A RESTATEMENT OF CONFLICT OF LAWS (PRIVATE INTERNATIONAL LAW) FOR THE PHILIPPINES

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A major program now being undertaken by the University of the Philippines Law Complex is a series of studies to revise the Philippine Civil Code. Through the Institute of Government and Law Reform (formerly the Division of Research and Law Reform) of the U.P. Law Center, various committees composed of civil law experts are conducting group studies to formulate draft proposals to be submitted to the Congress of the Philippines, to revise the Civil Code to update and make its provisions more relevant to Philippine society.

The present Civil Code drafted by a Code of Commission created under Executive Order No. 48 (1947) was approved as Republic Act No. 386 on June 18, 1949. The Code took effect a year after its publication in the Official Gazette.

Although the commission was mandated to draft a Civil Code "in conformity with the customs, traditions and idiosyncrasies of the Filipino people," the Code as approved did not altogether reflect said ideals and in fact retained much of Roman law and foreign law influences. Over the four decades since the Civil Code was enforced, several changes have occurred. A number of Supreme Court decisions interpreted and clarified many parts of the Civil Code.

Scattered in several books and chapters of the Civil Code are provisions governing cases where foreign elements are involved, identified as private international law, or what is now popularly known as Conflict of Laws.

Private international law has not been given much importance in Philippine jurisprudence. Although the subject had been included in the law curriculum since the American legal system was introduced in the Philippines, the textbooks prescribed in law schools were largely written by American authors. Law teachers taught the subject from compilations of doctrines derived from American and English decisions and treatises and comments of writers such as Story, Wharton, Beale, Minor, Weslake and Dicey.

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Even up to this date, Conflict of Laws, compared to other branches of law, had been developed partly because the Philippines had been largely influenced by foreign jurisprudence.

Before the revision of the subjects of the bar examinations, several years ago, public and private international law were combined as a separate bar subject. As now revised, private international law was merged with civil law while public international law is taken as part of political law.

As a result, law students have the mistaken impression that conflict of laws is merely a civil law subject giving it a narrower concept than what it actually is. Its international law character is not stressed. Yet, the subject covers practically the entire range of all the basic law subjects such as persons and family relations, property, obligations and contracts, citizenship, marriage, divorce and annulment of marriage, torts, crimes, negotiable instruments, private corporations, wills and succession, transportation and foreign judgments, as well as treaties and conventions to which the Philippines is a party.

The Philippines as an independent state is in the process of establishing its place as a respectable member of international community, and this is an opportune time to formulate its principles on private international law in compliance with its constitutional state policy that the country "adopts the generally accepted principles of international law as part of the law of the land adheres to policy of peace, equality, justice, freedom, cooperation and comity with all nations."

THE NEED OF RESTATEMENT OF A CONFLICT OF LAWS FOR THE PHILIPPINES

With modern means of transportation and communication, more and more Filipino nationals are exposed to various activities involving a foreign element. There is also the phenomenon of the growing number of intermarriages with aliens, and daily private commercial transactions outside the Philippines. The export of Filipino workers abroad has given rise to problems in contracts, torts, marriages, family and property rights involving diverse foreign laws, cultures, religion and traditions. For as long as there is a diversity of laws, customs, religion and culture among states, there is a need for a universally accepted system of conflict of laws.

In spite of the moves to formulate a uniform system of private law among states, diverse laws and customs still prevail. Private international law should provide insights that may help to manage the multifarious legal problems that arise from the constant interaction of people and their affairs among territorially organized legal systems.

SOURCES OF PHILIPPINE CONFLICT OF LAWS

Most textbooks on Conflict of Laws used in Philippine law schools heavily cite European and American decisions and writings of foreign jurists.

Today, judicial decisions of national courts and international tribunals can now be said to be the main sources of conflict of laws. This branch of law, according to an English author, is more completely "judge-made" than almost any other. In its application, judges have to deal with "all manner of people". More than any other branch of law where a foreign element is involved there is always a risk of discrimination on the part of the judge. The claim of justice or right as basis of conflict of laws is supported not only by the oath a judge takes but by judicial *dicta* in judgments.[1]

Judicial and administrative authorities are also guided by the policy set in the Article II, paragraph 2 of the Philippine Constitution that the state "adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and unity with all nations." Consequently, treaties and conventions entered into by the Philippines are also sources of the subject. Likewise, there are special statutes enacted by Congress which deal with cases involving a foreign element.

Writings of jurists are now referred to only as persuasive sources of Conflicts of Laws.

NATURE AND FUNCTION OF PRIVATE INTERNATIONAL LAW

Private international law, otherwise known as conflict of laws is that part of municipal law which determines whether in dealing with a legal situation, the law of another state will be recognized and given effect, or applied. One of the earliest writers simply defined this

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[1]GRAVESON, CASES ON CONFLICT OF LAWS, 3 (1949).

branch of law as those universal principles of right and justice which govern courts of one state having before them cases involving the operation and effect of laws of another state.[2]

Conflict of laws is a division of international law which concerns the rights of persons, national or juridical, within the territory of one state, by reason of acts done within the jurisdiction of another, based on the broad general principle that a country will respect and give effect to the laws of another insofar as they can be consistent with its own interest. Thus, the conflict of laws, although it is part of its municipal law must be more or less universally recognized, otherwise it loses its character as private international law and the principles of comity and reciprocity.

The foreign law or judgment of one state is recognized and applied in this country provided that in a similar situation, Philippine laws and judgments are also recognized and applied. Ultimately, the main object and function of conflict of laws is to achieve justice in every case where a foreign element is involved.

JURISDICTION AND CHOICE OF LAW

As generally understood, conflict of laws is that part of the municipal law of a state which directs courts or government agencies to apply a foreign law in a case where a foreign element is involved.

Unless the case falls under any of the exceptions to the rule of comity, the Philippine judge is called upon to apply a foreign law if properly pleaded and proved.[3]

Article 17, paragraph 3 of the present Civil Code more or less states the exceptions by stating that "prohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy and good customs shall not be rendered ineffective by laws or judgments promulgated or by determinations or conventions agreed upon in a foreign country".

The aforesaid provision can be broadened to include the exceptions as decided in several cases.

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[2]MINOR, CONFLICT OF LAW (1901).

[3]Collector of Internal Revenue v. Fisher, 110 Phil. 686 1961). A foreign law to be applied must be properly pleaded and proved because a Philippine judicial official has no judicial cognizance of foreign laws. Testate Estate of Suntay, 95 Phil. 500 (1954); PCIB v. Escolin, 11 SCRA 266 (1977).

The generally accepted exceptions to the application of foreign law comity are: where the foreign law invoked is: (1) contrary to public policy; (2) contrary to good morals (*contra bonus mores*); (3) the foreign law is penal in character, (4) the foreign law is procedural; (5) it involves personal or real property in the Philippines; (6) it is fiscal or administrative law; (7) the foreign law might result in injustice to the people of the forum, and (8) the foreign law might endanger foreign relations.

DOCTRINE OF *FORUM NON-CONVENIENS*

Most textbooks used in the Philippines cite only foreign decisions applying the doctrine of *forum non-conveniens*. The doctrine means that even if the local court has jurisdiction over the parties and the subject matter, it may decline to try the case on the ground that the controversy may be more suitably tried elsewhere. In other words, it is inconvenient for the local court due to the difficulty of securing evidence and the attendance of witnesses. If an important element of the incident occurred in another state, on which case the court in that state is in a better position to appreciate its evidence.

Thus in *Wing v. A. SyYap*,[4] the Court of Appeals applied the doctrine by stating that where the ends of justice strongly indicate that the controversy would be more suitably tried elsewhere, then jurisdiction should be declined.

The United States Court of Appeals in the celebrated Union Carbide incident in Bhopal, India sustained a ruling of the District Court of New York dismissing the suit on the ground of *forum non-conveniens*.[5]

In said case, thousands of residents of Bhopal, India filed suits for damages in a New York court as a result of a large scale accident in a chemical plant of Union Carbide in Bhopal. Applying a United States Supreme Court decision,[6] based on the *forum non-conveniens* doctrine, the U.S. Court of Appeals ruled that the court below did not abuse its discretion in dismissing the case.

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[4]64 O.B. 8316, 11 CAR 569, 2nd series.

[5]*In re* Union Carbide Corporation Gas Plant Disaster in Bhopal, India in December 1984, U.S. Court of Appeals, Jan. 14, 1987.

[6]Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1984).

The Philippine Supreme Court in *Keihen Narasaki vs. Crystal Navigation*[7] dismissed a complaint by a Japanese firm to recover the value of supplies and vehicles from a local corporation on the ground of *forum non-conveniens*.

SYSTEM OF PERSONAL LAW

Article 15 of the Civil Code follows the French Civil law system which is the personal law. Under this system, the status, condition and capacity as well as family rights and duties of a person is governed by his national law, which is different from the law of its domicile, as observed in most common law countries. Article 15 was taken from Article 9 of the Spanish Civil Code which was in turn reproduced from Article 3 of Code Napoleon.[8] On the other hand, situations will arise when nationals of countries which follow domiciliary theory in cases involving personal status and capacity will invoke the said theory. Philippine courts will have to apply the law of domicile of aliens residing in the Philippines in such cases.[9]

CHANGE OF DOMICILE

Domicile understood in another concept is provided in Article 50 of the Civil Code. The domicile of a natural person is his place of habitual residence for the purpose of exercising his civil rights and the fulfillment of civil obligations.

With so many persons leaving the Philippines usually to look for a better means of livelihood, the question may arise as to whether they have legally changed their domicile. A person may be a resident of several places but the law recognizes only one domicile at one time. Domicile denotes a fixed place of abode although a person can take residence in several places.[10] He is deemed to have one country as his domicile, a place where he lives and stays permanently and to which he intends to return after a temporary absence somewhere else no matter how long.[11] In order to hold that a person has abandoned his domicile and acquired a new one, there must be actual residence in the new one with an intention to remain there permanently (*animus manendi*) and

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[7]193 SCRA 484 (1991).
[8]Vivo v. Claribel 25 SCRA 616 (1968).
[9]Recto v. Harden 100 Phil. 437 (1956).
[10]Velilla v. Posadas, 62 Phil. 624 (1935); Gallego v. De Vera, 73 Phil. 453 (1941).
[11]Caraballo v. Republic, 114 Phil. 991 (1962).

the intention to abandon his old domicile (*animum revertendi*).[12] In contemplation of conflict of laws, domicile is more or less the permanent abode while residence applies to a temporary stay of a person in a given place.[13] A suggested draft on the determination of a change in domicile is that once domicile of a natural person as determined it remains to be so until a new one is acquired. A new domicile is said to have been acquired when the previous one is abandoned by a natural person who is a *sui juris* with no intention of returning and physically transferring to a new place abroad.[14]

THE *RENVOI* DOCTRINE

In intestate and testate proceedings and in some instances in marriage, the nationality law and domiciliary law systems of personal law may be applied to the same individual. In such cases local courts may apply the *renvoi* doctrine. Thus, in *Aznar v. Christensen-Garcia*,[15] which involved a testate proceeding of an American national domiciled in the Philippines, the Philippine Supreme Court applied the single *renvoi* doctrine and rendered justice to the Philippine heirs of the deceased by granting them the legitime to which they were entitled under Philippine law.[16] In another case the *renvoi* doctrine invoked by one of the parties could not be applied because the decedent was a national and domiciliary of only one state. Most states now accept the *renvoi* doctrine as it gives an opportunity for courts to render justice where it is due.

DUAL AND MULTIPLE NATIONALITY

The provision in the Civil Code enumerating who are citizens of the Philippines is not necessary as this subject is covered by the Philippine Constitution. Citizenship is properly the subject of political law.

Nonetheless, there is a need of providing rules on dual or multiple nationality. Article IV section 2 of the Philippine Constitution provides that those whose fathers and mothers are Filipino citizens are Filipino citizens. It is however, possible that the law of the alien parent also considers said children as its citizens. A

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[12]Avelino v. Rosales, 487 O.G. 5313.
[13]Ko v. Court of Appeals, 70 SCRA 298 (1976.)
[14]Testate Estate of Bohanan, 106 Phil. 997 (1960).
[15]7 SCRA 95 (1963).
[16]*In* Bellis v. Bellis, 20 SCRA 358 (1967).

child also born of Filipino citizens in a State that follows the *jus soli* principle may also have dual nationality. Marriage with an alien is another possibility of acquiring dual citizenship.

It is a recognized principle of international law that each state is free to determine under its own law who are its nationals. The Hague Convention of 1930 on conflict of nationality laws provides that the municipal law shall be recognized by other states insofar as it is consistent with the international conventions, international customs, and the principles of law generally recognized with regard to nationality.[17]

However, Article IV, section 5 of the 1986 Philippine Constitution considers dual allegiance of citizens as inimical to the national interest to be dealt with by law. To provide said law, the following draft is suggested:

> A Filipino citizen who is capable of having two or more citizenships shall declare, upon reaching the age of majority, which should be registered in the Civil Registry and the Commission on Immigration, the citizenship he will follow. If he chooses Philippine citizenship, he is deemed to have relinguished all other citizenship. If he chooses the citizenship of any other state, he is deemed to have renounced his Philippine citizenship.

The suggested draft implements Article IV section 4 of the Philippine Constitution on dual allegiance and in accordance with the rulings of the Supreme Court in *Frivaldo v. Comelec*.[18]

If an alien residing in the Philippines claims dual or multiple nationalities for the exercise of his civil rights, the decision of the International Court of Justice in the *Nottebohm* case enunciating the principle of "effective nationality"[19] should be followed.

A suggested draft is as follows:

> For the determination of the civil rights of an alien residing in the Philippines, who is capable of claiming two or more nationalities, his nationality is that one to which he is most attached to or closely connected with.

In the *Nottebohm* case, a German national residing in Guatemala, to avoid the seizure of his assets as enemy alien at the outbreak of World War II, applied for and was naturalized as citizen of

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[17]Section 3, Hague Convention on Nationality.
[18]174 SCRA 245 (1989).
[19]ICJ Rep. 1955.

Liechtenstein. The Guatemalan authorities, however, still considered him as German national. Applying the principle of "effective nationality" the court found that except for his naturalization there was no attachment at all between Nottebohm and Liechtenstein. On the other hand, he had retained connections with his family and business affairs in Germany.

MARRIAGE

Article 26 of the Family Code of the Philippines retained the principles of *lex loci celebrationis*, that is a marriage of Filipino citizen, valid where celebrated, is valid in the Philippines. However, the Family code provided several exceptions to said rule as provided in Articles 35, 36, 37 and 38. In other words, even if the marriage of Filipinos is valid in a foreign land where it was celebrated, it is not valid in the Philippines if it falls under any of the exceptions under Article 35, 36, 37 and 38 of the Family Code.

While Article 124 of the Civil Code concerning the law to govern property relations of the spouses was abandoned, one situation not covered by the Code is where both spouses change their nationalities. It is proposed that their personal relations shall be governed by their new national law. If only one of them changes nationality, their last common national law shall govern. However, the property relations shall be governed by the law applicable at the time of their marriage.

Another situation is where both spouses are living in the Philippines and one of them is an alien, their personal law and property relations shall be governed by Philippine law. If both spouses are residing in a foreign country their personal law shall be governed by the law of the country of their residence. If both are aliens residing in the Philippines, their property relations shall be governed by the law of their country unless said law contravenes Philippine public policy.

DIVORCE

Article 26, paragraph 2 of the Family Code recognizes partially absolute divorce. This applies to a situation where an alien spouse obtains a divorce from his Filipino spouse in a foreign country recognizing absolute divorce. If he or she remarries, the Filipino spouse has also the right to remarry.

Article 26, paragraph 2 of the Family Code is a compromise, in view of mixed marriages where the alien spouses obtain in many cases

divorce outside the Philippines. It solves an absurd situation when the alien spouse obtains a divorce and remarries and yet the Filipino spouse remains married to said spouse.

An additional provision should also be formulated to govern a situation where a Filipino spouse obtains a foreign nationality and later divorces his spouse who remains a Filipino citizen. It is proposed that such divorce should be considered included, as it would prejudice the Filipino spouse.

PROPERTY

The *lex situs* rule governing real and personal property is provided for in Article 16, paragraph 1 of the Civil Code. This provision should be clarified by stating that the *lex situs* rule applies only to transfer of ownership or rights or any form of alienation. This provision should be clarified. If the transaction does not involve transfer of ownership, title or alienation of property the rule on ordinary contracts should apply. The exceptions to the *lex situs* rule are: (1) when the transaction involving the property does not affect transfer of ownership, title or alienation; (2) where the transaction involves an obligation covered by the ordinary law of contract; and (3) in intestate or testate succession which is the government of the national law of the decedent applies whether the property is *movable or immovable* irrespective of the nature and location of the property.[20]

CONTRACTS

Article 17, paragraphs 1 and 2 state the universal rule of *lex loci celebrations* governing the extrinsic requirements of contracts.

The third paragraph of Article 17 however should be a separate provision as it concerns a different subject matter which falls under the exceptions to the rule of comity. A more comprehensive provision in a separate article is suggested as follows:

> Prohibitive laws, concerning persons, their acts or property, and those which have for their object national security, public safety, public health and good customs, or if they might work injustice to Filipino nationals, shall not be rendered ineffective by laws or judgments promulgated or by determinations or conventions agreed upon in a foreign country.

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[20]Liljedal v. Galsgow, 180 NW 870 (1921); Dolsom v. Stewart, 45 N.E. 377 (1897).

Article 1306 is the only provision of the Civil Code, that governs the intrinsic validity of contracts involving a foreign element.

To provide the gap the following provision is suggested:

> The intrinsic validity of contracts shall be governed by the law expressly agreed upon by the parties. If there is no express agreement, the law intended by the parties as shown from their contemporaneous or subsequent conduct and the attendant circumstances shall govern. If the intention cannot be ascertained, the law of the country where the contract is to be performed shall apply.

CHOICE OF LAW AND FORUM

Under the principle of freedom of contract, the parties are free to choose the law to govern their agreements. Thus, the parties may state in the contract the specific law governing the contract and the venue where the case may be filed in case of dispute. The Philippine Civil Code has no specific provision on this point. Spanish commentators favor *lex intentionis* as the law chosen by the parties. In the absence of a specific law chosen; the practice in the United States is that the law of the state that has the most significant relationship to the transaction of the parties shall govern.[21]

This is similar to the English system which maintains that if the parties did not express their choice, the court assumes that the parties follow the legal system with which the contract has the most substantial connections.[22]

CONTRACTS WITH ARBITRATION CLAUSE AND CHOICE OF VENUE

Most modern contracts where the parties are of different nationalities stipulate that disputes arising from said contracts shall be submitted to arbitration bodies instead of regular courts. In *Compagnie de Commerce v. Hamburg-Amerika*[23] a stipulation provided that in case of dispute on the contract the case should be submitted to a Board of Arbitrators in London. The Philippine Supreme Court ruled that the Philippine court where the case was filed had jurisdiction to try the case on the ground that it was not proved that compliance with

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[21] WEINTRAU, COMMENTARY ON THE CONFLICT OF LAWS, 263, (1971).
[22] CHESIRE, PRIVATE INTERNATIONAL LAW, 9th ed. (1971). p. 214).
[23] 36 Phil. 590 (1917).

the stipulation was a condition precedent in the enforcement of the contract.

This ruling is now obsolete. The modern practice is that where the parties belong to different nationalities they may stipulate that disputes be settled by arbitration binding upon the parties. Arbitration is now favored for international contracts involving highly technical matters. Judges of regular courts may not be so competent as experts on the subject to pass upon such issues. Experts on highly technical matters are usually chosen by the parties to sit as arbitrators from a list of competent arbitrators maintained worldwide. The impartiality of the arbitrators is more or less assured as the arbitrators usually chosen are not with the same nationalities of the parties in the dispute. Without an arbitration clause the plaintiff is likely to file the case in the court of his own home state and the adverse party takes a risk of a "home-town" decision.

In contracts where the parties expressly choose the venue in case of dispute, the Philippine Supreme Court ruled in *Molina v. de la Riva*,[24] that the clause may not be applied if it amounts to the ousting of the jurisdiction of the local court. A more favorable doctrine enunciated by the United States Supreme Court is that unless there is no showing of fraud or undue advantage taken by any of the parties, the choice of the forum clause should be enforced.[25]

The *Molina v. de la Riva* decision may be justified if it is shown that the choice of the forum clause is an adhesion contract usually imposed by huge corporations on individuals who may not be fully aware or did not comprehend the full significance of the clause. In the *De la Riva* case, the clause was in fine print on the dorsal side of the bill of lading.

Recently, the Philippine Supreme Court did not follow the law and venue chosen by the parties in a contract for a different reason. In *Pakistan Airlines v. Ople*,[26] Filipino employees of the Pakistan Airlines entered into an employment contract in Manila stating among others, that in the case of dispute, only the Karachi courts can try the case, applying Pakistan law.

The Philippine Supreme Court ruled that the parties may not bargain away applicable provisions of law especially dealing with the

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[24]6 Phil. 12 (1906).
[25]M/S Bremen v. Zapata, 107 U.S. 1 (1972).
[26]190 SCRA 90 (1990).

matters impressed with public interest. The principle of party autonomy in contracts, provided for in Article 1305 of the Civil Code, is not altogether absolute. When the relationship between the parties is much affected by public interest the otherwise applicable Philippine laws and regulations cannot be rendered illusory by the parties agreeing upon some other laws to govern their relationship.

A suggested restatement of the law is as follows:

> In contracts where the parties are of different nationalities, the law to govern, and the venue where a suit may be filed, may be freely chosen, unless said choice is contrary to Philippine public policy and public interest.

ADHESION CONTRACTS

The principle of adhesion contracts is now recognized and applied in Philippine jurisprudence. Individuals usually enter into ready made contracts unilaterally drafted by dominant parties like big commercial firms. The weaker party usually has no opportunity to bargain and simply gives his "conforme'" to the contract on a "take it or leave it" basis. Some of the conditions, however, usually in fine print as in insurance contracts, bills of lading, or airline tickets, are generally advantageous to the party that drafted the contracts. If it is shown that one of the parties was not fully aware of or did not fully comprehend the significance of said provision the court may not give effect to it.

The Philippine Supreme Court and the Court of Appeals have applied the adhesion contract doctrine in agreements where almost all provisions have been drafted only by one party, usually a corporation, and the only participation of the other party is in affixing his signature.[27]

CONTRACTS FOR INTERNATIONAL AIR TRANSPORTATION

The Convention for the Unification of Certain Rules Relating to International Carriage by an Airline adopted at Warsaw on 12 October 1929 was adhered to by the Philippines on 9 November 1950 and entered into force in the Philippines on 7 February 1957.[28]

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[27]Sweet Lines v. Teves, 83 SCRA 368 (1978); Ong Yi v. CA, 915 SCRA 23 (1979); Liamko v. PAL, G.R. 80119-R, Dec. 8, 1980).

[28]Phil. Treaties Index 1946-82. The Convention was amended by the Hague Protocol on 28 Sept. 1955 and entered into force in the Philippines on 28 Feb. 1967; by the

Under the aforementioned Convention and its amendments an international air carrier is made liable for damages for:

1) death or injuries of passengers;

2) destruction or loss of, or damage, to any registered luggage or goods; and

3) delay in transportation by air passengers, baggage or goods.

In *Pan-American World Airways v. IAC,*[29] the convention was applied as regards the limitation on carrier's liability there being a simple loss of luggage without any otherwise improper conduct on the part of officials or employees of the airline. On the other hand the Philippine Supreme Court in a number of cases found the Warsaw Convention inapplicable if there is satisfactory evidence of malice or bad faith attributable to the officers or employees of the airline. Thus an air carrier was sentenced to pay not only compensatory but also moral and exemplary damages for instances where its employees unduly put a passenger holding a first class ticket in the economy section[30] or busted a brown Asiatic from a place to give his seat to a white man.[31]

In *Ortigas v. Cuenca,*[32] the seat of the plaintiff who was holding a first class ticket and whose booking was confirmed, was given to a Belgian passenger. When Ortigas at first questioned being relegated to the economy class, the airline employee shouted at him. In an action for damages, the Supreme Court ruled that the behavior of the airline employee amounted to bad faith and fraud. Moral and exemplary damages were awarded to a Filipino passenger who was given a "rude and barbaric treatment by an airline employee calling him a "monkey".[33]

In *Korean Airlines v. CA*[34] and *KLM v. CA,*[35] the Warsaw Convention was not applied by the Supreme Court. Moral damages were awarded due to tortious acts.

Montreal Agreement in 1966 the Guatemala Protocol in 1971. the Guatemala Protocol set the limit to $100,000 per paragraph and P1,000 per baggage.

[29]164 SCRA 268 (1988), citing Ong Yiu v. CA, 91 SCRA 223 (1979).

[30]Northwest Airlines v. Cuenca, 145 SCRA 1065 (1986); Lopez v. PANAM, 16 SCRA 43 (1966).

[31]Air France v. Carrascoso, 18 SCRA 155 (1966).

[32]64 SCRA 610 (1975).

[33]Zulueta v. PANAM, 43 SCRA 379 (1972).

[34]154 SCRA 311 (1987).

A Filipino passenger was rudely compelled to transfer from his first class accommodation in spite of the fact that he was carrying a first class ticket. For wanton, reckless and oppressive acts of the airline employees, moral and exemplary damages were awarded the complainant.

In fine, the jurisprudence set by the Supreme Court of the Philippines is that the Warsaw Convention does not operate as an exclusive enumeration of the instances of airline liability. In other words, the convention is used as a limit of liability only in those cases where the cause of death or injury to passenger or destruction or loss or damages, or delay in transport is not attributable to or attended by any willful misconduct, bad faith, or recklessness or otherwise, improper conduct on the part of any airline official or employee. In short, the convention does not regulate or exclude liability for other breaches of contract by the carrier or misconduct of its officers and employees. Otherwise, said Philippine Supreme Court, an airline carrier would be exempt from any liability for damages in the event of its absolute refusal, in bad faith, to comply with the contract of carriage which is absurd.[36]

DAMAGES ARISING FROM FOREIGN TORTS

May a liability arising from a tortous act committed abroad be enforced in Philippine jurisdiction?

There is no statutory provision or jurisprudence in the Philippines on this matter. American, European and English jurisprudence allow persons injured or damaged through torts committed abroad to enforce their claim in local courts.

With the ever increasing activities and transactions involving Filipinos abroad tortious acts or damages may be suffered by them. The Philippines should follow the jurisprudence in American, European and English courts on the theory of vested rights. Usually, the law to govern the case is the law where the tort or quasi delict took place under the principle of *lex delecti commissii*. If the law of the country where the tort or quasi delict was committed does not consider said tort or delict actionable in said country, it cannot be actionable anywhere as no right was acquired by the plaintiff.

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[35]65 SCRA 257 (1975).
[36]Northwest v. Cuenca, 14 SCRA 1065 (1965).

Most major European states generally follow the *lex loci delecti* rule to govern torts committed abroad. The French Civil Code provides that the laws of a foreign *locus delecti* should determine the consequences of tortuitous acts occuring there.[37]

Germany adheres to the principle that tort liability is governed by the *lex loci delecti* although in varied forms. Article 12 of the German Code provides that "a tort committed abroad shall not entitle the victim to claims against a German national in excess granted by German law. The Article precludes claim against a German tort feasor in excess of that permitted by German law. A decree issued in Germany on 7 December 1942 which remains to be the law, states that claims for extra-contractual damages based on an act or omission of a German national committed abroad are governed by German law, in so far as a German national has been damaged. The effect of the law is to require the application of German law on German nationals irrespective of where the tort was committed.

The Italian Civil Code (1942) provides: "Non contractual obligations are governed by the law of the place where the facts from which they arise took place."[38]

The Netherlands follow the rules set in the Benelux Draft Convention on Private International Law which provides:

> (1) The law of the country where a tort takes place shall determine whether this fact constitutes a wrongful act, as well as the obligations which result therefrom.
>
> (2) However, if the consequences of a wrongful act belong to the legal sphere of a country other than the one where the act took place, the obligations which result therefrom shall be determined by the law by that other country.[39]

The exception provided for under paragraph 2 of the Benelux draft was applied in the case of *Beer v. de Hondt* decided by the Court of Appeals of the Hague.[40]

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[37]Art. 1384, French Civil Code; Latour C. Giraud Cour de Cass Action, 25 May 1948, 38 Rev. Crit. DIP 89 (1949).

[38]Italian Civil Code (1969), *cf.* Morse, Choice of Law in Torts, a Comparative Survey, 32 Am. J. of Comp. Law, 51 (1984).

[39]Art. 14. Translation from 18 Am. J. of Comp. L. 406 (1970).

[40]16 May 1955, 3 Ned. Tijal Vol. II R 290 (1956).

In said case the plaintiff who was riding in the car belonging to the defendant was injured in an accident caused by the defendant in France. The Court of Appeals applied the Dutch law. While admitting that the law of the place of the accident which is France was normally applicable, the Hague court ruled that the French law should be displaced in cases where the consequences of the wrongful act properly belonged to the legal sphere of another country. In said case both parties were Dutch nationals who lived in the Netherlands, and the agreement to travel was made in Netherlands, which was not limited to the travel in France.[41]

The Portuguese Civil Code (1968) requires, in case of tortious acts, application of the law of the state of the act. Article 45(1) applies the law of principal activity.

Article 45(2) of the Portuguese Civil Code applies where the act and injury occur in different states. The law extends protection to the plaintiff of the law of the place of injury in cases of a foreseeable accident. This rule specifically applies to cases of products liability.[42]

Where the tort feasor and victim have the same nationality or the same habitual residence, the law of such common nationality or common habitual residence shall apply if the parties happen to be in a foreign country whose law would normally be applicable.[43]

Article 10(9) of the Spanish Civil Code (1974) provides that:

> Non-contractual obligations shall be governed by the law of the place where the event from which they derive has occurred.

The provision does not include cases where the act or injury occur in different countries.[44]

Austria follows the basic rule of *lex loci delicti commissi* as provided in the statute on private international law (1978). *Lex loci delicti* is defined as the law of the place where the conduct which causes the harm occurs. An exception to this rule is where the parties have a stronger connection with the law of another state and where

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[41]Digest of case taken from C.J. Morse, Choice of Law in Tort: A Comparative Survey, 32 Am. J. of Comp. Law 51 (1984).

[42]*Cf*, Morse, *op. cit.* at 65.

[43]Art. 45(3) Portuguese Civil Code.

[44]Morse, *op. cit.*, at 67.

there is a common nationality or common habitual residence of the parties.[45]

Switzerland provides for a choice of law in particular types of torts, such as traffic accidents, products liability, unfair competition, nuisance and defamation.

The general rule where the parties have their habitual residence in the same state, the liability is governed by the law of that common habitual residence. Where the parties do not have common habitual residence, the applicable law will be the *lex loci delicti.*[46]

In Hungary, the Decree on Private International Law (1979) generally provides for the application of the law of the place of the tortious act or omission to determine the tort liability.[47]

Where the tortious act occurs in one state and the plaintiff suffers harm in a different state, the law of the place of injury will apply if it is more favorable to the injured party.[48]

Poland, likewise, follows the basic rule on *lex loci delicti.* Article 31 of the Code on Private International Law (1966) provides an exception to displace the *lex loci delicti* in favor of the personal law of the parties, that is the parties have a common nationality and must also reside there. The mere possession of common nationality is insufficient.[49]

Decisions of English courts generally apply the rule on *lex loci delicti.* Mr. Justice Wilke in *Phillips v. Eyre*[50] held: "as a general rule, in order to find a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England. Secondly, the act must not have been justifiable by the law of the place where it was done."[51] The same rule was

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[45]Art. 48.

[46]Article 129. Federal Law on Private International Law of Switzerland. *cf.*, Morse, at 70.

[47]Art. 32(1).

[48]Article 32(2).

[49]Morse, *op.cit.*, at 89.

[50]40 L.J.Q.B.28; l.R.6Q.B.1.

[51]Cited in Machado v. Fontes, (1897), ll L.S.Q.B. 542; Q.B.231 (1987).

applied in an action brought in Canada in a wrong alleged to have been committed in another province.[52]

Courts of the United States allow action in one state for torts committed in another state on the basis of the doctrine of vested rights and obligations. The leading case in the United States was *Louchs v. Standard Oil*.[53] In said case, Louchs, a New York resident was killed in a motor vehicle accident caused by defendant and driver in Masacchusetts. The administrator of the estate of Louchs filed a suit for damages in New York on the basis of the law of Massachusetts granting a monetary compensation.

The court held that the Massachusetts law will be applied in New York on the basis of vested right created under said law. The fundamental policy is that there shall be some atonement for the wrong. Rights fully vested shall be recognized everywhere.

Considering the foregoing jurisprudence, a suggested text for the Philippines governing foreign torts reads:

> Liability for torts or quasi delicts committed in a foreign country may be enforced in the Philippines provided that such enforcement does not contravene Philippine public policy. The elements or requisites and effects of torts or quasi delicts are to be covered by Philippine law and the law of the country where the act or omission took place.

A Philippine court may assume jurisdiction of a case based on a tort committed abroad provided that (1) tort in question is not contrary to a public policy of the Philippines, (2) the action is on civil damages, and (3) the judicial machinery in the Philippines allows the action to be filed.[54]

WILLS AND SUCCESSION

As to the extrinsic requirements or formalities, the present Civil Code allows a Filipino national who is abroad to execute a will or testament in accordance with the laws of the country where the will was executed or in accordance with Philippine law.[55]

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[52]Mc Millans v. Canadian Northern Railways, (1923), 92 L.J.P.C. 44; (1923) A.C. 113.

[53]225 N.Y. 99, N.E. 193 (1913).

[54]Slaten v. Mexican National Railway, 194 U.S. 120 (1904).

[55]Art. 815, Civil Code.

If the testator is an alien but domiciled in the Philippines and decides to execute a will in a third country, he can choose his national law, the Philippine law, his domicile or the law of the country where he actually makes the will.[56]

The suggested provision on the matter is as follows:

> The formalities of wills executed by Filipino nationals abroad, shall be governed either by the laws of the country where the will is executed or by Philippine law. If the will is executed before a diplomatic or consular official of the Republic of the Philippines in the diplomatic or consular premises of the Philippines, Philippine law will apply.

Wills may be probated in the foreign country where they are executed. Accordingly such probated wills may be allowed in the Philippines.

PUBLIC POLICY AGAINST JOINT WILLS

On the ground of public policy, joint wills executed by Filipinos in the Philippines or abroad are void. The prohibition should also include aliens whose properties are located in the Philippines. Although said wills may have been probated abroad, they shall not be allowed and recorded in the Philippines.[57]

The suggested provision in this matter is as follows:

> Joint wills whether executed by citizens of the Philippines or aliens who have properties in the Philippines or abroad shall not be allowed probate in the Philippines.

As to testate and intestate succession, the rule stated in Article 16, paragraph 2 of the Civil Code is still the universal rule. It is the national law of the decedent that shall govern the order of succession, the capacity to succeed, the amount of successional rights, whatever may be the nature of the property regardless of the country wherein the property is located.

If the decedent is stateless, the law of his domicile will apply.

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[56]Art. 17 and 816, Civil Code.
[57]Articles 817 and 819, Civil Code.

REVOCATION OF WILLS

The following provisions are proposed on the rule on revocation of wills:

> If a citizen of the Philippines revokes his will outside the Philippines, either Philippine law or the law of the country where the revocation is made will govern.
>
> An alien domiciled in the Philippines may revoke his will in accordance with Philippine law, his national law, or the law of the country where the revocation is made.

This provision follows the rule on the execution of wills.

If the alien is not domiciled in the Philippines, Philippine law will apply as to revocation affecting projects located in the Philippines.

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

One important test as to whether a state is observing universally accepted principles of private international law is its recognition or enforcement of foreign judgments.

The only place where the recognition or enforcement of foreign judgments is found is Rule 39, section 50 of the Rules of Court which is procedural in character.

A substantive law on the matter should be provided.

Public policy dictates that there be an end to litigation. A case already adjudicated by a court or tribunal which has valid jurisdiction over the parties and the subject matter may no longer be litigated in another state.

Under the principle of *res judicata*, parties may no longer relitigate the same case which had already been determined in the court or tribunal of one state. If parties are allowed to relitigate the same case in another jurisdiction, the principle of act of state doctrine may be violated. However, in case of failure to execute said judgment, in the state in which the case was decided, the judgment creditor may enforce it against the judgment debtor in another state on the principle of comity, reciprocity or vested rights.

The rule in enforcement of foreign judgments, however, is limited only to money judgments whether civil or commercial.

A suggested draft in foreign judgments reads:

> Subject to the rules of procedure and the principle of reciprocity, money judgments of a tribunal or court of a foreign country having jurisdiction thereof and not contrary to public policy may be recognized or enforced in the Philippines.

Under the rules of procedure a properly authenticated copy of the foreign judgment should be attached to the action for enforcement of judgment. The judgment should not be vitiated by fraud. The fraud refers to extrinsic fraud.[58]

As ruled by the Philippine Supreme Court in *Perkins v. Benguet Consolidated*[59] and *Boudard v. Taft*,[60] the foreign court which rendered the judgment must have validly acquired jurisdiction over the parties and the subject matter.

On the principle of reciprocity the foreign court that rendered the judgment to be enforced must also recognize and enforce Philippine Court decisions in *Hilton v, Goyut*[61].

The requirement that there must be no mistake of fact or law as now provided in Rule 39, section 50 of the Rules of Court is not universally accepted. If a foreign judgment can be challenged in another state on the grounds of mistake of fact or law, it may mean a *trial de novo*. Thus, in *Ingenohl v. Olsen*,[62] the U.S. Supreme Court reversed a Philippine Supreme Court ruling,[63] which held that a Hongkong court decision should be sufficed in the Philippines on the ground of mistake of fact or law. The U.S. Supreme Court ruled that even if there was mistake of law or fact, this alone would not prevent the enforcement of the judgment of the Hongkong Court which was rendered after a fair trial before a court having jurisdiction of the case. The courts of a state should not pass judgment on the appreciation of evidence or appreciation of law of courts of other states.

Since the foreign judgment is only a presumptive evidence of a right as provided for in Rule 39, section 50 of the Rules of Court, the party who seeks to enforce said judgment in the Philippines must file an

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[58]Labayen v. Talisay, 40 O.G. 109, 2nd supplement.
[59]93 Phil. 1074 (1953).
[60]67 Phil. 170 (1939).
[61]159 U.S. 113 (1895); Johnston v. Companie Generale, 242 N.Y. 38.
[62]273 U.S. 541 (1927).
[63]47 Phil. 189 (1925).

appropriate petition attaching a certified copy of the foreign judgment properly authenticated by a Philippine consul.

The Philippine Supreme Court had ruled on this issue in *Borthwick v. Castro*[64] concerning a judgment of the circuit court of the state of Hawaii sought to be enforced in the Philippines. The Supreme Court held that while it is true that a foreign judgment against a person is merely "presumptive evidence of a right as between the parties", and rejection thereof may be justified among others, by evidence of want of jurisdiction of the issuing authority, the judgment debtor must prove by convincing evidence such want of jurisdiction. It appeared in the case that the jurisdiction of its court of Hawaii hinged entirely with facts in accordance with other state law of Hawaii. The judgment debtor is precluded from impugning the factual finding, having deemed to have admitted the correctness of such findings.

Lastly, the judgment to be recognized or enforced should not be contrary to the public policy of the Philippines.[65]

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[64]152 SCRA 229 (1987).

[65]Querubin v. Querubin, 87 Phil. 124 (1950); Arca v. Javier, 88 Phil. 579 (1951).