

## كلية القانون / جامعة القادسية

### القانون الدولي الخاص

#### بعض المحاضرات قيد الترجمة للغة العربية

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## تعريف القانون الدولي الخاص تطور هو موضوعاته

أختلف الشراح حول تعريف القانون الدولي الخاص بسبب حداثة نشأة هذا الفرع من القانون وتنوع موضوعاته ومصادره. ويسود هذا الاتجاه في إيطاليا وألمانيا. وعلى هذا الأساس يعرف القانون الدولي الخاص ( مجموعة القواعد القانونية التي تعين القانون الواجب تطبيقه في علاقة قانونية مشوبة بعنصر أجنبي) وفي الدول الأنجلوسكسونية لا يقتصر تعريف القانون الدولي الخاص وموضوعه على تنازع القوانين فقط ، بل يشمل تنازع الاختصاص القضائي الدولي. وهناك اتجاه آخر يصور القانون الدولي الخاص بشكل أوسع بحيث يشمل إضافة الى تنازع القوانين وتنازع الاختصاص القضائي الدولي ، الجنسي والمواطن والمركز القانوني للأجانب وتنفيذ الاحكام الاجنبية أيضا. ويسود هذا الاتجاه في الفقه القانوني اللاتيني المتبع في فرنسا والدول الأخرى التي تحذو حذوها في التشريع ، مثل الأردن والعراق ومصر وسوريا ولبنان. وبذلك يمكن تعريف القانون الدولي الخاص بأنه: مجموعة القواعد القانونية التي تعين القانون الواجب تطبيقه والمحكمة المختصة في قضية مشوبة بعنصر أجنبي ، وتحدد المواطن والجنسية والمركز القانوني للأجانب وكيفية تنفيذ الحكم القضائي الأجنبي.

وعلم القانون الدولي الخاص ليس بقديم ، بل هو حديث النشأة ، فالعالم القديم لم يكن يعرفه ، لالآن كدولة كانت لها قوانينها الخاصة التي لا تقبل المزاحمة ، وكانت الدول تتشدد في التمسك بمبدأ السيادة وتطبيق قوانينها على جميع المنازعات والأشخاص في إقليمها من جهة ولا تعترف بمركز قانوني للأجانب فيها من جهة أخرى. وكان هذا المبدأ سائدا عند اليونان والرومان والدول الاقطاعية في أوروبا وفي الصين قديما.

وظل الوضع هكذا حتى نشأت الدول الحديثة في أوروبا وأقرت كل واحدة منها قانونا خاصا بها أيخ تلعين في ذاتين الملحد دولكم للإخ قرقوانونله الوطنيه دون الالانف اف ال قى ق انون جنسية المتقاض بين أو مد ل إج راء العق د أو غير رذل كم ن الظ روف ، ولك ن المد اكمل م نث اير على ه ذا الوض معندما رأت انه غير عمل ي ، فبدأت في إيطاليا وفرنسا تطبق في القضاء ايا المشو به بعنصر أجنبي ليس فقط قانون القاضي ، بل ايضا القانون الشخصي وغيره من القوانين.

الى أن اسنعمل لأول مرة أصطلاح القانون الدولي الخاص عام ١٨٣٤ م من قبل رجال الفقه في هولندا ، وبرزت فكرة الجنسية بتبلور فكرة الدولة المستقلة ذات السيادة بعد قيام الثورة الفرنسية وأرتباط علاقة الفرد بها.

## CHAPTER1

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**NATURE AND SCOPE OF CONFLICT OF LAWS**
**1.1 Introduction**

Conflict of laws (also known as private international law) is that part of English law which comes into operation whenever the English 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 English tourist is injured in a road accident in Spain; it may be the place of business of one of the parties, for example, an English company agrees to purchase computer software from a company incorporated in New York; or it may be a foreign domicile, for example, an English 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 English 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 English 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 English 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 English court is hearing a dispute involving the question of title to a land situated in South Africa, the choice of law rules direct the English 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 England? This type of question arises in the context where the

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parties litigate abroad. Suppose that a plaintiff, having obtained a judgment against an English defendant in a Turkish court for damages for negligence, decides to enforce it against the defendant's assets in England. Will the English court recognise and enforce the Turkish judgment, or will the action have to be tried in the English 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. As this book is solely concerned with the English rule that guide an English court whenever seised of a case which involves a foreign element, it is not the intention of this author to examine the various attempts at harmonisation except in so far as they form part of English law. It suffices to say at this stage that these attempts have been framed in two different ways:

- (a) the first is the unification of the international 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. This Convention was implemented in England by the Carriage by Air Act 1961;
- (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. This Convention was implemented in the UK by the Contracts (Applicable Law) Act 1990.

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### 1.2.2 Connecting factors

In many instances, the English 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 English company agrees to buy computer software from a New York company whom manufactures them in Spain. The software, which is to be delivered to the English 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 England.

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

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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 factor 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, as shall be seen in due course, the law of the domicile of a person is given much more weight in a question of succession than in a question of contract.

### 1.2.3 The concept of personal law

Every natural and legal person is assigned a personal law defining his or her status and capacity. The connecting factor determining one's personal law varies from one legal system to another. For instance, common law systems generally adopt 'domicile' as the relevant connecting factor, civil law systems adopt 'nationality', and Islamic law assigns personal law by reference to 'religion'. Personal law, as shall be seen in due course, is crucial in matters of family law, but increasingly less important in the context of transactions and disputes of a commercial nature. Hence, in *Bodley Head v Flegon* (1972), the court held that the capacity of the parties to a transaction is to be governed by the law applicable to the contract, rather than the personal law of the parties. On the other hand, in *Re Paine* (1940), the court applied the law of the domicile to determine whether a child is legitimate or illegitimate.