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The Impact of Federalism over the Formation of Personal Jurisdiction Rules in Two Different Legal Traditions: Limited Comparison to the Civil Law Model of the United Arab Emirates and the Common Law Model of the United States

Abaid Al-Mutairi

The American University Washington College of Law

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**THE IMPACT OF FEDERALISM OVER THE FORMATION OF PERSONAL
JURISDICON RULES IN TWO DIFFERENT LEGAL TRADITIONS: LIMITED
COMPARISON TO THE CIVIL LAW MODEL OF THE UNITED ARAB
EMIRATES AND THE COMMON LAW MODEL OF THE UNITED STATES**

By

Abaid Al-Mutairi

Submitted to the

Faculty of Washington College of Law

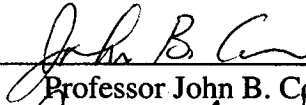
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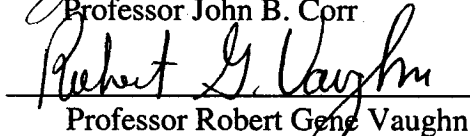
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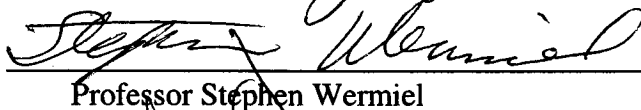
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Professor Robert Gene Vaughn



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ABSTRACT

In the last decade, a massive growth of international trade and cross-border commercial and civil transactions occur among individuals and entities of different jurisdictions and legal backgrounds, this international trend results in corresponding conflicts. This fact makes it critical to identify the nature of process involving the dispute resolution mechanisms under the various legal systems especially those rules addressing the instances in which a person is held subject to certain foreign adjudicative authority because of the contact.

In general, there is always a need in some circumstances to analyze the frameworks under one system to explore the nature of the standards adopted by the system to determine their efficiency, effectiveness or in some instances suggest reform.

The study will undertake the task of identifying the nature of the rules employed in the United Arab Emirates and the United States federal system, to assert personal jurisdiction over the person of the defendant in both national and international levels. It also addresses the main differences and grounds of similarities as well as how

far courts in the two studied systems can go in exercising its adjudicative authorities over litigants whom are not subject to the territorial adjudicative power of the system.

The study will also explore the nature of one-system foundations of adjudicating actions that have originated outside, and the nature of effect or contact considered as a sufficient base for granting jurisdiction therein. Their structures and implementations are examined in three parts.

The first is a survey of the legislative framework of *ekhtesas shakhsy* (personal jurisdiction) in the federal system of the United Arab Emirates (UAE), and the second is the law of personal jurisdiction in the United States. The third part is personal conclusion drawn based on the study of the two models in an attempt to choose the correct mix of rules and procedures, as well as assisting whether international standards are needed and the potential of success of such global procedural standards.

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INTRODUCTORY CHAPTER

Preamble

In recent years, concerns about foreign courts' adjudicative powers have increased. This legal trend is justified by the increasing level of trade among different nations. The expanded market established under the international treaties regulating commerce across borders and the entry of most countries in these global treaties, gives the subject an increasing importance.¹ Thus, a better understanding of the jurisdictional limits of one system is no longer an internal concern insofar as it becomes essential to protect foreign business interests.

In fact, jurisdiction and enforcement of judgments are the primary concerns of foreign parties seeking judicial relief and remedies in foreign jurisdiction, especially with the fact that arbitration as a method for dispute resolution has not yet developed in many jurisdictions, and that considerable disparities occur among various arbitration mechanisms not only with regards to individual laws and solutions, but also in terms of the development and refinement of these mechanisms. One such system is the United Arab Emirates legal system under which arbitration is still an evolving method that has not yet developed in that it does not address all relevant issues concerning dispute resolution. One reason justifying such conclusion is the absent of a clear legislative framework of arbitration in the UAE Legal system.²

In such context, the questions commonly asked concern what the basis are for

¹ See *e.g.*, General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). [GATT 1994].

² See generally, Saleh Samir, *Commercial Arbitration in the Arab Middle East*, (2nd ed., Hart Publishing 2005).

a court to assert jurisdiction over foreign parties. And what legal standards are to be employed in one system to determine judicial competence? There are also inquiries about how a court decides various disputes and the applicable law in particular circumstances involving foreign elements. Enforceability of judgments and many other concerns are likely to arise, especially when a foreign litigant is forced to litigate a dispute in unfamiliar legal surroundings. In addition, the fear of countries that their national courts lack the rule of law and the required efficiency of their judicial systems cause many of them to undertake substantial legislative and judicial reform, in order to overcome the hesitancy of foreign investment to conduct business in their national markets.

In this regard, the potential of multiple proceedings and conflicting jurisdiction arises insofar as the standards employed by one system are not operating at the required level of harmony and consistency. Above all, are concerns about how far the courts of one legal system can reach in the exercise of adjudicative powers? In addition, whether there should be an adherence to specific legal principles such as objective territoriality, under which courts are restricted in exercising its adjudicative powers within the confine limits of its territorial limits.

The extraterritorial exercise of adjudicative power became the general rule in most contemporary civil justice systems³ especially when the traditional notion of territoriality as the foundation of the exercise of state's sovereign powers has proven to be insufficient to protect the legitimate interest of states in subjecting persons or entities to its courts adjudicative power in matters linked to these systems by certain forms of connections.

³ Extraterritorial exercise of adjudicative power is a broad subject which includes the issue of personal jurisdiction.

In practice, whenever a dispute crosses over borders, involving more than one jurisdiction, questions arise as to where proceedings should or can be brought; which court has jurisdiction to hear the dispute; and which territory's laws govern the resolution of the dispute (choice of law). Both common and civil law systems have developed detailed legal rules to deal with such complex questions. In practice, not all systems are typical in the sense that they do not adhere to the same approach; nor all of the approaches adopted in various systems have been entirely successful.

Indeed there are no international uniform principles to decide the questions of jurisdiction, either as to when a court could have jurisdiction to hear a dispute, or as to when a court that has jurisdiction should decline it. Answers to these questions become significant where the questions pertain to genuine disputes involving more than one jurisdiction.

Jurisdictional inquiries in federal Systems (the effect of federalism over the questions of jurisdiction)

Federalism refers to the political system where there exist two levels of government; one at the federal level and the other relating to the authorities and power reserved to the federated units. In a federal system, as an intergovernmental system, authorities and powers are exercised by both the federal government and the states or territorial governments. The extent and nature of authorities and the interaction between the central government and the territorial or regional authorities is a question that has been given very diverse answers in different federal models. In practice, wide variations occur in both the degree of autonomy and the nature of one system's merit.

In fact, federalism contemplates two-dimensional aspects; the first being the relation between the federal government and the regional government within the federations; and the second governing the interaction between the federated states

within the federations. The idea of federalism has a great impact on all sorts of powers exercised under federal systems, particularly the judicial powers exercised under the federal system. In the context of adjudicative authority, deciding the jurisdictional question as to how, and against what basis the adjudicative authority is exercised becomes vital in two dimensions; the first is drawing a line between the competencies of various courts within the federations and setting forth the standards upon which, the exercise of judicial powers are justified. Thus, under federal models of government, jurisdictional inquiries typically involve analyzing the jurisdictional rules and frameworks in both the national and international levels.

The Traditional Differences among Various Legal Systems and its Effect on Drawing Proper Jurisdictional Analysis

General Characteristics of Civil Law Tradition:

In the traditional legal analysis, there are certain major characteristics which distinguish one system from another in both the operation and the institutional structure of the system. Civil law is a system that had its roots in the old *Roman law*.⁴ The tradition is best recognized by the adherence to the written principles in the form of codes being the start points of any relevant legal analysis.

Under this tradition, a legislature is the principal source of law. Judicial decisions are not intended to be an authoritative source of law in a traditional civil law system. Judge's rule is limited to the literal application of the law as expressed by legislature in codes. As a result, the doctrine of *stare decisis* has no equivalent in civil

⁴ The legal system of ancient Rome forms the basis for modern civil law systems.

law systems. Thus, judgments rendered by various courts generally have no subsequent binding effect.⁵

The law under this system is substantially limited to a legislative or administrative enactment in a written form. Codes of a respective area address all inquiries related to that area.⁶ Civil law analysis usually consists of mere mechanical application of law. The principal method of argument is by deduction from general principals or from statutes toward particular cases. In general the courts under the civil law system are not authorized to make law; the main function of the courts is to apply law as declared by the legislative authority and understood by the court. Normally judges of inferior courts are guided by superior courts' previous interpretations. Nonetheless, courts cannot ignore law on the basis of ambiguity or unfairness.⁷

The above characteristics give rise to the authoritative starting point of any legal analysis under this system. Such legal analysis starts typically with the respective textual sources according to their legislative hierarchy. This fundamental precept of legality contemplates that the essential task of the interpreter, be it a judge, an administrative agency, or any citizen potentially subject to the law, is to discern what the legislature intended with its enactment of a particular statutory provision. Another characteristic addresses the style of legal analysis where jurists of civil law

⁵ In practice decisions by higher courts could to some extent change the directions the lower court might take in deciding future cases, insofar as it provides a persuasive authority influencing the determination of similar future issues.

⁶ In addition, in most civil law system, due recognition is given to customary rules, religious rules, principles of justice, and principles of International law as sources of legality.

⁷ Power to make substantive laws is traditionally vested in the legislative authority based on a strict division of adjudicative and legislative functioning.

traditions still state legal propositions more abstractly and systematically comparing to jurists in common law tradition.⁸

Courts under this model have a duty to give adequate reasons of their findings which are sufficient enough to enable higher courts to know what facts the tribunals have found, and how the law was applied to the factual setting of the case as well as how the tribunal dealt with the substantial points that were raised.⁹

General Characteristics of Common Law Tradition

The common law tradition owes its existence to the decisions of the *English Royal Courts*. It is the body of law that makes the judicial decisions the principal source of authority.¹⁰ The name *Common law* is derived from the medieval theory that the law administered by the king's courts represented the common custom of the realm, as opposed to the custom of local jurisdiction that was applied in local or manorial courts.¹¹

Common law then, refers to rules of law which do not rest for their authority upon any express or positive form of written declaration.¹² Under this system of law, law is made by judges in giving their decisions in specific cases. This is in fact the

⁸ Arthur T. von Mohren, *The U.S Legal System: Between the Common Law and Civil Law Legal Traditions* (Centro di Studi e Ricerche di Diritto Comparator e Straniero 2000).

⁹ A strong presumption that fairness and natural justice require that decisions should not be allowed to go unexplained.

¹⁰ John Alison, *A Continental Distinction in the Common law- aHistorical and Comparative Perspective on English Public Law* (Oxford University Press. 1996).

¹¹ See in general, Theodore Plucknett T. F., *Concise History of the Common Law* (5th ed. 1956); Caenegem R. C. van, *The Birth of the English Common Law* (1973).

¹² See 15A Am. Jur. 2d *Common Law* § 1 (1976). In contemporary common law systems statutes and treaties are the other source of law. However to be enforced even statutes and treaties must be ultimately interpreted by judges.

foundation of legality in the common law system, and is one of the principal differences between common and civil law. The binding effect of a judicial decision is achieved through the operation of the Common Law doctrine of *Stare decisis*.

In the common law the principal method of analysis is induction and analogy. Induction is reasoning from particular cases toward general principles. Analogy is argument from similarity. Thus the majority of common law reasoning consists in demonstrating the similarities or differences between a case which has been decided and the case before the court. Analogy is made to determine whether a certain decision in the past had been made and whether the facts of this case are sufficiently similar to the facts of the previous case, so that the decision of the previous case must be applied to this one.

The Case Study:

United Arab Emirates Judicial System

The United Arab Emirates was founded in 1971. The agreement among the rulers of 6 Arab *emirates*¹³, formerly known as the *Trucial States*¹⁴, establishes the federation currently known as the United Arab Emirates. On July 18th, 1971, an agreement was signed by the rulers of the *Emirates* of *Abu Dhabi*, *Dubai*, *Sharjah*, *Ajman*, *Umm Al - Qwain*, and *Al-Fujaira* to issue the Constitution of the United Arab Emirates. The Constitution became effective on December 2nd, 1971 pursuant to the declaration of the Supreme Council of the Federation, which consists of the rulers of the federated *Emirates*.¹⁵

¹³ *Emirates* is the plural form of the word *emirate*. The term is derived from the Arabic word "*Emarah*" which best translated to the English word *state*.

¹⁴ *Trucial States* is the former name of the current United Arab Emirates. The name was largely used in historical documents.

The Constitution stipulated that the objective of the establishment of the federation is to protect its independence, sovereignty, security and stability, defend any attack on the federation or on the member Emirates; protect the rights and freedoms of the people, and achieve close cooperation between the Emirates for administering their common wealth.

This agreement among the federated *Emirates* led to the establishment of a new state named the United Arab Emirates,¹⁶ as an independent and sovereign state of recognizable international legal capacity. The birth of the state of the United Arab Emirates, leads each of the individual *Emirate* to surrender part of its sovereign powers to the new federal bodies.¹⁷ As the Emirates became constitutional entities within the federal state, they however continue to enjoy some aspects of autonomy which don't contradict with sovereignty of the newly established federal state.

Judicial Authorities Under the United Arab Emirates Federal Constitution

The United Arab Emirates Federal Constitution states that "[t]he Union shall have a Federal Supreme Court and federal courts of first instance as described hereafter"¹⁸. The Federal Constitution establishes, *inter alia*, a federal state, under which two forms of government exist; Central government and that of states governments represented by the previously existing governmental bodies of the 7 federated states. "The organization and administration of the local government was left in the hands of

¹⁵ The Supreme Council is the highest executive authority under the Federal Constitution.

¹⁶ The state of *Fujairah* had joined the federation later in 1973 to become the seventh state in the federation.

¹⁷ See generally, Khalil Mohsen, *Constitutional System of the United Arab Emirates*. (al-ein press. 1997).

¹⁸ United Arab Emirates Federal Constitution [UAE Constitution] art. 95.

those at the local level and dealt with by written laws or customary laws"¹⁹. Notably, the legal institution and methods applied before the federation are still in force with no major modifications.²⁰

The Federal Constitution provides that "The local judicial authorities in each emirate shall have exclusive jurisdiction within their geographic boundaries, in all judicial matters not assigned to the federal judiciary in accordance with this constitution."²¹ The subsequent Constitutional provision reads:

All or part of the jurisdiction assigned to the local judicial authorities according to the preceding article may be transferred by a federal law upon the request of the emirate concerned, to the federal courts of first instance. Circumstances in which appeals against judgments by the local judicial authorities in penal, civil, commercial, and other cases may be made before the federal courts shall be defined in a federal law, provided that the judgment of the federal courts in such appeals is final.²²

The Nature of the Legal System Established Under the Federal Constitution

The Legal system of the United Arab Emirates is a civil law legal system insofar as the legislations are considered the ultimate source of authority. The laws of the UAE are almost codified into statutes regulating various subjects²³. In addition, principles of Islamic *Share'a*²⁴ are recognized by the Federal Constitution as a main

¹⁹ 2 Buti Al-Muhairi, *The Development of the UAE Legal System and Unification with the Judicial System*, 11 Arab Law Quarterly, 119 (1996).

²⁰ *Id.* at 119.

²¹ [UAE Constitution] art. 104.

²² *Id.* art.105.

²³ In general, most legislations take effect after 30 days following their publication in the UAE official Gazette except when otherwise provided in the specific legislation.

²⁴ *Share'a* refers to Islamic law that is mainly based on principles derived from the *Holy Book (Quran)* and Prophet Traditions and Sayings (*Sunnah*).

source of law²⁵. Nonetheless, principles of Islamic *Share'a* are mostly codified and incorporated in the United Arab Emirates code of personal status.

The UAE legal system does not recognize judicial decisions as a source of authority; nonetheless higher court decisions have a marginal weight over lower courts in deciding similar questions. Legal analysis under the UAE legal system is governed by the order provided for under the United Arab Emirates federal law of civil transaction. The law provides that "legislative provisions are applicable to all matters fall within their scope of application either by direct express or necessary implication."²⁶ In cases, where there is no provision applicable to a specific set of facts, the judge must resort to the general principle of Islamic *Share'a*.²⁷ Any subsequent reference shall be made to customary law.

The hierarchical structure of United Arab Emirates legislations is set forth under the United Arab Emirates Federal Constitution providing that:

Provisions of this Constitution shall be superior over all constitutions of the federated states; federal laws enacted in accordance with this constitution shall have priority over all enactments issued by federated states authorities. In instances where contradictions occur, the inferior legislation shall be void to the extent of contradiction with the superior legislation. Should any conflict arise therein; the matter shall be decided by the federal Supreme Court.²⁸

²⁵ [UAE Constitution] art. 7 provides that "Islam is the official religion of the state, Islamic *Share'a* is a main source of law, and *Arabic* language is the official language of the State.

²⁶ UAE Federal Law of Civil Transaction, law 5 /1985 [FLCT].

²⁷ See generally Abdulhai Hejazi, *Introduction to the Study of Law*,500 (Kuwait University Press 1972).; Hesham Al-Qasim, "*Osool al Qanoon*" [*General Principles of Law*],137 (Kuwait University Pub. 1997).

²⁸ UAE Constitution., art.151.

The United States judicial system

The current American legal system was established under the federal Constitution signed on Sep. 17, 1787.²⁹ Under the Constitution, the United States of America is a federation consists of one central government and fifty sovereign states which enjoy substantial autonomy and authority. The federal Constitution consists of 7 Articles and 27 amendments, which have been subsequently added over time to form part of the Constitution.³⁰ The Constitution provides that any powers not delegated to the federal government in the Constitution, nor prohibited by it to the states, are reserved to the states, or to the people.

The concept of federalism was put by the framers of the United States Constitution to divide the powers between central and national governments as a safeguard of the rights of the people and against governments misusing their powers.

[In a federation], the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.³¹

Federalism has two dimensional consequences under the United States Constitution. The first shapes the relation between the states and the federal

²⁹ The United States Constitution was drafted in 1787.

³⁰ The later amendment was ratified May 7, 1992.

³¹ University of Chicago and Liberty Fund, Section on the Founder's Constitution , Federalist , no.51, available at

<<http://press-pubs.uchicago.edu/founders/documents/v1ch10s16.html>>
(last visited August 10, 2005).

government established under the Constitution.³² The second consequence relates to the interaction among the states.

The Judicial Powers under the Federal System

In general terms, there are two separate and distinct jurisdictions, such being the jurisdiction of the States within their own territorial boundaries and the other being federal jurisdiction. Federal jurisdiction is exercisable through the federal courts and by way of judicial power conferred upon federal courts by the Constitution. Federal jurisdiction is extremely limited, with the same being exercised only in areas external to state legislative power and territory. Also the reader should keep in mind that federal jurisdiction and judicial powers are not synonymous. Rather, it is the case that the two concepts comprise different aspects of the same issue. Judicial power refers to the administration of justice by various courts by means of constitutional, civil and criminal proceedings. On the other hand, federal jurisdiction refers to the scope of power conferred upon federal courts as distinguished from other courts.

Both federal and state jurisdictions are fundamental to the operation of the American judicial system as a whole. In fact, state courts have jurisdiction over a wide variety of legal actions; whereas federal jurisdiction is limited in nature. Federal jurisdiction is exercisable under the mandate given to federal courts by the U.S Constitution and acts of U.S Congress. The Constitutional provision means that the matters listed in the Constitutional provision are to be dealt with in the federal courts established under the mandate of Article 3, providing that:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both

³² See William Burnham, *Introduction to the law and legal system of the United States*, 2d ed., 18 (West 1999).

of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.³³

Section 2 of same article defines the scope and limit of federal courts adjudicative powers. The section reads:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.³⁴

The Nature of the American Legal System

A survey of the U.S legal system would reveals that it is a mixture of legal traditions, rather than a pure common law system.³⁵ In fact, every U.S. state has a distinct legal system, which in most cases is based on the common law model.³⁶ In its common law characteristics, where there is no statutory basis for specific inquiry; judges establish law by applying previous decisions (precedents) to present cases. Typically such mechanisms may be affected by some form of statutory authority. Broad areas of the law, most notably relating to property, contracts, and torts are traditionally part of the common law. These areas of the law are mostly within the jurisdiction of the states, and thus state courts are the primary source of common law.

³³ U.S. Const. art. III, § 1.

³⁴ *Id.* art. III, § 2.

³⁵ More detailed treatment of the subject matter is provided in Part II-Chapter 1 of this dissertation.

³⁶ With the exception of the State of Louisiana which relies on the French Civil Code.

Federal common law is relatively narrow in scope; primarily limited to clear federal issues that have not been addressed by a federal statute.

The Study's Main Inquiries, Methodology and Aims

The Nature of the Study

At the most basic level, jurisdiction refers to one court's authority to adjudicate matters brought before it between parties. In general, this authority has two fundamental and distinct dimensions; one relates to courts ability to entertain the action brought on the bases of its type or subject. The other dimension addresses the court's ability to validly adjudicate the rights and obligations of the parties. The first is commonly known as the rules or law of subject matter jurisdiction and the later is known by rules or law of personal jurisdiction.³⁷

In any judicial system, identifying the rules governing the subject matter of a given court is not as difficult as identifying the scope of court's authority over the litigants. In general, the establishment of any adjudicative authority would by itself reveal the nature and limits of the court(s) authority pertaining to the subject matter of the courts' adjudicative power. Nonetheless, such does not help in all circumstances in identifying the scope of a court's authority over the litigants.

In fact, the jurisdictional question pertaining to a court's authority over the persons gains a greater importance in legal analysis than any other jurisdictional inquiry, particularly in systems under which parallel court structures exists. In practice, different jurisdictions may employ different rules and standards, which make

³⁷ Different legal cultures might give different descriptions to certain bodies of the. Therefore, the subject might be treated in some jurisdiction as a distinct procedural body of law like the U.S. law or as an integral part within the procedural framework, like in the case of UAE legal system.

it very critical to clearly identify the framework governing the rules of interaction and operation.

The Main Inquiries

This study will undertake the task of identifying the nature of the rules employed in the United Arab Emirates and the United States Federal Systems to assert personal jurisdiction over the person of the defendant in both national and international levels, addressing how far courts in both systems can go in exercising its adjudicative powers over litigants, particularly, the assertion of jurisdiction over foreign defendants. The study will also explore the nature of both systems' jurisdictional foundations in adjudicating actions that originated outside their territorial limits.

In addition, the study will explore the extent to which differences among legal cultures might affect the operation of jurisdictional rules, as well as to identify the nature of the various interests protected when one system permits extraterritorial exercise of judicial power. In this regard, similarities and differences are closely examined in order to evaluate the rules' effectiveness, operation and sufficiency.

The Employed Method of Research

The two frameworks of personal jurisdiction are studied from a comparative perspective to determine their similarities and differences as the most appropriate method to the objectives of this study.

The Methodological Scheme of the Study

- Presenting a comprehensive legal analysis of the concept of personal jurisdiction in the two examined systems.

- Identifying the legal and institutional framework of the exercise of personal jurisdiction in the two federal systems in both national and international levels.
- Exploring the different perspectives and theoretical basis upon which rules of personal jurisdiction are found.
- Evaluating both frameworks to explore their practical similarities and differences
- Recommending any reform, re-evaluation, or modification to both systems, whenever applicable, to insure fairness and effectiveness.

The Objectives

Insofar as there is a potential of different outcomes as a result of the differences between the two legal systems in both institutional and legal frameworks applicable to dispute resolution mechanisms, it becomes critical to identify the different views underlying each system. These views will be compared, and evaluated against the principles and purpose of the rules in the other system as well as against internationally recognized principles for impact assessment and to minimize the uncertainty in transnational litigation. It will then be possible to determine the extent of divergence, and suggest steps to move towards a unified, widely supported model of the judicial process.

The study aims to help different groups of interested persons in the field of procedural law and jurisdiction matters; hence the study should appeal to a wide readership ranging from academics and practitioners to policy makers and the judiciary in both systems. For example, the enforcement of foreign judgments depends upon the knowledge of the internal laws of the foreign state. Thus, Judges dealing with questions of enforceability of foreign judgments, their determination of the question while is governed by their local rules and principles of international

comity, which likely would suggest that their examination of the validity of the foreign judgment depends on four causes. First, determination of jurisdiction, second determination of proper service, third determination of the legality of the foreign proceedings, and finally determination as to whether the foreign judgment is not contrary to the public order and policies of the forum in which the enforcement is sought. Under such circumstances, judges are certainly required to have certain familiarity with foreign laws and rules.

Also legislator interested in keeping the procedural law under review and making practical proposals for reform need to be familiar with different perspectives employed by different legislative or legal frameworks.

Comparative law scholars interested in initiating a coordinated approach to the various jurisdictional approaches in their effort to develop some common understanding among procedural systems might avail of this study as a part of such efforts.

PART I

THE LAW OF (*EKHTESAS SHAKHSY*) PERSONAL JURISDICTION

IN THE UNITED ARAB EMIRATES LEGAL SYSTEM

CHAPTER I
INTRODUCTION TO THE LAW OF JURISDICTION IN THE UAE¹ (THE
CONCEPT OF *EKHTESAS*)

Introduction to the Framework of *Ekhtesas*

"*Ekhtesas*" is an ordinary word of the Arabic language, which takes color and content from the context in which it is used. In my personal understanding, the word has no recognized or primary meaning other than authority and power. Frequently the word is used in a legal context to signify the judicial power, its nature or the scope and limits within which such power is exercised.²

The Federal Law of the UAE (United Arab Emirates) does not explicitly employ any standard definition for the term *ekhtesas*; however, the word meaning(s) in a technical sense can be understood by looking at the whole procedural structure of the system³. The fact that the UAE is a federation gives the technical meaning of the word an extreme importance. The existence of dual judicial system where both federal and state courts exist, would result in a complex courts structure that needs a clear legal framework within which the boundaries and limits of each system is to be clearly defined.

At the outset, it is important to explain the different implications of the term *ekhtesas* in order to reach the applicable definition for it through understanding the

¹ United Arab Emirates [hereinafter UAE].

² Harith Farouqi, *Faruqi's Law Dictionary (English-Arabic)*, (Librairie Du Liban, 3rd ed., 1991).

³ Reference is made to the United Arab Emirates Federal Law of Civil and Commercial Procedure, law 11/1992[FLCP].

operation of the whole procedural system. Moreover, it is worth noting in this regard that the UAE legislative approaches are significantly influenced by the Egyptian jurisprudence.¹ Such influence is clearly seen in the UAE legislative frameworks in the various legislations which were copied from the counterpart Egyptian codes² including as well the procedural body of law, like legislations regulating the *ekhtesas* of UAE courts.

Most notably, the UAE legislature has included the rules of *ekhtesas* within the general procedural law regulating the judicial process in the UAE courts typical to the Egyptian code regulating the same subject.³ The fact that the Egyptian legal system is a unitary civil judicial system makes it inappropriate to adopt the same approach in a federal system like the UAE federal legal system,⁴ under which there are two separate and distinct court systems, such being the jurisdiction of the *Emirates* within their own territorial boundaries and the other being federal jurisdiction.

In general, the questions of *ekhtesas* (jurisdiction) in any given legal system are answered in light of the respective guiding principles within the system itself. Its scope is determined according to the specific context within which the term is used. In a judicial context, civil courts are typically concerned with legal rights only when the aid of the

¹ Most United Arab Emirates legislations are *inspired* by their counterpart Egyptian codes. Egyptian jurisprudence as well has a significant presence in the UAE legal culture, and such presence is evident by the legal literature mostly written by Egyptian scholars.

² For example, the Federal law of Civil Transaction, law .5/1981 [FCTL] includes provisions that were drafted to be exactly the same as their Egyptian counterpart provisions, without any modifications. In some instances provisions were numbered the same.

³ [FLCP].

⁴ The political structure in the United Arab Emirates as a federal state, is different than the Egyptian political system, therefore, such differences should be taken into account and be reflected in the legislative framework in the UAE.

court is invoked by one party claiming a right against another party. This is done either to protect or enforce the right or to provide a remedy against that other party for infringement therein, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed.⁵ *Ekhtesas* then is understood as an introductory determination for the exercise of judicial authority with regards to grievances brought before the court over both the disputes and the parties.

Typically, determination of *ekhtesas* is made upon the existence of some links between the court and the action brought which in essence consists of three dimensions; authority to decide the general subject to which the specific action belongs; authority to subject the litigants to the court's adjudicative power⁶; and authority to provide the relief sought by the litigant.

In this context, the allocation of judicial power among the various courts in a complex courts structure requires the adoption of precise standards to establish the authority conferred upon each of the judicial systems, which is likely to be marked by differences in function and operation. Moreover, the potential of jurisdictional overlap may impair the operation of the judicial system as a whole. Hence, drawing a distinction is critical and essential in determining the system's efficiency.

In the broad political sense, the term *ekhtesas* is often used in reference to the distribution of one state's sovereign duties among various authorities according to the concerned state's internal institutional distribution of its powers.⁷ Under this general

⁵ Legal right is commonly understood as an interest recognized and protected by a rule of law.

⁶ See generally, Ahmed Mulaiji, *Judicial Jurisdiction*, 8 (dar al- ketab pub. 2nd ed., 1997).

meaning of *ekhtesas*, the term can be used to signify legislative, executive and judicial powers being the fundamental duties of any sovereignty. Traditionally, legislative *ekhtesas* refers to a state's authority to make substantive laws applicable to all persons and things within its boundaries.⁸ The second form of *ekhtesas* is the executive *ekhtesas* which refers to state's power to compel compliance with its laws. The third dimension of *ekhtesas*, under the political meaning, is the state's judicial *ekhtesas*, which refers to the state's authority to subject persons or things to the process of its courts.⁹

Different Meanings of Ekhtesas

Understanding that judicial *ekhtesas* refers to a state's power conferred upon its courts to subject persons and things to its process and to carry out its mission of dispute resolution, it then becomes necessarily concluded that such authority implies the power to hear and determine cases or controversies between parties and to carry its judgments and declarations therein into effect

In general, the meaning of judicial *ekhtesas* carries different implications and dimensions. First, there is the power of the court to examine the substance of the dispute, which is typically known as the qualitative *ekhtesas*; second, the power to subject parties to its authority known as *ekhtesas shakhsy* (personal jurisdiction). In addition, there is a less significant dimension which is the power of the court to provide the remedy sought.¹⁰

⁷ *Id.* at 5-9.

⁸ This form of *ekhtesas* is best understood under the western legal culture by jurisdiction to prescribe.

⁹ See generally, Ahmed D. Alsamdan, *Kuwait Private International law: Conflicts, Judicial Jurisdiction and Enforcement of Judgment*, 352-55 (1998).

¹⁰ See Wajdi Ragheb & Azmi Abdulfattah, *Principles of Civil Judiciary*, (dar al-ketab pub. 1984).

The significance of identifying the different dimensions of judicial power stems from the fact that each dimension is founded in a distinct set of rules and subject to different principles. For example, the concept *ekhtesas naoa'e* (qualitative jurisdiction) refers to the court's authority to hear certain types of disputes based on their subject-matter or the value of the action.¹¹ On the other hand, *ekhtesas shakhsy*, refers to the conditions that subject a person in particular circumstances to one court's adjudicative authority.¹²

In attempting to define this particular jurisdictional body of law (*ekhtesas shakhsy*-personal jurisdiction), I would suggest that these rules be defined as the rules defining the limits of one court's authority to litigate personal right, obligation or the status of a litigant brought before such court. In other words, any rule pertains to the foundations of the court's adjudicative power over the person of the litigant. This is providing that such a definition is likely to ease understanding this dimension of adjudicative power especially when the United Arab Emirates law does not recognize *ekhtesas shakhsy* (personal jurisdiction) as a distinct legal concept, in the sense that there is no explicit statutory provision applied to the subject literally.

Nonetheless, an *ekhtesas shakhsy* inquiry under the United Arab Emirates legal system is traditionally addressed by reference to the factors upon which the adjudicative power of national courts is exercised over the litigant. In essence, the rules are meant to

¹¹ See Ahmed Mulaiji, *supra* note 9, at 5.

¹² In practice, there is no specific framework within which the concept of *ekhtesas shakhsy* is studied as a distinct body of law. Thus, its various applications and meanings are understood by examining the whole jurisdictional rules provided for in the legislation.

define the scope of adjudicative power over the person, as well as to condition the exercise of such power unless certain statutory requirements are met.

The Legislative Framework of *Ekhtesas*

Under the United Arab Emirates Legal System, the Federal Law of Civil and Commercial Procedures is the ultimate source of *ekhtesas* (jurisdiction) rules. The law does not provide a definition to the term *ekhtesas*. However, its meaning can be understood, though indirectly, from the structure of the code itself. The code is divided into subjects, within which the subject of *ekhtesas* is regulated under the first chapter, entitled *the jurisdiction of courts*. The first section of this chapter regulates the *international jurisdiction* of the UAE courts;¹³ the second the *subject-matter jurisdiction*¹⁴ and the third the *territorial jurisdiction*.¹⁵

The code does not provide a particular section for *ekhtesas shakhsy* (personal jurisdiction). The subject is included within two sections of the code. One is the section entitled *international jurisdiction*. In fact, the title of this section is misleading in a way because it does not reflect the true content of the section. Such a legislative defect is justifiable under this system, which does not recognize personal jurisdiction as a distinct body of law. The other section, within which the subject is included, is the section regulating the distribution of adjudicative power among various courts. Typically, these

¹³ The title of the section is *International jurisdiction*. [FLCP] art. 20-24.

¹⁴ The title is best translated to *quantitative jurisdiction*. The section addresses the jurisdiction of various courts based of the nature of the action or its value. [FLCP] art.25-30.

¹⁵ The term used in the title of the section is best translated to *local jurisdiction*. This description is likely to cause confusion, insofar as the true intention of the legislative as concluded from the provisions of the section is to allocate the court in which the action is to be brought. [FLCP] art. 31-41.

rules are not concerned with the concept of personal jurisdiction. Nonetheless, the section provides in part conditions under which the defendant is to be held subject to the jurisdiction of UAE courts. The explanatory memorandum (*mothakarah tafseereyyah*) to the Federal Law of Civil Procedure provides that legislative provisions under the section *international jurisdiction* represent the starting point for any form of exercising adjudicative power in the UAE courts.¹⁶ Such explanatory comments, even though primarily intended as an aid to understanding the core principles of the legislation and its various provisions and not to provide a comprehensive guide to the respective provision, signify the type of function the rules have within the legislative procedural framework.

The legislative framework of *ekhtesas* under the UAE legal system¹⁷ is the appropriate starting point in conceptualizing the term within this framework. Therefore, defining the concept requires presenting the term in the most applicable general meaning through which more specific implications can be comprehended.¹⁸

Different Elements of *Ekhtesas Qada'ey* (Judicial Jurisdiction)

The general meaning of *ekhtesas qada'ey* (Judicial jurisdiction), under the UAE law of civil procedure, reveals that the judicial jurisdiction under the system addresses

¹⁶ The explanatory memorandum is a legislative document that explains and interprets the legislative provisions of certain legislations. In general, such illustrations do not constitute part of the legislative text. The memorandum's primary function is intended as an aid of to understanding the respective legislative text. In general its function is limited to being interpretation guidance.

¹⁷ [FLCP].

¹⁸ The goal of this chapter is to familiarize the common-law trained reader of the various implications of the concept of *ekhtesas* in the UAE legal culture. The fact is that in most common law systems the counterpart concept of jurisdiction is conceptually divided between jurisdiction over the subject-matter and jurisdiction over the person, where in the UAE, the law does not recognize it as a separate body of law having a distinct existence. Thus by presenting the various meanings of *ekhtesas* under the UAE procedural model, the different application of the concept is likely to be more understandable.

several jurisdictional inquiries. It addresses first, *how* adjudicative power can be exercised; *how* far such power can reach and based on *what* judicial standards UAE laws may apply? The answer for the first question presupposes one's familiarity with the legal foundation of the adjudicative power and the sources of its authority. The second answer concerns with the scope of such authority and the limits of its reach. The third question covers the standards employed to justify the jurisdictional power over litigants.

However, it is important to direct the reader's attention to other legal concepts that are likely to confuse the meaning of *ekhtesas qada'ey*. The most obvious example is the concept of *welayah*, a term that is frequently used in the legal literature to signify judicial power in a strict sense. Technically, the term *welayah* bears different implication than that of *ekhtesas*; nonetheless, both concepts share wide ground of similarity that makes it, in certain legal context, difficult to distinguish one from the other.

Welayah (Competence) and Ekhtesas

The term *welayah* is defined by most legal scholars, as the judicial authority of conferred upon national courts as a whole in carrying out the judicial tasks. Such authority corresponds to the powers reserved to both legislative and executive branches of the government.¹⁹ Consequently, *ekhtesas* is to be understood as a part of *welayah* conferred upon a particular court within the court system. Under this definition of *welayah*, *ekhtesas qada'ey* is understood to be divisible in nature insofar as the term *welayah* refers to the judicial system as a single unit rather than different sets of courts.²⁰

¹⁹ See generally, Ahmed Mulajji, *supra* note 9, at 3.

²⁰ See generally Fathi Wali, "*Alwaseet fe Qanoon el Qada'a Almadani [The Law of Civil Procedure and other Supplemental regulations]*" (dar al-nahdah al- arabeyyah 2001).

For example, *Dr. Wagdi Ragheb* defines the term *ekhtesas* as the portion of judicial power conferred upon a specific tribunal to exercise its adjudicative powers within the limits of the court's portion of *welayah*.²¹ In other words, the *welayah* of one court refers to the segment of judicial power reserved to this particular court. In fact, *Dr. Ragheb* captures *welayah* as the abstract judicial power recognized by law for the courts to exercise their judicial duties. Therefore, he considers *ekhtesas* to be the share given to each judicial unit within the judicial system. In his illustrative comments the Egyptian scholar explains the different aspects of *ekhtesas* by addressing the subject in three different contexts within which the term might be brought, describing *ekhtesas* as either: functional, qualitative or geographic in nature.²²

Conceptually, divisibility of *ekhtesas* is justified by the practical impossibility that a single court to undertake all judicial duties²³. Consequently, the multiplicity of courts requires designating the amount of power (the share of *ekhtesas*) carried by one specific court. Hence, defining one court's *ekhtesas* is identifying the share of *welayah* vested in such a court.²⁴

The meaning of the term can be better explained in the context of the duality of court system where both civil and administrative courts exist, as the case in France and Egypt.²⁵ Under this form of duality, the administrative judiciary is considered the

²¹ *Wajdi Ragheb, The Theory of Judicial Action*, 600 (dar al-fekr al-arabi 1970).

²² *Id.* at 600-605.

²³ *Fathi Wali*, *supra* note 23, at 220.

²⁴ *Ahmed Mulajji*, *supra* note 9, at 3.

exclusive forum over all actions of an administrative nature which by their very nature do not fall within the competence of ordinary civil courts. Under this form of duality of court systems, *welayah* is conceptually known as the adjudicative powers of both court systems whereas *ekhtesas* is understood as the powers vested in one courts system as distinguished from powers vested in the other.

The significance of drawing clear distinction between the concept of *welayah* and that of *ekhtesas* stems from the fact that such distinction has practical consequences. For example, a judgment rendered by a civil court in an administrative dispute over which the court lacks *ekhtesas* (jurisdiction), is characterized as voidable but not absolutely void. Technically, a voidable judgment is one entered erroneously by a court acting within the limits of *welayah* even if outside the statutory limits of *ekhtesas* in a strict sense. Judgment of such characteristic is correctable on review only if a timely appeal is taken.

On the other hand, judgment entered by court acting beyond the limits of *welayah* is absolutely void and may be attacked either directly or indirectly at any time. The traditional example of this form of jurisdictional defect is judgments entered by court in matters that are classified as *acts of state*²⁶. For example, a judgment entered by court concerning the state's accession to particular international treaty; the appointment of a political officer and the acceptance of the credentials of a diplomatic mission. By virtue

²⁵ In both systems, administrative actions are handled by a separate judicial authority known as administrative courts which do not constitute part of the ordinary civil court structure. These courts are headed by the Sate Council equivalent to supreme courts in the civil judiciary.

²⁶ In general, the expression *act of state* refers to one state's political duties that are normally not to be put into judicial inquiry.

of their very nature, such matters are beyond the general adjudicative power of the state's court and thus, cannot be put in any form of judicial inquiry.²⁷

In the previous examples, judicial action is considered a violation of the political division of sovereign responsibilities. Indeed, judges under the UAE legal system are not empowered to exercise any form of authority that is not reserved to them by law. Therefore, adjudicating matters of such a nature is considered an excess of power and deemed void of any legal effect²⁸.

The Different Applications of the Term "Ekhtesas" within the Judicial System of the UAE

The legislative framework provides for different implications of the term *ekhtesas*. One is the allocation of *ekhtesas qada'ey* (judicial power) among various courts on the basis of their geographical location, known as *ekhtesas mahally* and governed by the rules provided in chapter 2 part 1 of the law of civil procedure.²⁹ The rules' operation is similar to what is understood in the American Legal System as *venue*, in the sense that these rules refer to the place where a case is to be heard.

The legislature also employs the expressions *ekhtesas nao'ey* and *ekhtesas qeemy* in reference to the jurisdiction based on the nature of the dispute, or the value of the action. Both expressions are employed to describe the specific nature of court's authority

²⁷ For detailed treatment of the subject, see Ahmed Mulaiji, *supra* note 9, at 109-122.

²⁸ In the UAE legal system, Mahkamat al- Tamiez Dubai [Tamiez Dubai][Dubai Court of Cassation] addressed the issue, though indirectly, in the judgment No.32/94 dated 26 June 1994 reported by Essam Altamimi & Richard Price, *United Arab Emirates Court of Cassation Judgments 1989-1997*, 89 (Kluwer Pub. 1998).

²⁹ [FLCP].art.31-41.

over the action.³⁰ Generally, the context in which the term *ekhtesas* is brought determines the specific meaning for which the term is employed.

The Different Forms of *Ekhtesas* in the UAE Federal Judicial System (Types and Applications)

The UAE courts' competence is regulated under the federal law of Civil Procedure [FLCP], under which, understanding the various aspects of courts competence requires that a distinction between the different uses of the term *ekhtesas* be drawn in order to comprehend the operation of the system. The following illustration is meant as a general introduction to the law of *ekhtases* in the UAE.

The law literally addresses three different dimensions of *ekhtesas*. The first of these dimensions is *ekhtesas daowly* (international jurisdiction), regulated under³¹ the first section of the legislation.³² In fact, the title of this section does not reflect the rules' true content, as the title may indicate that it concerns only jurisdictional standard for transaction with an international element. That might be partially true, but it also refers to jurisdictional standards with pure national characteristics. The second dimension is *ekhtesas noa'e*, a form of jurisdiction which relates to the nature of disputes which courts may decide. The third dimension is *ekhtesas mahally*, a legislative reference employed by the law to allocate the geographic area in which the *ekhtesas* is to be exercised with regard to certain disputes.

³⁰ For detailed treatment of the subject *see*, Ahmed Mulaiji, *supra* note 9, at 9.

³¹ As previously discussed, the term *ekhtesas dowly* (International Jurisdiction) is inappropriately employed. In its essence the legislative articles address in part what can be understood as *ekhtesas shakhsy* (Personal Jurisdiction), rather than mere international jurisdiction rules.

³²[FLCP] art.20-24.

In what follows, further illustrations of each concept will be provided, starting with the implications of *ekhtesas noa'e*; followed by the concept of *ekhtesas mahally* and finally a detailed treatment of the concept of *ekhtesas shakhsy* and its implications under the United Arab Emirates Legal System.

Ekhtesas Noa'e of Federal Courts

The concept of *ekhtesas noa'e* means the distribution of cases among various courts according to the type of dispute being brought.³³ Traditionally, disputes are divided into three main categories; civil, criminal and administrative. A criminal dispute is the where the state is a party thereto, as a representative of the society.³⁴ The term *ekhtesas jena'ey* (criminal jurisdiction) is used in the judicial context to describe the power of a court to hear a case brought by the state accusing a criminal defendant of a violation of the law. The state's representative is usually there to inflict the penalty on behalf of the society.

Administrative proceedings refer to any form of legal action filed by or against any governmental authority. This form of legal action is to be distinguished from ordinary proceedings by reference to the capacity of the party(ies) involved. Typically, in the course of exercising its duties, the State or one of its governmental units may commit an act or adopt a decision that constitutes a violation of the law, which could render the state liable for its action.³⁵ In addition, the state may assert claims against an individual in

³³ Ahmed Mulaiji, *supra* note 9, at 67.

³⁴ See generally, Wajdi Ragheb & Azmi Abdulfatah , *Principles of Civil Judiciary According to the New Law of Civil Procedure*, (dar al-ketab pub. 1984).

any form other than criminal offences. In such events, disputes of such quality are deemed administrative disputes and subject to distinct set of rules governing the judicial process taken therein.³⁶ Some states tend to separate such disputes completely from the scope of the ordinary judicial system and to confer *ekhtesas* over such matters to separate judicial authorities that are normally known as administrative tribunals.³⁷

Ekhtesas noa'e is regulated under part two of the Federal Law of Civil Procedure [FLCP] entitled, *Ekhtesas Noa'e and Ekhtesas Qeme'e of mahakem Etehadeyyah* (monetary limits of jurisdiction).³⁸ The legislative section of the federal legislation confers *Mahkamah Etehadeyyah* [Etehadeyyah]³⁹ (federal court of first instance) general jurisdiction over all types of civil and commercial disputes.⁴⁰ The law establishes *ekhtesas noa'e* (subject-matter jurisdiction) for each of the several [Etehadeyyah] *Courts* according to the limits prescribed by the Federal Law of Civil Procedure [FLCP].⁴¹

³⁵ *Id.*

³⁶ Under the UAE legal system, administrative proceedings are subject to the Federal Law of Civil Procedure, law 11/1992.

³⁷ Examples of these authorities include the Egyptian and the French State Councils. Under the UAE legal system, the administrative disputes are handled through the traditional civil court system in accordance with the [FLCP].

³⁸ [FLCP] art.25,30.

³⁹ *Mahkamah Etehadeyyah* is the federal court of first instance [*hereinafter Etehadeyyah Court*].

⁴⁰ The scope of *ekhtesas* under [FLCP] art.25 has been broadened by virtue of article 10 of [FLCT] ,see Ahmed Sedqi, *Law of Civil Procedure in the United Arab Emirates: Analytical and Practical Study to the Federal Law No.11 for the Year 1992 of Civil and Commercial Procedure*, 194-95 (al-bayan press. 1st ed., 1999).

⁴¹ [FLCP] art.25-30.

Ekhtesas Noa'e for the Partial Etehadeyyah Court⁴²

The Federal Law of Civil and commercial Procedure provides that the partial branch of [Etehadeyyah] Court has the competence to hear civil and commercial cases where the value of the action does not exceed 100,000 *Dirhams*.⁴³ in addition the court is competent to decide all matters of personal status nature regardless of their value.⁴⁴ The legislative provision reveals that the law employs substantive and monetary measures in determining the respective *ekhtesas* (jurisdiction) of the court. The significance of determining the jurisdictional limits of the respective [Etehadeyyah] court whether partial or collective branch, is founded on the need to allocating the respective appellate jurisdiction of the action.

Ekhtesas Noa'e of the Collective Etehadeyyah Court

The *ekhtesas naoe'e* (jurisdiction) of the collective branch of [Etehadeyyah] Court is classified into two types of jurisdiction; first instance jurisdiction and appellate jurisdiction.

The first instance *Ekhtesas* (jurisdiction) of collective branch of [Etehadeyyah] Court

The Law provides that the collective branch of [Etehadeyyah] court has first instance *ekhtesas* (jurisdiction) in all actions of civil, commercial and administrative

⁴² Part of the [etehadeyyah] court that decides cases of relatively less importance disputes either by virtue of the amount involved or the type of action brought.

⁴³ [FLCP] art.30. The amount is equal to 24,000 U.S. Dollars. Dirham is the UAE national currency.

⁴⁴ These actions by their very nature cannot be monetarily valued.

nature.⁴⁵ However, this provision must be read in connection with Article 30. In fact, the court is empowered to hear every civil and commercial dispute whose value is not subject to the jurisdiction of the partial branch of the [Ettehadeyyah] court pursuant to article 30. Once monetary requirements are satisfied, the action becomes subject to the *ekhtesas* of the collective branch. In addition, *ekhtesas* of the collective branch of [Etehadeyyah] court is general. Typically the court is competent to deal with all civil disputes where the value involved exceeds the monetary limits of a partial branch, or where the action brought cannot be valued. Exceptions to that are actions concerning personal status actions and urgent matters. For these actions, the law provides that these actions remain with the exclusive *ekhtesas* (jurisdiction) of the partial branch of [Etehadeyyah] court. In sum, the jurisdiction of the collective branch of [Ettehadeyyah] extends to:

- 1-Cases whose value exceeds 100,000 *Dirhams*.
- 2-Cases that cannot be monetarily valued.
- 3- Administrative proceedings.

The appellate *ekhtesas* (jurisdiction) of the collective branch of [Ettehadeyyah] court

The appellate jurisdiction of the [Ettehadeyyah] court is established by the legislative provision according to which [Ettehadeyyah] court has 'appellate jurisdiction over judgments rendered by the partial branch of the court in accordance with article 30.⁴⁶ In exercising its appellate jurisdiction, the [Etehadeyyah] court is the second degree court with respect of judgments handed down by the partial branch.

⁴⁵ [FLCP]art.25.

⁴⁶ [FLCP]art.30.

Ekhtesas Noa'e of the Appellate Ettehadeyyah Courts

The jurisdiction of the Mahakema Ettehadeyyah Istenafeyyah [Istenaf] [Federal Courts of Appeal], is established by the legislative provision of article 27 according to which the courts of [Istenaf] have appellate jurisdiction over judgments rendered by the collective branches of [Ettehadeyyah] courts.⁴⁷ The legislative provision confirms these courts' role as being a special institutional safe-guard for the protection of the rights enshrined in the Constitution. The operational effect of this provision is set out in the Law of Civil Procedure in such a way as to provide that the [Istenaf] Courts may act in one of two ways if it finds that an appeal is well founded: The Court may firstly act as a court with complete jurisdiction over the case. Thus it may decide the case on its merits or simply overturn the judgment and refer the case back to the lower court. The court whose judgment has been overturned has the duty to deliver a fresh judgment.

Unlike the jurisdiction (*ekhtesas*) of Mahkamah Ettehadeyyah Olia {Mahkamah Olia} [UAE Supreme Court]⁴⁸, and the [Ettehadeyyah] courts, [Isteanaf] Courts do not have original jurisdiction, which is the power to entertain suits instituted in the first instance.⁴⁹ The reason for that may be ascribed to the fact that these courts were established subsequent to the establishment of the former Courts.⁵⁰

⁴⁷ [FLCP]art.27.

⁴⁸ *Mahkamah Etehadeyyah Olia* [Ettehadeyyah Olia] [UAE Supreme Court] is the UAE highest judicial authority.

⁴⁹ See [UAE Constitution] art.104.

⁵⁰ Federal Law Regulating Federal Judiciary, law 3/1983 [hereinafter LFJ], see [LFJ] art. 9,12.

Ekhtesas Noa'e for the Mahkamah Ettahadeyyah Olia

Article 104 of the Federal Constitution establishes a [Mahkamahah Olia] as an essential part of the legal order. The UAE Constitution confers the Court with its jurisdiction. The Court has jurisdiction over a wide variety of matters including conflicts of powers arising between the Federal government and those of the federated Emirates or between several Emirates. In addition, once the ordinary judicial procedures are exhausted, the Court has the power and jurisdiction to safeguard the fundamental rights of citizens through the so-called appeal for constitutional protection (Ta'an be Al-Tamiez). The Court is the highest judicial authority of the Federation and is only subject to the Constitution itself and the Organic Law whereby it is regulated. The constitutional provision reveals that [Mahkamah Olia] jurisdiction can be divided into three different categories:

Mahkamah Ettahadeyyah Olia as a First Instance Court:

The Federal Supreme Court has an original jurisdiction over all matters of conflict of laws or conflict of jurisdiction, whenever the dispute is brought before the court by the interested litigant or upon request of the Public Prosecutor. The Court's original jurisdiction over matters of conflict of jurisdiction may be invoked upon the request of the interested party when conflicts arise between the federal government and one or more of the federated Emirates.

This form of jurisdiction has been rarely invoked; the only reported case of this nature is the Case No.2 of the Year 17 Judicial (Conflicts)⁵¹, in which the Court ruled that

"a matter of conflict between the federal judicial authority and that of local judicial authority is considered within the exclusive jurisdiction of Mahkamah Ettahdeyyah Olia [UAE Supreme Court] pursuant to the UAE Constitution and the law establishing Mahkamah Ettahdeyyah Olia."⁵²

In this ruling, the Court outlined the conditions that must be complied with in order for the Court to exercise this form of jurisdiction. In addition, the Court added that an agreement to confer jurisdiction upon local judicial authority to decide a dispute of this nature, is considered void for its contradiction with the legal order established under the Constitutional provisions.⁵³

The judgment emphasized the nature of conflict that must fall within the exclusive jurisdiction of the Mahkamah Ettahdeyyah Olia [UAE Supreme Court], providing that jurisdictional conflict may be termed positive where two or more judicial authorities claim their competence over the dispute, or where the dispute has been decided differently in two jurisdictions. Conflict may be termed negative where two different judicial authorities deny their jurisdiction to settle a particular dispute. The later is also another form of conflict which falls under the exclusive jurisdiction of Mahkamah

⁵¹ *Mahkamah Ettahdeyyah Olia [Ettahdeyyah Olia]* [UAE Supreme Court], No.2, 19 June. 1990, The Compilation of United Arab Emirates Supreme Court rulings in Civil, Commercial and Personal Status matters, UAE University Publications, 1995. at.98

⁵² Federal Law for the Establishment of *Mahkamah Ettahdeyyah Olia*, law 10/1973 [hereinafter Law of *Ettahdeyyah Olia*], see [law of Ettahdeyyah Olia] art. 33/9

⁵³ See generally, Ahmed Sedqi, *Law of Civil Procedure in the United Arab Emirates: Analytical and Practical Study to the Federal Law No.11 for the Year 1992 of Civil and Commercial Procedure*, (al-bayan pub.1st ed., 1999).

Ettehadeyyah Olia, pursuant to Article 104 of the Constitution and Article 33 of the Federal Law No.10 for the Year 1973.⁵⁴

Ekhtesas Tafsery (Explanatory Jurisdiction) of Mahkamah Etehadeyyah Olia as a Constitutional Court.

This unique form of *ekhtesas* (jurisdiction) is established for the Mahkamah Ettehadeyyah Olia pursuant to Article 99 of the UAE Constitution, under which, the Court is regarded the ultimate and exclusive source of interpretation concerning Constitutional provisions or International treaties to which the UAE is a party.⁵⁵

In order for such exceptional form of jurisdiction to be exercised, the Constitution conditions the rendition of such opinion by Mahkamah Etehadeyyah Olia to the existence of a genuine dispute pending before one national court. Once the explanatory opinion is declared, it shall be binding upon all authorities.⁵⁶ This unique form of jurisdiction is intended to standardize and unify the judicial interpretation and to create a greater degree of harmony among the different courts by applying the same interpretation provided by a single judicial authority, that being the Mahkamah Etehadeyyah Olia.⁵⁷

Ekhtesas Este'anafy (Appellate Jurisdiction) of Mahkamah Ettehadeyyah Olia

Appeals to Mahkamah Ettehadeyyah Olia are regulated under the Federal Law of Civil Procedure [FLCP] and The Law establishing Mahkamah Ettehadeyyah Olia⁵⁸. Both

⁵⁴ *Id.* at 160-166.

⁵⁵ [UAE Constitution] art.99/4.

⁵⁶ [Law of Etehadeyyah Olia] art. 33/6.

⁵⁷ *Id.* art. 33/5/6.

⁵⁸ Law 10/1973.

legislative enactments provide that appellate jurisdiction of Mahkamah Ettehadayah Olia may be invoked in the form of a petition to the Court with respect to judgments rendered by the Federal Courts of Appeal [Isteanaf]. However, in this capacity the court is not to be considered an ordinary appellate court in the sense that it does not review the case in its factual findings, but rather verifies that the law was correctly applied by the respective Court of [Isteanaf].

In practice, although the legal system does not recognize the doctrine of *stare decisis*, the rulings of higher tribunals, especially those rendered by Mahkamah Ettehadayah Olia, to have significant weight. As the Court of last resort and the ultimate interpreter of the law, its rulings and principles have an intangible importance that goes beyond the cases it decides to reach other actions decided by the inferior courts. Typically, inferior courts will follow the judicial principles and approaches of higher courts. In practice, it is rare that an inferior court would depart from a principle that has been established under pervious higher court rulings.

CHAPTER II
**THE GENERAL BASIS OF THE EXERCISE OF *EKHTESAS SHAKHSY* IN THE
UAE FEDERAL JUDICIAL SYSTEM:**

Introduction and Division

In the previous chapter, we reviewed the various uses of the term *ekhtesas* and its implications. This chapter will discuss the concept of *ekhtesas shakhsy* in order to simplify the understanding of the various rules governing its application and present them in an acceptable manner, to enable the reader to compare the concept to other concepts of similar application.

However, the existence and application of the concept within certain a legal culture may not have the exact operative similarity to counterpart concepts in other legal system. For example, the term *personal jurisdiction* in the western legal culture is understood as a reference to the court's power to adjudicate the personal legal rights of the parties properly brought before it¹. Providing that, in order for a court to validly decide a cause of action, a court must have a legal authority over the action in both its object and parties.

It is commonly accepted that the operative mechanism of a legal concept is to be analyzed in the context of the specific legal culture within which the concept is meant to

¹See e.g., Black's Law Dictionary, 854 (6th ed.. West.1990).

operate. Generally, such an operation is determined in accordance with the specific framework regulating such an operation.

In practice, legal systems differ in their approaches in terms of subjecting individuals to national courts' adjudicative authorities. Such differences can be clearly seen in the adoption of different jurisdictional standards employed and incorporated to justify the exercise of judicial powers. Traditionally, territoriality used to represent the most acceptable foundation of adjudicative powers, under which the exercise of judicial powers is restricted in purely territorial terms. In the contemporary world, the application of traditional territorial factors of jurisdiction is no longer sufficient as an exclusive foundation of jurisdiction. Modern means of travel and communications have made it necessary to expand the factors upon which jurisdiction is to be found to cover the new means of connection that evolve in modern life style. Therefore, it is necessary to study and analyze the various bases that are employed in justifying the exercise of judicial *ekhtesas*. In practice, standards that establish the court's authority over persons to subject them to certain judicial authority differ in terms of their forms and effect. For instance, the requirement of "due process" in the American Legal System may not have a direct equivalent in the legal framework of a certain system. Nonetheless, its rationale may be found in a different form that complies with the nature and requirements of the system within which it operates.

The concept of *Ekhtesas Shakhsy*

The legal framework of personal jurisdiction, as evolved and developed in the American Judicial System, has no equivalent in the UAE legal culture. The legal

framework within which a similar concept exists is the body of rules technically known as *Qawa'ed Al Ekhtesas El Daowly* (international jurisdiction rules). A set of rules incorporated within the law of civil and commercial procedure No. 11 for the year 1992, which are meant to set forth among other things the instances under which persons are subjected to the adjudicative authority of UAE courts.

The rules pertaining to the concept of *ekhtesas shakhsy* are included in the first chapter of the code under the title "Rules of International Jurisdiction". Regardless of the title, by introducing these rules, which might give a misleading understanding of the rules' content, the chapter sets forth standards and criteria under which the *ekhtesas* of UAE national courts is established. In this respect, the rules are concerned with the exercise of judicial authority over the parties by setting down the standards and basis upon which the validity of the exercise is to be determined.

The rules of the title provide that *ekhtesas shakhsy* (personal jurisdiction) in the UAE federal courts is established based on three general criteria: the status of domicile, the type of action brought, and the voluntary consent of defendants to a court's authority.

**The Establishment of *Ekhtesas Shakhsy* Based on the Defendant's Legal Status:
Connecting Factors**

Under this category provided by the law, a defendant's legal status is considered for the assertion of *ekhtesas shakhsy*. In addition, nationality, as a legal and political tie, is recognized by the law to have citizens of UAE subject to the jurisdiction of federal court regardless of their domicile. Such form of *ekhtesas* is established under the Federal

Law of Civil and Commercial Procedure.¹ The legislative provides that jurisdiction may be exercised over the non-UAE defendant by the court having proper jurisdiction over the area where the non-UAE defendant domiciles or resides within the UAE.²

Therefore, nationality, domicile and place of residence are the three bases for the exercise of *ekhtesas*, based on the legal status of the defendant. The three factors are discussed in the following sections:

Nationality

The law recognizes nationality as a factor that connects the individual with the judicial system of the state. According to this connection the individual is subject to its national court, regardless of any other factor. The legislative rationale behind this construction is founded on the fact that individuals are entitled to the privileges of citizenship and the protection of the laws of their nationality. Thus, they should be subjected to their homeland authorities regardless of their actual place of establishment.³ Such formulation of this widely accepted factor is derived from a practical consideration that a sovereign has a wider authority over its citizens than any other state thus its courts should be given a legitimate tool by which it subjects them to its on authority.⁴

¹ Federal Law of Civil Procedure, law 11/1992 [hereinafter FLCP].

² FLCP]art.20.

³ Ahmed Mulaiji, *Judicial jurisdiction: International jurisdiction and territorial competence* ,9 (2nd ed., dar al-ketab. pub. 1997)., *See also*, Abdulmenem Foad & Sameyah Rashid, *Private International Law*, 351 (2nd ed. 1975).

⁴ Code Civil[hereinafter C.Civ] art.14,15 (Fr.).

The UAE legislator incorporated this factor in justifying the courts exercise of *ekhtesas shakhsy*.⁵ In all cases reference shall be made to the law of nationality which regulates the granting of citizenship as the ultimate authority in determining the nationality of UAE citizens. However, it is worth mentioning that granting citizenship may be established on different factors and falls within the absolute discretion of the executive branch of the government.⁶

In his treatment of the subject *Dr. Mulaiji* states that

The general rule in establishing the judicial jurisdiction is the application of territoriality. Its application extends over both citizens and non citizens within the boundaries of the state. For the former, jurisdiction extends according to an objective factor conferring national courts authority to reach citizens even if they have domicile outside the national territorial boundaries of their home state.⁷

As a result of the existence of two types of persons recognize by the law: judicial person and normal person, the factor of nationality is recognized differently as a result of the different legal nature of the two civil personalities.⁸

Natural Persons

A normal person is considered to be a citizen once such capacity is recognized by the state in accordance with the law of nationality of the UAE. Thus a person is subjected to federal courts authority in all cases filed against him/her once the United Arab

⁵ In practice, a person could have more than one nationality or may be recognized as having no nationality, in such cases, nationality as a connecting factor may become inoperative.

⁶ It is a well established principle under the UAE law that matters concerning nationality are considered acts of sovereignty which cannot be put into judicial question.

⁷ *Mulaiji, supra* note 4, at 8.

⁸ The civil capacity is the fitness to act with legal effect.

Emirates nationality of the person is established. Once established no regard shall be given to place of residence or actual domicile of the national defendant for purposes of jurisdiction.⁹

The nationality as a connecting factor is normally an easy matter to determine whereas other factors like domicile are frequently difficult to establish. Such difficulty could arise, for example, from the uncertainty of determining a person's intention based on the available facts, or it may result from the application of the legal principles relating to domicile in certain legal context.¹⁰

Judicial Persons

For legal purposes, companies, corporations and the state and its subdivisions are recognized judicial persons. The law recognizes its actions and their legal effects.¹¹ Generally speaking judicial persons are subject to the law of the land, which describes their capacities; their rights and obligations in connection with their activities. A judicial person may also acquire the citizenship like normal persons, thus be subject to the authority of the federal court in application of Article 20 of the law.

Pursuant to the commercial companies' law, every company incorporated under the UAE laws shall have UAE nationality.¹² The same principle is adopted within the Egyptian commercial law, which provides that all commercial companies incorporated in

⁹ Domicile and place of residence shall be considered only for purposes of venue (*Ekhtesas Mahally*).

¹⁰ For example, the domicile of incompetent persons, military personnel etc.

¹¹ For example, corporations and partnerships may acquire civil capacity that is separate and distinct from that of each shareholder, partner or holder.

¹² Federal Law of Commercial Companies, law 8 /1984 [hereinafter FLCC].

Egypt shall be considered Egyptian.¹³ The Egyptian judiciary signified the importance of corporations' nationality in an Egyptian Supreme Court judgment in which the court indicated the importance of the nationality for judicial persons by stating that "for every commercial company, the nationality has a significant importance. As with normal person, every company must have a nationality by which its legal status is determined in accordance with the law¹⁴

Therefore, we point here that, the fitness to be subject to legal relations with respect to a judicial person identifies three categories of judicial capacities, the state and its subdivisions; corporations, institutions and entities for public interests; and corporations, partnerships and associations for private interests.

As for the first category, it is obvious that in so far as the issue is related to the state or any of its subdivisions, nationality as a factor determining the jurisdiction is not in question. All other entities established for public interest, whether commercial or non commercial in nature, nationality is determined by reference to the law under which they operate. For the third category, corporations, partnerships and associations for private interests, nationality is determined in accordance with the respective law regulating their field of operation. For instance, commercial companies have their nationality determined in accordance with the law of commercial companies, while the nationality of private non-profit organizations is determined by the law that regulates the general subject

¹³ Egyptian Law of Commercial Companies, law. 159 /1981.

¹⁴ Awadallah Shaibah, *Conflict of Laws: Conflict of International Jurisdiction under the United Arab Emirates Law*. (Dubai Police Academy Press. 2001). n. at 400.

creating or recognizing them. In general, the law of civil transaction determines the legal status of any organization having a purely civil nature.¹⁵

Domicile

Domicile is identified by the law as a legal factor that links the defendant with the authority of the federal judiciary. Due to the importance of such factors in the UAE legal culture, the framework is explained in the following sections:

Domiciliary its Meaning and Importance

Domicile is one of the most connecting factors, which has long been recognized as the most fundamental concept in many areas of law. It gains such importance as a link between a person and the rules that are applicable to the person in a specific legal context. Domicile of a non-national is the geographic area where a person is subject to the law in force therein, and also refers to the area where a person has the intention to reside permanently.

In procedural law, the importance of domicile stems from the legal consequences of this connecting factor. In most jurisdictions, a person's domicile in a certain area is considered a sufficient link for subjecting the person to the laws thereof. Article 20 of the Law Civil and Commercial Procedure No. 11 for the Year 1992 stipulates that non-UAE citizens, who domicile or reside in the UAE, shall be subject to its court's authority in all actions brought against them in the UAE courts. Accordingly, the UAE law recognizes domicile as a connecting factor for purposes of jurisdiction.

¹⁵ The law of civil Transaction is the general law for any civil subject for which there are no specific regulations. In the UAE the subject is regulated under the Federal Law of Civil Transaction, law 5/ 1985 [*hereinafter* FLCT].

The Establishment of the jurisdiction based on the factor domiciliary is a universally accepted foundation of adjudicative authority. In almost all contemporary legal systems the concept has a form of existence, even with the fact that a marginal difference may be noticed in the frameworks governing determination of domicile among the systems.¹⁶ Historically, domicile as a connecting factor is one of the oldest factors of establishing the exercise of *ekhtesas*. The concept has its roots in ancient *Roman* law where the old *Romans* recognized the domicile in *Rome* as sufficient enough link to subject individuals to the *Roman* legal system.¹⁷ Islamic jurists had also treated the subject in their judicial literature known as *Fiqh* (Islamic jurisprudence), they have developed a principle that carries the meaning of domicile in contemporary sense.¹⁸

The establishment of jurisdiction, based on a defendant's domicile or place of residence, might be seen as a guarantee for the effectiveness of judgments, since the court in the area where the defendant domicile or resides is best situated to take whatever measures are necessary to guarantee the effectiveness of court's determination in the action. Additionally, a defendant's domicile is likely to be the place where the defendant's assets are found.

The UAE Federal Law of Civil Transaction Law [FLCT] defines the concept of domicile providing that domicile is the place where the person usually stays.¹⁹ The

¹⁶ Requirements of domicile may not be typical in all systems. In some jurisdictions domicile is treated synonym to residence.

¹⁷ See e.g., Catholic Encyclopedia, Section on Domicile, available at <<http://www.newadvent.org/cathen/05103b.htm>>. (last visited Aug.10,2005)

¹⁸ See generally, Aref Abueid, *the state and its components comparative study*, Share'ah and Islamic Study Journal. (1st ed.,1984).

¹⁹ [FLCT] art.81.

legislative definition of domicile contemplates that domicile as a legal concept consists of several components.

Elements of Domicile

Conceptually the question of domicile requires two conditions. The first is the physical presence in the forum and the second is the intention of having such a place as permanent a place of abode.²⁰ Therefore, domicile is not a simple question of mere physical bodily presence. Presence at a certain time may not involve domicile. Equally, physical absence is not inconsistent with residence. One should bear in mind that the occasional interruption of the presence does not contradict the meaning of domicile as long as the intention of having the place as a permanent place abode is identified.

As a direct consequence of the legislative framework of domicile, there is the possibility that a person may have no domicile under the meaning provided by the article. The obvious example of such is the case of the *beadwin (nomads)*, who, according to their social norms of life, have no specific area where they settle.²¹

The UAE legislator identifies this case in Article 81/3 of the code stating that "where the person has no place where he normally resides, he shall be considered as having no domicile".²² To supplement the deficiencies in instances where no fixed domicile exist the legislator provides for the place of residence as an alternative.

²⁰ Shibah ,*supra* note 15, at.403.

²¹ 1 Sha'aban Abdulrazzaq & Hosain Aljehazi, *Illustrative study to the Law No.5 for the Year 1985 in the United Arab Emirates: Judicial and Juristic analysis*, 431(1990).

²² [FLCT] art. 81/3.

Additionally, the law provides in Article 81–2 that domicile in the legal sense can have multiple existence. The said article provides a person may take more than one domicile at a time. The formulation of the provision considers the social life patron in the UAE where a person may have more than one wife and stay with each in separate places. In this case, the multiplicity of domicile could possibly exist. Historically, the concept of dual domicile is imported from the Islamic *Hanafi School of Fiqh* which acknowledges the existence of the duality of domicile.²³

Different Forms of Domicile

Besides the general meaning of domicile established under article 81, the law acknowledges different forms of domicile, each of which is meant to apply in specific contexts. For example the law recognizes the notion of special domicile under Article 82. Such form of domicile is understood as the place where a person is practicing a certain profession, tasks or special line of activities of commercial nature.²⁴

The law also provides for the establishment of legislative domicile, a phrase that refers to the place designated by law as the domicile of certain categories of people in certain context regardless of their actual physical presence. An example of this case is the domicile legislatively fixed for an incompetent or absent person or one under legal guardianship. The law provides that for the foregoing categories, the law determines the domicile of in special provisions.²⁵

²³ Sha'aban Abdulrazzaq & Hosain Aljehazy, *supra* note 22, at. 431.

²⁴ *Id.* at 431.

²⁵ Their domicile is the place where their legal representatives reside. *See* [FLCT] art.83.

Another form of domicile is established under Article 84 known as the elected domicile. The elected domicile is understood to be the place chosen by the person to be considered for certain types of actions relating to specific legal transactions associated with the purposes for which this elected domicile is established.²⁶

The aforesaid shows that the legislative framework differentiates between various types of domicile, each of which is meant to be considered in light of the purposes upon which they are established. For the purposes of explaining these concepts as a connecting factor and its various applications, in what follows the domicile for natural persons and judicial persons will be explained in light of their legislative frameworks.

Domicile of the natural person

General Domicile:

The law provides that a natural person's general domicile is the place of the person's permanent home.²⁷ The determination of such a general domicile is always considered an actual finding determined by the specific circumstances involved.²⁸ Consequently domicile, once established, is considered a link between that individual and the place in which he/she domiciled.

Legal recognition is given to the general domicile in respect of any legal transaction. Exception to this rule is the case where the transaction involved relates to

²⁶ Sha'aban Abdulrazzaq & Hosain Aljehazy, *supra* note 22, at 432.

²⁷ [FLCT] art. 81/1.

²⁸ Fathi Wali, "*Alwaseet fe Qanoon el Qada'a- al Madany*": *The Law of Civil Procedure and other supplemental regulations*, 509 (dar al-nahdah al-arabeyyah. 2001).

domicile of special nature. In this case the law recognizes the alternative domicile for the specific purposes for which it is established.²⁹

It is noteworthy here that the rule of general domicile, which defines the general domicile of a person as being the place where one permanently stays, is only applicable to persons of full legal capacity. The law considers categories of persons who are not qualified, such as minors, persons under guardianship, lost persons and absent persons, as being of special status. Thus, the general meaning of domicile is not applicable in all actions where they are involved. Their domicile is fixed by the law under exceptional provisions.³⁰

Special Domicile:

The special domicile, provided for under the law of Civil Transaction, is the "place where a person is exercising certain professions or line of activities of commercial nature, such place is considered person's domicile in all actions that are brought in connection with these activities".³¹ For example the merchant's commercial establishment is recognized as a special domicile in all commercial activities, thus any transaction that has no connection with such business of, must not be connected with the special domicile. In such instances, the reference must be made to the person's general domicile.³²

²⁹ See, Mulaiji *supra* note 4, at 14.

³⁰ *Id.* at 23.

³¹ [FLCT] art. 83.

³² See, Shaibah *supra* note 15, at 408.

Elected Domicile:

The federal law of civil procedure provides that United Arab Emirates national courts shall have jurisdiction over a non-citizen defendant having no place of domicile or residence in the federation whenever they have elected domicile in the federation.³³ The elected domicile, under the legislative meaning, is the chosen place that relates to specific legal transaction.³⁴ In this regard, the distinction between elected domicile, and any other form of domicile, stems from the fact that elected domicile is established by the will of the person.³⁵

Therefore, the law requires that such *will* must take the form specified by law. Hence, for an elected domicile to exist, a person must comply with specific formal requirements. The law sets forth the legislative requirements of elected domicile. The article provides that "elected domicile must only be proved in writing".³⁶

The traditional example of this form of domicile is the attorney's office as the elected domicile for the clients in connection with their legal transactions upon which the representation is concluded. The purpose of the rule is obviously to maintain a uniform procedure calculated to place in competent hands. Thus, any action having connection to the matters center to the representation could be linked with the elected domicile.³⁷

³³ [FLCP] art.20/1.

³⁴ Shaibah , *supra* note 15, at 409.

³⁵ See e.g., Ahmed Sedqi, *Law of Civil Procedure in the United Arab Emirates: Analytical and Practical Study to the Federal Law No.11 for the Year 1992 of Civil and Commercial Procedure*, 273 (1st ed., 1999).

³⁶ [FLCT] art. 84/2.

³⁷ Shaibah *supra* note 15, at 409.

Domicile of judicial person

The domicile of a judicial person is determined according to the nature of the judicial person in question, thus, their domicile is determined under the laws recognizing or creating their capacities. A distinction must be made between the legally recognized judicial persons; in fact each has a distinct legal framework under which its status is established.

The legal system of the UAE provides for the recognition of public and private judicial persons. The public judicial person is identified by the state and its subdivisions where the private judicial person is identified by companies, corporations, partnerships and all other organizations of a private nature.

Public Judicial Persons, the state and its sub divisions:

The state and its subdivisions are recognized to have its domicile in the places where the concerned public authority is located. Therefore, any action filed against the state or any entity of a public nature is considered in relation to the location of the particular public authority being sued. In fact, UAE legislation addresses, though indirectly, the domicile of public authority. Such can be concluded by reference to the law of civil and commercial procedure that regulates the service of process. The legislative provision provides that in judicial proceedings where a public authority is involved, all documents must be directed to the legal representative of the particular public authority concerned.³⁸

³⁸ [FLCP] art.9. The article reads "[u]nless otherwise provided by law in specific regulations; the copy of the notice shall be served in the following manners: 1- Government and sub- governmental authorities , all local governments and other public authorities and establishments, the summons shall be served to the legal representative of the concerned authority".

In fact, the UAE legislative approach in this respect is different than many other legal systems, where they designate a certain entity to act as a legal representative of the state and to consider its location as a fixed domicile for the state and its sub-divisions.³⁹ In practice, it would be difficult sometimes to determine the location of one particular authority in instances where such an authority may have many locations along the federation.

Judicial Persons for Private Interest:

For the judicial persons for private interests, a distinction must be made between the national judicial person and the foreign judicial person. For the first, the domicile is considered in the place where the entity has its principal place of administration, where in the second the domicile is determined according to the location where these foreign entities have their local branches.⁴⁰ The law provides that, for all foreign corporations, local branches shall be considered their legal domicile in the federation even if they have their principal place of business abroad.⁴¹

³⁹ The example of such designation is the stipulation in the *Kuwaiti* law of civil procedure that designates the general department of counseling and legislative affairs to act as the state's official representative in all actions filed against the state or one of its sub-divisions. See Kuwait Law of Civil Procedure, decree law 38/1980. art. 10/1.

⁴⁰ See Shaibah, *supra* note 15, at 406.

⁴¹ [FLCT] art. 93/2.

Place of Residence

The Legal Concept of Place of Residence

The place of residence is the third connecting factor employed by the UAE federal law of civil procedure to justify the exercise of *ekhtesas shakhsy*. The application of place of residence as a jurisdictional factor justifying the exercise of *ekhtesas shakhsy*, is primarily aimed to supplement any deficiency that could result from absent domicile as a legal factor.

Place of residence as a connecting factor shares the concept of domicile one of its elements. Both concepts require a continuing physical presence in the forum. Literally, place of residence factor is meant to address the status of foreigners present in the UAE national territories, for whom, the mere physical presence does not qualify the legislative meaning of general domicile under UAE law. In fact, UAE law states clearly that the national federal judiciary shall have jurisdiction over non-UAE citizens based on domiciliary or residence in the federation.⁴²

It is clear from the legislative provision that this rule is intended to apply to non-UAE nationals present within the UAE territory,⁴³ evident by the fact that UAE citizens are subject to the jurisdiction of UAE national courts regardless of their domicile or place of residence. Additionally, one should keep in mind that under the UAE law the only difference between domicile and place of residence is the intention of having the UAE federation as a permanent place of establishment. Thus the place of residence, though not legislatively defined as the case of domicile, is understood to refer to the place where a

⁴² [FLCP] art.20.

⁴³ Shaibah , *supra* note 15, at 405.

person stays for a period of time in a continuing manner, even if such place is not intended to be the permanent place of living. Thus a person is deemed a resident of a certain place insofar as the person's stay qualifies the legal requirement of continuity. Nonetheless, residence for jurisdictional purposes connotes some form of permanence other than mere regular occasional stay.⁴⁴

In practice residency as a connecting factor might be confused with similar concepts. Therefore, In order to give a precise comprehension of the concept, the following sections will explain aspects of similarity and differences between residency and the related concepts

Concepts that Share Similarity with the Legal Factor of Place of Residence:

Place of residence and domicile:

The notion of residence differs from that of domicile, in that the determination of place of residence is to be based on the physical presence without showing the intention of continuity and perpetuity even though that 'residence' connotes some form of permanence. The concept of residency is an acceptable link between the individual and the judicial authority in so far as the physical presence of individual in the forum qualifies the meaning of residence and that it is not only an accidental or temporary stay in the forum. Thus, national courts may exercise jurisdiction over the defendant in all claims pertaining to that defendant while a resident. Additionally, a person's residency is normally an easy matter to determine, whereas a person's domicile is relatively difficult

⁴⁴ Shaibah , *supra* note 15, at 405.

to establish. Such difficulty can spring from uncertainty in determining a person's intention on the available facts.

Worth mentioning in the respect is that a foreign defendant is subject to UAE federal court authority even if they are not domiciled in the federation once it is established that the foreign defendant has a place of residence in the UAE territory.

Place of residence and elected domicile

The practical importance of distinguishing place of residence from the notion of elected domicile stems from the legal fact that each notion may qualify separately as a connecting factor for purposes of *ekhtesas shakhsy* (personal jurisdiction). Under the Federal law of civil and commercial procedure, national federal courts have jurisdiction to entertain actions filed against non-UAE citizens, even if they do not domicile or reside in the UAE once they establish an elected domicile therein.⁴⁵

The provision covers the instances of where the foreigner defendant has no domicile or resident but previously has designated an elected domicile within the UAE in accordance with article 84.⁴⁶ In fact, the jurisdiction of the federal courts, established on the bases of this factor, has an exceptional character such that any exercises of jurisdiction under this provision is limited to the type of activities for which this domicile is elected. Thus the *ekhtesas shakhsy* under this exceptional factor is limited to actions brought in connection with these activities.⁴⁷

⁴⁵ [FLCP] art.20.

⁴⁶ [FLCT] art.84.

⁴⁷ Mulaiji, *supra* note 4, at 16.

Under the equivalent Egyptian provision, the explanatory memorandum for the Egyptian Law of Civil Procedure provides a similar reasoning where it explains that jurisdiction over the person of the defendant must be limited to the line of activities of the foreign defendant for which he elected a local domicile.⁴⁸

The only concern in this respect is to assure that the legislative requirements of UAE law are met.⁴⁹ The law conditions the establishment of elected domicile by restricting its extent to a specific legal transaction in addition to subjecting its recognition to the written form, which means that an elected domicile cannot be proven otherwise.⁵⁰

Place of residence and accidental stay

It has to be kept in mind that, residence as a connecting factor differs from accidental or occasional stay. In fact, the general features of the person's presence distinguish both forms of physical stay. Residence signifies a certain degree of settlement and denotes continuity of physical presence to a certain degree, where as accidental stay refers to the accidental presence, which does not carry any degree of settlement. For example, occasional presence for tourism purposes does not qualify a factor upon which the jurisdiction could be ascertained under the general principles.⁵¹ The UAE law does not acknowledge the accidental presence as a connecting factor. In fact, the law that does not grant any legal consequences from defendant's occasional presence in the forum

⁴⁸ Mulaiji, *supra* note 4, at 18.

⁴⁹ [FLCT] art. 84.

⁵⁰ [FLCT] art. 84/2.

⁵¹ Mulaiji, *supra* note 4, at 15.

unless the defendant is subject to the court's jurisdiction according to another connecting factor. According to Dr Ahmed Mulaiji, temporary presence in the forum is not by itself a sufficient enough factor to link a person with the legal system in a way that would enable the judicial authority to effectively intervene, especially when the dispute involved has no connection with the forum justifying such interference.⁵² One can understand the difficulty a defendant would encounter in defending an action initiated in a far corner of the world under a legal system that has no connection with the dispute except the defendant's presence for a brief period of time.

Consent to Jurisdiction

The link that connects a person to a particular system of law could be the person's domicile, residence or nationality. In addition, consent is another recognizable link. In fact, UAE law does not explicitly provide special provision for consent as a connecting factor for the exercise of *ekhtesas shakhsy*, but, the proper construction of the law would justify such construction, though indirectly.⁵³

The legislative provision provides that on occasions where the defendant fails to appear in the proceedings, and the court has no jurisdiction in accordance with the law, the court must dismiss the action. It is concluded from this legislative statement that UAE law acknowledges consent as a distinct connecting factor upon which the *ekhtesas* (jurisdiction) may be exercised. In fact, providing that the defendant may appear in the proceedings while the legislative foundations justifying the jurisdiction are absent

⁵² Mulaiji, *supra* note 4, at 15.

⁵³ [FLCP] art.32.

presupposes that consent is possibly acquired. In addition it is almost universally accepted principle of law that consent is a sufficient factor justifying the exercise of jurisdiction.

The Legal Concept of Consent

Ekhtesas shakhsy based on the consent can be possibly ascertained by reference to the proper construction of the aforesaid legislative provision which reveals that the *ekhtesas* (jurisdiction) might be established once the defendant appears in the proceedings without contesting to the court's jurisdiction. The jurisdiction, based on consent, is a special form of *ekhtesas*, under which the individual's will contributes to the exercise of jurisdiction, or in other words, legitimatizing the exercise of one court's adjudicative authority in instances where other factors are not present. This feature of consent gives it a unique character as a connecting factor that distinguishes consent from the other factors like nationality, domicile and place of residence, under which the law establishes the basis for the exercise of *ekhtesas* with no regard to the will and discretion of the defendant.

Different Forms of Consent

Actual consent

The consent is termed actual or direct in occasions where the individual expresses his/her acceptance of a court's adjudicative authority. In such a case, the consent is deemed direct when the defendant's states before the court that he is accepting its competency. Expressed consent is also recognized in instances where a contractual

agreement is validly concluded, providing for a choice of forum clause.⁵⁴ Such a form of contractual agreement is the most common form of consent through which a potential litigant may agree in advance to waive his objection to jurisdiction, should the disputed matters brought before specific adjudicative system.⁵⁵

Implied consent

Implied consent is understood to occur in instances where the defendant fails to present a timely procedural defense contesting a court's competence. Such failure would constitute a waiver of the defendant's procedural right to contest and thus the defendant is deemed subject to the court's authority on the basis of implied consent.⁵⁶ Such principle of procedural nature is recognized in most procedural systems.⁵⁷ Any objections to court's jurisdiction based on lack of personal jurisdiction must be raised by the defendant prior to the introduction of any meritorious defense. Thus, failure by the defendant to properly introduce such an objection at the outset of the proceeding shall constitute a waiver and subject the defendant to a court's adjudicative authority.⁵⁸

The procedural wisdom behind this legal requirement lies in the necessity of protecting the soundness of proceedings and not to threaten the actual existence of the

⁵⁴ Shaibah, *supra* note 15, at 455.

⁵⁵ Shaibah, *supra* note 15, at 455.

⁵⁶ See generally, Mulaji, *supra* note 4, at 27.

⁵⁷ See for example Egyptian Law of Civil Procedure, law 13/1968. art.32 ; Kuwaiti Law of Civil Procedure, decree law 38/1980. art.26. Pursuant to this legislative provision, Mahkamat al-Tamiez [Tamiez] [Kuwait Supreme Court] ruled that "appearance before the court without contesting to its competence would constitute an acceptance of its adjudicative power over the merits of the dispute which imposes an obligation over the court to proceed with the action". Mahkamat al-Tamiez [Tamiez] [Court of Cassation], 18 June 1984, Majmout Qawa'ed al-Tamiez, 1994, p.202.

⁵⁸ See [FLCP] art. 84,85.

lawsuit by virtue of a defense that may be submitted after the court has spent some time in investigating the merit of the action. This procedural safeguard is also meant to protect the interests of litigants by reserving the time and efforts consumed in the litigation.

CHAPTER III

**THE EXERCISE OF EXTRATERRITORIAL JURISDICTION (THE
ESTABLISHMENT OF *EKHTESAS SHAKHSY* BEYOND THE TRADITIONAL
BASIS)**

The previous section explains the general rules governing the exercise of *ekhtesas shakhsy* in the UAE legal system, which reveals that these legal principles are to a certain extent derived from the well established international law principle of territoriality. Such a traditional approach was concerned with a state's interference with the territorial sovereignty of another state.¹ The principle as evolved and developed governs the scope within which one state exercises its authorities. In essence, it represents the essential element of sovereignty as well as protecting international order.

In this section an attempt has been made to allocate and gather the rules that govern the exercise of extraterritorial jurisdiction under the United Arab Emirates legal system. In fact, in almost every legal system, the application of the traditional basis of jurisdiction is not sufficient to secure the national interests of one system under the growing interaction among citizens and entities of different nations. As a result of the insufficiency of these traditional basis, legal systems have developed principles and rules that are meant to legitimize the exercise of their national courts adjudicative power over objects, persons or incidents that have taken place elsewhere.

¹ See generally Ahmed D. Alsamdan, *Kuwaiti Private International Law: Conflic of Laws, Judicial Jurisdiction, executing foreign judgments*, 13 (Kuwait University publ.. 1998).

These rules are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner. Even with the various approaches adopted under different systems in this respect, all of which is designed to ensure security of transactions with justice. The security of the transaction for the plaintiff is to provide him with a chance to have his claim heard; such interest is to be balanced with fairness to the defendant. Fairness to the defendant in turn requires that the judgment be issued by court acting through fair process and with properly justifiable jurisdiction.

The UAE procedural system provides rules that link defendants who are not subject to UAE courts' authority on one of the traditional basis of jurisdiction explained in the previous chapter. The purpose of these rules is similar to the procedural purposes under the western concept of *long arm statutes* in the sense that both systems are meant to provide a justifiable basis for the far reach of a court's jurisdiction in cases where the litigant's connection falls out of the operational scope of traditional basis. In other words the rules aim to stretch the scope of the adjudicative power of national courts.

Under the UAE federal jurisdictional framework model, there are three different sets of rules meant to justify the exercise of extraterritorial jurisdiction. In an attempt to assure and simplify an understanding of their operation, I split these rules into three categories. The first is the rule provided for situations involving multiplicity of defendants. The second addresses the establishment of extraterritorial jurisdiction, based on the type of action. The third regulates the exercise of extraterritorial jurisdiction in the interest of justice.

Jurisdiction of Federal Courts based on Multiplicity of Defendants

The Federal Law of Civil and Commercial Procedure provides that national courts shall have jurisdiction over actions filed against any foreign defendant who is not subject to national courts' adjudicative authority on the bases of domicile or residency, where one of the multiple defendant is domiciled or resident in the federation.¹ Under the UAE law, multiplicity of defendants is a determining factor that justifies the exercise of jurisdiction over a foreign defendant in a multiple defendant action. Therefore, foreign defendants may be sued in the United Arab Emirates federal courts whenever the action involves others who are subject to the general jurisdiction of the court.²

The factor of multiplicity for jurisdictional purposes is determined by the particular circumstances of the action brought, which must show an actual multiplicity.³ Thus simulated or fictitious multiplicity is not considered a legitimate foundation for the exercise of *ekhtesas* (jurisdiction) under UAE law. In practice, reasonable factual allegations supported by sufficient showing, may justify the application of such legislative text.⁴

The rule has its rational basis on the need for preventing multiple litigation for the same issues between the same parties and thus, preventing contradicting judgments. The rule is meant to discourage multiplicity of litigation and to keep the litigation within certain bounds in the interest of justice. In fact, the law itself does not provide for a test

¹ Federal Law of Civil and Commercial Procedure, law 11/1992 [*hereinafter* FLCP] art.21/7.

² Awadallah Shaibah, *Conflict of Laws: Conflict of International Jurisdiction under the United Arab Emirates Law*, 410 (Dubai Police Academy Press. 2001).

³ *Id.* at 411.

⁴ [FLCP] art.21/7.

by which multiplicity is to be determined. Nonetheless, I suggest that the proper test in this respect could be one in which the foreign defendant must have some connection with the action and its parties that would make it impossible for the court to provide a complete disposal of the action should the court deal with the action in the absence of such defendant. In other words, the foreign defendant must be a real defendant in interests.

In my personal view, it seems that affording a reasonable and satisfactory rationale for multiplicity as a connecting factor requires providing a strong argument in support of this rule, beyond the possible argument of contradiction and multiplicity of litigation, which has been always the center of such justification.⁵ In fact linking the person to a certain legal system within which a person has no substantial connection is considered an exception to the acceptable standards of jurisdiction. Therefore, considerations aimed to protect foreign defendant's interests must be present in any formulation of such nature. As an exception, the application of the rule must be restricted by several measures as a means of protecting the sound legality of the proceedings for which the non-resident defendant is to be involved.

The court must ascertain that the person qualify the legal meaning of 'defendant' in terms that the person is a one upon whom the corresponding duty or liability is sought to be imposed. In the case where several defendants are sued, and that one of them who is sought to be brought before the court where he is not subject to its general jurisdiction, the court must be in a position in which it would be impossible for it to try the case in

⁵ See e.g., Shaibah, *supra* note 3, at 411 ; see also Ahmed Mulajji, *Judicial jurisdiction: International jurisdiction and territorial competence*, 24 (dar alketab pub. 2nd ed., 1997).

absences of the concerned foreign defendant in light of the particular circumstances involved in the dispute.

Then, the court must give a greater weight to the determination of the absence of the foreign defendant to the particular relief sought. In other words, whether the legal presence of the non-resident defendant is necessary to the extent it allows the court to completely dispose of the action in all of its contested issues.

In conclusion, the party upon whom the application is to be directed must qualify the meaning of necessary party.⁶ A term is understood in legal terminology to mean the adversary in the action which cannot be fully and finally adjudicated unless a ruling is issued in his/her legal presence as a party. Therefore, the party is considered a necessary party for purposes of multiplicity in so far as the duties and rights of the other parties are affected by the presence or absence of such party in the proceedings taken.

In my personal view the importance of such issues stems from the fact that in all actions involving a foreign element, considerations of enforcement become highly related. Thus the process of subjecting the foreign party to the jurisdiction of the national judiciary must be founded primarily on justifiable and acceptable bases. Otherwise the recognition and enforcement of the judgment rendered in such cases becomes questionable. In other words, the absence of justifiable bases of the rule is likely to be a sufficient reason upon which the denial of enforcement may occur.

In addition to enforcement considerations, I suggest that whenever an exceptional jurisdiction is exercised, that there should be a substantial connection existing

⁶ A party without whose legal presence, a complete disposal of the merit of the dispute would be impossible.

between the forum and the parties involved, which would justify the assertion of jurisdiction. Above all, consideration of fairness to the foreign defendant requires that the assertion of jurisdiction be founded on reasonable rules through fair process and with properly restrained jurisdiction, which are essential ingredients in any assessment of the proper administration of justice in light of the universal standards of jurisdiction.

The Type of Action as a Connecting Factor

UAE law recognizes this particular form of connection, which is based on the nature of the action brought. Under these rules jurisdiction over the foreign defendant may be exercised when there is a form of connection between the UAE and the action brought by virtue of its particular nature. The rules under this type of jurisdiction can be divided into two categories according to the legal description of the action involved: jurisdiction over the foreign defendant in actions involving *Ahwal Shakhseyyah* (personal status matters governed by codified Islamic rules), and jurisdiction established according to the nature of action involving matters of a financial nature.

Ahwal Shakhseyyah

Ahwal Shakhseyyah is the Arabic term referring to the codified principle of Islamic *Shari'ah*, regulating matters of personal status among Muslims. The United Arab Emirates Constitution gives due recognition to Islamic *Shari'ah* as a source of the law.⁷ Therefore, the principles of *Shari'ah*, which are mainly derived from the two main sources of Islamic law, the *Quran*⁸ and the *Sunnah*, are incorporated in the legal system

⁷ UAE Constitution art.7, provides that "Islam is the official religion of the State and *Shari'ah* shall be main source of law".

within the code known as the law of *Ahwal Shakhseyah*. The code regulates almost all aspects of personal status affairs. Among other things it regulates any question of Islamic personal law regarding marriage, including the validity or dissolution of that marriage; regarding family relationship; a foundling or the guardianship of an infant; any question of Islamic personal law regarding a *waqf*,⁹ gift, will or succession where the endower, donor, testator or deceased person is a Muslim. In addition, any question of Islamic personal law regarding an infant or person of unsound mind who is a Muslim or the maintenance or the guardianship of a Muslim who is physically or mentally infirm.

The Law of Civil and Commercial procedure provides that UAE Courts shall be competent to adjudicate actions filed against foreign defendants who are not subject to the general jurisdiction of the national courts on the basis of nationality or habitual residence, where the action brought concerned a personal status matter(s), and that the plaintiff is a citizen or a foreigner who domiciles in the federation. Also UAE federal courts may exercise jurisdiction over the action where the defendant domiciled abroad is unknown, or whenever the UAE national law is the applicable law in accordance with the rules of international conflict of laws.¹⁰

The legislative provision sets forth the pre-requisite conditions for the exercise of jurisdiction over the foreign defendant in all actions of *Ahwal Shakhseyah* (personal status among Muslims) brought before a federal court of the UAE. In order for the court to adjudicate the foreign defendant's rights and obligations in connection with such

⁸ *Quran* is the Muslims holy book, and *Sunnah* is the Prophet Mohammed Traditions and Sayings.

⁹ Assets that are donated for specific purposes.

¹⁰ [FLCP]art.21/6.

actions, the action must be one that cannot be brought in another forum due to the unknown whereabouts of the defendant. Thus, the jurisdiction in this case is justified by the fact that no alternative forum is applicable to the plaintiff. In addition, a court may not be able to decline jurisdiction in this case insofar as such a denial would constitute the prohibited denial of justice.

Once the legislative requirements are met,¹¹ the court has no discretion to decline the exercise of jurisdiction. Apparently, the legislative rule gives significant weight to the interest of the local plaintiff by providing a forum to the dispute in instances where no applicable forum is available.¹² In general, under these types of actions the legislative policy requires that the plaintiff's interest is to be given the greater weight. The law gives due recognition to the needs of the local plaintiffs in such disputes. Thus, exercise of jurisdiction is analyzed with an eye on these needs, which make matrimonial relationships a relevant factor in jurisdictional analysis under the UAE law. In fact, actions for divorce, financial support, and custody of children e.g., are legally recognized for their critical legal consequences. Hence, determination of jurisdiction, with respect to these types of legal actions, must be made in light of their very particular nature.

UAE law permits the extraterritorial exercise of jurisdiction over foreign defendants based on several basis.¹³ Various issues pertaining to such exercise of jurisdiction will be discussed in subsequent sections; each of which will address a specific aspect of the general subject.

¹¹ [FLCP]art.21/6.

¹² Shaibah, *supra* note 3, at 419.

¹³ [FLCP]art.21.

Situations Under Which a Foreign Defendant may be Sued in UAE Federal Courts for *Ahwal Shakhseyyah* Matters

Actions brought by wife against her husband for separation (*Talaq*)¹⁴

The law establishes *ekhtesas shakhsy* over the non-resident defendant in actions brought by a wife residing in the UAE in all matters concerning the declaration of ending the marriage relationship with her non-resident husband.¹⁵ In justifying this form of jurisdiction, legal jurists like Dr Shaibah explain that the rational basis for such legislative formulation of *ekhtesas* as ultimately resting on the protection of the local abandoned wives from any burden that might result from the settlement of such matrimonial conflict abroad.¹⁶ The legislative provision, hence, aims to provide an available forum through which such status may be determined conveniently.

Actions for *Nafaqa* (maintenance and monetary support)¹⁷

Maintenance or monetary support is another legislative factor for which the exercise of *Ekhtesas Shakhsy* is permissible.¹⁸ The legislative provision provides for the establishment of *ekhtesas* in actions brought by resident plaintiffs against a foreign defendant in all actions of *Nafaqa*. The term *Nafaqa* is an Arabic word that refers to the

¹⁴ *Talaq* is the formal dissolution of a marriage bond in accordance with the principles of *Islamic Share'ah*. Such a dissolution might be obtained by means of repudiation of the wife by the husband known by *Talaq*; vow of continuance by the husband (*ila*); injurious assimilation of the wife by the husband; acts of imprecation (*Li'an*) redemption by the wife (*khul'e*); and also by means of judicial decree known as (*faskh*).

¹⁵ [FLCP]art.21/4.

¹⁶ Shaibah, *supra* note 3, at 425.

¹⁷ *Nafaqa* (Monetary Support) matters are governed by the laws of *Ahwal Shakhseyyah* (personal status among Muslims).

¹⁸ [FLCP] art.21/5.

legal obligation of an individual to monetarily support relatives. Such support may include everything that is indispensable for sustenance, dwelling, clothing and medical attendance according to the social standing of the person obliged to give it, and the person entitled to this form of monetary aid and support. Such an obligation is recognized by the laws of *Ahwal Shakhseyyah* (personal status among Muslims),¹⁹ in the form of a sum of money that is in proportion to the available resources of the giver and the needs of the recipient.

The rationale behind the exercise of *ekhtesas* under this situation stems from the fact that defendant should be held responsible for his legal obligation of providing monetary support. In addition, the need of support by relatives who are entitled to such aid is given the greater weight in establishing the *ekhtesas* (jurisdiction) under this legislative rule. Apparently concern for the rights of domestic plaintiffs seeking justice in the courts of their home prevails over concern for the foreign defendant brought before the UAE courts.²⁰

Actions for inheritance²¹

According to UAE law, the *etehadeyyah* federal courts shall have jurisdiction in all actions relating to a citizen's inheritance or a foreigner whenever the UAE is

¹⁹ Mulaiji, *supra* note 6, at 23.

²⁰ Shaibah, *supra* note 3, at 426.

²¹ Inheritance is a mode of acquisition by virtue of which the assets of the deceased person is transmitted to his heirs or others in accordance with the *Sharei'ah* principles of *Mawareeth* (inheritance among Muslims).

considered the last place of domicile of the deceased person.²² The justification provided for the exercise of jurisdiction over the non-resident foreign defendant is that the inheritance should be settled in the place where the deceased person used to be domiciled. Conferring jurisdiction on such bases would allow the court to settle all claims and disputes related to such inheritance in one forum.²³ Such jurisdiction is founded on consideration of convenience and proper carriage of justice.²⁴

***Ahwal Maliyah* (Matters of Financial Nature as a Connecting Factor)**

Under this category, the United Arab Emirates legislation provides for several factors which may be considered in determining the jurisdiction of federal courts. Actions founded on these factors are to be distinguished from those under the first category in the way that all of these factors relate to financial disputes. In this sense, actions may be identified by their common characteristic.

In fact, the United Arab Emirates law of civil procedure does not provide for such classification, but the description can be used to simplify the understanding of their very nature and to distinguish these factors from other factors legislatively employed to justify the extraterritorial jurisdiction. The term *Ahwal Maliyah* is the Arabic expression best translated to mean financial matters; the expression reflects the nature of these factors as a foundation of jurisdiction.

²² {FLCP} art. 21/2.

²³ Muliji, *supra* note 6, at 26.

²⁴ Shaibah, *supra* note 3, at 435.

The law of civil procedure provides that extraterritorial jurisdiction may be exercised over foreign defendants on various bases.²⁵ Each of these factors can be addressed distinctly as a distinct connecting factor relating to the general category of the subject. In essence, the jurisdiction established is mainly found on a particular legal relationship between the defendant and the UAE federal judiciary, which is deemed sufficient to confer adjudicative authority to UAE courts over the foreign defendant.

Actions Concerning Assets Located in the UAE

The law provides that federal courts may exercise jurisdiction over the foreign defendant in all actions brought in the federal court concerning assets located in the UAE.²⁶ In fact, the language of the legislative text refers to the word *assets* in general terms without giving a fixed description to the nature of the assets upon which jurisdiction over the foreign defendant may be exercised. Accordingly, assets for purposes of the legislative provision must be liberally construed to mean all properties of any kind whether movable or immovable.²⁷

In its essence, this form of jurisdiction reflects a distinguished phase of territoriality with regard to the physical location of the assets involved in the action. The adjudicative authority of national courts to entertain the action is founded on a territorial element reflected in the existence of a defendant's assets in the forum upon such existence; the exercise of jurisdiction is legislatively justifiable. Hence, the connection between the forum and the foreign defendant is the assets located in the local boundaries.

²⁵ [FLCP]art.21.

²⁶ [FLCP]art.21/3.

²⁷ See e.g., Shaibah *supra* note 3, at 437.

Nonetheless, it is not clear from the legislative language whether such jurisdiction can result in a judgment that imposes a personal liability over the foreign defendant which goes beyond the value of the assets or is limited to the value of the assets.

In my personal view, the generality of the legislative statement concerning the nature of the defendant's assets as a connecting factor, whether referring to real estate rights, personal or mixed rights, is likely to give rise to a variety of actions such as real action, personal action or mixed action. Hence, the only condition which has to be satisfied in this regard is the location of assets upon the existence of which the jurisdiction is established.

Contractual Obligation as a Connecting Factor

The law recognizes a foreign defendant's obligation arising from a contractual agreement as a sufficient link according to which the foreign defendant is to be subjected to the UAE courts' authority. The law provides that *ekhtesas shakhsy* (personal jurisdiction) may be exercised on the bases of any contractual agreement formed, executed or meant for execution in the UAE.²⁸

Therefore, the United Arab Emirates law confers UAE federal courts the competence to adjudicate actions filed against a foreign defendant based on contracts that have been formed, executed or meant for execution in the UAE. In fact, the question of whether the forum can assume jurisdiction over the claims of plaintiffs in general against

²⁸ [FLCP]art.21/3. The article reads "UAE courts shall have jurisdiction over the foreign defendant in all matters concerning a legally recognized contractual obligation that has been formed, executed or meant to be executed in the UAE".

defendants in general, depends on the sort of relationship between the case, the parties and the forum.

In fact, it is almost a universal standard of jurisdiction that the exercise of jurisdiction under circumstances like the foregoing described by the UAE law, are reasonable and acceptable.²⁹ This form of legal relationship between the defendant and the forum is accepted as a sufficient connection upon which the national courts may assert jurisdiction over the contracting foreign party. By its very nature, contractual agreements create obligations having the force of law between the contracting partners. In essence, contractual agreements reflect the will of the parties. Thus it provides them the opportunity to reasonably anticipate the respective legal consequences.

Thus, it is reasonable for the defendant to foresee and expect being sued based on such interaction with the forum within which the contract has sufficient ties in the form of performance, formation of contract. The question of whether the contract has been formed, and whether the contractual obligation being carried in the forum or meant to be performed therein, are questions that have to be determined in accordance with the law of civil transaction regulating the contracts and contractual obligations.³⁰

Most notably, the legislative text conferring such jurisdiction comes in general terms which in fact do not specify the nature of the contract upon which jurisdiction may be exercised. The text does not provide whether it applies for commercial or civil

²⁹ See e.g., Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters , opened for signature Sep. 16, 1988 28 ILM 620 (1989)[hereinafter Lugano Convention],art.5.

³⁰ Shaibah, *supra* note 3, at 439-441.

contracts or both.³¹ Thus, the generality of the legislative provision contemplates that exercise of *ekhtesas* under the legislative provision may not be limited to certain type of contracts rather it extends to all types of contractual agreements with a foreign element regardless of its very specific nature.³²

Civil Liability as a Connecting Factor

The federal courts of UAE may exercise jurisdiction over a foreign defendant based on a wrongful act or omission giving rise to civil liability proceedings brought in a UAE federal court. Such an event may occur wholly or partly in the forum or may take place abroad where the injuries sustained locally. Civil liability jurisdiction is recognized by United Arab Emirates federal law of civil procedure providing that that national federal courts shall exercise jurisdiction over a foreign defendant in all actions of civil liability brought in a federal court for injuries sustained locally or which had taken place wholly or partially therein.³³

In fact, the law does not provide clear guidance in determining the intended meaning of the legislative text especially when employing the word *Wage'ah* (incident) in the legislative provision (or incident occurring therein). Insofar as such an incident is the legislative foundation of *ekhtesas* (Jurisdiction) under the legislative provision, determining its meaning could have a great importance in identifying the nature of the jurisdiction established on such a legislative foundation. It is likely that any construction

³¹ [FLCP]art.21.

³² Shaibah, *supra* note 3, at 441.

³³ [FLCP] art.21/3.

of its true meaning would have an impact over the scope and extent of adjudicative power sustained in such actions.

Whether the term should be liberally or strictly construed, requires that the terms of the legislative provision be more specific in this respect. In fact it must have been taken into consideration that judicial competence must not be left to mere construction of words and phrases, which would result in different conclusions achieved by applying varying interpretations. The fact that there is no general guiding rule for which reference can be made to clear such legislative ambiguity, makes it critical to come up with a framework within which the legislative provision's applicability is determined.

Jurists like Dr Shaibah, argue that "for purposes of such jurisdiction, the word must be liberally construed to cover all tortuous acts that have taken place locally or abroad whenever injuries have resulted in the United Arab Emirates boundaries".³⁴ Such argument is further supported by the continuing acceptance of the rule's application. In fact, Dr shaibah, refers to the French code of civil procedure providing that a French court shall have the territorial competence to try any action filed against defendants in delictual matters, in the court in whose province the wrongful act was occasioned or the one in whose province the damage was suffered.³⁵ He further cited a French court judgment, which asserts jurisdiction over a foreign defendant based on the fact that France was the place where the injury to the plaintiff occurred. The court further explained that even though that the act had taken place abroad, the fact that the injury

³⁴ Shaibah, *supra* note 3, at 442.

³⁵ *Id.* at 443.

occurred in France constitutes a sufficient connection under the French law of civil procedure.

In fact, most comparative legislative provisions addressing the subject provide that the jurisdiction in this case must be determined on the bases of either the place where the wrongful act occurred or the injury resulted.³⁶ Thus the only applicable construction is to give the word *Wage'ah* (incident) a broad meaning to cover all possible meanings of the word, including harmful acts that take place abroad causing injuries locally. Applying this construction, wrongful acts that took place abroad and resulting in injuries sustained in the UAE would qualify as a connection upon which the federal court may exercise *ekhtesas shakhsy* over foreign defendant(s). Once these requirements are found, no regard is given to the nature of the damages occurred which could be personal injuries, property damages or any other damages to the injured plaintiff(s).

One should keep in mind that the circumstances which give the UAE courts jurisdiction over foreign defendants in civil liability actions, must be carefully analyzed in order to assure the proper application of the respective legislative provision. In this regard, reference must always be made to the federal law of civil transaction [FLCT] in determining whether the defendant's act would constitute tort upon which jurisdiction may be exercised over the foreign defendant.³⁷

Finally, I would point out that the exercise of jurisdiction under this provision may cause a practical complication, since the framework of such jurisdiction is still

³⁶See e.g., Egyptian law of Civil Procedure, law 25/1968 art.30/2. ; see also Kuwaiti Law Regulating Matters involving Foreign Elements .Law5/1966, art. 66.

³⁷ [FLCT].

uncertain. Thus it is recommended that the legislature reconsider amending the language of article 21/3 to clearly indicate the intended meaning and to determine the scope of jurisdiction which might be exercised under this legislative provision.

Declaration of Bankruptcy as a Connecting Factor

The law provides that *ekhtesas shakhsy* (personal jurisdiction) may be exercised over a foreign defendant in all actions relating to a bankruptcy declared in one of the UAE national courts.³⁸ The federal law of civil procedure addresses the different factors upon which federal courts may exercise jurisdiction over the foreign defendants provides among other things that a declaration of bankruptcy by a national court may confer jurisdiction over foreign defendants in all actions brought before a federal court relating to the bankruptcy declaration.³⁹

In practice, the question of what type of actions would qualify as related matters to the declaration of bankruptcy for which the jurisdiction over the foreign defendant may be ascertained is critical to clearly identify the nature, justification and scope of such an exceptional form of jurisdiction. The legislative text establishing such jurisdiction is ambiguous and likely to cause a considerable amount of doubt in most cases invoking such application, especially with the realization that proceedings of such kind may require cooperation of other jurisdiction in seeking enforcement and recognition abroad.

³⁸ [FLCP]art.21/3.

³⁹ See generally, Ahmed Sedqi, *Law of Civil Procedure in the United Arab Emirates: Analytical and Practical Study to the Federal Law No.11 for the Year 1992 of Civil and Commercial Procedure* (1st ed., 1999).

In fact, even though that the legislative policy behind such legislative construction is understood to be concentrating all conflicts and disputes of similar nature in one single forum,⁴⁰ nonetheless, such a policy can alternatively be maintained by invoking other bases whenever applicable. For example, obligations of third parties may subject them to UAE courts jurisdiction on the bases of civil liability or contractual agreements.⁴¹ In addition, actions of such a nature might be brought based on a defendant's assets in the federations, which provide legislative alternatives to such a confusing form of jurisdiction.⁴² In fact, it might be argued that actions like those instituted by the bankruptcy trustee against debtors may invoke such application.⁴³ Nonetheless, I personally think that such actions do not constitute substantial connection upon which jurisdiction over the foreign defendant is sufficiently justifiable.

In addition, the language of the provision does not help determining the circumstances under which the foreign defendant might be sued. In fact, determining the foreign defendant's status, as being creditor, debtor or shareholder, in such cases could be helpful in identifying legislative purposes underlying such provision.

In my personal view, I think it would be inappropriate to rely on this section to confer jurisdiction to national courts over a foreign defendant in such a general terms that in the absence of a precise standard to what constitutes the relation between the declaration of bankruptcy in the UAE and the subsequent actions that would subject the

⁴⁰ Shaibah, *supra* note 3, at 445.

⁴¹ [FLCP] art. 21/3.

⁴² Such actions may be filed under [FLCP] art. 21/2.

⁴³ See the examples provided by Dr Shaibah, *supra* note 3, at 444.

foreign defendant to UAE adjudicative authority, the whole jurisdictional structure would be questionable.

Finally, the UAE legislative provision conferring such form of jurisdiction is influenced by the Egyptian law of Civil and Commercial procedure, law 25/68 ,art.30/2.

⁴⁴ The Egyptian legislative provision has been criticized by several *Egyptian* scholars for not precisely explaining the instances under which the Egyptian courts may adjudicate bankruptcy matters,⁴⁵ as well as not providing a distinction between bankruptcy declared under the law of commercial transaction and declared under the law of civil transaction.⁴⁶

⁴⁴ The Egyptian legislative provision reads "Egyptian courts shall exercise jurisdiction over all actions connected with bankruptcy declared in Egypt". law 25/1968 art. 30/2.

⁴⁵ See shaibah, *supra* note 3, at 445.

⁴⁶ Under the laws of the United Arab Emirates, Egypt and Kuwait, bankruptcy is subject to two legislative frameworks. Civil bankruptcy is subject to the law of civil transactions and commercial bankruptcy is subject to the law of commercial transactions. .

CHAPTER IV
**GENERAL PRINCIPLES GOVERNING *E'ALAN QADA'EY* (JUDICIAL
NOTICES AND SERVICE OF PROCESS)**

Preamble

Ekhtesas (jurisdiction) is understood to be the court's authority to decide matters presented before it in accordance with the legislative formalities required by law. The concept then contemplates a form of legal connection not only between the court and the general subject to which the specific action belongs, but also between the court and the parties among whom the dispute arises. Hence in order for *ekhtesas* to be legally exercised, the law provides for standardized methods for linking individuals with the specific adjudicative authority before which they are to be subjected. In this sense a distinction has to be made between *ekhtesas* in general terms and the actual exercise of *ekhtesas* (jurisdiction). The first addresses whether a court has a legal authority to adjudicate and the later addresses whether the parties are legally brought before a given tribunal.

The term *e'alan qada'ey* is the Arabic term referring to a legislative formality specified by law and required for the legitimate exercise of judicial power by a law court. The Arabic term *e'alan* is equivalent to what is known by judicial notice in a western

legal terminology, which is the process, by which person is informed of the action taken against him.¹ Although the ultimate purpose behind the notion in the two systems is substantially similar, their frameworks, applications and forms of notices are not typically the same.

In the UAE legal system, as in most other civil law jurisdictions, the concept of judicial notice is a direct implementation of the doctrine of *muwajahah*,² a legal doctrine that requires any court, in order to validly settle a controversy, to inform the opposing party-(ies) of any procedures taken which might affect their rights, legal status and legitimate expectations.³ In most jurisdictions, the principle is found on different forms, which reflect in general principles of natural justice. Such principles are likely to be assured by a Constitutional statement that safeguards such fundamental rights.

In its essence, *e'alan* is the formal procedural mechanism that directly implements the doctrine of *muwajahah*.⁴ Hence, *e'alan* is the certain formality meant to bring the action to a litigant's knowledge; In theory, such a formality results in connecting parties with the authority before which they are legally brought. The rationale base behind such formulation of the doctrine is understood to be the achievement of legal truth. Therefore, no truth can be reached unless both contradicting views are present. In addition,

¹ See e.g., Ramzi Saif, *The law of civil procedure*, 223 (Kuwait University Pub. 1974); Wajdi Ragheb & Azmi Abdulfattah, *Principles of Kuwait civil judiciary*, 164-65 (dar al-ketab pub. 1984).

² For more explanation, see Fathi Wali, " *Al-waseet fe Qanoon el Qada'a al Madani*", 425-427 (University Press 2001).

³ Wajdi Ragheb & Azmi abdufattah, *supra* note 1, at 165.

⁴ On the most basic level, *muwajahah* as a legal doctrine, means that a person should not be deprived of any rights as a result of a judgment without being first legally informed of the action. The doctrine is substantially similar to the Constitutional requirement of procedural due process in the United States Legal system.

requirements of fairness and justice necessitate providing a form of confrontation. As a result, judge is not empowered to decide matters without hearing all the parties, because declaring the judicial truth presupposes that all views are present and that all opposing parties are giving an opportunity to be heard.⁵

Thus, such procedural right must be observed and respected through a system that would likely achieve the purposes of confrontation. Legally speaking, *e'alan* then is the recognized legal form of bringing the action to the attention of the opposing party in manners that would allow the party to take all the necessary steps that are deemed appropriate to preserve his interests.

In a direct application of this principle, the Mahkamat al-Naqd (Egyptian Court of Cassation) held that "[i]t is not sufficient for the litigants to be entitled to this procedural right, it also must be observed in practice by enabling a litigant to actually submit his defense in full. Every judgment that does not observe the application of *muwajahah* is null and void".⁶

In so far as *muwajahah* is concerned, the term *e'alan* may be used to carry a broader meaning than notice of action. The term is frequently used in all occasions where a litigant in legal proceedings is entitled to be provided with documents submitted by the other litigant (mandatory disclosure), so that the party may have the chance to dispute, challenge or deny its relevancy, authenticity or validity under the applicable rule of *Evidence*. Under this phase of *muwajahah*, the court has no right to rely on any piece of

⁵ Wajdi Ragheb & Azmi Abdulfattah, *supra* note 1, at 166.

⁶ Mahkamat al-Naqd [hereinafter Naqd][Court of Cassation], 29 Mar. 1978, *Majalat Edarat Qadaya al-Daowlah* [hereinafter M.Q.D],3,1980, p.217 (Egypt).

evidence without providing the opposing party with the full opportunity of knowing what the content of such evidence is.⁷

The Concept of *E'alan Qada'ey* from a Juristic Perspective

It is important to note that there is common confusion over the juristic use of the term *e'alan qada'ey*. On many occasions, the term has been used to indicate the delivery of judicial notice concerning a particular action within the judicial proceedings, while on other occasions the term is used in reference to the ordinary meaning, which is informing defendants of the action filed against them. In fact, taking the term in one of its meanings may cause the reader to misunderstand the intended meaning.

The word *e'alan* in itself does not give a definite meaning unless the context shows that it refers to a particular meaning in relation to the specific proceedings involved. In all cases, jurists approach *e'alan* as the formal method recognized by the law to enable a defendant to become aware of the legal action brought against him/her. In other words, *e'alan* is the legal mechanism by which the defendant is legally connected with the adjudicative authority before which the action is brought.

Under such a characteristic, *e'alan* is the prescribed mood of notifications. Thus, the law requires that the service of judicial notices (*e'alan*) must comply with conditions specified by the respective rules governing the circulation of judicial notices. Generally speaking, this procedural formality must be observed; otherwise the process might be voided of any legal effect in establishing the essential link between the court and the parties upon whom the service is meant to be affected.

⁷ See Wajdi Ragheb & Azmi Abdulfattah, *supra* note 1, at 166.

Nonetheless, in complete observance to the governing rules, the connection is validly established once the process is completed, regardless of whether actual knowledge was achieved. A presumption of legal knowledge, which substitutes for actual knowledge, is deemed sufficient to establish the required legal connection. Such presumption is established upon the proper circulation of a notice that conforms to the designed methods, modes, and conditions specified by law.

Egyptian, Kuwaiti and United Arab Emirates courts emphasized the various aspects of *e'alan Qada'ey*, in many rulings that were concluded similarly. *Mahkamah Etehadeyyah Olia* [hereinafter Mahkamah Olia][Supreme Court] held:

The existence of the contestation in the legal sense is considered in light of a valid service of *e'alan* that upon its delivery, the contestation is to be held legally standing. Serving the party with any other following proceeding does not qualify the meaning of the original *e'alan*, thus courts must examine the validity of *e'alan*. Once not valid any subsequent handling of the matters must be quashed by the higher court.⁸

This ruling conforms to a Kuwaiti Supreme Court judgment, which establishes that:

The valid existence of the contestation is to be determined in light of the validity of *e'alan*, the process by which the contestation is to be held in existence. Once this condition is not met, the action is to be considered as if did not exist. In this respect, *e'alan* is the only legal mechanism that establishes defendant's knowledge of the action, without such knowledge the contestation is not to be existed in relation to that defendant.⁹

⁸ *Mahkamah Etehadeyyah Olia* [Mahkamah Olia] [Supreme Court],13 April 1999, Majmouat Al-Ahkam wa Al-Qawa'ed lil Mahkamah Al-Olia [hereinafter Majmouat],2000,460.

⁹ Mahkamat al-Tamiz [Tamiez] [Supreme Court], 30 Oct. 1985, Majmouat Ahkam Mahkamat Al-Tamiz[hereinafter Majmouat Al-Tamiez Al-Kuwaiteyyah], 1994,215

Constitutional Basis of *E'alan*

Legal jurisprudence in the Arab world is not accustomed to address the issue of connecting the application of *e'alan* with Constitutional principles that assures the equality, justice and fairness of judicial proceedings. Indeed, the examination of the process in the Constitutional context is relevant in analyzing the quality of the administration of justice in the UAE federation.

As a general rule, constitutional principles provided in the Constitution have no direct application unless these principles are incorporated and interpreted in the form of normal legislation.¹⁰ The Constitutional provisions are not self executing rules. Their applicability is limited to being a command to the legislative authority, which in turn must enact various legislative instruments in accordance with these Constitutional commands.¹¹

Nonetheless, It can be argued that giving due recognition to Constitutional principles as a general guidance in formulating any judicial test of procedural nature concerning the interpretation of legislative provision regulating the concept of *e'alan*, would likely result in more definite, well established exercises in this regard. For example, principles of natural justice, are considered a source of the law according to the UAE Constitution.¹² Thus, judges could supplement any deficiency of the legislative framework by interpreting the law in light of these universally accepted norms of justice.

¹⁰ The phrase normal legislation is provided to emphasize the difference between the Constitution as the highest form of legislation and other forms which must be enacted in conformity with the constitutional commands.

¹¹ Othman A. Alsaleh, *Constitutional Law Principles*, (Kuwait university pub. 1989).

From a theoretical point of view making reference to related constitutional principles would constitute a substantial contribution to the establishment of a stable and clear implication of these principles as well as furtherance in the harmonization among procedural systems. Such a move may underline the importance of the concept of *e'alan* and its role as a significant factor determining the quality of the administration of justice in one system.

It is needed to stress in this regard that Constitutional principles, which are derived from a universally accepted norm of justice, are more capable of carrying out similar or substantially similar meanings regardless of the form of rule that they are expressed with and regardless of the nature of system within which they operate. In almost every Constitutional framework, the notions of justice and fairness are mentioned as the ultimate aim for the exercise of judicial powers¹³. Nonetheless, the implications of these concepts in relation to procedural justice vary significantly from one procedural framework to another.

It is my personal view that such variance is a substantial shortcoming, which must be supplemented by a new move of juristic activism that explain the norms and method by which such principles of universal acceptance should be treated alike and put into effect through the application of the law which must be applied in light of a universally unified meaning of justice and fairness.

My reference in this respect aims to draw attention to this particular issue, which I feel is important and should be thoroughly studied and investigated, since subjecting

¹² United Arab Emirates Federal Constitution [UAE Constitution] art. 14,25.

¹³ " Justice, and Equality are the main pillars of society".[Kuwait Constitution] art.7.

persons to judicial authority must be always found on reasonable and acceptable grounds that must conform to the various universal declarations of justice and human rights and assure harmony and constancy among laws on a global scale.

Formality Associated with Procedural Actions in General

In general, procedures are formal legal actions in the sense that it must be taken in accordance with the patterns specified by law,¹⁴ nonetheless flexibility and restrictive applications of procedures differ from one action to another. Formality associated with procedural legal actions is reflected in the legal patterns designated for assuring the validity of the action and achieving certain purposes. Thus, once the procedural action is taken in a defective manner, the action could not be cured by means of completion or correction to the defect or proving otherwise. For example, if the service of *e'alan* does not comply with the conditions prescribed by the respective provision e.g., omission of the date of service, such defect cannot be cured by proving that the service has been circulated on a specific date.¹⁵ It is a well-established judicial principle that failure to comply with the formal pattern of a certain legal action of a procedural nature, cannot be cured by proving otherwise.¹⁶

As a general rule, procedural action is presumed to be taken in accordance with the patterns specified by law. Thus, any contestation to the otherwise must be brought forward and proven. In all cases, determination of compliance with the formal

¹⁴ Fathi Wali , *supra* note 2, at 358.

¹⁵ *Id.* at 358.

¹⁶ [Naqd][Court of Cassation], 11 Nov. 1965, *Majmouat al-Naqd*, 1965, p.267 (Egypt)

requirement of an action and thus, the validity of the action, is a matter to be decided under the sole discretion of the court.¹⁷ Such determinations are considered factual findings that fall under the absolute discretion of the court seizing the proceedings. The *Egyptian Court of Cassation* held in numerous judgments that "determination of procedural defects is a factual finding which does not fall under the review authority of the Court of Cassation".¹⁸

The importance of determining whether a certain legal action is formal in nature, to be taken within a certain required formality, and the scope of such formality as being part of the action, has critical consequences in judicial proceedings. In fact, the court seizing the action may have both subject matter jurisdiction over the dispute and personal jurisdiction over the parties; nonetheless, a procedural defect can limit or entirely negate that jurisdiction. Therefore, any judgment entered in such action may be quashed on the bases of procedural defects. In all cases, reference must be made to the respective legislative provision, which addresses the concerned procedural question in making such a determination.

In general, formality associated with procedural legal action is seen when the law requires a certain form to be taken as a substantial part of the action itself. Also formality may not form part of the procedural action itself, but rather conditions to the action's validity. The following is a further explanation of the forms of procedural formality:

¹⁷ Fathi Wali, *supra* note 2, at 359.

¹⁸ [Naqd][Court of Cassation], 11 May. 1968, *Majmouat al-Naqd*, 18th Judicial Year, p.956 (Egypt).

Formality as an Integral Part of the Procedural Actions

Formality is considered an integral part of the action, where the law conditions an action's validity with the prescribed form of it. An obvious example of a formality of this nature is the legislative stipulation that all legal pleadings must be presented in Arabic as "the official language of courts".¹⁹ It is clear from the terms employed in the legislative provision that the legislature intends that judicial proceedings must be presented or take certain form. Thus, non-compliance with such form would render such action void. Another example is the signature of the process server delivering judicial notices, where in fact the signature by itself is merely a procedural formality and does not have a practical role in informing a defender of the raising of the action, and in communicating to him the timetable within which he must act in instructing defense. However, regular citation is an essential step in the initiation of litigation. The clerk or other officer, in executing such a service, represents a legal mandate to act, and his authority as a qualified law agent to execute the warrant of the court. Thus, failure to comply with such a formal requirement would imply nullity.

Such legislative provisions set forth patterns of the model forms of legal actions in the sense that it defines the form, which is considered under these provisions to be an essential part of the action itself. Accordingly, in the first example, if foreign documents are submitted, it must be accompanied by an *Arabic* translation of such a document. Otherwise they could not form a part of the case file. In this respect the Egyptian Court of Cassation ruled that "where the court failed to request an official *Arabic* translation of the

¹⁹[FLCP] art.4. The article reads "Arabic is the official language of the United Arab Emirates courts".

submitted documents, the decision taken therein relying on these documents in their non-Arabic language, shall be deemed defective"²⁰.

Circumstantial Formality Associated with Certain Procedural Actions

In fact, there are no legal classifications of legal forms; procedural formality can be seen in different ways. One is circumstantial formality, which are patterns or frames of actions associated with the timing of actions, or the place of the process performance. Under these procedural models, formality could fall outside the action itself but still have a kind of connection to the action that justifies the required compliance with conditions, which must be observed in an action's performance.

An example of such type of procedural formality is connecting an action's validity with circumstances pertaining to place or time.

Formality Associated with Place of Performing the Action

Procedural formality related to the place of performance occurs when the law provides for a designation of the place of where the action must be taken. In this regard the law subjects the validity of the action to the compliance with this circumstantial condition. An example of such a circumstantial condition is designating specific locations where the action is deemed affected if taken therein. Serving of summons e.g., is a procedural action that is connected with a specific circumstantial formality in the sense that place of delivery is critical in determining the validity of the process.²¹

²⁰ [Naqd][Court of Cassation], 16 June. 1955, Majmouat al-Naqd, 6th Judicial Year, p.1266.

Formality Associated with the Timing of Performing the Action

Formality associated with the timing of action is regulated in many different ways. They reflect conditions that must be observed in executing the specific action. In certain legal actions the law provides that timeframe, or time limits must be observed. For example, Article 6/1 of the United Arab Emirates Federal Law of Civil and Commercial Procedure Provides that no notification may be made before 7 o'clock in the morning or after 6 o'clock in the evening or on holidays except by prior permission of the judge, which might only be granted in urgent matters only.²²

Accordingly, any execution of such service in a manner not complying with the prescribed legislative time frame set by the article is considered a procedural defect, which jeopardizes the legal existence of the action taken.²³

The Legislative Frameworks of *E'alan Qada'ey* in the United Arab Emirates

E'alan Qada'ey, under the United Arab Emirates legal system, is subject to two legislative frameworks. The general principles governing the nature, contents, forms, and delivery of judicial papers are regulated under the Federal law of Civil Procedure.²⁴ The law establishes a unified legislative procedural formality governing the delivery of judicial notices. The legislative provisions address subjects like the nature of the documents required to be served upon a defender in order to bring judicial proceedings to

²¹ Hosni Mustafa, *Serving Judicial papers: Judicial views in light of Egypt Supreme Court Rulings*, 6 (mansha'at al-ma'aref press 1988).

²² See also, Egyptian Law of Civil and Commercial Procedure, law 25/1968.art.7; Kuwait Law of Civil and Commercial Procedure, decree law 38/1980. art.6.

²³ See Fathi Wali, *supra* note 2, at 370.

²⁴ [FLCP].

his/her notice and the manners and methods by which such knowledge is presumed to be acquired.²⁵

E'alan is also subject to another federal legislation.²⁶ The law regulates, among other judicial matters, aspects of cooperation among the various national judicial entities in effectuating the service of judicial notices.

In addressing the subject, the search will be divided into two sections, each concerning the rules related to *e'alan* in the aforesaid two federal legislations.

Legal Principles Governing Formality of *E'alan* Under the Federal Law of Civil and Commercial Procedures No.11 of the Year 1992: Nature and Applications

The UAE legislature has endorsed the doctrine of *Muwajhah* in regulating the service of judicial notices. The doctrine sets forth the conditions required for the legitimate exercise of *Ekhtesas* (jurisdiction). It provides that no rights or obligation of any individual can be litigated unless the action is brought to the individual's attention in according to a reasonable and fair mechanism of notification. Without such mechanism of providing notice,²⁷ any legal action would not have any legal effects. The doctrine establishes a fundamental procedural right to litigants in being given fair opportunity to be notified in order for them to exercise any associated procedural or substantive right in connection with judicial proceedings involved.²⁸

²⁵ For example, the contents of notice, time of service, process server, etc.

²⁶ Federal Law Regulating Judicial Relations among Federated Emirates, law 11/1973.

²⁷ Fathi Wali, *supra* note 2, at 426.

²⁸ Wajdi Ragheb & Azmi Abdulfattah, *Principles of Civil Judiciary*, 210 (dar al-ketab Pub. 1st ed., 1984).

The UAE legislation incorporated several measures that are intended to implement the purposes of *muwajahah* and to achieve the minimum amount of justice and fairness of the judicial process. In this regard, the UAE legislation is highly influenced by the Egyptian procedural approaches in the sense that it adopts a large number of the provisions regulating the service of the process under the Egyptian law in the same linguistic construction.²⁹

Under the United Arab Emirates procedural law, *e'alan* (in the strict sense) is the recognized legal mechanism by which the action is brought to the knowledge of the defendant. The law provided for the prescribed procedural formalities of *e'alan* in order to assure the highest level of certainty in providing the intended knowledge of the action.. However, it is important to note that the term *e'alan* must not be interpreted to denote only to the act of delivering the notice in originating judicial proceedings. Frequently the term applies also to any other notice required to be served in connection with legal proceedings.

E'alan as a Formal Official Act

The federal law of Civil Procedures provides that *e'alan* can only be served by an official agent of the court appointed for this purpose.³⁰ The law also provides for such agent the manner, methods and limitation imposed in carrying out such service.³¹ The law

²⁹ This fact has critical consequences, one of which being a source of legislative interpretation. In occasions where the legislative text is unclear or ambiguous, reference can be made to the equivalent Egyptian text

³⁰ [FLCP]art.5.

³¹ See [FLCP] art. 3,5,6.

provides that judicial papers and notices may only be served upon the request of the interested party or by an order of the court in accordance with the manner outlined in the law.³² Accordingly, service of *e'alan* and all other judicial notifications is considered an official task in the sense that it can only be carried by a public officer who executes such service. Therefore, The UAE law does not recognize service by a private server, intending for the service to be completely governed by the court and its personnel.

For the reader to sufficiently comprehend the application of *e'alan* as a legal concept, the dispute must be understood as having two distinguish phases. In order for the action brought to be completely recognized as a legal fact there must be a link between the court and the particular claim brought. At this stage, known as the filing stage, through which the plaintiff's claim(s) reaches the court, a connection is established between the plaintiff and the court in. This stage is regulated under Article 42 of the Law of Civil and Commercial Procedures, which states that legal "action is brought in the form of a complaint presented to the clerk of the court by the interested petitioner which shall include the following information".³³

A plaintiff's act of presenting a qualified request establishes a connection between the court and the petitioner. Nonetheless the plaintiff's request at this stage does not qualify the meaning of a civil action for purposes of civil litigation unless such action is

³² [FLCP] art. 5 reads: "*e'alan* may only be served upon the request of an interested party or by the direct order of court in accordance with the prescribed legislative methods".

³³ [FLCP].

legally brought to the attention of the party upon whom the corresponding duty or liability is sought to be imposed.³⁴

The second phase is bringing the action to the attention of the defender through the service of *ea'lan*, a stage that connects the opposing litigants with the concerned court. Upon such a connection the contestation is held to exist in accordance with the requirements of *mwajahah*. The two phases are completely governed by the court and its agents, either in the first stage, or the second where the service executed by the public officer as explained.

The different aspects of *e'alan*'s formality in the UAE are evident by the stipulations provided under the law of civil procedure, which describes the manner, conditions and limitations of the service as follows:

Timing of the Service of E'alan

The federal law of Civil Procedures requires that the time during which the service of *e'alan* is to be executed should be between the hours 7 in the morning and 6 in the evening.³⁵ The provision also states that no service of process should take place during public holidays, except in urgent cases upon the leave of the court in the form of written permission. The Article also provides that the service of *e'alan* upon judicial persons, such as the government and its institutions, must be executed during official working hours. Thus, the UAE legislature has endorsed certain time limits governing the

³⁴ For further explanation, see e.g., Fathi Wali, *supra* note 2, at 434

³⁵ [FLCP]art.6.

service of *e'alan*. Such limits are sought to assure a certain degree of convenience to individuals and to suppress any miscarriage of the execution of the process.³⁶

The Content of Notice³⁷

The law requires that this form of *e'alan* (or any other papers of a judicial nature that are required by its terms to be served) must contain certain details;³⁸ such as the date and hour of the service the name, a description and place of residence of the plaintiff; the name, description, and the place of residence of the defendant; the name of the court in which the claim is brought; the name, capacity and signature of the server of the process; the name and capacity of the recipient of the service, if different than the person upon whom the service is affected.³⁹

The *e'alan* server is also required to indicate any incident associated with the execution of the service, such as where the person upon whom *e'alan* is to be served refuses to accept the service, or where the serving officer after using due diligence cannot find the person and where there is no person present at the place where the service is to have taken place. Such incidents must be cited.⁴⁰

The details required by law to be included in the form of *E'alan* are meant to achieve certain purposes.⁴¹ Nonetheless, several procedural law jurists argue that

³⁶ See Hosni Mustafa, *supra* note 21, at 12.

³⁷ [FLCP] art. 7.

³⁸ These formal requirements of *e'alan* apply only to personal service.

³⁹ [FLCP] art. 8.

⁴⁰ See Hosni Mustafa, *supra* note 21, at 21.

omission of certain citations or details do not necessarily affect the service, unless such omission is substantial.⁴² Omission is deemed substantial when such omission would likely cause a misleading understanding of the nature of the matters upon which the action is founded.⁴³

In my personal opinion, where the law provides in such specified manner what sort of information is to be included in a particular notice, it intends to achieve certain legislative purposes. Therefore, arguing that an omission of one particular kind of citation may not necessarily imply nullity is a clear disregard of legislative requirements and is an improper interpretation of the expressed intention of the legislature. In fact, the detailed treatment of the subject would manifestly explain the legislative intention of requiring each detail to be included in the *e'alan*, which in fact what essentially gives the notice its legal existence as *e'alan*.

In addition, in all possible situations, any omission of a certain piece of the required information would likely to result in some form of ambiguity in relation to the action brought. In fact, the proper construction of the *muwajahah* principle requires that action be brought to the attention of the intended person in a definite form, which would likely enable the person to identify and calculate all possible legal consequences which might result.

⁴¹ For example, the name, signature and occupation of the public officer ([FLCP]art.7. executing the service represents his mandate to act and his authority as a qualified law agent.

⁴² Hosni Mustafa, *supra* note 21, at. 35-40.

⁴³ 2 Ashoor Mabrook, *The General Theory of Judicial Regulations in the United Arab Emirates: The Laws of Civil Procedure Comparing to Islamic Principles of Share'a*, 115 (New University Pub. 2nd ed., 1998-1999).

The Delivery of *E'alan*

The law regulates the delivery of *e'alan* in different ways according to the nature and capacity of the person upon whom the service is to be affected:

Normal Person: Personal service⁴⁴

The general rule-delivery of judicial notice (*E'alan*) to the intended individual in person:

Actual personal delivery of *e'alan* is the most effective method of serving judicial notices. This form of delivery of *e'alan*, assures that the person is defiantly informed of the content of the papers being delivered to his person. In practice, such mode of serving judicial papers prevents any subsequent attempts to contest to the validity of the service in a later stage of the litigation.

This form of personal service of *e'alan* is affected through the actual delivery of a copy of the *notice*, along with any other papers required by law or court to be annexed to the copy of *e'alan*, to the intended individual in person in any location where this person may be found⁴⁵. Therefore, such a form of delivery is not limited to a specific location and could be done in any location where the person may be present, such as the person's place of residence, place of business, or any public place as long as the place located within the territorial jurisdiction of the public officer authorized to execute the service⁴⁶.

⁴⁴ The expression *e'alan shakhsy* "personal service" means any form of delivery of notice, other than substitute or restrictive forms. Ordinarily, such term of art which in the context of judicial proceedings referred to the process of delivering the notice to the defender in person (personal service in strict sense) or to someone who is legally authorized to accept the service on defendant's behalf (personal service in broad sense).

⁴⁵ [FLCP] art 8-2 reads "*e'alan* may be delivered in person, in any other location where he/she can be found".

⁴⁶ See Fathi Wali, *supra* note 2, at 368-69.

The legislative foundation for this mode of delivery is [FLCP] art.8/1, under which this form of service is recognized. The legislative reads "*e'alan* may be delivered to the individual upon whom the service is requested or, at his place of residence, or at his place of business as well as at the place elected by such person wherever such election is permitted".⁴⁷

The legislative provision sets forth the general rule governing the circulation of judicial papers. Such a mechanism of personal service of *e'alan* upon a natural person, contemplates that the physical delivery of notice upon the individual in person is the most desirable norm of notification insofar as it assures accomplishing the purpose of *e'alan*, which is bringing the action to the attention of the person. In fact, such delivery of *e'alan* assures the maximum degree of certainty that the intended person has been actually notified of the action taken.

The rationale underlying this rule is understood to relate to the presumption of legal knowledge of the process, and the means by which such legal knowledge is to be ascertained. Nonetheless, in practice, actual delivery of *e'alan* to the person is not always possible, thus the law provides alternatives to this form of delivery.

Delivery of *e'alan* to the individual's place of domicile, residence or business

In most cases, physical service on the person is not applicable due to reasons such as difficulty in identifying the person;⁴⁸ the busy schedule of court's personnel authorized to execute the service; the difficulty of knowing the person's whereabouts, or any other

⁴⁷ [FLCP]art.8/1.

⁴⁸ Fathi Wali *supra* note 2, at 372.

practical difficulties under which such form of personal service is deemed impractical.⁴⁹ Hence, the law provides for alternatives that are deemed similar in achieving the same legislative purpose of bringing the action to the knowledge of the person.

The law provides that delivery of the concerned copy of *e'alan* may be directed to the person's place of domicile, residence or business.⁵⁰ Such form of delivery is an efficient means which satisfies the requirement of personal service. Delivery of such a nature means that the documents are actually delivered to the custody of the person, even if at the time of service, the person wasn't physically present. The rationale behind such presumption is one that a person is reasonably expected to know of the process taken by virtue of the person's relationship with the individual accepting the service at the place where the service has taken place.

The legislative provision provides that in circumstances where the person is not found in his place of domicile, the notice is delivered by leaving copies of *e'alan* at the individual's dwelling house or usual place of abode with some person of suitable age and discretion residing therein.⁵¹ If the service is directed to the person's place of business and the person is found to be absent, the copy may be left with a person in charge of the administration of that place.⁵²

In all cases when law permits leaving the copy with any person other than the person himself, such person must not be a party to the action for which the service is

⁴⁹ *Id.* at 373.

⁵⁰ [FLCP] art. 8/1 provides that a copy of the *e'alan* may be directed to the individual in person, or at his place of domicile, residence or business. It may also be directed to the person's elected domicile.

⁵¹ [FLCP] art. 8/3.

⁵² *Id.*

made, or having any conflicting interest with the notified person.⁵³ In practice, such form of service is the most frequent mode of serving judicial notices.

Substitute service of *E'alan*

The substitute service is recognized as the adopted mode of serving *e'alan* in situations where the ordinary forms of personal service are not applicable. The law provides:

Where the person upon whom the *e'alan* is to be served is not found or refuses to accept service or where the serving officer after using due and reasonable diligence cannot find the defendant and there is no person to accept service of *e'alan* on his behalf nor any other person upon whom service can be made, the serving officer shall return the concerned *e'alan* to the court with a report endorsed thereon or annexed thereto explaining the circumstances.⁵⁴

The court on its own motion may order that the copy of *e'alan* be stuck at the outer door of a person's place of residence or any outer door of places where the person resides. The court may alternatively order publication of *e'alan* in a local newspaper of general circulation in Arabic language.⁵⁵

Worth noting is that court's discretion to resort to either of the two legislative options under article 8/4 may be preceded by ordering redelivery of the *e'alan*. Under the established judicial principles, in order for the court to order any form of substitute service, circumstances must show that proper efforts were made to find the person.⁵⁶ For

⁵³ *Id.*

⁵⁴ [FLCP] art. 8/4.

⁵⁵ *Id.*

example, the serving officer went to the designated place(s) at certain time when it is reasonable for the person to be present.

Alternative mode of service: service by publication

Service by publication is permissible in any case where neither forms of personal service is practicable.⁵⁷ The court on its own motion may order the *e'alan* to be effected by publication in a local *Arabic* newspaper of general circulation, and another newspaper published in foreign language if the circumstances so require.⁵⁸ The law further provides that the date of publication is to be considered the date of service.⁵⁹

Due to its nature, as an alternative method of notification, *e'alan* by publication is not permitted unless it has shown that ordinary means of *e'alan* are impractical.⁶⁰ United Arab Emirates Federal Courts, under [FLCP] art.8/3, have a wide discretion in ordering service by publication under any circumstances that justify such orders. In an action filed before the *Dubai Court*, the Dubai Court of Cassation held that "affecting service on a defendant by publication in a newspaper will only be sustained, if the plaintiff has

⁵⁶ Mahkamat al-Tamiez [Tamiez] [Dubai Court Cassation] , Dubai, 13 Feb. 1994, Judiciary and Legislation Magazine ,1997, p. 162.

⁵⁷ For instance, occasions where the person's domicile is unknown. See [FLCP]art 8/6.

⁵⁸ For example, if the person does not speak Arabic, service by publication may be ordered in a local Arabic newspaper and in another newspaper in the language of the person, e.g., English, Indian whenever available and as ordered by the court.

⁵⁹ [FLCP]art. 8/6.

⁶⁰ Mahkamat al-Tamiez [Tamiez] Dubai Court Cassation] , Dubai, 7 June 1992, Judiciary and Legislation Magazine,1997, p. 586

previously exhausted all legal means to effect service, without achieving satisfactory results".⁶¹

Thus, it appears that validity of such a mode of service is limited to situations where the whereabouts of the defendant is unknown or reasonably not determined, and where it shows from the circumstances of the case that regular means of service is neither appropriate nor applicable.⁶²

Service Upon Judicial Entities

By reference to their nature and purposes, the law recognizes two fictional judicial persons namely; judicial person for public interests, and judicial persons for private interests.⁶³ In recognition of their nature and purposes, the adopted legislative mechanism prescribed for affecting *e'alan* differs according to their civil capacities recognized by law.

***E'alan* upon public entity**

Service upon public entity is made at its head office, by handing a copy of the proceeding to the person representing this entity. Federal law of civil procedure provides:

Unless otherwise provided under any special legislative provision, *e'alan* shall be delivered: 1- To the concerned, federal, state or any other public authority through handing the copy of *e'alan* to the legal representative of such public unit.⁶⁴

⁶¹ Reported by Essam Altamimi & Richard Price, *United Arab Emirates Court of Cassation Judgments from 1989-1997*, 103 (Kluwer 1998).

⁶² See generally Fathi Wali, *supra* 2 note, at 383.

⁶³ Ahmed Sedqi, *Law of Civil Procedure in the United Arab Emirates: Analytical and Practical Study to the Federal Law No.11 for the Year 1992 of Civil and Commercial Procedure*, 276 (1st ed., 1999).

In fact, the United Arab Emirates legislative approach in this respect differs from other comparative approaches addressing the same issues, in the sense that under most legal systems service upon public authorities is directed to a specific public unit acting as the official state's address for such purpose.⁶⁵ An example of such unit is the *state department of judicial and legislative affairs*.⁶⁶

In practice, different public units are established under different legislative instruments, which make it difficult sometimes to determine the nature of their legal representation. For example, public authorities engaging in activities similar to those carried out by private persons, like governmental investment companies, are likely to raise such difficulties.⁶⁷

Therefore, it would be more appropriate if the law designates one governmental entity to act on behalf of the government. Thus, delivery of judicial papers concerning a governmental body could be affected through the delivery of the concerned papers to such department. Such specification in delivering *e'alan* would likely assure the validity of the service and provide certain level of convenience to those in conflict with governmental bodies.

⁶⁴ [FLCP]art 9/1.

⁶⁵ See also Egyptian Law of Civil and Commercial Procedure, law 25/1968. art.13/1. Under this provision, judicial notices may be directed to the *Qadaya alhokomah* department as the designated legal representative of the Egyptian government.

⁶⁶ Kuwaiti Law of Civil and Commercial Procedure, law 38/1980 art. 10/1.

⁶⁷ The examples of such public entities would be the UAE federal agencies of investment, communications ,,etc, for such governmental units. Unless the reference is made to their establishing law, it would be difficult to determine whether they are legally represented by the Minister of Finance or their internal administrative boards.

***E'alan* upon private entities**

Private judicial persons are entities recognized by law to have civil capacities in the sense that they may acquire and possess property of all kind, as well as incur obligations and be part of legal proceedings as defendants or plaintiffs. These entities are recognized under various legislative frameworks,⁶⁸ such as the law of civil transaction⁶⁹ and the law of commercial transaction.⁷⁰

In general, the law requires that all legal persons be designated by a name under which such entities are identified. Hence, all correspondents and notices of judicial nature must be directed to the head office of the concerned entity. The United Arab Emirates law of civil procedure provides, in Article 9, that service of judicial papers, such as *e'alan* upon private judicial persons, be delivered to the establishment's principal place of business or at their local branches in the United Arab Emirates (UAE),⁷¹ if the action relates to a foreign corporation having local branch(es). The Article further provides that copies of the concerned *e'alan* be directed to the legal representative of such establishment or any other officer(s) in charge of the said establishment.

⁶⁸ For instance, corporations, partnerships, and associations for private interest or purpose to which the law grants a judicial personality, separate and distinct from that of each partner, shareholder or member.

⁶⁹ The Federal Law of Civil Transaction, law 5/1985. The law regulates private non-profit organizations.

⁷⁰ The Federal Law of Commercial Companies, law 8/1984. The law regulates all private enterprises of a commercial nature.

⁷¹ [FLCP] art. 9/2.

Special Form of Delivery

The law provides for the adoption of a special form of delivering the *notice* upon certain categories of individuals who are recognized by law to have a particular status that requires the resort to such special methods. Members of the armed forces, imprisoned persons and workers on board of commercial ships are the categories recognized by the law to be served under the prescribed special mode.

Members of the armed forces⁷²

Service of *e'alan* upon members of the armed forces (army, police) is directed to the respective branch of the armed force where they are stationed. The law provides for this category a presumption of legal domicile in their units,⁷³ even if the action filed against them does not relate to their official capacities. The purpose behind providing such exceptional mode of service is giving the public authority in charge an opportunity to have some sort of control over members of the armed forces in activities taken beyond their official duties⁷⁴.

In this context, it would be worth mentioning that, in cases where the plaintiff is not aware of a defendant's capacity as a member of the military, *e'alan* is deemed valid if the service is executed in accordance with the general methods of service under article 8. Non-compliance with the special form of delivery was addressed by the Egyptian

⁷² [FLCP]art.9/4

⁷³[Naqd][Court of Cassation], 17 May 1980, Majmouat al-Naqd, 31st Judicial Year, p.1410.;see also, Ahmed Sedqi, *supra* note 62 ,at 275.

⁷⁴ See e.g., Wajdi Ragheb & Azmi Abdulfattah , *supra* note 1, at 195.

Supreme Court in the application of the equivalent Egyptian legislative provision.⁷⁵ The Egyptian Supreme Court held:

Contesting the validity of the service of *e'alan* by the respondent, as the respondent being a member of the armed, and thus he should have been notified by the special form, could not be considered under the circumstances of this case. In fact, such contestation has never been brought previously at the earlier stages of the litigation; in addition, the defendant in the original dispute was not expected to be aware of such capacity.⁷⁶

Incarcerated person⁷⁷

The law provides for the incarcerated person in jail or detention that notification is effected through the delivery of the notice to the administration of the facility in which the person is detained. Obviously, such service is justified by the fact that this form of delivery is the only applicable method of notifying the incarcerated person of the action.

Commercial marine personnel⁷⁸

In all actions filed against commercial marine personnel, the service is made through the delivery of the concerned judicial notice to the captain of the ship on which the person performs his or her duties. Such provision is applicable to all personnel of commercial ships situated in UAE ports, whether national or foreign. In fact, the legislative provision does not address whether its application extends to the commercial

⁷⁵ Egyptian Law of Civil and Commercial Procedure, law25/1968. art 13/6.

⁷⁶ ⁷⁶[Naqd][Court of Cassation], 12 June 1973, Majmouat al-Naqd, 24th Judicial Year, p.894.

⁷⁷ See [FLCP] art.9/5.

⁷⁸ See [FLCP] art.9/6.

ship's crew or all workers on board. Therefore, and in the absence of any ruling addressing this inquiry, it is likely that its application is intended for all workers on board the ship including the crew and others.

The legislative rationale behind this provision is understood to be the practical need of bringing actions to the knowledge of such individuals, which can only be achieved through the adoption of a special method of service. Thus, this form of delivery of *e'alan* would likely achieve the goal.

Extraterritorial Service of *E'alan*

In case where the action involves a foreign defendant whose domicile is established abroad, the service of *e'alan* is made through the delivery of the documents to the *Ministry of Justice*, which undertakes the submission of the notice to the concerned governmental authorities in the country where the concerned defendant is found.⁷⁹ Such service of judicial papers involves the interference of diplomatic channels from both United Arab Emirates and the concerned foreign state in which the defendant is found. Therefore, such a mode of service is subject to international agreements regulating the international service of judicial papers.⁸⁰

⁷⁹ [FLCP]art.9/7 reads "unless provided otherwise under special international agreement , service upon foreign defendants with known domicile abroad, is made through the submission of the concerned papers to the United Arab Emirates *Ministry of Justice* which submit the concerned paper to the concerned foreign authority through normal diplomatic channels".

⁸⁰ Example of such International agreements is the Convention on the service of judicial and extrajudicial documents in civil and commercial matters, *opened for signature* Nov.15,1965, 20 U.S.T.1361, *reprinted in* 28 U.S.C.A.(Appendix following Rule 4 FRCP) [hereinafter Hague Convention]

Delivery of the concerned notice to the *Ministry of Justice* is only applicable in the absence of a special international agreement regulating the matter.⁸¹ In cases where general or bilateral international agreement applies, the service is to be executed in accordance with the governing provision of the concerned agreement. An example of such an agreement is the *Etefageyyat Al-Ta'awon Al-Qada'ey Al-arabi* 1983. This regional international treaty regulates the exchange of judicial records and judicial notices among Arab Countries. The agreement provides that:

Subject to this treaty, judicial and non-judicial papers concerning matters of civil, commercial and administrative nature, and cases of personal status that requires providing judicial notices to persons residing in one of the contracting states, such notices shall be sent to the concerned court in the area within whose local limits the person to be notified resides. The court to which notice is sent shall then execute the service and return the record to the court requesting this service.⁸²

E'alan under the Federal Law No.11 of 1973 Regulating Judicial Relations Among Federated States

The Law regulates the judicial relations among the UAE member emirates. Among other things, the law regulates the intestate service of *e'alan* upon defendants who reside outside the limits of the local jurisdiction of the *Emirate* in whose court the action is brought. The law provides that:

Where the person to be notified is residing in an *Emirate* other than the *Emirate* before whose courts the action is brought, the court issuing *e'alan* shall send the file

⁸¹ Ashoor Mabrook, *supra* note 43, at 141.

⁸² Etefageyyat Al- Ta'awon Al-Qada'ey [Agreement for Judicial Cooperation among Arab States] opened for signature Apr.6,1985, Jordanian Official Gazette. No.3329, July 16, 1985. at 986 [hereinafter Riyadh Agreement],art. 5.

of the case to the court of the *Emirate* within whose local limits of jurisdiction the concerned defendant resides. The court to which such file is sent, shall serve the intended person in accordance with the applicable rules of *e'alan* in force in that *Emirate*⁸³ (in case such *Emirate* adopts different set of rules of service of *e'alan*).⁸⁴

**Procedural Irregularity of Service of *E'alan* Under the United Arab Emirates
Federal Law of Civil Procedure:**

The federal law of civil and commercial procedures provides that procedural irregularity of a specific legal process may not affect such process unless the law expressly provides for nullity. Formal irregularity may affect the process in instances where the defect is one which cannot be remedied subsequently.⁸⁵

The legislative provision lays down two legislative rules by which courts are guided in determining the effect of any procedural irregularity. The first is one laid down as a general rule governing any procedural irregularity. Under this rule, procedural irregularity associated with any legal process affects the validity of the process only when the law expressly provides for such effect. The second rule is applicable only in the absence of a direct legislative expression for the previous effect. In such a case, the law provides that where the defect is substantial, in the sense that it would certainly prevent achieving the purposes behind the process, such a process must be nullified. However, it

⁸³ Federal Law Regulating Judicial Relations among the Federated Emirates, law 11/1973, art.2.

⁸⁴ In fact, after the issuance of the Federal Law of Civil Procedure [FLCP] in January 25, 1992, all federated *Emirates* (states) apply the same rules of service under the federal legislation.

⁸⁵ [FLCP]art.13.

must be understood that procedural irregularity must not affect the validity of the process when the purposes of the defective process are achieved.⁸⁶

In fact, the UAE legislative approach to the question of procedural irregularity is similar to the Egyptian approach in this regard. The legislative test under the Egyptian law is one that measures the effect and consequences of the procedural defect and whether such defect is material in the sense that it is likely to cause real prejudice to the person affected by the process.⁸⁷

In light of the governing legislative provisions, those are in fact comprised of two elements, rule and discretion. It is fair to conclude that a defective service of *e'alan* under the relevant framework in the United Arab Emirates would not *prima facie* nullify the decision taken therein, unless the affected party is adversely affected by such defect. For example, based on such a defect a defendant had no knowledge of the case made against him and therefore had no opportunity to deal with it. In all cases, whether procedural irregularity causes real prejudice to the person affected by the process, that is to say if the rules been complied with, a different decision or more favorable one to the person alleging prejudice, might have resulted or not, is a matter to be decided in light of the relevant circumstances of the case. Normally, any decision taken will stand until challenged successfully, and in that sense is voidable but not void.⁸⁸

⁸⁶ [FLCP] art.13.

⁸⁷ See Egyptian Law of Civil and Commercial Procedure, law 25/1968, art. 20.

⁸⁸ [FLCP] art.14/1.

CHAPTER V
ALLOCATION OF JURISDICTIONAL POWER AMONG FEDERAL COURTS
(SUB-JURISDICTIONAL RULES)¹:

Introduction

It is important at the outset to point out that in reading this chapter, relevant terms of art used must not be understood as synonyms with those terms the reader might be familiar with under different legal systems. In fact, different systems may employ similar concepts underlined by principles and doctrines having complete different implications. For example, the term *venue* is understood by American lawyer as the legal distribution of judicial power among courts of concurrent jurisdiction in one particular *state* that has the requisite jurisdiction over the action.²

The same term, if translated to Arabic, would be one like *ekhtesas mahally*, an expression adopted by the law of the United Arab Emirates as a legislative reference to the court(s) within the federation that is deemed best situated to adjudicate the specific dispute. The court may share the same adjudicative power with over such a dispute with

¹ In fact, these rules govern the allocation of adjudicative powers among various courts including those of *Dubai* and *Ajman* (theoretically both *Emirates* are not part of the Federal judiciary). The title of this chapter of the dissertation is based on the legislative description of the rules provided for under the third section of the Federal Law of Civil and Commercial Procedure, 11/92 [hereinafter FLCP], entitled *Ekhtesas Mahally*.

² The court of the place or territory, over which a trial court has jurisdiction. See Black's Law Dictionary, 6th ed., 653 (West 1996). Cf the definition of the term provided by Harith Faruqi, *Faruqi's Law Dictionary*, 729-30.(3rd ed. Libraire Du Liban 1991).

another court in the federation, in the sense that litigants may in the first instance resort to any indifferently.¹ For example either *Abu Dhabi*² or *Sharjah's* court may try the action.³

The importance behind this preceding introduction is that under the American legal system, *venue* rules even though relevant to territorial authority to adjudicate, do not form part of the jurisdictional decision.⁴ In contrast, under the United Arab Emirates federal judicial system, jurisdictional decisions consist of two elements: *ekhtesas* in general terms (jurisdiction in broad sense) and exercise of *ekhtesas* (jurisdiction in strict sense).

The first element, discussed in chapter II & III of this dissertation, relates to the rules governing the competence of United Arab Emirates adjudicative tribunals as a whole in the sense that such rules address one of the two elements of the jurisdictional inquiry. In other words, the rules discussed in the second and the third chapters of this thesis set forth the legislative foundations for the establishment of adjudicative authority over the defendants without relating such authority to a specific legal system within the federation. In essence, the rules only answer the question of whether United Arab Emirates courts are competent to subject the person to its adjudicative authority.

The second element of the jurisdictional inquiry concerns the question of where such *ekhtesas* (once competence is established under the first set of rules) may be

¹ The concept is known under the American legal culture by concurrent jurisdiction.

² *Abu Dhabi* is the United Arab Emirates capital and one of the 7 federated Emirates.

³ *Ajman* is one of the 7 federated Emirates.

⁴ For more illustrations, consult 2nd Part of this dissertation to assure understanding of the rules implications when compared and contrasted with rules of *ekhtesas mahally* under the UAE legal system.

exercised and what type of competence may be ascertained. In other words, before what Emirate's court within the United Arab Emirates federation the defendant might be brought and to what is the extent of such jurisdiction. These questions are answered by reference to the rules known as the rules of *ekhtesas mahally*.

Ekhtesas mahally, is an Arabic phrase best translated to mean *local jurisdiction*. Such expression does not precisely convey the true meaning of rules of such a nature. The expression has been improperly imported from the Egyptian law of Civil Procedure which employed the term in the section of the Egyptian code that addresses the allocation of adjudicative power among *Egyptian* courts,⁵ without giving due consideration to the fundamental differences existing between the two systems. The fact that the Egyptian judiciary is a unitary system whereas the United Arab Emirates is a federation under which two separate court system exists makes it unwise legislative policy to adopt such a technical term which under the Egyptian judicial structure, would have a completely different implication.⁶ By their very nature, these rules are subordinate in the sense that their application is only invoked after the connection between the United Arab Emirates and the defendant is established. Such rules may be better described by sub-jurisdictional rules as the only expression which may reflect their true nature. The rules have a dual implication insofar as they relate to jurisdiction and venue.

First in their aspects as jurisdictional rules, they reflect connections of certain types between the forum and the defendant which justify the exercise of jurisdiction over

⁵ See Egyptian law of Civil and Commercial Procedure, law 25/1968, see also, Fathi Wali, *Alwaseet fe el Qada'a almadanl [The Law of Civil Procedure and other Supplemental regulations]* 251-277 (dar alnahdah al arabeyyah. 2001).; see also, Ahmed Mulaiji, *Judicial jurisdiction*, 133-188 (dar al-ketab pub. 2nd ed. 1997).

⁶ United Arab Emirates Federal Constitution [UAE Constitution] art.102-105.

the defendant in such particular forum. In addition, as venue rules they designate the particular place where specific action can be tried.

The Legislative Framework of the Sub-Jurisdictional Rules (Rules of *Ekhtesas Mahally*) Providing the Legislative Connections Between the Defendant and the Court in Which Action is Tried

As we have explained in the previous sections, jurisdictional determinations under the United Arab Emirates law primarily consist of two elements. The first, which we have already surveyed in the previous chapter is determining whether there is a recognizable link between the defendant and the forum. In this section we will survey the second element of the jurisdictional inquiry, which addresses the factors and connections that link such defendant with the particular court before which the action is to be tried.

The United Arab Emirates legislature has approached this element of the jurisdictional inquiry by defining the various connections upon which the defendant maybe brought before a particular tribunal. The designation of such court is essentially founded in some form of recognizable connection between the person and the designated forum. The law provides for a general rule governing such designation, with some exceptions based on certain circumstances. The general rule is that person is subject to the court having proper jurisdiction over the area within which the person is domiciled or resides.

The General Rule – Defendant's Habitual Residence as the Ultimate Connection

Natural Persons

The general rule under the UAE federal law of civil procedure provides that in all personal actions, a defendant is subject to the jurisdiction of the court in whose territorial jurisdiction is the defendant's domicile. The legislative provision provides:

Unless otherwise provided, exercise of jurisdiction shall be conferred upon the court of the place where the defendant domicile, If the defendant has no domicile in the UAE but resides or possesses property therein, he may be sued before the court of his ordinary residence or place of business.⁷

It is clear that this rule aims to strike a balance between the two parties to the dispute since the plaintiff selects the time of filing the action, which enables him to prepare the relevant documents and evidence before filing the action. Thus in order to strike a balance of fairness between the opposing parties, the trial of the plaintiff's allegations should be brought before the court within which the defendant has the most substantial connection. Such a connection is fundamentally found in the place where such defendant resides.

The determinant factor for invoking such jurisdiction is the defendant's status of domicile and residence which can be considered synonyms for purposes of Article 31. In fact, residence as a connecting factor is provided to supplement any deficiency resulting from the absence of domicile under the term's legal meaning.⁸ The law emphasizes that domicile differs from residence for purposes of *ekhtesas* (jurisdiction). The term *domicile*

⁷ [FLCP] art.31/1

⁸ This meaning is provided under the Federal law of Civil Transaction, law 5/1985 [hereinafter FLCT] art.81. " Person's domicile is the place where the person's permanently stays"

denotes a fixed and permanent residence, where *residence* indicates the meaning of a place of abode, whether permanent or temporary.⁹

The reader must keep in mind that under the UAE law, the court of the place where the person's domicile does not always have general jurisdiction over that person in all actions filed against him/her. In fact, the law of *ekhtesas mahally* in the United Arab Emirates does not recognize the concept of general jurisdiction under which a person is subject to a specific forum adjudicative authority in any cause of action which might be brought against him/her¹⁰ on the bases of kind of a substantial connection upon which the person is held subject to the adjudicative authority in that particular forum.¹¹

The said Article reads "In actions where multiple defendants are involved, jurisdiction shall be conferred upon the court where one of them domiciles".¹² Clearly, the rationale behind such provision is to prevent multiple litigations which might arise out of the same cause of action, as well as preventing conflicting judgments should the disputes be brought to multiple forums.¹³

⁹ Consideration has been given to the fact that the large population of foreigners presents in the UAE whose presence does not reflect the meaning of domicile.

¹⁰ For example, under the USA law of personal jurisdiction, X state courts may assert general jurisdiction over a person who maintains systematic and continuance contact. In such an example, the state's court may exercise general jurisdiction over that person in any cause of action, even if the action brought does not relate to a person's contact with the form. See *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 473 (1985).

¹¹ A person might be subject to the adjudicative authority of the UAE courts in accordance with the rules of *International Jurisdiction*. See, chapter 2 &3.

¹² [FLCP] art. 31/4.

¹³ Ahmed Sedqi, *Law of Civil Procedure in the United Arab Emirates: Analytical and Practical Study to the Federal Law No.11 for the Year 1992 of Civil and Commercial Procedure*, 214 (al-bayan pub. 1st ed., 1999).

Judicial Persons

In applying the general rule to a judicial person, it must be understood that a judicial person, for purposes of [FLCP] art 31, relates only to a judicial person for public interest.¹⁴ Domicile of judicial person for public interest is the place where the authority concerned has its principal place of administration.¹⁵ The law establishes a legal presumption of domicile for such a person in the principal place of administration. Thus, actions filed against any public authority must be brought before the court having competent jurisdiction over the area where the head office of the concerned entity is situated.

Legislative Exceptions to the General Rule of Defendant's Domicile

The general legislative principle sets forth by [FLCP] art.31, conferring jurisdiction to the *Emirate's* court in whose local jurisdictional limits the person domiciles or resides, is subject to limited number of legislative exceptions. Such exceptions are supported by several important practical considerations,¹⁶ and reflect the form of connection between the designated forum and the facts on which the proceedings are based.

¹⁴ For judicial person for private interest, [FLCP] art.33 is applicable.

¹⁵ Most likely *Abu Dhabi* courts where most public authorities have their principal places of administration, unless the public authority in question is one belonging to one *Emirate's* local government. In this case the action may be brought before the court in that particular *Emirate*.

¹⁶ The legislative text of [FLCP]art. 31, reads in part *unless otherwise provided*.

Jurisdiction Over the Person in Real Actions and Actions for Possession (*Heyazah action*)¹⁷ of Real Rights

The UAE Law of Civil Procedure provides that:

Actions affecting title to or possession of real property, or interest therein, shall be commenced and tried in the proper court which has jurisdiction over the area wherein the real property involved, or a portion thereof, is situated.¹⁸

Under this legislative provision, a person is subject to the jurisdiction of the court in whose local jurisdictional limits the real property involved is situated, in all actions brought against that person concerning the person's interest in such property. The presence of the property within the territorial jurisdiction of one court is deemed sufficient to link that person with the adjudicative power of the court therein.

Jurisdiction over a person in mixed action¹⁹

In all mixed actions the plaintiff has the choice of filing the action in the court having proper jurisdiction over the area where the property concerned is situated or the court where the defendant resides. This matter is regulated under Article 32/2, which states that, in all mixed action, jurisdiction is conferred upon either the court of the defendant or before the court where the property in question is situated in whole or in part.

¹⁷ *Heyzah* action is one form of real proceedings by which the plaintiff is claiming real rights over the property on the bases of a lawful position of such property for the required period of time. Such proceedings may be brought against any person claiming any right or interest in such real property. See e.g., Wajdi Ragheb & Abdulfattah Azmi, *Civil litigation in Kuwait*, 79-80 (dar al-ketab pub. 1st. ed., 1984).

¹⁸ {FLCP}art.32/1

¹⁹ Mixed action is the type of legal action that is partially real and partially personal. An example of such an action is the one brought by the plaintiff for the enforcement of personal rights in relation to real property against person having interest therein. For more explanations, see , Ahmed Sedqi , *supra* note 15 at 217

Jurisdiction Over Companies, Corporations, Partnerships or Any Other Private Organizations for Private Interest²⁰

In all actions brought against companies, corporations or any other organization for private interests, the action may be brought before the court in whose jurisdictional limits the principal place of business for this establishment is found.²¹

In addition the provision provides that where the action brought concerned one particular branch of a multiple-branch corporation, the action might be brought before the court in whose area the branch of the company, association or organization is situated.²² In addition, if the action concerned a foreign private organization, the action might be brought against such organization in the court in whose jurisdictional limit the agent or local branch is located.

Inheritance Jurisdiction²³

The law provides that the court having proper jurisdiction over the area within which the last domicile of the decedent was established shall have exclusive jurisdiction over all actions related to the estates of the decedent. The application of this legislative rule extends to actions brought from heirs against each others or actions brought from debtors against heirs before the complete division of that estate. The rationale behind this

²⁰ The application of the provision extends to companies under liquidation.

²¹ [FLCP]art.33.

²² *Id.*

²³ [FLCP]art.34.

provision is to consolidate all disputes related to such estate before a single court, in order to avoid any conflicting judgments, should such actions be brought in different forums.²⁴

However, it must be noted that this provision does not confer jurisdiction to such court in any action brought by heirs against others, even though the action relates to the concerned estate²⁵. In addition, the provision is not applicable to real action, which remains subject to the jurisdiction of the court in whose area the property is situated, according to the provision of [FLCP] art.32/1.²⁶

Commercial Bankruptcy Jurisdiction²⁷

The law provides that a person shall be subject to the exclusive jurisdiction of the court having proper jurisdiction over the area in which a commercial bankruptcy has been declared. Such jurisdiction extends over all causes of action that relate to such declaration. [FLCP] art. 35/3 provides that all actions relating to a commercial bankruptcy declared in a specific tribunal, jurisdiction shall be conferred to such court over any matter relating or arising out of such declaration of bankruptcy.²⁸

In order for such provision to apply two conditions must be established; first there must be a declaration of commercial bankruptcy by the court before which the proceedings are brought; second the proceedings in question must relate to such

²⁴ Ahmed Mulaiji, *supra* note 7, at 155.

²⁵ Ahmed Sedqi, *supra* note 15, at 220.

²⁶ See ,Ahmed Mulaiji , *supra* note 7, at 156.

²⁷ [FLCP] art. 35.

²⁸ Commercial bankruptcy is regulated under the United Arab Emirates Federal Law of Commercial Transactions, law 18/1993. Under such law, certain formal procedure must be complied with after any declaration of commercial bankruptcy.

declaration in some way that would justify the exercise of jurisdiction over the defendant in the subsequent proceedings. The justification for such jurisdiction is one that a court declaring bankruptcy may review, rescind or vary an order made by it under its bankruptcy jurisdiction.²⁹ Thus, such court must be conferred an exclusive jurisdiction over all subsequent proceedings concerning its previous decision.³⁰

Commercial Jurisdiction

The Federal Law of Civil Procedures provides:

In commercial matters, jurisdiction shall be conferred upon the court within whose jurisdictional limits the defendant's domicile, unless the action brought against the person is founded solely on contractual agreement. In this case, the court of the place where the contract was formed, the court of the place where the contractual obligation was executed wholly or partially, or that in whose territorial limits the agreement is meant to be executed shall be competent to exercise jurisdiction.³¹

The legislative provision sets forth a general rule that is applicable in all transactions of a commercial nature. Under such rule, an action may be brought in the court having proper jurisdiction over the area where the defendant is domiciled. Exception to this rule is provided for actions founded on contractual agreements. It should be considered that such contractual obligation may involve a foreign defendant over whom jurisdiction could not be established in applying the general rule of domicile.

In fact, this rule recognizes the important interest the forum has in enforcing contractual agreements formed, executed or meant to be executed, within its territory. It

²⁹ *See.g.*, Ahmed Mulajji, *supra* note 7, at 158; *see also*, Fathi Wali, *supra* note 7, at 255

³⁰ Fathi Wali, *supra* note 7, at 258.

³¹ [FLCP] art 31/2.

also entails the plaintiff several choices of forum selection in terms that the action can be brought in several courts. The only requirement for invoking the provision's application is that the transaction giving rise to the dispute must be commercial in nature³².

Jurisdiction Over Minor Contracts and Labor's Wages³³

In response to the need to designate the place of action for disputes arising from daily life contractual agreements, like those involving butchers, plumbers, grocer etc, the law provides that "[a]ctions concerning minor contracts pertaining to daily life supplies, and labors' wages, the action is to be instituted in the court of the defendant's domicile or the court of the place where the performance of the agreed service has taken place".³⁴

The legislative provision aims to protect the interest of a certain category of craftsman and labors performing basic tasks. The law realizes that the application of the general rule, would place unreasonable burden over this category of litigants by forcing them to litigate their minor contractual disputes, distance from the place where they perform their contractual agreements.³⁵ Thus, the law provides them with an additional option of filing their cases in the court having proper jurisdiction over the place where they performed the task upon which the action is found.

³² Commerciality for purposes of [FLCP] art.31/2 is to be determined by reference to the relevant provision under the Federal Law of Commercial Transactions, law 18/1993. .

³³ [FLCP]art.36.

³⁴ [FLCP]art.36.

³⁵ Fathi Wali, *supra* note 7, at 263.

The provision is applicable also to actions brought by servants, artisans, and craftsmen demanding their wages in the court of their domiciliary as long as they have performed the task for which the actions are brought within its territorial limits.³⁶

Ahwal Shakhseyyah Jurisdiction (Nafaqah)

The term *nafaqah* refers to legally prescribed monetary support among spouses and relatives. Such types of financial aid is recognized under the law of *Ahwal Shakhseyyah*³⁷ and includes the temporary *nafaqah*, which is the type of monetary support that may be demanded by the wife against the husband (defendant) within the course of litigating their matrimonial relationship, until the complete disposal of such action.³⁸

For this type of action, the law provides that legal action may be brought against the defendant in the court where the defendant domicile or the court where the plaintiff domicile at the election of the plaintiff. The legislative rational behind providing such an exception to the general rule, is recognizing by the need of the plaintiff in such proceedings to demanding monetary support.³⁹

³⁶ Ahmed Mulaiji, *supra* note 7, at 166-67.

³⁷ Personal status relationships among Muslims.

³⁸ For more explanations about the subject, *see*, Ahmed Sedqi, *supra* note 15, at 224-225.

³⁹ *Id.* at 224-225.

Insurance Jurisdiction

Under [FLCP] art.37, insurers are subject to the jurisdiction of the court within whose jurisdictional limits the beneficiary domicile or the court in whose jurisdictional limits the insured property is situated. Such jurisdiction is limited to actions brought by the beneficiaries claiming an insurance amount. The rationale behind this provision is to prevent any unreasonable burden beneficiaries may encounter in dealing with insurance companies in their home courts.

In fact, the legislative provision recognizes the practical difficulties which might result from the application of the general rule and that bringing the action to the courts in whose jurisdictional limit the principal place of business for such company is located would likely to cause unreasonable burden over the concerned plaintiff, especially when such company is situated a distance from where the beneficiary resides.⁴⁰

Jurisdiction, established under [FLCP] art.37, is limited to the demands of the insurance amount. Its scope of application does not extend to any other claim which might be founded on such an agreement, other than these particular demands. Therefore, action to nullify the agreement or actions brought by the insurance company against the beneficiary, are not within the scope of art.37 and remains subject to art. 31/1.⁴¹

Jurisdiction Over Urgent Matters

The United Arab Emirates Federal Law of Civil Procedure provides that

Jurisdiction over matters of urgent nature shall be exercised by the court having proper jurisdiction over the area

⁴⁰ Ahmed Sedqi, *supra* note 15, at 226; *see also* Ahmed Mulaiji, *supra* note 7, at 171-72.

⁴¹*Id.* at 226

within whose territorial limits the defendant in such proceedings resides, or the court in whose jurisdictional limits the requested provisional measures are sought to be imposed.⁴²

The Article further provides that:

Where the requested measures concern the execution of judgment or court order, the jurisdiction shall be exclusively exercised by the court within whose territorial limits the concerned execution is taking place⁴³

The legislative provision distinguishes between two types of provisional measures:⁴⁴ traditional conservatory measures and measures related to the execution of judicial orders and judgments.⁴⁵ Under the first category, the defendant of such proceedings is subject to either the jurisdiction of the court of his domicile, or the court in whose territorial limits the measures are sought. For the second category, the defendant is subject to the exclusive jurisdiction of the court seizing the executory proceedings.

It must be remembered that the application of Article 38 does not extend to all types of conservatory measures requested within an original course of action.⁴⁶ Action of such nature must be brought independently. As a matter of principle, the court seizing the

⁴² [FLCP] art.38/1.

⁴³ [FLCP] art.38/2.

⁴⁴ Such form of judicial proceedings are taken merely on demand by the interested party without hearing all parties *Ex Parte*, upon showing that irreparable harm or damage would likely to occur should such measures not be effected. For more illustration about the nature of this form of proceedings, see Wajdi Ragheb & Azmi Abdulfattah, *Principles of Civil Judiciary*, 34-41 (dar al-ketab Pub. 1st ed. 1984).

⁴⁵ Ahmed Sedqi, *supra* note 15, at 227.

⁴⁶ Original course of action is understood as legal action where the merit of the dispute is put into question.

original course of action is always competent to decide all related matters, including incidental claims brought before it.⁴⁷

Civil Liability Jurisdiction

In civil liability actions, a defendant is subject to the jurisdiction of the court in whose area the damage was inflicted.⁴⁸ The law provides that the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over the defendant. The United Arab Emirates Federal Law of Civil Procedure provides that "actions for damages may be brought before the court in whose jurisdictional limits the injuries occurred".⁴⁹

In application of this legislative provision, the United Arab Emirates *Mahkamah Etehadeyyah Olia* (Supreme Court) ruled that:

Insofar as the petitioner in this action is primarily demanding monetary damages as a result of the respondent's unlawful withdrawal of equipments needed for the completion of the project, in addition to demanding the workers to leave and deporting them before the completion of the project. Upon such grounds the court is satisfied that such action must be brought before the forum in whose area damages to the petitioner occurred in accordance with Article 31/5 of the Federal Law of Civil Procedures.⁵⁰

⁴⁷ [FLCP] art.39. Provides that courts seizing an original course of action shall be competent to litigate any incidental, or related claims.

⁴⁸ In application of this provision, the Mahkamat al-Isteinaf (Isteinaf) (Court of Appeal), Abu Dhabi, 25 May. 1996, Judiciary and Legislation Magazine, 2000, the court held that "since it is evident by case file and without opposition from the litigants that the accident giving rise to the injury for which the action for damages is brought, has taken place in Dubai, hence Dubai courts has jurisdiction pursuant to [FLCP]art. 31/5". YOU FORGOT TO CLOSE THE QUOTATION MARKS HERE

⁴⁹ [FLCP]art31/2.

⁵⁰ *Mahkamah Etehadeyyah Olia* [Mahkamah Olia][United Arab Emirates Supreme Court], 8 June 1996, *Majmouat al-ahkam wa al-qawa'ed* [Maj], 2000, also cited by Ahmed Sedqi, *supra* note 15, at 229. n.3.

Choice of Forum by Agreement

The United Arab Emirates Federal law of Civil Procedure provides that:

With the exceptions to jurisdiction established under Articles 32 and 34-39, any agreement to choice of forum between parties may be enforceable in that forum insofar as the designated court is competent to decide the general subject to which the proceedings belong. In this case, the court shall be competent to decide the matter beside that court in whose territorial jurisdictional limits the defendant domiciles, resides, or have a place of business.⁵¹

The legislative provision recognizes to the extent permitted by the Article, any agreement between parties or litigants that contains a clause designating the forum in which the dispute(s) can be brought.⁵² In fact, even though the said provision does not precisely explain the limits of such choices, it can be understood that designation of the forum is limited to those in which the action can be brought.⁵³ In other words, where more than one forum is capable of assuming jurisdiction, designation of the forum among equally suitable alternatives is left to the concerned parties to decide among themselves through such an agreement.

The Nature of the Rules of *Ekhtesas* and the Extent they Relate to Public Order

In general, when the law regulates a certain subject, it does provide for it principles or rules of general application that correspond to the needs for such regulation. Therefore, the application and enforcement of such rules and principles may vary from

⁵¹ [FLCP]art.31/5.

⁵² By applying the plain language of the text, such arrangement could also be made subsequent to the filing of an action. Such assumption is based on the fact that there is nothing in the language of the provision prohibiting such subsequent agreement.

⁵³ See [FLCP] art.31/1/2/3/4, 33.

one subject to another. This variation may also occur among rules within the same legal construction by virtue of the diverse interests and considerations underlying the whole construction and the nature of the specific interests needed to be observed and secured.

As a general rule, legal rules provided for the protection of purely private interest are given a lesser degree of applicability and enforcement than those aiming ultimately at the protection of public interest.⁵⁴ The distinction between these two types of rules is fundamental in most civil law systems. Under such tradition the determination of the specific nature of the rule is critical to both rules' interpretation and application. Therefore, rules of public order are likely to be construed and applied strictly where the other type is likely to be liberally construed to allow more flexible application.

In the light of the above, the question of whether rules of *ekhtesas* (jurisdictional rules) must be strictly or liberally construed is a matter of determining the nature of the specific jurisdictional provision in question. In other words, the question is, under what standard a jurisdictional rule can be said to form part of the public order? The answer to such question requires examining the language of the text involved in terms of whether it allows some sort of discretion or if the court is bound to accept the rule(s) as a matter of principle of an absolute application.

The Nature of the Rules of *Ekhtesas Shakhsy*

The legislative answer to the previous questions is found in [FLCP] art.24. The plain language of the text reveals that no agreement is permitted to the contrary of the

⁵⁴ The expression *public interest* in this context must be construed strictly to relate to the specific interests needed to be protected or the purposes and goals needed to be achieved. In fact, every legal rule in whatsoever form must, to some extent, be underlined by some considerations of public nature.

rules regulating *ekhtesas shakhsy* under the first chapter of the code.⁵⁵ Thus, all these rules are to be considered part of the public order in the sense that they must be strictly applied.⁵⁶ In fact, the application of these rules is ultimately rest upon certain considerations of public order. The said Article reads, "[a]ny agreement to the contrary of the preceding articles shall be void and null"⁵⁷

The legislative statement creates several legal consequences. First, courts are obliged to take notice of their jurisdictional limits. Thus, concerns of lack of personal jurisdiction may be addressed upon courts' own initiatives.⁵⁸ As the guardians of legality, courts are presumed to assure the proper application of the law including those provisions setting forth the limits and extent of their competency. Therefore, no amount of consent or waiver on the part of the parties can validate any exercise of jurisdiction where there is none.

The second legal consequence confers a litigants' unconditional procedural right to contest to jurisdiction at any stage of the litigation. Thus, failure to plea lack of jurisdiction at an early stage of the litigation does not waive such right and may be invoked at a subsequent stage even for the first time before the *Mahkamah Etehadeyyah Olia*⁵⁹ (United Arab Emirates Supreme Court)

⁵⁵ Literally, all provisions under the title *International Jurisdiction of the United Arab Emirates Courts*. [FLCP] art. 20-23. See part I- chapter I-II of this dissertation

⁵⁶ Insofar as public order rule is concerned, parties cannot agree to the contrary. Judges also cannot modify or amend the rules' scope of application.

⁵⁷ [FLCP]art 24.

⁵⁸ This could happen even if the issue is not brought or raised by the litigants.

⁵⁹ Ahmed Sedqi, *supra* note 15 at 233.

The Nature of the Rules of *Ekhtesas Mahally*(Sub-jurisdictional rule)

Sub-jurisdictional rules known as *rules of ekhtesas mahally*, are not classified collectively under one category. In fact, the nature of such rules' application depends on the nature of the specific legislative provision invoked. Rules that form part of public order are strictly applied. Thus, courts are bound to apply these rules as a matter of principle. In the other hand, where the relevant legislative provision does not form part of public order, courts are given discretion with respect to the rule's scope of application.

In fact, the language of Article 31/5 suggests that as a general principle, parties' agreement for choice of forum is permitted.⁶⁰ Nonetheless, the legislature in the said Article employs the expression *with the exception to*, which is understood in this context to limit the discretion conferred upon the court.

In light of the above, the rules of *ekhtesas mahally* under the United Arab Emirates legislative framework are not of the same nature and, thus, not applicable to one specific construction. The application of the rules depends entirely on whether discretion is allowed under a discretionary rule, or prohibited under a rule of mandatory nature.

Effect of Non-Compliance with *Ekhtesas Shakhsy* Rules

As a general principle of law, proceedings of a court without jurisdiction are null and its judgment therein has no legal effect. Under the United Arab Emirates legislative

⁶⁰ The legislative provision of [FLCP] art 31/5 provides that, with the exceptions to jurisdiction established under [FLCP] art.32,34-39. Therefore, any agreement of what the choice of forum should be between the parties may be enforceable in that forum insofar as the designated court is competent to decide the general subject to which the proceedings belong. In this case, the court shall be competent to decide the matter in addition to the proper court in whose territorial jurisdictional limits the defendant domiciles, resides, or has a place of business.

framework, the rules of *ekhtesas shakhsy* form part of the public order construction. Therefore, non-compliance with their stipulations, results in rendering the proceedings taken therein void in the fullest sense of the term. Thus, courts are bound to take notice of the limits of their authority and may, upon their own motion, recognize the want of *ekhtesas* and dismiss the action, at any stage of the litigation.⁶¹

The law provides that: "In the absence of voluntarily consent to jurisdiction, court must dismiss the action where there is no legislative foundation for the exercise of *ekhtesas shakhsy*".⁶² In addition, the subsequent legislative provision provides that "any agreement to the contrary of the rules provided under this chapter shall be void"⁶³.

Accordingly, non-compliance with jurisdictional rules regulated under chapter 1 of the code results in absolute lack of jurisdiction over the person of the defendant.⁶⁴ Any exercise of *ekhtesas shakhsy* therein can be formally challenged by a plea which can be raised at any stage of the litigation, even for the first time before the *Mahkamah Etehadeyyah Olia* (United Arab Emirates Supreme Court).⁶⁵ In addition, failure to plea lack of *ekhtesas shakhsy* at the outset of the litigation does not amount to a waiver and does not bar raising the plea at a later stage.⁶⁶

⁶¹ [FLCP] art.85/1.

⁶² [FLCP] art.23.

⁶³ [FLCP] art 24. The title of this chapter is *International Jurisdiction of the United Arab Emirates Courts*.

⁶⁴ Issues raised against a procedural course of action to have it declared irregular, extinguished or stayed, shall constitute a procedural plea.

⁶⁵ Ahmed Sedqi, *supra* note 15, at 233.

⁶⁶ See e.g., Ahmed Mulaiji, *supra* note 7, at 29.

Effect of Non Compliance with Sub-Jurisdictional Rules (*Ekhtesas Mahally* Rules)

Non-observance of *ekhtesas mahally* rules, (rules which are not of public order nature) cannot be *prima facie* considered by the court on its own initiative. Any objection therein must be brought by the party affected by such irregularity. In addition such objection must be brought at the earliest stage of the litigation, and prior to arguing the merits of the dispute.⁶⁷ Failure to object accordingly would amount to a waiver and the party cannot bring such objection subsequently at a later stage.

In fact, the rules under such nature are more reflecting considerations of venue than those of jurisdiction in the sense that where there is more than one forum capable of assuming jurisdiction, and that it would be necessary to determine where the action should be litigated. Such appropriate forum is likely to be determined through either the parties' agreement to a certain forum among the different suitable alternatives or a transference mechanism which allows the court before which the action is brought to transfer the action to another forum more appropriate to entertain the action.

To the contrary of the above, non-compliance with rules of *ekhtesas mahally* related to public order (mandatory rules), results in absolute want of *ekhtesas* (jurisdiction) in the sense that the court lacks the power to act at all in reference to relevant situation.

Transference of Action

The law provides for several grounds upon which orders of transference of actions among federal courts may be made. Transference of action among federal courts, based

⁶⁷ [FLCP] art. 84/1.

on jurisdictional grounds, is governed the United Arab Emirates Federal Law of Civil Procedure. The law provides:

Whenever the court seizing the action is satisfied that the exercise of jurisdiction under the particular circumstances would be improper and decides upon its own motion that it lacks jurisdiction by reasons related to the nature of action or on grounds of non compliance with *ekhtesas mahally*, the court must order that the action be transferred to the appropriate court.⁶⁸

Under such legislative provision, courts are bound to take notice of the limits of their authority and they may, by their motion, recognize that the prescribed conditions precedent to the exercise of judicial power, have not been complied with. In order to avoid an erroneous exercise of jurisdiction, the law provides that jurisdictional determination must be comprised of two elements; the first is deciding the competence of the tribunal and the other is designating the forum of the action.⁶⁹

The law then provides that dismissal of action is not an applicable remedy under [FLCP]art.85/2, providing that the first court must order the action to be transferred to the proper court in which such an action be litigated. In order to secure the application of such legislative provision, the law further provides that:

The court to which transference order of action was made in application of Article 85/2, must observe such an order, unless this court is satisfied under the relevant circumstances that it absolutely lacks jurisdiction⁷⁰

⁶⁸ [FLCP] art. 85/2.

⁶⁹ Ahmed Sedqi, *supra* note 15, at 237.

⁷⁰ [FLCP] art. 89/3.

The law also provides that where similar, or substantially similar, actions are pending before two courts, a party to such actions may request the court before which the second proceedings is brought, to transfer the action to the first court.⁷¹ Such a mechanism is meant to unite the two rights of action in one court for the purpose of avoiding multiplicity of actions where the same parties and subject matter are to be dealt with and to effect in one court a complete determination of the action.⁷²

Further, the court may order transference of action based on a valid agreement of choice of forum.⁷³ Under such an agreement, the party must be held to his/her bargain in litigating the dispute to a specifically designated forum whenever the law recognizes such an agreement. The law provides that "where there is a valid agreement between the parties to litigate their dispute in a specific court, the court seizing the proceedings may order the action to be transferred to such designated court".⁷⁴

In all cases, where such an order has sufficient grounds, the court to which the action is remitted must proceed with the action in the same condition whereby it has been referred.⁷⁵ Thus, the proceedings taken prior to such an order remain valid and where certain formalities have been started prior to the order of transference, they may be completed before the court to which reference has been made⁷⁶.

⁷¹ FLCP] art 87.

⁷² Ahmed Sedqi, *supra* note 15, at 240.

⁷³ FLCP] art. 86.

⁷⁴ [FLCP] art.86.

⁷⁵ Ahmed Sedqi, *supra* note 15, at 238.

Finally, it has to be understood that the court to which the action is transferred is not bound by such an order, except to the extent of the specific ground upon which the order is based.⁷⁷ For instance, if the *etehadeyyah partial court* in *Ajman* transfers the action to the *partial court* in *Abu Dhabi*, based on non-compliance with the *ekhtesas mahally* rule, the order of transference here could not prevent the later from dismissing the action based on different grounds.⁷⁸ Even though the order might bind the court to which the case is referred, such an order is nonetheless not binding upon the litigants themselves. Any party may raise an objection to jurisdiction before the court seizing the subsequent proceedings, insofar as such an objection is presented according to the prescribed formality.

⁷⁶ For example, if a certain question has been referred for investigation, or a technical opinion of an expert has been requested, such orders shall remain valid. Thus, the court to which the case has been transferred must complete these formalities as required per the previous court orders.

⁷⁷ Ahmed Sedqi, *supra* note 15 at 239.

⁷⁸ For instance, in cases where the court declines the exercise of jurisdiction based on previous judgment operating as *hojeyyah* (*Res Judicata*).

PART II

**THE LAW OF PERSONAL JURISDICTION IN THE AMERICAN
LEGAL SYSTEM**

CHAPTER I
THE COCEPT OF "*JURISDICTION*": ITS MEANINGS, SCOPES, AND
FOUNDATIONS

Introduction

Understanding any legal concept depends first and foremost on an understanding of the rules underlying this concept within specific framework. In general, the English term *jurisdiction* often associates with authority. In this sense, *jurisdiction* as a concept has a political implication derived mainly from the traditional division of sovereign state's powers, namely, legislative, executive and judiciary.

States' authority to enact rules of general application governing conduct, relation, status or interest of persons', whether by legislation, executive order or administrative rule or regulation, is referred to collectively as *jurisdiction to prescribe*. By contrast, *jurisdiction to enforce* describes the dimension of state's authority to compel compliance or impose sanction for noncompliance with its administrative or judicial order. The state also has *judicial jurisdiction*, a dimension of one state's authority to subject persons or thing to the process of its courts or administrative tribunal¹.

Proper understanding of any legal system requires a precise knowledge of the basis on which the system is founded, as well as the standards governing the scope and

¹ Restatement (Third) of the Foreign Relations of the U.S § 401 cmt. a (1987).

limits of its operation. Studying and analyzing a federal legal system as complicated and massive as that of the United States, however becomes more challenging.¹

The political structure of the United States contains a number of political units-states-that enjoyed some degree of independence,²even before the federal government existed.³ The states' judicial systems pre-dated the creation of the federal judicial system of the United States.

Therefore, the establishment of a federal judicial system alongside the existing states' systems required delineation of the framework of power of this new system by drawing clear lines for the tasks undertaken by each of the parallel judicial systems.⁴ Indeed, without providing such a clear construction, no court would be able to exercise appropriate and well-founded authority, and each court could conceivably hear every case brought, which would lead to confusing and contradictory results.

The Federal judiciary is established under Article III of the United States Constitution. The article defines the tasks of the federal courts.⁵ In this context, the establishment of federal jurisdiction to adjudicate does not, by itself, provide a conclusive definition that fits all applications of the concept. In general, courts must have the power

¹ See e.g., William Burnham, *Introduction to the law and legal system of the United States* 1-28 (2nd ed., West 1999).

² United States federation consists of 50 states.

³ The United States federal government was established after the ratification of the United States Federal Constitution in Philadelphia 1776.

⁴ See generally William Burnham, *supra* note 2, at 1-28.

⁵ The federal jurisdiction is a direct result of Article III of the U.S. Constitution.

to hear and determine disputes is conferred in clear and precise statements that describe the nature, limits, types, and scope of judicial power. Thus, the various meanings of the word *jurisdiction* with respect to judicial competence first must be determined to correctly identify the various dimensions and implications of the term.

The Meanings of the Term *Jurisdiction*

The Linguistic Meaning

The word *jurisdiction* is *Latin* and consists of two parts: *Juris* and *diction*. A dictionary defines it as the power, right or authority. It also means exercising authority or the limits within which authority may be exercised⁶. The linguistic meaning of the term *jurisdiction* tends to indicate link with the exercise of authority. However the linguistic definitions are general and would only be satisfactory in the abstract. In fact, linguistic definitions do not include all refinements of the use of the term. Apparently, linguistic meaning is not comprehensive because the word *jurisdiction* is never employed in the abstract, but always with reference to various specific relationships. Consequently, the term has come to have different meanings even within the same context, depending on the connection in which it is used.

The Technical Meaning

A dictionary of legal terms provides more precise meanings of the word and its judicial-related applications. Some of which were derived from judicial decisions that address the various dimensions of jurisdiction as a legal concept. According to *Black's*

⁶ Black's Law Dictionary, 853-854 (6th ed. West. 1990).

Law Dictionary, jurisdiction is a “term of comprehensive import embracing every kind of judicial action”.⁷ The term signifies the power of the court to decide a matter in controversy and presuppose the existence a duly constituted court with control over the subject matter and the parties.⁸

The above definitions attempt to lay down a precise framework within which the term 'jurisdiction' is to be understood. Note that all technical definitions of the term have a common element, namely, the legal authority to exercise duties of judicial nature. Thus, the term technically means 'the authority to adjudicate', or, as it is normally referred to, the 'jurisdiction to adjudicate', signifying the state's authority to subject persons or things to the process of its courts.

The Precise Meanings of Jurisdiction

[Personal Perspective]

Adjudicative power (jurisdiction to adjudicate) can be classified according to the nature and content of disputes to be dealt with by a certain judicial authority. The distinction that signifies the scope of adjudicative power in terms of dispute's content or type may refer to as *subject matter-jurisdiction*. On the other hand, any distinction that refers to the standards employed to determine *who* may be subjected to the adjudicative authority of certain court, is known as personal jurisdiction, which may also be defined as the power conferred upon specific tribunal to adjudicate the personal interests, rights or obligations of individuals.

⁷ Black's Law Dictionary, *supra* note 7, at 853. (quoting *Federal Land Bank of Louisville, KY.v. Crombie*, 258 KY. 383, 80 S.W. 2d 39-40).

⁸ See list of definition provided in Black's Law Dictionary, *supra* note 7 at 853-54.

Under the first type, courts of all types can be distinguished according to their specific functional or qualitative limitation. The jurisdiction or the specific courts' adjudicative power may be classified as being general⁹, limited¹⁰, exclusive¹¹, concurrent¹², original¹³, appellate¹⁴, civil¹⁵, criminal¹⁶ etc.

The second type (personal jurisdiction) which refers to the standards and criteria that establish the courts' power over the persons is entirely distinct as a body of law in the U.S. legal system. Indeed, the law of personal jurisdiction is distinguished body within the procedural framework.

The Various Dimensions of the Concept

As we have surveyed in the previous section the various meanings of the term jurisdiction, a reader will be able to identify the different phases of adjudicative power. In fact, such power comprises three distinct dimensions; each of which embodies a distinct legal framework within it must be studied and analyzed. The first of these dimensions is the one known as *subject-matter jurisdiction*, which refers to court's authority to

⁹ General jurisdiction refers to courts power that extends to all type of dispute.

¹⁰ Courts power that is confined to certain types of legal action also referred to as the exercise of judicial power under certain limitations and conditions prescribed by the law.

¹¹ Exclusive jurisdiction is the adjudicative authority confined to a particular court.

¹² Concurrent jurisdiction occurs when more than one court may exercise the judicial power over the same action within the same forum.

¹³ The initial exercise of judicial authority or first instance jurisdiction.

¹⁴ The authority conferred upon a higher tribunal or court to review the determination of inferior courts or tribunals.

¹⁵ Adjudicative power over actions of civil nature.

¹⁶ Adjudicative power over actions of criminal nature.

entertain the subject of the dispute. Under the United States Federal Judicial System, identifying the boundaries of the subject matter jurisdiction of federal district courts is a matter of legislative determination.

Subject-Matter Jurisdiction of Federal District Courts¹⁷

Federal Question Jurisdiction:

The subject matter-jurisdiction of federal courts refers to the type of actions that might be heard in the US federal courts. The legislative authority of the United States of America (U.S. Congress) has specified that federal courts have jurisdiction "over all civil actions arising under the Constitution, laws, or treaties of the United States"¹⁸. Thus federal courts only exercise jurisdiction conferred upon these courts by the United States Constitution and federal laws.¹⁹ Due to its nature, such adjudicative authority is limited, unlike states courts, which under general jurisdiction can try a wide range of civil actions. The jurisdiction conferred to federal courts under this Constitutional provision is known as *federal question jurisdiction*.

Diversity Jurisdiction

The other type of federal courts subject-matter jurisdiction is *diversity jurisdiction*²⁰. In diversity actions, the subject matter jurisdiction of federal courts is shaped by who the parties to the action are, rather than the content of the underlying

¹⁷ Subject matter jurisdiction is a huge body of rules and related principles, the section is dictated to provide illustrative information about the general aspects of the subject.

¹⁸ 28 U.S.C.A. § 1331.

¹⁹ U.S. Const. Article III § 2.

²⁰ 28 U.S.C.A. § 1332.

dispute.²¹ In satisfying the requirement of diversity jurisdiction the actions brought must originate between parties of different states or countries²², and the contested amount involved in the action must exceed \$ 75,000.²³

Supplemental Jurisdiction

This form of subject-matter jurisdiction balances considerations of public policy and the proper administration of justice.²⁴ Under 28 U.S.C.A. § 1367, federal courts can hear a claim that would normally come under the jurisdiction of a state court in order to allow a complete disposal of all claims between opposing parties in one forum²⁵. In order for a federal court to entertain the state law counts, "there must already exist at least one count that can satisfy federal subject-matter jurisdiction"²⁶. Nonetheless, supplemental jurisdiction is discretionary. The federal court may deny the exercise of supplemental jurisdiction over the state count that qualifies for supplemental jurisdiction.²⁷

²¹ The subject-matter jurisdiction of federal district court is exclusive in nature which means that state courts are not authorized to try the action that falls under the exclusive federal court adjudicative authority.

²² Steven Baiker-McKee, William M. Janssen & John B. Corr, *Student's Guide to the Rules of Civil Procedure*, 22 (West, 2nd ed. 1999).

²³ For further details in the subject refer to *id.* at 18-24.

²⁴ "...[T]he plaintiff in a situation such as this might theoretically have to prosecute two separate suits, one in federal court and the other in state court, and incur all the extra expenditures in time and money such suits would entail for both the parties and the taxpayers. Supplemental jurisdiction is intended to reduce such diseconomies, and at the same time limit damage to federalism by limiting the circumstances in which nondiverse state claims may be prosecuted in federal district court". *Id.* at 24-25.

²⁵ The statutory basis of this form became effective in December 1990 prior to that date the supplemental jurisdiction was governed by case law and the doctrines governing that area of law were known as ancillary and pendent jurisdiction. *See id.* at 25.

²⁶ *Id.* at 25.

Personal Jurisdiction

In the most basic level, personal jurisdiction²⁸ refers to court's adjudicative authority over the parties of a legal action²⁹. This concept is of paramount significance in the American legal system for various reasons. Some of these reasons pertain to the constitutional structure of the United States and some of which are direct consequences of the geographic expansion of the federal boundaries, and the need to achieve a fair and balanced judicial process.

However, the development of this area of law has been for a long time the product of court's decisions which are fundamentally founded on constitutional considerations. Such considerations are considered the central element of the law of personal jurisdiction. By virtue of its nature, personal jurisdiction law in the United States is a dynamic body of rules that reflect and correspond to social, economic and even political considerations³⁰. Unlike the law of subject-matter jurisdiction in the federal district courts, which is mainly statutory law, the law of personal jurisdiction is a clear indicator of the common law origin of the U.S. legal system.³¹ Nonetheless, statutory rules of different sources also contribute to the overall framework of personal jurisdiction.

A proper understanding of this body of law in the U.S legal system requires the reader's familiarity with the basic features and characteristics of the American legal

²⁷ The circumstances under which the federal court may deny the exercise of supplemental jurisdiction are provided under 28 U.S.C.A. § 1367 (c).

²⁸ This dimension of adjudicative power is also known as *in personam* jurisdiction.

²⁹ See e.g.; Black's Law Dictionary, *supra* note 7, at 854.

³⁰ In the next two chapters of this thesis, the reader will be able to identify the adaptable nature of the rules to the various changes that requires a corresponding flexible structure.

³¹ See generally, Grant Gilmore, *The Ages of American Law* (Yale University Press. 1977).

system.³² In order to achieve this goal, the reader should keep in mind that personal jurisdiction in the U.S. is a common law in nature as compared to statutory or legislative based rules.³³

The Nature of the US Legal System and Its Impact Over the Relevant Jurisdictional Analysis³⁴

In order to achieve proper understanding of the nature and operation of this huge body of rules that form the law of personal jurisdiction in the US legal system, a foreign lawyer who is not trained in a common law culture must acquire familiarity with the general aspects of the common law tradition.³⁵ The importance of such exposure is that it assures reader's comprehension of the nature, sources and norms of the legal reasoning involved in judicial context.

In fact, legal analysis and reasoning in traditional common law system differs significantly from the ordinary legal analysis under traditional civil law system. Such a difference may cause a degree of confusion when addressing specific legal concepts from a comparative perspective. Reader of civil law tradition should keep in mind that under common law system, law is viewed as an evolving body of doctrines and legal principles determined by judges on the basis of cases which they decide. Therefore, not only do

³² See generally, Jane C. Ginsburg, *Legal Methods: Cases and materials* (Foundation Press, 1996).

³³ In its essence, the legal framework of personal jurisdiction is a combination of federal, state, and international rules, all of which contributes to the operation of the system as a whole.

³⁴ A system of law that had its roots in the old English law which is founded primarily on legal principles derived from courts decisions rather than an expressed written form

³⁵ For the origin and development of American common law system, See e.g., Lawrence M Friedman, *A History of American Law* (Simon & Schuster, 2nd ed. 1985).

courts' rulings represent solutions to questions under examination, but also lay down legal principles that should be referred to in solving subsequent like disputes. Such form of legality is the distinctive feature of that system, under which, decision of one action is a potential law governing the outcome of subsequent actions.³⁶

Nonetheless, a legal rule derived from a judicial decision (*case law*),³⁷ as a source of authority and substance of legal reasoning, could occupy different levels in the hierarchal legal structure of one particular common law system. Such variation could be ascribed for example to the hierarchal level of the particular tribunal rendering the decision. Therefore, identifying the nature and the type of authority concluded from one judgment to measure the probable effect that such judgment could have over the subsequent dispute is essential ingredients of the legal analysis under such model.

The sources of Jurisdictional Analysis in the United States Judicial System³⁸

Among the various subjects where common law principles play a significant role, common law principles and doctrines shapes the legal framework of personal jurisdiction in the United States. Nonetheless this framework in essence is a mixture of rules and principles derived from different sources that altogether form, the foundation of jurisdictional analysis in particular factual setting. The interaction among these various sources presupposes the adoption of a collective legal analysis that adapts to the particular situation within which the jurisdictional inquiry arises.

³⁶ Jane C. Ginsburg, *supra* note 34, at 1-5.

³⁷ William Burnham, *supra* note 2, at 37.

³⁸ Special consideration is given to the major difference in the legal analysis between the civil and the common law worlds.

In its essence, the jurisdictional inquiry pertaining to determination of personal jurisdiction in the US legal system requires fitting together various applicable principles and rules in a form of interlinking analysis, which by itself gives the subject a degree of complexity not typical for a civil law trained lawyer who would typically addresses the inquiry through referring to the respective code to which the question relates.

Courts in the United States have succeeded in constitutionalizing the concept of personal jurisdiction through the development of a huge body of case law that addresses the various aspect of the subject. Most notably decisions of the United States Supreme Court as the highest judicial institution in the US, such decisions constitute precedents in the subject that have to be followed and respected as a binding law by other courts in the United States. In fact, the court's decisions laid down principles and standards for the exercise of adjudicative power in the United States.

A reader should bear in mind that the development of the law of personal jurisdiction in the United States had undergone a long history reflecting various changes and considerations which results in such a unique and dynamic legal structure that distinguishes American legal jurisprudence than any other legal culture.

The following section is provided as background information dedicated to the various sources of the rules and principles involved in an ordinary judicial analysis addressing questions of personal jurisdiction, for which the relevant legal analysis may involve utilizing different set of rules derived from different sources.³⁹

³⁹ The governing rules and its relevant legal analysis, may differ according to the specific context in which the rules are applicable. In general, personal jurisdiction analysis may involve evaluation of some of these rules depending on the specific facts of the case.

The United States Constitution

The United States Constitution is the most fundamental written law in the United States. Its provisions are superior to any other recognizable form of law including international treaties to which the United States may be a party.⁴⁰ Constitutional supremacy in the United States is the center of any legal debate pertaining to various forms of governmental action. In order to secure the implementation of any obligation imposed by the Constitutional terms, a form of review must be available. Hence, American courts had realized the importance of secured the application of Constitutional provisions through determining whether the acts of all branches of government and government officials comply with the Constitution.

Under the United States legal system, judicial review is the basic institution by which the Constitution has become the supreme law of the land through securing the proper implementation of its provision. This means that any law violates the Constitution, or any official conduct that conflicts with it, can be challenged and struck down by the courts.

Within the Constitution of the United States, several phrases are considered the foundation of legal procedures. Their interpretations and application by courts has been always considered the corner stone of procedural law. These two constitutional phrases are known by due process clauses of both the 5th and 14th amendments to the United States Constitution and refer to the fairness of legal proceedings in legal settings.⁴¹

⁴⁰ The United States Supreme Court in 1803 interpreted *constitutional supremacy* to mean that any conflict between the Constitution and other forms of law can be challenged and struck down by the courts. *Marbury v. Madison*, 5 U.S. 137 (1803).

The Fifth Amendment to the U.S. Constitution reads:

No person shall be held to answer for capital , or otherwise infamous crime, unless on a present or indictment of a Grand jury, except in cases arising in the land or naval forces , or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be to be witness against himself, nor be deprived of life; liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.⁴²

The Fourteenth Amendment to the U.S. constitution reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁴³

The constitutional statement that no person may be "deprived of life, property or liberty without due process of law" that is expressed twice under both the 5th and the 14th amendments, is recognized to have a procedural aspect known as procedural due process when compared to the other statements' dimension known as substantive due process.⁴⁴

In their procedural aspects both constitutional provisions have been interpreted to impose affirmative obligations upon the governmental body in the exercise of any form

⁴¹ Constitutional amendments are constitutional enactments that were adopted subsequent to the adoption of the original constitutional document. They form part of the United States Constitution.

⁴² U.S. Const. amend. V.

⁴³ U.S. Const. amend. XIV.

⁴⁴ Peter Strauss, *An introduction to the administrative justice in the United States*. 33-49(Carolina Academic Press.1989).

of official authority. In fact, they are considered the "source of all fundamental claims about fair procedure"⁴⁵ in the American legal system. Nonetheless, one must have in mind that the reference in the 5th Amendment applies only to the federal government and its courts and agencies where the reference in the 14th Amendment is applicable to all state governments, agencies, and courts. Such

Procedurally speaking, one's right asserted under both clauses has a collary reflection that is the obligation imposed over the concerned governmental body to provide a fair and justifiable procedure in connection with its action affecting person's life, property and liberty. Such interaction founded mainly on considerations of constitutional nature is distinguished feature of the procedural law in general and the law of personal jurisdiction in particular.

Procedural *due process* of both the Fifth and Fourteenth amendments to the US constitution plays the most significant role in shaping aspects of American procedural law and the adjudicatory process in the United States courts. This fact explains the nature of jurisdictional inquiry in the US courts. Essentially such inquiry is addressed in light of the governing constitutional principles that are directly the center of constitutional due process. In sum due process is the central element of the law of personal jurisdiction on both state and federal courts level⁴⁶. In the sense that a court may not exercise its adjudicatory power over an individual unless such exercise is permitted by due process.

⁴⁵ *Id.* at 33.

⁴⁶ The reference in the 5th Amendment applies only to the federal government and its courts and agencies. The reference in the 14th Amendment extends protection of due process to all state governments, agencies, and courts.

The due process clause of both the 5th and 14th amendment govern the adjudicative process in two procedural aspects; the first is reflected in a general requirement that in order for a court to exercise form of adjudicative over a person such person must have the sufficient contact with the concerned forum that justifies the exercise of jurisdiction, in that sense where the maintenance of action against the person in such forum does not offend "traditional notion of fair play and substantial justice"⁴⁷.

The other procedural aspect of constitutional nature derived mainly from due process clause is the right to be heard. A procedural due process right entitles "an opportunity to be heard....at a meaningful time and a meaningful place."⁴⁸ In implementing such right, courts are not remaking substantive policy, but rather supervising procedures through which laws are enforced on individuals.

Therefore, a distinction has to be clearly made between such right to be heard as a fundamental procedural aspect of due process and the right to prevail. The individual's entitlement of the first is Constitutional in nature where for the second, is collective analysis that depends on the particular circumstances involved. In all cases, such guarantee subjects the validity of the court's exercise of jurisdiction to providing proper notification to the concerned defendant.⁴⁹ Thus, failure to comply with the due process requirement of proper notice results in improper exercise of jurisdiction over the person of the defendant.

⁴⁷ *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct 2569,53 L.Ed.2d 683 (1977); *International Shoe Co.v. Washington*,326 U.S.310, 66 S.Ct. 154,90 L.Ed.95 (1945).

⁴⁸ *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

⁴⁹ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct.652, 94 L.Ed 865(1950); *Fuentes v. Shevin* , 407 U.S. 67,92 S.Ct 1983,32 L.Ed.2d 556 (1972).

Relevant Enactments

Rules of all types in written forms whether federal or state other than those derived from the federal Constitutional document which include states constitutional rules, federal and states' rules and enactments in a written nature which are made reference in the adjudicative process of one court in connection with the examination of the jurisdictional inquiry before such court.

The example of such rules would be the Federal Rules of Civil Procedure. Insofar as their relevancy to the jurisdictional inquiry is reflected in the part of the rules that address the service of process in United States Federal courts. Such rules are the product of the United States judicial conference and approved by the United States Congress. These rules govern the procedure in all actions of civil nature filed in the federal courts.⁵⁰ The rules regulate various procedural aspects of civil actions; among which the rules pertaining to the service of process and objections to jurisdiction⁵¹. On state level, similar rules are applicable on states-based litigations. Likely each state has its own internal rules similar or substantially similar to the Federal Rules of Civil Procedure.

Particular emphasis is given to individual state's enactments known by long-arm statutes⁵². These enactments are furnished by states' legislative authority to set standards of their courts' adjudicative power in all actions involving non local elements (either parties or events)

⁵⁰ Fed. R. Civ .P.1.

⁵¹ For example, Fed. R. Civ.P.12 (b) (2)- regulates objections to jurisdiction over the defendant.

⁵² In chapter 3, a detailed treatment of the subject is provided.

International Law Standards

In any given situation, the exercise of adjudicative power by a court though is governed by the court's own legal and constitutional frameworks must also comply with the general requirements of international legal order. Such requirements impose certain restrictions on the extent to which a judicial authority of one state (in international context) may be exercised. The restrictions imposed by the international law are premised on comity and the sovereign equality of nations.

In the United States the Supreme Court has frequently acknowledged such International law standards and its applicability though indirectly. The acknowledgment of such universal standards synchronized the formation of the early stages of the contemporary law of personal jurisdiction in the United States. For example, in the landmark case *Pennoyer v. Neff* (1877) the Supreme Court emphasized the importance of the concept of territoriality as the foundation principle governing the exercise of one state's adjudicative authority.⁵³

The Supreme Court in that case even though was addressing an internal issue, but it stressed the significance of territorial authority to adjudicate among various states within the United States. For long time, territoriality has been recognized as a universal principle of international law which confines one sovereign adjudicative authority in territorial terms. The principle is also applicable in any litigation with a foreign element, especially in federal states like the United States where the application of such principle has a broader application. The court provides:

⁵³ *Pennoyer v. Neff* 95 U.S. 714 (1877).

[p]rinciple of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, in illegitimate assumption of power, and be resisted as mere abuse.⁵⁴

The Court added that "no state can exercise direct jurisdiction and authority over persons or property without its territory"⁵⁵. Further the Court illustrated the applicability of the concept among various states in litigations involved residents of different states, providing that:

The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists as an elementary principle that the laws of one State have no operation outside of its territory except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.⁵⁶

In general, principles of international law require that national courts (in this context US courts as a whole) may not take actions that might violate other nation's laws or interests. In fact, American courts continue to give due recognition to the universal standards of international law emphasizing that the exercise of jurisdiction is subject to limitations reflecting principles of international law. In application of these principles The United States Supreme Court in a relatively recent judgment held:

The procedural and substantive policies of other nations whose interests are affected by the forum State's assertion of jurisdiction over an alien defendant must be taken into account, and great care must be exercised when considering personal jurisdiction in the international context. Although other nations'

⁵⁴ *Pennoyer v. Neff* 95 U.S. 714, 721(1877)

⁵⁵ *Id.* at 732.

⁵⁶ *Id.* at 723.

interests will differ from case to case, those interests, as well as the Federal Government's interest in its foreign relations policies, will always be best served by a careful inquiry into the reasonableness of the particular assertion of jurisdiction, and an unwillingness to find an alien defendant's serious burdens outweighed where, as here, the interests of the plaintiff and the forum State are minimal.⁵⁷

⁵⁷ *Asahi Metal Industry Co v. Superior Court* 480 U.S. 102, 115 (1987).

CHAPTER II

GENERAL BASIS OF JURISDICTION (TERRITORIALITY)¹

Introduction to the Operational Mechanism of Territoriality and State's Courts Competence (Nature- Origin):

Territoriality in International Context

Under the principles of international law, state's territory is the recognizable space within which a state may exercise its sovereignty, ordinarily exclusive in nature. Thus, one state's territory is the object of international law considerations in determining the scope of certain state's exercise of its sovereign powers.² In this regard all state's authorities must be exercised within such limits. The direct consequence of such formulation is that adjudicative power like other sovereign powers is only recognized once confined in territorial terms.

The other consequence is that other sovereigns must respect the different dimensions of other state's sovereignty in terms that, no other state may exercise any form of power within the territorial limits of other state.³ As the primary basis for

¹ Emphasis is given to the western approach of the different aspects of territoriality especially those developed under contemporary common law systems.

² The last long established principle of international law *territoriality* provides that a state enjoys jurisdiction within its territory, and that other states must respect the jurisdictional competence of one state within its territory. For more details see Robert Jennings, Arthur Watts. *Oppenheim's International Law* (9th ed. 1992).

³ Exceptions might be permitted under international customary law or special forms of international convention, which could restrict or modify the principle's traditional implications.

jurisdiction, other state's claims for jurisdiction is limited in all cases where the other state could have concurrent jurisdiction, in favor of that having territorial jurisdiction.¹ The primary consideration underlying such formulation is that state's ability to enforce its jurisdiction is limited to state's territory thus, territoriality is to prevail over other basis.

Territoriality and Federalism (the American Concept)

In the United States as a federation the application of territoriality as the primary basis of jurisdiction has been shaped to conform to the federal structure of the state (United States). In fact, the American model of territoriality's application is rooted in the need to facilitate the achievement of balance between competing sovereignties. Such balance is to be first approached by drawing clear lines between what falls and what doesn't within one state adjudicative authority comparing to others.

Considerations of individual state's sovereignty are noticeable under the American law of personal jurisdiction. In fact, state's sovereign powers can only be exercised within the recognized territorial limits of the concerned state. Accordingly, the state may not exercise any adjudicative activities in any form in a territory of another state. In its most basic level, the principle defines the scope of sovereign powers and authorities enjoyed by a single American state in territorial terms. In this sense the exercise of judicial power as a phase of one state's sovereignty is fundamentally territorial.

¹ For example, occasions where the other state's jurisdiction is founded solely on defendant's nationality.

In general, territoriality is the basic standard under which a state's exercise of power is studied and analyzed². The principle exhibits a form of sovereignty as single important element governing relations among states under the US Constitution. The standard operation of territoriality requires a state not to overstep the limits of sovereignty reserved to the concerned states under the Constitution.

Therefore, the strict view of territoriality contemplates that one state's courts cannot exercise jurisdiction to adjudicate matters unless the litigant(s), or the property in dispute is physically situated in the forum where the action is to be brought. The material presence of litigant(s) or the substance of the dispute in the territorial limits of a given state is the traditional pre requisite condition for the exercise of judicial jurisdiction. Such material connection between the state and the action is seen as an essential element for providing an effective disposal of the controversy since such connection allows the state to enforce its jurisdiction over the present litigant(s) or taking appropriate measure in the forms of seizure or attachment to the property concerned.

The Rationale Behind the Operation of Territoriality

Beside the fact that territoriality forms the primary basis for the one system's authority to adjudicate (judicial jurisdiction), it also plays a significant role in federal systems in particular through the establishing an accepted standard of order through which each state member of the federal community would be able to identify the limits of

² Changes had occurred to the traditional operation of territoriality (being the material form of sovereignty). International comity and the adoption of common policies among nations in the form of international treaties had significantly contributed to the modification of territoriality operation in contemporary world.

its authority, especially with a federation like the United States where considerations of state sovereignty is fundamental.

From the stand point of United States federal Constitution, the jurisdictional competence of a state is primarily territorial. While in fact does not exclude a state's exercise of extraterritorial jurisdiction exceptionally by virtue of a permissive constitutional standard (minimum contact) is as a general rule defined and limited by the sovereign territorial rights of the other states.

As a mater of principle, deviation from territoriality in favor of other basis has been admitted exceptionally to a very limited extent only insofar as the exceptions can be justified by an accepted construction³. All that can be required of a state is that it should not overstep the limits which the United States constitution places upon its jurisdiction; within these limits; its title to exercise jurisdiction rests in its sovereignty⁴.

The Significance of the Principle's Applications

The most significant practical result achieved by the adherence to the principle's application is that it sets forth a generally accepted uniform standard defining the limits of one legal system's adjudicative power. It draws a line between when a given judicial system has the competence to entertain the certain matters and when it should decline it. Essentially, the courts need powers to enforce its jurisdiction, in other words, that is to say beyond court's recognized limits such powers are absent and that the required

³ Generally speaking, there are no provision in the US Constitution of a prohibitive nature which might constitute an absolute obstacle to the deviation from the territorial principle in favor of other widely acceptable basis.

⁴ W. Michael Reisman, W.Laurence Craig, William Park & Jan Paulsson, *International Commercial Arbitrations ,Cases, Materials and Notes on the resolution of international business disputes*, 4 (Foundation Press. 1997).

effective enforcement of judicial order is necessary for the proper carriage of justice and maintenance of order in any given judicial structure.

It might be reasonable to say that, judicial comity requires restraint, based on mutual respect not only for the integrity of one another's jurisdictional limits, but also for one another's procedural and substantive laws. In this sense, comity involves respect for the states courts' jurisdiction and process. A court which is invited to exercise its jurisdiction that plainly violates the territorial limits of territorial jurisdiction (in broader sense) need feel no reluctance in supplying a want of territorial jurisdiction for which the other court would have acted.

In other words, the considerations of territorial competence in cross borders' disputes, gives rise to the need to draw specific lines between various available forums. Such clear limits would, in one hand, prevent the forum shopping and give individuals fair warning that a particular activity may subject them to the jurisdiction of other sovereign. Such approach would make it possible to ensure security of transactions with justice.

In addition to that, potential conflict of jurisdiction which might give rise enforcement's complications required the application of generally acceptable standard that of convenience and order. Thus, principle of territoriality is the only basis that has the needed justifiable function in forming the ultimate source of jurisdiction.

International Standards of Territorial Jurisdiction: Territorial Competence Based on Direct Links Between the Action and the Forum

Domicile-based Jurisdiction

Domicile is the most common recognizable connecting factor, which as a legal concept has been always seen as a concept of considerable importance in many areas of law⁵. The notion of domicile had its roots back to the old *Roman* law, under which the person is subject to the law of Rome based on person's status⁶. Under most contemporary legal systems the concept has considerable recognition as a factor that connects particular person with certain legal system. In a legal context domicile is a link that justifies the application of law to that person in specific context.⁷

Generally speaking, the domicile of a person is the place where the person intends to reside permanently. In almost every contemporary legal system individuals must have kind of status which will determine their capacities and the fitness to form actions of recognizable legal effects under certain legal framework or system of rules. Such status which is founded on considerations of legal necessity, that in fact, individuals are entitled to certain benefits and protection under one legal framework of sovereign state (regardless of the nature or extent of such benefits or form of protections), thus in order to implement such fundamental obligation on the part of the sovereign, a link must be established between the particular individual with the particular system of law, so the person's rights and obligations under such a system may be clearly determined.

⁵ See Generally Albert V. Dicey, John H.C. Morris, *The Conflict of Laws*, (10th ed. 1980).

⁶ Catholic Encyclopedia, Section on Domicile, available at <<http://www.newadvent.org/cathen/05103b.htm>> (last visited Aug. 10, 2005).

⁷ Domicile is the fundamental connecting factor that commands support in the laws of a number of countries, primarily those where the common law prevails.

One of such grounds of that is based on close link between one judicial system and particular action is the status of domicile. The notion of domicile has a wide acceptance and recognition as a connecting factor. In most International treaties addressing jurisdiction and enforcement of judgment, the concept of domicile is likely to be recognized. For example, the Supplementary Protocol to The Hague Convention on the Recognition and Enforcement of Foreign Judgment in Civil and Commercial matters⁸ provides:

This Protocol shall apply to all foreign decisions, regardless of their State of origin, rendered in matters to which the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters extends, and directed against a person having his domicile or habitual residence in a Contracting State.⁹

The protocol also provides among other basis, the grounds of jurisdiction referred to in the first paragraph of Article 2 of the Protocol, stating that:

The domicile, habitual residence or ordinary residence of the plaintiff within the territory of the State of origin unless the assumption of jurisdiction on such a ground is permitted by way of an exception made on account of the particular subject-matter of a class of contracts.¹⁰

⁸ Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters , *opened for signature* Feb. 1, 1971, 1144 UNTS 271, [hereinafter Hague Convention of Private International Law], art.1. There are currently 49 members of the Hague Conference. They include; Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Republic of Korea, Latvia, Luxembourg, Malta, Mexico, Monaco, Morocco, Netherlands, Norway, Peru, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Venezuela.

⁹ [Hague Convention of Private International Law], art.1

¹⁰ *Id.* art 4 (c).

The notion of domicile has a wide recognition as a connecting factor in many contemporary legal frameworks.¹¹ In the United States, domicile is recognizable connecting factor that "alone is basis for exercising jurisdiction over' an absent domiciliary.¹² Therefore, a person can always be sued for all claims regardless of where they arise, in the state of permanent residence.¹³

Before one can be said *domicile* at a particular place for purposes of judicial jurisdiction, the person's presence in that place must qualify the meaning of domicile in accordance with the law of that place. In general, such meanings might not typically conform other meanings under different a legal system which makes such a determination quite difficult matter to establish. In addition, the notion of domicile as a connecting factor could be expressed in varying terms and related to different legal contexts (e.g., rules relating to domicile of dependency, domicile of origin or domicile of married woman).¹⁴

Nonetheless, the notion is widely understood that a person domiciliary is determined in certain area where the presence is coupled with the intention to have the place a permanent place of abode, even though a difficulty can spring form the uncertainty of determining one person's intention to the available facts involved.

¹¹ See e.g., Nouveau code de procedure civile [N.C.P.C.] art.43. (Fr.) see also, Minji soshoho (Code of Civil Procedure) [MINSOHO], art. 4. (Japan).

¹² See e.g., *Millikin v. Mayor* 311 U.S. 475,61 S.Ct.339,85 L.Ed.2789(1940).

¹³ In the case of corporations (legal corporate person), its domicile is the state in which it is incorporated.

¹⁴ Differences may occur as a result of applying various factors constituting domicile under different legal constructions. For example, in number of jurisdiction, a person could have a single domicile at certain time. In some other jurisdictions, duality of domicile is recognized e.g., the UAE legal system. For more information see Part I, Chapter II.

The difficulties resulting from expressing the idea of domicile in different ways may cause practical complications which in practice legislators and judges may wish to overcome, but they simply cannot of themselves do so since they have no control over the approach to be taken in other jurisdiction¹⁵. Nonetheless, being ordinarily dependent on the presence of persons or assets within their territorial limits, judicial competence of one particular legal system might be established on other connecting factors other than domicile.

Habitual residence, place of residence and residency are terms often used to signify the status of individual presence in the forum which may not qualify the meaning of domicile and its legal implication, but they still constitute alternative grounds of jurisdiction that are based on close link between courts of one particular system and particular legal action.

Residence-based Jurisdiction

Habitual residence, residency or place of residence as the notion may be expressed under various legal system is being adopted as a connecting factor in many legal frameworks, since it is perceived as being free of the difficulties (intention, origin and dependency) associated with domicile. The notion of residence is now being increasingly used in International Conventions prepared by the Hague Conference, such as the Statute of the Hague Conference on Private International.¹⁶ In practice, residence

¹⁵ Difficulty is also noticed on national levels. In fact, even in the same jurisdiction, public knowledge of the basic technicality associated with the law of domicile is difficult to be achieved.

¹⁶ Statute of the Hague Conference on Private International Law, Oct. 31, 1951, 220 UNTS 121

constitutes a more satisfactory connecting factor than domicile it commands support in the laws of number of countries, constituting the most recognizable alternative to domicile as a connecting factor.

Generally speaking, the status of residency forms an acceptable link that connects persons to certain legal systems.¹⁷ In reference to determination of jurisdictional competence the notion gains its importance as a result of the fact that the establishment of domicile has been always associated with difficulties and are at variance with contemporary standards ,hence, residency became the proper alternative factor supplementing any deficiency or insufficiency of the facts based on which domicile is to be established¹⁸.

Variance occurs among legal frameworks in the legal tests adopted determining the status of residency. Nonetheless, the notion of residency has apparent clear advantages over the factor of domicile. The intention associated with the later though relevant in the case of residency but has a less controlling weight in the determination of residency¹⁹.

In most jurisdiction residence is the physical abiding in a particular place. Such physical presence must be accompanied by a clear indication of certain degree of continuity. In general, such a physical presence in a place is not sufficient factor by itself

¹⁷ See e.g. United Arab Emirates Federal Law of Civil and Commercial Procedure, law 11/1992 [hereinafter FLCP] art. 20 ; see also Egyptian Law of Civil and Commercial Procedure, law 25/1968.art. 29.

¹⁸ Any example of such difficulties most likely to relate e.g., to intention, origin, dependency..etc.

¹⁹ See generally, Awadallah Shaibah, *Conflict of Laws: Conflict of International Jurisdiction Under the United Arab Emirates Law*, 404-405 (Dubai Police Academy Press. 2001).

to constitute residency for purposes of granting jurisdiction²⁰. Normally any assumption of residence must be established against substantial supporting factual settings that justify such assumption.

A person is held to reside in a certain place where such a physical presence at the particular place is coupled with certain degree of stability and continuity. In this respect, the distinction between residency and domicile as previously explained relies on the factor of intention. Intention with regard to domicile must be clear and substantial denoting the indication of permanent nature of the stay, where in the case of residence the intention related to the physical presence in a particular place is not required to be permanent. The only required element for the stay to qualify the meaning of residency is to achieve certain degree of continuity.²¹

In sum, residence is not a simple question of mere physical bodily presence. Presence at certain time may not involve residence. Equally, physical absence is not inconsistent with residence. If a person is physically absent at the critical date, having been at some previous time resident at the place, the inquiry must be directed to ascertaining whether the person has at the critical date ceased to be relevantly resident at that particular place.

In practice, the determination of residence involves less complication than domicile. Even though habitual residence may have some drawbacks; but it provides a

²⁰ *Id.* at 405.

²¹ Such determination must be founded on a clear showing of the person's intention. In fact, the intention would determine the nature and quality of the stay. Generally speaking, occasional stay for short period of time for purposes of tourism, medication does not generally qualify the meaning of residency. Exception is given to the American approach where the law recognizes the validity of jurisdiction on the bases of personal service of process within the forum.

more appropriate and simpler solution in most cases and is in harmony with trends in the private international law of many jurisdictions.²² Significant practical importance has been noticed by the formers of various international treaties regulating the adjudicatory authority which rely on the concept of residence rather than domicile²³.

Territorial Service of Process

Territorial service of process is recognized as a connecting factor under several international treaties. Nonetheless, it is, however, important to note that “mere presence” in one forum does not constitute a basis on which its courts may exercise jurisdiction. The territorial service of process based jurisdiction is recognized under the Convention of Private International Law, which provides among other basis:

The grounds of jurisdiction referred to in the first paragraph of Article 2 are the following: e) service of a writ upon the defendant within the territory of the State of origin during his temporary presence there.²⁴

Consent- based Jurisdiction

Hague Convention of Private International Law provides:

Recognition and enforcement need not, however, be refused where the jurisdiction of the court of the State of origin could in the circumstances also have been based upon another ground of jurisdiction which, as between the State of origin and the State of recognition, is sufficient to justify recognition and enforcement.²⁵

²² In certain cases difficulty might be associated with determination of residency, especially the weight to be given to the individual's intention as an element of establishing residency under the relevant legal meaning of residency.

²³ For example, Convention on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters, Sep. 16, 1988, 28 ILM 620 (1989) [hereinafter Lugano Convention].

²⁴ Hague Convention of Private International Law, *supra* note, 11, art.4 (e).

Consent is another traditional connecting factor that links person to certain legal system. Courts may ascertain jurisdiction over the person by a way of sufficient consent to legalize the exercise of judicial power. Its effect is to determine under what circumstances a person may be sued in civil proceedings in a court where neither the person domiciles nor resides. A defendant may voluntarily consent or submit to the jurisdiction of a given court which otherwise would not have jurisdiction over his person. In the legal context, consent is the litigant's voluntary submission to a specific adjudicatory authority. The notion is recognized by most jurisdictions as a connecting factor which legalizes the exercise of adjudicatory power over the person to whom consent is said to be established.

As a general rule, in order for consent to qualify as a connecting factor, certain conditions have to meet. The person said to consent to jurisdiction must be capable of giving consent²⁶. This means that such person must have the capacity recognized by law to be bound by his/her deed.²⁷ In addition consent must be voluntary meaning that person's free will is the direct source of consent. In almost every legal systems consent obtained by coercion or fraud does not constitute consent for all purpose and thus any exercise of jurisdiction based on such consent is illegal assumption of authority. Also, consent must be specific, individual mean to submit him/her self directly to the judicial authority to which consent relates.

²⁵ *Id.* article 2/2.

²⁶ In order for an individual to understand the nature and effect of consent, the person must be of a full age and discretion recognizing all relevant facts and effects of his/her deed.

²⁷ Such determination is made by reference to the relevant law of the forum. In most jurisdictions the issue falls under the rules of *Private International Law*.

As a concurrence of will²⁸, consent may take several forms. The most effective form of consent is the one commonly referred to as *express consent*. Under this form of consent the defendant directly and expressly provides for his/her submission through the physical submission of his person on the proceedings taken by plaintiff in the forum where he/she is not subject to its adjudicative power²⁹ on the basis of domicile or residence. As a common feature of consent, express consent is unequivocal and does not require any inference on the part of the court. In practice this form of consent is least likely to give rise to misunderstandings and challenges. Express consent may also take the form of written agreement previously prepared to submit the disputes to specific forum.

In addition to the various forms of express consent, consent may be concluded indirectly. Such consent is deducted from related facts and surrounding circumstances.

American Theory of Personal Jurisdiction:

The Law of *Pennoyer v. Neff*: Sovereignty and Territorial Competence Under *Pennoyer v. Neff*

In his book on Civil Procedure, Professor Clermont comments that "power, in any realistic sense, was never the true rationale of American jurisdiction. The true rationale always involved the desirable allocation of jurisdictional authority among competing sovereigns"³⁰.

²⁸ Black's Law Dictionary, 305(6th ed. West 1990).

²⁹ In most cases, express consent involves verbal expressions indicating the acknowledgment of consent. Like saying "yes I do accept, consent or submit ..etc.

³⁰ Kevin M. Clermont, *Civil Procedure: Territorial Jurisdiction and Venue*, 7 (Foundation Press 1999).

The U.S. Supreme Court affirmed back in 1877 the well established principle of territoriality as the primary basis of jurisdiction. The law recognizes the supreme authority of every state within its territory. Thus, no other state may exercise its power within the territory of another. Even though if another state has a concurrent basis for jurisdiction. The application of the principle has been always founded on considerations of sovereignty. The Supreme Court in *Pennoyer* case noted that the states even though did not occupy exactly the same position as sovereign nations, but nevertheless found that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."³¹ Furthermore, "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum ... an illegitimate assumption of power"³²

Since the early stages of the development of the contemporary law of personal jurisdiction, the United States Supreme Court recognized the effect of federalism in drawing the jurisdictional analysis, the Court held that:

The several States of the union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as, restrained and limited by the instrument, they possess and exercise the authority of independent states, and the principle of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.³³

³¹ *Pennoyer v. Neff*, 95 U.S. 714, 722, 24 L. Ed. 565 (1877)

³² *Id.* at 720.

³³ *Id.* at 722.

Apparently, the court meant to emphasize the importance of shaping the scope to which sovereignty is applicable within the newly formed system and that sovereignty must be shaped to conform to the federal structure of the Constitution. Territory is clearly a critical element in determining the scope of one state's jurisdiction power once it is the space within which the state exercises its supreme. Thus, jurisdictional competence is based on territoriality as an incident of sovereign equality and independence.

From the standpoint of the *Pennoyer* law, the jurisdictional competence of any state is primarily territorial.³⁴ Thus, state's courts power to adjudicate reached as far as the state's territorial boundaries. States were permitted to exercise jurisdiction over persons and property within their exclusive territorial borders. The rule established under *Pennoyer v. Neff* provides that in order for state courts to exercise *in personam* jurisdiction,³⁵ the defendant must be brought within its jurisdiction by service of process within the state, or by his voluntary appearance.³⁶

Jurisdiction over the defendant's person is a condition prerequisite for rendering any effective disposal of *in personam* action. Initially, personal jurisdiction would only be found if the party was physically present in the forum state. The condition is fulfilled, when the person's presence in the forum, constitutes domicile or residence even if the

³⁴ Personal jurisdiction or *Jurisdiction in personam*, the action brought therein may result in imposing a personal liability or obligation upon the defendant in favor of the plaintiff.

³⁵ Action *in personam* is a legal action seeking to hold an individual personally liable.

³⁶ *Pennoyer*, 95 U.S. at 733-34.

person is absent there from³⁷. In addition service of process during occasional or temporary stay may justify the exercise of jurisdiction under *Pennoyer v. Neff*.

Jurisdictional Factors Under *Pennoyer v. Neff*

Domicile

As a connecting factor, the concept of a legal domicile has a functional operation that is connecting a person with a particular place for a particular purpose. "[D]omicile is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined"³⁸. Under the US law, the concept of domicile has a paramount importance. Jurisdictional determination of jurisdiction under the US law depends largely on the specific meaning of domicile which has a distinguished application than the ordinary operation of similar concepts as discussed in the preceding part of this dissertation.

The determination of person's domicile is made by reference to state law concerned.³⁹ Even though, the court determines domicile under federal law and is not bound by the law of any state,⁴⁰ domicile in general, is the place where a person has

³⁷ *National Exchange Bank v. Wiley*, 195 U.S. 257, 270 (1904); *Iron Cliffs Co. v. Negaunee Iron Co.*, 197 U.S. 463, 471 (1905).

³⁸ Justice Holmes: *See General elec. Co. v. Cugini, D.C. Puerto Rico* 1986, 640 F. Supp 113.

³⁹ "[F]ederal courts may look to state law for guidance in defining terms, formulating concepts, or delineating policies." *See Rishell v. Jane Phillips Episcopal Memorial Center*, C.A.10th, 1993, 12 F.3d 171; *Stifel v. Hopkins*, C.A.6th, 1973, 477 F.2d 1116, 1120; *Napletana v. Hillsdale College*, C.A.6th, 1967, 385 F.2d 871, 872.

⁴⁰ *Taylor v. Milam*, D.C.Ark.1950, 89 F.Supp. 880. It has been also held that "[C]itizenship is ultimately a matter of Federal law". *Acridge v. Evangelical Lutheran Good Samaritan Soc.*, C.A.5th, 2003, 334 F.3d 444.

his/her permanent establishment, to which whenever he/she is absent, has the intention of returning. Most notably, domicile has a two distinguished elements, one is being the physical presence in one place and the other is the mental condition of having such place as the permanent place of abode⁴¹.

Therefore, domicile is more than physical presence in the form of continuing stay; "it is the place a person calls home".⁴² This general meaning of legal domicile conform the meaning of domicile under Virginia law⁴³ which provides that "domicile is residence or physical presence accompanied by intention to remain for unlimited time"⁴⁴. Thus a person has only one domicile at a particular time⁴⁵, even though he or she could have several places of residence.⁴⁶ Determination of domicile in case of multiple places of residence is made through investigating the actual intent of the defendant; the surrounding circumstances⁴⁷ which must telegraph intent to make certain place qualify as permanent legal residence.

⁴¹ A natural person normally acquires a domicile voluntarily by residing in a place with an intention to remain there indefinitely. Exception is given to specific categories like incompetent persons, minors, married women..etc ,Their domiciliary is fixed by special rules corresponding to their special status.

⁴² In this meaning see *Blau v. Rappaport*, D.C.Pa.1994, 861 F.Supp. 338; *Hicks v. Brophy*, D.C.Conn.1993, 839 F.Supp. 948.

⁴³ Mentioned as an example of state law of domicile.

⁴⁴ *Gambelli v. U.S.*, D.C.Va.1995, 904 F.Supp. 494.

⁴⁵ *Janzen v. Goos*, C.A.8th, 1962, 302 F.2d 421; *Ellis v. Southeast Constr. Co.*, C.A.8th, 1958, 260 F.2d 280.

⁴⁶ *Texas v. Florida*, 1939, 59 S.Ct. 563, 306 U.S. 398, 83 L.Ed. 817, 121 A.L.R. 1179.

⁴⁷ See *Livers v. Wu*, D.C.Ill.1998, 6 F.Supp.2d 921; *Edick v. Poznanski*, D.C.Mich.1998, 6 F.Supp.2d 666; *Stucky v. Bates*, D.C.Kan.1998, 2 F.Supp.2d 1434.

Under the US law, question of domiciliary is a mixed question of law and fact requiring a careful evaluation of all relevant facts and circumstances of the case⁴⁸. For example, factors of residency, ownership and family relations are relevant indicators of the actual intent of the defendant in determining his/her domicile.

Residency

The terms *domicile* and *residence* are often used interchangeably; however, the terms are not synonymous. Each concept has a distinct legal meaning that differs significantly⁴⁹. Domicile is acquired by a person of proper legal capacity by actually establishing a dwelling place in a state with the intention to remain there. The physical presence and intention must normally occur simultaneously. On the other hand "place of residence" means only the place where a person is living at the moment. Thus, a person could be a resident of a place without being domiciled there.

In general, domicile has a broader meaning and is more significant in linking the individual with particular system of law than residence, and carries the meaning of residence. The legal concept of residency though bearing less importance than domicile in the American legal systems is still a factor for purposes of jurisdictional determination either in allocating the proper venue of a certain legal action or establishing jurisdiction over the person of the defendant based on his/her status as a resident of a particular area.

⁴⁸ It has been held that "[A] party's own declarations concerning his domicile, as is true of any self-serving statement, are subject to judicial skepticism. They are accorded little weight when in conflict with the facts". *Hendry v. Masonite Corp.*, C.A.5th, 1972, 455 F.2d 955, certiorari.

⁴⁹ "Where one lives is *prima facie* evidence of domicile". *Krasnov v. Dinan*, C.A.3d, 1972, 465 F.2d 1298.

Drawing a clear distinction between the two in determining jurisdictional inquiry ensures the validity of the proceedings; maintains consistency and harmonization among systems employing different tests involving the same concept; and avoids as far as possible multiplication of the bases of jurisdiction in one legal relationship. In fact reconciling potential inconsistencies of the diverse approaches has always been a matter of concern in public policy and administration of justice.

Residency establishes a relationship of substantive legal consequence between an individual and the forum, in the sense that such status justifies the exercise of jurisdiction where domicile is not established under the law of the forum, or where the convenience of the parties or the end of justice would require it. In general, place of residence is likely to be the center of an individual's activity, which suggests that a person's actual residence is the person's domicile. It has been held that "the place where a person lives is taken to be that person's domicile until the contrary is shown."⁵⁰

Such ruling and numerous other judgments in the same context reveals that US courts tends to rely significantly on the presumption of domicile in all cases involving determination of residency without employing a legally definite standard for the determination. Nonetheless, determination of residency for purposes of jurisdiction is made using the same test for determining domicile. The determination requires an evaluation[†] of all the circumstances of the case⁵¹; no single factor is considered conclusive.

⁵⁰ *Anderson v. Watt*, 1891, 11 S.Ct. 449, 138 U.S. 694, 34 L.Ed. 1078.

⁵¹ *Mizell v. Eli Lilly & Co.*, D.C.S.C.1981, 526 F. Supp. 589.

Despite their widely accepted importance and operations, the concept of domicile and the related concept of residency as criteria for jurisdiction operate differently in the U.S. legal system, which makes this area of law uncertain and complex.⁵² Each case has to be decided on its own facts. Confusion is likely to occur in circumstances when a litigant maintains a new residence, and is considered to have changed domicile. These considerations and others could affect the choice of forum, and accordingly affect the outcome of one legal action.

The Law of *Burnham v. Superior Court*⁵³: Service of Process in the Forum during Transitory or Temporary Presence (Transient Jurisdiction⁵⁴):

Burnham v. Superior Court affirmed and elaborated on the notion of physical presence established under *Pennoyer v. Neff*. The United States Supreme Court deemed that service of process on an individual physically present in the forum is a sufficient basis for the state to exercise in *personam* jurisdiction. The *Burnham* law makes it clear that transitory presence falls under the presence standard established in *Pennoyer* case. This unique form of presence which has long been held to be beyond the traditional basis of jurisdiction, qualifies as a sufficient basis for purposes of jurisdiction in *personam* as

⁵² Detailed assessment in this respect will be followed in the 3rd part of this dissertation

⁵³ *Burnham v. Superior Court* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 The question under this case was whether the Constitutional 14th Amendment denies California courts jurisdiction over a nonresident, who was personally served with process while temporarily in California, in a suit unrelated to his activities in the State.

⁵⁴ The transient jurisdiction is also established under *Shaffer v. Heitner*. 433 U.S. 186 (1977). The Supreme Court's decision in *Shaffer* related only to *quasi in rem* and *in rem* jurisdiction. However, many subsequent decisions have relied on *Shaffer* to determine whether transient jurisdiction can be exercised simply by serving the defendant in the forum state.

long as the defendant being personally serviced of process during such transitory presence in the forum.

Nonetheless, assertion of jurisdiction over the defendant based on service of process within the forum during an occasional or transitory stay might prove incompatible with international law standards of jurisdiction.⁵⁵ Yet this form of jurisdiction is valid law governing the exercise of jurisdiction over the non-resident defendant under the US law of jurisdiction. The United States Supreme Court split when determining whether the fairness factors applied when a defendant was served while briefly within the forum state. Justice *Scalia* wrote for four justices to argue that service within the territory of the government is always fair under due process.⁵⁶ In addition, it has been argued that pure transient jurisdiction, has a little judicial and juristic support.⁵⁷

In fact, the law of *Bernham* disregards the quality and nature of the defendant activities in the forum. Jurisdiction is justified based on the service of process in the forum during the short-term presence of the defendant within which the defendant is said to be entitled and enjoyed all the benefits and guarantees assured by the forum state.⁵⁸ Hence, by his voluntarily presence in the forum, the defendant should have expected to be subjected to the exclusive adjudicatory power of the forum state.

⁵⁵ See e.g., Shaibah, Awadallah, *supra* note 22, at 405.

⁵⁶ *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990). ("[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'").

⁵⁷ See Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289, 295-96 (1956).

⁵⁸ See Justice Brennan conception, *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990).

In his concurring persuasive opinion, Justice *Brennan* provides a test of *reasonable expectation* in justifying the exercise of transient jurisdiction;

[By] visiting the forum State, a transient defendant avails himself of significant benefits provided by the State. His health and safety are guaranteed by the State's police, fire and emergency medical services; he is free to travel on the state's roads and waterways; he likely enjoys the fruits of the state's economy as well. Moreover, the Privileges and Immunities Clause of Article IV prevents a state government from discriminating against a transient defendant by denying him the protections of its law or the right of access its courts. Without transient jurisdiction an asymmetry would arise; A transient would have a full benefit of the power of the forum State's courts as a plaintiff while retaining immunity from their authority as defendant.⁵⁹

Under the law of *Bernham* the only condition that has to be satisfied in order to reasonably establish jurisdiction over the transient defendant who is personally served in the forum, is that the presence should be voluntarily. Thus, in-state personal service procured by coercion or fraud is not valid service justifying the exercise of jurisdiction over the defendant⁶⁰.

Jurisdiction Based on Defendant's Consent

Jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.' That standard was developed by analogy to 'physical presence,' and it would be perverse to say it could now be turned against that touchstone of jurisdiction." Exactly the same thing is true of consent as a traditional basis of jurisdiction over the person".⁶¹

⁵⁹ *Burnham*, 495 U.S. at 619. Justice Brennan concurring opinion.

⁶⁰ *Tickle v. Barton W.Va. Sup.Ct. App.*, 142 W.Va. 188,95 S.E.2d 427 (1956), Where service of process is procured by fraud, the court will refuse to exercise jurisdiction and such service of process will be deemed invalid.

Consent has been recognized as a sufficient factor that connects an individual with certain legal system in recognition of individual fundamental right of choice. The US law recognizes this notion as a conventional basis that justifies the exercise of jurisdiction over the person of the defendant. In general, a defendant who has not been personally served in the forum can nevertheless voluntarily appear and consent to the court's jurisdiction. In practice, consent as a connecting factor may be either express or implied.

Express consent to jurisdiction may occur through an advance agreement by the party to submit to certain court's jurisdiction in the event of dispute. Under this contractual choice of forum, parties may agree after the commencement of the action for an alternate forum of their action⁶².

Implied consent can be inferred from circumstances of the case. In *Hess v. Palowski*,⁶³ the United States Supreme Court recognizes this form of consent, providing that a state can legislate that a nonresident motorist using state's highways be deemed to have appointed a local official as his agent to receive service of process in any action growing out of the use of the vehicle within the state. However, the state must provide actual notice to the nonresident defendant. In addition, a defendant *general appearance* would amount to consent for purposes of jurisdiction unless the defendant's present is

⁶¹ Justice *Scalia*, *Ocepek v. Corporate Transp., Inc.*, 950 F. 2d 557-58 (8th Cir.1991).

⁶² Unless there is an apparent unequal bargaining power between the contracting parties or that the party is being fraudulently induced to conclude the underlying agreement, choice of forum is likely to stand. valid and enforceable establishing jurisdiction over the consenting litigants. For exceptions, *See Shell v R.W. Sturge, Ltd.*, 55 F.3d 1227(6th Cir.1995)

⁶³ *Hess v. Palowski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927).

made exclusively to contest the jurisdiction.⁶⁴ Also consent might be inferred from filing counterclaim(s)⁶⁵.

⁶⁴ Defendant's failure to object to court's jurisdiction amount to waiver of his/her right therein, accordingly defendant is deemed consenting to court's jurisdiction based on such waiver. Objections to jurisdiction in federal courts are regulated under Fed. R. Civ. P. 12.

⁶⁵ Steven Baicker-McKee, William M. Janssen & John B. Corr, *A Student Guide to the Federal Rules of Civil Procedure* 3 (2nd ed. West 1999).

CHAPTER III

EXTENDING COURTS JURISDICTION BEYOND THE TRADITIONAL BASIS

Introduction

Pennoyer principle of jurisdiction based on physical state boundary lines became inadequate in the face of developing commerce within the U.S. It became obvious, however, that these limited bases for competence are not enough. The United States Supreme Court, therefore, expanded the traditional jurisdictional principles.¹ Sixty-eight years after *Pennoyer*, the Court made it clear that regardless of a defendant's physical presence within the forum, a court could constitutionally assert personal jurisdiction when the defendant had "minimum contacts" with the forum state.²

The United States Supreme Court demonstrated, the trend toward extending the permissible scope of state jurisdiction over nonresidents particularly foreign corporations "was attributable, in part, to "the fundamental change of national economic nature."³ The Court announced that in order to subject a non-resident defendant to an *in personam* judgment, due process required only that the defendant have "certain minimum contacts

¹ See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

² *Id.* at 316

³ *McGee v. International Life Ins. Co.*, 355 U.S. 220,222 (1957).

with [the forum state] such that maintenance of [a] suit does not offend 'traditional notions of fair play and substantial justice.'¹

Explanations of Relevant Terminology

For a reader who is not familiar with the various aspect of the law of personal jurisdiction in the American courts, understanding the legal terminology is the key to a complete comprehension of the subject matter. In fact, some terms might have conceptual counterparts in other judicial systems; unfamiliarity with them as they relate to the U.S. courts may cause confusion and difficulty in comprehending the American law of personal jurisdiction. For example, the expression *long-arm statutes* may seem self-explanatory to an American lawyer as states' legislations aiming to establish jurisdiction over non-resident defendants, but may not as easy for a foreign reader to comprehend its applications without certain knowledge of the concept's history, and the related constitutional considerations.

This introductory part will address this need by explaining the terms and expressions commonly used in association with the relevant legal analysis in the United States legal jurisprudence.

¹ *International Shoe*, 326 U.S. at 316, (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Following *International Shoe*, many states enacted various jurisdictional statutes, or long-arm statutes. When deciding jurisdiction based on a long-arm statute, a court must first determine if the statute applies, and then determine whether asserting jurisdiction is constitutional.

Long-Arm Statutes²

Each court is bound to a territorial jurisdiction and does not normally have jurisdiction over persons that reside outside of that jurisdiction. For example, a court in California would not normally have jurisdiction over a resident of Virginia. Long-arm statutes are a tool which gives a court jurisdiction over a person even though the person is not residing in the territory limits of the court. Thus, it allows a court to have jurisdiction over a non-resident defendant.

As noted above, state's statutory and constitutional rules granting personal jurisdiction over a non-resident defendants commonly known as *long-arm statutes*,³ allowing the "long arm" of the local law to be applied to the nonresident. These statutes are meant to "promote the determination of jurisdictional questions on the basis of the relationship of the defendant and the dispute to the forum state".⁴ The rationale behind the enactments of these laws was the need for various states to adapt to changes in methods of communications, cross border transactions, and mobility as well as transformation of national economy.

² State's statutory and constitutional law rules governing the exercise of jurisdiction by its courts granting personal jurisdiction over a non-resident are sometimes referred to as "long-arm" statutes, allowing the "long arm" of the local law to be applied to the non-resident. Blacks Law Dictionary defines the expression as; Various state legislative acts which provide for personal jurisdiction, via substituted service of process, over persons or corporations which are non residents of the state and which voluntarily go into the state, directly or by agent, or communicate with persons in the state, for limited purposes, in actions which concern claims relating to the performance or execution of those purposes. See Black's Law Dictionary, 924 (6th ed. West 1990).

³ The expression *long-arm* comes from the purpose the statutes serve, being the far reach of state courts.

⁴ Joel H. Spitz , *The "Transient Rule" of Personal Jurisdiction: A Well Intentioned Concept that has Overstayed its Welcome*, 1989 Marq. L. Rev. 181

The long-arm statute "was thus considered to be internal policy of the state aiming to protect its inhabitants (citizens) in that, normally the plaintiff was put in the position of having to travel in a place with which he had no contacts other than being the place of the non-resident defendant to litigate an incident that occurred in the plaintiff home land.

Historically, early versions of these enactments were known as *non-resident motorist statutes* which allowed states to have personal jurisdiction over out of state motorists.⁵ In *Hess v. Pawloski*⁶, the Supreme Court upheld a Massachusetts statute which permitted jurisdiction over any non-resident who was operating a motor vehicle within the state and was involved in an accident.⁷ After the court upheld these statutes, many states began passing statutes that allowed jurisdiction over out-of-state defendants for a variety of causes of actions.⁸

⁵ Old versions of long-arm statutes were subjected to amendments over time to become more inclusive and responsive to the requirements of changing norms.

⁶ 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927).

⁷ According to Joel *Supra* note 7, at 181. The first truly comprehensive long-arm statute was enacted in Illinois. The statute provides in part: (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

(1)The transaction of any business within this State; (2) The commission of a tortious act within this State;(3) The ownership, use, or possession of any real estate situated in this State; . . . [The act goes on to list other causes of action that would allow Illinois jurisdiction over the out-of-state resident.] (c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States. [735 ILCS 5/2-209 (West 1999).]

⁸ For example, N.Y.C.P.L.R. 302 provides for jurisdiction of New York courts over any non-resident defendant who transacts business within the state or contracts anywhere to provide goods or services to customers or business associates within the state, so long as the cause of action arises out of that contract. In practice, states' long-arm enactments differ in the extent of their reach.

Substantial variation occurs among states' long-arm statutes. In some states long-arm statutes allow their courts to exercise jurisdictional power to the full extent allowed under the Due Process Clause of the Constitution,⁹ where in other states statutory restrictions apply enumerating situations when courts may exercise personal jurisdiction over an out-of-state defendant.¹⁰ Some limits are placed on the particular cause of action, while other limits are based on the activities of the defendant.¹¹

Minimum Contact¹²

A defendant who has never set foot in a state may nevertheless be subject to valid personal jurisdiction so as to be compelled to defend a lawsuit in that state provided that he has minimum contacts with the forum state such that compelling him to appear and defend in the forum "does not offend traditional notions of fair play and substantial justice".¹³ In fact, there are two requirements for a court to exercise personal jurisdiction over an out of state defendant. The first is that the state must have statutory authority that grants the court jurisdiction over the out of state defendant (state's long-arm statute). The second requirement is the Due Process Clause of the Constitution must be satisfied (minimum contact analysis). The Supreme Court in a number of cases has limited the reach of state statutory authority because of violations of constitutional due process.

⁹ See e.g., Cal. Civ. Proc. Code § 410.10 (West 1996).

¹⁰ See e.g., Mass. Gen. Laws ch. 223A, § 3 (Law. Co-op. 1996); N.Y. C.P.L.R. 302

¹¹ Michael MacClary, *Personal Jurisdiction and the Internet*, 3 Suffolk J. Trial & App. Adv. 96 (1998). (Citing Mass. Gen. Laws ch. 223A, § 3 (Law. Co-op. 1996)).

¹² A judicial standard that refers to the minimum due process requirement, which has to be existed, in order to subject a non-resident civil defendant to a court's personal jurisdiction. See Black's Law Dictionary 995 (6th ed. 1990).

¹³ *International Shoe Co. v. Washington*, 326 U.S. 310,315, 66 S.Ct. 154, 90 L.Ed. 95 (1945)

The *minimum contact* jurisdictional standard was first introduced by the United States Supreme Court in *International Shoe v. Washington*.¹⁴ The Court adapted defendant's contact with the forum as a standard for jurisdiction over out-of-state non resident defendants. The case involved a Washington court attempting to assert jurisdiction over a corporation that was incorporated in Delaware and had a principal place of business in Missouri. The court allowed jurisdiction because there was sufficient "minimum contacts" with Washington. The Court provided that:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam* [personal jurisdiction], if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'¹⁵

The minimum contact standard is a judicial standard by which the court measures the nature and quality of non-resident defendant's contact with the forum. A defendant's contact must meet the minimum contact standard in order to legitimize the exercise of personal jurisdiction. Over time American courts have developed criteria deemed essential to establish minimum contact. The Supreme Court explained the nature of such test stating that "like any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test...is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."¹⁶

¹⁴ *Id.*

¹⁵ *Id.* at 156

¹⁶ *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978).

If the nature and quality of the activities is continuous and systematic, a court will have general jurisdiction over the entity. Such jurisdiction allows a court to decide any cause of action over the defendant, even if the activity occurred out of forum. If the nature of the activity is of an isolated nature, a court would only have specific jurisdiction. Specific jurisdiction only allows a court to exercise jurisdiction for a cause of action which arises from the defendant's activities within the forum state.

Due Process of law – 5th and 14th Amendments of the U.S. Constitution¹⁷

The phrase *Due Process* is mentioned in two places in the Constitution; in the 5th Amendment and in the 14th Amendment. Due process, in the Constitutional context of the United States, refers to how laws are enforced and applied. It applies to all persons, citizen or alien, as well as to corporations. The two constitutional statements within which due process is mentioned are the 5th and 14th amendments. Fifth amendment reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.¹⁸

Section 1 of the fourteenth Amendment to the US constitution reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make

¹⁷ Constitutional amendments that are forming part of the US Federal Constitution aiming to impose a Constitutional obligation over states and federal authorities to afford citizen of due process of law. This Constitutional amendment can be invoked by citizens when states' or federal authority violate citizen's fundamental rights guaranteed by the Constitution.

¹⁸ U.S. Const. amend. V

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁹

The reference in the 5th amendment applies only to the federal government and its courts and agencies, where the reference in the 14th amendment extends protection of due process to all state governments, agencies and courts. Essentially, the clause *due process of law* refers to governmental Constitutional obligation to ensure fundamentally fair and reasonable governmental action that may affect private individuals²⁰. In this regard, it has been held that:

[D]ue Process of law implies and comprehends the administration of laws equally applicable to all under established rules which do not violate fundamental principles of private rights, and in a competent tribunal possessing jurisdiction of the cause and proceeding upon justice. It is founded upon the basic principle that every man shall have his day in court, and the benefit of the general law which proceeds only upon notice and which hears and considers before judgment is rendered.²¹

Due Process can be either substantive or procedural²². The substantive component of due process protects basic individual's substantive rights that are fundamental to the individual to possess,²³ entitle or to do. Substantive Due Process

¹⁹ U.S. Const. amend. XIV, § 1.

²⁰ Reader should note that there are *two* different *Due Process* clauses in the U.S. Constitution (the 5th Amendment, and the 14th Amendment). The reference in the 5th Amendment applies only to the federal government and its courts and agencies., where the reference in the 14th Amendment extends protection of due process to all state governments, agencies, and courts. Thus it is a safeguard mechanism aiming to protect individuals from arbitrary governmental action, no matter what level of government is acting

²¹ *State v. Green*, 232 S.W.2d 897, 903 (Mo. 1950).

²² See generally, Peter L. Strauss, *An Introduction to the Administrative justice in the United States* 32-49 (Carolina Academic Press 1989).

guarantee not only that appropriate and just procedures (or "processes") be used whenever the government is punishing a person or otherwise taking away a person's life²⁴, freedom or property, but that these clauses also guarantee that a person's life, freedom and property cannot be taken without appropriate governmental justification, *regardless* of the procedures used to do the taking. In a sense, it makes the *due Process* clause a *due substance* clause as well.²⁵

Conceptually, procedural due process plays a significant role in determining the validity of states' long-arm statutes. It assures that state assertion of jurisdiction over non-resident defendants is justifiable and fair. Ultimately, due process requires that the defendant have "fair warning that a particular activity may subject [it] to the jurisdiction of a [certain forum]".²⁶ For example, the United States Supreme Court affirmed the Constitutionality of Massachusetts' legislation designated to extend jurisdiction of Massachusetts's courts over non-residents motorists for acts they committed while driving in Massachusetts giving rise to liabilities established in the State²⁷. Under the statute, process is deemed sufficiently served through a state official as the motorists' agent for service of process.

²³ *Substantive* rights are those fundamental rights that reserve to the individual the power to possess or to do certain things. Procedural rights in turn means rights that, instead, dictate *how* the government can lawfully go about taking away a person's freedom or property or life, when the law otherwise gives them the power to do so.

²⁴ Under the broad meaning, due process clause protection extends over civil and criminal contexts.

²⁵ See Strauss, *supra* note 25, at 32-49.

²⁶ *Burger King Corp. v. Rudzewicz*, 471 US 462, 472 (1985) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).

²⁷ See, *Hess v. Pawloski* 247 U.S. 352 (1927).

Personal Jurisdiction Based on Defendant's Contact with the Forum (The Law of "Minimum Contact"²⁸)

The long history of *Pennoyer* law proved to be insufficient to govern all aspects of activities having connection with certain forum²⁹. The traditional bases of jurisdiction established under *Pennoyer* were stretched by the U.S. Supreme Court in order to fashion a new analytical framework to assess and test the assertion of jurisdiction. Prior to the introduction of the minimum contact standard, applying consent and presence theories as bases for jurisdiction over corporations was problematic and inconsistent.³⁰ This fact was evident in various courts ruling attempting to rationalize the exercise of jurisdiction over foreign corporations³¹.

²⁸ A judicial standard was first introduced by the U.S. Supreme Court in 1945. The expression *minimum contact law* is brought by the writer to signify the significant impact of this decision over the new theory of personal jurisdiction following International Shoe case. In the US legal System *minimum contact* is a judicial standard and does not by itself form a separate legal framework. All cases conferring jurisdiction based on this standard are justified by different factors giving rise to the type, nature and extent of the defendant's contact with the concerned forum.

²⁹ The new US Supreme Court jurisdictional test was introduced 78 years after the *Pennoyer* case was decided.

³⁰ "...[B]ecause of the curious status of corporations in American [law], the basis of the assertion of jurisdiction of the courts of a State over a foreign corporation has been even more uncertain than that with respect to individuals, although the terms have been common. First, it was asserted that inasmuch as a corporation could not carry on business in a State without the State's permission, the State could condition its permission upon the corporation's consent to submit to the jurisdiction of the State's courts, either by appointment of someone to receive process or in the absence of such designation, [Second], the corporation by doing business in a State was deemed to be present there and thus subject to service of process and suit because it was present. [Presence] conflicted with the prevailing idea of corporations as having no existence outside their State of incorporation, but the theory was nonetheless accepted that a corporation "doing business" in a State to a sufficient degree was "present" for service of process upon its agents in the State who carried out that business. Generally, with rare exceptions, even continuous activity of some sort by a foreign corporation within a State did not suffice to render it amenable to suits therein unrelated to that activity. Without the protection of such a rule, it was maintained, foreign corporations would be exposed to the manifest hardship and inconvenience of defending, in any State in which they happened to be carrying on business, suits for torts wherever committed and claims on contracts wherever made[And] if the corporation stopped doing business in the forum State before suit against it was commenced, it might well escape jurisdiction altogether." Annotations, Cases and Codes :U.S. Constitution : Fourteenth Amendment at 13.

A new theory of jurisdiction was introduced by the US Supreme Court to supplement the deficiency of the legal framework governing the exercise of personal jurisdiction. The new theory was mainly founded on justifying the exercise of personal jurisdiction over the non-resident defendant based on defendant's contact with the forum, to the extent allowed by the due process. The new jurisdictional test provides that "non-resident defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice"³²

The new test of *minimum contact* became the general standard for the determination of jurisdiction over the non-resident defendant in all cases involving the question of whether the defendant's has the required sufficient connection (in light of defendant's contact with the forum) which makes it reasonable according to the constitutional due process to be subjected to court's adjudicative authority.

Depending on the nature, and quality of defendant's contact with the forum, jurisdiction over the non resident defendant termed general when the defendant conducts routine business in the forum. Such jurisdiction extends to all causes of action, regardless of whether the cause of action arose from the defendant's activities within the forum state or one that was not directly linked with the forum state.³³ The foundation of this type of jurisdiction is the defendant's *continuous and systematic* contact with the forum.³⁴

³¹ See John J. Ground, Jack H. Friedenthal, Arther R. Miller & John E. Sexton, *Civil Procedure: Cases and materials*, 74 (West 1997). (Cases cited include : *Bank of Augusta v. Earle*, 38 U.S .(13 Pet .) 519,588, 10 L.Ed. 274 ,308(1839)(Taney, J.) ; *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264,265,37 S.Ct. 280, 61 L.Ed. 710,711-12(1917) (Brandeis,J.)

³² *International Shoe Co. v. Washington*, 326 U.S. 310, 315, 66 S. Ct. 154 (1945).

Jurisdiction is termed specific when the cause of action arises out of the defendant's contacts with the forum, and the defendant has purposefully availed itself of the privileges of doing business in the forum. The United States Supreme Court held that: "[W]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personam* jurisdiction."³⁵

Under this limited type of jurisdiction, the defendant must conduct act or perform some transaction within the forum by which defendant "purposefully avails"³⁶ itself of the privilege of carrying these activities in the forum, accordingly invoking the forum's benefits and protections constitutes "fair warning that a particular activity may subject [Defendant(s)] to the jurisdiction of a foreign sovereign"³⁷

Compared to the general jurisdiction, specific jurisdiction warrants jurisdiction over the non-resident defendant to the extent of the activity involved. The scope of jurisdiction is limited in nature that it does not extend to all activities of the non-resident defendant. The action brought must arise out of or results from the defendant's forum-related activities. In either case, the exercise of jurisdiction must be reasonable, such that

³³ "[T]he criteria by which we mark the boundary line between those activities which justify the subjection of a [defendant] to suit, and those which do not, cannot be simply mechanical or quantitative." *International Shoe*, 326 U.S. at 319.

³⁴ *See id.*

³⁵ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

³⁶ *Burger King v. Rudzewicz*, 471 U.S. 462, 472, 475, 105 S. Ct. 2174 (1985).

³⁷ *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977).

it does not violate "traditional notions of fair play and substantial justice."³⁸ In general, whether the assertion of jurisdiction is "reasonable" may be decided based on " the forum state's interest in adjudicating the dispute; the plaintiff's shared interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental social policies."³⁹

**General Jurisdiction: "Systematic and continuous" Contact: The Law of
*International Shoe Co. v. Washington*⁴⁰.**

The land mark case *International Shoe* is considered the general law governing the exercise of jurisdiction over non-resident defendants. This type of personal jurisdiction is primarily founded on non-resident defendant's contact with the forum. The question(s) submitted to the court for consideration under the fact of this historical case was (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes⁴¹, and (2) whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.

The factual background of the case was:

³⁸ *International Shoe*, 326 U.S. at 319.

³⁹ Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1067.2 (West 2002) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

⁴⁰ 326 U.S. 310 (1945)

⁴¹ Washington Unemployment Compensation Act, Washington Revised Statutes, 9998-103a through 9998-123a, 1941 Supp.

A Washington statute set up a scheme of unemployment compensation, requiring contributions by employers. The statute authorized the commissioner, Washington (the plaintiff), to issue an order and notice of assessment of delinquent contributions by mailing the notice to nonresident employers. International (the defendant), a Delaware corporation having its principal place of business in Missouri, employed 11 to 13 salespersons under the supervision of managers in Missouri. These salespeople resided in Washington and did most of their work there. They had no authority to enter into contracts or make collections. International (D) did not have any office in Washington and made no contacts there. Notice of assessment was served upon one of International's (D) Washington salespersons and a copy of the notice was sent by registered mail to International's (D) Missouri address.⁴²

Special appearance was made by the Corporation before the office of unemployment requesting to set aside the order and challenging the validity of the notice of assessment on the ground that the service upon appellant's employee was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had not appoint an agent within the state upon whom service could be made; and that appellant is not an employer and does not furnish employment within the meaning of the statute⁴³. The motion was heard by the appeal tribunal which denied the motion and ruled in favor of the respondent (Washington), the action then was affirmed by the state Superior Court and Supreme Court.

⁴² Norman S. Goldenberg, *Casenote Legal Briefs : adaptable to courses utilizing John J. Ground, Jack H. Friedenthal, Arther R. Miller & John E. Sexton's Casebook on Civil Procedure*, 19 (Casenote Pub. 1997).

⁴³ *International Shoe Co. v. Washington*. 326 U.S. 310, 310 (1945). The motion was denied

The General Rule Established Under International Shoe

The U.S. Supreme Court affirmed the State's court ruling through the adoption of a new standard for jurisdiction over out-of-state non resident defendants. The Court held that exercise of jurisdiction is permissible under the due process of the 14th Amendment insofar as the defendant has the sufficient *minimum contact* with the forum that the maintenance of the suit does not offend the notion of fair play and substantial justice⁴⁴. The court further illustrate that *minimum contact* is not mechanical test rather it depends on "quality and nature of the activity in relation to the fair and orderly administration of laws"⁴⁵

The Nature and Quality of Defendant's Contact

The U.S. Supreme Court decision in the case established several principles governing the application of the *minimum contact standard*. The first is that jurisdiction over the non-resident defendant is permissible insofar as the defendant's activities in the forum is *systematic and continuous* and that the cause of action is related to defendant's forum activity.

[P]resence in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to he liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.⁴⁶

The second principle provides that casual activity of the defendant in the forum does not warrant jurisdiction in cause of action which is not related to the forum activity.

⁴⁴ *Id.* at 316

⁴⁵ *Id.* at 319.

⁴⁶ *Id.* at 319.

The court provided in this respect that "[i]t has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there".⁴⁷

The third principle of *International Shoe* provides that court may assert jurisdiction over the non-resident defendant on causes of action unrelated to the defendant's systematic contact with the forum where such contact is deemed substantial that the assertion of jurisdiction would be reasonable. The Supreme Court explains that "there have been instances in which the continuous corporate operations within a state were though so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."⁴⁸

The fourth principle of *International Shoe* provides that a single act in the forum may warrant jurisdiction over the non-resident defendant based on causes of action given rise to such act or activity. The court explained that "because of their nature and quality and the circumstances of their omission, may be deemed sufficient to render the corporation liable to suit."⁴⁹

Specific Jurisdiction: Casual or Sporadic Activity

Constitutional due process requirement imposes a limitation over a court's ability to subject non-resident defendant to its adjudicative authority unless the act or conduct on the side of the defendant has sufficient link with the forum that reasonably

⁴⁷ *Id.* at 319.

⁴⁸ *Id.* at 319.

⁴⁹ *Id.* at 319.

justifies the exercise of in *personam* jurisdiction over the defendant. The *minimum contact* standard established under *International Shoe* requires examining the activity of the defendant upon which the jurisdiction is to be exercised in order to legitimately invoke the adjudicative power of the forum.

Purposeful Contact

In the absence of the defendant's systematic and continuing contact with the forum, if there is to be personal jurisdiction it must be specific jurisdiction.⁵⁰ Under this type of minimum contact-jurisdictional analysis, an individualized analysis of the defendant's contact is required in order to determine whether the contact satisfies the meaning of purposeful contact: that the defendant upon such contact avails himself from the benefits afforded or achieved from the forum state.

A court may acquire specific jurisdiction over the non-resident defendant when the cause of action arises directly from a defendant's contacts with the forum state. The defendant must conduct act or perform transaction within the forum by which defendant "purposefully avails"⁵¹ himself of the privilege of conducting activities in the forum. By invoking the benefits and protections of the forum the particular activity, the defendant may be subjected to the court's jurisdiction.

The US Supreme Court held that:

⁵⁰ The distinction between the two types of jurisdiction giving rise to defendant's contact with the forum, is articulated by the supreme court ruling in *Helicopteros Nacionales de Colombia, S.A. v. Hall* 466 U.S. 408 (1984). The importance of drawing a clear distinction stems from the fact that once general jurisdiction is established there is no need to further inquire to whether there were a *minimum contact* relating to specific cause of action in question.

⁵¹ Purposeful availment exists "if the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents." *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 44 U.S.P.Q.2d (BNA) 1928 (9th Cir. 1997).

[A] forum may assert specific jurisdiction over a nonresident defendant where an alleged injury arises out of or relates to actions by the defendant himself that are purposefully directed toward forum residents, and where jurisdiction would not otherwise offend "fair play and substantial justice." Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum.⁵²

The example of purposeful contact is commercial activity, where the actor directs activities in the forum availing himself of the benefit of the contact. The US courts repeatedly point to this type of contact in addressing the test of purposeful availment, where the stream of commerce, goods and services travel from one jurisdiction to another. The U.S. Supreme Court broadened the *purposeful availment* requirement where the defendant is a commercial actor by adding the *stream of commerce* standard in the personal jurisdiction analysis⁵³. The Supreme stated that "the forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State".⁵⁴

Reasonable Anticipation

The Court Supreme Court held that the *purposeful availment* requirement is satisfied if two elements of the *stream of commerce* standard are established. First, the non-resident defendant must have placed or delivered its product into the stream of

⁵² *Burger King Corp. v. Rudzewicz* 471 U.S. 462,478(1985).

⁵³ See, *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); see also, *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

⁵⁴ *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Citing, *Gray v. American Radiators & Standard Sanitary Corp.* 22 Ill.2d 432,176 N.E.2d 761.

commerce. Second, the non-resident defendant must have placed or delivered the product with the expectation that the product will be purchased by consumers in the forum state⁵⁵.

Reasonable anticipation on the part of the defendant is an essential element in the evaluation of defendant's contact. Similar analysis was introduced in *Asahi* case where the court held that the "defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State".⁵⁶

The U.S. Supreme Court also addressed the question of reasonable expectation as to when a non-resident defendant should "reasonably anticipate" being haled into another jurisdiction. The court held that the defendant should reasonably anticipate being haled into another state's jurisdiction if defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."⁵⁷

Reasonableness of the Exercise of Jurisdiction Over the Non-resident Defendant

Even if the defendant's minimum contacts with the forum state are found to exist, the court will not exercise jurisdiction if considerations of fair play and substantial justice would require making the defendant defend in the forum state so unreasonable as to constitute a due process violation.⁵⁸

⁵⁵ *Worldwide Volkswagen Corp*, 444 U.S. at 298.

⁵⁶ *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102,112 (1987).

⁵⁷ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

⁵⁸ *International Shoe* , 326 U.S. at 316.

Satisfaction of due process requirement presupposes the reasonableness of the court's exercise of jurisdiction over the non-resident defendant. The U.S. Supreme Court analyzed the reasonableness of exercising jurisdiction over the out-of-state defendant as a relevant factor. In *Asahi* case, the Court explained that:

....[D]etermination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies".⁵⁹

These considerations sometimes serve to establish the reasonableness of the exercise of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required⁶⁰ under different circumstances. In all cases, the weight to be given to each of these factors, is a collective evaluation of the circumstances concerning the defendant's interaction with, or activity within the forum concerned. Under these circumstances, in order for the non-resident defendant, to defeat the jurisdiction, defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable⁶¹.

⁵⁹ *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102,114 (1987).(Citing *World Wide Volkswagen*,444 U.S. at 292).

⁶⁰ *Burger King Corp. v. Rudzewicz* 471 U.S. 462, 471(1985).

⁶¹ *Id.* at 478.

CHAPTER IV
SERVICE OF PROCESS

General Introduction

Jurisdiction over the person is commonly understood to mean the court's power, obtained by a valid service of process or notice or by the voluntary appearance of the defendant. Such authority is essential in order for a court to render a valid personal judgment. In fact, the rules governing the service of process are procedural in nature; which make them an essential part of the jurisdictional inquiry. In this regard, service of process is not simply a question of whether the defendant could be expected to have known about the action; it goes to jurisdiction, as the foundation of the court's authority to make an order against the person of the defendant.

In most common law jurisdiction, personal service of the originating process is regarded foundation of jurisdiction in actions *in personam*. In other words, personal jurisdiction over a given defendant is based upon the requirement and sufficiency of personal service within the province or territory of the forum.

Jurisdiction over the defendant is founded on considerations pertaining to the requirements and sufficiency of service. Both formal requirements and sufficiency of service are to be determined in accordance with the relevant rules governing service of the originating process. Thus, compliance with the rules of service is not an inconvenient formality, rather it is the foundation of the right to a judgment against the defendant.

In almost every legal system, service of process is the pre-requisite legal mechanism to establish the required link between the adjudicative power and the concerned party(ies), without which no effect is given to the exercise of judicial power¹. In the procedural context, the rules of "notification" are fundamental requirement for the assessment of procedural fairness. Regardless of the fact that notice requirements may vary from one legal system to another, they are commonly founded on consideration of fairness and justice², not mere technicality.

The Meaning and Function of the Originating Process

Commonly understood, that originating process (judicial notice) is the act of providing the party to a legal action with a copy of the pleadings or the judicial paper concerned in order to convene him to the Court. Consequently whatever the method of such notice adopted, it is an essential step in the initiation of litigation. Note that service of process is distinguished from the filing of the pleadings for which the notice is required. The filing of the pleadings is the act of presenting the original copies of the pleadings required to be served to the court processing official, where the service in turn is the act by which pleadings or concerned papers are delivered to the intended person(s).

It is clear that judicial notice of the originating process does have a critical role in informing a defender of the raising of the action, and in communicating to him the timetable within which he must act in instructing a defense. Essentially the rational bases

¹ See e.g., Wajdi Raghīb & Azmi Abdulfattah, *Principles of Civil Litigation*, 227 (dar al-ketab Pub. 1984).

² See e.g., Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 1361, 658 U.N.T.S. 163 [hereinafter Hague Convention].

underlying any judicial notification system is to safeguard person's fundamental rights and to assure that judicial process is taken with fairness and justice to all parties. In fact, the enjoyment of the rights and freedoms shall be jeopardized without the formulation of reasonable standard by which persons are notified of any actions that might affect their rights, interests or legitimate expectations.

Judicial Notice: Its Nature and Relation to the Exercise of Jurisdiction

First of all, it is my personal view that a distinction has to be clearly made between the general *jurisdictional facts*, which are those facts condition one court's authority to entertain actions³, and invoke its adjudicative power; and the other facts that relates to the validity of the exercise of jurisdiction. In other words, in order that a court's adjudicative power is exercised, there must be a dispute legally before the court.

The legality or validity of the entertainment of action and any determination therein, is conditioned by providing the opposing party with a fair opportunity to be heard founded on a notice aiming at bringing the action to the party's knowledge. The question of what form of notice would be sufficient to conclude party's knowledge is a relative matter. Generally speaking it would be difficult to adhere to certain fixed mechanism as to the kind of notice that must be applicable in all circumstances; the notice required will necessarily vary with case surrounding circumstances.⁴ Thus, alternative mode of notification could be recognized as valid having the effect of actual notice. In other

³ In reference to personal jurisdiction, domicile, residence, and contact with the forum reflect the general examples of jurisdictional facts.

⁴ For example, in cases where the person's whereabouts is unknown or undetermined (e.g., missing persons), the regular forms of service would be impractical.

words, the satisfactory notification is said to be established when due diligence has been exercised to circulate the notice in order to bring the action to the intended person.

In certain legal systems like the American legal system potential confusion may arise as a result of recognizing territorial service of process as a ground for the exercise of jurisdiction⁵. Hence, reader may confuse the operation of service of originating process with jurisdictional factors.

General Requirements of Proper Notice under the USA law

Service of process is the fundamental step in the judicial process. In addition under the USA law, notice is a question of Constitutional implication. In this regard, it has been held that "[t]he essential elements of due process of law are notice, and opportunity to be heard, and the right to defend in an orderly proceeding⁶". Assurance that no person shall be "deprived of life, liberty, or property without due process of law"⁷ is expressed twice in the U.S. Constitution in both the fifth and fourteenth amendment of the US Constitution. The proper notice and opportunity to be heard are the most fundamental two Constitutional requirements of procedural fairness in the U.S. legal system.⁸

⁵ See e.g., *Hess v. Pawloski*, 247 U.S. 352, 47 S.Ct 632, 71 L.Ed. 1091; *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁶ *Fihe.v. R.E. Householder Co.*, 125 So. 2, 7 (Fla.1929).

⁷ U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

⁸ Distinction has to be made as to whether the question relates to legislative or adjudicative governmental act. Constitutional requirements may differ accordingly. For example, a requirement of hearing applies to adjudicative but not to legislative action. See, *Londoner v. City of Denver*, 210 U.S. 373 (1908).

Constitutional Procedural *Due Process* Requirements (Proper Notice and Opportunity to Be Heard)

The due process clause of both the fifth and fourteenth amendment to the US Constitution sets forth general requirements of legal order⁹. These requirements are meant to limit governmental act by imposing an obligation over the governmental body to afford citizens with certain rights¹⁰. In the procedural dimension of these rights, the requirements impose a limitation over the state's ability to adopt certain procedural constructions that are not compatible with the obligatory observance of individual's rights assured by the Constitution Due Process.

The constitutional procedural dimension of due process gives rise to all governmental acts involving determination affecting rights, interests and legitimate expectations of persons which fall under the protection of due process. The US Supreme Court in *Mullane v. Central Hanover Bank*¹¹ held that:

Many controversies have raged about the cryptic and abstract words of Due Process Clause but there can be no doubt at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.¹²

In one phase of its operation, procedural Due Process aims to balance between states interests of adjudicating matters having sufficient connection with the state and the

⁹ See Peter L. Strauss, *An Introduction to Administrative Justice in the United States*, 32-49 (Carolina Academic Press 1989).

¹⁰ Governmental act in broad sense refers to all aspects of governmental function, legislative, judicial and executive.

¹¹ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.306, 70 S.Ct. 652,94 L.Ed.865.

¹² See *Id.* at 314.

securing the constitutional requirement of providing the opportunity to be heard¹³. The protected Constitutional right of individuals that is the 'opportunity to be heard'¹⁴ would have no real value unless being put into effect by the establishment of efficient informing mechanism¹⁵ and that the sufficiency of the informing mechanism gives rise to the method of serving the process in light of the factual setting of the particular action. In all circumstances, it must afford the interested parties adequate opportunity to be heard, as well as affording the parties a reasonable time to make their appearance. The U.S. Supreme Court in *Grannis v. Ordean* provides that the defendant upon "receiving the notice, would be sufficiently warned that it affected his interest...,is free of doubt, he could of course observe the misnomer...."¹⁶

In this context, the question became, what form of notice under certain circumstances would satisfy due process requirement of proper notice, which consequently would allow the concerned litigant to a full entitlement of the constitutional guarantee of *being heard*. In other words, under what circumstances, certain notice is said to be sufficient to bring the action to the knowledge of the concerned defendant allowing him to calculate for himself whether to act or not. The Supreme Court defines the functional operation of notice stating "the function of service of process is to notify the

¹³ Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified" *Mullane*, 339 U.S. at 314.

¹⁴ *Grannis v. Ordean*, 234 U.S. 385,394, 34 S.Ct. 779, 783, 58 L.Ed. 1363.

¹⁵ See, John J. Ground, Jack H. Friedenthal, Arther R. Miller & John E. Sexton, *Civil Procedure: Cases and materials*, 185 (West 1997).

¹⁶ See, *Ordean* , 234 U.S. at 398.

defendant of the institution of an action¹⁷. This constitutional implication of notice was addressed by the US Supreme Court in *Mullane v. Central Hanover Bank* providing the constitutional standard for notice and service of process. Under this ruling, The U.S. Supreme Court held:

[N]otice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.¹⁸

The court employed a general test that adapts to the changing circumstances involving the circulation of the notice as well as the variance of the different state internal mechanism of the form of service. The court held that "notice reasonably circulated, under all circumstances, to appraise interested parties of the pendency of the action¹⁹". The court further explained that "no decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books".²⁰

However, the Due Process does not specifically prescribe the steps that must be taken to provide notice.²¹ The Only guidance in this respect is "balancing between the interests of the defendant in receiving notice and the interests of the public entity in

¹⁷ *Mullane*, 339 U.S. at 319.

¹⁸ *Id.* at 314.

¹⁹ *Id.*

²⁰ *Id.* at 315.

²¹ *Sinclair & Valentine Co. v. County of Los Angeles* (1988) 201 Cal.App.3d 1021, 1026.

obtaining final settlement regarding fiduciary duties."²² The Court further stated that "the means employed must be such as one desirous of actually informing the absentee [owner] might reasonably adopt to accomplish it."²³

In sum, Due process does not dictate any particular method of circulating notices. States' legislature is free to choose the mechanism it considers sufficient to protect the interests involved, provided that its choice is not unreasonable or arbitrary and satisfies the constitutional requirements of reasonable and opportunity to be heard. Hence, Due process does not require any particular method of procedure or form of notice to be associated with certain type of proceedings²⁴ ; it is sufficient to observe that, "whatever the technical definition of its chosen procedure... provided its procedure accords full opportunity to appear and be heard".²⁵

Among other things, the Supreme Court has clearly established that in general ,resorting to means of constructive service in certain circumstances does not by itself affect the validity of the service, in so far as under the circumstances involved would likely to be the most possible or practicable means of giving more adequate warning of the action.²⁶ The Court also illustrated the factors which may reasonably justifies the resort to substituted customary means of service;

[The court] recognize[s] the practical difficulties and costs that would be attendant on frequent investigations into the status of

²² *Mullane*, 339 U.S. at 313.

²³ *Id.* at 315.

²⁴ *Id.* at 316.

²⁵ *Id.* at 313.

²⁶ *Id.* at 317.

great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impracticable and extended searches are not required in the name of due process.²⁷

Federal Rules of Civil Procedures²⁸(Service of Process in the Federal District Courts

The service of process in the U.S. Federal District Courts is governed by the Federal Rules of Civil Procedure²⁹. The purpose and scope of the rules are stated in Rules 1 and 2³⁰. The mechanism of giving notice in civil actions is governed by Rule 4 of the FRCP entitled "summons"³¹. The Rule elaborates the various aspects of serving summons in federal district courts.

²⁷ *Id.* at 318.

²⁸ These rules govern the conduct of all civil actions brought in Federal district courts. While they do not apply to suits in state courts, the service of process in states courts is governed by the rules of the concerned state. In general, states' rules of civil procedure in many states have been closely modeled on the federal model. The rules are designed to "secure the just, speedy, and inexpensive determination of every action.

²⁹ Fed. R. Civ. P. 1 provides that the Federal Rules govern the procedure of all civil suits in the United States District Courts, except those suits provided for in Rule 81.

³⁰ According to Fed. R. Civ. P. 2 "There shall be one form of action to be known as 'civil action.'"

³¹ According to Black's Law Dictionary the word summons means "instrument used to commence a civil action or special proceeding and is a means acquiring jurisdiction over a party" .Black's Law Dictionary, 1436 (6th ed. 1990) The term is equivalent to the *Arabic* word *e'alan*.

Service of Process Under Rule 4³²: (the Distinguished Features of the Federal Model of Service of Process)

Waiver of service

The Rule introduces a unique feature of serving summons in Federal District Court known as waiver of service. Under Rule 4(d) the plaintiff is permitted to send the notice of the action coupled with a request of waiver of service by the defendant³³. By returning the signed waiver form, the defendant agrees to waive his/her future procedural right of being notified of any further notifications in the same action. The waiver advantages the defendant in two ways; first, it allows the defendant a longer period of time to respond to the action³⁴, in addition it saves defendants penalties and costs that might associate with the formal service of process. To the contrary, refusal of waiver by the defendant will result in penalties. "The court shall impose the costs subsequently incurred in effecting service on the defendant"³⁵, unless the defendant can show a good cause upon which the failure occurred.

The use of states and foreign methods of serving the process

Rule 4 authorizes the use of state procedures prescribed by the law of the state in which the Federal District Court situated³⁶, as well as the use of state's procedures to effect service on the defendant in any Judicial District in the United States. In addition

³² Fed. R. Civ. P. 4. The Rule provides a detailed guide to the different types of summons that a plaintiff can effectuate.

³³ According to Fed. R. Civ. P. 4(d) (2) (A), the request of waiver "must be in writing".

³⁴ Normally the period is 20 days to respond, in case of waiver the period extends to 60 days.

³⁵ Fed. R. Civ. P. 4 (d) (2).

³⁶ Fed. R. Civ. P.4 (e).

Rule 81 provides for the applicability of the local Rules in federal courts proceedings. Subsection (c) states that the Rules "apply to civil actions removed to the United States district courts from the state courts and govern procedure *after* removal³⁷". Under this section, state procedural rules govern cases originating in state court until the case is removed to federal court.

Subsection (i) of Rule 4 provides a flexible way to utilize the rules governing service of process employed by a foreign jurisdiction (world-wide), with exception to personal service which might constitute a violation of the foreign states sovereignty³⁸ and consequently, might affect the enforceability of the judgment abroad.³⁹

The use of international agreements for service of process

Under Rule 4 (f), federal courts may resort to international agreement or any applicable unilateral agreement to affect service abroad. For example, the *Hague* convention to which the United States is a party, is one of the commonly known International agreement regulating service of process abroad. Under the *Hague* convention, service of process is affected through the submission of the notice to the concerned state's authority established for that purpose⁴⁰. The national authority of the state will receive and execute the request of service "by a method prescribed by its

³⁷ Fed. R. Civ. P. 81 removal of the case from state to federal court.

³⁸ Principles of International law require that domestic courts not take actions that may cause violations of another nation's laws.

³⁹ Friedenthal, *supra* note 15, at 194. In addition, principles of international comity may so require.

⁴⁰ Convention applicability does not extend to foreign corporations with national branches. The local branch is deemed the foreign corporation's agent in relation to action filed against the foreign corporation. Fed. R. Civ. P. 4 (h) (1).

internal law for the service of documents in domestic actions upon persons who are within its territory".⁴¹ One of the advantages of resorting to such convention is that even though the use of *international registered mail* may be invalid under Federal Rules of Civil Procedure to effectuate service upon foreign party⁴², Hague Convention may supplement Federal Rules of Civil Procedure, thereby providing independent manner of service⁴³.

Formality of Service Under Federal Rules of Civil Procedure

Citation requirements of summons (content of judicial notice) are specified by Rule 4 (a)⁴⁴ subsection (b) addresses the formal process involving the issuance of summons⁴⁵; the mechanism of service and the server of process addressed by subsection (c)⁴⁶; upon whom service shall be made regulated by subsections (e)(f)(g)(h)(i)(j)⁴⁷. In

⁴¹ [Hague Convention], *supra* note 2, art. 5(1)(a).

⁴² Fed. R. Civ. P. 4. Since service of process by mail requires activity only on the part of a foreign country's postal authorities, it is one of the forms of service least likely to be prohibited.

⁴³ *G.A. Modefine, S.A. v. Burlington Coat Factory Warehouse Corp.* (1995, SD NY) 164 FRD 24, 37 USPQ2d 1413.

⁴⁴ Fed. R. Civ. P. 4 (a). Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.

⁴⁵ Fed. R. Civ. P. 4 (b). Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

⁴⁶ Fed. R. Civ. P. 4 (c) (1). A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.

(2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.

⁴⁷ Fed. R. Civ. P. 4 (e). Service Upon Individuals Within a Judicial District of the United States. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction, or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

(g) Service Upon Infants and Incompetent Persons. Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

(i) Service Upon the United States, and Its Agencies, Corporations, or Officers.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the

United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) Service upon an officer, agency, or corporation of the United States shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, agency, or corporation.

(3) The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

(j) Service Upon Foreign, State, or Local Governments.

(1) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. 1608.

(2) Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

most of its aspects service of process, under the United States Federal model of service of process stipulated by Rule 4 of the Federal Rules of Civil Procedure, complies with the international standards of service⁴⁸.

Effect of Non Compliance with "Notice" Prescribed Formality

In *International Shoe*, the United States Supreme Court cited a *Pennoyer v. Neff* holding that "personal service and notice are key elements of personal jurisdiction"⁴⁹. The Court addresses the effect of non-compliance with the formal requirements of service of process in several occasions; In general, service of process must comply with the statutory requirements prescribed by the relevant rule. However, the court's authority over the party is not affected by mere technical deficiency of the service, insofar as, courts possess the power to order corrections to cure the defects which is the appropriate remedy of defective service.

In practice, personal service of process does not involve practical complexities typical of those associated with prescribed formalities for substituted or constructive forms of service, in the later form of service⁵⁰, the prescribed methods are held to be strictly pursued⁵¹. Under statutes providing for substituted service of process, "there must

⁴⁸ See e.g., *Egyptian Law of Civil Procedure*, law 25/1968; *French Law of Civil Procedure*, *Nouveau code de procedure civile* [N.C.P.C.] ; *Kuwait Law of Civil Procedure*, Decree law 38/1980 ; *Quebec code of Civil Procedure* [R.S.Q.c.C-25] [Canada].

⁴⁹ *International Shoe Co. v. Washington*, 326 U.S. 310,320 (1945).

⁵⁰ Personal service has been said to be service made by delivering the process into the defendant's hands or by seeing him and bringing the process to his notice. See Friedenthal, *Supra* note 15, at 198.

⁵¹ *Guaranty Trust & Safe Deposit Co. v. Green Cove S. & M. R. Co.*, 139 US 137, 35 L Ed 116, 11 S Ct 512; *Hunt v. Wickliffe*, 27US 201, 7 L Ed 397.

be a degree of strict compliance with the requirements of statutes authorizing substituted or constructive service"⁵².

The general the federal courts attitude is one that the provisions of Rule 4 should be liberally construed in the interest of doing substantial justice and that the propriety of service in each case should turn on its own facts within the limits of the flexibility provided by the rule itself. This is consistent with the modern conception of service of process as primarily a notice-giving device⁵³. Nonetheless, it has been held that "The fact that the defendant had actual knowledge of attempted service does not render the service effectual if in fact the process was not served in accordance with the requirements of the statute"⁵⁴. It has been also held that "The service of process is not the foundation of the action but a means to jurisdiction",⁵⁵ therefore, when a motion to quash service is granted on grounds of lack of service and defective process, dismissal of the action is not usually proper.⁵⁶ Although improper service and defective process are

⁵² *Liley v. District Court for Denver (Colo)* 709 P2d 1379.

⁵³ C. Wright & A. Miller. *Federal Practice and Procedure: Civil* § 1083, at 332-33 (1969 & Supp.1977). *See also, id.* § 1063, at 204. "The Primary function of Rule 4 is to provide the mechanism for bringing *notice of the commencement* of an action to defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the law suit."

⁵⁴ *Napoleon B. Broward Drainage Dist. v Certain Lands, etc.*, 160 Fla 120, 33 So 2d 716; *Berryhill v Sepp*, 106 Minn 458, 119 NW 404; *Sullivan v Walburn*, 9 NJ Misc 280, 154 A 617; *Beachler v Ford (Darke Co)* 77 Ohio App 41, 32 Ohio Ops 317, 42 Ohio L Abs 609, 60 NE2d 330.

⁵⁵ 9A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 4460 (perm. ed., rev.vol.2000).

⁵⁶ *See Id.* §4460.

grounds for dismissal of the action, it will not be dismissed unless plaintiff declines to amend or take further proceedings to correct the defective service of process.⁵⁷

[Personal Perspective]

Procedural irregularity associated with service of process though would imply nullity; it does not *prima facie* render the service entirely invalid. The associated failure or defect resulting from non compliance with the prescribed form must be first identified whether being material defect which can be cured or one that has a practical role in informing a defender of the raising of the action and in communicating to the party the timetable within which he must act in instructing a defense therein. In the former, insofar as the defect can be cured, the service is valid. For the later, the general rule is that service is valid unless the affected party can prove that the defect was of such substantial nature that could not reasonably accomplish its purposes. The reason being that if the defective service would render the lawsuit invalid, the court would have been obliged – by its own motion – to reject the lawsuit, irrespective of whether the Defendant would be present or not. In other words, the appearance of the Defendant at the hearing waiving the right to contest the respective deficiency could not be possible to "rectify" the "invalid/ non-existent" lawsuit. Therefore, irrespective of whether the writ has not been served at all or has not been properly served, the Court is entitled to carry on the proceedings, in case the Defendant is present, or postpone the hearing until proper.

⁵⁷ *Id.*

Challenges to Courts Exercise of Jurisdiction over the Defendant

Jurisdiction questions may arise as to whether the court can entertain the subject matter of the action in general, as well as to whether the court has the ability to exercise authority over the defendant. In its exercise of jurisdiction over the defendant the adjudicative power of the court must be founded on minimum, purposeful contacts and must not offend traditional notions of fair play and substantial justice derived from the relevant constitutional requirement of due process⁵⁸. Thus, personal jurisdiction can be challenged once these foundations are not satisfied in light of the relevant jurisdictional facts of a given situation.

In general, lack of jurisdiction may consist in lack of judicial power to act in a given situation, or may denote want of power at all where the prescribed conditions precedent to the exercise of judicial power have not been complied with. In this sense, a clear distinction has to be made between errors of judgment and errors of jurisdiction, the former is one which the court may commit in the exercise of its jurisdiction where the later is one that relates to the judicial power of a court to act.

In fact there is a substantial difference between the legal consequences of lack of jurisdiction and the effect of error of judgment, where a court has jurisdiction over the party, whether its decision is erroneous or correct is entirely different from its authority to decide the action, and however erroneous such decision might be, the error would not divest the court of its jurisdiction.

In the United States legal system, court's authority to exercise jurisdiction over the party can be challenged in the form of challenge to courts power in two distinct

⁵⁸ *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

means of lack of personal jurisdiction challenges; direct attack to courts jurisdiction and collateral attack.

Direct Attack

Challenge to courts exercise of jurisdiction over the defendant is governed by Rule 12(b) of the Federal Rules of Civil Procedure which regulates the presentation of defenses and objections the section reads⁵⁹:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.⁶⁰

In accordance with sub-section 2 of the Rule, Lack of jurisdiction over the defendant must be introduced in a timely manner prior to any contestation in the merits of

⁵⁹ Fed R. Civ. P. 12. The Rule entitled " Defenses and Objections-- When and How presented-- By Pleading or Motion--Motion for Judgment on the Pleadings"

⁶⁰ Fed R. Civ. P. 12 (b).

the dispute⁶¹. Failure of the defendant to object to courts jurisdiction amount to consent and by so failure, defendant's right to object is deemed to be waived⁶². The rule laid down a burden on the plaintiff to establish the court's jurisdiction⁶³. Granting defendant's motion will result in actions dismissal; however, granting the motion does not constitute a disposal of action on the merit, hence the plaintiff may bring the action once jurisdiction over the defendant is properly founded⁶⁴.

Personal jurisdiction may also be attacked by the defendant through the use of the common law procedure known as 'special appearance'.⁶⁵ Under this form of appearance termed *special* the defendant appears for one purpose which is objecting to the jurisdiction of the court over his person, and confines the appearance solely to that jurisdictional question.⁶⁶ The requirement of special appearance varied depending on the

⁶¹ See also Fed R. Civ. P. 13 (b).

⁶² Objection to lack of jurisdiction over the defendant is waived by invoking the court's jurisdiction, as by, counterclaim, consent, or voluntary submission to jurisdiction, or conduct amounting to general appearance.

⁶³ A district court, faced with a motion to dismiss for lack of personal jurisdiction, may choose from among several methods for determining whether the plaintiff has met the burden of proving the existence of jurisdiction. *Dynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, C.A. 1st, 2002,290 F.3d 42, certiorari denied 123 S.Ct. 558,537 U.S. 1029,154 L.Ed.2d 444; *Bank Brussels Lambert v. Fiddler Gonzaleez & Rodrigues*, C.A.2d,1999, 171F.3d 779. The standard of proof may vary depending on the procedure used by the courting making the determination.

⁶⁴ Plaintiff's right to bring the action which previously dismissed based on lack of personal jurisdiction over the defendant once again is considered in light of the applicable statute of limitation governing the filing of the plaintiff's specific action. (in case the jurisdiction over the defendant is established in the subsequent proceedings).

⁶⁵ *Special appearances* are not recognized except where a party appears solely to object to the court's jurisdiction over the person on the ground that defendant is not amenable to process. *Hurst v Southwest Mississippi Legal Services Corp.* (Miss) 610 So 2d 374.

⁶⁶ *American Farmers Ins. Co. v. Thomason*, 217 Ark 705, 234 SW2d 37; *State ex rel. Valles v Brown*, 97 NM 327, 639 P2d 1181; *Willis v Aetna Life Ins. Co.*, 185 Okla 647, 95 P2d 608; *Union Bond & Mortgage Co. v Brown*, 64 SD 600, 269 NW 474, 107 ALR 1089; *Swetnam v Dalby*, 95 Utah 74, 79 P2d

law of the state in which the court situated. In general, any contestation on the merits of the dispute would constitute general rather than special appearance and the defendant is deemed waiving any objection to court's jurisdiction by his/her voluntary submission therein.⁶⁷

Collateral Attack

Collateral attack refers to the presentation of challenges to courts exercise of personal jurisdiction, by the party whose rights or legitimate expectations are adversely affected by certain judgment in any subsequent judicial proceedings where the previous judgment is sought to be enforced or where judgment's validity is put into question⁶⁸. In this regard, it has to be noted that if defendant's special appearance for the purpose of contesting to the court's jurisdiction over his person is granted and that defendant is afforded a full hearing upon the jurisdictional question, and subsequently overruling the motion, the judgment of the merit therein is not subject to collateral attack.⁶⁹ The same also result if the party has appealed the original proceedings upon which the judgment has been entered.

In addition, the court before which the collateral attack is presented must be exercising proper jurisdiction over the subsequent action. Presumption is given in favor

20; *Zarbell v Bank of America Nat'l Trust & Sav. Asso.*, 52 Wash 2d 549, 327 P2d 436; *State ex rel. Nelson v Grimm*, 219 Wis 630, 263 NW 583, 102 ALR 220.

⁶⁷ See Friedenthal, *supra* note 15 at 176.

⁶⁸ *Guranty Trust & Safe Deposit Co. v. Green Grove S. & M. R. co.*, 139 US 137, 35 L Ed 116, 11 S Ct 512.

⁶⁹ *Baldwin v. Iowa State Traveling Men's Asso.*, 283 US. 522, 75 L Ed 1244, 51 S Ct 517.

of jurisdiction and the jurisdictional facts giving rise to the exercise of jurisdiction therein.⁷⁰

⁷⁰ The rule on collateral attack is one that unless the contrary affirmatively appears from the records, all jurisdictional facts are conclusively presumed to have existed, including the proper service of process, whether there are recitals in the record to show them or not, applies only to domestic judgments and not to foreign judgments *Honeywell v. Aaron*, 228 Miss 295, 88 So 2d 558.

CHAPTER V
THE LAW OF VENUE¹

The Meaning of Venue and Its Procedural Framework

The Meaning of Venue and Its Procedural Purposes

Under the American law venue relates to the place where a specific action is triable. The designation of the place of trial is determined in accordance with the relevant law, and is entirely distinct from the meaning of judicial jurisdiction.

In general, Jurisdiction implies the power of court to entertain the action, where venue pertains to the designation of the specific county which a court having proper jurisdiction may in first instance properly hear and determine the action.

Chief Justice *Rugg*, chief justice of the Massachusetts Supreme Judicial Court, differentiated the two in stating that

Jurisdiction is a term of comprehensive import. It concerns and defines the power of judicatories and courts. It embraces every kind of judicial action touching the subject of the action, suit, petition, complaint, indictment or other proceeding. It includes power to inquire into facts, to apply the law, to make decision and to declare judgment....Venue in its modern and municipal sense relates to and defines the particular county or territorial area within the State or district in which the cause or prosecution must be brought or tried. It commonly has to do with geographical subdivisions, relates to practice or procedure, may be waived, and does not refer to jurisdiction at all.²

¹ In the United States Legal system, venue rules do not form part of personal jurisdiction analysis. Nonetheless, the rules are relevant to the subject of territorial competence. This chapter is provided to illustrate the difference between the two examined legal systems.

² *Paige v. Sinclair*, 130 N.E. 177, 178, 237 Mass. 482 (1921).

Accordingly there is no inconsistency between the law which determines the place of trial, referred to as law of venue and that fixes the jurisdiction of the court. The law of jurisdiction sets forth the basis of court's adjudicative power and the law of venue relates to the procedure for exercising the adjudicative power established.¹

In this sense, designation of the place of trial is procedural question in nature², it concerns the exercise of jurisdiction by designated tribunal over the person, which establishes a kind of relation between the plaintiff and the defendant to a given action. Such relation is founded on consideration of trial convenience rather than jurisdictional concerns. Thus, venue rules serve to ensure that judicial proceedings are held in the most convenient forum³. In *Burlington Northern R. CO. v. Ford*,⁴ Justice *Souter* delivering the opinion of the court provides:

Venue rules generally reflect equity or expediency in resolving disparate interests of parties to a lawsuit in the place of trial. The forum preferable to one party may be undesirable to another, and the adjustment of such warring interests is a valid state concern. In striking the balance between them, a State may have a number of choices, any of which would survive scrutiny, each of them passable under the standard tolerating some play in the joints of governmental machinery. Thus, we have no doubt that a State would act within constitutional prerogatives if it were to give so much weight to the interests of plaintiffs as to allow them to sue in the counties of their choice under all

¹ My personal view is one that the law of venue can be defined in precise terms as the procedural legal mechanism of putting court's adjudicative power into action.

² In some jurisdiction rules of venue are not considered jurisdictional in nature, thus question of venue is factual rather than legal question. For example Appellate Court of Michigan held "Michigan's venue provisions are not jurisdictional. Thus, in this case the trial court did not err in denying a motion for a change of venue based on the location of the assets subject to forfeiture"; 194 Mich App 134; 486 NW2d 326 (1992), lv den 442 Mich 905; 503 NW2d 439, cert den 510 US 867; 114 S Ct 189; 126 L Ed 2d 147 (1993).

³ Convenience is primarily evaluated in light of parties' interests, relevant witnesses and availability of evidence.

⁴ *Burlington Northern R. CO. v. Ford*, 504 U.S. 648 (1992).

circumstances. It is equally clear that a State might temper such an "any county" rule to the extent a reasonable assessment of defendants' interests so justified.⁵

The history of this body of procedural law in the United States legal system has gone through different stages within which its development in the American courts has not been satisfactory⁶. American courts have struggled over time to come to specific formula that settles the relatively confusing operation of this procedural system. An example of this struggle is the judicial construction of the meaning of terms "residence" and "domicile" (for venue purposes) where in occasions the terms were treated distinctly⁷ and on other occasions as synonymous⁸.

Venue of State Courts

At the state level, the question of venue is determined in accordance with the state law that regulates the issue. In almost every state, venue designation is governed by the state law provisions that are provided to govern plaintiff's selection of place of trial. These provisions mostly depend on the cause of action, the subject matter of the claim brought⁹, the parties involved or any relevant combination therein. Indeed, there are no

⁵ *Ford*, 504 US. at 652.

⁶ See John J. Ground, Jack H. Friedenthal, Arthur R. Miller & John E. Sexton, *Civil Procedure: Cases and materials*, 326-38 (West 1997).

⁷ See e.g., *State ex rel. Jealous of Him v. Mills*, 2001 SD 65, 627 N.W.2d 790 (S.D. 2001).

⁸ See 77 Am. Jur. 2d Venue § 33. Relationship between 'Residence' and 'Domicile'. Although the terms "residence" and "domicile" are distinguishable for certain purposes, it is generally recognized that for purposes of venue, the terms are synonymous, regardless of whether they are used in the form of a verb or a noun in the particular statute. See also, relationship between residence and domicile under venue statute, 12 A.L.R. 2d 757.

⁹ Specialized State Courts – which are courts hearing certain types of cases in accordance with the plaintiff's relief sought. For example, Family Courts, Probate or Surrogate Courts, Tenant Courts..etc. Also

specific formula governing states specifications in this regard. In general states use varied formulas when allocating the place of trial.

In general, venue requirements may vary from one jurisdiction to another.¹⁰ Nonetheless, the dominant traditional factors for purposes of venue determination under most states' laws are; place of residence, domicile and place of transacting business. Aside from the variation in the specific meaning of domicile and residence for purposes of venue, a wider inconsistency occurs for the *doing or transacting business* standard. In designating the place of trial for actions brought by or against corporations, the expression *doing business* has been interpreted in different ways¹¹ by different states judiciaries, and different tests have been employed for such formulations. For example under the law of the State of Alabama, doing business and transacting business are treated equally for purposes of venue,¹² where in another jurisdiction doing business by agent not sufficient to support venue.¹³

according to the value of action brought, the action might fall under the jurisdiction of a specialized state court designated to hear certain type of dispute according to its monetary value, example of this designation is the states' small claim courts. Accordingly, plaintiff's choice of forum might be restricted in terms of which county or city court within a state is the proper place of the plaintiff's specific action.

¹⁰ Generally speaking, venue requirements may vary on state level according to the concerned state's framework of venue, thus reference to such framework is indispensable.

¹¹ The term *transaction of business* does not include casual or occasional transactions not a part of the ordinary business; see e.g., (Michigan) *Marposs Corp. v. Autocam Corp.*, 183 Mich App 166,454 NW2d 194; (North Dakota) *Griffin v. Implement Dealers's Mut. Fire Ins. Co.*, 62 ND 21, 241 NW 75. (South Carolina) *Jackson v. H& S Oil Co., Inc.*, 261 SC 214,199 SE2d 71.

¹² Ex Parte Southwest Bank, 619 So 2d 1356 (Ala 1993).

¹³ For example. In Missouri see, *State v. Gaertner*, 605 SW2d 506.

Venue of Federal District Courts¹⁴

General Statutes

Requirements of venue in federal district courts are controlled by the act of Congress.¹⁵ The Congress has enacted several venue statutes. The general law of venue is 28 U.S.C.A. Section 1391, which sets forth the requirement for choice of venue in federal courts. The federal enactment commonly referred to as the general venue statute, provides plaintiffs in federal courts choices of forum in diversity suits and suits brought under federal law¹⁶.

Venue in diversity actions¹⁷

The statutory requirements under Section 1391(a) are satisfied in diversity action if the plaintiff files the action in one of three available venue options. The law provides that in diversity actions plaintiff has the option to file the action in the district court where the defendant 1) resides,¹⁸ 2) in the district court where *Substantial events or*

¹⁴ Rules of venue are rules of convenience for allocating cases territorially, usually among counties within a state and among judicial districts and their divisions within the federal court system.

¹⁵ It has been held that "Congress has power to authorize a suit under federal law to be brought in any federal district court and to provide that process may run into any part of the United States." *Blank v. Bitker*, C.C.A.7th, 1943, 135 F.2d 962., also "[e]nactment of a venue statute is within the power of Congress, and it is not within the judicial province to deny that power even though effect of its exercise may be to place a burden upon interstate commerce." *Cooke v. Kilgore Mfg. Co.*, D.C.Ohio 1952, 105 F.Supp. 733.

¹⁶ The statute also provides venue in actions against Alien , United States, and foreign governments.

¹⁷ 28 U.S.C.A. § 1332.

¹⁸ *Id.* § 1391 (a)(1).

*omission occurred,*¹⁹ or 3) in the district court *where any defendant is subject to personal jurisdiction.*²⁰

Federal question²¹

Where the action brought is not mainly based on diversity, the plaintiff of the federal question suit has three options for the election of the forum. The available options are identical with those afforded to plaintiff under section 1391(a).²²

Actions against corporations

Section 1391(c) reads:

For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.²³

In light of Section 1391(c) corporations are resident for purposes of venue in any judicial district in which they are subject to its jurisdictional power at the time of the

¹⁹ *Id.* § 1391 (a)(2).

²⁰ *Id.* § 1391 (a)(3).

²¹ Federal question Jurisdiction is conferred by the Constitution on federal courts to hear all cases arising under the Constitution, the laws of the United States, and treaties.

²² Applicable exception is found under 28 U.S.C.A § 1391(b) (3) providing that "where any defendants may be found".

²³ 28 U.S.C.A § 1391(c).

commencement of the action.²⁴ In addition there is a view that the provision is applicable to actions brought by corporation as a plaintiff. In this regard, it was held that 1391(c) is "equally applicable to corporate plaintiffs, with the result that a corporation could bring an action in the federal district in which it was licensed to do business or was actually doing business"²⁵

Actions against Aliens²⁶

Under Section 1391(d) aliens may be sued in any judicial district. Further, the relevant case law "suggests that this provision applies equally to Alien Corporation as well as alien natural person"²⁷.

Actions against United States as defendant

Section 1391(e) reads:

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved

²⁴ Whether a corporation is subject to jurisdiction in a specific forum or not, is a matter of *minimum contact* analysis. In case where the concerned state is a multi-district state, the jurisdictional analysis must relate to the specific district of that state or the most significant contact. For further explanation see , Steven Baicker-McKee, William M. Janssen & John B. Corr, *A student's Guide to the Federal Rules of Civil Procedure*, 34-35 (West. 2nd ed. 1999).

²⁵ For example, *Freiday v. Cowdin* (1949, DC NY) 83 F Supp 516, app dismd (CA2) 177 F2d 1020; *Hadden v. Barrow, Wade, Guthrie & Co.* (1952, DC Ohio) 105 F Supp 530; *Southern Paperboard Corp. v. United States* (1955, DC NY) 127 F Supp 649.

²⁶ 28 U.S.C.A § 1391(d) reads " [a]n alien may be sued in any district".

²⁷ Steven Baicker-McKee, William M. Janssen & John B. Corr, *supra* note 26, at 35.

in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party. The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.²⁸

Actions against foreign Countries

Section 1391(f) reads:

A civil action against a foreign state as defined in section 1603(a) of this title may be brought - (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title; (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.²⁹

Special Venue Statutes

Section 1391 is "the general venue status to all transitory civil actions for which there are no special venue statutes".³⁰ The general venue provisions are displaced by a special statute limiting the place of bringing a particular suit for certain causes of

²⁸ 28 U.S.C.A § 1391(e).

²⁹ 28 U.S.C.A § 1391(f).

³⁰ See, *Randolph Labs. v. Specialties Dev. Corp.*, D.C.N.J.1945,62 F. Supp.897.

action.³¹ These enactments aim to regulate special venue concerns and supercede the general law of venue to the extent of their inconsistency. Hence, any deficiency of the special venue statutes is supplemented by reference to the general venue statutes.

Section 1391(a) and (b) provides the plaintiff with an additional options to resort to the special venue statutes whenever applicable for the specific cause of action brought. Both statutory provisions employ the expression "..., except as otherwise provided by law".³² The example of such special statutes is the special venue provision of patent infringement suits.³³

The Nature of the Venue Procedural Rights under § 1391

The plaintiff's procedural right of electing the venue under Section 1391 is waivable in nature. In turn, defendant's consent to personal jurisdiction of particular district court carries the meaning of consenting to venue therein. In this case defendant's consent is waiver of defendant's procedural right to object to venue. In addition, defendant's failure to object to plaintiff's choice in a timely manner constitutes consent.

Objections to choice of venue are governed by Rule 12(g) and (h) of the Federal Rules of Civil Procedure. The Rule provides:

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so

³¹ See, *U.S. v. Congress Constr. Co.*, 1911, 32 S.Ct.44, 222 U.S. 199, 56 L.Ed. 163.

³² 28 U.S.C.A § 1391 (a), (b).

³³ 28 U.S.C.A. § 1400 (b). See also, 28 U.S.C.A. § 1401 (shareholder's derivative actions).

omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.³⁴

In his comments on Rule 12(g) Professor *Corr* states; "if a party chooses to make a motion under Rule 12, the party must include all Rule 12 defenses and objections available in a single omnibus motion. Rule 12 (g) must be read in conjunction with Rule 12 (h), concerning waiver and preservation of certain defenses".³⁵ Section (h) of the Rule provides:

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.³⁶

Transfer of Venue in Federal District Courts

Objection to improper venue is ordinarily made by a preliminary motion to dismiss, usually without prejudice to re-file in the proper venue. If, for some reason a dismissal would effectively extinguish the plaintiff's right to seek redress irrespective of the merits, the alternative to dismissal is to transfer the action to a proper venue within the same judicial system.³⁷

In the federal courts, for example, a court in which venue has improperly been laid may dismiss, "or if it be in the interest of justice, transfer such case to any district or

³⁴ Fed. R. Civ. P.12 (g).

³⁵ Steven Baicker-McKee, William M. Janssen & John B. Corr, *supra* note 26, at 222.

³⁶ Fed. R. Civ. P.12 (h).

³⁷ Typically, such determination is made in light of the applicable statute of limitations.

division in which it could have been brought."³⁸ If the alternative forum is in the U.S., the proper motion is a motion to transfer under 28 U.S.C. Section 1404(a). If the alternative forum is outside the state's judicial system or even outside the U.S., the courts cannot do much. State courts have no power to transfer a case to the courts of other states, and neither state nor federal courts have the power to transfer cases to the courts of foreign countries. In such cases, only a motion to dismiss on grounds of *forum non conveniens* is proper.

The federal law provides for three procedures governing the transference of actions in federal district courts. The three procedural transference mechanisms are regulated under three statutory sections; transfer under 28 U.S.C.A. § 1404(a); 28 U.S.C.A. § 1406(a); 28 U.S.C.A. § 1407(a).³⁹

Change of Venue under Section 1404(a)

The law provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought".⁴⁰

The statutory provision gives the district court discretionary authority to transfer any action based on finding of convenience of the parties and witness and consideration

³⁸ 28 U.S.C.A. §1406(a).

³⁹ 28 U.S.C.A §1407 Governs pretrial proceedings only. Transfer by the Judicial Panel on Multidistrict Litigation of civil actions for coordinated or consolidated pretrial proceedings is for pretrial purposes only, and the fact that all parties are not amenable to suit in a particular district does not prevent transfer to that district for pretrial proceedings where the statutory prerequisites are otherwise satisfied; succinctly, venue is not a criterion in deciding the propriety of transfer.

⁴⁰ 28 U.S.C. 1404 (a).

of proper carriage of justice⁴¹. Nonetheless, such discretion is not absolute, since the transferee district court must be one in which the action "might have been brought". The statute meant to provide a remedy for bringing an action to improper forum, where the applicable remedy in the absence of such statute is to dismiss the action brought in the inappropriate forum.

However, the remedy for inconvenient forum under § 1404(a) is not a dismissal but a transfer. Nonetheless, there is nothing in the language of the statute that precludes the Federal District Court from dismissing an action where the trial of the action in the court is inconvenient, and where there is alternative proper federal forum to which a transfer may be made. The language of the statute dictates that either party may move to transfer on motion. In addition, delay in making a motion for transfer under § 1404(a) is not, by itself, a sufficient ground for denying the motion, since the ultimate purpose of the statute is the maintenance of convenience and proper carriage of justice⁴², thus, delay must not be treated as a waiver of litigant right to transfer under the statute.

⁴¹ For convenience of the parties and witness, *see e.g.*, *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.* (CA2) 178 F2d 866; *Webster-Chicago Corp. v. Minneapolis-Honeywell Regulator Co.* (1951, DC Del) 99 F Supp 503; *Glickenhau v Lytton Financial Corp.* (1962, DC Del) 205 F Supp 102; *Wilson v. Ohio River Co.* (1964, DC Pa) 234 F Supp 283.

⁴² The legislative purpose of the statute has been stressed by Justice Frankfurter in his dissenting opinion in *Hoffman v. Blaski* 363 US 335,352. Stating that "[t]he problem in this case is of important concern to the effective administration of justice in the federal courts. At issue is the scope of 28 U.S.C. 1404 (a), providing for the transfer of litigation from one Federal District Court to another. The main federal venue statutes necessarily deal with classes of cases, without regard to the occasional situation in which a normally appropriate venue may operate vexatiously. Section 1404 (a) was devised to avoid needless hardship and even miscarriage of justice by empowering district judges to recognize special circumstances calling for special relief. It provides that an action, although begun in a place falling within the normally applicable venue rubric may be sent by the District Court to go forward in another district much more appropriate when judged by the criteria of judicial justice.

Under the language of the statute, the statutory power of the district court to transfer the action is limited not only on the finding of convenience as the foundation for transference⁴³, but rather on whether the transferee district is one in which the action could have been brought by the plaintiff.⁴⁴ The legislative phrase *might have been brought* has been a source of controversy and confusion since the statute was enacted, and this controversy continues despite several Supreme Court decisions addressing what the words mean.⁴⁵

The federal case law developed under this statutory provision reveals the struggle that federal courts had experienced in constructing the proper meaning of the legislative phrase *might "have been brought"*.⁴⁶ In one phase of this difficulty, courts had to determine whether the reference should be made to the time of transfer or the time of bringing the action to the court in the first place.⁴⁷

The U.S. Supreme Court held:

It is not to be doubted that the transferee courts, like every District Court, had jurisdiction to entertain actions of the character involved, but it is obvious that they did not acquire jurisdiction over these particular actions when they were brought in the transferor courts. The transferee courts could have acquired jurisdiction over these actions only if properly brought in those courts, or if validly transferred thereto under 1404 (a). Of course, venue, like jurisdiction over the person, may be waived. A defendant, properly served with

⁴³ Court's discretion in granting change of venue for convenience of parties, in the interest of justice, should be guided by balancing of numerous factors, while bearing in mind that plaintiff choice of forum is entitled to great weight. These factors include convenience of parties and witnesses, availability of documents, possibility of consolidation and interests of justice.

⁴⁴ *Hoffman v. Blask* 363 US 335 (1960).

⁴⁵ For example, *Hoffman* case is one of the numerous cases where the legislative phrase was put in question.

⁴⁶ *Hoffman v. Blask* 363 US 335 (1960).

⁴⁷ *Id.* at 353.

process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default. But the power of a District Court under 1404 (a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action "might have been brought" by the plaintiff.⁴⁸

Transfer of Venue under Section 1406(a)

The statute reads:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.⁴⁹

The statute sets forth the circumstances under which transference of action is allowed under 1406(a). The statute allows transference of the action to another federal district court where venue is improper in the original district court⁵⁰. In general, the federal courts attitude is one that, if venue is not proper in District Court where action is initiated, transfer to proper district or division is normally preferred over dismissal.⁵¹

The legislative intent behind the statutes is similar to the objective of 1404(a) in that the statute provides statutory sanction for transfer instead of dismissal,⁵² where

⁴⁸ *Id.* at 344.

⁴⁹ 28 U.S.C.A. § 1406(a).

⁵⁰ In this regard, it has been held that "the evidence was insufficient to support the defendant's objection to venue, and that therefore the defendant's motion in all respects should be denied". *Mincy v. Detroit & Cleveland Navigation Co.* (1950, DC NY) 94 F Supp 456.

⁵¹ *Van Gelder v. Taylor* (1985, ND Ill) 621 F Supp 613; also it has been held that "[u]nder cure of venue defects statute, a defendant is entitled to a transfer of venue only if venue is laid in the wrong district". *Pacer Global Logistics, Inc. v. National Passenger R.R. Corp.*, 272 F. Supp. 2d 784 (E.D. Wis. 2003).

⁵² "The purpose of § 1406(a) was to avoid the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn". 32 Am. Jur. 2d, *Federal Practice*

venue is improperly laid⁵³. Hence, § 1406(a) applies only when venue is improperly laid in the court in which an action is brought. Its application does not depend upon considerations of inconvenience in trying the action.

Transference foundation under 1406(a) relates to the inappropriate choice of forum by the plaintiff and does not depend upon the inconvenience of trying the action where it has been brought⁵⁴. Thus, improper venue is a prerequisite for applying § 1406(a).⁵⁵

The case law developed under 1406(a) does not provide a precise construction to what might qualify as "improper" venue under the statutory provision⁵⁶. The courts grant motions to transfer actions properly brought before them in occasions where the court lacks jurisdiction over the defendant.⁵⁷ In other words, the transference had been affirmed in cases where the court lack jurisdiction over the defendant. In this regard, it has been held that:

A lack of personal jurisdiction over a defendant satisfies the standard that allows a court to dismiss or transfer a case in which venue is laid in the wrong division or district whenever there is an impediment preventing the court from proceeding to trial on the merits.⁵⁸

and Procedure § 202.

⁵³ The transfer of a civil action for the convenience of parties and witnesses and in the interest of justice is governed by 28 U.S.C.A. § 1404(a).

⁵⁴ *Schiller v. Mit-Clip Co.* (1950, CA2 NY) 180 F2d 654.

⁵⁵ 28 U.S.C.A. § 1406 (a) applies only to cases laying venue in the wrong division or district.

⁵⁶ For a broad interpretation of the term *improper* see e.g., *Dubin v. United States* (1967, CA5 Fla) 380 F2d 813; *Mayo Clinic v Kaiser* (1967, CA8 Minn) 383 F2d 653, 3 ALR Fed 460.

⁵⁷ See e.g., *Goldlawr ,Inc. v. Heiman*, 369 U.S. 463 (1962).

⁵⁸ *Drayton Enterprises, L.L.C. v. Dunker*, 142 F. Supp. 2d 1177 (D.N.D. 2001).

In *Goldlawr ,Inc v. Heiman*, the Supreme court held :

Nothing in that language indicates that the operation of the section was intended to be limited to actions in which the transferring court has personal jurisdiction over the defendants. And we cannot agree that such a restrictive interpretation can be supported by its legislative history - either that relied upon by the Court of Appeals or any other that has been brought to our attention. The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporations could be "found" or that they "transact . . . business" in the Eastern District of Pennsylvania. The language and history of 1406 (a), both as originally enacted and as amended in 1949, show a congressional purpose to provide as effective a remedy as possible to avoid precisely this sort of injustice.⁵⁹

In addition, the reader should have in mind, that the original venue of action could have been considered proper under traditional standards. The action nonetheless, could be subject to dismissal on grounds other than improper venue. In this regard, it has been held that "[a]lthough it has been generally held that an action whose venue is proper cannot be transferred to another court under § 1406(a), even though it is subject to dismissal on a ground other than improper venue".⁶⁰

⁵⁹ *Heiman*, 369 U.S. at 466-67.

⁶⁰ *Pitman v. Pan American World Airways, Inc.* (1963, DC Pa) 223 F Supp 887.

Forum Non Conveniens⁶¹

Its Origin, Meaning and Procedural Functions

According to the United States Supreme Court "...the origins of the doctrine of forum non conveniens in Anglo-American law are murky, most authorities agree that forum non conveniens had its earliest expression not in admiralty, but in Scottish estate cases."⁶² Historically, the first Scottish cases dealt with the plea known of *forum non competens*. This procedural plea was normally directed to a lack of jurisdiction, and "was sustained in cases where the jurisdiction seemed clear but the parties were nonresidents and trial in Scotland would have been inconvenient."⁶³

In its essence, *forum non conveniens* is a common law doctrine which governs where a lawsuit must be tried. When the location is inconvenient for the parties or witnesses, if a party makes an adequate showing of inconvenience, the principle of *forum non conveniens* allows a judge to decline to hear, or to transfer, a case even though the court is competent to decide the case. The basis of the doctrine is that there is a more appropriate forum for the determination of the dispute than the one in which the case has been brought.

⁶¹ *Forum non convenient* is a Latin term "refers to discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum". Black's Law Dictionary, 655 (6th ed. West 1990).

⁶² *American Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994).

⁶³ Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 Cal.L.Rev. 380, 387 n. 35 (1947); "The doctrine of forum non conveniens may apply intrastate, as well as interstate" *Wieser v. Missouri P. R. Co.*, 98 Ill 2d 359, 74 Ill Dec 596, 456 NE2d 98; "[A]nd it may be applied in actions instituted by writ of foreign attachment." *Plum v. Tampax, Inc.*, 402 Pa 616, 168 A2d 315, 90 ALR2d 1105, cert den 368 US 826, 7 L Ed 2d 30, 82 S Ct 46.

Traditionally, the doctrine of *forum non conveniens* is used in deciding jurisdictional issues that arise because of the interprovincial or international elements in a case.⁶⁴ It is sometimes referred to in cases that concern the allocation of litigation as between the courts of a concurrent jurisdiction, but the discretion of one court to decline in favor of the other, is usually exercised more on the basis of the courts' respective constitutional roles and subject-matter expertise.

The court would consider several matters in exercising its discretion regarding the issue of *forum conveniens*. That issue is usually put in terms of whether the forum is the most convenient place to try the issues raised. It is clear however that a judge exercising discretion must weigh not only the convenience of the parties, but also policy considerations, such as the need to avoid a multiplicity of suits.

In general, determining *forum non conveniens* involves two tests. First, the litigant is required to show that there is another alternative forum, available and more appropriate than the forum where the action is brought, and that the other forum will better serve the interest of parties and the ends of justice. Second, once the litigant discharges the above burden, the court will grant a stay, unless the opposing party (most likely the plaintiff) can show that, even though the case may be tried in the alternative forum, special circumstances exist to show that substantial justice cannot be obtained there.

⁶⁴ James J. Fawcett, *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law, Athens, August 1994*, 124 (Oxford University 1995).

Forum Non Conveniens in the United States' Federal District Courts

One of the principal case law in the U.S. concerning *forum non conveniens*, is the U.S. Supreme Court case *Piper Aircraft Co. v. Reyno*.⁶⁵ Under this case the Supreme Court reconfirmed its earlier decision in *Gulf Oil Corporation v. Gilbert*⁶⁶ which provides two tests for trial courts in exercising their discretion on the defense of *forum non conveniens*.⁶⁷ The courts are required first to inquire into whether an adequate alternative forum exists and is available. Second the court must weigh both public and private interests involved in litigating the action elsewhere.

As a prerequisite for the first test, the court must establish that an adequate alternative forum exists that has jurisdiction over the action. In this regard, the defendant must specify the alternative forum to which the case is more closely connected⁶⁸. Thereafter the court determines whether the forum is adequate or not. In this context, it has been held that the potential of physical danger to plaintiff in alternative forum

⁶⁵ 454 U.S. 250 (1981).

⁶⁶ 330 U.S. 501 (1947).

⁶⁷ Considerable amount of discretion is left with judges. As a result, the difficulty with the doctrine of *forum non conveniens* is one that it lends itself to case by case decisions, without lucidly articulating the clear policy questions which underlies individual decisions. The real fairly challenge is to determine an acceptable collection of principles upon the basis of which a court either hears or declines to hear a particular case.

⁶⁸ It has to be remembered that an action is controlled by the law of the jurisdiction in which the allegedly more convenient forum is located has frequently been considered by the federal courts in dismissing the action on the ground of *forum non conveniens*, although such a dismissal is not necessarily controlled by the fact that the law of another jurisdiction is applicable or that such law is different from the law of the jurisdiction in which the action was brought; a federal court's unfamiliarity with the law of a foreign country bears little weight in favor of dismissing on the ground of *forum non conveniens*, and an action involving foreign elements may not be dismissed on such ground where it is governed by United States statutory law.

rendered in inadequate.⁶⁹ In another case, the Bolivian judicial system was held to be too corrupt to be an adequate forum.⁷⁰

For the second test (public and private interest factors), the court considers private interests such as the location of witnesses, ease and cost of access to documents, ability to implead, the possibility of enforcement of judgment and language translation. Public interest considerations on the other hand, include for example, the interests of the forum state, the burden on the courts and the notion of judicial comity.⁷¹

At the final step of this analysis, the court inquires into whether the defendant is amenable to process in the alternative forum. If for some reasons, defendant cannot be sued in alternative forum, then there will be no rational basis for dismissing the case.⁷² In order to avoid this consequence, the defendant may submit to process in alternative forum or the court could set conditions to make defendant amenable to process in alternative jurisdiction.

In conclusion under the Anglo-American law, the discretion exercised in cases involving the application of the doctrine *forum non conveniens* must be distinguished from the discretion to decline jurisdiction where the jurisdiction is established 'as of right'. The substantive difference in the basis of jurisdiction is reinforced by the procedural difference that, instead of the plaintiff seeking leave to serve the defendant,

⁶⁹ *Cabiri v. Assasie- Gyimah* 921 F. Supp. 1189, 1191 (SDNY 1996).

⁷⁰ *Eastman Kodak Co v. Kavlin* 978 F. Supp. 1078, 1084 (SD Fla. 1997).

⁷¹ 454 U.S. 250, 253 (1981).

⁷² If the court decides that the balance favors another forum, it must finally insure that plaintiff can reinstate the action in the alternative forum without undue convenience or prejudice.

the defendant was seeking a stay of proceedings after being served, which means that the source of the discretion is different.

As a general rule, leaves should not be granted unless it is proven to the court that the case is a proper one for service in the alternative forum. The basic principle is that a stay will only be granted on the ground of forum *non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

In this regard, in order to succeed, the defendant must show, first, that the continuance of the action in the forum would be oppressive or vexatious to the defendant or an abuse of process in some other way; and, secondly, that the stay would not cause an injustice to the plaintiff.

PART III

FINAL ASSESMENT OF THE SUBJECT

CHAPTER I
GENERAL REMARKS

Preamble

The essential function of a court is providing resolution to controversies. The process starts with the ascertainment of all material and relevant facts of the cause of action, and is followed by the application of law, in order for the action to be authoritatively settled. In its essence, this process involves the application of two distinct set of rules, one governing the substance of the action brought and the other governing the prescribed method or procedure by which the substance is put into action. The first is known as the substantive law and the later, as procedural law.

While western legal scholars are not in agreement about providing a specific definition to both bodies of law¹, they nonetheless, have been able to draw a functional distinction between substantive law and procedural law. They commonly address the function of substantive law by providing that substantive law is the body of law defining the legal rights and duties of persons in their ordinary relations with each other or the body politic.² On the other hand, procedural law is recognized as a legal mechanism by which rights might be protected, or the machinery for the enforcement of substantive rights.

¹ Fleming James, Jr. & Geoffrey C. Hazard, Jr., *Civil Procedure*, 2 (3rd ed. 1985).

² *Id.* at 2.

A similar functional definition is provided by a well known Egyptian scholar, Dr *Fathi Wali*.¹ According to him, procedural law is the mechanism governing the effectuation of judicial protection. In his book, *Alwaseet fe Qanoon Al Qada'a Almadany*, Dr Fathi Wali defines the law of civil procedure as "the body of law regulating the various means by which adjudicative power is put into action"².

It is worth noting, that both legal cultures approach the formality of judicial process in the same manner even though each tradition has a distinct institutional framework that differs than the other. Nonetheless, the aim of this chapter is to identify the essential nature of jurisdictional rules as well as identifying its sources and charting its boundaries.

In order to determine the rules' specific nature in a comparative perspective, the reader should keep in mind that each procedural system must be comprehended as a whole, and that a single element involved in the judicial process in one system might have a stronger operational effect than the same element in the other system.³

Jurisdictional Rules (Its Nature, Source and Operation)

Based on the basic functional definition of the rules, one might ask, in what category will jurisdictional rules most likely fit?. In fact, under both systems, jurisdictional rules are treated as a distinct procedural body within the procedural

¹ Former Dean of the Faculty of Law at Cairo University.

² Fathi Wali, "*Alwaseet fe Qanoon Alqada'a Almadany*": *The Law of Civil Procedure and other supplemental regulations*, 7 (dar al-nahdah al-arabeyah 2001).

³ Fleming James, Jr. & Geoffrey C. Hazard, Jr., *supra* note 1, at 823.

framework. The rules are recognized as having a special and essential function which differs from the ordinary formal procedures.

In both systems, no specific definition to jurisdictional rules is provided except those attempts addressing the rules' functionality. In fact, the rules operate as prerequisite conditions that govern the exercise of the adjudicative authority of courts in all different dimensions of the adjudicative authority. Apart from the procedural framework within which the rules exist, categorizing these rules within the two bodies of law requires at the outset identifying the specific function of the rules within each system.

In my personal view, jurisdictional rules are those addressing the authority conferred upon certain adjudicative authority by a previously established rule of law and conferring such authority the power to hear and determine cases and controversies between parties. In this sense, identifying the extent of the relevant adjudicative authority requires identifying and examining the law in force at the time where such authority is held to be established.

The other inquiry in this context is identifying the basis for the judicial power in question. In other words, determining the instances under which a jurisdictional rule is applicable. The answer to these inquiries within any procedural framework would clarify that jurisdictional rules are to be distinguished from ordinary procedural rules in the sense that the jurisdictional rule becomes one that deals with the power of the court in real and substantive sense where the ordinary procedural rule is one by which the power is put into action.

Therefore, jurisdictional rules, regardless of their forms must be understood as a set of rules that fix the conditions under which the adjudicative power of a court is

invoked. In this regard, distinction must be clearly drawn between the adjudicative power in an abstract sense and the actual exercise of judicial power. The first refers to the abstract authority of a court to decide a case, whereas the later pertains to all questions involved following the entertainment of the action.

In fact jurisdictional inquiry in any given legal system is addressed in light of guiding principles in a specific context within which the term is brought. In the context of judicial proceedings, a civil tribunal is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, either to protect or enforce the right or to provide a remedy against other party for infringement of such right, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. Consequently, jurisdictional rules can be classified according to the nature and object of such power. For example, the authority of a court might be limited⁴, general⁵, special⁶ ..etc.⁷ For the classification of jurisdictional rules based on its object, the adjudicative power may relate to person or subject matter.

Therefore, jurisdictional rule, which confers the authority to a specific court to hear and determined whether a particular case falls within the general class of cases to which the proceedings in question belongs, is purely a subject matter rule. In turn, rule

⁴ Limited jurisdictional power is one that confines the adjudicative power of one court to a particular type of legal dispute(s). In other words, one which can be exercised only under limitation

⁵ General adjudicative power means authority that extends to all legal controversies which might be brought before one court.

⁶ Adjudicative power which might be invoked under restrictive or limited circumstances.

⁷ The above provided are example of the various classification of the adjudicative power based on its nature. Many classifications can be also provided depending on the legal context within which the relevant rule is applicable. Thus, classifications like concurrent jurisdiction, civil jurisdiction...etc., are commonly associated with jurisdictional analysis.

that determines whether the defendant is properly before the court and subject to its authority can be described as a personal jurisdiction rule or rule of *ekhtesas shakhsy* insofar as it relates to the parties of the dispute and the determination of the extent of judicial power in relation to them.⁸

After we have reviewed in the previous two parts of this dissertation the law of personal jurisdiction and *ekhtesas shakhsy* in the two examined systems, in an attempt to determine the nature and operation of the rules in force under the two models, any assessment of the two frameworks' efficiency depends on three specific factors, rules clarity, sufficiency, and justifiability.

What follows is an attempt to address the merits of each set of rules in light of the three factors:

Personal Perspective about the Elements and Foundations of Fair and Adequate Jurisdictional Framework⁹: (Clarity, Consistency and Justifiability)¹⁰

In my personal view a fair assessment of any legal framework requires analyzing the rule(s) in question in light of the concerned rules' clarity, consistency in the institutional framework and justifiability in operation. The factors I suggest are

⁸ Different legal systems may employ different terms to identify this category of legal rules. For example, the rules are known as the law of personal jurisdiction in the American legal system where under the Canadian legal system, for example, the expression "personal jurisdiction" does not exist. *See e.g.*, Quebec Code of Civil Procedure R.S.Q.c.C-25 [Canada].

⁹ This section addresses the various aspects of jurisdictional framework including in particular the rules of personal jurisdiction.

¹⁰ It should be kept in mind that a potential of confusion and misunderstanding may occur, especially in determining the proper meaning of certain legal terms within a specific framework when the specific subject is addressed in international context. The differences in cultural, religious, linguistic backgrounds as well as differences in the structure, nature and form of law could substantially attribute to the general comprehension of the rules' content and scope of operation.

fundamental elements in evaluating and describing the operational mechanism of one procedural system. By themselves, the factors constitute the minimum requirements needed in order for a legal framework to function.

In fact, each factor would by itself help the reader to identify the weaknesses and strength in one system as compared to the other. By keeping in mind these three factors, the reader is likely to comprehend the rational basis of the conclusion of this study.

Clarity¹¹

For personal jurisdiction rule as for any other legal rule, clarity is a fundamental factor for judging its efficiency. In order for any legal framework or legal system to function effectively, the rules must be sufficiently clear and intelligible in order to be understood by those individuals to whom they apply. What I mean by rule's clarity is that the consequences of legal action must be foreseeable in advance by the individuals who are subject to the concerned legal system. In other words, the person (likely the defendant in legal proceedings) should be held to expect being subject to the rule and thus act accordingly.

The ultimate goal of any legal rule in any form is to adequately help persons and to guide their activities, which requires that the rule as a guidance be clear, direct and expressive to the true meaning of its content. In addition, individual are obliged to

¹¹ Clarity for purposes of this section extends to both rule's linguistic structure and the purposive approach of the rule in question.

observe law in their interaction which requires that the law itself be clear in order to best give effect to its purposes.¹²

Vagueness or ambiguity in personal jurisdiction rules of a legal system is likely to cause uncertainty as to whether powers have been legally established over individuals in accordance with legal requirements or may cause uncertainty as to whether the adjudicative authority has initially been invoked.

Generally speaking, it must be understood that identifying the law and its meaning is not an exclusive activity to the adjudicative institutions of one legal system. Individuals in their normal life are responsible for observing the law and acting accordingly in the sense that they are able to decide the extent of rule's applicability in a particular situation. Thus a person should be given an adequate and reasonable opportunity to adequately anticipate the consequence of his/her actions. Without such of legal rule in general and procedural rule in particular the minimum amount of fairness is not achieved and there is substantial risk that justice will not be done and properly carried. Thus, a legal framework that diminishes the capability of clearly identifying the law is a defective system.¹³

¹² In general see, H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994).

¹³ In general non-clarity of the rule might be ascribed to as either being ambiguous or uncertain. Ambiguity occurs when the meaning of the rule is not identifiable or difficult to be concluded. On the other hand, uncertainty occurs when the rule is capable of bearing different meanings and thus different applications. Ambiguity in this context addresses the internal structure of the framework other than the external circumstances which might give rise to proper understanding of the law as a result of the variation occur among individuals' expectations, values and experiences.

Consistency

Consistency as the second factor of assessment means that the rule is practically functional, with regard, among other things to the conditions and standards established under the other rules addressing or relating to the same subject. Hence, consistency addresses the whole structure of the jurisdictional framework as a model of analysis within which the specific rule or set of rules are questioned. In fact, individual rule may be perfectly clear and its meaning can be gathered without difficulty, but when it contradicts to another rule of the same nature within the framework its functionality comes into in question. In order to analyze the extent to which the rules conformed to the whole system as well as they operate altogether as a functioning single framework within the whole legal system and to achieve the required level of rules' orderly operation and functionality.¹⁴

In general, consistency of the framework requires that each component of it fits with the other parts and that no rule would impair its functionality by being contradictory or by not conforming to the other rules forming the same specific framework. Therefore, there are questions of *how* to ensure consistency between jurisdictional law and rules *how* to judge the consistency of certain jurisdictional frameworks, the extent to *which* such consistency is required and of *what* internal mechanisms the framework should have in order to rectify any discrepancies. These questions are likely to arise in this phase of assessment. Their answers depend first and foremost on the degree of

¹⁴ See generally, Abdulhai Hejazy, *Introduction to the study of law*, (Kuwait University Pub. 1972); Hesham Al-Qasim, *Intoduction to the study of law*, (Kuwait University Pub. 1997).

familiarity and knowledge of the legal system as a whole, as well as familiarity with the specific framework or body of law in question.

After analyzing the framework in light of rules' clarity and consistency, the reader should be able to evaluate operative rationale. In my personal understanding, reasonability is a factor based upon the relationship of proportionality between the means employed and the aim sought to be achieved.¹⁵

Justifiability of the Rule

In so far as the rules determining in what circumstances a person may be sued in civil proceedings are concerned, and under any legal description given for such adjudicative power,¹⁶ justifiability of the rule carries with it not only the presumption that its interpretation or construction is one intended by the lawgiver but also that the lawgiver intended that the foundation, provided for, or prescribed to is to be understood in accordance with the principles of justice. In such a case any departure from those principles would be unreasonable and thus unjustifiable.

The factor of justifiability is likely to be addressed in the context of judicial discretion; that courts should be given a legitimate tool that would enable them to prevent the abuse of legal machinery whenever it could occur as a result of unreasonable legal foundation of the court's adjudicative power. The meaning here pertains to occasions where for no substantial benefit the defendants are dragged through litigation

¹⁵ The means employed relate to the foundation of jurisdiction in both the American and the United Arab Emirates systems.

¹⁶ In practice, these rules might be identified under different linguistic terms and subject to different legal frameworks. For example, in Scotland the rules are incorporated within *the Jurisdiction and Judgment Act* of 1982. Under other systems, the rules could be found under certain titles.

which could be unjustifiable under the circumstances involved and bear an extreme burden which does not bear any balance with the interests intended to be protected by the action. The underlying presumption is that no one should be entitled any right to bring or continue proceedings which are an abuse of the process of the court in away that does not justifiably founded on a balance between the conflicting interests involved.

Therefore, any formulated foundation of court's authority must be constructed on the basis of the proper administration of justice and must therefore be regarded as legitimate considering the relationship of proportionality between the means employed and the ultimate aim sought to be achieved. And no factor should supersede or ignore the fundamental basis of justice and fairness.

Summary of the Two Models of Personal Jurisdiction Rules

The United Arab Emirates Law of Personal Jurisdiction: Nature and Sources and Legislative Framework

The rules of personal jurisdiction are incorporated within the first Chapter of the first part of the federal law of Civil and Commercial procedure.¹⁷ The code is the ultimate source of authority in most jurisdictional inquiries.¹⁸ The personal jurisdiction code-based rules form the general framework of jurisdictional matters in the UAE legal system. In light of the fact that UAE law does not recognize judicial decision as a source of authority the statutory provision becomes the only starting point of any legal analysis

¹⁷ Federal Law of Civil Procedure, law 11/1992 [hereinafter FLCP]. The Law was published in the 235 ,al-majallah al-rasmeyyah [the United Arab Emirates Official Gazette] ,on March 8, 1992.

¹⁸ Exception is given to subject-matter jurisdiction of *Mahkamah Etehadeyyah Olia* [Mahkamah Olia][United Arab Emirates Supreme Court].The court's subject matter jurisdiction is established by constitutional provision. UAE Const. art. 99.

under the system. The jurisdictional reasoning process under the UAE model is deductive, proceeding from stated general principles or rules contained in the code.

The UAE federal constitution does not impose any direct limitation on the exercise of jurisdiction in the UAE courts. Also, considerations of enforcement are not addressed which could be ascribed to the fact that all Emirates have the same common base of jurisdiction through the adoption of the law of Civil Procedure by all the federated states.

The code provides for several grounds to justify the exercise of jurisdiction in the UAE courts. A legislative distinction is adopted to distinguish citizen from non-citizen through the application of different standards. For national defendants, nationality is the single basis for jurisdiction regardless of any other factor giving rise to their domicile or residence.¹⁹ For the latter, the law provides two different sets of rules that apply to foreign defendants through the adoption of two statutory foundations of jurisdiction; the first is the physical presence in the forum and the other is the substantial connection.²⁰

As a legally recognized concept, *ekhtesas* is entirely a creature of statute and one must look to the legislation of the *lex fori* for the factors to be considered when determining whether an action falls within the jurisdiction of UAE courts. In The UAE, the authority to adjudicate is vested in courts in accordance with the stipulations provided by the Federal Law of Civil Procedure, which provides for a different basis

¹⁹ Ahmed Mulaiji, *Judicial Jurisdiction: Judicial competence and International Jurisdiction*, 8 (dar al-ketab pub. 2nd ed. 1997). See also, 2 Abdulmonem Reyath & Sameyah Rashid, "Alwajeez fe el Qanoon el Daowlee", 351(1975).

²⁰ Connection with the UAE as a whole rather than connection with a single state within the federation.

under which UAE courts' exercise their legislative adjudicative authority (*ekhtesas*). A person may be sued in civil proceedings in the UAE courts on several bases where jurisdiction can be classified accordingly to several categories; assumed jurisdiction presence-based jurisdiction; consent-based jurisdiction, and substantial connection-based jurisdiction.²¹

Article 20 of the code explains the general basis under which UAE courts jurisdiction might be invoked. The Article reads:

With the exception to actions brought relating to real property situated abroad,²² UAE courts shall have jurisdiction over all actions brought against citizens of the UAE or non-citizen defendants domicile or reside in the federation.²³

In all actions of civil nature, UAE courts assumed jurisdiction over the citizen defendant regardless of the citizen-defendant's actual place of residence²⁴, UAE citizens are presumed to domicile in the federations in so far as they carry its nationality.²⁵ Presence-based jurisdiction permits jurisdiction over non-resident defendants who are physically present within the territory of the court. Physical presence in the form of residence or domicile is the second foundation of jurisdiction applicable to non-uae

²¹ The law does not provide for these classifications which are brought by the writer for illustrative and contrast purposes according to the legislative framework from which they are derived.

²² Real action is one founded on privity of real property, typically those actions affecting title to or possession of real property, or interest therein.

²³ [FLCP] art. 20.

²⁴ Shaibah, Awadallah, *Conflict of Laws: Conflict of International Jurisdiction under the United Arab Emirates law*, 394 (Dubai Police Academy Press 2001).

²⁵ *Id.* at 395-400.

citizens. The legislative provision provides that action against non-UAE citizen can be sued in the UAE if the defendant *domiciles or resides* in the federation.

A proper construction of the Article reveals that the intended purpose was to treat the terms 'domicile' and 'residence' as synonyms under article 20. In fact, In so far as the action can be brought on either factor, there is no purposeful rational for distinguishing domicile from residence for the purposes of article 20.

In addition to the two bases of jurisdiction, the first referred to as 'assumed jurisdiction' and the later 'presence-based jurisdiction', the law provides several exceptions and permits the assertion of jurisdiction over a non-resident defendant on the basis of multiplicity of defendants, consent, and substantial connection.

The law provides that UAE courts shall have jurisdiction over a non-resident defendant where the action is brought against multiple defendants among whom the non-resident and that the court has the jurisdiction over one of them in accordance with article 20.²⁶ The article provides that the defender who is not subject to courts jurisdiction under article 20 can be made subject to UAE courts jurisdiction by virtue of article 21/7 only if there is a relevant action against another defender who is subject to the jurisdiction of UAE courts according to the general rule of physical presence. For the article to apply there must be a connection of a kind that would make it indispensable to subject the non- resident defendant to courts jurisdiction in order to provide a complete and justifiable disposal of the action.²⁷ The rationale behind this legislative provision is explained by professor *Shaibah* who stated that "the judgments in two jurisdictions might

²⁶ [FLCP] art. 21/7.

²⁷ Shaibah, *supra* note 26 at 411.

be irreconcilable either because different views were taken of the applicable law or because of conflicting findings in fact".²⁸

The other exception to the general rule established under Article 20 is the Consent-based jurisdiction under which jurisdiction over the non-resident defendant is permitted, where the defendant consents, whether by voluntary submission²⁹, or prior agreement, to submit disputes to the jurisdiction of the UAE court.³⁰

The law permits the assertion of jurisdiction over a non-resident defendant in certain circumstances. The jurisdiction established under these special facts can be distinguished from the ordinary forms of jurisdiction under Article 20 and 21/7 in the sense that it relates more to certain forms of connection between the defendant and the UAE forum recognized by law to be sufficient to confer national courts with a legislative authority (*ekhtesas*), in occasions where *ekhtesas* cannot be ascertained under the traditional basis established by virtue of articles 20 and 21/7.

Under this category of mainly *connection-based ekhtesas* (jurisdiction), UAE courts could have jurisdiction over a non-resident defendant who has certain connections with the UAE in accordance with the conditions set forth by the law of civil procedure. The law provides that:

UAE courts shall have jurisdiction over actions brought against non-resident foreign defendant in the following circumstances:

2-In actions concerning assets situated in the federations or inheritance of a citizen or a legacy made in the federation.

²⁸ *Id.* at 410-11.

²⁹ [FLCP] art. 23.

³⁰ [FLCP] art 31/5.

3-If the action relates to obligation concluded or executed or to be executed in the federation, or to a contract to be finalized in the federation, or to a cause of action arises in the federation, or to a bankruptcy declared in a national court.

4- If the action is brought by a wife domiciled in the federation against her husband who previously had a domicile or residence in the federation

5-If the action relates to legal maintenance claimed by parents, wife, minor, domicile in the federation, or where the action relates to guardianship of minors domicile in the federation.

6-If the action relates to personal status matters whenever the defendant is citizen or non-citizen, who resides in the federation, or where the defendant's domicile abroad is unknown and the national law is applicable.³¹

The grounds for competence over extra-territorial defendants rest on a notion of connection to the jurisdiction of the court. The legislative provision sets forth the conditions under which the assertion of jurisdiction over the foreign non-resident defendant is permitted. The conditions allowing the exercise of jurisdiction under the above legislative provisions can be classified into two categories according to their natures provided for in the legislative text.³² First, actions related to personal status matters;³³ and second, actions related to financial or business matters.³⁴

Under the first category, the legislation authorizes courts to assert jurisdiction over the extra- territorial defendant in actions concerning marriage³⁵, divorce,³⁶

³¹ [FLCP] art. 21/2/3/4/5/6.

³² See Shaibah, Awadallah *supra* note 26 at 415.

³³ It is obvious that this form of connection is very much the product of society and its culture. Matters of personal status are regarded a fundamental part of public order in the UAE approach of public order. For more about the subject see *id* at 417.

³⁴ *Id.* at 436.

³⁵ *Id.* at 421.

³⁶ *Id.* at 423.

maintenance³⁷, kinship,³⁸ guardianship,³⁹ and inheritance.⁴⁰ These matters are known by *Ahwal Shakhseyyah* (personal status affairs), and subject to the law of personal status.⁴¹

The following is a summary of the statutory grounds for UAE courts in exercising its adjudicative powers over non-resident defendants in civil actions based on tort. The law provides that whenever a tort or delict is committed in the province; damages from a tort or a contractual breach are sustained in the province; contractual obligations were to be performed in the province; the parties to a contract specified that the courts of the province would have competence over any disputes arising from it; a contract specifies that disputes are to be governed by the laws of the province in a dispute over support or custody or the effects of marriage, one of the spouses or children is domiciled or resident in the province; the dispute concerns real property or goods situate in the province.

In general these rules must have been found on some kind of application of principles of order and fairness that require specifying the far reach of jurisdiction against foreign defendants and that jurisdiction can only be asserted against foreign defendants on the basis of a real and substantial connection with the UAE forum as established by the law. However, whether these conditions satisfy the legislative meaning of substantial connection provided for under the UAE law or not, and whether

³⁷ *Id.* at 426.

³⁸ *Id.* at 428.

³⁹ *Id.* at 431.

⁴⁰ *Id.* at 434.

⁴¹ Personal status matters are subject to codified religious rules derived from *Islamic Share'a*.

these forms of connection are justifiable is a matter of critique and analysis which will be addressed in the second chapter of this study.

The Law of Personal Jurisdiction in the United States

Personal jurisdiction in State and Federal Courts

At the outset it has to be remembered that in general there is no difference between the assertions of jurisdiction by state or federal court the same analysis is applicable in both forums. In fact, federal courts are subject to similar personal jurisdiction limitations as the courts of the states in which they sit.⁴² Both federal and state courts are subject to due process limitations of the 14th and 5th Amendments to the US constitution.⁴³ The 14th Amendment applies only to the states and not to the federal government and the 5th Amendment due process clause applies to the federal court. Federal courts are authorized by Rule 4(k)(1)(A)⁴⁴ to exercise personal jurisdiction only to the extent that the state court in which it sits is permitted under the state's long-arm statute.⁴⁵

⁴² See e.g., Steven Baicker-McKee, William M. Janssen & John B. Corr, *A Student's Guide to the Federal Rules of Civil Procedure*, 2 (West 2nd ed.1999).

⁴³ U.S. Const. amend. V., provides in part that "...no person shall be deprived of life, liberty, or property, without due process of law." The due process clause of the Fourteenth Amendment provides that "...no state shall...deprive any person of life, liberty, or property interest, without due process of law."

⁴⁴ Fed. R.Civ. P. 4 (k)(1)(A). The rule provides that service of summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant "who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located,....".

⁴⁵ An exception to that is Congress authorization in some instances, of nationwide service of process by specific statutes. See Fed R.Civ.P.4(k)(1)(D). Many of these provisions are designed to facilitate the assertion of the claims created by specific statutory scheme. See also Fed. R. Civ. P. 4(k)(1)(B) and 4(k)(2)

The Foundation of Courts Authority Over Persons

Personal jurisdiction in the United States is exhibited in Common law principals that have evolved through case law over many years. Under these principles the most basic form of a court's authority in exercising jurisdiction over parties to a dispute is their presence in the forum. The rule is one that courts may assert *general* jurisdiction where the defendant is domiciled in the state or has *continuous and systematic* activities there which justify the assertion of jurisdiction over defendant's person.⁴⁶

In its earliest development, the current law of personal jurisdiction established under *pennoyer v. neff*⁴⁷ stressed the importance of sovereignty among various states by establishing the general principle which allocates the jurisdictional power among courts providing that "[E]very state possesses exclusive jurisdiction and sovereignty over persons within its territory".⁴⁸ This ruling, affirms that presence in the forum and domicile⁴⁹ are the principal foundation of general jurisdiction.⁵⁰

The alternatives to general power, is "specific" jurisdiction under which court exercise of jurisdiction over a non-resident defendant is to be found on special

⁴⁶ *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408; *Data Disc Inc. v. Systems Technology Associations Inc.*, 557 F. 2d 1280 (9th Cir. 1977). General jurisdiction is understood to extend to all the defendant's activities whether relating to defendant's contact with the forum or not.

⁴⁷ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁴⁸ *Pennoyer*, 95 U.S. at 734.

⁴⁹ In *Pennoyer* decision, the Supreme Court held that judgment could not bind a defendant *in personam* unless he had been served with process while physically present in the forum state, or unless he voluntarily appeared. Thus, the physical presence of a defendant in the forum is a sufficient basis for acquiring jurisdiction over him, no matter how brief his stay might be. *Id.* at 731-32.

⁵⁰ "General jurisdiction is applicable [to non resident defendants]only where the nonresident defendant's contacts with the forum state are so 'continuous and systematic' that the defendant may be subject to suit for causes of action that are unrelated to the forum contacts". *Bell v. Imperial Palace Hotel/Casino, Inc.*, 200 F. Supp. 2d 1082, 1087 (E.D. Mo. 2001).

circumstances. The specific jurisdiction is determined by a three-part test.⁵¹ First, the defendant must do some act or enter into a transaction with the forum. Second, the litigation must arise out of the act or transaction. Third, the exercise of jurisdiction must be reasonable under the circumstances. The circumstances establishing the specific jurisdiction must be found on sufficient contact between the forum and the non-resident defendant. The court ordinarily analyzes whether the exercise of its jurisdiction is consistent with "traditional notions of fair play and substantial justice."⁵² This is likely to be determined in light of the reasonable expectation of the parties of having their disputes litigated in the particular forum.⁵³ Whether general or specific jurisdiction is in question, jurisdiction must satisfy the requirements of due process, but general jurisdiction requires a higher level of contacts with the forum state.⁵⁴

One test often used to determine specific jurisdiction in the U.S. is the application of the *purposeful availment* test.⁵⁵ Under this rule, the court analyzes whether the defendant has deliberately taken the opportunity to conduct activities in the forum and thereby obtain the benefits of the domestic law.⁵⁶ If so, and assuming the exercise of

⁵¹ Specific jurisdiction exists when a non-resident defendant has sufficient contact with the forum state and the cause of action arises out of, and relates to, that contact. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

⁵² *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁵³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

⁵⁴ *Helicopteros*, 466 U.S. at 417.

⁵⁵ This test was first introduced by both the Ninth Circuit Court of Appeals and after by the Sixth Circuit Court of Appeals.

⁵⁶ The Eighth Circuit found that long-arm jurisdiction cannot be exercised over a non-resident defendant unless the "defendant purposefully avails itself of the privilege of conducting activities within the

jurisdiction is otherwise reasonable and fair, the court will be competent to hear a dispute arising from those activities. The purposeful availment test, and other rules used to establish specific jurisdiction, do not require that a defendant have a physical presence in the forum.⁵⁷ In the words of the U.S. Supreme Court, the defendant's conduct and connection with the forum must only be such that he "should reasonably anticipate being haled into court there".⁵⁸

Therefore under the American law a person is subject to *in personam* jurisdiction based on four theories; presence in the forum (in state service of process), domicile and residence, consent to jurisdiction and minimum contact. The aforesaid theories have been elaborated by the Supreme Court in various rulings addressing the subject.

The development of the law can be summarized by tracing the United State Supreme Court rulings forming the current US law of personal jurisdiction. This series started with *Pennoyer v. Neff* decided in 1877, followed by *Hess v. Pawloski*⁵⁹ decided in 1927. Both cases relate to the early stage of the development of personal jurisdiction law, , and the establishment of territorial foundation of jurisdictional analysis. A new era of jurisdictional analysis started with the *Worldwide Volkswagen* case decided in 1980 in which the Supreme Court introduced the minimum contact standard as a justifiable foundation for the exercise of jurisdiction over a non-resident defendant. Under the minimum contact test, for the court to exercise jurisdiction over the non-resident

forum State, thus invoking the benefits and protections of its laws." *Soo Line Railroad Co. v. Hawker Siddeley Canada, Inc* 950 F.2d 526 (8th Cir. 1991).at 529

⁵⁷ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

⁵⁸ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286,297 (1980).

⁵⁹ 274 U.S. 352 (1927).

defendant, the defendant must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁶⁰

Constitutional Principles of Jurisdictional Restraint in Both Federal Systems

Sovereignty Considerations in USA and UAE

The US law clearly shows that considerations of state sovereignty were considered a factor that contributed to shaping the current law of personal jurisdiction in the United States. Sovereignty concerns of a dominant 19th-century world power were meant to safeguard the state's territorial sovereignty and to prevent any attempt to violate the independent of other states

The United State Supreme Court explained in 1877 in *Pennoyer v. Neff*, that:

[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also the regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred.⁶¹

⁶⁰ *International Shoe*, 326 U.S. at 316.

⁶¹ 95 U.S. 714,722 (1877).

Hence, sovereignty concerns are essential ingredients of achieving a proper jurisdictional allocation of judicial power among the various judicial systems. The significance is drawn from the need to assign to each system those cases most appropriate in light of the basic principles of federalism.

Under the United Arab Emirates system, concern over territorial sovereignty of federated states generally has no reflections in the legislative framework and thus has no direct application in the context of interstate litigation. In fact, even though the United Arab Emirates Federal Constitution provides that "[t]he local judicial authorities in each emirate shall have jurisdiction in all judicial matters not assigned to the federal judiciary in accordance with this constitution",⁶² the literal meaning of the constitutional article imply that such concern of sovereignty exists, but in practice the constitutional provision must be read and understood in connection with another constitutional provision which provides:

All or part of the jurisdiction assigned to the local judicial authorities in accordance with the preceding article may be transferred by a federal law issued at the request of the emirate concerned to the federal courts of first instance. Circumstances in which appeals against judgments by the local judicial authorities in penal, civil, commercial, and other cases may be made before the federal courts shall be defined in a federal law, provided that the judgment of the federal courts in such appeals is final.⁶³

All states with the exception of *Dubai* and *Ras Alkhaimah*,⁶⁴ had transferred their judicial powers to federal courts established under the Federal Constitution.⁶⁵ The

⁶² UAE Constitution. art. 104.

⁶³ UAE Constitution. art 105.

Judicial jurisdiction of federal courts has also expanded as a result of the federal legislative enactments that expanded the scope of federal judicial authorities.⁶⁶

In rare circumstances where there is potential of jurisdictional conflict, the matter is to be decided by the UAE [*Mahkamah Olia*] [the UAE federal Supreme Court] according to the federal Constitution:

(7) Conflict of jurisdiction between the Union judicial authorities and the local judicial authorities in the emirates; (8) Conflict of jurisdiction between the judicial authority in one emirate and the judicial authority in another, and the classification of the principles relating thereto in a federal law; and (9) Any other jurisdiction stipulated in this constitution, or which may be assigned by a federal law.⁶⁷

Enforcement Considerations in Both Systems

Under the United States Constitutional framework, enforcement of judgment in domestic setting bears no significant concern. The Constitutional requirement of Full Faith and Credit are applicable to all states. Under this requirement states are required to fully respect others state judgments. The Constitution in this respect provides:

⁶⁴ See, Ahmed Sedqi, *Law of Civil Procedure in the United Arab Emirates: Analytical and Practical Study to the Federal Law No.11 for the Year 1992 of Civil and Commercial Procedure*, 157 (1st ed.1999).n. 2.

⁶⁵ "The Union shall have one or more federal courts of first instance which shall sit in the permanent federal capital or in the capitals of some of the emirates in order to exercise judicial powers within the scope of their jurisdiction in the following cases: (1) Civil, commercial, and administrative disputes between the union and individuals whether the union is plaintiff or defendant; (2) crimes committed within the boundaries of the permanent federal capital, except such matters as are reserved for the Federal Supreme Court under Article 99 of the constitution; (3) Personal status actions, civil actions, commercial actions, and other actions between individuals which arise in the federal capital". UAE Constitution. art.102.

⁶⁶ The Federal Judiciary Law, law 3/1983 [FJL] art. 10 provides: " Federal Courts of first instance shall have jurisdiction over all matters and crimes in accordance with the Constitution and the applicable enactment governing the transference of judicial power from Emirates judicial authorities to federal judiciary".

⁶⁷ UAE Constitution. art. 99/7/8/9.

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.⁶⁸

The Constitutional provision laid down a principle that courts of one state are to be expected to give effect to judgments given in another state. But on the other, questions of whether there must be some limits to the exercise of jurisdiction by the state court deciding the matters is also a non-issue based on the fact that US Constitution acts as common base for all states in the exercise of their adjudicative powers.⁶⁹

Enforcement of judgment in domestic setting in the United Arab Emirates legal system is governed by the Federal law No 11 for the year 1973.⁷⁰ The Article provides:

Every final judgment declaring civil, commercial rights, or damages in connection with criminal matters or, related to civil status matters issued by any local judicial authority in one of the federated states, shall be enforced in all other states in accordance with this law.⁷¹

The article sets forth a presumption of validity of all judgments declared by the local judicial authority. Hence, domestic judgments cannot be challenged on the grounds of lack of jurisdiction. In fact, jurisdictional determination is not a factor for purposes of

⁶⁸ U.S. Cons. art. IV, § 1.

⁶⁹ In practice, while the actual methodology of enforcement differs from state to state, the mechanics are typically similar. In general, obtaining entry of a "sister-state judgment," is done through the application by the judgment creditor to a court in the state in which the judgment debtor's property is located. Some courts have a particular form which must be used by the judgment creditor and there is typically a requirement that the application for entry of the sister-state judgment be filed in a particular court.

⁷⁰ The law regulates judicial affairs among the federated states of the union.

⁷¹ Federal Law Regulating Judicial Affairs among Federated Emirates, law 11/1973. art.11.

domestic enforcement since the federal law of civil procedure acts as a common ground for all states.

CHAPTER II

OBSERVATION AND EVALUATION

Introduction

After we have reviewed the various aspects of the two examined frameworks governing courts' power over persons under the law of personal jurisdiction in the United States and the rules of *ekhtesas shakhshy* of the United Arab Emirates legal system, in this chapter I will give my personal observation about the operational mechanism of the two models and the difficulties associated with their operation.

The analysis will be based on the three factors I discussed in the previous chapter; the clarity of the rules governing court's authority to compel a person to appear and defend a civil action, the consistency of the whole construction of the rules within the framework and the justifiability of the rules in response to whether such formulation would constitute a proper assertion of jurisdiction or there are some defects or failures to take into account the general principles of the proper administration of justice.

The two models will be discussed in the following two sections, starting with the law of personal jurisdiction in the United States and followed by the rules of *ekhtesas shakhshy* (personal jurisdiction) in the United Arab Emirates. The two sections will emphasize the major problematic issues in this area and the suggested solutions. The following represents my personal understanding of how the systems work in practice,

and how the systems should operate in order to achieve the required level of fairness and maintain a proper mechanism for better carriage of justice and order.

The USA Law of Personal Jurisdiction

The Uncertainty of Minimum Contact Test

The most problematic body of law within the personal jurisdiction framework in the USA is the body of law related to minimum contact analysis. The minimum contacts test established by the United States Supreme Court in *International Shoe v. Washington*¹ was developed as a justification for the assertion of jurisdiction over a defendant in occasions where traditional basis of personal jurisdiction is not in existence to establish a court's authority.

The test has ever since been considered "the cornerstone of Supreme Court personal jurisdiction doctrine",² which came to supplement the insufficiency of territorial notion of jurisdiction and its impracticability under the increased mobility of society,³ and the high level of human interaction and international commerce and communication. In fact, the Supreme Court test of minimum contact was introduced under the necessity to expand the grounds for courts' competence to constitutionalize the assertion of jurisdiction over defendants outside their territory.

¹ *International Shoe Co., v. Washington*, 326 U.S. 310, 323 (1945).

² Kevin C. McMunigal, *Desert, utility, and minimum contacts: toward a mixed theory of personal jurisdiction*, 108 Yale L. J. 189-235 (1998).

³ See generally, John J. Ground, Jack H. Friedenthal, Arther R. Miller & John E. Sexton, *Civil Procedure: Cases and materials*, 71 (West. 1997).

In its essence, the jurisdictional analysis developed under *International Shoe* centralized the jurisdictional inquiry into the contacts between the defendant, the forum, and the litigation. In this transforming point of the law of personal jurisdiction, the Supreme Court provided that, in order to satisfy due process requirements, a state could exercise personal jurisdiction over a foreign defendant (whether individual or entity) where there are "certain minimum contacts with the forum in certain quality that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice".⁴

In fact, the court did not explain what contact might qualify as sufficient contact for purposes of *minimum contact jurisdiction*. Under this judicial test of jurisdiction, a single contact on the side of the defendant can suffice to establish personal jurisdiction, in this case where jurisdiction is based on a single contact,⁵ the nature and quality of defendant's contact is determinative and that the contact be of such quality and nature that legitimize the assertion of jurisdiction over the defendant.

In essence, what have been introduced under the *International Shoe* are general indications of the quality and quantity of defendant's contact rather than defining the contact itself in precise terms. The Supreme Court in this ruling emphasized the elastic nature of its test by providing that:

It is evident that the criteria by which we mark the
boundary line between those activities which justify the

⁴ *International Shoe Co. v. Washington*, 326 U.S. 310,316 (1945).

⁵ "...[A]lthough the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit". *Id.* at 318.

subjection of a [defendant] to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the [defendant] has seen fit to procure through its agents in another state, is a little more or a little less.⁶

The Court also provides that:

...[T]o the extent that a [defendant] exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.⁷

Under the test developed by the Supreme Court in this case, defendant's contact with the forum which justifies the assertion of jurisdiction is the kind of tie and connection with the forum under which the defendant is entitled to the enjoyment of benefits and privileges offered by the state within which the contact occurred. Such purposeful-based contact inquiry focuses solely on defendant's activities,⁸ looking for some voluntary action by defendant establishing a beneficial relationship with forum state.

In this respect the court further explained that defendant's systematic and continuance contact with the forum would confer the state with general jurisdiction over any action brought against the defendant in the forum within which he maintains

⁶ *Id.* at 319.

⁷ *Id.* at 319.

⁸ Some of the factors which may be examined, among others, to determine whether minimum contacts exist include: (1) the quantity of contacts with the state, (2) the nature and quality of those contacts, (3) the connection or relationship between the contacts and the cause of action, (4) the state's interest in providing a forum, and (5) the relative convenience of the parties.

continuing ties, regardless of whether these actions relate to defendant's contact or not. In this meaning the Court further held that "there have been instances in which the continuous [defendant's activities] within the state were so substantial and of such nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities"⁹. The general jurisdiction founded on defendant's systematic contact was later illustrated and contrasted with specific jurisdiction¹⁰, under which the courts' exercise of jurisdiction over the defendant is limited to causes of action resulting from specific defendant's contact with the forum.

Following the *International Shoe*, The Supreme Court continues, to expand and refine the jurisdictional standard by adding additional factors to the minimum contact test which maximize the scope of its application. In fact in the sixty-year period following the *International Shoe* decision the court have introduced many factors some of which can be identified as distinct foundation of jurisdiction.¹¹ This chain of judicial jurisdictional standards continues to employ new factors such as the reasonable anticipation approach as a justification of asserting jurisdiction over a non-resident defendant.

The reasonable anticipation approach was introduced as a relevant element in the formulation of the jurisdictional analysis. Under this approach, the defendant should expect being subject to a court's jurisdiction based on the defendant's activities that give

⁹ *Id.* at 318.

¹⁰ The distinction between the two types of jurisdiction founded on defendant's contact is articulated by the Supreme Court ruling in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S.408 (1984).

¹¹ The example for that is the purposeful availment test.

rise to liability established in the forum. The U.S. Supreme Court defined when a non-resident defendant should "reasonably anticipate" being haled into another jurisdiction. The court held that the defendant should reasonably anticipate being haled into another state's jurisdiction if he "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."¹² The Court's reasoning behind this definition was that in cases where the "quality and nature" of the defendant's single related act or continuous activities with the forum were "so 'random,' 'fortuitous' or 'attenuated,'" exercise of personal jurisdiction by the forum over a non-resident defendant would be improper.¹³

The test has been further refined by the Supreme Court in *Worldwide Volkswagen*¹⁴. In this decision, the U.S. Supreme Court broadened the "purposeful availment" requirement where the defendant is a "commercial actor" by adding the "stream of commerce" standard for personal jurisdiction analysis. The Court began by stating that "so long as a commercial actor's efforts are 'purposefully directed' toward residents of another state . . . an absence of physical contacts [within the forum state is not enough] to defeat personal jurisdiction there."¹⁵ The Court further held that the "purposeful availment" requirement is satisfied if two elements of the "stream of commerce" standard are established. First, the non-resident defendant must have placed or delivered its product into the stream of commerce. Second, the non-resident defendant

¹² *Hanson v. Denckla*, 357 U.S. 235,253 (1958).

¹³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462,486 (1985).

¹⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

¹⁵ *Burger King*, 471 U.S. at 476.

must have placed or delivered the product with the expectation that the product will be purchased by consumers in the forum state.¹⁶ However, this factor was later further addressed by the Supreme Court ruling in *Asahi* case¹⁷, in which the U.S. Supreme Court clarified its decision in *Worldwide*. The Court held that the "defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state."¹⁸ The defendant must perform some additional action that shows he intended to avail himself of the forum state's market. For instance, the defendant advertises his product in the forum state. Once the "purposeful availment" requirement is satisfied, a court must then determine if the cause of action arises out the defendant's activities within the forum state. This requirement is achieved if the "defendant's contacts with the forum state are related to the operative facts of the controversy."¹⁹

In sum, the principal test of foreseeability in a due process analysis is that the defendant's conduct and connection with the forum state are substantial, such that he should reasonably anticipate the possibility of such a consequence. In reality, a defendant could not reasonably anticipate out-of-state litigation unless such defendant has purposefully availed himself of the privilege of conducting activities or invoking the benefits and protections of particular forum.

¹⁶ *Worldwide Volkswagen*, 444 U.S. 286,298 (1980).

¹⁷ *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

¹⁸ *Id.* at 112.

¹⁹ *Reynolds v. Internat'l Amateur Athletic Federation*, 23 F.3d 1110, 1119 (6th Cir. 1994).

In fact, in most aspects of its application, the minimum contact test is a very confusing body of law that is neither clear nor stable.²⁰ Even though, it might be argued that in national level, the test has been widely accepted as a reasonable foundation of jurisdiction over the non-resident defendant especially with the Full Faith and Credit Clause which provides a certain degree of stability and strength to its outcome, but in an international context, the issue is not the same.

The fact that United States is the most effective economic power in the world, and hence, has relations of an economic and financial nature with every country may subject any individual or entity to the United States laws and courts in any formal international transactions should such jurisdictional standard of jurisdiction be applied. Keeping that in mind, most companies carrying activities of an international nature are likely to have at least some form of connection with U.S. banks and financial institutions.

The current judicial jurisdictional approach would, in essence, subject virtually every transaction of an international nature to the United States laws and courts regardless of where that transaction took place, regardless of the nationality of the parties, and regardless whether another inconsistent, or even conflicting, competition regime is also applied to the same business transaction. For example, a defendant's systematic and continuance contact with New York banks (being the world financial state) would subject these companies or individuals to US courts jurisdiction for any act that is isolated from the specific contact with NY.

²⁰ McMunigal, *supra* note 2, at 191. The first criticism was provided by Justice Black in World-Wide Volkswagen case in which he describes the test as being vague and uncertain. *International Shoe* 326 U.S. at 323-24.

Insofar as the court does not explain what are the specific circumstances under which a person is said to be availed himself the benefits and protection of the forum, and there was no specific applicable standard under which the reasonability of the exercise of jurisdiction is to be ascertained, the minimum contact test will remain a law with uncertain boundaries which might be stretched or narrowed according to any factors which might give rise to a specific set of facts. Thus, predictability is clearly absent in its application.

Therefore, In my view, I think that the only way by which the Supreme Court can eliminate the unpredictability and doctrinal confusion associated with this body of law is by formulating a single comprehensive test which defines the causes of action that constitute the contact for purposes of judicial competence instead of resorting to the particular facts in each situation. Moreover, the constitutional due process requirements which lay down principles of order and fairness could be best served by interpreting the limits on the reach of jurisdiction against out-of-state defendants if these limits were explained on grounds of defined and precise determination of the connection.

In addition, the defined cause of action must be one that is so substantial to the forum to adjudicate it and determine its outcome in sense that it must be intended to capture the idea that there must be some limits on the claims to jurisdiction" and that any assumption of and the discretion not to exercise jurisdiction must ultimately be guided by a clear and defined requirements of order and fairness, not an elastic counting of undefined contacts.

Unreasonable Exercise of Transient Jurisdiction²¹

One of the established jurisdictional principles in the American theory of personal jurisdiction is the transient jurisdiction. Under the doctrine of transient jurisdiction, personal service of process within the state boundaries is regarded a legitimate foundation of personal jurisdiction over the non-resident defendant regardless of any other supporting connecting factors. The forum has the authority to adjudicate defendant's personal rights whenever the person of the defendant has been personally served with the process during defendant's casual or transient presence in the state.

Under the law of *Burnham*, which affirms and elaborates the notion of physical presence established under *Pennoyer v. Neff*, a defendant could be made to defend a civil suit based solely on his having been served with process while within the court's territory, even if that individual's physical presence was temporary and even if the lawsuit had nothing to do with that presence.. The United States Supreme Court provides that:

Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a state have jurisdiction over nonresidents who are physically present in the state. The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the state could retain jurisdiction to enter judgment against him, no matter how fleeting his visit.²²

The *Burnham* law makes it clear that transitory presence falls under the presence standard established under *Pennoyer v. Neff*.²³ This unique form of presence

²¹ This type of jurisdiction is best explained by Supreme Court ruling in *Burnham v. Superior Court of Cal., Marin County*, 495 U.S. 604 (1990).

²² *Burnham*, 495 U.S. at 610.

²³ 95 U.S. 714 (1877).

which has been for a long time beyond the traditional basis of jurisdiction, qualifies as a sufficient basis for purposes of jurisdiction in *personam* as long as the defendant is being personally serviced of process during such transitory presence in the forum. The defendant remains subject to the court's power even after leaving the state.

Even though, that such assertion of jurisdiction over the defendant based on service of process within the forum during an occasional or transitory stay might have a possible incompatibility with international law, this form of jurisdiction is a valid law governing the exercise of jurisdiction over the non-resident defendant under the U.S. law of jurisdiction.. The law of *Burnham* gives no regard to the quality and nature of the defendant activities in the forum, the assertion of jurisdiction is justified based on the service of process in the forum during the short term presence of the defendant within which the defendant is entitled and enjoyed all the *benefits* and guarantees assured by the forum state.²⁴ By his voluntarily presence in the forum, the defendant should or should have expected to be subjected to the exclusive adjudicatory power of the forum state.

In his concurring persuasive opinion, Justice *Brennan* provides a jurisdictional test of *reasonable expectation* in justifying the exercise of transient jurisdiction;

By visiting the forum State, a transient defendant "avails" himself of significant benefits provided by the State. His health and safety are guaranteed by the State's police, fire and emergency medical services; he is free to travel on the state's roads and waterways; he likely enjoys the fruits of the state's economy as well. Moreover, the Privileges and Immunities Clause of Article IV prevents a state government from discriminating against a transient defendant by denying him the protections of its law or the right of access its courts. Subject only to the doctrine of forum non conveniens, an out-of-state plaintiff may use state courts in all circumstances in which those courts would be available to state

²⁴ *Burnham* 495 U.S. at 606.

citizens. Without transient jurisdiction an asymmetry would arise; a transient would have a full benefit of the power of the forum State's courts as a plaintiff while retaining immunity from their authority as defendant.²⁵

Under the law of *Bernham* the only condition that has to be satisfied in order to reasonably establish jurisdiction of the transient defendant who is personally served in the forum, is that the presence should be voluntarily in nature. Thus, in-state personal service procured by coercion or fraud is not valid service justifying the exercise of jurisdiction over the defendant²⁶.

In my personal view and from the standpoint of public international law, the jurisdictional competence of a given state is primarily territorial, under which any exercise of exceptional form of jurisdiction is permitted only under certain limited bases. These bases of jurisdiction²⁷ may include nationality, substantial connection, effect, protection and passive personality. Such forms of jurisdictional foundation are (as a general rule) defined and limited by the sovereign territorial rights of other States. Hence, any formulation of jurisdictional competence must be made to reflect these ordinary and essentially territorial bases of jurisdiction. Beyond that, bases of jurisdiction must be exceptional and requiring special justification, which must be sufficiently supported by a reasonable justification.

In fact, such formulation of this exceptional nature must take into consideration, the appropriate balance among relevant factors in asserting jurisdictional competence

²⁵ See *id.* at 637-38: Justice Brennan concurring opinion.

²⁶ *Tickle v. Barton W. Va.* Sup.Ct. App., 142 W.Va. 188,95 S.E.2d 427 (1956). "Where service of process is procured by fraud, the court will refuse to exercise jurisdiction and such service of process will be deemed invalid."

²⁷ The discussion is limited to jurisdiction in civil and commercial matters.

according to the specific factual pattern involved. One of these is the burden on the defendant and the defendant's foreseeability which is relevant providing that the defendant ought to be able to anticipate that his action makes it amenable to suit in a particular jurisdiction, also the shared interest of other states in providing an efficient resolution of the dispute.

Therefore, I highly recommend that this jurisdictional foundation be re-examined by the Supreme Court especially with the realization that the transient jurisdiction may result in unacceptable consequences like conferring jurisdiction based on service on a defendant while on board an airplane entering Arkansas airspace.²⁸ Moreover, giving the enforcement consideration (in international context), it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit. Thus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction which I believe not present in the case of transient jurisdiction.

The Rules of *Ekhtesas Shakhsy* in the United Arab Emirates

Institutionally Defective Structure: Overlapping Court Systems with Conflicting Jurisdiction- Potential Confusion and Instability within the Judiciary

Before one can provide useful suggestions to the improvement of the jurisdictional framework of the United Arab Emirates, one should note at the outset that the law does not adequately address the jurisdictional relationship between the federal

²⁸ *Grace v. MacArthur*, 170 F. Supp. 442 (D. Ark. 1959).

courts and the states judiciaries. Under the current jurisdictional arrangements, both Dubai and *Ras Alkhaimah* are considered completely independent judicial authorities having an exclusive jurisdiction within their national boundaries.²⁹ In other words, no federal jurisdiction exists in these two emirates! This institutional defect facilitates serious jurisdictional overlap and subjects the determination of the exercise of jurisdiction in each case on the application of a different set of rules without a clear guidance. This is likely to result in conflict in each case whenever *Ras Alkhaimah* or *Dubai* is concerned. This form of defect is so serious that it could lead to jurisdictional conflict, confusion and inconsistency.

The different judicial entities (federal and state jurisdiction) in practice are likely to share the same authority over the same geographic area. In fact, federal jurisdiction is one defined and established by the law of civil procedure but cannot be exercised in reality, whereas the state jurisdiction (*Dubai* and *Ras alkhaimah*) is not specifically defined by the federal law which in reality is exercised.

Under the current UAE model there is a clear absence of precise framework to allocate the jurisdiction among these court systems. Therefore, there are potential possibilities of problematic overlap between federal tribunals and *Dubai* and *Ras Alkhaimah* tribunals dealing with the same subject without a determinant standard. Further, various provisions of the federal law of civil procedure would not be applicable in practice. For example, the law provides that "with the exception to actions related to

²⁹ Ahmed Sedqi, *Law of Civil Procedure in the United Arab Emirates: Analytical and Practical Study to the Federal Law No.11 for the Year 1992 of Civil and Commercial Procedure*, 157 (al-bayan pub. 1st ed., 1999).

estate situated abroad, federal courts shall have jurisdiction to decide all actions filed against UAE citizens or foreigners domicile or reside in the federation".³⁰ Also the federal law of civil procedure provides that "[a]ction shall be brought to the proper court having jurisdiction over the area in which the defendant domicile...."³¹ ,in this case , any attempt to implement these legislative provisions would be useless, simply because whenever the defendant in the action is domicile in *Dubai or Ras Alkhaimah* the legislative provisions are inapplicable because there is no federal court in both *Dubai* and *Ras alkhaimah*.

In addition, few reported cases from the *emirate* of Dubai show that the issue is more than an ordinary jurisdictional conflict. The Dubai Court of Cassation in 1994 held:

According to article 104 of the UAE Constitution, the Dubai Courts are independent from other Federal Courts in the country. It is therefore open to the Dubai Courts to determine by their own rules whether or not they have jurisdiction to hear a case. Any articles to the contrary in the UAE law of civil procedure, in particular those concerning domestic jurisdiction between the various Emirates, will not bind the Dubai Courts.³²

In fact beside the jurisdictional limits set forth in the federal law of civil procedure Dubai courts follow a distinct legislation that defines the competence of Dubai courts which makes it even difficult to determine in what circumstances *Dubai* court's competence is determined.³³ In other words, under what legislation the issue must be

³⁰ Federal law of Civil Procedure, law 11/1992 [FLCP] art.20.

³¹ [FLCP] art.33.

³² Reported by Essam Al Tamimi & Richard Price, *United Arab Emirates Court of Cassation Judgments 1989-1997: Arab and Islamic Law Series* , 95 (Kluwer 1998).

³³ See, Dubai Law for the Formation of the Courts in the Emirate of Dubai, law 3 /1992 [Dubai], reported in 9 Arab Law Quarterly, 278 (2001).

resolved. Clearly there is a substantial deficiency, which would result in a justice system that lacks definite operational capacity.

Federal courts should be established in all states, even those which has not yet transferring their judicial authorities to federal government. This requirement necessitates a creation of a unified federal judicial system, that in the absence of a clear Law addressing the whole Judicial Authority structure, there remain competing sources of law and overlapping court systems with conflicting jurisdiction.

In fact, federal law does not provide a precise mechanism of allocating jurisdictional power among the various court systems. Neither the Federal Constitution nor federal laws address the allocation of judicial powers between the federal judiciary and the emirates jurisdictions.³⁴ In addition, the existing court system in the United Arab Emirates may be seen contrary to the Constitution in the sense that current institutional structure does not interpret the objectives of unity established under Article 6 and Article 8 of the federal Constitution.³⁵

In fact, the current legal framework fails to provide the needed clarity. And it is obvious that this jurisdictional overlap and confusion has a substantial impact over the judicial process in this system. My suggestion to establish a fair and effective jurisdictional framework requires that a set of rules be clearly drawn, that the rules be enforced, that the means to ensure the application of the rules exist, that any conflicts be

³⁴ The only exception is provided under the United Arab Emirates Federal Constitution: "the Emirates shall exercise all powers not assigned to the Federation by this Constitution.". UAE. Constitution art. 116. Also UAE. Constitution. art. 122, provides that " the Emirates shall have jurisdiction in all matters not assigned to the exclusive jurisdiction of the Federation, in accordance with the provision of the preceding two articles."

³⁵ UAE. Constitution. art. 6, provides that "[t]he people of the union shall form one society". They shall also enjoy one nationality that is the nationality of the United Arab Emirates. UAE. Constitution.art.8.

resolved by binding decisions made by a superior judicial authority that must monitor the proper administration and carriage of justice, and that procedures be available for changing the rules when they cease to serve the purpose for which they were intended.

In this respect, I would particularly suggest that the jurisdictional conflict be addressed either by the Supreme Council as the highest authority of the federation through the establishment of federal courts in both *Ras Alkhaimah* and *Dubai*, or by a legislation that re-establishes in a clear provision the types of matters that are reserved to the federal judiciary and clearly separates them from those left to local judicial authorities

Also the Supreme Court should take a more effective role in shaping the jurisdictional rules, especially since it is empowered under the Federal Constitution. The Constitution provides:

The judgments of the Federal Supreme Court shall be final and binding upon all. If the Court, in rendering judgment on the constitutional legality of laws, legislation, and regulations, rules that federal legislation is inconsistent with the constitution of the Union, or that local legislation or regulations under consideration contain provisions which are inconsistent with the federal constitution or a federal law, the authority concerned in the union or the emirate shall be obliged to take the necessary steps to remove or rectify the constitutional inconsistency.³⁶

Therefore, the jurisdictional inconsistency resulted from complex structure can be solved by the Supreme Court in declaring the unconstitutionality of any local legislation that contradicts or impairs the operation of federal legislation. The UAE *Mahkamah Etehadeyyah Olia*³⁷ Court could take a more active role pursuant to article 99(7)(8)³⁸ of

³⁶ UAE Constitution. art.101.

³⁷ Mahkamah Etehadeyyah Olia [Mahkamah Olia] [The UAE Supreme Court] is the highest judicial authority of the union.

the Federal Constitution to harmonize and unify the jurisdictional rules for the sound operation of the systems.

Inconsistency of the Rules of Domicile as a Foundation of Jurisdiction

Generally speaking, domicile as a connecting factor is meant to link a person with specific judicial authority in specific context. These rules are designated to achieve fairness and maintain order. For jurisdictional purposes, domicile has been always considered a reasonable factor upon which exercise of judicial power is justified. on one hand, determination of domicile is critical for purposes of legal proceedings due to the legal consequences which might be attached to such determination, and in the other hand, identifying the framework of domicile ease and facilitate the anticipation of legal consequences which might be drawn with respect to certain legal transaction.

In general, domicile of a person is the place where the person intends to reside permanently. Thus a person is legally recognized to have a domicile. In addition at one time a person could not be said to have more than one domicile. Nonetheless, every national and international legal system might define legal concepts differently in some respects, under the UAE law the legal framework of domicile might not be typical to what one might generally understand about domicile. In fact, domicile as a connecting factor under the UAE law has a distinguished feature in three aspects. First, domicile is not considered a connecting factor with respect to national defendants who are subject to

³⁸ "The Federal Supreme Court shall be competent to render judgment in the following matters:(7) Conflict of jurisdiction between the Union judicial authorities and the local judicial authorities in the emirates; (8) Conflict of jurisdiction between the judicial authority in one emirate and the judicial authority in another, and the classification of the principles relating thereto in a federal law.... UAE Constitution. art..99/7/8.

general jurisdiction of UAE courts based on mere nationality.³⁹ Second, the UAE law recognizes multiplicity of domicile.⁴⁰ Third, the law recognizes complete absence of domicile in certain circumstances.

In my personal view, recognition of multiplicity of domicile does not correspond to the ultimate purposes of domicile as a definite connecting factor. Domicile as a legal concept is founded on the need to link a person with specific legal system so that the person's legal status can be determined according to the applicable rules in operation under that legal system. Thus recognizing multiple domicile as well as complete absence of domicile might be seen a legislative defect which requires attention and re-consideration.

In addition, multiplicity of domicile may result in confusion and uncertainty in all occasions where the person is held to domicile in two or more areas subject to different legal frameworks. In practice, multiplicity would make this area of law complex and uncertain. A person might have multiple places of residence, but there must be one of which is considered the center for the person's legal affairs, otherwise the whole purpose of domicile would be lost and that would make it impracticable.

Therefore, I suggest that Article 81 of the law of civil transaction be amended to remove the difficulty arising from duality of domicile and to provide for a single place of domicile that is considered for a person's legal affairs regardless of the factors which might be adopted to designate this place. In fact, it is critical to review the bases on

³⁹ UAE national courts shall have jurisdiction over UAE citizens regardless of their domicile or place of residence. [FLCP] art. 20.

⁴⁰ Federal Law of Civil Transaction, law 5/1985. [FLCT] art. 81/2, reads " a person might have multiple domicile at the same time" , the article further provides under section 3 that " where the person does not have a place of permanent stay ,he/she shall be considered without domicile".

which UAE courts generally may assert their competence, and the circumstances in which they will yield to the competence and where the domicile is one of the foundations upon which the court's competence is asserted in the sense that domicile sets out a condition precedent to jurisdiction, therefore the concept must be regulated in light of the ultimate purpose for which the concept is brought avoiding any potential risk of jurisdictional conflict. Hence, it is my personal understanding that multiplicity of domicile must be avoided in order to reduce the level of complexity and uncertainty in the jurisdictional allocation of judicial powers in the UAE.

Duality of domicile would create a form of forum shopping which can be avoided by a minor legislative amendment to the current provision. The current legislative framework would enable plaintiffs not only to choose the forum but also to elect the law most favorably suitable to them. For example a defendant who has dual domicile in both *Dubai* and *Sharjah*⁴¹ will be subject to two different jurisdictions applying to two different substantive laws, which makes the plaintiff's choice of forum an outcome determinative. Therefore, I think it necessary, in all circumstances, to determine what the single domiciles of the parties are in order to determine the likelihood of jurisdictions as well as to determine whether a court should exercise or decline jurisdiction in a particular context.

The domicile as a connecting factor must be always defined autonomously so as to make the rules of jurisdiction more transparent and predictable. In addition, the

⁴¹ The *emirate of Sharjah* laws are mostly based on Islamic *Shari'a*, therefore, under the laws of *Sharjah*, interest is forbidden and considered illegal where in *Dubai* for instance the law permits interest (relatively *Dubai* laws and regulations are relatively more secular than most other emirates in the federation).

interests of harmonious administration of justice require minimizing any possibility of conflict and inconsistency in the jurisdictional rules. Therefore in order to provide a clear and effective mechanism for the dispute resolution process, the legislative framework of domicile must be reformed as suggested.

Nationality as a Foundation of Jurisdiction Applicable to National Defendants Regardless of Any Other Connecting Factor⁴²

Under the United Arab Emirates legal system, nationality is the basic foundation of jurisdiction over national defendants regardless of any other connecting factor and regardless of whether the national defendant is domiciled in the UAE or abroad.⁴³ This factor provides that the defendant's political status confers authority to national courts regardless of any other connecting factor between the state and the dispute. In fact, nationality as a connecting factor is recognized in most contemporary civil law systems.⁴⁴

In fact, the nationality as a connecting factor has been criticized by many private international law scholars for being unreasonable in circumstances where the national defendant has no substantial connection with the national forum. One of those scholars is Professor *Shaibah awadallah*⁴⁵ who considers the nationality based-jurisdiction as

⁴² Nationality represents a person's political status, whereby the individual owes allegiance to some particular country.

⁴³ [FLCP] art. 20, reads " [w]ith the exception to actions brought concerning real estate situated abroad, federal courts shall have jurisdiction over all actions filed against UAE citizens....".

⁴⁴ For example, France, Egypt and many other jurisdictions

⁴⁵ Egyptian Legal scholar, the author of several law articles. He also teaches law in the *Emirate* of Dubai.

unwise legislative policy unless the factor is strengthened by supporting factors. Otherwise such a connection lacks a rational basis which can justify the denial of any judgment enforcement sought abroad.⁴⁶

In fact, nationality alone should not always form a sufficient basis for the exercise of judicial jurisdiction unless the circumstances of the case show that a close link exist between the forum and the defendant besides being a national. Nationality should be neither a necessary basis of jurisdiction in all cases nor, if it is, so strictly applied so as to disregard the nature and circumstances of the action brought which must be supported by sufficient additional links. Some reasonable connection with the forum should be the prime concern especially in circumstances where one may have little or no practical connection.

Even though nationality as a connecting factor is normally an easy matter to determine compared to other connecting factors in some occasions it does not reflect a genuine link between a person and a specific legal system. The fact that an individual might have a certain nationality without being physically connected with the issuing authority makes it difficult to accept nationality as an ultimate foundation of one state's adjudicative power.

It is my personal view that nationality as a connecting factor should be abandoned and that the law of one's permanent establishment is sufficient and more appropriate to determine the question of jurisdiction as well as one's legal status in all instances where a person has little or no connection with the forum. Indeed, it would be

⁴⁶ Shaibah Awadallah, *Conflict of laws: Conflict of jurisdiction under the UAE law*, 396 (Dubai Police Academy Press 2001).

unfair to compel a non-resident national to litigate an action far away from where he/she is. In addition, many legal systems acknowledge the duality of nationality and where the same nationality embraces more than one legal system, the application of the nationality factor would be problematic.

Therefore, the determination of jurisdiction would be initially best established on the basis of domicile which serves as more practical standard since it permits the application of the designated rules of a particular legal system. In fact, domicile denotes more reasonable connection with the jurisdiction than nationality. Thus, a wise legislative policy is one which formulates bases of jurisdiction that meet the interests of the state and of those who genuinely belong to it without allowing access to court to transients, 'forum-shoppers', and others with no real connection with the national judiciary.

Therefore, I here suggest that article 20 of the federal law of civil procedure⁴⁷ that confers jurisdiction to national courts over all actions filed against national defendants regardless of any other supporting jurisdictional factor to the following suggested provision, *Subject to the provisions of this law, persons domiciled or resided in one of the federated emirates shall, whatever their nationality, be sued in the courts of that State.*

The application of this suggested provision would allow reducing the unfair treatment and burden placed over national defendants domiciled abroad as well as eliminating the potential of jurisdictional overlap, which might occur as a result of applying the nationality factor.

⁴⁷ [FLCP] art.20, reads " [w]ith the exception to actions brought concerning real estate situated abroad, federal courts shall have jurisdiction over all actions filed against UAE citizens as well as all foreigners domicile or reside in the federation".

I added also place of residence to the suggested rule to supplement any deficiency and as an alternative to domicile. In fact, the application of place of residence is less problematic than domicile, but I didn't want to suggest it exclusively so that courts would not be deprived of this fundamental connecting factor.

The UAE Supreme Court Inactive Role Must Be Effectuated

It is clear that the United Arab Emirates Supreme Court is not playing an active role in shaping the jurisdictional boundaries. The few reported cases show that jurisdictional allocation and standards have not been addressed in a way that would conceptualize the issue.⁴⁸ The Court has not attempted to narrow and harmonize the confusing structure of the law of Civil Procedure.⁴⁹

In fact, the law gives the *Etehadeyyah Olia* Court a wide discretion over questions of constitutionality, interpretations and conflicts of jurisdiction.⁵⁰ Under this law the court could have played a more active role in correcting the inconsistencies in the legislative frameworks which may lead to a complete confusion. It would be wise that The Supreme Court as the ultimate guardian of the Federal Constitution intervenes in all circumstances where there is a potential institutional or legislative inconsistency that impedes the spirit of the Constitution.

⁴⁸ See e.g., cases reported by Essam Altamimi & Richard Price, *United Arab Emirates Court of Cassation Judgments from 1989-1997, Arab and Islamic Law Series* (Kluwer 1998).

⁴⁹ This conclusion is based on the cases personally reviewed and others cases reported, e.g., see Essam Altamimi & Richard Price *supra*. Exception is to be given to few cases in which the Etehadeyyah Olia Court [UAE Supreme Court] intervenes in issues of conflict without laying down a meaningful test that would establish a permanent jurisdictional rule.

⁵⁰ See, UAE Federal Law for the Establishment of the Mahkamah Etehadeyyah Olia [Etehadeyyah Olia] [UAE Supreme Court], law 10/1973. art. 33.

CHAPTER III

CONCLUSION

Similarities and Differences

The adjudicative power under both systems is originally founded on territorial factors that link the parties to a legal action to the forum in which the action is brought.¹ In both the UAE and USA the material links that justify the exercise of jurisdiction over the defendant are substantially similar. Traditionally jurisdiction is ascertained by means of domicile, residence, agent, and property ownership, which all reflect forms of material territorial links.² Under both jurisdictional theories, domicile is the traditional foundation upon which the exercise of jurisdiction is permitted. From this notion of domicile, both system expand the scope of its application to cover areas like presence of foreign enterprises³ and foreign residence⁴.

The common characteristics of the traditional approaches of the two models suggest that both jurisdictional theories originate from the application of territoriality under which the adjudicative authority of the court(s) is restricted to geographic area. The

¹ See e.g., Ahmed D. Alsamdan, *Kuwaiti Private International Law: Conflic of Laws, Judicial Jurisdiction, executing foreign judgments*, 375 (Kuwait University pub. 1998).

² Exception is given to in-state service of process, recognized under the U.S. law as a valid jurisdictional foundation, and nationality based jurisdiction under the United Arab Emirates legal system.

³ For example, local branches of foreign corporation are considered the foreign corporation elected domicile for purposes of jurisdiction.

⁴ Residency of foreign defendant in the state is considered sufficient factual findings to supplement any deficiency of the meaning of domicile.

classical approaches underlying the territorial authority to adjudicate in the two systems. Even though substantially similar, one must notice that in the United Arab Emirates legal system, the legislative jurisdictional analysis under the law of civil procedures involves two-step reasoning. First, the legislative requirements of article 20 must first be established.¹ After the jurisdictional facts have been established, any national court may assert jurisdiction over the presented claims regardless of whether the action is being filed in the specific court where the defendant domicile or not. Thus the action can be filed in *Abu Dhabi* federal court against a defendant domiciled in *Sharjah*. In fact, considerations of improper choice of court are addressed in article 84/1 which gives the defendant the right to raise the objection of improper choice prior to the introduction of any defense on the merits of the claim.

The above represents the most significant difference between the two jurisdictional systems. The UAE law does not give any regard to consideration of sovereignty among the federated emirates, whereas in the USA such considerations are paramount. Indeed, the Supreme Court of the United States has established these firm jurisdictional lines since the early stages of drawing the contemporary territorial competence. In the land mark case *Pennoyer v. Neff* the U.S. Supreme Court provides two jurisdictional principles respecting the states in federal system. First, it provides that "every State possesses exclusive jurisdiction and sovereignty over persons and property

¹ UAE Federal Law of Civil Procedure, law 11/1992. [FLCP] art.20, reads " [w]ith the exception to actions brought concerning real estate situated abroad, federal courts shall have jurisdiction over all actions filed against UAE citizens as well as all foreigners domicile or reside in the federation".

within its territory," and, second, "no State can exercise direct jurisdiction and authority over person or property without its territory".²

In the absence of facts that constitute the traditional foundations of territorial authority, both systems have developed approaches under which courts are permitted to exercise its authority. The approaches stem from two distinct paths, nonetheless both are meant to designate, secure and limit judicial competence in circumstances where the proceedings involve a foreign element.

The traditional factors cannot always serve as a basis to establish the jurisdiction of the court regarding defendants having no domicile, place of residence or property in the forum. Thus, an additional foundation must exist to justify the assertion of jurisdiction beyond traditional bases. The question to what extent the court may assert jurisdiction over actions with foreign elements either in their subject or parties becomes the concern for what is known as the extraterritorial basis of jurisdiction.

The very purpose of this legal structure in both systems differs in one obvious way. In the USA the aim is to allocate and determine jurisdiction among the courts of different states; thus it has no relevance to or bearing on matters of a purely domestic nature. In the UAE, however, it mainly concerns what is known as the 'international jurisdiction' of the UAE courts. This difference gives rise to the fact that what is meant as 'foreign element' might not be the same in the two models. Foreign element under the extraterritorial American approach is mainly refers to a party of another state. In fact, concerns of foreign defendants are secondary and have never been subject to a particular

² *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

legal construction. On the other hand, the UAE model of extraterritorial jurisdiction is based on foreign element which is basically a foreign party who is not subject to the adjudicative authority of any UAE court under article 20 of the federal law of civil procedure.³

The USA legal structure in this respect is a composition of legal doctrines and principles formulated by the Supreme Court over the years specifying the boundaries within which a state court may exercise jurisdiction over a non-resident defendant. In essence, the American approach is wide in nature covering a wide range of foreign defendants' activities which might give rise to actions brought in a specific American forum. The fact that each state has its own rules for assuming jurisdiction on a territorial basis does not affect the Supreme Court's ability to determine for all states when and to what extent a state may assume jurisdiction. The state instrument granting jurisdiction over the non-resident defendant is known as long-arm statutes.⁴ Any danger resulting from an unfair procedure in one state is avoided by constitutional factors that play a significant outer rule in restricting state ability to adjudicate. The question of whether the required connection between the action and the State is established and whether this connection complies with the constitutional requirements of "fair play and substantial justice"⁵, is one to be answered in reference to Supreme Court principles established in this particular area of procedural law.

³ See part I chapter III.

⁴ See Part II chapter III.

⁵ See , *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945).

The UAE in turn addresses the issue under what is known as the '*International Jurisdiction of the UAE Courts*'.⁶ The conditions are set forth in specific legislative provisions that address the circumstances under which a foreign defendant may be subjected to UAE courts in the absence of any traditional factor. Under these exceptional legislative rules a UAE court has territorial competence in a proceeding that is brought against a person only if: there is a recognizable legislative connection between the UAE and the facts on which the proceeding against that person is based.⁷

Enforcement Considerations

In so far as the enforcement inquiry is concerned, the question of whether the judgment obtained by the plaintiff against a defendant will be enforced is a question with two dimensions governed by two completely different frameworks in the two models. In the USA if the judgment is rendered by an American court, the fairness of the process of the court may not be challenged on the basis that the court's proceedings are unfair.

In fact, there is really no comparison between the interstate enforcement and those sought between foreign countries. Indeed the considerations underlying the rules of enforcement apply with greater force between the different units of a federation. The enforcement mechanism is constitutional in nature and secured by the Full Faith and Credit Clause of the US Constitution. The Constitutional doctrine provides that courts of the 50 states must recognize, honor and enforce each other's actions. The constitutional foundation of enforcement across state-line reads:

⁶ [FLCP] art. 20-24.

⁷ See Part I chapter III.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.⁸

Therefore, interstate enforcement is constitutionally secured by a common ground of enforcement under which the courts are accustomed to disregard concerns about the differential quality of justice among the various state courts when their differences can have no real effect. This unique constitutional mechanism of enforcement provides stability, unity and deters conflict and inconsistency.⁹

On the other hand, enforcement of foreign judgments in the United States is governed by different frameworks.¹⁰ Generally, enforcement of judgments issued by foreign courts in the United States is governed by the laws of the state in which the enforcement of judgment is sought. Under U.S. law, an individual seeking to enforce a foreign judgment, decree or order must file suit before a competent court. The court will determine whether to give effect to the foreign judgment keeping in mind the quality of justice provided by the foreign tribunals.

In general, US courts may deny the enforcement of foreign judgment where the judgment was rendered under judicial system that does not provide impartial tribunals or procedures compatible with due process of law or where the court rendering the judgment lacks jurisdiction over the defendant according to the law of the foreign state.

⁸ U.S. Cons. art. IV, § 1.

⁹ A judicial public policy exception applies to the clause in matters where the legal pronouncements of one state conflict with the public policy of another state.

¹⁰ It has to be noticed that there is no bilateral treaty or multilateral international convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments.

Recognition may also be denied in instances where the defendant did not receive notice of the proceedings in sufficient time that would enable the defendant to defend and present his case.¹¹

Therefore, it would be safe to say that enforcement of a foreign judgment in the USA is mainly based on natural justice considerations which are restricted to the form of the foreign procedure and to due process. If that procedure, while valid there, is not in accordance with American concept of due process, the foreign judgment will be denied enforcement.

In the United Arab Emirates, enforcement of judgment is also subject to several frameworks depending on the origin of the judgment sought to be enforced in the national court. Judgments rendered by a court within the federation are automatically enforced pursuant to the law No.11 for the year 1973.¹² The Article provides that:

Final judgments establishing civil, commercial rights, providing for compensations in connection with criminal proceedings, or concerning personal status rendered by a local judicial authority of one of the federated emirates shall be enforced in all other emirates in accordance with this legislation.

The legislative provision laid down a rule of enforcement that is substantially similar to the Full Faith and Credit clause under the USA model of internal enforcement. Similarly, the article does not impose any formal requirement for enforcement when the judgment presented for enforcement is rendered by a court of a sister emirate.

¹¹ Restatement (Third) *The Foreign Relations Law of the United States* § 482. Grounds for denial of enforcement (1987).

¹² UAE Federal Law Regulating the Judicial Affairs among the Federated Emirates, law 11/1973. art. 11.

In theory, mechanism of internal enforcement in the United Arab Emirates stems from the presumption that all judgments are subject to the same legislative framework as well as that all are subject to final review by the Supreme Court of the UAE, which can determine when the courts of one emirate have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another emirate should recognize such judgments. Above all there is a need for the enforcement throughout the federation of judgments given in one emirate.

In the United Arab Emirates enforcement of foreign judgments and arbitral awards is governed by the federal law of civil procedure. The law provides that "[j]udgments and decrees issued in a foreign court may be enforced in the UAE in the same conditions governing enforcement of national judgments".¹³ The law further provides that national courts must deny enforcement in all cases where the national courts could have assumed jurisdiction over the matters in accordance with principles of international private law in force in the foreign state where the judgment was rendered.¹⁴ In addition the article provides among other things, that the judgment must be the final disposal of the action by a competent court exercising proper jurisdiction over the matter in accordance with the law of the foreign state.¹⁵ Also, the parties to the original proceedings must have been properly notified of the proceedings taken therein.

The Article first sets forth the different stages governing the enforcement of the foreign judgment. First it provides for the adoption of reciprocity principle of foreign

¹³ [FLCP] art. 235.

¹⁴ [FLCP] art. 235/2.

¹⁵ [FLCP] art.235/2 (a)(b)(c).

judgment enforcement. Under the principle no judgment shall be enforced from the foreign jurisdiction unless the national judgments are recognized for enforcement therein.¹⁶ Second, when the reciprocal requirements are found national courts will examine the foreign judgment according to the conditions set forth in article 235 of the law of civil procedure.

Potential Conflict of Jurisdictional Rules and Mutual Denial of Enforcement

In light of the above and in the absence of bilateral treaty between the United States of America and the United Arab Emirates, mutual enforcement of judgments would be encountered with formal requirement which by itself require among other things the re-examination of jurisdictional rules. Most likely the USA courts would deny recognition of judgments rendered by the UAE courts. Denial could be found on grounds of procedural quality according to which there must be a system of procedures compatible with due process in the USA in order for the judgment to be recognized and subsequently enforced.¹⁷

In the United Arab Emirates, the high potential of declining the enforcement of the American judgment arise in occasions where national courts have a legitimate

¹⁶ Pursuant to this principle, Mahkamat Al Tamiez [Tamiez] [Dubai], Dubai Court of Cassation denied enforcement of foreign judgment sought to be enforced in Dubai. The Dubai Court of Cassation held that "foreign judgment will not be enforceable in the United Arab Emirates even if final, if the UAE courts also have jurisdiction over the subject matter in the original proceedings". Reported by Essam Altamimi & Richard Price, *United Arab Emirates Court of Cassation: Judgments 1989-1997: Arabic and Islamic Law series*, 293 (Kluwer 1998).

¹⁷ See, Restatement (Third) *The Foreign Relations Law of the United States* § 482. Grounds for denial of enforcement (1987).

connection with the action that would have justified the exercise of jurisdiction should the action have been brought in a USA court¹⁸.

Therefore, I suggest that international comity and the prevalence of international cross-border transactions as well as the free movement of goods and services, call for a modernization of this body of law through the adoption of a system of recognition that is neither a matter of absolute obligation, nor of mere courtesy and good will, upon the other. But it is the recognition which a nation allows within its territory to the judicial acts of another nation, having due regard both to international duty convenience, necessity, and to the rights of its own citizens or to others whom are under the protection of its laws.

Such a goal can be accomplished through an international agreement designed to harmonize the different jurisdictional approaches especially when a foreign element is involved in the proceedings. Such an agreement would likely alter the rules of jurisdiction in force in each party state where an international element is present. A state may maintain its rules of jurisdiction regarding all other matters. Thus, persons domiciled in that state party will not normally be affected by the agreement. This could be the case in several examples. For instance, in occasions where the defendant is a national of another state, a situation in which the principle of equality of treatment would apply, or where the proceedings related to a matter over which the courts of another State have exclusive jurisdiction; or where identical or related proceedings had been brought in the courts of another State.

¹⁸ [FLCP] art. 235/2 (a).

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