Jurisdiction in Civil Actions at the End of the Twentieth Century: Forum Conveniens and Forum Non Conveniens

Robert C. Casad*

Lawyers from civil law countries often have difficulty understanding the concepts of jurisdiction employed in the courts of the United States. From time to time I have been asked by lawyers of other countries to explain how courts can claim competence in a particular case. I have also been asked why our courts can't or won't exercise competence in a particular case. It seems to those who have asked such questions that American courts will entertain cases that they should not, and that they will not entertain some cases that they should. To them it appears that our system of long-arm jurisdiction is an abuse of procedure per se. A student from another country recently told me that she thought our concept of long-arm jurisdiction was merely an expression of American imperialism, exerting American power over citizens of other countries. I don't know how widespread this idea is, but there is little validity to it. Our concept of long-arm jurisdiction developed in the interstate context, not the international one. American courts apply the same standards, whether the defendants be American or foreign. In the first part of my remarks, I will attempt to explain in a brief and simple way the circumstances

* John H. and John M. Kane Professor of Law Emeritus, The University of Kansas, U.S.A.

under which most American courts will or will not entertain a case that involves parties, things or events that have connections with other countries. In the second part, I will make some observations about how, in my opinion, our law of jurisdiction should develop as we approach the twenty-first century.

I. JURISDICTION AND COMPETENCE COMPARED

In the countries of Western Europe and those other countries that have legal systems patterned on European models, including Japan, Latin America and most African nations, the power of a court to adjudicate a case is more likely to be referred to as "competence" rather than "jurisdiction." An action must be brought before a "competent" court. Competence has two components: a subject matter component, which requires the action be brought before a court with authority over actions of that type, and a territorial component, which requires the action be brought before a court with an appropriate geographical relation to parties, things or events involved in the suit.[1] If the court chosen by the plaintiff is competent in both aspects, that court has competence over the action.

The Anglo-American concept of jurisdiction is similar, but subtly different. Our concept of jurisdiction also has subject matter and territorial elements. An action must be brought before a court that has jurisdiction of the subject matter (sometimes referred to as "competence"); the case must be one of the type that the court is empowered to hear.[2] In addition to subject matter jurisdiction, however, the court must have jurisdiction over the person or the parties (if it is an action *in personam*) or jurisdiction over the *res* or property (if it is an action *in rem*).[3] The territorial element of jurisdiction is found in the requirements for jurisdiction over the person or personal jurisdiction. Before a court can have personal jurisdiction over a party, that party must have a suitable connection to the territory of the sovereign that established that court.

Jurisdiction over the subject matter is rarely a problem in state courts. Federal courts have limited subject matter jurisdiction. They can entertain only a few specific kinds of cases, most notably cases arising under federal law and controversies between citizens of different states, or between citizens of a state and citizens of foreign

1. ARTHUR T. VON MEHREN, THE CIVIL LAW SYSTEM 94-101 (Prentice Hall 1957).
2. 1 CASAD & RICHMAN, JURISDICTION IN CIVIL ACTIONS § 1-1(1) (3d ed. Lexis 1998).
3. *Id.* § 1-1(2).

countries.[4] General state trial courts, however, are able to entertain any kind of case, except those for which federal jurisdiction is exclusive. So far as subject matter jurisdiction is concerned, the general court of first instance in my state of Kansas can entertain a suit by one Japanese citizen against another Japanese citizen for breach of a contract formed in Japan and to be performed in Japan. However, acquiring jurisdiction over the person of the defendant in such a case would probably be impossible. In American courts, jurisdiction of the person is the main limitation on a court's power. Thus, instead of thinking about jurisdiction over the action, as in civil law countries, we think primarily about jurisdiction over the person of the defendant. The reason that we think in terms of jurisdiction over the person rather than competence over the action, as in civil law countries, is traceable to the theory of the nature of jurisdiction that we received from the old English common law.

If a defendant consents or waives any objection to a court's jurisdiction over the defendant's person, then no territorial connection to the case is required. If the defendant does not consent, however, the plaintiff must choose a court in a jurisdiction where the defendant has an appropriate connection. Only such a court can acquire jurisdiction over the person of a nonconsenting defendant.

If an individual defendant has a home in the territory of the sovereign whose court is seeking to exercise jurisdiction, that has always been considered a suitable connection to permit the exercise of jurisdiction over the defendant's person. However, residence or domicile of the defendant is not the only appropriate connection.

Historically, Anglo-American common law has considered jurisdiction over the person of a defendant to be primarily a function of the court's coercive power.[5] If a court can physically arrest a person, that person is subject to the court's jurisdiction. In the earliest days of the English common law, many civil actions were indeed commenced by the physical arrest of the defendant, who was held under the court's order until the case was tried.[6] In time, however, physical arrest was supplanted by symbolic arrest. Rather than taking the defendant into custody like an accused criminal, the defendant was handed a piece of paper—a summons—demonstrating that the defendant could have been arrested if that were necessary. Thus, if

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4. *See* U.S. CONST. art. III § 2.

5. Justice Holmes noted that "the foundation of jurisdiction is physical power." McDonald v. Mabee, 243 U.S. 90, 91 (1917).

6. This physical arrest was initiated by the writ *capias ad respondendum*. *See* Casad & Richman, *supra* note 2, § 2-2(a).

the defendant could be found by a process server while physically present in the territory of the court's sovereignty, even a nonconsenting nonresident could be subjected to personal jurisdiction.

Historically, then, the only appropriate connections between the defendant and the court's territory were physical presence, consent or residence (or domicile). These were, and are still, referred to as the traditional "bases" for personal jurisdiction. In the famous nineteenth century case of *Pennoyer v. Neff*,[7] the United States Supreme Court declared that these three traditional bases were the only constitutionally permissible bases.[8] In that case the Court said that these traditional bases for personal jurisdictional were an element of the constitutional concept of "due process of law."[9] The Fourteenth Amendment to the United States Constitution declares that no state of the United States may "deprive any person of life, liberty, or property, without due process of law."[10] Accordingly, *Pennoyer v. Neff* established that no state can exercise jurisdiction over a person unless that person consents to jurisdiction, is a resident or domiciliary of that state, or is found physically present in the state by a process server.

Pennoyer v. Neff reflected a strong bias in favor of defendants. It severely limited the ability of courts to exercise jurisdiction over nonconsenting nonresidents. A court simply could not do it unless the defendant was caught by a process server while physically present in the state. However, the common law recognized a way around this limitation if the defendant had property physically located in the state. Jurisdiction over the person of the defendant, although required for *actions in personam*, was not required for actions *in rem*. A court that has power over property can determine rights of ownership in that property without jurisdiction over the person of the rival claimants.[11] Presence of the property in the state is a sufficient basis for jurisdiction over the property (or jurisdiction *in rem*, as it is often called).

An action *in rem* is brought to determine interests in property.[12] A suit to recover a sum of money or to force the defendant to do or refrain from doing something is an action *in personam*. However, the common law developed a theory that would allow an action to recover a sum of money to be brought as an *in rem* action. If the plaintiff's

7. 95 U.S. 714 (1878).
8. *See id.* at 735.
9. *See id.* at 733-34.
10. U.S. CONST. amend. XIV, § 1.
11. *See Pennoyer*, 95 U.S. at 734-36.
12. *See* CASAD & RICHMAN, *supra* note 2, § 1-1(3).

claim for money damages is valid, then the plaintiff has a potential interest in property belonging to the defendant. If the plaintiff gets a judgment for money damages against the defendant, and the defendant fails to pay the judgment, then the plaintiff can have the defendant's property sold in execution of the judgment. By a bit of fictitious reasoning, a claim for money damages could be considered like an action *in rem* in which the plaintiff asserts a claim to certain specific property of the defendant.[13] The plaintiff could bring a suit on the claim wherever the defendant had executable property, even if the defendant was not subject to personal jurisdiction there. Property can include debts owed to the defendant. A court that can get personal jurisdiction over the defendant's debtor can exercise *in rem* jurisdiction over the property represented by the debt.[14] The availability of this sort of action, called *quasi in rem*, provided a limited way to circumvent the strictures placed by *Pennoyer v. Neff* on *in personam* jurisdiction. The effect of the judgment in a *quasi in rem* action merely gave the plaintiff a right to sell that particular property to satisfy the claim. The judgment could not be executed against other property.

That was the status of the law of jurisdiction at the beginning of the twentieth century. As the modern era evolved, the gross inadequacy of a theory of jurisdiction that did not permit jurisdiction over nonconsenting nonresidents unless they could be caught physically in the state became apparent. By the middle of the twentieth century our thinking about jurisdiction had changed enough that the U.S. Supreme Court, in 1945, provided us with a new theoretical foundation for personal jurisdiction. The case was *International Shoe Corp. v. State of Washington*.[15]

II. MINIMUM CONTACT AND FUNDAMENTAL FAIRNESS

In *International Shoe* the United States Supreme Court addressed the question of whether a Missouri-based corporation could be sued in the courts of the state of Washington. The corporation claimed that the activities carried on by its agents in Washington did not constitute "doing business," and therefore the corporation was not "present" in Washington.[16] In rejecting the corporation's argument, the Supreme

13. *See* CASAD & RICHMAN, *supra* note 2, § 1-1(1).
14. *See* Harris v. Balk, 198 U.S. 215 (1905).
15. 326 U.S. 310 (1945).
16. *See id.* at 312.

Court gave a completely new description of "due process of law" in the context of personal jurisdiction:

> Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. . . . But now that the *capias ad respondendum*[17] has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, 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.[18]

Along with this new minimum contacts standard, the Court recognized that the amount or kind of contact that would satisfy the due process minimum depended upon whether the cause of action in the suit arose from the contact or did not.[19] Before *International Shoe*, courts did not make such a distinction unless a state statute limited jurisdiction to causes of action arising in the state. If a defendant was present or domiciled in a state, he could be sued there for any cause of action, whether or not it had any connection with the state. But in the case of a corporation, *International Shoe* recognized that "presence" is a fiction.[20] The defendant had to have some connection with the state; even a single or isolated contact could be sufficient if the cause of action arose from the contact.[21] On the other hand, if the defendant's contact was systematic and continuous and substantial, the defendant could be sued there for any cause of action, regardless of where it arose.[22]

How can one tell what single or isolated activity will satisfy the constitutional minimum so as to support jurisdiction for a call arising from the contact (what we now call "specific jurisdiction")? And, how can one tell what systematic and continuous activity is sufficiently substantial to support jurisdiction for a claim unrelated to that activity (what we now call "general jurisdiction")?[23] In

17. *See supra* note 6.
18. *International Shoe Co.*, 326 U.S. at 316.
19. *See id.* at 321.
20. *See id.* at 316.
21. *See id.*
22. *See* Perkins v. Benguet Mining Co., 342 U.S. 437 (1952).
23. The terminology of "general" and "specific" jurisdiction was first introduced in an important article by Professors von Mehren and Trautman. Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). The Supreme Court of the United States has adopted that usage. *See* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 at 414, n.9 (1984).

International Shoe, the Court said the answer depends upon "the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[24] This was understood to mean interest balancing. How difficult would it be for the defendant to defend the case in the chosen forum as compared to the difficulty the plaintiff would face if the suit could not be brought there? Litigational convenience is a major factor in whether it is fair and reasonable to allow the case to proceed in the court chosen by the plaintiff. Fairness and reasonableness are values that the due process clause is concerned about.

The new standard of due process derived from *International Shoe*, then, looks to see if the defendant has some contact with the forum state. If not, jurisdiction cannot be upheld. If the defendant does have some contact (not necessarily physical) with the forum state, then it is necessary to see whether the cause of action arises from that contact or not. If it does, then it is necessary to look at the interests affected by the decision whether or not to permit jurisdiction: interests of the plaintiff, defendant, state, and others.[25] If the balance of the interests favors jurisdiction in the forum state, the court can proceed with the suit. If the balance does not favor jurisdiction, then the court must dismiss the case.

If the cause of action does not arise from the defendant's forum state contacts, then it is necessary to determine whether the defendant's contacts are sufficiently systematic, continuous and substantial to make it fair to require the defendant to defend the suit in the forum state despite the lack of a connection between the forum state and the cause of action. This step also involves interest balancing.

International Shoe mitigated some of the extreme defendant bias reflected in *Pennoyer v. Neff*, but a legal standard that depends on interest balancing tends to be somewhat unpredictable. Different judges may assess the relative weights of the interests affected differently, and different judges may reach different conclusions in

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24. *International Shoe*, 326 U.S. at 319.

25. In recent years the Supreme Court has referred to five interests that must be evaluated; (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interests of the several state's in furthering fundamental substantive social policies. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985). *See also* von Mehren and Trautman, *supra* note 23.

similar cases. This is a major problem with the jurisdictional analysis spawned by *International Shoe* that still troubles us today.

III. EXPANDING LIMITS OF STATE COURT JURISDICTION: LONG-ARM STATUTES

The *International Shoe* decision did open the way for great expansion of the permissible bases for state court jurisdiction. In the 1950s and early 1960s, states began adopting statutes permitting their courts to exercise *in personam* jurisdiction over nonconsenting nonresidents by serving process on them outside the state. These statutes are referred to as long-arm statutes. Some are specific in identifying only certain acts that will cause a defendant to be subject to long-arm jurisdiction. Others broadly declare that the courts of that state can exercise jurisdiction on any basis consistent with the Constitution.[26]

IV. PURPOSEFUL AVAILMENT AND THE STREAM OF COMMERCE

In 1958 the Supreme Court rendered another landmark decision in *Hanson v. Denckla*,[27] which announced a limitation on the *International Shoe* doctrine. Even if the cause of action arises from the defendant's contact with the forum state, and even if the forum state is a convenient forum for the case, that state cannot exercise jurisdiction over a defendant unless the contact giving rise to the suit is the result of the defendant's own purposeful action, not the result of the actions of the plaintiff or third parties. The Court said that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protection of its laws."[28]

Hanson's "purposeful availment" requirement posed a barrier to states seeking to exercise long-arm jurisdiction over manufacturers of defective products in products liability cases. Often the presence of the defective product in the state is not the direct result of the manufacturer's own activity, but of some independent jobber's or wholesaler's. However, the state courts developed a theory to permit the exercise of jurisdiction over the manufacturers of defective

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26. The long-arm statutes of all states may be found in the appendices to two treatises: 2 CASAD & RICHMAN, JURISDICTION IN CIVIL ACTIONS, 3d ed. (1998) Appendix E; CASAD, JURISDICTION AND FORUM SELECTION, (1988) Appendix B.

27. 357 U.S. 235 (1958).

28. *Id.* at 253.

products in product liability cases despite the purposeful availment requirement. If the manufacturer purposefully places its products in the "stream of commerce" with awareness that a substantial volume of them will be sold and used in the forum state, that is the equivalent of purposefully placing the products there, even though the actual presence of the product there is the result of the actions of independent middlemen.[29] The manufacturer purposefully caused its product to be sold in the forum state, and if a cause of action arises from that, the manufacturer should be subject to jurisdiction there.

Some courts, reasoning from this stream of commerce idea, took the position that what the purposeful availment requirement really meant was that even if the defendant acted entirely outside the forum state in doing what gave rise to the cause of action, if the defendant could foresee that what it did, wherever it did it, could cause effects in the forum state, would be enough to satisfy the purposeful availment requirement. This view proved to be too broad, however.

The Supreme Court addressed the stream of commerce idea in *World-Wide Volkswagen Corp. v. Woodson*,[30] a products liability suit brought in Oklahoma by plaintiffs who at the time of the suit resided in Arizona. The plaintiffs had purchased an Audi automobile from a retail dealer in New York, and while driving across Oklahoma en route from their former New York home to their new Arizona home, the Audi was struck from the rear by another car. The Audi caught fire and the plaintiffs were severely injured. They sued the manufacturer, the importer of the car, the East coast regional distributor, and the retailer of the car, claiming the damages were the result of negligent design. The manufacturer and the importer did not contest the jurisdiction of the Oklahoma court, but the regional distributor and retailer did.

The Oklahoma courts held that the defendant retailer and distributor were subject to jurisdiction in Oklahoma because they could foresee the possible use in Oklahoma of the vehicle they sold in New York. The Supreme Court of the United States, however, reversed that decision.

The Court rejected the foreseeable effects test, but did not reject the "stream of commerce" theory:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such

29. *See* Gray v. American Radiation & Standard Sanitary Corp., 176 N.E.2d 761 (1961).
30. 444 U.S. 286 (1980).

> that he could reasonably anticipate being haled into court there . . . [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or others.[31]

This seemed to say that foreseeability of the *sale* of its product in the forum state is enough to satisfy the purposeful availment requirement for a product liability suit against a manufacturer, but foreseeability of the *use* in the forum state of a product sold elsewhere is not sufficient to permit a product liability suit there against a retail seller. Of course, even if the contact was purposefully caused, that does not end the matter. It is still necessary to look at the balance of the fairness factors to decide if the constitutional minimum has been met.

The Court visited the "stream of commerce" theory again in *Asahi Metal v. Superior Court of California*.[32] That case arose from a motorcycle accident in California. A motorcyclist was severely injured, and his wife was killed when a tire on the vehicle exploded. The motorcyclist sued Honda, the manufacturer of the motorcycle, and Cheng Shin, a Taiwanese corporation, manufacturer of the tire. Cheng Shin sought to implead Asahi, a Japanese corporation, manufacturer of the tire valve. Cheng Shin claimed that if the tire was defective, the cause was a defective valve, and Asahi would be obligated to indemnify Cheng Shin if Cheng Shin were found liable. The plaintiff settled the claim against Honda and Cheng Shin, but Cheng Shin's indemnification claim remained.

Asahi moved to dismiss the claim for lack of personal jurisdiction. The California courts ruled that jurisdiction was proper, relying on the "stream of commerce" theory to satisfy the purposeful availment requirement. Asahi was fully aware that a significant volume of the valves it sold to Cheng Shin in Asia would be incorporated into tires that would be sold in California. The Supreme Court of the United States, however, reversed that decision.

All nine of the Justices were of the opinion that even if Asahi did purposefully establish the contact with California by the presence of its valve, the balance of interests made it unfair to require Asahi to defend Cheng Shin's indemnity suit in California. The relation between Cheng Shin and Asahi was entirely based in Asia. California

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31. *Id.* at 297.
32. 480 U.S. 102 (1987).

had no interest whatever in resolving the controversy between them. Moreover, if Cheng Shin were to win a judgment, it probably would not be executable in the United States, and Japan would probably not recognize and enforce it. On balance, it seemed unreasonable and unfair to require Asahi to defend Cheng Shin's suit in California, or to require California citizens to sit as jurors in such an action.

Four of the Justices, however, went further. Justice O'Connor and three others were of the opinion that Asahi's contact was not the result of Asahi's "purposeful availment." To those Justices the mere fact that Asahi placed its products into the stream of commerce knowing a significant volume of them would be incorporated into vehicles sold in California was not enough to constitute purposeful availment. Some additional conduct by the defendant indicating an intent to serve the forum state market, such as advertising, ought to be required.[33] Justice O'Connor's opinion basically rejects the stream of commerce theory and the dicta endorsing it in *World-Wide Volkswagen*.

Four other Justices, however, in an opinion written by Justice Brennan, reaffirmed the validity of the stream of commerce theory. The ninth Justice, Justice Stevens, refused to endorse either viewpoint. Consequently, the Asahi decision leaves some doubt about the validity of the stream of commerce theory. In later cases, some courts have followed Justice O'Connor's view; others have sided with Justice Brennan's view.[34] The latter group is probably more numerous. After all, in *World-Wide Volkswagen*, the Court seemed to endorse the stream of commerce theory as a means of satisfying the purposeful availment requirement in a suit against a manufacturer who could foresee resale of its products in the forum state. A majority of the Justices of the Supreme Court have never rejected that.

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33. *Id.* at 112.

34. *See* Terry W. Schackmann, *Limits of U.S. International Jurisdiction: Structuring Business to Avoid Suit in the U.S.* 1994. Looking only at decisions of federal courts, the author found the cases to fall within six groups: (1) those that follow the O'Connor opinion; (2) those that lean toward the O'Connor opinion, but do not clearly follow it; (3) those that reject the O'Connor opinion; (4) those that lean against the O'Connor opinion, but do not clearly reject it; (5) those where there are conflicting decisions, some following and some rejecting the O'Connor view; and (6) those that had at that time rendered no decisions one way or the other.

The first group included all seven states in the 8th Circuit, three states, plus the Virgin Islands, in the 3d Circuit, and Colorado. The second group included the five states in the 4th Circuit, the three states in the 11th Circuit, and Kansas. The third group included three states in the 5th Circuit, the three states in the 7th Circuit, the District of Columbia, Utah, and Wyoming. The fourth group included the nine states of the Ninth Circuit and the four states plus Puerto Rico in the 1st Circuit. The fifth group included the three states of the 2d Circuit and the four states of the Sixth Circuit. The undecided states were Oklahoma and New Mexico.

V. BURDEN OF PROOF AND FAIRNESS

We have seen that the modern analysis of the constitutionality of personal jurisdiction requires finding purposefully established contact between the defendant and the forum state and an examination of the relevant interests to see if the exercise of jurisdiction over the defendant in the particular case would be fair and reasonable. The question arises of who has the burden of proof on the fairness issue. Must the plaintiff prove that jurisdiction is fair? Or must the defendant prove that it is unfair?

Until the Supreme Court's decision in *Burger King Corp. v. Rudzewicz*,[35] it was generally assumed that the plaintiff bore the burden of showing that the exercise of jurisdiction would be fair. The *Burger King* case, however, shifted the burden to the defendant. The Court held that:

> Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice' . . . [W]here a defendant who has purposefully directed his activities at forum state residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other factors would render jurisdiction unreasonable.[36]

In short, if the plaintiff can show that the defendant has purposefully established the contact with the state out of which the cause of action arose, the burden of persuading the court that jurisdiction would be unfair will be upon the defendant.

VI. CONTINUED VITALITY OF THE TRADITIONAL BASES

Since the *International Shoe* decision, it has become clear that so much of the traditional theory of jurisdiction that held that physical presence of the defendant in the state was a necessary condition for personal jurisdiction over a nonconsenting nonresident is no longer valid. States can constitutionally exercise jurisdiction over nonconsenting nonresidents who are not found physically present in the forum state.

The traditional theory, however, also held that physical presence of a person within the state, even temporary, transient presence, was a sufficient condition for jurisdiction. This was true even for what we

35. 471 U.S. 462 (1985).
36. *Id.* at 476-77.

now call general jurisdiction, jurisdiction for cases having nothing to do with the forum state. Did that aspect of the traditional theory survive? Many lawyers, judges and scholars thought not. If the test for due process is fundamental fairness, as *International Shoe* and its progeny indicated, then it is difficult to see how mere temporary physical presence of the defendant in the state could make it fair to require the defendant to defend a case there that has no other connection with the forum state. Many thought, after *International Shoe*, that even if the defendant were personally served while physically present in the state, it would still be necessary to engage in the interest balancing analysis to see if it were fair to require the defendant to defend that particular case in that forum.[37] In *Shaffer v. Heitner*,[38] the Court had ruled that the *International Shoe* interest analysis had to be applied in a case where the defendants' property in the state was used as a basis for the kind of *quasi in rem* action, described above. In that case, the Court had even said that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Show* and its progeny."[39]

In *Burnham v. Superior Court*,[40] the Court was faced with the question of whether mere physical presence of a person is sufficient basis for general personal jurisdiction. Again, as in *Asahi*, the Court failed to provide an authoritative answer.

Four of the Justices were of the opinion that mere physical presence was still a sufficient basis for jurisdiction over a nonconsenting nonresident. To them, *International Shoe* applied only to defendants *not* present. Four of the Justices thought that the *International Shoe* analysis did have to be applied, but suggested that normally it would be satisfied when the defendant was physically present. Again, Justice Stevens refused to endorse either view. And so again, as in *Asahi*, we are left with a four-to-four split of the Court on the question of whether temporary physical presence of the defendant, without more, is a sufficient connection for general personal jurisdiction.

37. *See* CASAD & RICHMAN, *supra* note 2, § 2-4(1)(a) n.160.
38. 433 U.S. 188 (1977).
39. *Id.* at 212.
40. 495 U.S. 604 (1990).

VII. SUMMARY OF THE CONSTITUTIONAL LIMITS ON STATE COURT PERSONAL JURISDICTION

A court can exercise jurisdiction over a defendant who consents or waives objection. Participation in the action without objecting to personal jurisdiction constitutes a waiver.

A court can exercise jurisdiction over an individual who resides or is domiciled in the forum state. Residence or domicile is a sufficient connection to support general jurisdiction.

A court can exercise jurisdiction over a corporation that is incorporated in the forum state, and a corporation that is "doing business" in the forum state. Whether "doing business" is a sufficient connection for general jurisdiction depends on whether the business activity is continuous, systematic and sufficiently substantial to make it fair to require the corporation to defend the particular lawsuit in that forum.

A court may also exercise specific jurisdiction over an individual or corporation that has purposefully established contact with the forum state that gave rise to the cause of action, unless the defendant can show by an analysis of the relevant interests that jurisdiction in the case would be unfair. In products liability actions against manufacturers, the purposeful contact may be established by way of the stream of commerce theory, except in those courts that have followed Justice O'Connor's *Asahi* opinion.

A court may not exercise *quasi in rem* jurisdiction over a defendant's property in the state for a claim unrelated to the property unless the defendant has the connections with the state that would support *in personam* jurisdiction under the *International Shoe* analysis.

A court probably can exercise even general jurisdiction over an individual defendant who is found and served with process while present in the state.

VII. FORUM NON CONVENIENS

The fact that an American court can exercise jurisdiction over a person does not necessarily mean that it will. Most American states have adopted the common law doctrine of *forum non conveniens*. Under that doctrine, a court does not have to exercise jurisdiction in a case in which the court would be a seriously inconvenient forum.

The leading American case on the doctrine is *Gulf Oil Corp. v. Gilbert*.[41] The doctrine as applied in that case, like the jurisdictional analysis under *International Shoe*, entails interest balancing. The Court declared that:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining the attendance of willing, witnesses . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive . . . But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
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> Factors of public interest also have place in applying this doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation . . . There is an appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case. . . . [42]

These factors are the same ones that must be examined under *International Shoe* to see whether the court has jurisdiction at all or not. Does that mean that a court must look at the same factors twice, once to determine whether jurisdiction over the defendant is fundamentally fair, and, if it is, look at them again to see whether the forum is seriously inconvenient? That would be anomalous. It is hard to visualize a case where the balance of interests makes the forum fundamentally fair, but where the forum is seriously inconvenient and the balance is so strongly in favor of the defendant that the plaintiff's forum choice should be rejected.

In reality, the doctrine of *forum non conveniens* is essentially limited to cases where the defendant's forum contacts are so substantial as to permit jurisdiction there for any cause of action, no matter where it arose. That would be true, for instance, when an individual is sued in the state of his domicile, or, perhaps, in a state where he was found physically present. It would also be true of a corporation sued in the state of its incorporation or principal place of business.

The doctrine finds its most common application in cases where an American manufacturer is sued in a products liability action in the manufacturer's home state by a foreign plaintiff seeking damages for a product injury incurred abroad. American products liability law is

41. 330 U.S. 501 (1947).
42. *Id.* at 508-09.

generally more favorable to plaintiffs than that of most countries, and American damage awards tend to be more generous. Accordingly, foreign plaintiffs, as it has been said, are drawn to American courts as moths are drawn to light,[43] and it is common for them to sue American manufacturers in such cases in the United States where the manufacturer is clearly subject to general jurisdiction, even though all the events giving rise to the suit occurred abroad.

Some state courts will not allow the doctrine of *forum non conveniens* to be invoked by a defendant that is sued in the defendant's home state. The Supreme Court of the United States, however, has upheld the doctrine's application by federal courts in actions brought in the defendant's home state. In *Piper Aircraft Co. v. Reyno*,[44] the Court upheld a federal district court's refusal to entertain a suit against an American aircraft manufacturer brought by Scottish plaintiffs arising from an airplane crash in Scotland. The Supreme Court held that the presumption in favor of the plaintiff's forum choice is not so strong when a foreign plaintiff sues in the United States for an injury sustained abroad. If the plaintiff has an alternative forum in the place where the injury occurred, an American court can appropriately decline to exercise jurisdiction on *forum non conveniens* grounds.

Since the *Piper Aircraft* case, courts have increasingly declined to hear products liability suits brought by foreign plaintiffs against American manufacturers for product injuries sustained abroad. Generally, before dismissing the plaintiffs case, court will require the defendant to agree to submit jurisdiction in the alternative court and agree not to raise the statute of limitations as a defense if the plaintiff commences a new action in the foreign court with reasonable promptness.

Foreign lawyers are sometimes dismayed by the fact that an American court that clearly has competence or jurisdiction will refuse to exercise it. Continental European countries generally reject the doctrine *forum non conveniens*.[45] That doctrine, however, is a fairly well established feature of American law at the end of the twentieth century. The congestion of courts in major urban areas puts strong

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43. *See* Paul D. Carrington, *Moths to Light: The Dubious Attractions of American Law*, 46 KAN. L. REV. 673 (1998) (quoting Lord Denning in Smith Kline & French, Ltd. v. Bloch, 1 W.L.R. 730 (CA 1983)). *See also* Friedrich Juenger, *Forum Shopping, Domestic and International*, 63, TUL. L. REV. 553 (1989).

44. 454 U.S. 235 (1981).

45. *See* Lowenfeld, *Forum Shopping Antitrust Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L. L. 314, 318 (1997). *See also*, J.J. FAWCETT, DECLINING JURISDICTION IN INTERNATIONAL LAW 10 (1995).

pressure on courts to dismiss cases where the doctrine of *forum non conveniens* will warrant it. This is particularly true in suits for money damages where there usually is a constitutional right to a jury trial of the case if the trial is in the United States. Foreign plaintiffs who choose to bring their suits on foreign-based causes of action in the United States are increasingly likely to be unable to do so.

VIII. WHERE WE ARE AT THE END OF THE TWENTIETH CENTURY

One problem with our system is that in our desire to be perfectly fair in the exercise of jurisdiction, we use standards that say little more than that: be fair. But that invites virtually every defendant with resources to contest jurisdiction in cases where it really is not uncertain. As a result, every year 200-300 new appellate decisions dealing with jurisdiction are reported.

On the horizon of the twenty-first century, we see looming the problem of dealing with the jurisdiction questions arising from litigation spawned by the internet. How can we deal with the problems arising in cyberspace with jurisdiction doctrines bound up in earth-based territorialism? Before we can deal with that, we have to clarify the doctrine that we have.

During the span of about ten years preceding the *Burnham* case, the Supreme Court rendered some very unfortunate decisions and opinions that served to confuse our jurisdictional doctrine rather than clarify or refine it. Apart from those unfortunate cases, through the years since the *International Shoe* decision, many lawyers, judges and law professors got lax in their discussions of the "minimum contact-fundamental fairness" theory now embodied in the Fourteenth Amendment to the Constitution. There is ambiguity and disagreement even about the meaning of "minimum" in this context, impeding our ability to refine the theory to make it more useful and predictable.

In Justice Stone's opinion in *International Shoe*, "minimum" was not a term that had an independent meaning, nor was it a qualification of the requirement of contact. It was not the starting point of the jurisdictional analysis, but the conclusion. One could not tell whether the defendant had such contacts as would satisfy the constitutional minimum until after weighing the competing interests. Contact was the starting point; minimum was the conclusion.

Through the years, many have lost sight of that. My impression is that more people today think of minimum as a concept that has some independent meaning, or perhaps as an element of the contact requirement. It is preliminary to an examination of the competing

interests. However, few people using it that way ever take time to answer the question, "Minimum for what?" How can there be a minimum without a standard to measure it by? And what is that standard? To Justice Stone in *International Shoe* the end product of his analysis was the standard of fair play and substantial justice. But to those who use minimum as a threshold step, it appears to be the purposeful availment requirement by a different name.

Justice Brennan seemed to use the term minimum this way as a threshold concept in his opinion in *Burger King v. Rudzewicz*. *In Burger King*, Justice Brennan said, "Once it has been decided that a defendant purposefully established minimum contacts with the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice."[46] In other words, first you find the minimum, then you balance the interests. However, in Brennan's opinion, unlike those of most others who use minimum as a starting point rather than a conclusion, he gave some guidance as to what he meant. Basically, what Brennan meant was that the contact must not be "random, fortuitous or attenuated."[47] "Random and fortuitous" clearly cover the same ground as the purposeful availment requirement. If the contact is purposeful, it can hardly be random or fortuitous and vice versa. "Attenuated" could have some independent meaning, but the only other time the Court used that term was in connection with the purposeful availment requirement in *World Wide Volkswagen*. The potential benefit to the retailer from the foreseeable use of the Audi in Oklahoma was too attenuated to permit the conclusion that the retailer's contact with Oklahoma was purposeful. "Attenuated" might also apply to the question of whether the cause of action arises from the defendant's contact. But the use of that idea at the threshold without really calling it what it is, be it purposeful availment or arising from, is confusing and hardly conducive to rational analysis.

Justice O'Connor's opinion in the *Asahi* case also reflects this threshold use of "minimum" as a statement of what is really the purposeful availment requirement. She stated, "the substantial connection between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum state."[48] To her, the

46. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).
47. *Id.* at 475.
48. Asahi Metal v. Superior Court of Cal., 480 U.S. 102, 112 (1987).

stream of commerce theory was not just a means of solving the purposeful availment problem, but *the* answer to whether the contact was minimum. Of course, we have to find purposeful availment in order to find minimum contacts, but even if we do, that alone is not enough to satisfy the constitutional minimum. Justice O'Connor, like so many others, simply confused the issue. Since purposeful availment is often the most difficult question in the case, it should be considered as a separate requirement, not some sort of subsidiary qualification of the contact requirement.

I contend that we should go back to *International Shoe*. To determine whether a defendant has the minimum contacts sufficient to support jurisdiction requires a four-step analysis. First, we have to see if the defendant has some contact with the forum state. This step should be the simplest and most mechanical. If the defendant causes injury to a resident of the forum state by a tort or breach of contract, that is a contact.

The next step, the *Hanson* requirement, is often the most important and difficult one: Is the defendant's contact with the forum state the result of the defendant's "purposeful availment"? If not, that ends the inquiry. If so, then we have to go to the third step: Did that purposeful contact give rise to the cause of action? This can be complicated too. There is much disparity in the cases about how closely connected to the defendant's forum contact the cause of action must be in order to say that it arises from the conduct. If the conclusion is that it did, then, as the fourth step, the defendant must show by an examination of the interests the Supreme Court identified in its decisions in the 1980s that it would not be fair to require it to defend that suit in that forum.

I believe putting "minimum" back where it was in *International Shoe*—the end of the analysis, not the starting point—and dealing separately and clearly with "purposeful availment" and "arising from" will help considerably to promote more rational and predictable decisions, thereby contributing to the reduction of the annual volume of jurisdiction cases in the state appellate courts and federal reports.

For a long time there was a concept of "indispensable" party that had independent meaning. Courts approached compulsory joinder of parties questions by starting out to see if a missing party was indispensable. But in the middle 1960s, thanks to the scholarship of Geoff Hazard, John Reed and others, Federal Rule 19 was amended to identify the considerations that were really relevant in compulsory joinder cases. Indispensable became a term that described the end of analysis, not the beginning. Most states have followed the federal

example. That has helped us to understand and better deal with compulsory joinder cases.

Let it be so with "minimum" and personal jurisdiction cases.