Unit One

General Introduction to Conflict of Laws

1.1 Nomenclature

Two names: ***Private International Law and Conflict of Laws*** (also shortened Conflicts rules).

The object of the subject is to eliminate any conflict between two or more systems of laws which have competing claims to govern the issue before the court, rather than to provoke such a conflict, as the words may appear to suggest.

1.2 Definition and Analysis

- Difficult to come up with a universally agreed upon single definition of the discipline 'Conflict of Laws'.
- majority of possible elements of the discipline and construct a functional definition:
- it can be described as *a branch of law which provides procedures and guidelines to assist a judge in private litigation, to select a court and a law to which a case is closely connected, which might appropriately be applied in resolving a legal dispute before the court arising out of a set of fact, events or transactions which have a foreign element*.
- It also *comprises rules of recognition and enforcement of foreign judgments and arbitral awards.*
- It deals with the questions of ***when*** and ***why*** the courts of one jurisdiction take into consideration the **elements of foreign law** or fact patterns in a case or consider the prior determination of another state in a case pending before them.

Although the **main focus is on choice-of-law process**, questions of **judicial jurisdiction**, and **recognition and enforcement of judgments of a foreign state** are also governed by the rules of conflict of laws.

Foreign Element

What do we mean by *foreign element*?

And what does it *refer* to?

- When a case is said to contain a foreign element, the *reference(s)* may be of three natures – **personal, local, or material** – in that, if one of the parties of the case is a foreigner

(including one from another federating unit) or the transaction of any nature took place, totally or partially, abroad (outside the forum state) or, finally, the object of the dispute (property, esp. immovable property) is situated in another state (including a member of federation); the case is said to contain a foreign element.

- For conflict of laws to come to the scene of the court, it is essential that a foreign element should exist in a case.
- In other word, if the case contains no foreign element, from the outset, this area of law is irrelevant.
- It functions only to the extent such element exists.

1.3 Nature

The application of the rules of conflicts law (choice of law) does not by itself decide a case, unlike that of the rules of law of contracts, tort, or family.

It does not solve a case in the sense that its rules do not furnish a direct substantive solution to the dispute at hand.

1. **It carries the case only half a way until a certain category of law is chosen** in order to dispose of the case with a substantive remedy.
- We cannot talk about conflicts law rules after we choose the applicable system of law. The function of the rules is only up to that stage.
- It does nothing on its own.
- It deals with most private cases of civil and commercial nature so long as they contain a **foreign element**.
- This body of law is an instrument or a technique merely providing a body of rules that prescribe the conditions under which a certain court is examined whether it has adjudicatory jurisdiction to entertain a case; and if it has the required competence, what system of law, the forum's or foreign, will be employed to decide the case or whether a judgment of a foreign court will be recognized and enforced by a state's courts.

2. Conflict problems arise at both the international and national level (interstate conflicts). In the latter case the situation arises **in countries with a federal constitutional setup** such as the **present Ethiopia** in which powers are divided between the component states of the Federation and the federal government. (See Art.50 Subs-(1) and (2) of the FDRE

Const.)

To the extent that the constituents of the federation are endowed by the federal constitution with the power to enact their own respective laws, the **states are treated as independent for the purpose of conflicts law**.

Each unit is regarded as **separate and sovereign entity** having distinct and separate legal system concerning the areas of legislative power entrusted to them.

Besides, the states are to consider one another as a foreign nation but in a sisterhood manner. Hence, a case that concerns **domiciliaries of at least two states is said to contain a foreign element.**

For example, a case of **validity of marriage** between a boy from the Tigray and his former girl friend from Oromia is said to contain a foreign element.

1.4 Scope

The traditional view: conflicts mainly deal with three major sub-divided but interrelated areas. They are **judicial jurisdiction, choice of law, and recognition and enforcement of foreign judgments and foreign arbitral awards**.

Many **civil-law legal system** nations regard questions of jurisdiction and recognition and enforcement of foreign judgments and arbitral awards as matters of international procedural law, not issues of private international law. According to these countries, the discipline deals essentially with **choice of law** problems.

However, these Civil Law Legal System following nations, such as France, have choice of law rules which turn on the connecting factor ***nationality*** of one or both parties. Hence, the subject in those countries often encompasses **the Law of Nationality and Citizenship and some special rules pertaining to the position of aliens.**

Ethiopia does not have a codified and coherent conflicts law, Art.11 (2) (a) and (c) of **Proc. 25/1996 and the Civil Procedure Code of Ethiopia** (esp. the former) implies that (recognition) and enforcement of foreign judgments is not part of conflicts discipline.

On the other hand, Art.3 of the Initial **Draft Proclamation to Provide for Federal Rules of Private International Law** prepared by the Justice and Legal System Research Institute considers the three elements as parts of the discipline. What do the three elements mainly deal

with?

a) **Judicial jurisdiction:**

dispute-resolving power or competence to hear and determine a case, is about whether a court of a particular state can appropriately entertain a case with a foreign element.

b) **Choice of law:** for which "conflict of laws" is often used as a synonym and to which "conflict of laws" is referring when used in its narrow sense, is the most volatile, difficult and challenging of the three principal conflicts subdivisions.

It is concerning the **selection of the appropriate rules of a system of** law, the forum's or foreign's which it should apply in deciding a case over which it has jurisdiction.

The rules that are employed for the purpose of selection of same are known as "choice of law" rules.

The issue arises whenever citizens of different states have a connection to a certain case and a contention arises as to which their respective laws differ, or there is "genuine conflict".

This time a choice of the applicable law comes to the stage.

C) **Recognition and enforcement of court judgments and arbitration awards** rendered by foreign courts and arbitration tribunals, respectively.

1.5 Raison d'être (reason or justification for existence***)***

Why and how could the question arise? Can't we get rid of it?

Arthur Taylor von Mehren wrote that *if human society were so organized that all aspects of life moved within economic, social, legal, and political spheres that were unitary and coexistence; the problems dealt with through choice of law would never arise. The reality is not, however, so. There are certain factual and legal realities that necessitate the existence of the choice of law discipline.*

There is a fact that **some legal transactions** are somehow connected with **more than one legal community**,

- either because the **parties** to the transaction are **citizens or domiciliaries or residents** of **different jurisdictions**,
- or because the **occurrence** that gave rise to their legal relationship took place in another state and/or their own,

- or because the **object of their relationship is situated elsewhere**.

Moreover different legal communities have different laws.

There is no universally established law governing relationships between private parties.

Integration and diversity together give rise to conflicts cases.

Different communities' cultures are naturally diverse and practical necessity calls for **harmonization or integration** as a sole alternate.

- Because of **economic-** commerce; social- marriage; political; natural catastrophe; even war, and some other related phenomena: people move or travel from state to state or from jurisdiction to jurisdiction.
- This fact necessarily results in the creation of transactions connected with more than one jurisdiction.
- This inevitably gives rise to disputes, as in any legal transactions. But the transactions as well as the disputes arising therefrom clearly **involve more than one state**, resulting in the involvement of different systems of laws.

Therefore, ***necessity*** is the fundamental motivating force - the need for order so that better life can exist and continue.

1.6 Functions

As a mechanism; if uniform laws cannot be made for all states which is largely unattainable, it will be the concern of the conflict of laws realm to come up with a mode of adjustment to do away with the unfavourable *effects* of the existence of diverse laws.

Why don't we simply apply the law of the forum for any case that comes to the attention of the forum, which is the easiest way to the judge no matter whether it involves a foreign element?
What are the controlling motives behind allowing the application of foreign laws but in another nation's soil?

1. **To do justice in cases involving a foreign element**.

The invariable application of the *lex fori* i.e., the local law of the place where the court is situate, would often lead to gross injustice as in this case: suppose a couple were married abroad many years ago. The marriage ceremony (which is not an essential element in a marriage relationship), though regular according to the law of the place where it was performed, did not perhaps satisfy the formal requirements of the forum law. Nevertheless, to apply the forum's relevant law to test

the formal validity of such a union, and thereby to deny that the couples are husband and wife, would be nothing but a travesty of justice.

The local law (*lex fori*) may not always necessarily be the proper law (*lex causae*) that should govern the transaction at hand. Another law other than the *lex fori* might be the appropriate law. In both ways, to apply either the *lex fori* or foreign law; it is through the predetermined choice-of-law rules that one can reach the applicable law. The choice-of-law rules help us settle the problem of choice between possible eligible laws. A judge is required essentially to apply the law found to be applicable through the direction of the choice-of- law rules unless there are strong reasons such as public policy not to do so.

Injustices of applying a forum law for all cases:

1. A great injustice might be done to a **foreigner**, who is **abroad and who has not agreed to submit to a forum's court a dispute arising from a transaction** which is not connected to the forum by summoning him before that court and so placing him in dilemma that either he has to incur the **inconvenience and expense of coming to the forum** to defend his interests or he has to run the **risk of default judgment** and so putting in peril assets he may possess here.

2. The following example can afford a justification for granting recognition and enforcement to a foreign decision. If the rendition forum (the forum that rendered or passed the decision) has exclusive jurisdiction but the judgment can only be enforced in the recognition or enforcing forum (assume the court is where sole enforcement can be effected); or in other words, **if the person cannot bring a *de novo* action in the recognition forum for the latter lacks judicial jurisdiction and the person cannot demand enforcement in that forum**, **he will be left without any remedy** – which is completely unfair! The only alternative to do away with this gross injustice is to lend a hand i.e., to recognize and/or enforce the judgment.

2. **To determine the rights and obligations of the parties:** (the Vested Rights Approach).

If the parties have selected a foreign law, expressly or impliedly, to govern their rights and liabilities under it, and have regulated their positions on the assumption that the foreign law

would govern, it would in most cases be wholly wrong for the forum court to impose different rights and duties on them by applying the unintended local law. The assumption is that two countries' laws of even the same legal category are **different in their substance**. Accordingly, **the right and duties they create are different in content.** This necessarily implies that the legal effects of an act performed in one state differ from those of another state's legal effects of similar act. It is from this situation that the **threat of *limping legal relations*** emanates – when a legal condition created by one law is not validated by another.

It is the task of the choice-of-law rules to intervene in order ***to prevent limping legal relationships and protect individuals who acted in careful compliance with the law which is believed to govern their everyday legal conducts*.** In that a right having been created by the appropriate law of a state where some definitive fact occurred, the recognition of its existence should follow everywhere unless public policy reasons of the forum forbid so.

3. ***preventing or reducing forum shopping***

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.

This is again due to the assumption that laws of different states are not the same.

How can we reduce forum shopping?

i. to delineate the boundaries of a court's jurisdiction in multistate cases in the sense that there will be only one state where the plaintiff could bring suit and there would be no opportunity for forum shopping. In the presence of the conflicts law applicable to the whole federation, this is attainable in interstate conflicts problem involving cases.

ii. the plaintiff has a choice between several laws for a given case; a unilateral choice of forum would not make any difference to the outcome of the case. The key point here is to have one choice-of-law rule that directs to a fixed applicable law.

NATURE AND SCOPE OF CONFLICT OF LAWS

1.1 Introduction

Conflict of laws (also known as private international law) is that part of Ethiopian law which comes into operation whenever the Ethiopian court is faced with **a case involving one or more foreign elements**. This foreign element may be an event which has occurred in a foreign country, for example, an Ethiopian **tourist** is injured in a road accident in Kenya; it may be the **place of business** of one of the parties, for example, an Ethiopian company agrees to purchase computer software from a company incorporated in New York; or it may be a **foreign domicile**, for example, an **Ethiopian woman marries a man domiciled in Iran**.

If the parties cannot resolve their differences amicably, then **three main types of questions** may arise in such cases.

1.1.1 Jurisdiction

The first question which has to be decided in a dispute involving a foreign element is whether the **Ethiopian court has power** to hear the case. This raises the issue of whether the parties to the dispute should be free **to choose the jurisdiction** most favourable to their case.

1.1.2 Choice of law

Once the Ethiopian court has accepted jurisdiction, the next question which has to be determined is **what system of law should be applied to the dispute**; that is, to determine the particular municipal system of law, by reference to which the **rights and liabilities of the parties to the dispute** must be ascertained.

Evidently, in a conflict situation, the **existence of one or more foreign elements may make it more appropriate to apply a foreign law to the dispute**. The rules which direct the Ethiopian court to identify the applicable law are called **choice of law rules**. For instance, the law which governs the **question of title to immovable property** is the law of the **country** in which the property is **situated**.

Hence, where, for example, the Ethiopian court is hearing a dispute involving the question of title to a **land situated in South Africa**, the choice of law rules direct the Ethiopian court to apply South African law for determining that title.

1.1.3 Recognition and enforcement of foreign judgments

Under what circumstances will judgments of foreign courts be recognised or enforced in Ethiopia? This type of question arises in the context where the parties litigate **abroad**. Suppose that a plaintiff, having obtained a judgment against an *Ethiopian defendant* in a *Turkish court* for damages for negligence, decides to enforce it against the defendant's assets in Ethiopia. Will the

Ethiopian court recognise and enforce the Turkish judgment, or will the action have to be re-tried in the Ethiopian court?

1.2 Preliminary issues

1.2.1 Private and public international law

There are obvious differences between conflict of laws, or private international law, and public international law. The latter is **primarily concerned with the rules that govern relations between sovereign States** and consisting, in general, of customary and treaty rules which bind States in their interrelations. The former, however, is designed to regulate **disputes of a private nature**. Conflict of laws is that part of **municipal law** which only comes into play when a dispute has a connection of some kind with one or more foreign legal systems.

Every modern legal system has its own rules of private international law, and they differ from one another as much as any other branch of domestic law.

In recent years, there have been strong international movements towards harmonising the various systems of conflict of laws.

These attempts have been framed in two different ways:

(a) the first is the unification of the internal laws of the various countries on a given topic via international conventions, so that no conflict of laws will arise. For instance, the **Warsaw Convention of 1929**, as amended in 1955 and supplemented by the **Guadalajara Convention 1961**, *provides uniform rules in relation to the international carriage of persons or goods by air*.

(b) the second method attempts to unify the rules of private international law, so that a case containing a foreign element, wherever tried, will result in the same outcome. A good illustration of this method is the adoption of the Rome Convention on the Law Applicable to Contractual Obligations by the European Community in 1980.

1.2.2 Connecting factors

In many instances, the Ethiopian court is faced with a range of choices as to the appropriate law which should apply to the dispute in question. Let us consider the following examples:

(a) an Ethiopian company agrees to buy computer software from a New York company who manufactures them in Spain. The software, which is to be delivered to the Ethiopian company's office in Rome, falls short of expectations;

(b) the carrier is an Italian company. In the course of transit through Italy, the lorry containing the software collides with a car driven by Dimitris, a Greek. Dimitris is seriously injured;

(c)an English girl of 15 marries an Iranian man in Iran. Their son is born in Ethiopia.

In attempting to determine what law governs any one of the above situations, the court seeks guidance from **connecting factors**, that is, the factors **which link an event**, a transaction or a person to a country. Examples of such factors are:

(a) ***lex loci contractus****:* the law of the place where the contract was made;

(b) ***lex loci solutionis:*** the law of the place where the contract is to be performed;

(c) ***lex loci celebrationis****:* the law of the place where the marriage was celebrated;

(d) ***lex loci delicti****:* the law of the place where the tort was committed;

(e) ***lex domicilii****:* the law of the place where a person is domiciled;

(f) ***lex patriae****:* the law of the nationality;

(g) ***lex situs****:* the law of the place where the property is situated;

(h) ***lex fori****:* the law of the forum, that is, the internal law of the court in which a case is tried.

These connecting factors have no independent significance. They only provide the means to choose the appropriate law, but they cannot determine that choice. For instance, succession to immovable property is governed by the *lex situs.* The connecting factor is clearly *lex situs,* but this is part and parcel of the rule itself.

Connecting factors are nearly always determined by the law of the forum.

For example, Valerie is domiciled in France according to the rules of English law of domicile. She is domiciled in England according to the rules of French law of domicile. The English court, as the forum, would decide where Valerie is domiciled according to the rules of English law of domicile. Consequently, Valerie would be domiciled in France.

It must be noted, however, that **nationality as a connecting factor** can only be determined by the law of the State to which a national claims to belong. Nationality cannot be determined by the law of the forum. So, if Valerie, for example, claims French nationality in an English court, her nationality must be determined in accordance with French law rather than English law.

The process of identifying the connecting factors is the same, regardless of the nature of the dispute. However, the weight attached to a particular connecting factor varies according to the nature of the dispute. For instance, the law of the domicile of a person is given much more weight in a question of succession than in a question of contract.