Chapter Two
Judicial Jurisdiction

2.1. Meaning

- 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.
- 3 Elements of Jurisdiction
  - Judicial jurisdiction
  - Material Jurisdiction
  - Local Jurisdiction

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
- Why should a forum worry about the involvement of foreign element in assuming judicial jurisdiction?
  - The question of recognizability of judgment by the recognition forum;
  - the fear of retaliation (i.e. citizen or domiciliary of such forum state);
  - and the need to promote free flow of commerce may compel a state to consider various interests implicated in a case

2.2. Theories of Judicial Jurisdiction

- Bases for the assertion of judicial jurisdiction are different in both Civil law and Common Law Legal System.
- Civil Law emphasizes the defendant's domicile as a primary basis of jurisdiction,
- In the Common Law the physical presence of the defendant within the territorial jurisdiction of a forum suffices in order to assert jurisdiction against him

Various Theories of Jurisdiction

- **The Power Theory (or Territorial Theory)**
- Physical Presence of the Defendant at time of summons in the territory of the court.
- Famous case (Grace V. McArthur) in which the court pronounced "… a defendant served on an air plane flying over the state was reached jurisdictionally even though the plane trip started and was to end elsewhere, and did not even include local landing."
- The power theory is defended mainly from the viewpoint of enforcement of judgments.
- *Applicable in common law countries*

Theories of jurisdiction ctd…

- Critics :
  - Exorbitant/ excessive/ Jurisdiction
  - Cannot reach defendant leaving jurisdiction of the state
  - Difficulty of Jurisdiction over intangible properties
- Limitation: Constitutional guarantee of “full faith and credit clause”& “Due process Clause” in the US

The Minimum Contact Theory

- Complement to Power theory
- Famous case :*International Shoe Co.* V. *Washington*.
- In this case, the court holds that "... *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“
  - Doing of business,
  - establishing domicile,
  - place of cause of action etc could be the basis for the existence of contact

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;
    - Domicile and habitual residence as opposed to temporary and casual presence
    - litigation capacity of the litigants
  - 2) The relationship between the underlying controversy and the forum;
    - Accessibility of material evidence besides the close and strong ties of the litigants with the forum.
  - 3) The controversies' substantive relation to the forum
    - To avoid Risk of misinterpretation of foreign laws

2.3. **Domicile, Habitual Residence, Nationality as basis of Judicial Jurisdiction**

1. Domicile as Ground of Judicial Jurisdiction

- Definition: Domicile is generally understood as the cumulative value of two elements:
  - The fact of residence (the fact of physical presence with some continuity), and
  - The intention of remaining at a certain place (or the non existence of any intention to make a domicile elsewhere).
- Principles of Domicile
  - 'a person cannot at the same time acquire more than one domicile‘
  - 'every person has a domicile‘
- Domicile of a corporate or business organization Dilemma:
  - Place of Registration or Place of Business as domicile of corporation?
  - Is it necessary that a business organization should acquire only one place of domicile?
- Expanded the concept of domicile:
    - corporation acquires an extra domicile for branches if it satisfies certain criteria imposed by the host state in addition to domicile at place of registration.

Domicile as Ground of Jurisdiction contd…

- Justification for Domicile as a basis of jurisdiction:
  - Convenience and familiarity. A person is likely to be convenience when sued in his domicile forum in which he is most connected.
  - Benefit burden rationale. A famous dictum goes "…the state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties[by claiming jurisdiction on him]“
- 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

Domicile as Ground of Jurisdiction contd…

- 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
- Habitual residence it can be understood as “permanent and usual centre of interests of a person chosen by the person with the intention to live there permanently.“

2. 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

consent/submission

3.Jurisdiction based on consent/submission

- **Earlier Times:** The parties did not have had any control over place of trial they had to go but only to the statutory place of trial.
- **Current understanding**: 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/submission ctd…

- 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

consent/submission ctd…

- Forum selection clause:
  - Must have some connection with selected forum either:
    - Place of contract
    - Place of performance
    - Domicile
- The need to protect with weaker bargaining position from economic coercion
  - Employees, consumers
- Jurisdiction to particular court or any court selected by plaintiff?
- Jurisdiction to any court contrary to procedural due process of the law

2.4.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

2.5. 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

Forum Non Conveniens

1. Inappropriate forum doctrine
   - Forum court is not convenient or appropriate to hear and determine the matter brought before it
   - The exact formulation of the test differs from one country to another, reflecting different degrees of judicial comity.
   - However, the underlying purpose of the doctrine is similar in each case – to ensure that a matter doesn't proceed in a forum with which it lacks genuine connection.

Forum Non Conveniens cntd…

- Defendant need to show
  - Vexatious & Oppressive
  - Abuse of Process
  - No injustice to Plaintiff
- Oppressive: seriously & unfairly burdensome, prejudicial or damaging
- Vexatious: productive of serious & unjustified trouble & harassment
- Onus of proof always on the Defendant
- Focus: moral proprietary of proceeding rather than territory law area,
- Stay/dismissal rarely granted
- Dismissal does not entail a *res judicata* effect nor does exclude it

Forum Non Convenience cntd…

- **Objectives** of Forum Non convenience doctrine:
  - Antidote to Excessively Wide Bases of Jurisdiction
  - Providing Flexibility
  - Preventing Forum Shopping and vexatious
- **Critiques against FNC:**
  - Greater potentiality for abuse by courts exercising their discretion.

Pendency (Lis alibi pendens)

- **Meaning**: Parallel proceedings exist in another forum that raise same issue between same parties or be substantially related proceedings
- **Objective:** to prevent inconsistent judgements
- No uniformity as to the basis for pendency rule:

  A. As part of Forum Non Convenience doctrine

  B. The First Seized Approach

  - when is a court deemed to be seized of proceedings?
    - the moment when the document instituting the proceeding is filed with a local court or,
    - the moment when this document is served on the defendant.

  C. Recognition Prognosis: a court declines jurisdiction if the action abroad is likely to lead to a judgment which is recognizable under its law

Ousting Jurisdiction by Agreement

- **See discussion on forum selection clauses**

2.6. 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**

Jurisdiction Under Federal draft Conflict of Law

- General and special Jurisdiction
- Two Understandings :
- 1. In reference to the scope of jurisdiction of a court
  - A court of limited jurisdiction is one which is restricted only to those classes of cases specifically listed under legislations, constitution or other legal sources of the sovereign establishing the court
  - A court of general jurisdiction is one that is conferred with jurisdiction over any cases except those which supply exclusive jurisdiction of another court or that given to the court of limited jurisdiction.

- In USA, for example, state courts are courts of general jurisdiction whereas federal courts are regarded as courts of limited jurisdiction
- In some other states, neither federal nor state courts are identified by general or limited jurisdiction. A typical example of such tradition is found in Switzerland, and the Federal Democratic Republic of Germany. In Switzerland, general jurisdiction, both internationally and in the interstate matter, lies in the court in which the defendant is domiciled, be it a federal or state court.

2. In reference to the grounds of jurisdiction

- Basic Place of Jurisdiction
  - Default place of Jurisdiction in Normal circumstances unless another place is indicate by law
- Special Jurisdiction
  - Based on special nature of the dispute
    - To protect weaker party
    - For procedural expediency
- Exclusive Jurisdiction
  - No other place can claim jurisdiction other than the place indicated as exclusive
  - Cannot be ousted by agreement of parties

Case of Ethiopia under draft

- Classification
  - General Jurisdiction (Basic place of jurisdiction)
  - Special jurisdiction
  - Exclusive Jurisdiction
- General Jurisdiction (Art.17)
  - Place of defendants domicile (Art.17(1))
  - Interstate dispute jurisdiction of Federal High Court (art.17(3))

Special Jurisdiction(Art.18 -32)

- Based on Nature of the Subject Matter (Art18)
- Based on Nature of Action (Art.19)
- Concerning marital rights and duties (art.20)
- Concerning foliation (Art.21)
- Concerning guardianship (Art.22)
- Concerning succession (Art.23)
  - Movable
  - Immovable
- Limitation of liability (Art.24)
- Insurance (Art.25)
- Consumer Contracts (Art.31.)

Exclusive Jurisdiction (Art.34)

- Claims *in rem* on Immovable
  - Citus of immovable
- Business organization
  - Seat of organization
- Entry in public registry
  - Place of registry
- Patent tarde mark etc
  - Place of registration of patent or tarde mark
- Enforcement of Judgement
  - Place judgement given
  - Place judgenment to be enforced

2.7.Practice of Ethiopian Courts in 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

Approach 1. Silence regarding Judicial Jurisdiction

- ***Case of Verginella V. Antoniani,***
- ***Abebech Wolde V. Estate of Signor Konstantinov Escrapino***
- ***Nediya Chartes V. Estate of Antonio Chartes***

- The court ignored totally issue of judicial jurisdiction and went to choice of law.
- We are not saying court lacked judicial jurisdiction in all these cases but it must be raised clearly and established.

Practice of Ethiopian Courts Contd…

- ***Approach 2: Recourse to the Civil Procedure Code***
- Courts or parties have made recourse to the Civil Procedure Code by:
  - Applying the provisions referring to cases containing foreign elements directly to establish judicial jurisdiction
  - Applying the rule for local jurisdiction to determine judicial jurisdiction. (Art.19 ff)
  - *Dr. Henry Colombo V. Andrel Lewis Herald*
  - *W/ro Astraid Debahian Jerahian V. Estate of Mr. George Jerahian*
  - *Brigadier General Tafesse Ayalew V.Clarville A.J Co. and Mr. Robert William*

Practice of Ethiopian Courts Contd...

- ***Approach 3: Recourse to General Jurisprudence***
- *Hallock V. Hallock*
- The court commented: as there is no codified law on Private International Law in Ethiopia, the question of jurisdiction has to be decided by having recourse to the system "most common in the European continent".
- "general principles of jurisprudence accepted in other countries"
- *Brigadier General Tafesse Ayalew V.Clarville A.J Co. and Mr. Robert William*
- *W/ro Aynalem Demoz V. Peter Beckensil*
- **I both court made reference to Sedler's Material**

Practice of Ethiopian Courts Contd...

- **EVALUATION AND RECOMMENDATIONS**

First observation

Domicile as the ground for judicial jurisdiction because the Civil Code provisions are there to serve Private International Law purposes

- *(e.g. Marry Shatto V.Theodore Shatto).*
- *Nowadays, however, Private International Law instruments are shifting towards habitual residence as a substitute for domicile.*
- ***Recommendation** : Better to use Habitual Residence as ground*

Practice of Ethiopian Courts Contd…

Second Observation

- Many Judgments made with total disregards of the issue of judicial jurisdiction.
- *Problem:*
  - *a*) denial of recognition and enforcement of the judgment in other states, and
  - b) failure to safeguard the forum's public policy.
- *Recommendation*
  - *Clearly raise the issue of Judicial jurisdiction and establish its existence before proceeding to choice of law*

Practice of Ethiopian Courts Contd...

- **Third Observation**
- Reference to provisions of Civil Procedure code on Local Jurisdiction to Cases of conflict of laws
- **Problem:**
  - The civil procedure was not intended for conflict of laws cases Meant to apply only to domestic disputes
  - The policy behind provisions different
- **Recommendation**
  - Better to devise separate rule for conflict of laws

Practice of Ethiopian Courts Contd…

- **Fourth Observation**
- In the absence of legislation Many courts proposed a resort to general jurisprudence to establish Judicial Jurisdiction.
- Earlier general reference to practice of other countries but recently relying on Sedler’s Book
- Problem
  - If no guideline prepared for the courts to which country's practice should we refer? Possible inconsistency among court practice.
  - Wastage of Judicial Resource