Chapter Three
Choice of Law

Choice of Law Methods

- Choice-of law is the core element of the conflicts discipline.
- It is very muddy, controversial, and unsettled field.
- methods can be categorized into: unilateralism, multilateralism, and substantive law approaches.

- **Unilateralism (Territorial Method)**
  - It determines the spatial reach of a certain state's substantive laws
  - deals with the determination of the personal and territorial reach of the potentially applicable local rules of decision.
- **Multilateralism (Classical Method)**
  - determine whether the issue or legal relationship has a strong relationship with one or the other law; and finally decide the case in accordance with the legal system with which the law has strong relationship or has most close connection.

Choice of Law Methods cntd…

- **Substantive law approach** (New Choice of law Methods)
  - a policy -oriented approach in which substantive policies directly determine the outcome of the choice-of- law process.

3.1. The Classical Choice of Law Method

- Developed by the German scholar von Savigny (*Sitz* theory) in 1849
- Is also called the allocation method
- **Goals of the Classical Method**
  - Decisional harmony or Uniformity of judgments
  - avoid or reduce forum shopping,
  - ensuring predictability and certainty
- Built on the premise that choice of the applicable law is determined by the "center of gravity" of the legal relationship at issue ascertained through :
  - Legal Categories (Operative Facts)
  - Connecting Factors

The Classical Method contd…

- Depend on a set of choice-of-law rules each of which covers a specific category of legal relationships, for which it contains an appropriate connecting factor.
- The choice of jurisdiction to which the connecting factor refers entails the choice of the law of that jurisdiction.
- E.G. “Succession to Immovable property is governed by lex situs.” This Provision has two elements.
  - 1. “Succession to Immovable property” (Legal Category)
  - 2. “Situs” (Connection factor)

The Classical Method contd…

- **Legal categories** (operative facts) are like pigeon holes in to which the legal issue disclosed by the facts of the case may be placed
- **Connecting factors** connect the legal categories to the applicable law

3.2. The General Part in the classical choice of law method

Analysis of Choice of law Problems:

- Choice of law problems may arise in three different ways:
- **Characterization** of the subject matter of the dispute
- Questions of Connecting factors
- The doctrine of Renvoi

3.2.1. Characterization

- Is the process through which the court assigns the dispute to its **correct legal category**.
- It is a mechanism through which the court identifies the juridical nature of the dispute i.e. whether dispute relates to contract, property, tort etc. Or whether the matter is substantive or procedural.
- A single legal issue may fall under different legal categories in the lex fori(law of the forum) and the lex causae (The relevant foreign law)
- E.g. Ethiopian law (lex fori) regards breach of betrothal as tort issue while it is considered as issue of contract under Kenyan law (the lex causae)

Characterization contd…

- If the case has been characterized as one of tort the choice of law rule may refer to the place of injury so that the law of the place where the injury occurred would be the appropriate law to govern the case.
- But If understood as contract then place where contract is made or to be performed governs.
- Therefore, characterization surely affects out come of litigation

Characterization contd…

- Characterization includes three things:
- **Subject matter Characterization (also Primary Characterization)**
  - Allocation of a case to its correct legal category
  - Or determination of whether the disputed question before the court is a tort or contract etc…
- **Connecting Factors** (their use and definition)
- **Substance - Procedure Characterization**
  - Determination of the extent of the application of the law already selected. i.e. if procedural it will be excluded if substantive it will be applied.

1. Subject matter Characterization

- Problem of subject matter characterization arises when the law of the forum and the lex causae characterize the nature of the case differently. E.g. Forum as tort, but by lex causae as contract
- Characterization affects the out come of the case.
- Whose characterization should be accepted? Four Options: Characterization
  - By Lex fori
  - By Lex causae
  - By general international principles
  - By both lex fori and lex causae

Subject matter contd..

Characterization by Lex fori

- Court should characterize the issue in accordance with categories of its own domestic law and foreign rules of law in accordance with their nearest analogy in the same law
- Proposed by Khan and Bart who discovered problem in 1890s
- Justification: Characterizing the matter by foreign laws infringes sovereignty.
- Exception:
  - Movable Vs. Immovable by law of situs. Because it is the sovereign over the property.
  - Matters of contract by the law chosen by the parties.

Subject matter contd…

Characterization by lex causae

- Disputed characterization should be determined by the appropriate foreign law.
- Justification: Not to accept characterization by lex causae is equal to failure to apply that law.
- Critics:
  - It is circular
  - Difficult to apply if more than one lex cause exist

Subject matter contd…

Characterization by General International Principles

- Characterization not of forum or foreign law but of the general international principle of comparative law.
- Approach base on view that conflict of law is part of international law
- Critics: Vague to apply and impracticable b/c few general principles of universal application.

Subject matter contd…

Characterization both by lex fori and lex causae

- Primary characterization by lex fori
- Secondary characterization by lex causae
- Critic: Distinction b/n primary and secondary caracterization artificial and brings arbitrary decision.
- Generally most countries accept characterization by lex fori. Except Property movable Vs. immovable by situs.

2. Connecting Factors

- Connecting factors are terms embodied in every states' conflict rule in order to indicate the place whose law may be applied.
- E.g. "Capacity to marry shall be governed by the law of the parties domicile."
  - "Formal validity of marriage is governed by the law of place of celebration."
  - "Succession to immovable governed by the law of the situs."
- Here terms 'domicile', 'place of celebration' and 'situs' are connecting factors.
- Problem of interpretation of connecting factors.
  - E.g.. Domicile in accordance to Ethiopian law may be different to domicile in Kenyan law so which should be accepted?

Connecting factors contd…

Categories of Connecting Factors:

- **Connecting factors based on factual allocation**
- To establish a link with the jurisdiction with which the legal question is factually most closely connected.
  - E.g. Place of injury, place of situs of property, place of celebration etc.
- **Connecting factors based on functional allocation**
- To promote certain social values and protect weaker party
- Refer to the jurisdiction that may be considered to have the strongest interest in the application of its law on the dispute.
  - E.g. Habitual residence of maintenance creditor, Consumer's habitual residence,
- **Connecting factors based on Party autonomy.**
  - Eg. Contacting parties chose the applicable law in their agraament.

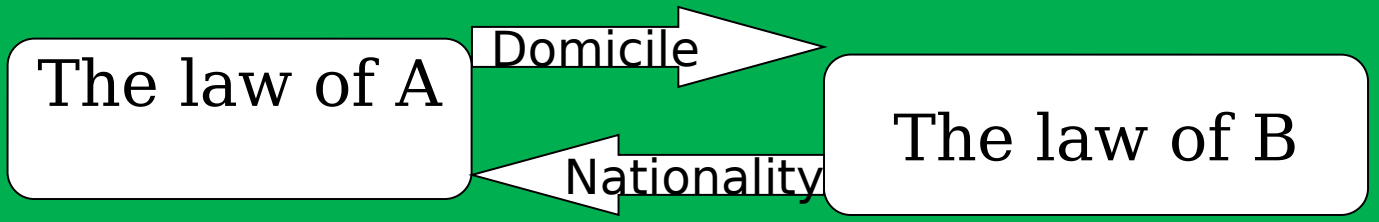
3. Substance - Procedure Characterization

- Relates to the extent of application of a law when the forum's choice of law rule refers to the law of another jurisdiction: delimitation of the proper law.
- **Principle**: Even if foreign law is chosen as applicable law the forum applies only the foreign substantive laws but uses its own procedural law.
- If issue is procedural then forum law applies if it is substantive then foreign law applies.
- **Justification**: We should not suspend our normal court operation by applying foreign procedural law in our court.
- Traditional test (Outcome determinative test)
  - those rules that don’t affect out come are procedural

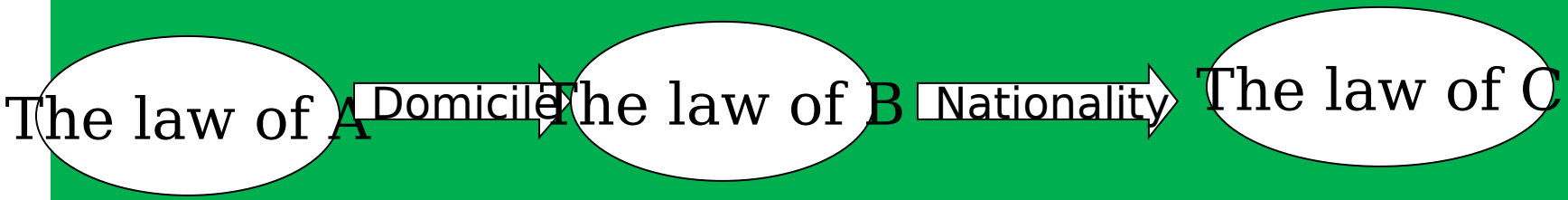
3.2.2. Renvoi (refer back)

- French term to mean ‘refer back’ or ‘sending before the court’, or ‘send back’
- A problem of renvoi arises whenever a case containing a foreign element is referred by the conflict of law rules of the forum to the “law” of a foreign country and when ever this reference is **to entire law of the foreign state** including its conflict of law rules involving the possibility that the conflict rules of this foreign state refers the question back to the law of the forum or forward to the law of a third country.

- The reference back to the law of the forum called **remission**



- Reference to the law of a third state called **transmission**



Hypothetical Example

- An Englishman dies domiciled in France and a question arises in an English court as to the distribution of tangible movable property which he leaves in England. It is a well established English law that a decedent's property is distributed on death according to "the law of the country of his **domicile**". Let us say, however, that the conflict of laws rule applicable in France is that an alien decedent's property is to be distributed according to "the law of the county of his **nationality**", which in our case is English.

- This is to mean that when the rule of conflict of law of England directs the matter to the law of France ,including the latter's rule of conflict of laws , the French conflict rule refers the case back to the law of England.
- In this case a problem of renvoi arises and court would face a question as to which law , English or French apply?

Approaches to resolve renvoi

- **Three approaches to solve Renvoi** :
- Rejecting Renvoi, Accepting Renvoi and the Foreign court theory

I. Rejecting Renvoi

- Reference to foreign law means **only to substantive foreign law** not foreign conflict rules
- Accepted in Common law countries, US and English
- In our case if English court rejects renvoi it means reference is only to substantive laws of France and the applicable law is French law.

Approaches to resolve renvoi contd...

II. Accepting Renvoi

- Reference to foreign law means to **the whole law including conflict rules of the foreign**.
- Accepted in some Continental countries
- In our case the English court accepts the reference made by French conflict rules to the law of Nationality and apply its own English law.

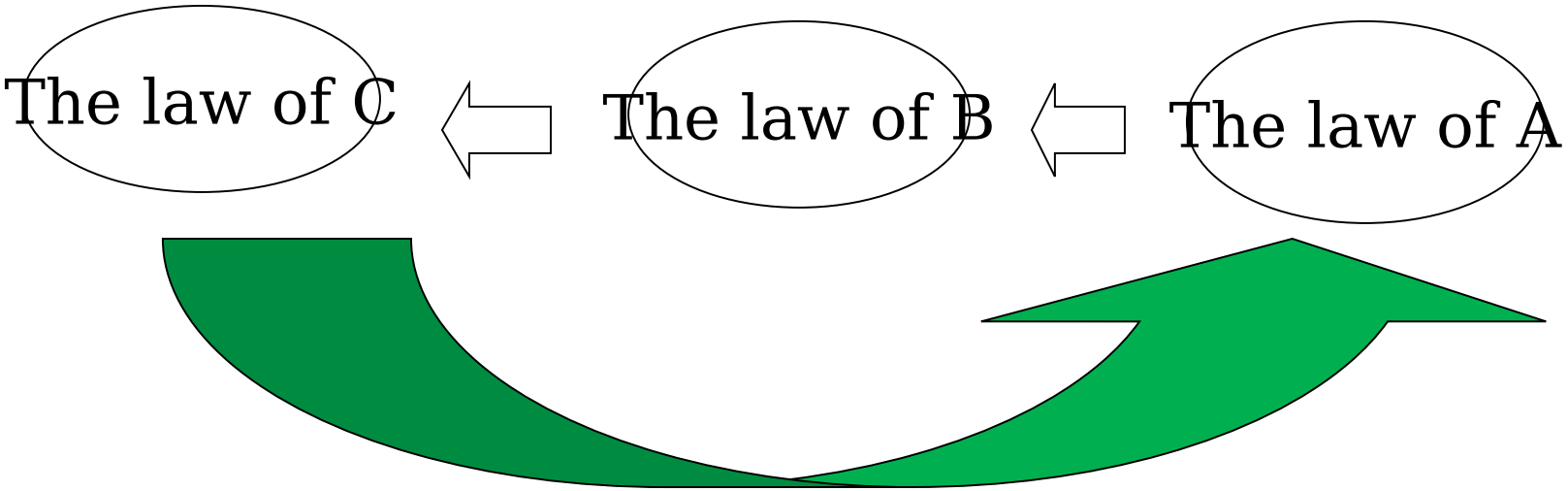
- **III. Foreign Court theory**
- **Being in the shoe of the foreign judge and apply the law that would have been applied by the foreign court in same cases.**

- Here, state X's judge is referred by his choice of law rule to the law of Y. what is the law of Y? It is the law which state Y's court would have applied to the same case.
- Then if state Y's court would have applied Y's "internal law", then state X's court should apply state Y's "internal law".
- If state Y's court would apply state X's "internal law, then state X's court would apply state X's "internal law".
- And, if state Y's court would apply state Z's "internal law", and then state X's court would do the same.

Indirect renvoi

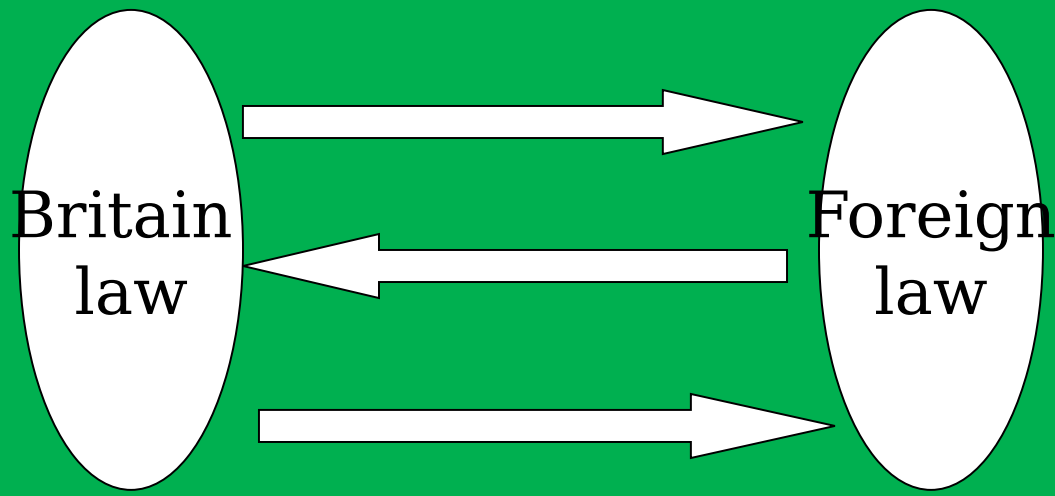
For a case，the court will use law of B according to its rule of conflict ,but this B conflict law direct the legal relation will apply to the law of C. But C confilct law direct to the lex fori.

indirect renvoi



Double renvoi

It is only in Britain.



In the end, it apply to foreign law

Evasion/ Fraud

- Means parties of civil legal relation either to avoid the forum law's effect on their acts or to gain better but undue advantage of a foreign law, might **deliberately create a foreign element** to their case.
- In other words, there might be a case involving the creation of a relationship between a person and a legal system other than the forum's (or another to which one is closely related) in an **artificial manner** whose main purpose is to avoid the application of the forum (proper) law.
- It is not, for example, uncommon to encounter would-be-couples to celebrate marriage where the jurisdiction of one or both of them does not allow them to do so by leaving their own jurisdiction and going to another jurisdiction which does allow or at least does not prohibit them to exercise same, to avoid the applications of the law of the jurisdiction they are rushing from. The same holds true for divorce situations.

Evasion Contd…

Way of evasion of law

(pass and alter the dynamic connection to click)

- Alter the residence or the nationality
- Alter the behavior ground
- Alter the site (when suitable to apply the local law of the thing)

Exclusion of Foreign Law

Public Policy and Rules of Immediate Application

I. Public Policy

- Means in certain circumstances the foreign law ordinarily applicable will not be applied because to do so would violate public policy of the forum.
- Difficult to define and vague
- But it is observed that the public policy of a state can be reflected in its **constitutions**, **statutes**, and **decision of courts**.
- Justice Cardozo's definition: “A foreign law must violate some fundamental principles justice , some prevalent conception of good morals some deep rooted tradition of the common weal”
- Must be construed narrowly lest we become super moralist.
- Public policy exception has limited application between states of a federal union as their policy is not very different.

Con’t

II. Rules of Immediate application

- As a rule of conflict of law deals with rights and remedies of a civil nature and strictly affecting persons as individuals in their private affairs, these rule are limited to laws of private nature.
- Rules of domestic public law are beyond scope of conflict of laws. So they will not be applied.
- Eg. Foreign penal, tax, and other related laws

The Incidental Question

- The problem of the incidental issue or incidental question is said to arise when dealing with the main issue another issue incidentally arises and it becomes necessary to resolve this issue to decide on the main issue.
- E.g. in many cases the issue of the validity of marriage arises incidentally as a secondary question while the principal claim concerns like divorce, property or pecuniary rights, succession, support and alimony, etc
- The main issue may be governed by one law and the incidental issue by another.
- In interstate choice of law in Ethiopia incidental question may not be a big problem due to the fact that we will not, hopefully, have choice of law rules for each state but one Federal Conflicts Rules.
- As a result, all issues, whether they are main, incidental or incidental of second degree are going to be resolved by the federal choice of law rules.

Foreign Law

Main questions that arise are:

- What status does foreign law has in the forum?
- How can we ascertain the content of foreign law? (method of proof)
- What will be the effect failure to prove?

Foreign Law contd…

Application and Status of Foreign law

- Regarding status two approaches:
- **Common law : foreign law seen as issue of fact**
  - Court will not take judicial notice of foreign law
  - So burden to raise the issue of applicability of foreign law and prove lies on the parties.
- Method of proof: By expert testimony
- Who is an expert?
- Expert testimony conclusive
- **Failure to prove**: results in dismissal of case or application of Forum law.

Foreign Law contd…

- Civil law: Foreign law seen as **issue of law**
- Court takes judicial notice of foreign law
- Party are merely responsible to **assist court** in the proof.
- **Method of proof**: By reference to standard official documents of the foreign law and court practice,
- Expert testimony not conclusive

Criticism Against Classical Choice of Law Method

- **Criteria for evaluation of choice of law methods**: Strength of a certain choice of law method can be measured based on:
  - Utility (simplicity in application)
  - Certainty (predictability of out come)
  - Justice to the parties

The classical method criticized Because :

- It is **mechanical** and do not take in to consideration policy factors
- **Not easy to apply** it is complicated
- **Failed to achieve its stated objectives** : Because of connecting factor, Revoi etc problem Decisional harmony to avoid forum shopping not achieved

The Governmental Interest Analysis

- Also known the *Lex fori* (law of the forum or local law) theory.
- Developed by American scholars David Cavers, Brainerd Curre, and Robert Leflar,
- Only applicable in the USA
- Contend that Multistate case should be seen as a potential collision of laws
- Out come of choice of law process is determined by
  - The policy underlying a rule of substantive law and
  - The interest a state might have in its actual application

Stages in choice of law by Government Analysis

Stage One

- Identify the issue and determine the contents of the various relevant substantive rules
- Compare if they lead to the same practical out come
- If so then, no conflict therefore no need for choice of law since it has no effect on out came of the case.

Stages in Government Analysis contd…

Stage Two

- If there is difference in the substantive rules of decision then identify whether the case represents true or false conflict.
- To do so examine:
  - The policy underlying each rule of decision
  - The relation of each state to the dispute
- **False conflict** where only one state has interest resolve by applying the law of the state concerned
- **True conflict** where more than one state has interest , Very difficult to resolve.

- Basic law: Law of the forum
- Law of the forum displaced only where
  - Justice to the parties so requires ,and
  - higher governmental interest of foreign state requires

Forum = Foreign ⇒ Forum Law Applies

Forum > Foreign ⇒ Forum law Applies

Forum < Foreign ⇒ Foreign Law Applies

In Most cases the Forum law applies.

Babcock Vs. Jackson (1963)
Court of Appeals of New York

- A husband and wife from New York went on a car trip with a friend Babcock to Ontario. While in Ontario they had a motor vehicle accident. Babcock sued Jackson, the driver, claiming their negligence caused the car crash.
- New York recognizes Liability of host driver for negligence
- However, Ontario had a law that prohibited passengers from suing the driver. So immunized him from suit by his guest.
- The court rejected a traditional lex loci delicti rule and instead, a process of weighing factors such as relationship between the party, decision to take the trip, connections to the locality.
- Thus, the Court held that the parties did not have substantial connection with Ontario and so it would be unfair to apply the law as the location was largely fortuitous.
- The Court found that the jurisdiction with the most connections was New York and so New York law should apply.

Critics Against Government Interest Analysis

- It is difficult to find governmental interest in each and every private dispute
- Policy behind rules is difficult to ascertain
- How to measure policies?
- “All roads lead to home”

Choice of law In a Federal set up

- The American Experience

Constitutional limitations on choice of law

- Full faith and credit clause
- Due process clause
- Equal Protection clause
- Privileges and immunities clause

Choice of law in the FDRE

- As regards choice of law the accepted rule is federal court must in diversity cases apply the conflict of law rules of the state in which it is sitting.
- The court may refuse to apply the conflict rules of the state if they are inconsistent with the constitution.
- Critics to help develop uniform body of law federal courts should ignore conflict of law rules of state and apply their own federal conflict rules. And decide for itself which state's substantive law should apply.

Choice of law in the FDRE contd…

- **Law Applied in Diversity Cases**
- *Proclamation no. 25/1996*
- *Art.6 Substantive Laws to be Applied by Federal CoUIts*
- 1) Federal Courts shall settle cases or disputes, submitted to them within their jurisdiction on the basis of:
  - (a) Federal laws and international treaties;
  - (b) Regional laws where the cases relate to same;
- 2) Regional laws to be applied pursuant to sub-Article (1)(b) hereof shall not be applicable where they are inconsistent with Federal laws and international treaties.

Relation b/n state and federal law

- Art.6 of US Const state laws are subordinate to federal laws
- Art.254 of Indian Constitution on concurrent jurisdiction when conflict arises Union law prevails
- No clear hierarchy made in Ethiopian constitution b/n state and federal laws in concurrent jurisdiction.
- But procl.25/96 Art.6(2) federal law prevails.
- Art.9 Draft conflict of laws Federal law prevails.