

Conflict of law

Chapter 2

Judicial Jurisdiction

Introduction

- Jurisdiction of courts is the power of courts to subject a particular persons or things to a judicial process.
- If a court does not have jurisdiction, it is not authorized to hear and determine the dispute.
- Any judgment that is made with out having a jurisdiction will be nothing more than a piece of paper.

Components of Jurisdiction of Courts

❑ Jurisdiction of courts has three components

i. Judicial jurisdiction;

- whether Ethiopia (some court in Ethiopia) has the power to adjudicate a certain case or not

ii. *Material jurisdiction*;

- which level or layer of court has the power to dispose the case. a high court/first instance court, a state court/a federal court

iii. Local jurisdiction;

- Which a specific area of court from the same level or type of courts has the power to adjudicate the case

❖ Of these three elements of jurisdiction, *the primary concern of private international law or conflict of laws is the first one, i.e., judicial jurisdiction*

Why Courts Nee to Ascertain Judicial Jurisdiction

1. Avoidance of Forum Shopping

- *Forum Shopping*: is when a plaintiff goes for the more favorable forum disregarding the defendant's interest
- Rules on judicial jurisdiction, by requiring some kind of defined contact between the plaintiff/the cause of action and the forum, ascertain that plaintiff cannot shop the forum in a manner that suits his interest and circumscribe the rights of the defendant.

2 . Avoidance of Inconvenience to the Defendant

- Rules on judicial jurisdiction help defendants avoid inconvenience in the form of distant litigation.
- Rules regulating judicial jurisdiction, therefore, help defendants to avoid cost, cultural, language, evidence...problems that could have otherwise been artificially created by plaintiffs.

3. Avoidance of Unnecessary fight over Jurisdiction

- If plaintiffs have absolute freedom to select the forum, defendants may move to transfer the venue or enter the motion of dismissal objecting jurisdiction.
- It also help courts by focusing them on important points of disagreement other that jurisdictional issues

4. Avoidance of the possibility of denial of Recognition and/or enforcement out of the rendition forum

- Lack of judicial jurisdiction over a case results denial of recognition and enforcement in another forum,
- In almost all countries of the world, one of the criteria for recognition/ enforcement of a foreign given judgment is the exercise of a valid jurisdiction by the court

Classification of Judicial Jurisdiction

Personal Jurisdiction

- Is jurisdiction over persons
- Can result in a judgment imposing a personal liability or obligation upon the defendant in favor of the plaintiff
- diminishing the personal rights of a party in favor of another party
- Example, a successful tort action resting on personal jurisdiction subjects all of the defendant's nonexempt assets to execution.

Non-personal jurisdiction/ jurisdiction in rem

- Here the action is against the thing and a relief is sought with respect to a thing itself, though a human person is named as a defendant in the litigation.
- No personal liability or obligation results from such a proceeding.
- Example: the plaintiff seeks ownership over a certain thing/property in which case she is asserting the title against anybody.

Mechanisms of Checking Personal Jurisdiction

General Jurisdiction

- It is when the forum state looks at and bases itself on the relationship between the defendant and the forum to establish judicial jurisdiction in personam
- The grounds in which the relationship established includes nationality, domicile, habitual residence and consent.
- It is *dispute-blind* type of jurisdiction, based on affiliations between the forum and one of the parties without regard to the nature of the dispute.

Special/specific/ alternative jurisdiction

- When the forum state exercises judicial jurisdiction by looking at the nexus between the forum and the nature of the dispute,
- From plaintiffs' point of view, it widens their alternatives to sue the defendant.

Theories on Judicial Jurisdiction

Power Theory(Minimum Contact Theory)

- A court of a country assumes judicial jurisdiction when it has the power over the defendant to force him in to its judicial process.
- The physical presence of the defendant (even transient defendant) in the territories of a state gives the courts of that state the power to adjudicate the matter as long as he is properly served with summoned

Fairness Theory

- A court should assume jurisdiction only if doing so provides a convenient, fair and just forum to the parties.
- Assumption: a fair decision given by any court will be recognized and given effect anywhere in the world.

Personal Jurisdiction in the Common Law

- The following are the primary bases of power for personal jurisdiction in common law countries:

1. *Presence/ transient jurisdiction:*

- The fulfillment of the two elements i.e., the physical presence of the defendant and serving her/him with a proper summon suffices for a court to establish personal judicial jurisdiction.

2. *Domicile:*

- If a defendant is domiciled or incorporated, in the forum, the court of the forum state can adjudicate over the matter.

3. **Agency:**

- a defendant can be subjected to a jurisdiction of a court if she/he designated a local person to be his agent for some specific task.

3. Consent/Submission:

- A person may consent to personal jurisdiction, thereby creating a basis of power though she/he/it is neither present nor domiciliary of the forum.
- This may arise from express agreement or conduct. There are the following possibilities:
 - i. The defendant contracts to submit:*
 - It could be through including a *choice of jurisdiction clause or agreement after disagreement*

ii. The defendant pleads to the merits:

- If the defendant pleads to the merits of the case, such as by disputing liability for breach of contract, he thereby submits
- If a person, however, appears before a court of law for the sole purpose of objecting the jurisdiction of the forum, it is never regarded as submission.

iii. A claimant who is abroad sues a defendant in the local forum.

- This gives the court jurisdiction over a counterclaim by the defendant if it arises out of a matter which is related to the claim.

Bases of special jurisdiction (in personam) in the common law

- Two points need to be considered here
 1. If a court has sufficient ground to assume general jurisdiction in personam, it would not consider this second item (i.e. special jurisdiction).
 2. There does not exist a uniformly applicable jurisdictional base for all kinds of conflict matters to establish specific jurisdiction. The bases that are often used for contractual disputes, for example, are different from

Example

□ For contractual disputes:

- Generally speaking, place of conclusion of a contract or/and place of performance of a contract give a court valid jurisdictional base to exercise specific jurisdiction.

❑ ***Tort/extra-contractual liability:***

- There are two alternatives available and a third one, in some countries, that considers the two grounds together.
- i. Some states rely on place where injury occurred (tort act is committed) as a connecting factor.
- ii. Other states, attach importance to the place where the result of the injury has occurred (place of result of tort).

❑ **Matrimonial cases**

- A case pertaining to the determination of marital status or divorce, the role of *domicile* is so pertinent

Personal Jurisdiction in the Civil Law Legal System

- The transient rule of jurisdiction does not exist in the civil law system.
- The Continental law system generally uses three bases for establishing general jurisdiction in personam.

1. Nationality:

- Some civil law countries establish general jurisdiction in personam if the defendant (or one of the parties) is a national of the forum state
- The advocates of nationality claim that it is more stable and ascertain than domicile because nationality cannot be changed without the formal consent of the State of new nationality.

2. Domicile:

- Some civil law countries use domicile for general jurisdiction purpose.
- The understanding of the concept of domicile in some of these states is different from the one in the common law. In France, for example, domicile means ordinary residence but a person can have only one residence under French law.

3. Consent:

- In a similar fashion to that in common law countries, civil law countries recognize consent as a jurisdictional base.
- The consent given could be express or implied

Bases of special jurisdiction (in personam) in the Civil law countries

- ➔ ***Contractual disputes***: the place where the contract is performed
- ➔ ***Extra contractual liability***: the most widely accepted rule is that the country where the tort action took place will have specific jurisdiction.
- ➔ ***matrimonial matters***; in the civil law system is almost similar with the common law approach and is based on the domicile of the parties.

Jurisdiction over Things (In Rem Jurisdiction)

- ❑ The rules and solutions here in under in connection with jurisdiction over property/things have applicability in both civil and common law legal systems and there does not exist any substantial difference to be examined separately.
- As a matter of general principle, a court exercises jurisdiction over a thing when that property is found within the territorial limits of the forum state.
- ➡ ***Immovable property***: the universally recognized rule of jurisdiction is the *situs rule /exclusive jurisdiction/*.

➤ ***Tangible movable (chattels) things:***

- Subject to jurisdiction of the place where such is located.
- However, this rule may not be applied if the thing is casually within the state or in transit. Some countries provide as an alternative ground the place of domicile of the defendant in such situations.

➤ ***Intangible property:***

- Poses a difficulty to which no a clear cut solution is provided.
- According to some, if the intangible interest is represented in a document (a good example could be a negotiable instrument) the state where the document is located has jurisdiction.
- Where such representing document cannot be present, however, considering the relationship between the person and the forum would be important.

Limitations on the Exercise of Jurisdiction

- Jurisdiction may be limited by a number of factors *like constitutional considerations, treaty provisions* and *public international law rules*.
- Besides, there could be other self imposed limitations by *the forum*.
- Examples

1. Forum Non-Convenience Doctrine

- ***Forum non-convenience***: A general discretionary power for a court to decline jurisdiction on the basis that the appropriate forum for trial is abroad and adjudication at the local forum is inappropriate.

2. Lis Pendis/pendency

- As there is a possibility for a case to be submitted to different courts in different countries, a plaintiff might institute a fresh case in a court while that same case is being litigated in a court of another country.
- Taking this in to account, courts of some states have a discretionary power to grant a stay until the outcome of the case in the other court is known.

3. Jurisdictional Immunity

- As instance, Persons that undertake diplomatic activities and personnel of international organizations are exempted from suit in the host state.
- This is, therefore, a limitation that emanates from a binding law or agreement.

**Ethiopia Law and Practice on
Judicial Jurisdiction.....**

- **Assignment(Individual)**

Find attached paper: Rationalizing Judicial Jurisdiction in Ethiopia, Samuel Teshale

➤ Read and review the paper by not more than 2 pages