 583-584.

348- See Cour de cassation 1re Ch. Civ., 24 Janvier 1984.

349- Mr *Charles Mari* a French national married *Grazialla Magni* an Italian national in Italy on the 25 june 1912 without a marriage contract. The latter died on the 18th of August 1970. on the 15th of july 1976 he married *Mme Céline Coutier*. 73 *Re .crit. dr..int..priv.*, (1984) pp 631-632, note Bertrand Ancel.

350- *Ibid.*, p 632; 111*Clunet*, (1984), P 870, note J. Dérruppé.

acquired property in France.[351]

On the whole it has been stressed that renvoi is excluded completely in relation to property regimes and for practical reasons the rejection of its mechanism should, therefore, be approved in principle.[352]

VI)-Rejection of renvoi mechanism in law of tort.

A)- Discussion of the reasons for rejecting renvoi in the field of tort. The repudiation of renvoi does not apply only to contract but has also been extended to other areas, such as, the law of tort where renvoi is said to be excluded in this field.[353] In fact some scholars underline that in matters of delictual liability "...renvoi seems unthinkable."[354] This leads us to suggest that renvoi will be excluded in principle in law of tort and the reference to foreign law should be interpreted to connote the foreign internal law, i.e., the internal law of the *lex loci delicti* and not its private international rules.[355] More important scholars have admitted that a similar argument concerning the application of the substantive law in matters of contract should be applied in matters of delict where more attention has been made to the social environment of both the parties and the act.[356] In this context, Cheshire points out that "...The purpose of resort to the *lex loci* is very largely to give effect to the presumed intentions of the parties. The average man thinks in terms of internal Law...".[357]

B)- Controversies upon the law that governs matters of tort. It should be remembered that if characterization is subject to different theories,

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351- 111, *Clunet, Ibid.*, p 872.

352- 73 *Re .cri.t dr..int..priv., Loc. cit.*, pp 651-652; See Nouveau Répertoire de Droit, Mise A Jour (1980 à 1990), Paris, Jurisprudence Générale Dalloz, 1990, p 301.

353- See Lipstein, K," The General Principles of Private International Law ",*Recueil des cours*,Vol I, Tome 135, (1972), p 212.

354- Anton, A.E., *Op.cit.*, p 62 See in this context the case of *M' Elroy* v. *M' Allister*, 1949 S.C. 110.

355- The Law Commission working Paper N° 87 and the Scottish Law Commision Consultative Memorandum N° 62, *Private International Law choice of Law in Tort and Delict*, London, Her Majestey' s Stationery Office, 1984, pp 18, 94; See also Karsten, I.G.F " Chaplin v Boys: Another Analysis" 19 *Int' t & Comp. L. Q.*,(1970), p 36; Cheshire, *Droit International Privé*, 7th edition, London, Butterworths, 1965, p 257.

356- Kahn-Freund., O.," General Problems of Private International Law" *Loc.cit.*, p 436.

357- Cheshire, G.C., 7th edition, *Op.cit.*, p 257. Karsten, I. G. F., *Loc.cit.*, p 36. notes 9.

law of tort as well has been related to different theories. Accordingly, the discussion of the latter requires the writer to ask the same question, which law should govern matters of tort. Is it the *lex fori*,[358] the *lex delicti*[359] or the proper law of the tort?[360]

1)-*Lex loci delicti* or the governmental interest analysis. It is well known that in the field of tort the *lex loci delicti*, i.e., the place of wrong was established for a long time in the United States of America in which the substantive law of the *lex locus delicti* governs the rights and liabilities of the parties.[361] As has been shown, however, the modern tendency in private international law has led scholars to switch from the traditional approach, the *lex loci delicti*, to a governmental interest analysis.[362] In fact, Brainerd Currie, for instance, rejects the traditional choice of law and relies in his conception, instead, upon the policies of the substantive laws of the State which has some contact with the case.[363] According to his view there will be no place of renvoi in his suggested analysis in that "...There can be no question of applying other than the internal law of the foreign state"[364]

358- Among its advoctes is Savingny, *System des hentigen roemishe rechts* , Vol. 8, 1849, P 275. In the united States of America, this theory has been advocated by Ehrenzweig, A.A., " Not So ' Proper " Law of a Tort : Pandora' s Box "17 *Int' l & Comp. L. Q.*, (1968), p 1. This theory, however, has been criticized on the ground that it favour the forum shopping. See in this context, Morris, J,. H. C., *The Conflict of laws, Op.cit.*, p 302.

359- Its application is said to be still predominant in Europe. This theory, however, has been criticised because of its ambiguity in that the defendant act may take place in a country X whereas the harm and its results might occur in the country Y. See Morris, J.H.C., *Ibid.*, pp303-304.

360- It is important to not, in this regard, that Morris has been considered as the scholar who drew sholars' attention in the common law countries by suggesting the concept of the proper law of the tort. According to it advocates the proper law of the contract will govern the tort liability as an analogy from the use of the proper law of the contract. Morris, J.H.C., *Ibid.*, p 304. See Graveson, R.H., *Comparative Conflict of Laws, Selected Essays, Op.cit.*, p 207.

361- For more details see , Shapira, A.,*The Interest Approach to Choice of Law with Special Reference to Tort Problems*, The Hague, Martinus Nijhoff, 1970, p 24.

362- Egnal., J.D.," The 'Essential' Role of Modern Renvoi in the Governmental Interst Analysis Approach to Choice of Law" 54 *Temp. L. Q.*, (1981), p 237

363- Siehr, K.G., *Loc.cit.*, p 53.

364- Currie, B.,*Selected Essays on the Conflict of Laws*, Durham, N.C., University Press, 1963, p 184. See *Supra.*, Chapter 1, Section 2, Sub-section 1, p 15.

In this context, the case of *Babcock* v. *Jackson*[365] is said to represent an example of the proper law conception by using the expression center of gravity and is also inspired by Brainerd Currie's approach of the governmental interest analysis.[366] It means that this case has been considered as a good opportunity for the American court of getting rid of the traditional rule of the *lex loci delicti*.[367] In fact, he court of Appeal allowed recovery in that it considered the parties as New Yorkers and the Ontario, i.e., the place of accident as Fortuitous.[368]

2)-The proper law of tort and *lex loci delicti*. In an English case *Boys* v. *Chaplin*[369] the Maltese law as the *lex loci delicti* was excluded in favour of the application of English law.[370] The reason for the application of this law has been the subject of much study. In this case both the plaintiff *Boys* and the defendent *Chaplin* were British habitually resident in England and the former was injured by the negligence of the latter in Malta. The problem was that under Maltese law £53 damages was recoverable whereas under English law the sum for damages was assessed over £ 2,000. The House of Lords decided that the plaintiff should receive the latter amount and not the former one.[371]

Accordingly, the House of lords is said to have the opportunity to modernize the English conflict rules concerning the delictual liabilities.[372] Boys is taken after much discussion to support the possibility of an exception to the double rule in a suitable case, on the lines of the judgments of Lords wilberforce

365-12 N.Y. 2d 473 ; 240 N.Y. S. 2d 743; 191 N. E. 2d 279 (1963); [1963] 2 LIoyd's Rep. 286.

366- See Loussouarn, Y et Bourel, P., *Op.cit.*, pp 173, 175.

367- Morris, J. H. C., *The Conflict of Laws*,*Op.cit.*, pp 325, 329.

368- *Ibid.*, p 326.

369-- [1969] 3 W. L. R. 322; [1969] 2 All E.R 1085.

370- See Graveson, R. H., *Comparative Conflict of Laws, Selected Essays*, *Op.cit.*, p 213. Therefore,the House of lords in this case is said to have overruled the case of *Machado* v. *Fontes*. [1897] 2 Q. B. 231; See Morris, J. H. C., *The Conflict of Laws, Op.cit.*, p 312.

371- Graveson, R. H., *Ibid.*, pp 208, 218; See also Morris, J. H. C.," L'Évolution Récente du Droit International Privé Anglais", 100 *Clunet*, (1973), p 197.

372- It must be noted that different arguments and approaches had been proposed by the five English judges in deciding this case. [1971] A.C. 356 at 379, 380, 389, 392; [1968] 2 Q. B. 1, 20, 24-26; See in this context, Morris, J.H.C., *Ibid.*, pp 197-198; Morris, J.H.C., *The Conflict of Laws, Op.cit.*, p 312.

and Hodson.

3)-First and second American Restatements. A remarkable change has been done between the first and the second restatement of the conflict of laws.[373] The first Restatement of the conflict of laws adopted the traditional law in tort, i.e., the *lex loci delicti.*[374] The second Restatement of the conflict of laws,[375] however, rejected this old rule by adopting the most significant relationship approach.[376] In other words, the traditional view, in this matter, was that the substantive law of the place of wrong, i.e., *lex loci delicti*, governs matter of tort.[377] in the second Restatement of the conflict of laws, however, the tort will be governed by the local law of the State which is most closely connected with the parties and the occurrence.[378] The last principle, in fact, is included in §145 (1) of the American law institute' s second Restatement which states that "...The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which as to that issue has the most significant relationship to the occurrence and the parties".[379]

373-The First Restatement of the conflict of Laws of 1934 which was inspired by Beale' s vested right conception to resolve the conflict of laws problem led , however, Professor Brainerd Currie to consider the mechanical application of the principle of conflict of laws by the first Restatement as nonesense. See in this context, Tate. A, Jr., " Governmental Interests in the Conflict of Laws: Mr Currie's Views and their value for Louisiana Lawyers" 39 *Tul. L. Rev.*,(1964-1965), pp 163- 164.

374-In order to determine the law of the State that has the most significant relationship to both the occurence and the parties the Restatement takes into account the places where the injury happened and where the conduct causing the harm took place. See the Restatment of Laws § 378 (1934); Morris, J.H.C., *The Conflict of Laws, Op.cit.*, p 322.

375-See the Second Restatment, conflict of laws, § 379 (1). (Tent Draft N 8, 1963).

376- For more details see Palmer, V.V "Conflict of laws-Guest Statute-Center of Gravity Theory", 38 *Tul. L. Rev.*, (1963-1964), pp 398-399.

377- See Palmer, V.V.," Conflict of Laws in Louisiana:Tort", 39 *Tul. L. Rev.*, (1964-1965), p96.

378- Restatment Second, conflict of laws, § 379 A-L (tent. draft N 8, 1963).

379- See the Restatement second of the Conflict of laws, § 145 (1) (proposed official Draft, 1968; As quoted from James B. St. John,(notes) 43 *Tul. L. Rev.*, (1968-1969), p 707; See also Morris, J. H.C., *The Conflict of Laws, Op.cit.*, P 305; Hanotian, B., " The American Conflicts Revolution and European Tort Choice -of-Law Thinking", 30 *Amer. J. Comp. L*, (1982), p 83; Kahn-Freund, O.," Delictual liability and the Conflict of Laws" *Recueil des cours*, Vol II, Tome 124, (1968), p 50.

C)- Cases that illustrate the hostilitity towards the mechanism of renvoi in tort. The reference will be in this context merely to Scottish and American authorities. Before that it should be noted that although there is no English Authority concerning the doctrine of renvoi in relation to law of tort, it has been claimed that renvoi might have no place in this field.[380]

1)-Scottish Authority. In this context, *M' Elroy* v. *M' Allister*[381] has been considered as a Scottish case which supports the inapplicability of the renvoi mechanism in the field of tort.[382] According to the facts in this case *M' Elroy* was killed at shap in Cumbria in England and the widow sued the driver in Scotland, bearing in mind that the concerned parties had their residence in Glasgow.[383] By her action for reparation to the Scottish court , the widow got only a reparation for funeral expenses[384]

There has been a claim that Scotland is more related to both parties and to the occurrence than England. This has been justified by the fact that the accident took place not far south of the Scottish border and the victim was a Scotsman resident in Scotland. This led to consider that all elements concerning this case were Scottish.[385] Despite the Scottish connection, the double rule was applied with bad effects for the widow. In fact, Lord Russell stressed that the court refers to domestic law of the *lex locus delicti* and not to its private international law in order to know by which law the parties' rights and liabilities will be

380- Morris, J.H.C., & North, P.M., *Op.cit.*, p 666.

381-(1949) S. C. 110, 126 (court of session).

382- Cheshire & North, 11th edition, *Op.cit.*, p 71; Dicey & Morris, 1987, *Op.cit.*, p 82; Jaffey, A. J. E., *Op.cit.*, p 262.

383- both the pursuer's claim to be entitled damages for solatium if the accident occured in Scotland and for a substantitial damages under the law reform Act 1934, for the loss of the deceased's expectation of life, however, failed. The failure of the former claim is due to the fact that English law, as the *lex loci delicti*, did not recognize it whereas the latter claim failed on the ground that it was not actionable by the *lex fori*.(1949) S.C. 110. See Morris, J.H.C., & North, P.M., *Op.cit.*, p 666; See also Cheshire & North, *Ibid.*, p 529.

384- The widow got neither a moral dammage, unknown in English law but known to Scottish Law, nor a pecuniary compensation as damage because her claim was not made in time according to English law. See Kahn-Freund, O., " Delictual liability and the Conflict of Laws",*Loc.cit.*, pp 47-48; Morris, J.H.C. & North P.M., *Ibid.*, p 666. See also Cheshire & North, *Ibid.*, p 529.

385- Kahn-Freund, O.,*Ibid.*, pp 45-46, 54.

regulated.[386] This reasoning, therfore, has been taken as a proof that the Scots court excluded renvoi in the field of tort.[387]

2)- American Authority. In the United States of America *Pfau* v. *TrentAluminium* [388] has been cited as an example which supports the rejection of renvoi mechanism in the field of tort.[389] In this case the New Jersey supreme court held that Iowa where the accident occurred[390] had no interest in this suit. The court went on to maintain that the substantive laws of connecticut, which represents the law of the plaintiff' s domicile and that of of New Jersey, which is the law of the defendant's domicile, are similar and the case, therefore, represents a false conflict.[391] In Other words, the substantive laws of both connecticut and new Jersey agreed on the point which allows guest passengers to recover from his host-driver for ordinary negligence[392] whereas in Iowa the guest statute provided that the latter was not liable to the former for such negligence.

Concerning the plaintiff 's claim for damage the defendant argues that the reference should not be to the Connecticut' s substantive law which allows the plaintiff recovery but it should be to the connecticut' s conflict rules which stick, in this context, to the *lex loci delicti.* It follows from the defendant' s argument that the reference to Iowa substantive law, as the *lex loci delicti*, means that the plaintiff would not be allowed recovery. The court decision, however, was not in favour of the application of the Connecticut' s choice of law rule by fear of frustrating the governmental analysis goals and instead held that the

386- (1949) S. C. P 126 (court of session). Morris, J.H.C., & North P.M., *Ibid.*, p 667.

387- Collier, J. G, *Op.cit.*, p 29.

388- 55 N.J. 2d 511; 263 A. 2d 129, at 136-137 (1970).

389- Cheshire & North, 11th edition,*Op.cit.*, p 71; Dicey & Morris, 1987, *Op.cit.*, p 82.

390- Both the plaintiff *Pfau* and the second defendent *Trent* were student at a College in Iowa. The former was injured why their car hit another one. Morris, J.H.C. & North P.M., *Op.cit.*, p 704

391-The New Jersey court stated that the case in an eample of a false conflict and, therefore, it was not necessary to choose between the laws of connecticut and New Jersey because both law were the same. Egnal, J.D., *Loc.cit.*, p 241; Morris, J. H. C., & North, P. M., *Ibid.*, pp 706-708.

392- In *Pfau* v. *Trent* Aliminium both the plinatiff and the defendant were domicilked in a recovery States. Egnal, J. D.,*Ibid.*

Connecticut plaintiff, *Pfau* should be given the same protection as if he was a New jersey plaintiff.[393] According to an opinion the New jersey court refused the use of "Modern renvoi" in order to determine the interests of connecticut.[394] As a matter of fact, New Jersey Supreme court states that " We see no reason for applying connecticut' s choice of law rule. to do so would frustrate the very goals of governmental interest analysis. Connecticut choice of law rules does not identify that states' interest in the matter..."[395]

Finally, there are indications that even in the continent renvoi has been excluded, for instance, by the French case law in the delictual responsibility on the ground that it leads to a *vicious circle*.[396]

Section 2:- Renvoi mechanism in International Conventions.

Sub-section 1:- General points.

I)-**International cooperation in the field of private international law**. The codification of private international law by way of treaties has been considered as a natural method for resolving the conflict of laws problems.[397] It should be noted, therefore, that the purpose of International Conventions is the creation of International harmony and the achievement of the unification of conflict of laws. As a matter of fact, the aim of the Hague Conferences, for instance, is "...to work towards the progressive unification of private international rules".[398] More important, the work of multilateral Conventions is to achieve not only the unification of the conflict rules but also the substantive rules.[399] In fact, Geneva Conventions concerning the bills of exchange and

393- Morris, J.H.C., & North, P.M., *Op. cit.*, pp 707-708.

394- See Egnal, J.D.,*Loc.cit.*, p 257. originally emphasised .

395- *Pfau* v. *Trent Aliminium* Co., 55 N.J. at 526; 263 A. 2d at 1367, As quoted from John David Egnal, *Ibid.*

396- Trib. Gr.Inst. paris 21 Juin 1969: Gaz. Pal. 1970, 1, 138; D..S. 1970, 780, note J. Prévault; see also Dérruppé, J et Agostini, E., *Loc.cit.*, p 8.

397- Jayme, E., " Considerations Historiques et Actuelles sur la Codification du Droit International Privé, *Recueil des cours*, Vol. IV, Part 177, (1982), p 51.

398- See article 1 of the Hague Conference statute which came into force 15 Juin 1955, Conférence de la Haye de Droit International Privé" , *Receuil des Conventions de la Haye*,(1951-1977), Edité par le Bureau Permanent de la Conférence, La Haye, Pays Bas, Martinus Nijhoff, p 1.

399- See *Supra* ., Chapter 1, Section 2, Sub-section1, p 20, Footnotes 82.

promissory notes of 1930 and 1931, which imposed a uniform internal legislation, are an illustration of the latter unification.[400] Besides, the United Nations Convention on contracts for the international sale of goods elaborated by UNCITRAL in Vienna in March-April 1980 is another example of a Convention which tends to unify the substantive law of contract..[401] However, among the Conventions which can be cited as an example of the unification of choice of law rules are: the Hague Convention on the law applicable to international sales of goods of June 15, 1955 and the European Convention on the law applicable to contractual obligations of june 19, 1980.[402]

II)- The hostility of Convention rules to renvoi as a contemporary tendency. Scholars' intentions have been drawn to the fact that renvoi cannot occur by the establishement of Conventional private international rules. According to this view when all member States sign the Convention and adopt the same connecting factors it should be understood that renvoi mechanism is unimaginable in this case.[403] In fact, the incompatibility of renvoi with Conventional conflict rules has been justified by the fact that Conventional rules, should, normally replace the contracting States conflict rules. In other words, when the conflict rules of the former indicate the application of the law of the latter this should not mean the application of those contracting States' conflict rules.[404]

This hostility can be illustrated, for instance, by the uniform conflict rules established by the modern Hague Conventions which are considered as rejecting renvoi, implicitely or explecitly, by referring to the substantive rules.[405]

400- loussouarn, Y et Bourel, P., *Op.cit.*, pp 31-32. This Convention is considered, therefore, as an example of international uniform legislations. Mayer, P., *Op.cit.*, p 80.

401- The aim of this Convention is to replace the Hague Convention on the law of international sales of contracts. Despite twenty one States have signed the Convention only seven States have ratified it till January 1985. See in this context, article 99 Par. (1), which states that the minimum of ten States must accede to the Convention in order to come into effect.; See in this context Sandrock, O.,*Loc.cit.*, pp 151-152, footnotes 20, 22.

402- *Ibid.*, pp 147-148.

403- Foyer, J.,*Loc.cit.*, p 115.

404- Lewald, H., " la Théorie du Renvoi" *Recueil des cours*, Vol. IV, Tome 29, (1929), p 578; See also Bellet, P., *Loc.cit.*, p 211

405- This is with the exception of the Hague Convention on Marriage of 12 juin 1902; See

Sub- Section 2:- Conventions that accept renvoi.

I)- The Hague Convention of 12 June 1902 concerning the conflict of laws. Article 1 of the Hague convention of 12 June 1902 relative to marriage is an example of the application of the renvoi system despite the fact that the majority of delegates were against it.[406] In fact, its disposition states that " The right of contracting marriage shall be governed by the national law of each of the parties intending to marry unless a provision of such law refers expressly to some other law".[407]

Besides, this article has been considered as accepting renvoi from the national law to another one,.i.e, it admits renvoi from the national law to the law of domicile.[408] There has been a divergence between scholars upon the forms of renvoi indicated in this article. According to some this means the acceptance of renvoi remission by the Convention[409] whereas others believe that renvoi is accepted whatever the process might be a remission or transmission.[410] Additionaly, Meijers, E.M., goes on to stress that the Hague Convention as an institution applied a "unique renvoi" system, i.e., without considering whether this system involves a renvoi to the *lex fori* or to a foreign law.[411]

On the whole, although article 1 is said to give marriage "...an additional chance of validity"[412] this Convention has been considered as a failure.[413]

Ibid., pp 578-579; Von Overbeck, A.E., *Loc.cit.*, p 129.

406- These are for instance, Asser from Netherland, Lainé from France and Pierantoni from Italy. See in this context Potu, E., *Op.cit.*, pp 148, 153,159, Lerebours- Pigeonnière, P., "Observations sur la Question du Renvoi" *Clunet*,(1924), p 897.

407- As quoted from Lorenzen, E.G., *Loc.cit.*, P 330; Westlake, John, *A Treatise on Private International Law*, by Norman Bentwich (ed.,), 7th edition, London, Sweet & Maxwell Limited, 1925, p 34; Wolff, M.,*Op. cit.*, p 191.

408- Arminjon, P., " L' objet et la Méthode du Droit International Privé" *Recueil des cours.*, Vol. I, Tome 21, (1928). p 495; Pelichet, M.,*Loc.cit.*, p 177, notes 246.

409-Pålsson, L., *Marriage and Divorce in Comparative Conflict of Laws*,*Op.cit.*, pp 106-107, notes 216.

410-See for instance, Wolff M., *Op. cit.*, p 191.

411- Meijers, E.M., " la Question du Renvoi" 38 *Bulletin de l'Institut Juridique International*, (1938), p 206.

412- Lorenzen, E.G.,*Loc.cit.*, p 331.

413- North, P. M., " Development of Rules of Private International Law in the Field of Family Law, *Recueil des cours*, Vol. I, Tome 166,, (1980), p 98.

II)- Discussion of the famous Convention of 15 June 1955 known as the renvoi Convention. It must be underlined that the Hague Convention for regulating the conflict between the law of nationality and the domicile should be related to the Netherlands government project in which Mr Meijers suggestions was to regulate renvoi by a Convention.[414] In fact, the proposed solution of Meijers in 1938, concerning the renvoi controversies, was consecrated in both Benelux uniform projects on private international law[415] and the Hague Conventions of 15 june 1955 for the regulation of the conflicts between domicile and nationality.[416] Only the latter, however, will be considered in this context.

A)- The Convention proposed to institutionalize renvoi. This Convention has been labelled as the renvoi Conventio[417] in that it tried to lay down or establish renvoi in this matter.[418] It should also be noted that from the title of the Convention title the word renvoi has not been used but instead the Convention refers to its purpose which is solving the Conflicts between the two principles.[419]

B)- The field of the Convention application.

1)- The Convention allows renvoi mechanism only between nationality and domicile. This Convention is said to deal only with the conflict between nationality and domicile, i.e., it admits renvoi only between the law of domicile and that of nationality.[420] In fact, article 4 of the Convention

414- See Derruppé, J., " le Renvoi dans les Conventions Internationales, Fasc.532-C, 1984, *Juris -Classeur de Droit International*, Paris, Editions Techniques, 7, (1987), p 6.

415- See article 15.

416- Van Hecke, G., "Principes et Méthodes de Solution des Conflits de lois", *Recueil des cours*, Vol. I, Tome 126, (1969), p 438.

417- See Lalive, P.,*Loc.cit.*, p 269.

418- Von Overbeck, A E., *Loc.cit.*, p 130; See Foyer, J., *Loc.cit.*, p 112.

419- See Derruppé, J., " le Renvoi dans les Conventions Internationales,"*Loc.cit.*, p 6; See also the provisional report of Maridakis, G.S., " Le Renvoi en Droit International Privé" *Annuaire* , Vingt Troisième Commission, Session d' Amsterdam, Volume 47, Tome II,(1957), p40.

420- Pålsson, L., *Marriage and Divorce in Comparative Conflict of Laws*, *Op.cit.*, p 107. notes 218; Batiffol, H., *Loc.cit.*, pp 479, 485, 486.

states that "...no Contacting state shall be obliged to apply the rules laid down in the Convention when its rules of private international law do not prescribe the application to a given case either of the law of the domicile or the law of the nationality".[421] Accordingly, the Convention has been considered as not applicable if the conflict rules of the person's nationality or domicile refer to a law which is not that of his nationality or domicile.[422] In other words, the Convention is said to resolve only the conflict that occurs between either principle, nationality or domicilein which there will be a renvoi made by one principle to another. If, however, either the law of nationality or domicile refers to the *lex rei sitae* or the *lex loci actus* such renvoi is not resolved by the Convention because its disposition do not give solutions to this legal situation.[423] This is the case, for instance between France and Italy concerning the succession of immovables situated in Italy of a French citizen. In this case Italian law refers to the national law, i. e., France if an Italian court is seized of the case. French law, however, applies the *lex rei sitae*.[424] Although the reference is made to the law of nationality this negative conflict is not resolved by the Convention.

Furthermore, there has been a claim that article 2 of the Hague Convention of 1955 allows renvoi from the law of nationality to the law of domicile and not the inverse.[425] According to this view the acceptance of renvoi from the national law to the law of domicile and not the inverse can be justified on the ground that the former leads often the judge to apply the *lex fori*, i.e., the dispute in the former renvoi will be resolved by the *lex fori*.[426] To prove this claim, some scholars have illustrated it by a hypothetical case concerning the capacity of a British subject domiciled in France. Following this view and the rule of the convention renvoi is possible because French law refers to the law of nationality, i.e., England, whereas English law refers to France as the law of domicile. French law, therefore, will be applied. If, however, the British citizen is domiciled in

421- Pålsson, L., *Ibid.*

422- *Ibid.*, pp 107-108.

423- Derruppé, Jean., " le Renvoi dans les Conventions Internationales", *Loc.cit.*, p 6.

424-*Ibid.*, p 7.

425- Foyer, J., *Loc.cit.*, p 112, Francescakis, P. h.,*Op.cit.*, pp 261- 262.

426- See Von Overbeck, A.E., *Loc. cit.*, pp 154-155; Soulaiman, A. A., *Op.cit.*, p 55.

England an English judge, in this context, will apply automatically English law, i.e., *the lex fori* without the mechanism of renvoi.[427]

One might ask how the mechanism of renvoi can, practically, occur according to this convention? By referring to article 1, it can be seen that its disposition states that " when the state where the person concerned is domiciled prescribes the application of the law of his nationality, but the state of which such person is a citizen prescribes the application of the law of his domicile, each contracting state shall apply the provisions of the internal law of his domicile".[428] According to this disposition in which the internal law of domicile will be applied it has been indicated that, in spite of avoiding the use of the renvoi term, the State which refers to the person' s nationality has to admit a remission to its own law.[429]

In order to comprehend the system of renvoi in this Convention it seems, therefore, important to refer to the position of both the state of nationality and that of domicile when they agree and when they disagree

First, it has been noticed that according to article 1 when both contracting States disagree, i.e, the state of nationality links to domicile and the State of domicile to nationality the renvoi from the law of nationality to the law of domicile should be accepted by all States.[430] This situation can, practically, be explained by an example in which French law will be applicable concerning the personal status of an Englishmen domiciled in France. According to this article both English and French judges will apply French law which means that renvoi from English law to French law is admitted.[431]

Second if, however, both the State of domicile and that of nationality agree on the application of the law of nationality all states should apply it.[432] Following

427- Soulaiman, A. A., *Ibid.*

428- As quoted from Pålsson, L., Marriage and Divorce in Comparattive Conflict of Laws, *Op.cit.*, p 107. See Conférence de la Haye de Droit International Privé, *Op.cit.*, p 24.

429- Pålsson, L.,*Ibid.*

430- Derruppé J., " le Renvoi dans les Conventions Internationales", *Loc.cit.*, p 7.

431- *Ibid.*

432- It means that if the countries of X and Z both apply the nationality principle this law must be applied not only by those two countries but also by a country which adopts

the same cited example the personal status of a French national domiciled in Belgium will be settled according to article 3 as follow.[433] French law will be applied by both Belgian and French judges. This law should also be applied by a country which prescribes the application of the domicile. For instance, if English court is seized of the issue it should apply French law and then admits renvoi from the law of domicile, i.e., Belgian to French law as the law of nationality.[434] If, however, the country of nationality, (X) and that of domicile(Z) both apply the domicile principle this law must be applied not only by the courts of X and Z but also in a court Y which adopts nationality principle, such as, Spain.[435]

Overall despite the Hague Convention of 15 June 1955 suggests a partial solution on renvoi it has been interpreted, however, as an important contribution to the problem of renvoi.[436]

2)- <u>The Convention is designed to lessen the complications that result from the system of nationality and that of domicile</u>. When the Hague Conference in its seven session established a Convention on the 15 June 1955 it was for the purpose of regulating and resolving the conflict between the two different principles, nationality and domicile.[437]

It must be noted, however, that despite the aim of the Hague Convention to achieve the coordination between the two principles, this Convention has not come into force up till now.[438] According to some it is regrettable that the renvoi Convention has not come into force on the ground that it could reduce the complications caused by the divergence of the two systems of private international law.[439] According to others this Convention will lead to the

domicile. Philip, A., *Loc.cit.*, p 50.

433- See Conférence de la Haye de Droit International Privé , *Op.cit.*, p 24.

434- Derruppé, J., " le Renvoi dans les Conventions Internationales," *Loc.cit.*, p 7.

435- This is the case, for instance of a capacity of a Norwigian natioanl domiciled in Danemark. See Philip, A., *Loc.cit.*, p 50; See article 2 Conférence de la Haye de Droit International Privé, *Op.cit.*, p 24.

436- Derruppé, J., " Le Renvoi dans les Conventions Internationales" *Loc. cit.*, p 6.

437- *Ibid.*, See also Loussouarn, Y.et Bourel, P., *Op.cit.*, P 274: Foyer, J., *Loc.cit.*, p 112.

438- See Pålsson, L., *Marriage and Divorce in Comparative Conflict of Laws, Op.cit.*, p107.

439- Lalive, P., *Loc.cit.*, p 269.

uniformity of solution especially in the field where the main divisions of the contemporary legal systems is between nationality and domicile.[440]

3)- The Convention is applicable only to a negative conflict of laws. The Convention, however, does not regulate the positive conflict and is applicable only in negative conflict between the national law and the law of domicile.[441] In fact, if the law of nationality supports the application of its own law whereas the law of domicile claims the application of its own law, the Convention does not regulate this positive conflict. The consequences will be the application of nationality by the country of nationality and the law of domicile by the country of domicile.[442] By referring, for instance, to article 1 it can be seen that if the country where the person is domiciled applies the law of nationality whereas the State of the person nationality applies the law of the domicile the internal dispositions of that domicile, therfore, will be applied.[443] This is the case, for instance, of the personal status of an Englishman domiciled in France.[444] To illustrate the failure of the Convention in solving the positive conflict the same example will be taken but with slight difference. Suppose that the person is a French but domiciled in England. Concerning his personal status French court will apply French law as the law of his nationality if it is seized of the case. If English court, however, is seized of the case it will apply English law.[445]

On the whole, if this hypothetical example supports the view that non of the first, second or the third articles could resolve the situation of the positive conflict, this means that the unity of solution cannot be achieved by the Convention.[446]

440- Batiffol, H., *Loc.cit.*, p 488.

441- See Von Overbeck, A E., *Loc.cit.*, p 156; Derruppé, J., " Le Renvoi dans les Conventions Internationales,", *Loc.cit.*, p 6.

442- Philip, A., " General Course on Private International Law" , *Recueil des cours*, Vol. II, Tome 160, (1978), p 51.

443- See Conférence de la Haye de Droit International Privé, *Op.cit.*, p 24

444- See *Supra.*, pp 188-189.

445- Derrupé, J., " le Renvoi dans les Conventions International,", *Loc.cit.*, p 6.

446-*Ibid.*

C)- Definition of domicile in the" Renvoi Convention".

1)- Emergence of habitual residence as a connecting factor. An important element which should be discussed in this respect is the definition of domicile by the renvoi Convention. As a matter of fact, the Hague Convention of 15 June 1955 defines itself the meaning of the domicile in article 5 to connote the habitual residence of a person.[447]

More important the difference between the English concept of domicile and the continental concept of habitual residence should also be taken into consideration for the non ratification of this Convention by the U.K. as one of the participating States .[448] In fact, according to an opinion, the reason why the Convention has not been ratified is that " ...it is impossible for the United Kingdom to ratify the convention unless domicile in English law is defined to mean habitual residence..." [449] which is not the case up till now in English law.

2)- Its purposes. It must be noted that in order to avoid differences in the interpretation of the connecting factor between the signatory states and for the sake of the unification of their private international rules Conventions normally give a definition of a connecting factor.[450] As a matter of fact, by referring to the history of the Hague Conference, i.e., before the first world war, it can be noticed that Conventions that were prepared at that time were based upon nationality. It was held, however, that the adherence of Great Britain to the Conference does not permit the application of nationality as a general principle. Domicile as well was not accepted as an international principle. habitual residence, therefore, was taken as subterfuge.[451] In other words, the

447- Article 5 indicates that " domicile for the purpose of the present convention, is the place where a person habitually resides, unless it depends on that of another person or on the sear of an authority ". See the Seventh Hague Conference on P. I. L, 1 *Amer. J. Comp. L*, (1952), P 280; Conférence de la Haye de droit International Privé, *Op.cit.*, p 24; See in this context Van Hoogstraten, M. H., " la Codificatin par Traités en Droit International Privé dans le Cadre de la Conférence de la Haye" *Recueil des cours*, Vol III, Tome 122, (1967), p 357.

448- See Graveson, R.H., *Comparative Conflict of Laws, Selected Essays*, *Op.cit.*, pp 163, 198, 199.

449- Dicey & Morris, 1987, *Op.cit.*, p 89 notes 90. See also the Seventh Report of 1963, Cmnd. 1955. Para. 13-17.

450- See Mayer, P.,*Op.cit.*,p 148.

451- Schwind, F., *Loc.cit.*, p 74.

use of habitual residence by the renvoi Convention has been related to the modern development which began in 1930.[452]

It can be said, therefore, that to resolve the problem of divergence in qualifications that might occur between the contracting States the renvoi Convention has defined the domicile to mean the place of the person habitual residence.[453]

D)- The reasons for the failure of the Convention. What makes the Convention considered as a failure is that it has not entered into force.[454] This fact has been related to the problem of ratification in that among the five contracting States which signed the Convention only Netherlands and Belgium have ratified it.[455] It is clear, therefore, that the Hague Convention of 15 june 1955 has not been ratified yet although it has been accepted and supported by doctrinal arguments.[456] More important, there are those who wish the renvoi Convention a success in future and call for the signatory States to ratify it.[457]

III)- Geneva Conventions Concerning bills of exchange and promissory notes. The Geneva Conventions of 1930 and 1931 concerning the Bills of exchange and promissory notes, has also been cited as an example which recognizes renvoi.[458] The use of renvoi, in fact, can be noticed through article 2 (al.1) which states that the capacity of a person to be bound by bills of exchange and promissory notes should depend upon the law of his nationality.[459] This disposition, therefore, is said to represent an illustration of an express acceptance

452- Nedelamnn, H., *Loc.cit.*, p 446.

453- Derruppé, J., " le Renvoi dans les Conventions Internationales"*Loc.cit.*, p 8; Rabel, E., Vol 1, 1958, *Op.cit.*, p 89.

454- Derrupé, J., *Ibid.*, p 6; Bellet, P., *Loc.cit.*, p 211; Foyer, J., *Loc.cit.*, p 112.

455- This Convention has been signed by Netherland, Belgium, Luxumboug, France and Spain; See Derrupé, J., " le Renvoi dans les Conventions International", *Loc.cit.*, p 6; See also Gessner, A.F., 37 *R. I. D. C.*, (1985), p 777.

456- See Von Overbeck, A. E., *Loc.cit.*, p 156.

457-Batiffol, H., *Op.cit.*, p 488.

458- Lewald, H., " Règles Générales des Conflits de Lois, Contributions à la Technique du Droit International Privé, *Recueil des cours*, Vol. III, Tome 69, (1939), p 54; Madl, F., *Fooreign Trade Monopoly, Private International Law*, Buadapest, Akadémaii, Kiado, Budapest, 1967, p160.; Lalive, P., *Loc.cit.*, p 269.

459- Philip, A., *Loc.cit.*, p 47; Wolff, M., *Op.cit.*, pp 191-192.

of renvoi in that its mechanism works if the law of the person nationality indicates the application of another law, i.e., renvoi is accepted from the law of the person nationality to another country.[460] Furthermore, it has been stressed that the renvoi mechanism works also from the law of the person domicile or habitual residence, as his personal law, in the absence of nationality.[461] It is, therefore, questionable whether the convention accept both renvoi at first and second degree? According to an opinion both forms are, in fact, accepted whether it is renvoi to the law of the person domicile or to the *lex loci actus*.[462]

It should be noted, therefore, that the use of the mechanism of renvoi, in this Convention, has also been interpreted as a way of surmounting the divergence between the nationality and domicile countries. In other words, the use of the renvoi mechanism, in this context, has been seen as a sort of compromise between the two connecting factors, nationality, and domicile.[463]

Sub-section3 :- Conventions that are hostile to renvoi.

I)- Exclusion of renvoi in bilateral Conventions

A)-Is renvoi incompatible with the bilateral Conventions. It has been admitted that the mechanism of renvoi is impossible between contracting states in bilateral conventions. In fact, what makes renvoi not imaginable in the bilateral conventions is the purpose of these conventions which is the creation of a common rule by unifying the conflict rules of the two contracting States.[464] A point to be emphasized is that if renvoi occurs because of difference in the conflict of rules bilateral Conventions, however, have been considered as a means of removing such divergence.[465] To maintain such claim two Conventions, therefore, will be discussed as an illustration of the rejection of renvoi in this type of Conventions.

460-Derruppé, J.," le Renvoi dans les Conventions Internationales ", *Loc.cit.*, pp 2-3; Philip, A., *Ibid.*

461- Derruppé, J., *Ibid.*, Philip. A.,*Ibid.*, p 49.

462-Wolff, M., *Op. cit.*, pp 191-192.

463- Philip, A., *Op.cit.*, p 49.

464-Derruppé, Jean.," le Renvoi dans les Conventions Internationales", *Loc.cit.*, p 4.

465- *Ibid.*

B)- Convention between France and Yugoslavia of 18 May 1971. This Convention which concerns the competence and the applicable law in the field of personal and family law has been considered as rejecting renvoi implicitly. [466] It has been claimed, in this context, that if the Convention designates only the law of one of the two contracting States renvoi, therefore, will be excluded between those two States. In addition to that renvoi from one of the two contracting States to a third State is also excluded.[467] From another point of view, however, this Convention is an example of a bilateral Convention which does not pronounce on the renvoi issue.[468]

C)- Convention between France and Morocco of 10 August 1981. The second bilateral Convention which rejects renvoi is the Convention between France and Morocco concerning personal and family status and the judiciary Co-operation.[469] By referring to to the general dispositions of the convention it can clearly be seen that article 3 states that the reference to the law of either state should be considered as reference to the internal law of that state excluding its international system of conflict of laws.[470]

II)- Exclusion of renvoi in multilateral Conventions.

A)- Condemnation of renvoi by the Hague Conventions.

1)- The Conventional wisdom for the rejection of renvoi mechanism. If the Hague convention of 15 June 1955 admits renvoi[471] It has been generally admitted that the recent Hague Conventions, however, do not accept its mechanism.[472] In other words, it has been held that the tendency of the Hague Conventions since 1955 is to exclude renvoi implicitly. This means that according to the Hague formula, when the Convention designates or

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466-Signed in Paris 18 May 1971, published by the decree Nº 73-492 of 15 May 1973, J. O., 24 May 1973, p 5640; See 62 *Re .cri.t dr..int..priv.*, (1973), p 570; Foyer, J., *Loc.cit.*, p 113.

467-Foyer, J., *Ibid.*

468-Derruppé, J., " le Renvoi dans les Conventions Internationales", *Loc.cit.*, p 4.

469- *Ibid.*, pp 3-4.

470- Signed in Rabat on the 10 August 1981 and published in France by decree Nº 83- 435 of 27 May. J.O. 1º June 1983; See 110 *Clunet*, (1983), pp 922-923.

471- Foyer, J.,*Loc.cit.*, p 112.

472- Lewald, H., " Questions de Droit International des Successions", *Recueil des cours.*, Vol IV, Tome 9, (1925), p 37; Mayer, P., *Op.cit.*, p 192; Pierre, L., *Loc.cit.*, p 269

determines the applicable law, this should be interpreted as a reference only to the substantive rules of the chosen country.[473] Furthermore, the exclusion of renvoi by the Hague Conventions in conflict of laws has been considered as one of the tradition of the Hague conferences.[474] As a matter of fact, Emile Potu points out that the Hague Conventions that are in force or in the preparatory stage should be considered as rejecting the renvoi system and the applicable laws designated by the Convention are the internal dispositions. The Convention which accepts renvoi, such as, the Hague Convention of 1902 should be considered as an exception.[475]

2)- Discussions of the Hague Conventions which are hostile to renvoi. It will be shown through this discussion that renvoi has been excluded not only in one field but in different matters.[476] The discussion, however, will refer only to some of the Hague Conventions which are hostile to the mechanism of renvoi. Those Conventions, therefore, are cited in chronological order.

First, the Hague Convention on the law applicable to international sales of goods concluded in 15 June 1955 excludes implicitly renvoi.[477] Article 2, in fact, states that the sale is governed by the internal law of the State designated or chosen by the contracting party.[478] It means that the Convention refers only to the internal law chosen by the parties whether this choice is explicit or implicit.[479] Concerning the ratification among the eleven member States eight, however, have ratified it.[480]

473- Foyer, J., *Loc.cit.*, p 113; Loussouarn, Y et Bourel, P.,*Op.cit.*, p 274; Philip, A., " *Loc.cit.*, p 48.

474- See Pelichet, M., *Loc.cit.*, pp 176-177.

475- Potu., E., *Op.cit.*, p 168.

476- Foyer, J., *Loc.cit*, p 112.

477- *Ibid.*, p 113.

478- See article 3 of that Convention which also excludes renvoi. Conférence de la Haye de Droit International Privé", *Op.cit.*, pp 12-13 ; Diamond., A.L., *Loc.cit.*, p 253.

479- Conférence de la Haye de Droit International Privé, *Ibid.*, See also Loussouarn, Y et Bourel, P., *Op.cit.*, p 293; Isaad, M., Volume 1, p 176.

480- It was ratified by by Belgium, Danemark, Finland, France, Italy, Norway, Sweden and Switzerland. See Information Concerning the Hague Conventions on Private International Law, 35 *Netherlands International Law Review*,(1988), p 198; Sandrock, O., *Loc.cit.*, pp 147- 148, notes 6.

Second, the Hague Convention on the law governing transfer of title in International sales of goods of 15 April 1958 also excludes renvoi in article 3.[481] This Convention, however, which was signed by its two member states, Greece and Italy, has not entered into force.[482]

Third, the Hague Convention on the the conflicts of laws relating to the forms of testamentary dispositions of 1960, concluded on October 5 1961, has also been considered as rejecting the mechanism of renvoi.[483] In fact, this exclusion can be clearly seen in its article 1 which indicates that the testamentary disposition is formally valid if it is made according to one of the five listed internal laws.[484] These are either the laws where the testator made its testamentary disposition, the law of the testator' s nationality, the law of the place in which the testator had his domicile, the place in which he had his nationality or the place in which the testator had his habitual residence. Finally, in relation to the *lex rei sitae*, the reference is made to the internal law of the place where that immovables are situated.[485] This Convention has been ratified by all members States except Italy, portugal.[486]

Four, the exclusion of renvoi can also be seen in the Hague Convention on the law applicable to traffic accidents concluded in May 4 1971[487] in which article 3 States that the internal law of the State where the accident took place is

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481- Foyer, J.,"*Loc.cit.*, p 113; See Conférence de la Haye de Droit International Privé, *Op.cit.*, p 16.

482-See Information Concerning the Hague Conventions on Private International Law, *loc.cit.*, p 201.

483- Graveson, R.H., *Comparative Conflict of Laws, Selected Essays, Op.cit.*, p 358; For more details upon the renvoi in relation to the formal validity of will see *Supra.*, Section 2.

484- See Conférence de la Haye de Droit international Privé, *Op.cit.*, p 49; Foyer, J., ,*Loc.cit.*, p 113; Loussuarn, Y., " la Règle de Conflit est elle une Règle Neutre ?". Séance du 30 Janvier 1981, *Trav. Comité, Français. dr..in.privé.*, Tome 2, (1980-1981), pp 52-53

485- From the point of view of time article 3 states that this Convention "...shall not affect any existing or future rules of law in contracting States which recognize testamentary dispositions made in compliance with the formal requirements of a law other than a law referred to in the preceding Articles. See Conférence de la Haye de Droit International Privé,*Ibid.*

486- See Information Concerning the Hague Conventions on Private International Law, *Loc.cit.*, pp 202-203.

487- Foyer, J.,*Loc.cit.*, p 113.

applicable.[488] Among the ten member States who signed it nine, however, have ratified it.[489]

Five, article 3 of the Hague Convention on the law Applicable to Matrimonial property Regimes of 14 March 1978 which excludes renvoi.[490] According this article the applicable law that governs the matrimonial property regime is the internal law designated by spouses before marriage.[491] If, however, the spouses did not designate the law to govern their matrimonial property regime before marriage this will be governed by the internal law of the State where both spouses, after the marriage, established their first habitual residence.[492] Only two among the four member States have ratified it and consequently the Convention has not entered into force.[493]

Six, there are indications that the Hague Convention on the Law Applicable to Agency of 14 March 1978 excludes renvoi implicitly.[494] According to article 5 the agency relationship between the principal and the agent is governed by the internal law chosen by them. If this law, however, is not chosen the applicable law will be the internal law of the State of the agent' s business establishment. If there is no such business establishment it will be the internal law of his habitual residence.[495] This Convention has not entered into force because it has been ratified only by two countries.[496]

Seven, the new Hague Convention[497] on the law applicable to contracts for

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488- See Conférence de la Haye de Droit international Privé , *Op.cit.*,pp 142-143.

489- See Information Concerning the Hague Conventions on Private International Law, *Loc.cit.*, p 215.

490- Foyer, J.,*Loc.cit.*,p 113; Derruppé, J., 111 *Clunet, Loc.cit.*, p 871.

491- The spouses have the right to designate one internal law. These are: the law of the State of the nationality of either spouse, the law of the State of the habitual residence of either spouses at the time of designation or the law of the first State where one of the spouses after marriage establishes a new habitual residence.

492- See Article 4. Conférence de la Haye de Droit International Privé,*Op.cit.*, pp 228-231.

493- See Information Concerning the Hague Conventions on Private International Law, *Loc. cit.*,p 218

494- Foyer, J.,*Lo.cit.*, p 113; Derruppé, J., 111*Clunet, Loc.cit.*, p 113.

495- For more details on the application of the internal law of the state where the agent is primarily to act see article 6 para 2 , Conférence de la Haye de Droit International Privé *Op.cit.*, pp 252 - 255.

496- See Information Concerning the Hague Conventions on Private International Law, *Loc. cit.*, p 218

497- The revision of the Hague Convention on the International sales of goods of 1955

the international sale of goods signed on the 22nd of December 1986 is said to exclude renvoi in Article 15 which says that " In the Convention ' Law ' means the law in force in a State other than its choice of law rules".[498]

Finally, the more recent Convention established by the Hague Conference, which excludes renvoi, is the Convention on the law applicable to succession to the estates of deceased persons.[499] In fact, article 17 states that " in this Convention, and subject to article 4, law means the law in force in a State other than its choice of law rules".[500]

B)- Repudiation of Renvoi by the Rome Conventions.

1)- Implicit rejection of renvoi in the Convention of 10 September 1970. The implicit exclusion of the mechanism of renvoi can also be noticed in the Rome Convention on legitimation by marriage signed in Rome on the 10 of September 1970. In fact, article 1 of the Convention indicates that if according to the internal dispositions of either the national law of the father or that of the mother, their marriage accords legitimation to a natural child, this legitimation should also be considered as valid in the contracting States. Besides, Article 3 as well states that public policy cannot stand against the validity of legitimation as far as this is in accordance with the internal law of either the national law of the mother or the father.[501]

2)- Explicit rejection of renvoi in the Convention of 19 June 1980. If renvoi has been excluded in matters of contract by legislation and jurisprudence such repudiation has also been advocated in international level. In fact, the E.E.C. Convention project on the applicable law to contractual

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was, therefore, achieved by the elaboration of New Hague Convention on the law applicable to contract for the international sales of goods by which it states in article 28 that the latter Convention shall replace the former. Pelichet, M., *Loc.cit.*, pp 192, 207.

498- *Ibid.*, pp 176, 203, Originally emphasised.

499- The final draft was completed in October 1988. See *Hague Convention on Succession*, Consultation paper, Lord Chancellor' s Department Scottish Courts Administration, 1990, p 30.

500- *Ibid.*

501-This is an indication that it is by the substantive rules that the legitimation can be reached. See Foyer, J., *Loc.cit.*, p 113; Derruppé, J., 111*Clunet*, *Loc.cit.*, pp 113-114; See also 103 *Clunet*, (1976), p 740.

obligation, which became the Rome Convention of 19 June 1980,[502] is said to exclude renvoi expressly from the Convention through its article 15.[503] By referring to its disposition, this article states that " The application of the law of any country specific by this Convention means the application of rules of law in force in that country other than its rules of Private International law".[504] More clearly this explicitly can be noticed through the sub-title of the Convention labelled as exclusion of renvoi".[505]

By way of summing up, the aim of the E.E.C. Convention[506] on the law applicable to contractual obligations is the establishment of uniform rules in this area.[507] Article 15, in fact, is an example of such uniform rule which gives a negative solution to the mechanism of renvoi.[508]

502- The Rome Convention on the law applicable to contractual obligation was signed 19 June 1980 in the framework of the E.E.C. For the proposed Rome Convention on the law applicable to Contractual obligations. See 23 Official Journal of the European Communities [O. J.] L / 226/ 1, Oct. 9, 1980; See Juenger, F., " The European Convention on the Law Applicable to Contractual Obligations. Some Critical Observations" 22*Virginia Journal of International Law*, (1982), p 123, note 1; See also Lawenfeld, A.F., " Renvoi Among the law Professors: An American's View of the European of American Conflict of Laws, 30 *Amer. J. Comp. L* (1982), p100, note 104.

503- Foyer, J., *Loc.cit.*, p 113; Derruppé, J., 111 *Clunet, Loc.cit.*, p 114, See also page 122 footnotes 26 bis; See Bellet, P., 70 *Re .cri.t dr..int..priv.,Loc.cit.*, p 211; Von Overbeck, A E., *Loc.cit.*, p 134; See Derrupé J., " Le Renvoi dans les Conventions Internationales,", *Loc.cit.*, p 3.

504- See Sandrock, O., *Loc.cit.*, p 203.

505- Foyer, J., *Loc.cit.*, p 122 footnotes 26 bis.

506- Concerning the problem of ratification its article article 29 par (1), states that the Convention shall enter into force unless Seven member states will deposit their ratification or approval., See Sandrock, O., *Loc.cit.*,pp 148-149; Morris, J.H.C., *The Conflict of Laws, Op.cit.*, p298; The U.K. now has enacted the Contracts (Applicable Law) Act, 1990. This constitutes the seventh ratification. See *The British Institute of International and Comparative Law*, N° 4, October 1990.

507- See in this context the preamble of the Convention in English version in Sandrock, O., *Loc.cit.*, p 195.

508- Badiali, G.," le Droit International Privé des Communautés Européennes", *Recueil des cours* Vol. II, Tome 191, (1985), pp 69, 102.

Remarks

1)- Following scholars' controversies upon the application of renvoi through different cases , the writer would like to draw attention to different points.

First, *Collier* v. *Rivaz*, *Frere* v. *Frere*, and *Goods of Lacroix*, have been considered as the first English decisions which admitted renvoi despite the fact that they did not use the renvoi expression.[509]

Second, concerning the case of *Maltass* v. *Maltass* John Delatre Falconbridge has said that this case "...contains a dictum favourable to the renvoi but the decision did not involve the renvoi". [510] There are, however, those who believe that *Maltass* v. *Maltass* cannot be regarded as a precedent or authority that favours the use of renvoi for the simple reason that the treaty which contains a rule of private international law, that is applied to both countries, does not involve conflict of laws. In other words, the treaty of peace avoids the emergence of any question of conflict of law because the disposition of the treaty itself represents a common private international rule for both the U.K. and Turkey.[511] According to this view the application of English law concerning the succession of a British subject, who died in Turkey, is confirmed by a disposition of the peace treaty of 1809 concluded between Ottoman Empire and England.[512] Albrecht Mendelssohn Bartholdy denies, in fact, any form of renvoi in this case when he says that " *Maltass* v *Maltass*is not concerned with either renvoi or transmission and is not a case of conflict of laws in the proper sense of the term".[513] Moreover, John Pawley Bate himself denies any claim that *Maltass* v. *Maltass*should be considered as a renvoi case and in his opinion the succession of a British subject should be governed by English law because of the treaty and not by remission from Turkish law.[514]

509- Martin, W., *Op.cit.*, p 189.

510- Falconbridge, J.D.,*Essays on the Conflict of Laws*, *Op.cit.*, p 148.

511- It must be noted that in that case Dr Lushington refers to the case of *Collier* v. *Rivaz*. (1844), 1 Rob, Eccl. 67; See Mendelssohn-Bartholdy, A., *Op.cit.*, p 65.

512-See Mendelssohn-Brtholdy, A.,*Ibid.*, pp 65-67.

513- *Ibid.*, p 75.

514- Bate, J.P., *Op.cit.*,pp 11-12.

Third, in *Re Johnson*, although renvoi is said to be approved partly by *obiter dicta*,[515] the English court in this case, used for the first time the renvoi expression.[516]

Four, in reply to the question of whether the case of *Re Trufort* can be considered as an Authority for transmission Albrecht Mendelssohn Bartholdy has maintained that the decision in the *Re Trufort* concerns matters of jurisdiction and could not be considered as a renvoi or transmission decision.[517] In his view, Edwin H. Abbot too maintains that "...The present case ...is an example not of renvoi but of *res judicata*." [518]

Five, if renvoi is said to be applicable in legitimation by subsequent marriage the doubt, however, is whether under the legitimacy Act of 1976 S 3 its mechanism is applicable to the recognition of a foreign legitimation.[519]

Six, it should be noted that *Armitage* v. *Attorney Gen* is also controversial on whether it represents a renvoi case. As a matter of fact, it has been pointed out that the recognition of a foreign decree of divorce in England because it would be recognised by the courts of the domicil of the parties " ...has nothing to do with renvoi)" [520] From another point of view *Armitage* v. *Attorney Gen*.cannot be considered as a renvoi case but a decision which concerns the courts jurisdiction.[521] In other words, the issue deals with matter of the court jurisdiction and not with the conflict of laws.[522]

Seven, if it is a true to think that nowadays an Italian court will consider the national law of a British subject domiciled in Italy to mean Italian law and not his domicile of origin or English law this belief will lead to an important change. As a matter of fact, Morris, J.H.C., went so far as to say that "... the cases of *Re*

515- See Wolff, M., *Op.cit.*, pp 194-195.

516- *Ibid.*, p 195, note 2. See Schreiber, E.O.,*Loc.cit.*, p 523

517- Mendelssohn-Bartholdy, A., *Op.cit.*, p 75.

518- Abbot, E.H.,*Loc.cit.*, p142.

519- Cheshire & North, 11th edition, *Op.cit.*, p 73, notes 12. Though of course *Re Askew* [1930] 2 Ch. 259 (pre Act) is a famous renvoi case on legitimation.

520- Morris J. H. C., *The Conflict of Laws*, *Op.cit.*, p 475.

521- See Falconbridge, J.D., *Essays on the Conflict of Laws*, 1954, *Op.cit.*, P 745; Cheshire & North, 11th edition, *Op.cit.*, p 71, notes 19; .

522- See Dicey & Morris , 1987, *Op.cit.*, p 82. See *Supra.*, Section 1, Sub-section 1, p 148.

Ross and *Re O' Keefe* are no longer reliable guides ".[523] It should also be borne in mind that although the revival of the domicil of origin has been rejected in the U.S.A.[524] and its abolition is recommended by the law Commission it is, however, still adopted by the English jurisprudence.[525]

Eight,with regard to the use of double renvoi to upheld a will it has been stressed that the use of total renvoi in *Re Annesley* led to the partial validity of a will. According to an opinion, however, the will, would be entirely valid if the theory of simple renvoi was applied.[526]

2)- Of course the renvoi mechanism has been used and excluded by English courts. There must be, therefore, justifications of either position. It means if the repudiation of renvoi, for instance, in contract is due to the incompatibility of its mechanism with the intention of the parties, what is then, the justification of using its mechanism by English courts.[527] Views in this context, however, differ. According to Elizabeth Edinger "...English Cases appear to use renvoi both as a rule and as an alternative rule..."[528] It is meant by the latter rule that "...renvoi is really being used...as an alternative rule of validation...".[529]

3)-The argument which considers that the rejection of the mechanism of renvoi by the Algerian legislature is logical on the ground that it avoids the application of Algerian family law, i.e., Islamic principle on foreigners seems also

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523- Morris, J.H.C., *The Conflict of Laws,Op.cit.*, pp 479- 480.

524- In the United States of America there has been a shift from the revival of the domicil of origin to a rule which maintains that an existing domicile should continue until the acquisition of a new domicile. See in this context, Graveson, R.H., *Comparative Conflict of Laws, Selected Essays* , *Op.cit.*, p 243.

525- See the Law Commission Working Paper N° 88, and the Scottish Law Commision Consultative Memorandum N° 63, *Op.cit.*, Para. 4.22., See also The Law Commission and the Scottish Law Commission (Law COM N° 168) (Scot Law Com. N° 107), *Op.cit.*, p 8; For more details see especially, Carter, P.B., " Domicile: the Case for Radical Reform in the United Kingdoom., *Loc.cit.*, p 716;

526-Wolff, M., *Op.cit.*,p 204. note 3.

527- Parties' intentions and expectations are important in contract, but different considerations may be said to apply in matters of status. However, the writer queries whether there should be such a distinction.

528- Edinger, E., *Loc.cit.*, p 50.

529- *Ibid.*, p 48.

unacceptable. It can be replied to this argument that if this is the only reason for the repudiation of renvoi by the Algerian legislation why should not the renvoi mechanism be accepted if the foreigners are not Christians but French or British Moslems? Because, whatever is the applicable law, in this context, nationality or domicile, Islamic religion principles will be applied. So What is the real problem!. It seems, therefore, that there will be no problem in accepting renvoi if the foreigners are British Moslems but otherwise, i.e., if they are British Christians. There is indeed a problem.

4)- Furthermore the penetration of renvoi in matter of form, i.e., *locus regit actum* has been seen from practical aspects. As a matter of fact it has been claimed that renvoi from the local law of the *locus regit actum* to a third law should not be favoured if it leads to the invalidity of the legal act.[530] Others have remarked that if renvoi from the local law to a third law, as the common law of the parties, leads to the validity of the act such renvoi should be admitted.[531]

5)- It should be noted that the argument which supports the view that there is a certain incompatibility between the autonomy law and renvoi in matter of contract[532] has been considered as not absolute. In fact, From Graveson's point of view there is no reason to exclude renvoi in contract if the parties, themselves, chose expressly the proper law and would stress that it included the conflict rules of the chosen system.[533] According to others, claiming that renvoi principle finds no place in contract is" also not invariably true".[534] From their point of view the Case of *Re United Railways of Havana and Regla Warehouses*[535] does not show that the intention of the contracting parties was the exclusion of the foreign conflict rules and the proper law, therefore, could include the whole foreign law. In addition to that, § 187 (3) of the second

530- Audit, B.,*Loc.cit.*, p 334.

531- *Ibid.*

532- Foyer, J., *Loc.cit.*,p 124.

533- See Graveson, R.H., *Conflict of Laws*, *Op.cit.*, p 76; See also Spiro, E.,*Loc.cit.*, p 201; Sadekh, H.A.,*Op.cit.*, pp 83-84.

534- Levontin, A.V., *Op.cit.*, p 60.

535- [1960] Ch. 52, 97.

American Restatement of the Conflict of laws has also been cited as an example to support this view.[536]

6)-Concerning the problem of autonomy law in relation to matrimonial property regime it has been claimed that if according to the decision of Mari-Magni renvoi is dismissed in a case of matrimonial property regime it does not mean, however, that it condemns the mechanism of renvoi totally in this field.[537]

7)- Alternative conflict rules have also been used by conventions, such as, the Hague Convention on the testamentary dispositions of 5 October 1961 in order to achieve the validity of a legal Act.[538]

Moreover, the point to be emphasized is whether the Wills Act of 1963 repeals the previous one, i.e., the Wills Act of 1861.? From a historical point of view and according to English law before 1861, the will was formally valid only if it complies with the forms prescribed by the law of the testator' s last domicile.[539] This, however, was amended by the passing of Lord Kingsdown' s Act of 1861 which gave the testator the right to choose between the forms required by various laws.[540] In the twentieth Century, however, Lord Kingsdown' s Act was amended by the Wills Act of 1963.[541] The problem to be emphasized is that section 2 (1) (b) of the Act has been considered as excluding renvoi despite the fact that the doctrine of renvoi has not been abolished by the Act.[542] In the view of the advocates of the possibility of renvoi it has been

536- Levontin, A. V., *Op. cit.*, 1976, P 60 notes 136. However, the modern ' British' view may be expressed generally to be against the use of renvoi in contract.

537- Drruppé, J., 111*Clunet*, *Loc.cit.*, p 870.

538- Derruppé, J.," le Renvoi dans les Conventions Internationales?"*Loc.cit.*, p 5.; Foyer, J., *Loc.cit.*, p 117.

539- This rule is the old Common law rule concerning the formal validity of wills. See Dicey & Morris, 11th edition, *Op.cit.*, p 80.

540-According to Lord Kingsdown's Act the will made by a British citizen will receive probation if it is done outside the United Kingdom provided it respected the required formalities of one of the three stated laws. These are first forms of the law of the place of making the will. Second, Forms of the law of the domicile of the testator at the time of making the will. Finally, forms of the laws of the domicile of origin of the testator. See Falconbridge, J. D., " Renvoi in New York and Elswhere" *Loc.cit.*, pp 712-713; Dicey & Morris, *Ibid.*, pp 76- 77 notes 11.

541- Morris, J.H.C., *The Conflict of Laws*, *Op.cit.*, pp 471-472, note 10.

542- Dicey & Morris, Rule 141, 11th edition, *Op. cit*, pp 1015, 1017.

stressed that although the English Wills Act of 1963 excludes renvoi by referring to the internal law of various laws systems stated by this Act it does not, however, abolish the old common law rules for the formal validity of wills through which there might be a possibility of renvoi from the law of the testator's last domicile.[543] Others have remarked that despite the fact that the Wills Act of 1963 is said to be against the renvoi doctrine, section 2 (1) (d) has led to a belief in the possibility of renvoi through this provision. According to this view renvoi can be seen through this disposition because that section "...refers to ' the law ' governing the essential validity of the power, and not to the internal law of that system."[544]

8)- It is obvious that International Conventions may either reject renvoi or accept it. The problem, however, is with the Conventions which are silent on renvoi. According to an opinion those conventional rules qualified as silent on renvoi should be considered as rejecting it implicitly.[545]

9)- It must also borne in mind, however, that even the rejection of renvoi in the Hague Conventions is not absolute.[546] The question which arises, in this context, is whether the testamentary dispositions will be valid if it complies with the laws other than those stated in article 1? The answer is positive in that article 3 of the Hague Convention on the conflict of laws relating to the form of testamentary disposition states that " ...The present Convention shall not affect any existing or future rules of law in contracting states which recognizes testamentary dispositions made in compliance with the formal requirements of a law other than a law referred to in the preceding Articles."[547] This means that if there is a rule in the contracting state which accepts the mechanism of renvoi

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543- See *Ibid.*, p 80; Morris, J.H.C., " The Wills Act, 1963 ", *Loc.cit.*, P 684. See alsoJaffey, A.J. E., *Op.cit.*, p 205 notes 36.

544-This provision concerns the English Powers of appointment Originally emphasised. See in this context Graveson, R.H., *Comparative Conflict of Laws, Selected Essays, Op.cit.*, pp202, 205.

545-Derruppé,J., " Le Renvoi dans les Conventions Internationales" *Loc.cit.*, p 4.

546- *Ibid.*, p 3.

547- See Art 3, of the Convention on the Conflict of Laws Relating to the Forms of Testamentary Dispositions, Concluded on the 5th October 1961. Conférence de la Haye de Droit International Privé, *Op.cit.*, pp 48-49.

in a matter of form of act this rule should be upheld.[548]

10)-It has been noticed that the renvoi mechanism may occur in the Conventional level if the conflict rule selects or indicates the application of law of a non contracting State.[549] In this respect, it has been claimed that if a conflict rule rejects the mechanism of renvoi between the contracting States and accepts it in relation between those States and a non contracting State this is due to the fact that in the former there is a common rule which eliminates a negative conflict and then the renvoi issue.[550] For instance, the Hague Convention on the law applicable to succession to the estates of a deceased person[551] is said to admit the mechanism of renvoi when the case involves a non Contracting States. As a matter of fact article 4 states that: " If the law applicable according to article 3 is that of a non-Contracting State, and if the choice of law rules of that State designate,...the law of another non-Contracting State which would apply its own law, the law of the latter state applies." [552] It can be noticed that although the Convention excludes renvoi in its article 7 an exception has been made by article 4.[553] Whether the United Kingdom will admit the limited renvoi of this article or benefits from the reservation of article 24 para 1(b),[554] in case the Convention come into effect, is still questionable.[555]

Additionally, Article 4 (2) of the Hague Convention on the law applicable to matrimonial property regimes is said to consecrate renvoi. According to its dispositions "...the matrimonial property regime is governed by the internal law of the State of the common nationality of the spouses...where that State is not a

548- Derruppé, J., " Le Renvoi dans les Conventions Internationale?" *Loc.cit.*, p 3.

549- Von Overbeck, A. A., *Loc.cit.*, p 130.

550- Derruppé, J., " Le Renvoi dans les Conventions Internationales" *Loc.cit.*, pp 5 - 6.

551- See the manuscript that was under revision in the sixteenth session of the Hague Conference on private international Law during the 3rd and the 2oth of October 1988. See in this context Aranguren, G.P., *Loc.cit.*, p 80, note 149.

552- *Ibid.*, emphasise added; *Hague Convention on Succession*, Consultation Paper, *Op.cit.*, p 18.

553- Hague Convention on Succession, Consultation Paper, *Ibid.*, p 30.

554- This article concerns the possibility of a State in making a reservation against article 4 ehich allows a limited renvoi, *Ibid.*, p 36.

555- *Ibid.*, p 40.

Party to the Convention and according to the rules of private international law. of that State its internal law is applicable...".[556] It has been pointed out, in this context, that the Matrimonial Property Regime Convention consecrates renvoi between a contracting State and a State which is not a party to Convention. The latter, therefore, must be the State of the Common nationality of the spouses that accepts the competence[557],i.e., a reference is made to the international private law rules of the non-Contracting State.

556- Conférence de la Haye de Droit International Privé ,*Loc.cit.*, pp 228-229; See *Re. crit. .dr. intl. priv.*,(1976), p 822; See la Treizième session de la Conférence de la Haye de Droit International Privé, 65 *Re. crit. dr. intl. priv.*, (1976), p 821. Emphasise added.

557- Derruppé, J., " Le Renvoi dans les Conventions Internationales" *Loc.cit.*, p 3.

Chapter 4
Conclusion

1)- It follows from the facts stated in the above chapters that the main characteristic of the mechanism of renvoi is that it represents a difficult issue. Besides, it is a problem which concerns the general theory of private international law.[1] One should also remember that if renvoi might be applied by a country X whereas its mechanism is rejected in the country Y this indicates that up till now there is no universal solution to the subject that can be accepted by all countries. This failure , in fact, is another problem.

2)- With regard to the historical considerations of private internationational law it should be noted that this is not an elementary discussion of this discipline but an account of its elements seems useful as a basis of making a detailed study of the renvoi issue. By referring, for instance, to the development of private international law in the United States of America it can be seen that there has been a substitution of flexible rules of the second Restatement of the conflict of laws for the regid rules of the first one. Concerning the conflict crisis evoked by Kegel it must be emphasised that all differents conceptions, such as, unilateralism, conflict rules, substantive rules and *lois de police* means one thing; that the discipline of private international law knows a coexistence of methods.[2]

3)- If one admits that renvoi occurs because of the divergence of the connecting factors adopted by the two legal systems, it should be remembred that, historically, it is the clash of the internal rules of different countries which gave birth to the discipline of private international law.[3] To this interpretation

1- Badiali, G., "le Droit International Privé des Communautés Europeènnes", *Recueil des cours*, Volume II, Tome 191,(1985), p 102.

2- See *Supra.*, Chapter 1.

3- Bate, J.P.,*Notes on the Doctrine of Renvoi in Private International Law* , London,

one might ask a simple question whether or not renvoi is inevitable? Theoretically, different justifications have been given in this context. There are those who believe that if laws are governed by a super law there will be no conflict of laws.[4] Concerning the call of Savigny for a uniform law it has been stressed that when the diversity of conflict rules is abolished renvoi will not exist.[5] In practical terms, one must realize that these days are not yet with us.

4)-It should also be borne in mind that the main problems of private international law is not only renvoi but other issues which are related to its mechanism, such as, preliminary questions and qualification. Concerning the last issue despite different solutions which have been proposed by scholars in treating the process of characterization, two points are worth emphasasing. First, characterization is a primary process that precedes the renvoi mechanism. Second, both characterization and renvoi have a close link.[6] Of course, it is worth emphasizing the different theories of characterization but it seems also important to make a reflection on the hypothesis that, if renvoi is due to the difference in qualification will the former disappear from private international law when the problem of the latter is resolved? In truth this is another controversial question which requires a thorough search.

5)-Chronologically, it' s clear that renvoi has contributed to the emergence of controversies between scholars from German court via English decisions down to the French jurisprudence in 1882. This is an indication that the phenomenon of renvoi existed even before l'Affair *Forgo*.[7] In fact, if *Forgo*' s case represents an authority upon the origin of the theory of renvoi the truth which

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Stevens & Sons ,1904, p 120; See *Supra.*, Chapter 1.

4- Ehrenzweig, A.A., " Specific Principles of Private Transnational Law" *Recueil des cours*, Volume II, Tome 124, (1968), p 219.

5- Lewald, H., "la Théorie du Renvoi", *Recueil des cours.*, VolumeIV, Tome 29, (1929), p616.

6- See *Supra.*, Chapter 1.

7- *Id.*

should not be denied is that the previous reasoning must not be neglected, otherwise, they might be forgotten. In other words, l'Affair *Forgo* is not the only renvoi case, but renvoi is the subject of discussion of courts, scholars, lawyers before 1882 until the contemporary age. With regard to English jurisprudence it will also be a mistake if the previous cases are ignored and might be an illogical analysis if the discussion started only from the case of *Re Annesley*. The writer, therefore, disagrees with those who believe that this case should be considered as the begining of the application of the renvoi mechanism in English jurisprudence. As a matter of fact, the historical discovery of renvoi is an indication that the reference to those cases, since *Collier* v *Rivaz*, are not only relevant but also necessary to this reflection.

Furthremore, if the controversies upon the acceptance of renvoi in the 19th Century increased it does not mean that before that Century the renvoi question was ignored but it was less dealt with. This is due to the fact that the renvoi issue did not occur so often and also it did not have a lot of advocates to support its mechanism as is the case in the 19th and the 20th Centuries.[8] It was only after 1882 that the controversies upon the process of renvoi have widened.

6)- If either nationality or domicile represents the favoured connecting factor for the country X or Y this means that each country bases its choice for either principle on practical and social factors.[9] In fact, if personal law is governed by the concept of nationality or domicile, this shows that each connecting factor is taken into account on the basis of its characteristics.

7)- As the "cold war" between the two camps illustrate, the controversies on renvoi indicate that scholars differ on the question of what is the real and logical solution that will be achieved by renvoi? One must remember that each

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8-*C.f.*., Meijers, E.M., " la Question du Renvoi" 38 *Bulletin de l'Institut Juridique International* " (1938), pp 200, 202; See *Id.*

9- Graveson, R.H., *Conflict of Laws. Private International law*, 7th edition, London, Sweet & Maxwell, 1974, p 190.; See *Supra.*, Chapter 2.

conception that defends or condemns its mechanism does not escape other scholars' criticism.[10] Concerning the question of whether renvoi can achieve principles of private international law, such as, harmonization and coordination of systems this should be related, historically, to Savigny who recognised for the first time the possibility of the legal harmony in private international law.[11] This consideration, therfore, is useful in that it leads to the question of whether this legal harmony is totally achievable nowdays? More important, if the basic argument of the pro-renvoiists is that renvoi represents a technique that leads to uniformity of law, the real question is whether it is the only technique which provides such uniformity? To this it can be replied that there are other ways by which the uniformity of law can be achieved, such as, uniform legislation and International Conventions [12] Besides, if uniformity of decisions and harmony of laws have been considered as the main arguments of justifying renvoi one must find out whether renvoi really achieves these principles or the fact that scholars want only to talk about them? If the answer supports the view that renvoi achieves these principles it will be still doubtful once those exceptions where renvoi has been repudiated are taken into account. Does it mean that uniformity of decisions and harmony of laws cannot be achieved by renvoi mechanism in those situations? If yes the writer believes that although those arguments might be advocated by the pro-renvoiists they are not strong enough to be applied as a general principle. Concerning the view that renvoi might achieve international harmony and coordination of conflict systems this becomes unacceptable when one hears that renvoi also leads to the infringement of the expectations of the parties or to nullify certain legal acts. Is is, therefore, possible that renvoi can

10- See *Supra.*, Chapter 2.

11- *Id.*

12- See Nadelmann, Kurt, H., *Conflict of Laws: International and Interstate, Selected Essays*, by Cavers, D.F., *et al.*, The Hague, Martinus Nijhoff, 1972, p 88; Von Ovebeck, A.E., " Les Questions Générales du Droit International Privé À la Lumière des Codifications et Projets Récents. Cour Général de Droit International Privé," *Recueil des cours*, Volume III, Tome 176, (1982), p 162.

lead to the the former without making the latter consequences possible ? In other words, if renvoi according to those who advocate it leads to a positive consequences, logically, its process should not lead to negative consequences as well. Of course it is a better way if principles, such as, harmony of solutions, coordination of systems, etc can be achieved through the process of renvoi. It is worse and dangerous, however, if its mechanism is used as a ruse under the name of the achievement of of certain principles of private international law.

Moreover, it is difficult to maintain the view of those who believe that accepting renvoi is better than rejecting it on the ground that it leads to the application of a uniform law by different countries.[13] It can be replied to such reasoning that if uniformity of law can really be achieved by renvoi why is the number of countries that refute renvoi numerous and also what is the usefulness of a non ratified Convention which adopts its mechanism, such as the Hague Convention of 1955? Besides, if international harmony can really be achieved by the process of renvoi why does article 15 of the EEC. Convention of 1980, for instance, excludes its mechanism?[14]

8)-If the anti renvoiists support their view by referring to the difficulty found by Wynn-Parry J in the Case of *Re Duke of Wellington*, .i.e., of ascertaining the view of Spanish law on renvoi, it can be said that this particular statement is outdated.[15] Moreover, the view which says that renvoi does not erase the opposition between nationality and domicile but multiplies the difficulties and makes harder the judge' s task[16] should not be considered as the main argument to reject renvoi. Perhaps, this argument might have a legal value in the 19th Century and the beginning of the 20th Century, but it should

13- Meijers, E.M., *Loc.cit.*, p 219.

14- See *Supra.*, Chapter 3.

15- Anton, A.E., *Private International Law, A Treatise from the Standpoint of Scots Law,* Edinburgh, W. Green & Son L.T.D,1967, p 59; See *Supra.*, Chapter 2.

16- Maridakis, G.S.," les Principaux Traits de la Récente Codification Héllinique Touchant le Droit International Privé" *Recueil des cours*, Volume I, Tome 85, (1954), p 169.

not be considered as the most important justification nowadays, otherwise the contribution of International Institution, International Conferences, Comparative studies and more important the publications might be ignored. To say it differently, it might be acceptable to maintain the view that renvoi is not a useful device but not under the pretext that it is hard for the judge to know the foreign law and its contents.

9)- The view that renvoi is a classical problem and should be neglected is not accurate. In fact, the arguments of those who are against a further analysis of its mechanism should be considered as exaggerating. Of course renvoi is a difficult issue but this is not a justification for ignoring it. Was it , practically, possible and easier for Wynn Parry to ignore renvoi in the case of the *Duke of Wellington*?

10)- Furthermore, if your fascination about renvoi leads you to know more and more about this controversial issue you might be astonished if you are advised by a professional or a novice that you have only a few things to say on this subject. How would you react? It seems that this advice could be right if you are dealing with renvoi only from one legal system or you are based only on a limited conception. It is also a right guidance if your analysis refers to different criticisms but without any analytical mind. This advice, however, is wrong on the basis that logically a person who is entering a cinema while the movie is in progress might not see the audience clearly at the first time. This, however, does not mean that later he could not see who is sitting close to him despite the darkness of the room.

11) From a logical point of view, why should the problem of the complexity of renvoi be raised if other techniques are being used to facilitate its discussion, such as, the technique of diagrams? In addition to this, sarcasm is another technique of compensation which tries to clarify what is ambiguous and explains what might be seen as difficult and makes it understandable. So how

can one justify the complexity of the renvoi theory if by the intermediary of the sarcasm technique the reader understands the mechanism of renvoi and also shows a sign of confidence once he can imagine such autopsy being made on renvoi and follows the process of the trial till the end of the deliberation of either camp?[17]

12)- Scholars' controversies also indicate that there is a trend which is in favor of renvoi and the second one rejects it. Concerning the first trend, although the pro-renvoiists' s arguments have tried to prove the usefulness and the necessity of the mechanism of renvoi theory these are divided upon its application. There are those who support renvoi remission others adopt renvoi transmission and a third tendency prefers another conception of a unilateral application. The first approach has been adopted by French *cour de cassation* in the famous *Forgo'* s case. The last approach, known as the foreign court theory, works in relation to countries that apply renvoi of first or second degree and to those who reject it. It does not work, however, with another country that applies the same doctrine. The second trend, however, means always the application of the domestic law of the foreign law, as illustrated by the Hague Conventions and the Italian civil code.[18]

13)- With regard to the application of renvoi as a general principle or exception scholars' arguments can be grouped into two main tendencies. First, the rejection of renvoi in principle but allowing some exceptions : in fact, although the opponents camp is against the application of the renvoi theory it has, however, accepted its application in exceptional cases.[19] Second, its acceptance in principle while recognizing some exceptions: it means that an intermediate tendency has been found in which renvoi is accepted in some field

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17- See *Supra.*, Chapter 2.

18- See *Supra.*, Chapter 3.

19- See Cowan, T.A.," Renvoi does not Involve a Logical Fallacy," 87 *U of Pa L. Rev.*, (1938) pp 40-41.

whereas rejected in others.[20]

Concerning this point the writer agrees with the view which stresses that the question of whether you are pro-or anti-renvoiists is out of date. In fact, the real and the logical question seems to be whether renvoi is a general principle subject to exceptions or the exclusion of its mechanism is the principle.[21] In other words, which is the suitable and logical solution: the rejection or the acceptance of renvoi? According to the writer the answer should be subject to different criteria. First, if renvoi really should be used as a general principle it should be subject to different principles, such as, the necessity to avoid the infringment of the parties' expectations. In fact, this reflection has shown that renvoi controversies deal with different personalities such as, Mr *Forgo*, Mrs *Annesley*and Miss *O' Keefe*. These and others , however, might be a victim of any unsuitable conception or a solution to the renvoi problem. Second, if the rejection of renvoi will be maintained it should be subject to another condition, such as, avoidance of the dogmatic view that it is difficult for a judge to know the foreign law. Which of these criterion is likely to be fully supported nowdays is a question not easily answered. To say it differently, the question whether the use of renvoi is much better than its elimination or vice versa is still controversial.

14)-One plus one is definitely two. Two, however is not only the addition of those two numbers but it could be the substitution of four minus two. This leads straight to the point that even if the phenomenon of renvoi is universally known its justifications differ from one scholar to another and from one jurisprudence to a different one depending on their own legal, theoretical, practical and rational bases. In other words, despite the usefulness of both camps' conceptions it can clearly be noticed that there is still a lack of general consensus from all scholars on the renvoi dispute. More important the analysis

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20- Pagenstecher, M., " Renvoi in the United States, A Proposal" 29 *Tulane Law Review*, (1954-1955), p 387; See Von Overbeck, A.E.,"*Loc.cit.*, p 133.

21- *C.f.*, Foyer, J., "Requiem pour la Renvoi?" Séance du 4 Juin 1980, *Travaux du Comité Français de Droit International Privé*, (Annees 1979-1980, p 129.

of the controversial conceptions that have tried to justify renvoi leads to the question of whether those justifications represent truly decisive arguments that prove the soundness and the inevitability of renvoi? To answer this question the accuracy of these theories should be looked at not only from a dogmatical standpoint but one should also examine whether they interpret and justify the mechanism of renvoi as logical and a unique process? If the answer is yes, the doubt will still persist as far as many scholars, jurisprudence and legal systems reject its mechanism. It can also be noticed that what scholars have tried to do is to prove either the usefulness of renvoi or its uselessness. The writer' s view is that this justifications are not convincing because you cannot prove that each argument is correct : nothing is perfect 100%. For this reason in order to understand the renvoi difficulties and try to solve its controversies we must rely on logical and pragmatic solutions. In other words, the logical solution should depend not only on the unilateral proposition of scholars and Judges' views but it should also be supported by international agreements whether they are bilareral or multilateral Conventions.

15)-It is not only the theory which is divided into two camps upon the problem of renvoi. The division, however, can also be seen through case law, legal systems and International Institutions. In fact, The analysis of its mechanism in Continental and Common law countries clarifies the controversial discussion among scholars and judges and also shows the consequences[22] that result from either position, i.e., acceptance or repudiation of renvoi.[23]

The application of renvoi in France shows , of course, the different forms of renvoi and the various fields of its application. It also indicates the legislative policy of the French legal system behind accepting renvoi in some areas and rejecting its process in other areas.

22- Graveson, R.H., Conflict of Laws, Private International Law, 7th edition, London,, Sweet & Maxwell, 1974, p 65.

23- See *Supra.*, Chapter 3.

Concerning its application in England it must be admitted that there has been a divergence between judges and scholars upon the adoption or the rejection of the theory of renvoi in English jurisprudence. There are those who support the view of the application of the internal law theory by English judges. Others, however, agree upon the application of renvoi but differ upon the forms used by English judges. On the whole, whether it is a transmission, remission or foreign court theory all these forms represent part of English law. Concerning those scholars who believe that the foreign court theory has an advantage in achieving principles of private international law, it can be replied to this view that if this is the case why, practically, the double renvoi theory is not the only form applied by English courts? Second, what is the usefulness of a doctrine that in its application can only be unilateral?

Although Algerian jurisprudence and legislature are silent about renvoi, it has been said that as a rule its mechanism is excluded by the Algerian legal system. This rejection has been supported on the ground that it will avoid the risk of applying norms which are unknown to the foreign citizens domiciled in Algeria, bearing in mind that Algerian family law is based upon Islamic religious principles. However, it can be proposed to the Algerian legislature that there should be an express position on the renvoi issue. The express rejection of renvoi, according to the writer, seems to represent the right solution as far as there is no disestablishment of the Islamic religion from the State. Besides, this can avoid any misunderstanding of the legislature' s position and also avoid the misinterpretation of article 23 which concerns the internal conflict .[24]

16)- Concerning the limitations of renvoi this can be seen through both internal conflict rules and Conventional conflict rules.[25] As indicated above there are strong arguments against the use of renvoi in matters related to the autonomy principles and alternative connecting factors.[26] With regard to the

24-*Id.*

25-*Id.*

26- Von Overbeck, A, E., *Loc.cit.*, p 153.

position of International Conventions these have either rejected or accepted its mechanism. As an example of the latter position it can be noticed that the Hague Convention of 1955, which established renvoi, tends to coordinate the divergence of the Conflict rules between different States.[27] Concerning the former position one has to mention the work of the Hague Conference since 1960 which have tried to establish Conventions that refer to the internal law of any State indicated in the Convention.[28]

With regard to the prospects of its mechanism in the future, it can be said that whether renvoi should be repudiated or admitted in private international law is a very difficult issue to be predicted. What is true is that the flexibility of the law shows that there is a movement of revolt in the whole field of private international law, such as, the condemnation of renvoi in many fields and lastly the international call for the unification of private international law. It can also be argued that what has been said against renvoi has restricted its field of application. An examination of the scopes of renvoi justifies this claim. More important, the imposed restrictions expression used in the third chapter does not mean the total rejection of renvoi in these stated fields by all countries. It shows, however, that if renvoi mechanism has been excluded in some areas this is not the final and definitive scope of its mechanism. Who knows? Other arguments could be proposed in the future to support the view that other areas might be found as incompatible with the process of renvoi. In fact, this proves that its mechanism is not safe and might be subject in the future to other exceptions and then to another failure. The question which has to be asked, therefore, is what will be the reaction of renvoi advocates if the future can admit the possibility of witnessing a day to checkmate renvoi?

27- De Nova, R., " Historical and Comparative Introduction to Conflict of Laws "Recueil des cours, Vol II, Tome 118, (1966), p 523.

28- Conférence de la Haye de Droit International Privé, *Actes et Documents*, Tome III, Edités par Le Bureau Permanent de la Conférence, Imprimerie Nationale, La Haye,1978, p 37.

On the whole as a general rule it can be affirmed that sooner or later everybody is going to die. With renvoi it can be maintained that this star has left its moments of adolescence and is facing what might come afterwards according to the rule of transition. Who knows this might be the last days of its old age!

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