Conflict of Laws Notes

Prepared By: Yonas Mekonnen

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Chapter One
General Introduction On Conflicts

- Various names have been suggested to refer to the subject but each are inadequate to describe it
- Does not have a universally agreed up on definition
- Robert Allen Sedler Defines :
  - " that body of law that determines whether the forum will give effect to the laws of another state where the case that is adjudicated contains a *foreign element."*
  - **When does a case contains a foreign element?**
  - Three grounds:

    1. When the **events** giving rise to the litigation occurred partially or totally in foreign lands or;

    2. When the **Parties** to the dispute are domiciliary, nationals or residents of different states; or

    3. When the **property (subject matter of the dispute)** is **situated** outside the forum.

A. Nature

- 1. Conflict of law rules **does not by themselves dispose** of a case with substantive remedy. They simply indicate the law through which final remedy could be obtained
- 2. Is not concerned with **public cases** like criminal, revenue, customs, constitutional and administrative cases. It deals with disputes of private nature.
- 3. It is **basically a national law** made by each country.
- 4. conflict problems arise at both the international (intra -state) and national level (interstate conflicts).e.g. in Federations

- **B. Scope**
- According to the traditional view, conflicts mainly deal with three major sub-divisions
- They are:
  - **Judicial jurisdiction**, (whether the forum court has the power to see and decide on the case);
  - **Choice of law**, (the law which related state governs the case) and;
  - **Recognition and enforcement** of foreign judgments and foreign arbitral awards. (How should we recognize a foreign judgment and ward; How to execute domestically.)

- Raison D'être of conflict of Laws(What is the purpose of its existence, Why do we need It?)
- Two important facts create obstacle to smooth operation of law in the international community and give rise to Conflict of laws Problems:
  - Different legal communities have different laws *(diversity factor)*
  - Legal transactions are some how connected with more than one legal system because of cross border commercial, family etc relations *(Integration factor)*

- **What would happen if there were no Conflict of law rules?**
- International legal transactions would be greatly impeded Forum shopping would be rampant
  - Forum shopping is making use of jurisdictional options to affect the outcome of a lawsuit provided that all courts would always apply their own laws.
- Lex fori would always be applicable
- No one involved in multistate legal relationship would be sure of the out come of his action
- Prevention of Injustice to parties. Individuals could be gravely harmed for they may lose a right or status legally obtained in one state when they cross a border to another state
- Judgment creditors may be left without execution of their right obtained in one state against defendant in another state
- Business, and investment will be greatly hampered.

Chapter Two
Judicial Jurisdiction

- What is Jurisdiction?
- Jurisdiction refers to the power of a court to entertain a case. It has got other meanings depending on the context it is used.
- What is Judicial Jurisdiction?
- It refers to the power of the court of a particular state to render a judgment binding an individual or his property.
- Arises when the case contains a foreign Element

- Various Teories of Jurisdiction
- **The Power Theory (or Territorial Theory)**
- Famous case (Grace V. McArthur)
- Physical Presence of the Defendant at time of summons in the territory of the court.
- The power theory is defended mainly from the viewpoint of enforcement of judgments.
- Applicable in common law countries
- **The Minimum Contact Theory**
- *International Shoe Co.* V. *Washington*
- *“ Due process* requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, we have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice“

- **The Fairness Theory**
- Fairness requires the forum state to try a case when it is convenient, fair and just to the parties.
- Justification: Resolution of a dispute based on fairness guarantees recognition elsewhere
- Fairness can be established by consideration of three relational circumstances :
  - 1) The relationship between the litigants and the forum;
  - 2) The relationship between the underlying controversy and the forum;
  - 3) The controversies' substantive relation to the forum

Domicile, Habitual Residence, Nationality as basis of Judicial Jurisdiction

- Justification for Domicile as a basis of jurisdiction:
  - Convenience and familiarity.
  - Benefit burden rationale.
- Critics of domicile as ground of jurisdiction
  - It disregards the significance of a convenient forum in the administration of justice.
  - Convenience to party depends on accessibility of witnesses, and the connection of the underlying controversy to the forum
- New Developments
  - Habitual Residence replacing domicile as ground of judicial jurisdiction in EU parties to Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

Nationality as ground of Judicial Jurisdiction

- Justification: as the state has extended protection and benefits to the person he reciprocally has duty of loyalty allegiance to submit himself to jurisdiction of his national courts
- Critics: Nationality and place of Domicile or Habitual residence could be different it making jurisdiction at place of nationality inconvenient for defendant

3.Jurisdiction based on consent/submission

- The parties' consent or choice as to the place of trial is regarded as a major basis for the assertion of judicial jurisdiction.
- **Advantage** :
  - It enables parties to escape the harshness or the inconvenience of statutory place of trial.
  - minimizes, at least potentially, the cost of litigation, and other related factors.
- Consent by Plaintiff established by bringing of action in a forum court
- Consent by defendant established:
  - By prior consent (forum selection clause in contract)
  - Agreement after cause of action arises
  - Consent by appearance and defense of subject matter of the case
- Exception: Special appearance to contest jurisdiction is not consent

Categories of Judicial Jurisdiction

- **Three basic categories**:
  - Jurisdiction *in personam*
  - Jurisdiction *in rem*
  - Jurisdiction over status

1. **Judicial jurisdiction *in personam*** (claim against the person)
   - At the place of :
     - Defendants domicile
     - Contract making or performance
     - Cause of action arise
2. **Judicial jurisdiction *in rem*** (claim of right over a property)
   - Place of citus of property
   - Exception: Movable property in transit at place of destination
3. **Judicial jurisdiction on status** (Filiations, Guardianship, marriage, divorce)

- At the place of : Domicile or Nationality

- **Limitations on the Exercise of Judicial Jurisdiction**
- Defendant may challenge the Plaintiff's choice of forum because of three major grounds for a declining of jurisdiction:
  - 1) Forum non convenience(Inappropriate forum)
  - 2) Pendency Similar proceedings on foot elsewhere)and
  - 3) Austere clauses (Parties agreed on another forum as suitable prior to the dispute in issue)
- Remedy: Seek to stay, dismiss(decline), or transfer proceedings

Judicial Jurisdiction of Ethiopian Courts

Jurisdiction in International Interstate Conflict

- Federal Courts have Jurisdiction on intra state and inter state conflicts
- **Procl.25/96**
  - FHC Jurisdiction on civil cases between persons permanently residing in different states
- **Justification** :
  - Avoid local prejudice
  - To help formulate national rule of conflict of laws
  - Quality of justice
- **Critique of justification**
- **Jurisdiction Related Basic Constitutional Guarantees**
  - **Full faith and credit clause**
  - **Immunities and privileges clause**

Practice of Ethiopian Courts on Judicial Jurisdiction

- *Three different approaches , these are:*
  - Approach 1. Silence regarding judicial jurisdiction
  - Approach 2: Recourse to Civil Procedure Code
  - Approach 3: Recourse to general jurisprudence

Chapter Three
Choice of Law

- **Choice of Law Methods**
- 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.
- **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.

- **The Classical Choice of Law Method**
- **Goals of the Classical Method**
  - Decisional harmony or Uniformity of judgments
  - avoid or reduce forum shopping,
  - ensuring predictability and certainty
- 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)

- **Characterization (subject matter characterization)**
- Is the process through which the court assigns the dispute to its **correct legal category**.
- Generally most countries accept characterization by lex fori. Except Property movable Vs. immovable by situs.
- **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.
- **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.

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

Exceptions to application of foreign law

- **1.Evasion/ Fraud**
- **Deliberately creating a foreign element** in an **artificial manner** whose main purpose is to avoid the application of the forum (proper) law.

2.Public Policy

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.

3.Rules of Immediate Application

- **Foreign Law**
- 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?

- 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

Government Analysis theory

- 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

- **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”

Chapter Four
Recognition and Enforcement of Foreign Judgments and Arbitral Awards

- **Why do we need to recognize and enforce foreign judgments and award?**
- The world today we have **diverse states** g the **interactions** of which in different spheres of life often results in conflicting international legal situations.
- Such interactions may give rise to court decisions that requires to be enforced out side its territory.
- As states are sovereign they will not readily enforce judgments by foreign courts. Therefore unless certain mechanisms are created to allow recognition and enforcement of foreign judgments in a certain country:
  - legitimate rights and status obtained under a foreign law may be lost,
  - Parties to the dispute will be subject to additional costs and trouble as they may be required to bring a new suit or claim in this court

Execution of foreign judgments in Ethiopia

- We have two methods:
  - On the basis of International treaty(agreement)
  - On the basis of on fulfillment of conditions under civil procedure code provisions
- If there is any treaty that was entered between Ethiopia and other country for recognition and enforcement of judgments of each other based on that treaty Ethiopian courts will recognize and enforce judgments obtained in that country. (Art.456)
- E.g. Treaty between Ethiopia and Djibouti.

- In the absence of treaty, then the conditions under Art.458 must be full filled. These are:
- *a) the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed was given(**Reciprocity)**;*
- *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 mora*

Part Two
Application of Conflict of law in Specific Areas of Law

Chapter Five
Contractual Obligations

- **Doctrine of the proper law of Contract**
- It is that law which a court is to apply in determining the obligations under the contract. However, meaning and identification of this proper law of contact is very different from county to country.
- **Choice by the Parties**
- the appropriate system of law to govern the formation and outcome of contacts containing foreign elements in principle is left for the parties to choose.
- the parties are not free to choose any law they like. They have to have substantial relationship with the parties and the chosen law should not be contrary to the public policy of the forum
- **Law of Most significant Relation**
- if the parties fail to make a valid choice, the practice of different countries shows that the court of the forum applies the law of the state that has the most significant relationship or the closest connection with the contract.
- In order to determine the law that has the most significant relationship or connection countries use indictors like the place of contracting , place of performance, place where the subject matter of the contract is situated or the place where the parties have their address particularly - domicile residence, or place of incorporation or place of business of the parties.

Chapter six
Non-contractual Obligations

- Choice of law in tort issues are areas of conflict of law where, as opposed to contract, the parties are not free to chose the governing law. This seems to be based on policy consideration to give the victim a chance to be compensated since he is the party with a weak bargaining power and needs protection.

- The traditional rule for choice of law in multi state tort cases have always been **the *lex loci delicti* .i.e., the law of the place of wrong.**
- **The Exceptions where lex loci damni may not apply**
- The general exceptions include the following:
- (1) the application of the law of the parties' common habitual residence, under Article 4(2);
- (2) the application of the law of a state that has a "manifestly closer connection," under the escape clause of Article 4(3)
- (3) the application of the mandatory rules of the forum state, under Article 16;
- (4) the "taking into account" (and possible application) of the "safety and conduct" rules of the state of conduct, under Article 17;
- (5) the application of the law chosen by the parties before or after the occurrence of the tort, under Article 14;
- (6) the non-application of the lex loci (or any other law) when it is manifestly incompatible with the ordre public of the forum, under Article 26.

Chapter Seven
Choice of law Rules Governing Property

- Property rights are areas of law where the sovereignty of the state in which the property situated is most jealously guarded.
- Thus, we will see how the **law of the place of situs** affects the status of the property and the different types of transactions on properties that call for choice of law. i.e conveyances and encumbrances, and successions.
- The appropriate questions that should be addressed in conflict of laws rules dealing with property are:
  - what law governs the creation, transfer and effect of property right?
  - Which law should determine whether the property should be considered as movable or immovable?
  - Are immovables and movables subject to the same law? And the like.

- Both immovables and movables are governed by **the *lex rei sitate***, *i.e., the law of the state in which the properties are situated.*
- The definition of what properties are movable or immovable is different from country to country.
- In accordance to which law should we determine whether the property involved is movable or immovable?
- Authorities and the jurisprudence of many countries hold that **the *lex situs* decides whether the property is movable or immovable.** Not the lex fori.
- It is submitted that **law of the situs** should be quite broad and should include all questions related to **capacity and formal requirements** for the transaction.

7.3.Rules Governing Succession

- **. Succession to Movables**
- **A. Intestate Succession**
- The rule has been established for some two centuries that movable property in the case of intestacy is to be distributed according to the law of the domicile of the deceased person at the time of his death.
- **B. Testate Succession**
- The general principle established concerning testamentary succession of movables both in England and U.S.A is that it is governed exclusively by the law of the domicile of the deceased as it existed at the time of his death.
- When a testator dies domiciled in a foreign country, leaving assets in another country, it is necessary to note that the action for succession should be made at the court of the country where the property is situated.
- Moreover it is true that assets must be administered in the same country according to the law of the situs.
- But nevertheless all questions concerning the beneficial succession must be decided in accordance with the law of the domicile

- # II. Succession to Immovable
- ## A. Intestate sucession

- The devolution of interests in land upon the death of the owner intestate is determined by the law that would be applied by the courts of the situs. These courts would usually apply their own local law in determining such questions.
- There will be situations in any event where the courts of the situs would look to the local law of some other state to determine questions involving intestate succession to local land. i.e incidental questions.

B. Testate succession

- **Validity and Effect of Will of an Immovable**
- Whether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs. These courts would usually apply their own local law in determining such questions.
- The rule of this Section is applicable to questions relating to testamentary dispositions of interests in land

Rules Governing Choice of Laws in succession Under the Federal Conflict of Law

- Relevant provisions are Art.66 and 67 of the draft.

I. Succession to Immovable Property (BothTestate and Intestate)

- As stated under Art. 66, succession of immovable property is subject to the laws of the **place where the property is situated**.
- This emphasizes the importance of the place of sitis for all matters relating to the immovable property one of which is transfer by succession.

II. Succession to Movable Property (Testate and intestate)

- The provision of Art 67 provides that succession to movable property whether testate or intestate shall be governed by the personal law of the deceased at the time of his death.
- Both provisions lack sufficient specificity to enable Ethiopian judges identify and apply the appropriate law governing the matter. It seems that all issues related to succession except construction of will are supposed to be governed by single law.

Chapter Eight
Choice of Law Rules Governing Marriage and Divorce

- Generally the applicable law on status is the law of the place where the transaction or the person has more contact when compared to the laws of other places
- What can be the connecting factor employed for personal status matters in general and family matters in particular?
- The major leading principles are **nationality**(Continental) **and domicile** (common law).
- Some states employ "residence "or" habitual (principal) residence" in place of domicile
- Other may use "most intimate and most tense connection" of a person with a given legal system for the purpose of regulating one's personal status.
- **Which connecting factor should be used in Ethiopia? Nationality, Domicile or Residence?**

Issue of Interstate conflict of Family cases in Ethiopia

- **Relevance of the Issue**
- Under the FDRE constitution the powers of the federal government are enumerated while residual power vested in states.
- Federal government does not have a clear mandate on family law.
- Regional governments with residual power to enact on many private laws including family.
- Family law fall under private law category with many public policy implications. i.e. equality of women and protection to children.
- So federal or state family law ? Diverse or Uniform family law?

Marriage

Formal validity of Marriage

- Formal validity of marriage is generally governed by the law of the place of celebration.
- “A marriage valid where celebrated is valid every where.”
- However, if the law of the matrimonial domicile prescribes compliance with certain formalities to be very essential, amounting to policy requirements, failure to meet those requirements may preclude the recognition of the marriage celebrated out of the state.

- In Ethiopia interstate conflict of marriage , problem of formal validity does not seem to arise because of similarity in the family laws of states. Three recognized forms of marriage (i.e., religious, civil, and customary).
- Formal validity of marriage celebrated in another state with a bit different formal requirement does not usually affect substantive requirements of the forum/domiciliary state. Unless found to be contrary to public policy. See Art.5 Revised family code and Harari Family code, Art 15 of SNNPR family code.

- **II. Essential (Substantive) Validity**
- **1. Matrimonial Domicile Test**
- **The capacity to marry is the personal status laws of the prospective spouses' common domicile or intended matrimonial domicile** at the time of the conclusion of the marriage which is in accord with due process.
- **2. Dual or ante nuptial domicile test**
- If spouses have a capacity to marry each other by the laws of **their respective domiciles during the ceremony, the marriage is to be held valid.**
- **3. Doctrine of lex loci lelebration (For both formal and essential validity)**
- "a marriage good where contracted is good everywhere, and *vice versa*."

- **Which test should be used in Ethiopia?**
- Many states adhere to the law of common domicile of the spouses. Because if either the law of respective domiciles or the place of celebration is employed in which the parties might not live either in either's domicile or the place of celebration, there might be a possibility for the contravention of the intrinsic conditions, and thereby possibly public policies, of the place the parties made their matrimonial home/domicile.

- **Effect of contravention of Essential validity Void or voidable?**
- If the essential validity contravened cannot pass(change) through time the marriage is ***void ab innitio* and subject to attack at any time**.
- Eg. Consanguinity or Affinity. Art.32 RFC.
- If essential validity contravened is transient i.e can change through passage of time, the marriage is **voidable and can be attacked only at the time the contravention persists**.
- eg,. Age, Bigamy etc see Art.31 and 33 of RFC.

- **Why do we recognize foreign marriages?**
- The main aim lies on the preservation of the **“justified expectations” of the parties** at the expense of some local but not that much significant values, that are however, not strong enough to destruct the moral standards or/and very essential conditions of the local law.

- **Effects of Marriage (Personal and pequinary)**
- The effects or incidents of marriage in those the rights and duties of the spouses are, as a rule, governed by the **common personal status of the spouses during the lifetime of the marriage.**
- In most instances, this law is the **common matrimonial domicile of the spouses**.
- Exception: Pecuniary effect of marriage may be agreed up on by the parties. They may select the applicable law without contravening fundamental provisions of law.

- Choice of Law Rules Governing Divorce
- **I. Grounds of Divorce**
- There are staggering diversities amongst the family laws regarding **Grounds of divorce**, at least between the 1960 CC on the one hand and the new family laws on the other hand, choice of law to find the applicable law in case a suit for divorce is instituted is essential.
- Explained, while divorce in the 1960 CC is fully based on fault, it is not so in the others. The Tigray Family Law only requires, as it seems, the existence of **incompatibility**. "When they reach the stage where they can no longer live together." Art.102 of TFC.

II. Effects of Divorce

- Some diversity exists on this matter. Eg. On restitution of personal gifts between spouse on divorce. Art.691 of the 1960 Civil code and Art.121 of TFC. While under Civil code gifts given between spouses due to marriage are restitutable on divorce , they can’t be so under TFC. This could lead to diffrence in out come.
- Other Family laws are silent on this issue.

- **Choice of Law on substantive issues of Divorce.**
- **Choice of Law on substantive issues of Divorce.**
- There are two choices of law views: the Common Law and the Civil Law.
- In the U.S as well as in the Common Wealth the rule is well established that the divorce **court applies its own law** to the substantive requirements of divorce that seems sufficient and reasonable so long as the principle prevailed that the parties' matrimonial domicile is the basis of jurisdiction.
- The second view has a startling point in almost all laws of the civil law orbit –**the parties common personal law applies**. This is most of the time the last (or the predominantly lived) **common domicile of the spouses**.
- **Which position should be taken in Ethiopia?**
- The rule that the "law of the matrimonial domicile of the parties' control" seems proper. Because:
- This is the law that is believed to have been accustomed to by the parties.
- This is the law the spouses are said to have predominantly connected with or the law of the parties their matrimonial life is predominantly lived.
- Therefore, it will not be unfair for either of them to be judged according to the law of the place they were living in. Hence, due process of law is respected.