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Conflict of Laws Rules in Nepal

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Conflict of Laws Rules in Nepal

Devendra P N Pradhan

Nepal has adopted a new National Civil Code 2074 (2017 AD) (the 'Civil Code'), which came into effect on 17 August 2018. The Civil Code repealed the preceding Country Code, which had been in force for over five decades. The primary objective for introducing the Civil Code was to update and unify various civil laws into a single comprehensive, unified code, as well as to adopt and introduce the major principles of common law and private international law that are essential to govern the administration of justice in this modern era.

One of the major additions introduced by the Civil Code into the Nepali legal system is the concept of private international law, commonly known as the conflict of laws. The conflict of laws is often referred to as the 'jurisdiction-selecting technique' or 'jurisdiction-selecting rule'. It is a set of legal principles that provides guidance to courts on which country's laws should be applied in adjudicating a dispute among private parties involving diversity, that is, a dispute involving foreign elements. Conflict of laws is regarded as a complex legal topic in every jurisdiction. The rules relating to the conflict of laws are not always confined to the domestic laws of states. Sometimes they obtain their source from bilateral and multilateral treaties concluded by states in the international domain, and thus are also treated as a source of international law.

Prior to the enactment of the Civil Code, the Nepali legal system had remained in complete isolation in the matter of conflict of laws as neither was there a set of conflict of laws rules nor had Nepali courts ever attempted to apply conflict of laws rules. Now this issue has been addressed by the Civil Code by incorporating rules of private international law.

Conflict of Laws Rules in Nepal

Devendra P N Pradhan*

Background and introduction

Nepal has adopted a new National Civil Code 2074 (2017 AD) (Muluki Dewani Samhita) (the 'Civil Code'), which came into effect on Bhadra 1, 2075 (17 August 2018). The Civil Code repealed the preceding Country Code (Muluki Ain), which had been in force for over five decades. The primary objective for introducing the Civil Code was to update and unify various civil laws into a single comprehensive, unified code, as well as to adopt and introduce the major principles of common law and private international law that are essential to govern the administration of justice in this modern era.

One of the major additions introduced by the Civil Code into the Nepali legal system is the concept of private international law, commonly known as the conflict of laws. The conflict of laws is often referred to as the 'jurisdiction-selecting technique' or 'jurisdiction-selecting rule'.¹ It is a set of legal principles that provides guidance to courts on which country's laws should be applied in adjudicating a dispute among private parties involving diversity, that is, a dispute involving foreign elements. Conflict of laws is regarded as a complex legal topic in every jurisdiction. The rules relating to the conflict of laws are not always confined to the domestic laws of states. Sometimes they obtain their source from bilateral and multilateral treaties concluded by states in the international domain, and thus are also treated as a source of international law.

A bilateral treaty concluded between two states or a multilateral treaty concluded among several states creating rights of, as well as imposing

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1 David F Cavers, 'A Critique of the Choice-of-Law Problem' (1933) 47 Harvard Law Review 173–208.

obligations upon, peoples of those contracting states is a legally binding instrument upon the contracting states and is regarded as a primary source of international law. Such a treaty becomes the subject matter of private international law and people of contracting states are entitled to enforce their rights through the domestic courts in contrast to some other types of treaties, which protect rights of states and also must be availed only by states in international forum under the rules of public international law. Some major examples of treaties governed by the rules of private international law are:

- Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 (the ‘Warsaw Convention’) and its Protocols;
- Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999 (the ‘Montreal Convention’);
- Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (the ‘Athens Convention’);
- Convention on Limitation of Liability for Maritime Claims 1976 (the ‘LLMC Convention’);
- International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1924 (‘The Hague Rules’);
- Treaty of Rome 1957 to govern carriage of goods by railway;
- International Convention concerning the carriage of passengers and luggage by rail (the ‘CIV’) 1961 and its Protocols;
- Convention on the Contract for the International Carriage of Goods by Road (the ‘CMR’) 1956 and its Protocols;
- Berne Convention for the Protection of Literary and Artistic Works (the ‘Berne Convention’);
- Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the ‘New York Convention’); and
- Paris Convention for the Protection of Industrial Property (the ‘Paris Convention’).

Although these conventions are primarily created from the juxtaposition of private international law, they also reflect characteristics of public international law, as the rights and obligations of contracting states are also attached in enforcing these treaties.

Prior to the enactment of the Civil Code, the Nepali legal system had remained in complete isolation in the matter of conflict of laws, as neither was there a set of conflict of laws rules nor had Nepali courts ever attempted to apply conflict of laws rules. Now this issue has been addressed by the Civil Code by incorporating rules of private international law.

Scope and applicability

General application

Rules on conflict of laws, under the Civil Code, are applicable where a legal relationship between private parties triggers the connection of a 'foreign element'. Such a foreign element may either be in the form of a foreign party, a foreign object or asset, or an act carried out in a foreign jurisdiction.² The presence of a foreign element is essential to attracting the rules of Nepali conflict of laws. Generally, the rules of Nepali conflict of laws apply primarily in one of the following situations:

- where at least one party to a dispute is a foreign national or a foreign entity;
- where the subject matter relates to a foreign object;
- where a dispute relates to asset/property situated outside Nepal; and
- matters relating to a contract executed outside Nepal.

A private relationship among two or more parties, whether legal or contractual, to which at least one party is a foreign national or a foreign entity will trigger the application of Nepali conflict of laws rules. The presence of a foreign national or a foreign entity may exist in the form of one of the following:³

- a party to a contract or to a non-contractual matter that creates rights and obligations;
- an interested party to the asset/property situated outside Nepal; and
- a party to a matter relating to matrimonial, paternity/maternity, other family relationship, inheritance or to other matters celebrated/effectuated outside Nepal.

The Nepali conflict of laws rules adopt different approaches in their applicability compared to the English conflict of laws rules. In the English rules, a party must demonstrate that the application of the foreign law advantages at least one of the parties in order to establish a case of conflict of laws. Further, foreign law is treated as a question of fact and, like any other fact, it must be proved by producing evidence, that is, the English text of a foreign law, witnesses or expert witnesses and so on otherwise, English courts will apply the English law by default.⁴ By contrast, the Nepali conflict of laws rules will apply instantly once the presence of the foreign element is established, notwithstanding whether the application of the foreign law has no advantage to either party. Further, unlike the English rules, foreign law is not merely

2 Civil Code, s 692(1) provides: 'The provisions [relating to private international law] shall apply to any matter relating to private legal relationship involving a foreigner, foreign object or any act done in a foreign country'.

3 *Ibid* s 692(2).

4 *Macmillan Inc v Bishopgate Investment Trust Plc (No 40)* [1999] CLC 417.

treated as a question of fact, which, if not proved by evidence, can be ignored completely. Nonetheless, there is a lack of clarity on how a foreign law should be interpreted by Nepali courts where the English conflict of laws rules allow English courts to interpret a foreign law in accordance with English rules.

Special application

There are no standard sets of rules of conflict of laws that can be applied uniformly. Conflict of laws rules may vary from country to country, as well as from legal system to legal system. Notably, each country may have its own sets of rules of conflict of laws to deal with a specific topic. The set of conflict of laws rules applied by one state may have an opposite in the rules applied by another state; nonetheless, conflicting approaches taken by both states are equally valid within their national domain. In matters formulated by treaties, uniformity in the interpretation of provisions of and application thereof among member states can be expected, despite the fact that each member state adopts a different legal system and has its own sets of conflict of laws rules within its national domain.

Nepal is no exception to this idea. Conflict of laws rules shall not apply in matters involving a foreign element other than the three scenarios stated above, for which other specific laws in force adequately provide a remedy. In that case, the dispute will be determined by applying the specific law instead of the conflict of laws rules.

Treaty exclusivity

Like any other country, Nepali conflict of laws rules adopt the concept of treaty exclusivity. The domestic law of Nepal governing treaties – the Nepal Treaty Act 2047 (1990) – adopts the Monist theory in recognising treaties. As such, provisions prescribed in a treaty to which Nepal is a party shall prevail over domestic laws in case of conflict between the provisions of a treaty and domestic law.⁵ The Civil Code further safeguards the concept of treaty exclusivity and provides that where a treaty to which Nepal is a party provides separate provisions in a matter, then that matter shall be regulated under the treaty and the conflict of laws rules shall not be applied in that matter.⁶ The United States adopts a similar concept and the US Constitution recognises treaties as the supreme law of the land.⁷ This is mainly because the rules of

⁵ Nepal Treaty Act 2047 (1990 AD), s 9(1).

⁶ Civil Code, s 720.

⁷ US Constitution, Art VI provides: 'This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.'

private international law formulated by treaties are legally binding, therefore such treaties are regarded as a primary source of international law. As a result, matters dealt with by the treaty shall be determined exclusively under the provisions of the treaty. Therefore, a treaty must be interpreted and applied uniformly among the member states in order to avoid bewildering results and accordingly to achieve the goal of uniformity. Examples of uniform application of rules of private international law sought by treaties are the provisions of the Warsaw Convention, Montreal Convention, Paris Convention, New York Convention, Berne Copyright Convention and so on, to which Nepal is a party.

Jurisdiction of Nepali courts

General and special jurisdiction

The Nepali conflict of laws rules warrant certain disputes to be referred to the jurisdiction of the Nepali courts, which include, among others, disputes relating to property, contract and inheritance. The following disputes fall under the jurisdiction of the Nepali courts:⁸

| | |
|----------------------|--|
| Property | Disputes between foreign nationals or between foreign national(s) and Nepali national(s) relating to property situated in Nepal |
| Monetary transaction | Disputes relating to monetary transactions concluded in a foreign jurisdiction between foreign national(s) and Nepali national(s) in which payment is sought to be made in Nepal |
| Contract | Disputes arising out of a contract concluded in Nepal or sought to be performed in Nepal between foreign nationals or between foreign national(s) and Nepali national(s) |
| Inheritance | Disputes relating to inheritance of foreign national(s) who resided in Nepal at the time of his/her death and owed property in Nepal |
| Tort | Torts committed outside Nepal wherein both counterparties are either Nepali citizens or foreign nationals having habitual residence in Nepal |
| Unjust enrichment | Disputes relating to unjust enrichment that occurred outside Nepal where both counterparties are either Nepali citizens or foreign nationals having habitual residence in Nepal |
| Quasi-contract | Disputes relating to quasi-contracts executed outside Nepal to which both counterparties are either Nepali citizens or foreign nationals having habitual residence in Nepal |
| Resident defendant | <ul style="list-style-type: none"> • Lawsuits against foreign national(s) who resides in Nepal • Disputes between foreign nationals residing in Nepal or between foreign national(s) and Nepali citizens, which are governed under the laws of Nepal |

The Nepali conflict of laws rules have incorporated a combination of different approaches adopted by various legal systems in prescribing the jurisdiction of the Nepali courts, which includes the concept of general and special jurisdiction based on the relationship between the person and the forum, that is, the residence of the defendant (defendant's forum), as well as

⁸ Civil Code, s 718.

the jurisdiction based on the dispute and the forum. For example, in disputes relating to inheritance and property, Nepali courts will have exclusive jurisdiction if the property is located within the territory of Nepal. This is the identical concept adopted by the Brussels I *bis* Regulation,⁹ which is the predominant rule governing the European Union regime of jurisdiction among its member states.

Likewise, Nepali courts will have special jurisdiction if the place of performance is chosen to be Nepal, which is the identical to the Brussels I *bis* Regulation¹⁰ provision. Similarly, Nepali courts will assume jurisdiction based on habitual residence of the parties in disputes relating to torts committed outside Nepal, unjust enrichment, quasi contracts and so on. Again, this is based on the concept of ‘general jurisdiction’ under the Brussels I *bis* Regulation,¹¹ which requires the showing of a ‘strong connection’ of the defendant with the chosen jurisdiction or a ‘substantial connection’ under the English law with the United Kingdom for which the minimum requirement of residency test is residence in the UK for a period of three months or more¹². As long as this minimum requirement is met, the requirement of ‘substantial connection’ is presumed to be fulfilled. In the Nepali context, except for tax laws, under which an assumption is that a person is deemed to be a ‘resident’ of Nepal if he/she resides 183 or more days in Nepal in a year, no other law defines the term ‘habitual residence’ or adopts the concept of ‘substantial connection’ or ‘strong connection’. This is indeed one of the challenging issues for Nepali courts to ascertain in the conflict of laws area.

Choice of court agreement not enforceable

While the Civil Code has properly addressed the concern of choice of law clause, as well as conflict of laws rules, its major flaw is that it failed to incorporate the rules relating to the choice of court agreements, as well as the enforcement of foreign judgments in Nepal. Nepal is neither a party to the Hague Convention on Choice of Court Agreement nor any other bilateral agreement, nor does its procedural law provide provisions for the enforcement of foreign judgments in Nepal, with the exception of judgments of divorce.

Nepal hasn’t enacted domestic procedural laws like those of the UK, such as the Foreign Judgments (Reciprocal Enforcement) Act 1933, which provides

9 Brussels I *bis* Regulation, Arts 8(4) and 24.

10 *Ibid* Art 7(1)(b).

11 *Ibid* Art 4(1).

12 Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929), Sch 1, para 9(6).

for the enforcement of foreign judgments in the UK from certain territories¹³ or the Civil Procedure Rules, which provide for the enforcement of foreign judgments under common law as a summary judgment for recovery of debt.¹⁴ Similar provisions can be found in the procedural rules of other jurisdictions, in particular, in common law countries. In the US, the enforcement of foreign judgments primarily falls within the jurisdiction of states, which is governed under state laws and common laws. State laws in this area are generally derived from two model acts, namely, the Uniform Foreign Money Judgments Recognition Act 1962 and Uniform Foreign-Country Money Judgments Recognition Act 2005. For example, New York has enacted the Civil Practice Law and Rules, which provide full faith and credit to a foreign judgment relating to debt, and thus enforces it in the same manner as a judgment of its courts.¹⁵ States without a statute for enforcement of foreign judgments still enforce foreign judgments under common law. Although Nepali laws do not bar parties from selecting choice-of-court agreements through a contract agreeing the jurisdiction of foreign courts to a dispute in a civil and commercial matter, notwithstanding, in reality, except for a judgment of divorce, a foreign judgment is not enforceable in Nepal.

Ancillary jurisdiction

The disputes mentioned above are not intended to be an exhaustive list of disputes that fall under the jurisdiction of the Nepali courts. In certain situations, a court may determine a jurisdictional issue on case-by-case basis. Likewise, in the course of adjudicating a primary dispute, which falls under the jurisdiction of a Nepali court, if the court is also required to adjudicate other ancillary issues associated with the primary issue, then the court in such situation may also adjudicate those ancillary issues, although the Nepali conflict of laws rules do not specifically provide jurisdiction to a Nepali court to adjudicate those ancillary issues, though such ancillary issues have not been identified in the rules.¹⁶

This appears to be opposite to the philosophy of the EU regime as adopted in the Brussels I *bis* Regulation of granting provisional and protective measures to aid foreign proceedings¹⁷ despite a court lacks jurisdiction to hear on the merits of the case, which is consistent with the English concept of granting protective measures, such as a *Mareva* injunction, freezing order, and so on.

13 Foreign Judgments (Reciprocal Enforcement) Act 1933, s 7.

14 Civil Procedure Rules (SI 1998/3132), Pt 24.

15 NYCPLR, s 5402.

16 Civil Code, s 719.

17 Brussels I *bis* Regulation, Art 35.

Assuming jurisdiction in matters where Nepali courts lack jurisdiction may create an undesirable situation of concurrent jurisdiction and parallel proceedings in two or more countries in the same dispute resulting, on the one hand, a court of Nepal rendering a judgment assuming jurisdiction and, on the other hand, a court of another jurisdiction at the same time also assumes jurisdiction. If this happens, there may be multiple judgments from courts of two or more jurisdictions on the same subject matter dealing with them differently and, most probably, conflicting with each other.

Stay of proceeding at Nepali courts

Undoubtedly, a multijurisdictional transaction produces complex legal issues attracting interest from various parties, as well as from various legal systems of multiple jurisdictions and thus must be handled with the utmost care and efficiency. Such a dispute will obviously attract the attention of the courts of multiple interested jurisdictions. It is quite a common practice for parties to a dispute to attempt to avail the jurisdiction of a court of a country according to their convenience and choice, which will inevitably attract the jurisdiction of courts of multiple countries to the same matter.

Fortunately, in the case of parallel proceedings, the Nepali conflict of laws rules adequately prescribe provisions for the stay of proceedings of Nepali courts, similar to the concept of *lis pendens* provided in the Brussels I *bis* Regulation,¹⁸ until such time as the courts of another jurisdiction finally dispose of the dispute. A court of Nepal may pass an order staying its proceeding until a foreign proceeding is finally disposed of, if it is convinced that:¹⁹

- a proceeding in a court of another jurisdiction relates to the same matter;
- a judgment to be rendered by a court of another jurisdiction will have a direct effect on the proceeding of the Nepali courts; and
- parties to a Nepali proceeding make a request to the court to stay its proceeding.

The Civil Code doesn't state in express term as provided in the Brussels I *bis* Regulation that a court other than the court first seized may decline jurisdiction if the court first seized assumes jurisdiction.²⁰ Nevertheless, it can be anticipated that the Nepali courts would decline to assume jurisdiction if the court first seized assumes jurisdiction in a dispute where parallel proceedings are commenced in multiple jurisdictions.

18 Brussels I *bis* Regulation, Arts 29 and 30.

19 Civil Code, s 717.

20 Brussels I *bis* Regulation, Art 30.

Choice of more appropriate forum

During a proceeding before a Nepali court, if parties realise that the courts of another competent jurisdiction would be ideal and appropriate for practical reasons to adjudicate that dispute and, accordingly, if they wish to avail the jurisdiction of the foreign courts to initiate a proceeding afresh, both parties must seek the consent of the Nepali court to terminate the proceeding in Nepal.²¹ In selecting a more appropriate foreign forum, the Nepali conflict of laws rules adopt the similar concept of *forum non conveniens* – a concept that was invented by the Scottish courts, adopted by the English courts and widely used by the United States courts – instead of adopting the mandatory jurisdictional rules under the EU regime where except for *lis pendens* under the Brussels I *bis* Regulation²² courts lack judicial discretion to accept a plea of *forum non conveniens*. Nonetheless, Nepali courts will have discretion over whether or not to grant consent to terminate the proceedings in Nepal. A Nepali court, before granting its consent, will first conduct an investigation into that issue and review the matter adopting a ‘reasonable test’ standard. No further guidance has been prescribed on how a judge should adopt a ‘reasonable test’ standard on this issue. It can be anticipated that while conducting a ‘reasonable test’ review, the Nepali courts will look into factors such as cost and delays in litigation, availability of witnesses, level of damage available in the foreign country and availability of fair hearing to claimant, in a similar way as the US and English courts examine these factors in *forum non conveniens* cases.

Once a Nepali court grants its consent, the proceedings will be terminated in Nepal with prejudice; consequently, neither can a subsequent proceeding on the same matter be permitted to be initiated before the Nepali courts in future nor can the proceeding that was terminated before be restored again.²³ Parties are permanently barred from instituting another proceeding in the Nepali courts in future in the same matter irrespective of the outcome from the courts of the foreign jurisdiction. The Nepali conflict of laws rules have adopted this approach in order to discourage forum shopping practices in multiple jurisdictions.

Applicable rules

The pivotal element of conflict of laws rules is to identify the most appropriate country whose laws should govern a dispute and then apply them to that dispute.

21 Civil Code, s 716(1).

22 See n 18 above.

23 Civil Code, s 716(2).

This is obviously not an easy task in many cases. If all parties to a dispute belong to a single jurisdiction, then the selection of the applicable laws of that jurisdiction is quite straightforward and thus can be applied without issue. By contrast, if parties to a dispute are from different countries, then complexity may arise and conflict of laws rules of the various jurisdictions may need to be analysed. This makes the task of identifying the applicable laws of the most appropriate jurisdiction more complex. In doing so, a court may find a cascade of possibilities where it needs to identify the laws of the most appropriate country that has the closest connection to the dispute.

The Nepali conflict of laws rules adopt a mixed approach in identifying and applying the laws of the appropriate jurisdiction based on the subject matter of each dispute, which are as follows.

Property

The Nepali conflict of laws rules adopt the generally accepted concept of *lex situs* (law of the place where the property is situated) to deal with questions relating to ownership or possession of property. A question relating to ownership or possession of both movable and immovable property will be determined under the laws of a jurisdiction where the property is actually situated.²⁴ The concept of *lex situs* has been widely adopted in various legal systems, including the English conflict of laws in disputes relating to ownership and possession of movables and immovables with few exceptions. The conflict of laws rules of the US also adopt the concept of *lex situs* with respect to immovables and are generally regulated under the laws of the country where the immovable property is situated.²⁵ With respect to questions relating to inheritance/succession to property, the Nepali conflict of laws rules are different – as described below. Under the traditional view in common law jurisdictions, the law of the domicile of the owner will be applied to govern movables, whereas the law of the situs will be applied to govern immovables.

Inheritance/succession

The Nepali conflict of laws rules adopt a concept similar to the English conflict of laws relating to succession with regard to movables and immovables. Generally, a question relating to inheritance/succession to the movable property of a deceased person – whether they are a citizen of Nepal or a foreign country – shall be determined by applying the laws of

²⁴ *Ibid* s 707(1).

²⁵ Restatement (Second) Conflict of Laws, ss 236 and 239 (1971).

the jurisdiction where the deceased maintained a habitual residence at the time of his/her death,²⁶ which is a slightly different concept to the English conflict of laws, which adopt the concept of last 'domicile' instead of habitual residence. By contrast, the Nepali conflict of laws rules adopt the concept of *lex situs* (law of the place where the property is situated) to deal with questions relating to inheritance/succession to immovables,²⁷ which is identical to the English conflict of laws rules, in general.

Notwithstanding the above, the Nepali conflict of laws rules apply differently in questions relating to the inheritance/succession of foreign nationals in connection with a property situated in Nepal, which warrants the application of the laws of various jurisdictions depending upon the factors at play. A question relating to inheritance/succession to a property situated in Nepal belonging to a foreign national, who dies in Nepal, will be determined by applying the laws of the jurisdiction of which the deceased foreign national maintained citizenship at the time of his/her death²⁸ – the concept known as the principle of *renvoi*: one of the most complicated rules in the field of conflict of laws. The principle of *renvoi* is applied where, in a dispute, conflict of laws rules of one jurisdiction refer to apply the laws of another jurisdiction as the former finds that the latter has greater interest in the dispute. In referring the laws of the country of the foreign national in a dispute of inheritance/succession, the Nepali courts will apply the 'domestic law' of the country of the foreign national but not the conflict of laws of that country. Therefore, Nepali courts would not accept the *renvoi* back, something known as 'double renvoi' in the conflict of laws rules, from the law of the foreign country and would not apply Nepali domestic law. Failing to determine the country of citizenship of the deceased person, Nepali courts will apply the laws of the country where the deceased maintained a habitual residence at the time of his/her death; or failing that, the laws of Nepal will be applied.²⁹

Legal heir

A question relating to the determination of legal heirs in connection with inheritance of property of a deceased foreign national residing in Nepal will be determined by applying the laws of the jurisdiction of which the deceased foreign national maintained citizenship at the time of his/her death;

26 Civil Code, s 698(1).

27 *Ibid* s 698(2).

28 *Ibid* s 696(1).

29 *Ibid* s 696(2).

or failing that, the laws of the country where the deceased foreign national last maintained a residence.³⁰

Marriage

MARRIAGE CELEBRATED BY NEPALI CITIZENS ABROAD

It is obvious that a marriage between Nepali citizens celebrated in Nepal will be governed under the general laws of Nepal. However, a marriage of Nepali citizen(s) celebrated outside Nepal will be governed by applying the Nepali conflict of laws rules. Questions relating to capacity to marry, qualifications and other conditions of the marriage of a Nepali citizen must be determined under the substantive laws of Nepal with respect to the marriage between Nepali citizens or between a Nepali citizen and a foreign national.³¹ Procedural formalities will be complied with in accordance with the laws of the country where the marriage is celebrated,³² a concept commonly known as *lex loci celebrationis* (law of the place where marriage is celebrated). This is identical to the concept of marriage adopted in the English as well as the US rules. A marriage celebrated abroad without complying with the substantive laws of Nepal relating to marriage with respect to a Nepali citizen shall neither be deemed to be valid nor shall it be recognised in Nepal.³³

An interesting development in the Nepali legal system occurred in the Supreme Court case of *Suman Panta v Ministry of Home Affairs et al*,³⁴ in which the court ruled that a foreign national as a spouse of a same-sex Nepali citizen is entitled to a visa in Nepal as a dependant, albeit that same-sex marriage has yet to be recognised in Nepal. It is yet to be seen how the Nepali courts will rule on the issue of the validity of a same-sex marriage that was celebrated abroad in the absence of a definitive law in this area. Another equally challenging issue is gender change cases, where a person of one gender acquires the opposite gender with medical assistance. Unlike in the UK where, under the Gender Recognition Act 2004, a person can obtain a 'gender recognition certificate' upon gender change and in the US, where almost all states recognise gender change, Nepal has yet to enact legislation recognising gender change. Amid this, it is yet to be seen how the Nepali courts will rule on the issue of marriage celebrated abroad by person(s) with gender change.

30 *Ibid* s 695.

31 *Ibid* s 699(1).

32 *Ibid* s 699(2).

33 *Ibid* s 699(3).

34 NLJ 2074, 2083.

MARRIAGE CELEBRATED BY FOREIGN NATIONALS IN NEPAL

On a similar note, questions relating to capacity and other qualifications to marry and other conditions of marriage of foreign national(s) to be celebrated in Nepal between foreign national(s) or a foreign national and a Nepali citizen are to be determined under the substantive laws of the country of citizenship of each party.³⁵ In other words, if both parties are foreign nationals, the substantive laws of the country of each foreign national applicable to the marriage will be followed. Likewise, where a party is a foreign national and the other party is a Nepali citizen, then the substantive laws of the country of which the foreign national is a citizen will be followed with respect to the foreign national, whereas the substantive laws of Nepal will be followed for the Nepali citizen. Further, all procedural formalities will be performed under the laws of Nepal to a marriage celebrated in Nepal.³⁶ A marriage celebrated in Nepal without fulfilling the substantive and procedural formalities stated above will not be recognised in Nepal.³⁷

In applying the substantive law of the country of a foreign national in questions relating to capacity to marry, qualifications and other conditions of a marriage, a complex question is likely to arise in a situation where the laws of certain countries provide validity to a marriage celebrated over the telephone, internet or other electronic means, or by proxy. For example, some countries, such as Brazil, Gambia, Nigeria, Pakistan and Paraguay, and several states in the US, namely California, Colorado, Montana and Texas, permit marriage by proxy. Montana further allows double-proxy marriage, where neither party is required to be present at the ceremony and can be presented by proxy. In Nepal, certainly these issues will raise a concern of 'public policy'. The matter will be further complicated if the marriage is celebrated in outer space. It is yet to be seen how the Nepali courts will rule in these circumstances.

POST-MARRIAGE RELATIONSHIP

Questions relating to the marital relationship and other issues arising out of a marriage will be determined under the laws of the country citizenship of the couples if the couples are citizens of the same country.³⁸ In cases where the couples are citizens of different countries, then the laws of the country where the couples maintained a habitual residence will be applied in determining

35 Civil Code, s 700(1).

36 *Ibid* s 700(2).

37 *Ibid* s 700(3).

38 *Ibid* s 710(1).

questions relating to the marital relationship and other issues arising out of a marriage; or failing that, the laws of the country where they maintained their current residence will be applied; or failing all of the above, the laws of the country where the marriage was celebrated will be applied.³⁹ If the couples are citizens of a country or countries other than Nepal, then the Nepali courts will recognise a marriage contract, such as pre-nuptial and post-nuptial contracts or separation and settlement contracts subject to the applicable choice of law clause. Nonetheless, a marriage contract between Nepali citizens or between a Nepali citizen and a foreign national residing in Nepal may not be enforceable as under the laws of Nepal statutory provisions will regulate the post-marriage relationship rather than a contract.

Furthermore, the relationship between parents and children, such as parental authority and custody, will be determined under the laws of the country of citizenship of the child.⁴⁰ Where there is a failure to determine the country of citizenship of the child, then the issue will be determined under the laws of the country where the parents maintained their habitual residence; or failing that, the laws of the country of their current residence.⁴¹

Divorce and alimony

Nepali conflict of laws rules provide full faith and credit to divorce decrees obtained abroad among Nepali citizens or a Nepali citizen and a foreign national, and will be recognised and enforced in Nepal, provided that the divorce decrees comply with the laws of the country where the divorce was obtained.⁴² In the pre-Civil Code regime case of *Pushkarraj Pandey et al v Sabina Pandey*,⁴³ the Supreme Court bluntly declined to recognise a judgment of divorce rendered by the District Court of the State of Oklahoma, US, for various grounds, among others, public policy, lack of comity and reciprocity, and lack of a fair trial during the US divorce proceedings. The grounds adopted in *Pushkarraj* in the pre-Civil Code regime are less likely to be followed by courts in granting recognition of judgments of divorce obtained in foreign countries in the present Civil Code regime, which adopts a strong foundation to grant full faith and credit to divorce decrees obtained abroad.

39 *Ibid.*

40 *Ibid* s 702(1).

41 *Ibid* s 702(2).

42 *Ibid* s 706.

43 NLJ 2068, 387.

Adoption

Nepal is not a signatory to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, nor has it ratified it yet. As such, an adoption certified by the competent authority of the Hague Convention state may not be recognised in Nepal. In determining a question relating to the validity of an adoption, the Nepali courts will apply the concept of *lex fori* (the law of the forum) and thus will determine the issue under the laws of the country where the formalities of adoption had taken place irrespective of the diversity of citizenship of the adopted child and the adoptive parents. This would generally be the country where the adopted child resided at the time of the adoption. Nepali conflict of laws rules will come into play where the adoptive parents and the adopted child are of different nationalities. By contrast, the relationship between the adoptive parents and the adopted child, in relation to the rights of the adopted child, obligations of the adoptive parents, custody and so on, will be governed by the laws of the country of citizenship of the adoptive parents.⁴⁴ Complexities may arise where each of the adoptive parents holds citizenship of a different country. In that case or in a case where the citizenship of the adoptive parents cannot be identified, the relationship between the adoptive parents and the adopted child will be determined under the laws of the country where the former maintained a habitual residence; or failing that, under the laws of the country where the adoptive parents have spent most of their married life.⁴⁵

Guardianship or curatorship of a disabled person

Issues relating to the guardianship or curatorship of an incapacitated/disabled or a semi-incapacitated/disabled person will be determined under the laws of the country of citizenship of such a person; or failing to identify such a country, the question will be determined under the laws of the country of the habitual residence of the person; or failing that, under the laws of the country where the person maintained their current residence.⁴⁶ On the other hand, issues relating to the relationship between a guardian or a curator and an incapacitated/disabled person will be determined under the laws of the country where the appointment of the guardian or the curator has taken place.⁴⁷ Nonetheless, the relationship will be determined under the laws of Nepal if it is the habitual residence of the incapacitated/disabled person.⁴⁸

44 Civil Code, s 703.

45 *Ibid.*

46 *Ibid* ss 704(1) and 704(2).

47 *Ibid* s 704(3).

48 *Ibid.*

Identification of the country of citizenship

Generally, questions relating to eligibility, conditions of maintaining of, abandonment and revocation of citizenship are regulated under the domestic laws of each country. Conflict of laws rules will play a major role with respect to a person holding citizenship of more than one country or a stateless person. If the country of citizenship of a person holding citizenship of more than one country is to be identified to apply the conflict of laws rules to a dispute, the laws of the country of citizenship of the person will be applied where he/she has maintained a habitual residence; or failing that, the laws of the country of his/her citizenship that has the 'closest connection' to the dispute will be applied.⁴⁹

With respect to a Nepali citizen having a habitual residence in Nepal or a non-resident Nepali citizen, the laws of Nepal will apply to a dispute irrespective of the fact that the application of laws of a country other than Nepal is warranted under the closest connection test.⁵⁰ For a stateless person or a refugee, the laws of the country of his/her habitual residence or in the absence of a habitual residence, the laws of the country where the stateless person or the refugee maintained a residence at the time of the dispute will be applied.⁵¹

Questions relating to parent-child relationship, such as the father/mother's rights and obligations over children, custody and guardianship of children, will be determined under the laws of the country of the child in question.⁵² The applicable law may vary for each child if he/she maintained citizenship of different countries. If the citizenship of a child cannot be identified, then the laws of the country of the habitual residence of the parents will be applied; or failing that, the laws of the country where the parents are currently resident will be applied.⁵³

Death and disappearance

A question relating to the assumption of death or the disappearance of a foreign national will be determined under the laws of the country of citizenship of that person.⁵⁴ In the event of a failure to identify the citizenship of a foreign national, an assumption will be made under the laws of the country of his/her habitual residence; or failing that, under the laws of the

49 *Ibid* ss 715(1) and 715(2).

50 *Ibid* s 715(2).

51 *Ibid* s 715(3).

52 *Ibid* s 702(1).

53 *Ibid* s 702(2).

54 *Ibid* s 694(1).

country where the person maintained residency immediately prior to his/her death or disappearance.⁵⁵

Capacity of natural person and body corporate

CAPACITY OF NATURAL PERSON

A Nepali citizen who attains the age of 18 years will be considered to be a major and will be legally competent in that capacity.⁵⁶ Furthermore, a person who has not attained the age of ten years or a person who is unable to protect his/her rights and interests due to an unsound mind, despite attaining the age of ten years, will be considered to be a legally incompetent person.⁵⁷ Similarly, a person between the age of ten and 18 years will be considered as a quasi-competent person.⁵⁸ A document, which is required to be executed on behalf of an incompetent person or a quasi-competent person, must be executed through his/her guardian or curator.⁵⁹ Any issues relating to the legal capacity of a foreign national will be determined under the laws of the country of his/her citizenship.⁶⁰ In the event of a failure to identify the citizenship of a foreign national, any issues will be determined under the laws of the country where he/she maintained a habitual residence; or failing that, under the laws of the country where he/she maintains their current residence.⁶¹

CAPACITY OF A BODY CORPORATE

Any issues relating to the legal capacity or legitimate status of a body corporate will be determined under the laws of the country where it was incorporated; or failing that, under the laws of the country where the head office of the entity is situated; or failing that, under the laws of the country where it conducts its business.⁶²

Donation or gift

Any questions relating to the validity of a donation or gift will be determined under the laws of the country of citizenship of the donor at the time when

55 *Ibid.*

56 *Ibid* s 32(1).

57 *Ibid* s 33(1).

58 *Ibid* s 34(1).

59 *Ibid* ss 33(3) and 34(4).

60 *Ibid* s 693(1).

61 *Ibid* s 693(2).

62 *Ibid* s 697.

the donation or the gift was made.⁶³ Furthermore, in order for a donation or gift to be deemed to be granted lawfully, the donation or the gift must have complied with formalities prescribed by the laws of the country where the donation or gift was made.⁶⁴

Tort

The Nepali conflict of laws rules adopt the concept of *lex loci delicti commissi* (law of the place where the tort was committed) in determining the applicable laws in tort cases involving a foreign element. In determining liability for a tort committed outside Nepal, which must also constitute a tortious act under Nepali laws, the laws of the country where the tort was committed will be applied, provided that the dispute in question involves either a foreign national as a party or a foreign object as a subject of the dispute.⁶⁵

In a case of a multijurisdictional tort, where a tortious act is initiated in a country and the result thereof is produced in another country, liability under the tort will be determined under the laws of the country where the result occurs; or failing that, under the laws of the country where the tort is conducted.⁶⁶

The requirement of 'foreign object' as one of the elements to determine liability under the Nepali conflict of laws rules in a tort case somehow lacks clarity. Unlike other jurisdictions, where product liability is deemed to be an integral part of the law of tort and liability in a product liability case is determined under the law of tort, in the Nepali legal system, the Civil Code classifies tort and product liability separately and thus must be dealt with under separate sets of laws. If the requirement of 'foreign object' in the conflict of laws rules is meant to indicate liability arising out of a defective product manufactured in a foreign country, then this matter must be dealt with under the law of product liability and not under the law of tort. Therefore, a reference to the term 'tort' in the conflict of laws rules is somehow erroneous and should otherwise be 'product liability'. Conversely, if the term 'foreign object' is meant to refer to a tort committed in a movable object, such as an aircraft or a vessel, then such tort will be governed under the laws of the country of nationality of the aircraft or vessel and not under the laws of Nepal, unless the nationality of the aircraft or vessel happens to be Nepali. Furthermore, such tort will fall under the domain of sector-specific international conventions, such as the Warsaw Convention and its Protocols

63 *Ibid* s 711(1).

64 *Ibid* s 711(2).

65 *Ibid* s 712(1).

66 *Ibid* ss 712(2) and 712(3).

or the Montreal Convention for an act conducted by a carrier of an aircraft and the Athens Convention, Limitation of Liability for Maritime Claims (LLMC) Convention, International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 and the International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of the Owners of Sea-going Vessels 1924 for an act conducted by a carrier of a vessel.

With respect to tort cases, the Nepali conflict of laws rules adopt an old-fashioned approach by today's standards – *lex loci delicti commissi* (law of the place where the tort was committed), a concept that is not favoured in the English, US or EU conflict of laws rules. A more prevailing approach in tort cases is *lex loci damni* (the law of the country where the direct damage occurs) or the law of the state that has the most 'significant relationship' to the occurrence and parties. Strangely, it is unknown why the drafters of the Civil Code adopted a century-old concept in the conflict of laws rules – one that has already been abandoned by other jurisdictions.

Contract

Undoubtedly, the law of contract is the most frequently sought law in cases where the conflict of laws rules apply. The law of contract of Nepal provides 'party autonomy' in execution and performance of a contract and parties are free to determine the form or subject matter, terms and conditions, nature of remedies in case of breach and terms relating to dispute resolution, provided that such terms do not contravene the laws of Nepal.⁶⁷

The Nepali conflict of laws rules recognise the choice of law clause selected by parties in a contract as long as at least one party is a foreign national or a foreign entity.⁶⁸ This is similar to the concept adopted by the US in its Restatement (Second) Conflict of Laws.⁶⁹ However, unlike the Restatement (Second) Conflict of Law, the Civil Code doesn't provide discretion to courts to ignore the choice of law selected by the parties on the ground – the chosen state has no substantial relationship to the parties or the transaction; or application of the choice of law would be contrary to a fundamental policy of a state that has a materially greater interest than the chosen state.⁷⁰ The courts of Nepal are bound to apply the choice of law clause selected by the parties irrespective of the fact that there is no 'substantial relationship' or the other jurisdiction has 'material greater interest'. In the absence of a choice

67 *Ibid* s 507.

68 *Ibid* s 709(1).

69 Restatement (Second) Conflict of Laws, s 187 (1971).

70 *Ibid*.

of law clause in a contract that was executed in Nepal, the contract will be regulated under the laws of Nepal.⁷¹ By contrast, if a contract was executed outside Nepal and the parties failed to stipulate a choice of law clause, the contract will be regulated under the laws of the country where performance under the contract is sought to be done; or failing that, under the laws of a country where it was executed.⁷²

The Civil Code has identified some factors, such as the place of execution of the contract and place of performance, as in the Restatement (Second) of Conflict of Laws to apply the law applicable to the issue in the absence of a choice of law clause in a contract. Nonetheless, the Nepali conflict of laws rules adopt a very straightforward approach in applying the law in the absence of a choice of law clause in a contract leaving no discretion to the courts. The Nepali conflict of laws rules do not borrow the concept adopted by the Restatement (Second) Conflict of Laws, which provides discretion to the courts to apply the law evaluating 'the most significant relationship to the transaction and the parties' and some other factors as well, such as:

- the place of negotiation of the contract;
- the place of location of the subject matter of the contract; and
- the domicile, residence, nationality, place of incorporation and place of business of the parties and some other factors.⁷³

These are not factors for consideration for the Nepali courts.

Furthermore, a question relating to the validity of a contract or a deed executed outside Nepal will be determined under the laws of the country where the contract or deed was executed.⁷⁴ A contract or deed executed outside Nepal is required to have complied with the formalities of execution of the country where it was executed in order for it to be recognised in Nepal.⁷⁵

Sale of goods

The Nepali conflict of laws rules regarding the sale of goods that travel across more than one country warrant application of the laws of the country of destination in a dispute relating to sale of goods.

There are several international conventions in force that deal specifically with the carriage of goods in international transport, such as the Hague Rules to govern the carriage of goods by sea, the Treaty of Rome 1957 to

71 Civil Code, s 709(2).

72 *Ibid.*

73 Restatement (Second) Conflict of Laws, ss 188 and 6 (1971).

74 Civil Code, s 710.

75 *Ibid.*

govern the carriage of goods by railway, CIV 1961 and its Protocols to govern carriage of luggage by rail, CMR 1956 and its Protocol to govern carriage of goods by road, the Warsaw Convention and its Protocols, and the Montreal Convention to govern the carriage of goods by air. Under the rule of exclusivity of treaties, which has been adopted by the Nepali conflict of laws rules, the provisions of respective treaties will govern in matters relating to the international transport of goods where applicable.⁷⁶

Recognition and enforcement of foreign judgments and public order

A major shortfall of the Civil Code, which the drafters missed, is the recognition and enforcement of foreign judgments, with the exception of divorce judgments.⁷⁷ As of yet, Nepal hasn't acceded to any treaty for the enforcement of foreign judgments, nor has it concluded any bilateral agreements with any country to that effect. In this situation, a proper resolution of this issue would inevitably be to incorporate the appropriate rules in domestic law, which the drafters of the Civil Code unfortunately missed and accordingly missed the boat while drafting the Civil Code. In the absence of a proper set of rules for the enforcement of foreign judgments, they are still not enforceable in Nepal, albeit that parties opt to select choice of foreign law clauses and jurisdiction of courts of foreign countries applying to disputes. The issue of the enforcement of foreign judgments in Nepal still remains an unaccomplished task and thus makes the Nepali legal system incompatible with international practice. Consequently, this would result in the non-enforcement of judgments rendered by Nepali courts by the courts of other jurisdictions against their people and entities due to a lack of reciprocity or comity. This still remains a major drawback of the Nepali legal system that needs to be faced in the years to come.

As in other areas of laws, such as the enforcement of foreign judgments or foreign arbitral awards, public policy has been characterised as a tool in the conflict of laws rules to avoid the application of laws that otherwise would have applied under conflict of laws rules. The Nepali conflict of laws rules adopt this concept and grant courts a last-ditch weapon to avoid applying the conflict of laws rules where the application of the rules is against the public order (*ordre public*). In *Pushkarraj*,⁷⁸ though in the absence of the rules of private international law at that time, the Supreme Court stated that foreign judgments cannot be ignored and should be enforced in Nepal based on reciprocity and comity, provided that the foreign judgment is not

76 See n 6 above.

77 See n 42 above.

78 See n 43 above.

contrary to public policy. Though the ruling of this case was laid down in the pre-Civil Code regime, it is more likely that courts may follow this ruling in granting recognition of foreign judgments on case-by-case basis as the absence of a legal basis for the non-enforcement of foreign judgments still exists in the present Civil Code.

The Nepali conflict of laws rules will be enforced subject to compliance with public order. If the application of conflict of laws rules contradicts with the public order in any manner, then the conflict of laws rules will not be applied.⁷⁹ The Civil Code neither defines the term ‘public order’ nor is there any specific guideline in other prevailing laws as to what activities this term will cover, thus leaving it ultimately to the discretion of courts.

In a dispute where the conflict of laws rules are avoided as a matter of public order, the courts will regulate the dispute applying the law to be identified through other linking criteria to the extent they find practical; or failing that, under the laws of Nepal.⁸⁰ The term ‘against public order’ used in the Nepali conflict of laws rules is slightly different than the prevailing term used in other jurisdictions: ‘manifestly incompatible with the public policy’.

It is not clear why the Civil Code adopted the civil law concept of *ordre public* in the conflict of laws rules whereas other prevailing laws, that is, the Arbitration Act 2055 (1999 AD), adopt the common law concept of ‘public policy’ in declining the enforcement of foreign arbitral awards in Nepal on similar grounds.⁸¹ It can be expected that the Nepali courts will interpret both concepts, *ordre public* and public policy, as interchangeable concepts. Since the application of the conflict of laws rules is in a nascent stage in Nepal, we have yet to see court rulings applying these rules. Nonetheless, it is likely that the Nepali courts will decline to apply the conflict of laws rules in certain cases that warrant the application of the domestic laws of another country that would be manifestly inconsistent with the domestic laws of Nepal, for example, cases where the rules refer to the substantive law of the country that validates a marriage celebrated by a foreign national by telephone or other electronic means or by proxy.

Conclusion

By incorporating the conflict of laws rules in its legal system, Nepal has expanded its application and further sent a message that its legal system is ready and its judiciary is capable enough to handle the complex conflict of laws rules. Indeed, the adoption conflict of laws rules should be taken as

79 Civil Code, s 721(1).

80 *Ibid* s 721(2).

81 Arbitration Act 2055 (1999 AD), s 34(4)(b).

a positive step towards making the Nepali legal system more uniform and reliable in international legal circles.

Until the enactment of the Civil Code, there was a complete paucity of conflict of laws rules in the Nepali legal system, and as such, in adjudicating disputes, courts were neither authorised to apply the choice of law of another jurisdiction nor were they authorised to apply the laws of another jurisdiction in legal proceedings albeit that private international law requires this.

With the adoption of the conflict of laws rules in its legal system, the jurisdiction of the Nepali courts has been widened, which now allows them to adjudicate disputes relating to diversity. More interestingly, the Nepali courts will now be required to apply the laws of other jurisdictions when parties adopt a choice of law clause of another jurisdiction in a contract or due to the application of conflict of laws rules in disputes. This is an innovative concept for judges in Nepal, which they have previously never had to deal with, and are therefore unaccustomed to it. Thus, now judges are required not only to interpret Nepali laws but they also need to understand the laws of other jurisdictions and interpret them in adjudicating cases. Obviously, this is likely to be a challenging task for them. It seems relevant to borrow a few words from the prominent US judge Benjamin Cardozo: ‘the average judge, when confronted by a problem in the conflict of laws, feels almost completely lost, and, like a drowning man, will grasp at a straw’.⁸²

Another challenge in applying the Nepali conflict of laws rules is that they neither recognise the concept of ‘domicile’ nor ‘nationality’, which has been widely adopted by a large number of jurisdictions. In common law jurisdictions, it is ‘domicile’ and not ‘nationality’ that plays a major role in conflict of laws cases, which represents a state of mind that is demonstrated by a ‘fixed’, ‘permanent’ and ‘principal adobe’. By contrast, in many non-common law countries, ‘nationality’ is taken as the major factor in conflict of laws cases. Contrary to the concept of ‘domicile’ and ‘nationality’, the Nepali conflict of laws rules adopt a narrower concept of ‘citizenship’. This provision may not have any impact on Nepali citizens as under the Nepal Citizenship Act 2063 (2006 AD), a Nepali citizen cannot hold the citizenship of any other country and if he/she voluntarily acquires the citizenship of other country and his/her Nepali citizenship will automatically be deemed to be lapsed.⁸³ In this sense, the terms ‘citizenship’ and ‘nationality’ can be taken as being interchangeable.

Neither the rules of Nepali conflict of laws nor any other laws adopt the concept of ‘domicile’. Strangely, in *Pushkarraj*,⁸⁴ the Supreme Court ruled

82 Cited in Morris, *The Conflict of Laws* (2016), 6.

83 Nepal Citizenship Act 2063 (2006 AD), s 10(1).

84 See n 43 above.

that the plaintiff wife, who objected to the enforcement of a foreign judgment of divorce obtained by the Oklahoma resident husband, was neither a domicile of the US nor did she accept the jurisdiction of the District Court of the State of Oklahoma, therefore, in matters relating to her marriage, the laws of Nepal and not of the State of Oklahoma were applicable. In determining that the wife was not a domicile of the US, the Supreme Court stated the following as evidence: her return to Nepal, lack of employment in the US, difficulty in obtaining a spouse visa and so on. It is curious that the Supreme Court had to engage in an analysis of the ‘domicile’ of the wife, where the applicable law for the divorce – the Oklahoma Statute – does not prescribe a ‘domicile’ requirement for the defendant wife and what it requires is that either the petitioner or the respondent must be a ‘resident’ of the state for six months immediately preceding the filing of the petition for divorce.⁸⁵ ‘Domicile’ is not a requirement for a divorce action in many states in the US. For example, in the State of New York, the requirement is either that the petitioner or the respondent must be a ‘resident’ of New York State continuously for at least two years before the divorce case is started, or one year, provided that certain conditions are met.⁸⁶ Undoubtedly, the Supreme Court in *Pushkarraj* erred in engaging in an analysis of ‘domicile’ and rendered the judgment on an unfounded basis.

A state that has adopted a specific type of legal system may borrow general acceptable rules of conflict of laws within the same legal system. For example, a member state under the common law system may borrow the English rules of conflict of laws, and similarly, a state under the civil law system may borrow the French or German rules of conflict of laws. A real dilemma, however, for Nepal is that its legal system is neither based on a common law nor a civil law system as it adopts a legal system that can be seen as a hybrid of both of those legal systems. Because of this oddity, the Nepali conflict of laws rules place it in a difficult position when it comes to finding generally acceptable principles of conflict of laws that it can borrow in a specific situation. The Civil Code provides a catch-all provision that in matters relating to conflict of laws where Nepali laws do not provide specific guidance, then the matter will be dealt with according to the recognised principles of private international law.⁸⁷ Although courts are more inclined to adopt principles of English common law on non-traditional issues, nonetheless, such a practice may neither always seem wise nor practical in the application of the conflict of laws rules. Thus, the Nepali courts will eventually need to develop their own rules in this area.

85 43 OK Stat s 43-102.

86 NYDom Rel L s 230.

87 Civil Code, s 714(1).

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