A Reflection on Public Policy Exception in Private International Law under the New York Convention, European Union Instruments and Ethiopian Law

Abiyot Mogos[*]

Abstract

With the advent of globalization, an expansive increase in cross border transaction and socio-economic interaction has resulted in cross border law, judgment, and conflict of jurisdiction. This resulted in the development of private international law to ensure decisional harmony. Yet as a complete uniformity may sometimes run against public policy of concerned states, public policy exception is usually inserted. This piece reflects on the notion of public policy exception in private international law under the Ethiopian private international law rules in light of the European Union (EU) instruments and New York convention, and demonstrates how the EU experience could be helpful to improve the Ethiopian draft laws on the issue. Unlike EU, Ethiopia does not have comprehensive and binding laws of private international law other than some insufficient provisions under the civil procedure code (CPC) and the draft law. Even more, the existing Ethiopian rules under the CPC and draft law are crafted in manner that allow broader space to public policy exception including morality, are anti-foreign law or judgment in principle, less coherent and incomplete, and hence, are not as good as its EU counter parts to achieve the desired goal of private international law. Even if Ethiopia ratified the New York Convention, the scope of the Convention is limited to recognition and enforcement of award only. Hence, to have a complete and coherent Ethiopian legal regime on private international law, it is necessary to include pertinent stipulations on public policy exception under the EU instruments in the Draft proclamation.

***Key words*:** Ethiopia, EU, public policy, private international law

Introduction

Globalization has led to an expansive increase in cross-border transactions and socioeconomic interaction among citizens of different states or federating units. The cross-border interactions of individuals, which manifests in different

[*] LL.B, LL.M in International Economic and Business law, Lecturer of Law at Mettu University and can be reached at abiyot00@gmail.com. The author is indebted to the Editor-in-Chief and the anonymous reviewers.

spheres of life, often result in conflicting international legal situations in the form of cross-border law, judgment and conflict of jurisdiction, resulting from the existence of diverse legal orders on the globe. Such interactions of nationals and domiciliary of different states in areas of trade, commerce, and investment have necessitated the development of private international law.[1]

The objective of private international law at this juncture is to achieve decisional harmony by providing rules on each of its three sub-stages: choice of court, choice of law and the recognition and enforcement of foreign judgment and arbitral award.[2] However, as this may sometimes run against public policy of concerned states, public policy clause is usually inserted as safety valve.[3] Yet this in turn creates other problem of abusing the public policy exception, thereby making the normal operation of private international law an empty promise. Thus, the intricacies and lacunae in the operation of the law call for a balanced approach to the exception.

Looking into the literature on legal instruments pertaining to this problem, one could see that there is no full-fledged universal convention on the point except the case of the New York convention.[4] Yet there is an important development to address the issue under the EU framework.[5] This framework is a well-developed legislation widely considered as a major development into modernization of private international law. As such, many argue that modernization of private international law is nothing but Europeanization of private international law rule.[6] Thus, it can serve as a model for other states like Ethiopia in the development of rules in this regime of law.

With its citizens increasingly interacting with nationals of other states, Ethiopia needs a workable private international instrument regulating this interaction in employment, trade, commerce, and investment. Yet it has no comprehensive private international law except provisions dealing with enforcement of

[1] Araya Kebede & Sultan Kassim ,*Conflict Of Law Teaching Material*, Sponsored by Justice and Legal System Research Institute, (2009), P. 8.
[2] Burkhard Hess & Thomas Pfeiffer, Study on Interpretation of the Public Policy Exception as Referred to in EU Instruments of Private International And Procedural Law, European parliament, Brussels, (2011), p.20.
[3] Ibid.
[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations, New York, (1958) (hereinafter The New York Convention).
[5] Hess & Pfeiffer , *Supr*a note 2, p. 27.
[6] L.R. Kiestra, The Impact of the European Convention on Human Rights on Private International Law, PhD Thesis, University of Amsterdam, (2013), P.17.

judgment and arbitral award under the CPC.[7] The country has also ratified the New York convention, and this can be considered as part of the domestic law of the country in the wording of the Constitution[8] regarding enforcement and recognition of arbitral award. Besides, there is draft proclamation[9] which courts could resort to in entertaining cases containing a foreign element as persuasive interpretative guide in the absence of binding law applicable to the matter. Yet the body of rules in these documents is too incoherent to show the country's public policy rules in private international law.

This piece doctrinally reflects on the notion of public policy exception in private international law under the Ethiopian private international law rules in light of the EU instruments and the New York convention. It also makes analytical comparison of the Ethiopian and EU system on the issue. Further it demonstrates how the EU experience could be helpful to revisit the Ethiopian draft laws on issues not addressed under the CPC and the New York convention, and it takes a right approach to public policy exception in each sub-stage of private international law.

1. Basic Concept, Function and Justification of the Public Policy Exception

A Public policy is one of the escaping devices that preclude normal operation of conflict of law rules in each of the three components of private international law. It is mainly invoked in respect of the application of foreign law and non-recognition and enforcement of foreign judgment or award.[10] A related term "*ordre public*" possesses two distinct meanings.[11] First, it has a meaning similar to that associated with "public policy" in the common law: courts will not enforce acts the performance of which would contravene fundamental moral principles, or which would offend against some other overriding public interest. Turning to the meaning in civil law traditions, this term (ordre public) refers to

[7] Civil Procedure Code of the Empire of Ethiopia , Decree No.52/1965, *Negarit Gazetta*, (1965), (hereinafter Civil Procedure Code).

[8] The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazetta*, (1995), Article 9(4)

[9] Federal Democratic Republic of Ethiopia, Draft Federal Rules of Private International Law (hereinafter Draft Proclamation)

[10] Parameshwaran Anupama, Conflict of Laws in the Enforcement of Foreign Awards and Foreign Judgments: the Public Policy Defense and Practice in U.S. Courts, LL.M Thesis, University of Georgia school of law, (2002), p.1.

[11] Ibid., p.79.

legislative provisions which are mandatory or "*jus cogens*", i.e., provisions which cannot be contracted out or otherwise excluded.[12]

Despite some level of differences in the conceptualization of the notion in the two legal traditions, public policy is, in effect, a safety valve that precludes the normal operation of conflict of law rules in each components of private international law. Also, in the meanings, it is evident that the main function of public policy is to protect the fundamental values of the forum state against unacceptable results which may derive either from the application of foreign law or from the recognition of foreign judgments.[13] It usually operates in a negative way as it prohibits the application of foreign law or the recognition of a foreign decision contrary to the fundamental values of the *lexfori*[14] In this respect, public policy is used as a "shield" barring negative results from the forum.[15]

However, public policy also serves a positive function of ensuring application of the forum law to ensure sovereignty and secure benefit of nationals.[16] The proponents of public policy exception justify their position with these negative and positive functions that may be achieved through maintaining public policy exception. Some legal writers take a negative stance against public policy arguing that it represents an obstacle to apply foreign law or it is a ground for refusal of foreign judgments.[17] Yet many scholars adhere to the middle, golden approach which supports maintaining public policy as exception; while construing it narrowly to offset its negative consequences and avoid abusive resort.

2. Public Policy Exception under the New York Convention, European Union Instruments and Ethiopian Law

A considerable number of attempts had been made by the international community to come up with a comprehensive convention in the field of private international law along with meaningful approach towards public policy exception. Among these, the Hague Conference on Private International Law is mandated as the only intergovernmental organization with a legislative mission on issues of private international law.[18] Accordingly, the Hague Conference had produced the Convention on the Recognition and Enforcement of Foreign

[12] Ibid.
[13] Hess & Pfeiffer , *Supr*a note 2, p. 27.
[14] A. V. M. Struycken, *Public Policy in Its Private International Law Function*, (2004) P.395.
[15] Ibid.
[16] Ibid., p.400.
[17] Kiestra, *Supra* note 6.
[18] Hans Van Loon, The Hague Conference on Private International Law, *HJJ I,* Vol. 2 No. I , (2007)

Judgments in Civil and Commercial Matters in 1971, but it was ratified by only four countries including Albania, Cyprus, Kuwait and Portugal.[19] The Hague convention on choice of court[20] is also prepared under the auspices of the Hague conference but only 29 countries including EU member states ratified the convention. Under the auspices of the United Nations diplomatic conference, New York Convention on Recognition and Enforcement of Foreign Arbitral award was adopted, and ratified by 162 states including the EU and Ethiopia.[21] Besides, the issues of private international law are regulated under framework of regional integration like EU and domestic laws of individual states. This section discusses public policy exception under the New York convention, EU and Ethiopian private international law.

2.1. Public Policy Exception under the New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, widely known as the New York Convention, is the most important convention in the field of arbitration. The convention aims to provide a common legislative standard that requires courts of contracting states to give effect to private agreements to arbitrate, and recognize and enforce arbitration awards made in other contracting States. Article III of the Convention requires a Contracting State to 'recognize arbitral awards as binding' and enforce the awards according to the State's own rules of procedure, but State may not impose 'more onerous conditions or higher fees or charges' for the recognition or enforcement of awards under the New York Convention than it would impose for domestic award.

Article V of the Convention provides for grounds of non-recognition and enforcement of a foreign award which includes public policy exception. According to Article V (2) (b) of the Convention, recognition and enforcement of an arbitral award may be refused if the competent authority in the country, where recognition and enforcement is sought- finds that the recognition or enforcement of the award would be 'contrary to the public policy' of that country.

[19] Trimble Marketa, The Public Policy Exception to Recognition and Enforcement of Judgments in Cases of Copyright Infringement, Scholarly Works. Paper 564, (2009), p. 11.

[20] Convention on Choice of Court Agreements, The Hague Conference on Private International Law, (30 June 2005) (hereinafter Hague Convention on Choice Of Court)

[21] Ethiopia ratified of the New York Convention on 13 February 2020, and becomes the 162nd Contracting State.Source:http://www.newyorkconvention.org/news/ethiopia+ratifies+the+new+york+convention

However, though notion of public policy under this provision is not clearly defined to limit it, the general trend in most countries is to be in line with and faithfully observe the pro-enforcement rule under Article III, and narrowly interpreting the public policy exception.[22] For instance, English Courts have adopted a strong pro-enforcement policy and are reluctant to excuse an award from enforcement on grounds of public policy.[23] In United States, too, a precedent has shown that the courts narrowly interpreted this notion of public policy invoked under Article V (2) (b) of the convention.[24] For instance, the United States court in *Parsons & Whittemore v. RAKT*[25] explicitly noted that the defense of public policy must be limited to a situation where the enforcement would violate the most basic notions of morality and justices only.

At this juncture, it is important to note that the New Convention does not seem to impose obligation to apply a transnational notion of public policy in the recognition and enforcement of arbitrary awards as long as the state complies with the pro-enforcement obligation by narrowly construing its public policy on a case-by-cases basis. Thus, the Convention accommodates differences in the notion and application of public policy arising from fundamental social, economic, moral, and even constitutional differences underlying legal systems of States.[26] Hence, the Convention does not dictate a uniform interpretation of public policy, but encourages State courts to limit public policy grounds to principles considered fundamental within the legal system of the Enforcement State through its pro-enforcement obligation.

2.2. Public Policy Exception under the European Union Instruments

Under the EU instruments, the public policy clauses are a ground for the non-recognition of a foreign judgment and for the non-application of foreign laws. The three legal regimes governing the issues of judicial jurisdiction, and the recognition and enforcement of judgments within EU system in civil and commercial matters include the Brussels Convention,[27] the Brussels I

[22] Nivedita C. Shenoy, Public Policy under Article V(2)(b) of the New York Convention: Is there a Transnational Standard?, *Cardozo Journal of Conflict Resolution*, Vol. 20:770, (2018), p.90.
[23] Ibid., p.94.
[24] Joseph T. Mc Laughlint & Laurie Genevro, Enforcement of Arbitral Awards under the New York Convention Practice in U.S. Courts, *International Tax & Business Lawyer*, Vol. 3:249, (1986), P.259
[25] Ibid, citing Parsons & Whittemore Overseas Co. v. Soci&t6 General de l'Industrie du Papier (RAKTA), 508 F.2dp. 969 (2d Cir. 1974).
[26] Shenoy, *supra* note 22, p.102.
[27] The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil And Commercial Matters (as amended by Various Accession Conventions), (27 September 1968) (hereinafter Brussels Convention)

Regulation,[28] and its recent amendment called the *Brussels I regulation recast*.[29] The essence of the Convention is largely covered by the Brussels I Regulation and the Brussels I Recast Regulation, both of which incorporate provisions on public policy exception to recognition and enforcement of foreign judgment.[30]

With regard to other areas that have been agreeably settled under international instruments, the Brussels instruments expressly recognize the applicability of other instruments rather than reproducing similar provisions in their respective instruments.[31] For instance, with regard to the recognition and enforcement of arbitral award, the Brussels instruments make express reference to the New York convention, and the same reference is made to the Hague convention on jurisdiction.[32] The issues of choice of law and public policy exception, on the other hand, are governed under Rome instruments, namely Rome regulation I[33] and Rome Regulation II[34] which deal with the applicable law in contractual and non-contractual matter respectively.

2.2.1. Public Policy Exception in Brussels Instruments

With regard to public policy, Article 27(1) of the Brussels Convention, which was applicable until Regulation 44/2001[35]came into force, states: "A judgment shall not be recognized if such recognition is contrary to *public policy* in the state in which recognition is sought." In the Brussels I Regulation, public policy clause is contained in Article 34(1), according to which "[a] judgment shall not be recognized if such recognition is *manifestly* contrary to public policy in Member State in which recognition is sought". Similarly, Article 45(1) (a) of the Brussels I Recast states: "On application of any interested party, recognition of

[28] Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, EC Council Regulation No 44/2001,(22 December 2000) (hereinafter Brussels Regulation I).

[29] Regulation on Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters, EU Regulation No 1215/2012, (12 December 2012) (Hereinafter Brussels I Regulation Recast).

[30] See Article 34(1) of the Brussels I Regulation , Article 45(1)(a) of the Brussels I Regulation Recast

[31] See Chapter VII of Brussels I recast entitled "The Relation with other Instruments" which made reference many other instruments like New York Convention.

[32] With regard to public policy exception to choice of court agreement, Article 6 of the Hague Convention on choice of Court States "A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless giving effect to the agreement would lead to a manifest injustice or would be *manifestly contrary to the public policy* of the State of the court seized".

[33] Regulation on the Law Applicable to Contractual Obligations, EC Regulation No 593/2008 of the European Parliament and of the Council, (17 June 2008 (hereinafter Rome I Regulation).

[34] Regulation on the Law Applicable to Non-Contractual Obligations, EC Regulation No 864/2007 of the European Parliament and of the Council ,(11 July 2007) (hereinafter Rome II Regulation).

[35] The Brussels Regulation I, *supra* note 28

judgment shall be refused if such recognition is *manifestly* contrary to public policy in the members".

As can be inferred from the above provisions, the new Brussels I Recast Regulation retains and cumulates the earlier exceptional grounds of challenge from the Brussels I Regulation with respect to public policy. The difference between the convention, on the one hand, and the regulation and its Recast, on the other, lies in the word "manifestly" used under the latter. Even if the Public policy clause is the only ground for refusal of recognition and enforcement of an open nature under Brussels instruments, the term "manifestly" employed under the Recast clearly shows the intention to limit the use of public policy clause stringently. Certain limits in application of public policy are also set by the Brussels I Recast. Particularly, Article 45(3) of the instrument precludes the application of 'test of public policy' to rules relating to jurisdiction.

2.2.2. Public Policy Exception under the Rome Regulation I

The Rome regulation I provides for rules to determine applicable law in contractual obligation in civil and commercial matters. According to Article 21 of the Regulation, the application of a provision of the law of another country may be refused "if such application is *manifestly* incompatible with the public policy (*ordre public*) of the forum". Furthermore, Article 9 of the regulation addresses the application of so-called "overriding mandatory provisions". These mandatory overriding provisions are relevant in the context of public policy because they address a similar problem. To this end, Article 9 reflects the positive function of public policy, while Article 21 of the Regulation serves as a negative shield against an application of foreign provisions based on public policy. Moreover, Article 9 - which is the result of a rather intensive debate in the Member States - can be interpreted as a significant indicator for the relevance of public policy reservation in this area.

2.3. Public Policy Exception under the Ethiopian Law

Unlike the case of EU, Ethiopia does not have comprehensive and binding laws of private international law[36] except some fragment and insufficient provisions of judicial jurisdiction scattered in different codes such as the commercial code, the maritime code, and the civil code. Further unlike the case of EU, Ethiopia is not a party to the Hague Convention on choice of court, nor does it have binding laws on choice of law. Yet, with regard to the issue of enforcement of foreign

[36] Araya & Sultan, *Supra* note 1, p. 24

judgment and arbitral award, some stipulations have been provided under CPC though the recognition part is not dealt with.[37] In addition, as Ethiopia ratified the New York convention as of February 13/2020, the rules under the Convention,[38] together with the pertinent provisions of the CPC[39], can provide sufficient framework on issue of public policy exception to recognition and enforcement of award. Besides, there is also a Draft Private International Law rules proclamation comprehensively dealing with each ingredients of private international law and this draft proclamation, though not binding, may be referred by Ethiopian courts as persuasive guide for interpretation in absence of binding law applicable to the matter.

2.3.1. Public Policy under the Ethiopian Civil Procedure Code

Article 458 of the Ethiopian civil procedure code of provides for a general principle against execution of foreign judgment along with the conditions for allowing its execution. Also, the provision makes an express mention of compliance with public policy and morals as a major requirement for execution of such judgments. As such, the provision reads:

> Permission to execute a foreign judgment shall not be granted unless (a) the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed was given; (b) the judgment was given by a court duly established and constituted; (c) the judgment-debtor was given the opportunity to appear and present his defense; (d) the judgment to be executed is final and enforceable; and (e) execution is not contrary to public order or morals.

Apart from this provision on execution of foreign judgments, the code also contains a provision dealing with enforcement of arbitral award. To this end, Article 461 of the code provides:

> (1)… Foreign arbitral awards *may not be enforced in* Ethiopia unless (a) reciprocity is ensured as provided for by Art.458 (a); (b) the award has been made following a regular arbitration agreement or other legal act in [sic][in accordance with the law of] the country where it was made; (c) the parties have had equal rights in appointing the arbitrators and they have been summoned to attend the proceedings; (d) the arbitration tribunal was regularly constituted; and (e) the award does not relate to matters which under the provisions of Ethiopian laws could not be submitted to arbitration or is *not contrary to public order or morals*; and, (f) the award is of such nature as to be enforceable on the condition laid down in Ethiopian laws…

[37]The Civil Procedure Code, Articles 456 *et al.*
[38]The New York Convention, Article V (2) (b)
[39]The Civil Procedure Code, Article 461

As can be inferred from the above provisions, the CPC provides anti-foreign judgment and arbitral award enforcement approach that generally limits the enforcement of foreign judgment or awards unless certain specified conditions are met. This is evident in the use of such negatively limiting phrases as "…*shall not be granted unless...*" under Article 458 and "…*may not be enforced in Ethiopia unless…"* under Article 461 of the CPC, both reinforcing the anti-enforcement approach by making the enforcement conditional on the fulfillment of all the stated conditions including the public policy.

In both cases, compliance with public policy and morals has been inserted as an exception, yet there is no guiding principle that could be used to limit this illusive concept of public order and morality. Though definition to the term is to be decided on a case-by-case basis, the pro-enforcement principle as in the case of the New York Convention and the EU instruments should be adopted so as to encourage narrow interpretation of the term.

2.3.2. Public Policy under Ethiopian Draft Private International Law

Under Ethiopian Draft private international law proclamation, the public policy clause has been inserted as a ground of non-application of foreign law and non-recognition and enforcement of foreign judgment or arbitral award. The starting point to deduce the inclusion of public policy exception in the Draft proclamation is the preamble of the proclamation which recognizes that the just and fair disposition of cases involving a foreign element may demand taking into account of this 'foreign element' to the extent of the applying foreign laws in so far as it does not contradict the public policy, fundamental principles and morals in the forum court.

Apart from the preamble, there are also operative and specific provisions that deal with public policy exception for choice of laws and recognition and enforcement under the draft proclamation. To this end, chapter III of the Draft proclamation lays down laws particularly applicable for a situation where Ethiopian courts may apply foreign laws in deciding cases involving foreign elements.[40] The proclamation, under this particular section, provides public policy exception as a ground to exclude application of foreign laws. Evidencing this, the relevant section reads: "The application of provisions of a foreign law shall be excluded if the outcome is incompatible with Ethiopian public policy or to fundamental principles of justice and fairness and to such principles as are

[40] The Draft Proclamation, Article 33 *et al.*

laid down in international human rights legislation".[41] Looking into this provision, one could see that the legislators unequivocally make public policy a major ground to safeguard public interest from any malice coming from foreign laws. This legislative intent is further reflected in the definition given to the term. For the purpose of the Proclamation, 'Public Policy' is broadly defined to include (a) fundamental principles of justice (b) some prevalent conceptions of good morals and (c) some deep-rooted tradition of common will[42], and this list is still open.

Turning to chapter V of the proclamation, there are provisions governing recognition and Enforcement of judgment. Article 85 of the proclamation provides for grounds of non-recognition and enforcement of judgment, of which public policy cause is a typical one. Specifically referring to this issue, Article 85(1) states that "A foreign judgment shall not be recognized and enforced in Ethiopia if its recognition or enforcement would be clearly incompatible with Ethiopian public policy or morals".

Article 88 of the Draft proclamation deals with rules on recognition and enforcement of arbitral award, and provides for ground of non-recognition and enforcement of foreign award, including public policy clause. It states:

> Foreign arbitral awards *may not be recognized and enforced* in Ethiopia unless: (a) the award has been made following a regular arbitration agreement or other legal act in the country where it was made; (b) the parties have had equal rights in appointing the arbitrators and they have been summoned to attend the proceedings; (c) the arbitration tribunal was regularly constituted; (d) the award does not relate to matters which under the provisions of Ethiopian laws could not be submitted to arbitration or is not contrary to *public order or morals*; and (e) the award is of such nature as to be recognizable or enforceable on the condition laid down in Ethiopian laws.[43]

As can be inferred from this Article, Public order and morality is one of the requirements for execution of foreign judgment in Ethiopia. However, unlike the case of applicable law[44], the draft proclamation does not enumerate the grounds on which foreign judgments could be denied execution for violating public order. Of course, one may resort to the definition given to public policy for the purpose of excluding application of foreign law as a starting point. Yet an express list of grounds for this specific purpose would make the proclamation more complete.

[41] The Draft Proclamation, Article 37(1).
[42] The Draft Proclamation, Article 37(2).
[43] The Draft Proclamation, Article 88.
[44] The Draft Proclamation, Article 37(2).

Another point worth considering in this document is the notion of morality. The concept of morality is not clearly defined under this Draft proclamation. According to Idris, the concept of morality, in this specific sense, refers to the fact that those foreign judgments appearing repugnant to the conduct, the customs, or accepted practices of the Ethiopian society would not be carried out.[45] Though like the case of public policy, defining morality could be difficult, unless approached on a case-by-case basis, a working definition with a space to accommodate a case-by-case context could have been provided as in the case of public policy (as indicated above). Yet this is one of the missing elements in the Draft proclamation.

3. The Need to Revisit Ethiopian Draft Law in Light of the EU Instruments

As has been stated above, unlike the case of EU, Ethiopia does not have comprehensive and binding laws of private international law other than the draft law. Further, even if the country has ratified the New York Convention on recognition and enforcement of arbitral award, the scope of the convention is limited to recognition and reinforcement of awards, and the convention has no rules on issues of choice of court, applicable law, and recognition and enforcement of foreign judgments. Moreover, the provisions of the CPC are limited to enforcement of foreign judgments and awards, omitting the recognition part. Hence, neither the New York Convention nor the CPC has relevance to the issues of public policy exception to choice of court, choice of law, and recognition of foreign judgment. Consequently, to have a coherent and complete Ethiopian legal regime on private international law, it is imperative to revise and enrich the Draft proclamation.

Unlike the Ethiopian Draft law and CPC, All EU instruments adhere to narrow interpretation of the public policy exception and uphold it only in explicit situations. For instance, Article 45(1) of the Brussels I Recast in principle dictates for the recognition of a judgment and allows for non-recognition and enforcement only if such recognition is manifestly contrary to public policy of the Member State. However, there is no such requirement of "manifest incompatibility with public policy" under the Ethiopian Draft proclamation as well as the CPC. As can be understood from its literal meaning, the word "*manifestly*" used under the EU instruments serves to limit the use of public policy clause as much as possible.

[45] Idris Ibrahim, The Law of Execution of Foreign Judgments in Ethiopia, *JEL* , Vol.19, (1999).

A similar wording of being "*manifestly contrary to the public policy*" is employed under Article 21 of the Rome regulation I to exclude application of foreign law, but there is no requirement of manifest incompatibility under its Ethiopian counter parts. Though the phrase *"clearly incompatible with public policy*" - used under Article 85(1) of the Draft proclamation - can serve a purpose similar to that of "*manifestly contrary to the public policy"* in respect of refusal of recognition and enforcement of foreign judgment, an equivalent phrase is not incorporated in the provisions dealing with public policy exception for purpose of exclusion of foreign laws (Article 37) and non-recognition and enforcement of arbitral awards (Article 88(d)). This leaves the word "public policy" alone with no qualifier under these provisions. Accordingly, unlike in EU Framework, the drafters of the Ethiopian proclamation use of the word public policy alone, omitting the phrase "*clearly incompatible or manifestly incompatibility"* which bears the key meaning for grounds of exclusion of foreign law and non-recognition and enforcement of arbitral award under Articles 37 and 88(d). This opens a door for broader interpretation of public policy clause, and hence can be easily abused to eclipse the rules. Even worse, public policy clause under the Ethiopian Draft law is used to include the other illusive and subjective term "public morality". However, there is no such reference to public morality under its EU counter parts.

The other areas of divergence between Ethiopian Draft laws and EU instrument is related to procedure of enforcement and the party upon whose initiation the refusal of recognition and enforcement of judgment on public policy exception could commence. Under Article 45 of the Brussels I Recast, any procedure regarding declaration of enforceability has been abolished. This, in effect, means judgment given in one Member State of the EU can be automatically enforced in another Member State, and it is upon application by an interested party (debtor) that a refusal of enforcement be initiated. However, under the Ethiopian Draft proclamation, there is no necessary requirement for application by the interested party (debtor). The judgment can be refused by the court - regardless of the application of the debtor - if it is found incompatible with the public policy.

This renders the Ethiopian approach anti-enforcement model that limits enforceability. From this, it can be understood that unlike the EU instruments which is pro-enforcement, the Ethiopian Draft proclamation is anti-enforcement from the outset. This can be inferred from the wording of Article 88 of the Draft proclamation which, in the relevant part, provides: "Foreign arbitral awards may not be recognized and enforced in Ethiopia unless..."

The stipulation in this provision sounds anti-enforcement in the sense that it makes enforcement conditional on the fulfillment (and presumably on the production of evidence to that effect) of all the conditions laid down in the law including the compliance with public policy of the country. In other words, unlike the case in EU instrument - which requires automatic enforcement of judgments in the absence of application for refusal of enforcement - foreign judgment or awards are not enforceable automatically under the Ethiopian Draft Proclamation.

Looking further into the limits contained in the Brussels Recast, one can see more disparities between the two laws. Article 45(3) of the recast states that the test of public policy may not be applied to the rules relating to jurisdiction. Yet there is no similar provision under Ethiopian Draft laws. It has also been provided under Article 45 of the Brussels recast that public policy cannot be raised if there is other ground of non-recognition and refusal that could be raised. However, there is no express provision governing the relationship between public policy and other ground of non-recognition or enforcement under the Ethiopian Draft proclamation. Finally, the relevant provisions of EU instruments make an express reference to the existing international conventions such as the New York convention and the Hague Convention on Choice of court. However, no reference was made to such instruments either as a gap filler or mandatory part of the Ethiopian Draft proclamation.

Overall, seen in light of the EU instruments, the Ethiopian Draft private international law rule is crafted in a manner that allows broader space to public policy exception including morality. Thus, these sets of rules are characteristically anti-foreign law or judgment, and they are not as good as its EU counter parts to achieve the desired goal of private international law. This is because the very purpose of private international law is to achieve decisional harmony by narrowly construing public policy exception. Yet the Ethiopian Draft proclamation, as it stands, is too weak to attain this goal of this regime of law.

Concluding Remarks

The emergence of faster and newer modes of transportation and communication in the globalized world has led to boom in offshore commercial transaction and socio-economic interaction among domiciliary of different states. This resulted in the emergence of cross border laws, judgment and concern about the fate of foreign judgment/awards, which in turn necessitated the development of conflict

of law rules to address. Meanwhile, as complete uniformity may cost the public policy of the States, the public policy clause has usually been inserted as an exception to choice of court, choice of law and recognition and enforcement of foreign judgment and awards.

In this piece of reflection, it is noted that both EU and Ethiopia insert public policy clause as a ground for non-application of foreign law and non-recognition and enforcement of foreign judgments or awards. Yet the way they do so is largely incomparable. Particularly, it is found that the provisions of Ethiopian CPC as well as the Draft Proclamation are crafted in manner that allow broader place to public policy exception including morality, while EU limits public policy only to the situation of grave and *manifest* incompatibility. Furthermore, the EU instruments are pro-enforcement and recognition of award in principle, allowing for refusal in limited exception, whereas the Ethiopian CPC as well as the Draft law are anti -enforcement in principle, both starting with the negative assertion against enforcement of foreign judgment or award.

Finally, even if Ethiopia ratified the New York Convention, the scope of the Convention is limited to recognition and enforcement of awards only. Moreover, since the provisions of the CPC are limited to enforcement of foreign judgments and awards, omitting the recognition part, neither the New York convention nor the CPC has relevance to the issue of public policy exception to choice of court, choice of law, and recognition of judgment. Hence, to have a complete and coherent Ethiopian legal regime on private international law, it is necessity to revise the Draft proclamation by adopting the pertinent stipulations on public policy exception under the EU instruments.