Toward Reasonable Limitations on the Exercise of General Jurisdiction

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I. INTRODUCTION

One of the most controversial aspects of the current jurisprudence of personal jurisdiction is the concept of "general jurisdiction." "General jurisdiction" refers to a state's exercise of personal jurisdiction over a nonresident defendant in a lawsuit not arising out of or related to the defendant's contacts with the forum.[1] In a general jurisdiction case based on a nonresident defendant's activities,[2] because the cause of action has no connection with the forum state, a court may assert personal jurisdiction consistent with the Due Process Clause only if the defendant's forum contacts are "continuous and systematic."[3]

When a state exercises personal jurisdiction over a defendant in a suit "arising out of or related to" the defendant's contacts with the forum, the state is said to be exercising "specific jurisdiction."[4] By contrast to general jurisdiction, because there is some nexus between the cause of action and the forum in a specific jurisdiction case, due process requires a lesser quantum of contacts by the defendant. Indeed, a single act, such as a tortious act committed by a nonresident defendant in the forum state, may be sufficient where it directly gives rise to the cause of action.[5]

The concept of general jurisdiction based solely on the defendant's continuous and systematic contacts has been frequently criticized as unfair to the defendant.[6] In domestic litigation, general jurisdiction may

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1. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984).

2. The type of general jurisdiction referred to here is based on a nonresident defendant's activities in the forum state that are unrelated to the plaintiff's cause of action. Other traditional, well-accepted types of general jurisdiction are based on an individual defendant's habitual residence or domicile in the forum state, or on a corporate defendant's principal place of business or place of incorporation. *See generally* Lea Brilmayer, et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988) (evaluating the rationales for the various traditional bases of general jurisdiction). Transient jurisdiction, another traditional type of general jurisdiction based solely on service of process on the defendant while physically present within the forum state, has been unanimously approved by the Supreme Court in *Burnham v. Superior Court*, 495 U.S. 604 (1990).

3. *Helicopteros*, 466 U.S. at 416; Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952) (ruling that general jurisdiction attaches where a foreign corporation carries on continuous and systematic general business within the forum); *see* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945) (explaining the rationale for general jurisdiction).

4. *Helicopteros*, 466 U.S. at 414 n.8.

5. *See Int'l Shoe*, 326 U.S. at 318 (citing *Hess v. Pawloski*, 274 U.S. 352 (1972) for the proposition that a single purposeful contact, such as an automobile collision by a nonresident defendant in the forum state, may be sufficient where it directly gives rise to the cause of action).

6. *See, e.g.*, Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119 (discussing problems in scope, application, and fairness of general

permit a plaintiff to engage in unfettered forum shopping designed to capture the most favorable substantive law or statute of limitations, or both. A defendant who conducts business in all fifty states may be sued in any such state, even though the plaintiff's cause of action has no other connection with the forum state. A rational plaintiff will file suit in a state whose choice-of-law doctrine, and therefore the law to be applied to the case, is most favorable to the plaintiff.[7]

General jurisdiction is particularly controversial in international litigation involving foreign defendants who do business in the United States. Such defendants fear they will be forced into a court in the United States, an unfamiliar venue perceived to be more plaintiff friendly than the courts in most other countries, to defend against claims that arose in another part of the world. Some well-known cases feed these fears.[8] Indeed, perhaps more than any other difference in views

jurisdiction); Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 271–80 (1991) (arguing that general jurisdiction based on contacts unrelated to the cause of action is unfair to the defendant); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1177–79 (1966) (suggesting that general jurisdiction is unfair to the defendant and should be abandoned, and that defendants should be sued on any cause of action only where an individual habitually resides or a corporation has either its principal place of business or its place of incorporation); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988) (arguing that the courts have distorted the meaning of general and specific jurisdiction and suggesting that dispute-blind application of general jurisdiction should be restricted to a defendant's home base).

7. A classic example is *Ferens v. John Deere Co.*, 494 U.S. 516 (1990), where the plaintiff, a Pennsylvania resident injured in Pennsylvania while operating farm machinery manufactured by the defendant, a Delaware corporation headquartered in Illinois and doing business in all fifty states, commenced a diversity action in a federal court in Mississippi in order to capture Mississippi's choice-of-law doctrine. Plaintiff's tort action would have been barred under Pennsylvania's two-year statute of limitations, but not under Mississippi's six-year statute of limitations. The Mississippi federal court applied Mississippi choice-of-law doctrine, under which Pennsylvania substantive law controlled plaintiff's personal injury claim, but Mississippi's own law governed the limitation period. Further gilding the forum shopping lily, the plaintiff then successfully transferred the case back to a federal court in Pennsylvania pursuant to 28 U.S.C. § 1404(a) which, after the transfer, was required to apply the law of the transferor court, i.e., the Mississippi statute of limitations and Pennsylvania tort law.

8. *See, e.g.*, Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851 (N.Y. 1967); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000). In *Frummer*, personal jurisdiction over the defendant, a British corporation, was upheld with respect to plaintiff's suit in a New York state court alleging personal injuries suffered while plaintiff attempted to shower in his room at the London Hilton Hotel, based on defendant's continuous and systematic business contacts in New York through a reservation service. *Frummer*, 227 N.E.2d at 853–54. In *Wiwa*, the plaintiffs, Nigerian

about personal jurisdiction, disagreement over the propriety of activities-based general jurisdiction has become a major obstacle in the current attempts to negotiate a multilateral treaty on personal jurisdiction and enforcement of foreign judgments in international litigation.[9]

These concerns about general jurisdiction are not unfounded, but may be somewhat overstated. One reason is that they tend to focus only on the "minimum contacts" test for personal jurisdiction. Another component of the due process analysis, which assesses the "reasonableness" of jurisdiction under the circumstances of a specific case, may emerge as a significant limitation on activities-based general jurisdiction. These concerns also ignore other doctrines, such as forum non conveniens, which may significantly effect a plaintiff's choice of forum in a general jurisdiction case. This article examines these potential limitations on the exercise of general jurisdiction in the context of international civil litigation.[10]

II. THE DUE PROCESS LIMITATIONS ON GENERAL JURISDICTION

A. Due Process Does Not Require the Plaintiff or the Claim to Have Contacts with the Forum State

General jurisdiction is controversial because it permits a nonresident plaintiff to sue a nonresident defendant in a state that has no connection to the cause of action or the plaintiff, so long as the defendant has "continuous and systematic" general business contacts with that forum state. Some typical fact scenarios demonstrate how this might occur in cases where the defendant conducts substantial business in the forum state and is sued there by a plaintiff who suffered personal injuries

émigrés, commenced an action in a New York federal court alleging that the defendants, Dutch and English companies, had participated with the Nigerian government in human rights violations committed in Nigeria. The court affirmed personal jurisdiction based on the defendants' continuous and systematic business contacts in New York through an agent, which consisted of listing their stocks on the New York Stock Exchange and providing related investment services. *Wiwa*, 226 F.3d at 99.

9. *See* Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 323–24, 331–44 (2002) (discussing the strong disagreements over the propriety of activities-based general jurisdiction which threaten to derail the Hague Convention negotiations); Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 161–65 (discussing the disagreements among the United States and other countries over general jurisdiction in the latest draft of the proposed Hague Convention).

10. Although the focus of this article is on litigation against a foreign defendant in a court in the United States, much of the discussion is also relevant to the exercise of general jurisdiction in a purely domestic context. *See infra* notes 53–58 and accompanying text.

allegedly caused by that defendant in another state.

In domestic litigation, for example, a defendant company that does business in all fifty states could be sued in California over a wrongful act and injury that occurred in New York. If the plaintiff is a resident of California, at least it can be said that the forum choice was based on convenience. But where the plaintiff is not a resident of California, the plaintiff obviously has chosen the forum not on the basis of convenience, but rather to capture favorable law. For example, the statute of limitations may have expired in all other jurisdictions except California, or California tort law may authorize a cause of action not recognized in any other state.

Likewise, in international civil litigation, a foreign defendant company that conducts business in many parts of the world, including in the United States, could be sued in a court in the United States over a wrongful act and injury that occurred abroad. For example, a plaintiff injured in India by an Japanese company's alleged negligence there would be able to sue that defendant in a court in the United States, for example in California, so long as the Japanese defendant has "continuous and systematic" contacts with the forum state.[11] If the plaintiff is a resident of California (or of the United States, if filed in a federal court), then the forum choice may be based, at least in part, on convenience. But if the plaintiff is a resident of India, or any other country for that matter, the plaintiff's choice of a California forum is obviously not based on the plaintiff's convenience. Instead, the forum choice is (just as obviously) based on the plaintiff's desire to utilize California's tort and

11. Moreover, under the "national contacts" approach, a federal court can exercise personal jurisdiction over a foreign defendant based on an aggregation of contacts with the United States as a whole, rather than the defendant's contacts with the state in which the federal court sits. FED. R. CIV. P. 4(k)(2) (authorizing national contacts approach as to federal claims when there is no state that can exercise jurisdiction over the defendant); *see also* SEC v. Carrillo, 115 F.3d 1540, 1543 (11th Cir. 1997) (adopting the national contacts test and citing to seven other circuits that have held that the national contacts test is constitutionally appropriate); Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1415–17 (9th Cir. 1989) (applying the national contacts test to uphold personal jurisdiction over foreign defendants with respect to antitrust claims under the Clayton Act); Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 813–24 (1988) (explaining why the national contacts approach should determine personal jurisdiction as to foreign defendants); Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (1983) (discussing why the federal courts should apply the minimum contacts test to foreign defendants based on their contacts with the United States as a whole).

damages law, as well as its discovery and civil jury system, which will undoubtedly be more favorable to the plaintiff than the law applicable in a court in Japan or India.

Why do nonresident plaintiffs have such an unfettered choice of forum? One reason is that the Due Process Clause does not require a *plaintiff* to have any contacts with the forum state before permitting that state to assert personal jurisdiction over a nonresident defendant.[12] Another reason is that the Due Process Clause also does not require the cause of action to have any connection with the forum state, so long as the nonresident defendant otherwise has "continuous and systematic" contacts with that state.[13]

B. Due Process Requires the Exercise of Jurisdiction to Be "Reasonable"

Since the Supreme Court's landmark decision in *International Shoe Co. v. Washington*,[14] the primary due process inquiry into the propriety of personal jurisdiction has been whether the defendant has sufficient "minimum contacts" with the forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[15] The main focus of this "minimum contacts" analysis is on whether the defendant has purposely conducted activities in the forum state.[16] As noted previously, if the defendant's forum activities are "continuous and systematic," a court may assert personal jurisdiction over that defendant on "causes of action arising from dealings entirely distinct from those activities."[17]

There is, however, a second component to the due process limitation on the exercise of personal jurisdiction. Once a court has examined the defendant's "minimum contacts" with the forum state, these contacts must be evaluated in light of other factors to determine whether the

12. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 (1984) ("[W]e have not to date required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking.").

13. *See supra* notes 1–6 and accompanying text.

14. 326 U.S. 310 (1945).

15. *Id*. at 316.

16. As the Supreme Court first explained in *Hanson v. Denckla*, 357 U.S. 235 (1958), and repeated in subsequent decisions, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id*. at 253; *see, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–99 (1980).

17. *Int'l Shoe*, 326 U.S. at 318.

exercise of personal jurisdiction is "reasonable" under the circumstances of the particular case.[18] These factors were identified by the Supreme Court in *Asahi Metal Industry Co. v. Superior Court*[19] as follows:

> 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."[20]

This new "reasonableness" inquiry has been frequently criticized as ambiguous and unpredictable.[21] So far, the Supreme Court has provided only limited guidance as to what these factors mean and how they are to be weighed with respect to each other and with respect to the "minimum contacts" analysis.[22] The Court relied on these factors to divest the court of jurisdiction in *Asahi*, but characterized as "rare" cases in which these

18. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987), *vacated*, 236 Cal. Rptr. 153 (1987); *Burger King*, 471 U.S. at 476–78; *World-Wide Volkswagen,* 444 U.S. at 292. This reasonableness inquiry ensures that the exercise of jurisdiction in a particular case does not offend "traditional notions of fair play and substantial justice." *Asahi*, 480 U.S. at 113 (quoting *Int'l Shoe*, 326 U.S. at 316).

19. 480 U.S. 102 (1987).

20. *Id.* at 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

21. *See, e.g.*, Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 76–78 (1990) (criticizing *Asahi*'s use of the reasonableness factors as further muddying the constitutional test for personal jurisdiction); Jay Conison, *What Does Due Process Have To Do With Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1202 (1994) ("The trouble with reasonableness in connection with jurisdiction is that there exists no tradition or practice to give it a meaning useful in deciding cases."); Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 925–27 (2000) (reviewing authorities that criticize the subjective nature of the reasonableness inquiry and concluding that the absence of meaningful standards permits a court to justify any "reasonableness" conclusion it desires); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit Clause and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 841–46 (1981) (observing that the less principled reasonableness approach makes possible completely arbitrary decisions).

22. *See* Heiser*, supra* note 21, at 927 (explaining that the "reasonableness" inquiry requires a court to make an "unguided, fact-specific, *ad hoc* determination as to the propriety of personal jurisdiction in each case, regardless of whether the minimum contacts requirement has been satisfied"); Bruce Posnak, *The Court Doesn't Know Its* Asahi *From Its* Wortman: *A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 887–88, 891–95 (1990) (criticizing the complexity and uncertainty of the *ad hoc* balancing required by the reasonableness test); Russell J. Weintraub, Asahi *Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L.J. 55, 62–63 (1988) (discussing the uncertainty of balancing fairness considerations against minimum contacts).

factors will defeat the reasonableness of jurisdiction where the defendant has purposely engaged in forum activities.[23]

This lack of Supreme Court direction has given the lower courts more freedom to develop meaningful guidelines for problematic cases. As a result, a clearer picture of the meaning and effect of the reasonableness factors is now emerging from lower court decisions.[24] This picture suggests that the reasonableness factors could provide a significant constitutional limitation on the assertion of general jurisdiction, particularly as to foreign defendants.[25]

Although the Supreme Court cases discussing the reasonableness factors have been specific jurisdiction cases, several lower courts have concluded that these factors also apply to general jurisdiction cases.[26] This conclusion seems appropriate, as there is nothing in the Supreme Court's discussions of these factors to indicate they apply only in specific jurisdiction cases. Indeed, because there is no nexus between the cause of action and the forum state, concerns about whether the exercise of jurisdiction is reasonable and fair should actually be heightened in general jurisdiction cases.[27]

1. The Burden on the Defendant

The "burden on the defendant" is a primary concern in assessing the

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23. *Asahi*, 480 U.S. at 116 (Brennan, J., concurring); *see also Burger King*, 471 U.S. at 477–78 (stating that a defendant who has purposefully engaged in forum activities must present a compelling case that some other considerations would render jurisdiction unreasonable). The Supreme Court also suggested that these factors may "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* at 477.

24. For a thorough discussion of various lower court interpretations of the Supreme Court's "reasonableness" standards, see Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441 (1991).

25. Professor Silberman has noted that *Asahi's* "reasonableness" inquiry might be defensible if it were confined to a comity concern for foreign country defendants. *See* Linda J. Silberman, "*Two Cheers" For* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 755, 760 (1995).

26. *See, e.g.*, Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 573 (2d Cir. 1996) (collecting cases); Amoco Egypt Oil Co. v. Leonis Navigation Co., 1 F.3d 848, 851 n.2 (9th Cir. 1993); Donatelli v. Nat'l Hockey League, 893 F.2d 459, 465 (1st Cir. 1990); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 377 (5th Cir. 1987).

27. *See* B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1129–41 (1990) (arguing the reasonableness factors may play a more significant role in general jurisdiction cases than in the specific jurisdiction context); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 196–97 (indicating that courts in general jurisdiction cases can use the reasonableness prong to avoid unjust results).

"reasonableness" of personal jurisdiction.[28] This factor assesses the expense and inconvenience of staging a defense in the chosen forum.[29] The inquiries relevant here include the location of potential witnesses, documents, and records; whether the defendant has a subsidiary or agent, maintains an office or other physical presence, in the forum; the distance between the defendant's residence and the forum; and the extent of the defendant's purposeful interjection into the forum state's affairs.[30] In domestic litigation, where the distances to the forum state and the differences in legal systems are relatively minor, this factor may not be as significant.[31]

The "burden on the defendant" may be the most influential of the reasonableness factors in international litigation.[32] The Supreme Court in *Asahi* specifically addressed the meaning of this factor in the context of a Taiwanese corporate (third-party) plaintiff suing a Japanese corporate (third-party) defendant for indemnity in a California state

28. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d 126, 128 (9th Cir. 1995); Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 210, 212 (1st Cir. 1994).

29. This factor repeats some of the considerations already taken into account in the "minimum contacts" inquiry. *See World-Wide Volkswagen*, 444 U.S. at 292 (explaining that the justification for the "minimum contacts" requirement is to protect the "defendant against the burdens of litigating in a distant or inconvenient forum"); Ins. Corp. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 n.10 (1982) (ruling that the due process limitation on personal jurisdiction protects the defendant's individual liberty interest to be free from the burdens of litigating in a distant or inconvenient forum, unless that defendant has purposeful connections with the forum).

30. *See, e.g.*, *Metro. Life*, 84 F.3d at 573–74; Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 99 (2d Cir. 2000); OMI Holdings, Inc. v. Royal Ins. Co., 149 F.3d 1086, 1096 (10th Cir. 1998); Core-Vent Corp. v. Nobel Indus., 11 F.3d 1482, 1488–89 (9th Cir. 1993); *Bearry*, 818 F.2d at 377; *see also* ROBERT C. CASAD & WILLIAM M. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 2-5[4][d] (3d ed. 1998 & 2003 Supp.) (collecting cases); Abramson, *supra* note 24, at 447–51 (collecting cases).

31. *See* Mesalic v. Fiberfloat Corp., 897 F.2d 696, 701 (3d Cir. 1990) (finding burden on defendant to defend in New Jersey rather than Florida not severe and unlike defending itself across national borders); Interfirst Bank Clifton v. Fernandez, 844 F.2d 279, 284–85 (5th Cir. 1988) (finding the burden imposed on a Louisiana defendant to defend in Texas, a neighboring state, insubstantial); Pittsburgh Terminal Corp. v. Mid Allegheny Corp., 831 F.2d 522, 529 (4th Cir. 1987) (finding burden on Virginia defendants litigating in bordering West Virginia is *de minimis*); Abramson, *supra* note 24, at 448 (collecting cases). *But see* cases cited *infra* note 58.

32. Although certainly a primary concern, this factor is not necessarily dispositive even when the defendant is a resident of another country. As several courts have observed, modern advances in communications and transportation have significantly reduced the burden of litigating in another country. *See, e.g.*, Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1199 (9th Cir. 1988); *Metro. Life*, 84 F.3d at 574; *Core-Vent*, 11 F.3d at 1489.

court. The Supreme Court viewed the burden on the defendant as severe, because the defendant not only had to traverse the distance between Japan and California but also had to submit to a dispute in a foreign nation's judicial system: "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."[33]

This factor weighs strongly against the exercise of general jurisdiction over a foreign defendant where the cause of action arose overseas, particularly where, as in *Asahi*, that defendant must travel a great distance, defend in an unfamiliar judicial system, and produce relevant evidence located overseas. Other considerations may affect how much this factor weighs in a specific case, such as the extent of a foreign defendant's presence and activities in the forum state, familiarity with our legal system, and any translation problems with respect to witnesses and documents.[34] But in a general jurisdiction case where the foreign defendant has only general business contacts with the forum state, fundamental fairness would likely favor dismissal.

2. The Interests of the Forum State

The forum state's interests in adjudicating the dispute is another important factor in determining the reasonableness of jurisdiction. A state has a strong interest in providing a forum in which its residents can seek redress for injuries caused within its borders by out-of-state actors.[35] Some courts have suggested this interest is present, although perhaps diminished, even when one of the forum state's residents has been injured elsewhere.[36] However, this interest is nonexistent when neither

33. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987).

34. *See* Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found., 297 F.3d 1343, 1356 (Fed. Cir. 2002) (finding burden of subjecting Canadian corporation to specific jurisdiction in Kansas court relatively minimal in light of modern transportation, communication, and the similarity between the Canadian and United States' legal systems); *Wiwa*, 226 F.3d at 99 (finding burden on European parent companies to litigate in New York not sufficient to preclude jurisdiction where defendants have significant forum presence through subsidiaries, access to enormous resources, and no language barriers); Pritzker v. Yari, 42 F.3d 53, 64 (1st Cir. 1994) (finding the burden imposed on a Puerto Rican defendant to defend a specific jurisdiction case in New York not especially or unusually burdensome).

35. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776–77 (1984); Dole Food Co. v. Watts, 303 F.3d 1104, 1115–16 (9th Cir. 2002); *OMI Holdings*, 149 F.3d at 1096; *Core-Vent*, 11 F.3d at 1489; *see also* Abramson, *supra* note 24, at 451–53 (collecting cases).

36. *See, e.g.*, Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 718 (1st Cir. 1996); Caruth v. Int'l Psychoanalytical Assn., 59 F.3d 126, 129 (9th Cir. 1995); *Interfirst Bank*, 844 F.2d at 285; *see also* Abramson, *supra* note 24, at 454 n.75 (collecting cases).

the plaintiff nor the defendant is a resident of the forum state, and the cause of action and injury occurred elsewhere.[37] Although a foreign defendant's business contacts with a state might give that state a general interest in disputes involving its products, the concern that injuries might occur there in the future is adequately protected by specific jurisdiction when the defendant's product does in fact cause injury within the state.[38]

In a general jurisdiction case based solely on a foreign defendant's "continuous and systematic" contacts with the forum state, where the wrongful act and injury occurred in another country, this factor would seem to support the "reasonableness" of such jurisdiction only when the plaintiff is a resident of the forum state (or of the United States, where the forum is a federal court). Even so, the forum state's interest in such general jurisdiction cases would not be as strong as in a specific jurisdiction case, where the plaintiff's injury occurred within the forum state as the result of the defendant's activities there. Of course, where the plaintiff is a nonresident of the forum state, this factor should weigh heavily against the exercise of general jurisdiction over a foreign defendant.

3. The Plaintiff's Interest in Obtaining Relief

This factor assesses the interests of the plaintiff in obtaining convenient and effective relief in the chosen forum.[39] The relevant inquiries here may include whether the plaintiff is a resident or domiciliary of the forum state, where the plaintiff suffered injury, whether the forum state is more convenient for witnesses or other evidence than some other available forum, whether the plaintiff has a financial or physical ability to litigate elsewhere, whether all the parties to the dispute can be joined in the chosen forum, and whether the plaintiff will be able to enforce a judgment obtained from the forum.[40]

37. *Metro. Life*, 84 F.3d at 574; Bearry v. Beech Aircraft Corp., 818 F.2d 370, 377 (5th Cir. 1987); LeBlanc v. Patton-Tully Transp., 138 F. Supp. 2d 817, 820 (S.D. Tex. 2001).

38. *Bearry*, 818 F.2d at 377.

39. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

40. *See Metro. Life*, 84 F.3d at 574 (finding the forum inconvenient where the plaintiff was not a forum citizen and had not identified any witnesses or other evidence especially convenient to that forum); *Bearry*, 818 F.2d at 377 (finding plaintiffs to lack a "distinct interest" in the chosen forum since they were not forum residents and had not pointed to any witnesses or other evidence located in the forum state); *see also* Abramson, *supra* note 24, at 456–60 (collecting cases).

These inquiries invite a comparison of the convenience and effectiveness of the chosen forum to other available fora.[41]

Most of these inquiries will likely weigh against the reasonableness of general jurisdiction where neither the plaintiff nor defendant is a resident of the forum, and where the wrongful act and injury occurred in another country. Even if the plaintiff is a forum resident, the other relevant considerations may readily outweigh the plaintiff's convenience.[42] Moreover, because other countries are under no obligation to recognize the judgments of a United States court and are likely to view a judgment based on general jurisdiction as invalid, the plaintiff may be unable to enforce a judgment outside the United States.[43]

Equally significant is what the lower courts find is *not* relevant to this factor. Some courts have concluded that choice-of-law considerations are not relevant in determining the plaintiff's interests in proceeding in the chosen forum.[44] In other words, for example, the fact that the plaintiff's chosen forum may be the only jurisdiction in which the suit against the defendant is not barred by the statute of limitations is not a permissible consideration in the context of the "reasonableness" of jurisdiction.[45] Likewise, therefore, the fact that the chosen forum state will apply substantive or procedural law more favorable to the plaintiff than will be applied in some other available forum should not be a

41. The Ninth Circuit identifies the "existence of an alternative forum" as a separate reasonableness factor and, pursuant to this factor, requires the plaintiff to prove that no alternative forum is available in which the claims can be effectively remedied. *See, e.g.*, Dole Food Co. v. Watts, 303 F.3d 1104, 1116 (9th Cir. 2002); *Caruth*, 59 F.3d at 128–29; Core-Vent Corp. v. Nobel Indus., 11 F.3d 1482, 1490 (9th Cir. 1983); Amoco Egypt Oil Co. v. Leonis Navigation Co., 1 F.3d 848, 853 (9th Cir. 1993).

42. The Ninth Circuit views the plaintiff's preference for its home forum as an insignificant factor in the balancing of these reasonableness considerations. *See, e.g.*, *Dole Food*, 303 F.3d at 1116; *Caruth*, 59 F.3d at 129; *Core-Vent*, 11 F.3d at 1490.

43. *See* Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 133–36 (1992) (analyzing the Brussels Convention and concluding that European countries do not accept personal jurisdiction based on continuous and systematic business contacts with a forum); Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 95–96, 111–12, 114–16 (1999) (explaining that most other countries will not respect U.S. judgments based on exorbitant jurisdiction, such as general jurisdiction based on continuous and systematic contacts); Degnan & Kane, *supra* note 11, at 850–54 (explaining assertions of personal jurisdiction not accepted in a foreign country will mean that any U.S. judgment that is forthcoming may not be enforced in that country); Heiser, *supra* note 21, at 945–46 (discussing personal jurisdiction rules applicable among member states of the European Union, which do not recognize general jurisdiction in a member state based on continuous and systematic contacts unrelated to cause of action, unless that State is the defendant's domicile).

44. *See, e.g.*, *Metro. Life*, 84 F.3d at 574; Follette v. Clairol, Inc., 829 F. Supp. 840, 846–47 (W.D. La. 1993).

45. *Metro. Life*, 84 F.3d at 574; *Follette*, 829 F. Supp. at 846–47.

consideration relevant to this reasonableness factor.[46]

Consequently, in a general jurisdiction case where the plaintiff is not a resident of the forum state and where no other relevant consideration suggests the forum is convenient to the plaintiff, this factor should weigh heavily against the exercise of jurisdiction. Where the plaintiff is a resident of the forum state, the strength of the plaintiff's interest will depend on whether the sources of evidence, the defendant's executable assets, and any other defendants, are located in the chosen forum or abroad.

4. The Judicial System's Interest in Efficient Resolution of Controversies

This factor examines whether the forum state is the most efficient place to litigate the dispute. Key to this inquiry are the likely location of the witnesses, documents, and other evidence, where the claim arose and the injury occurred, whether the entire dispute can be resolved in the forum so as to avoid piecemeal litigation, and what state's substantive law governs the case.[47] This factor necessarily involves a comparison of available alternative fora in order to determine where the litigation may proceed most efficiently.[48]

Obviously, in a general jurisdiction case where the events giving rise to the lawsuit have no connection with the forum state and where the plaintiff is not a resident of that state, this factor will weigh against the exercise of personal jurisdiction. This is particularly likely in international litigation when, based on choice-of-law principles, the forum must apply the unfamiliar law of another country. Even where the plaintiff is a resident of the forum state, the mere fact of residency alone may not alter the evaluation of this factor where all the other relevant witnesses and evidence are located elsewhere.[49]

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46. However, some courts may find relevant to this reasonableness factor an inquiry into whether the law applied in another forum is so unfavorable that the plaintiff's chances of recovery will be greatly diminished. *See* OMI Holdings, Inc. v. Royal Ins. Co., 149 F.3d 1086, 1097 (10th Cir. 1998); Pac. Atl. Trading Co. v. M/V Main Express, 758 F.2d 1325, 1331 (9th Cir. 1985).

47. *See OMI Holdings*, 149 F.3d at 1097; *Metro. Life*, 84 F.3d at 574–75; *Caruth*, 59 F.3d at 129; Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1552 (11th Cir. 1993); *see also* Abramson, *supra* note 24, at 460–65 (collecting cases).

48. *See* text and cases cited *supra* note 41.

49. *See* Benton v. Cameco Corp., 375 F.3d 1070 (10th Cir. 2004) (holding assertion of personal jurisdiction over defendant Canadian company unreasonable

5. *The Shared Interests in Furthering Fundamental Substantive Social Policy*

This factor requires the court to consider the common interests of the several states in promoting substantive social policies. Precisely what this means in domestic litigation is unclear.[50] However, the Supreme Court has provided some guidance as to the meaning of this factor where the defendant is a resident of another country. According to *Asahi*, this factor calls for a case-specific consideration of the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by a court in the United States:

> In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.[51]

Asahi's cautionary advice suggests that a court in the United States should decline to assert general jurisdiction over a foreign defendant where the plaintiff is not a resident of the forum state (or of the United States in a federal court case) and where there is no other connection with the forum state sufficient to create a significant forum interest. Consequently, this factor should weigh strongly against the exercise of jurisdiction over a foreign defendant in such a general jurisdiction case.[52]

C. *Balancing the Reasonableness Factors and Minimum Contacts*

As noted previously, the Supreme Court has provided very little

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despite individual plaintiff's forum residence, where majority of reasonableness factors weighed in favor of dismissal); Core-Vent Corp. v. Nobel Industries, 11 F.3d 1482, 1487–90 (9th Cir. 1993) (holding assertion of personal jurisdiction over foreign defendants unreasonable despite plaintiff corporation's forum residence, based on balancing of seven reasonableness factors).

50. The Supreme Court has noted that "minimum-contacts analysis presupposes that two or more States may be interested in the outcome of a dispute, and the process of resolving potentially conflicting 'fundamental substantive social policies' can usually be accommodated through choice-of-law rules rather than through outright preclusion of jurisdiction in one forum." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 & 483 n.26 (1985) (citation omitted). Precisely what this factor means in the context of a personal jurisdiction determination is uncertain.

51. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987) (internal quotation marks and citations omitted).

52. Of course, the possible conflict with a foreign nation's sovereignty "is not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States court." *OMI Holdings*, 149 F.3d at 1097 (quoting *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984)).

guidance as to how the "reasonableness" factors are to be weighted and weighed with respect to each other and with respect to the "minimum contacts" analysis. The Court has stated, however, that once a defendant has purposely established minimum contacts with a forum, "he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[53] Despite this language, the lower courts have developed what amounts to a balancing test.

As to the interplay between the "minimum contacts" and "reasonableness" inquiries, several courts have invoked a sliding scale approach depending on the strength of the defendant's contacts with the forum: the weaker the plaintiff's showing of minimum contacts, the less the defendant need show in terms of unreasonableness to defeat jurisdiction.[54] If the showing of minimum contacts is weak, the courts weigh the reasonableness factors more heavily in the balance.[55] When these factors weigh strongly against the reasonableness of the chosen forum, subjecting the defendant to jurisdiction in that forum would offend due process even though minimum contacts are present.[56]

In several recent decisions, lower courts have found that the defendant has presented a "compelling case" of unreasonableness, and have dismissed for lack of personal jurisdiction. As expected, some of these decisions are in general jurisdiction cases where neither the plaintiff nor the defendant is a resident of the United States, and the cause of action also occurred in another country.[57] But many are purely domestic general jurisdiction cases.[58] Even where the plaintiff is a forum resident, courts

53. *Burger King*, 471 U.S. at 477.

54. *See* Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 129 (2d Cir. 2002); *OMI Holdings*, 149 F.3d at 1091–92; *Core-Vent*, 11 F.3d at 1488; Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994); Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568–69 (2d Cir. 1996).

55. Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 717 (1st Cir. 1996).

56. *OMI Holdings*, 149 F.3d at 1095; *Ticketmaster*, 26 F.3d at 210.

57. *See* Glencore Grain Rotterdam v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1125–26 (9th Cir. 2002) (ruling that a California district court's assertion of general jurisdiction was unreasonable in an action brought by a Dutch plaintiff against Indian defendant); Amoco Egyptian Oil Co. v. Leonis Navigation Co., 1 F.3d 848, 851–53 (9th Cir. 1993) (holding a Washington federal district court's exercise of general jurisdiction to be unreasonable in an action brought by Egyptian plaintiffs against a Philippine defendant arising out of a collision between defendant's ship and plaintiffs' oil platform in Egyptian waters).

58. *E.g.*, *Metro. Life*, 84 F.3d at 573–76 (finding unreasonable a Vermont district court's exercise of general jurisdiction over the defendant Delaware & Pennsylvania company in an action brought by a New York plaintiff company for alleged negligence occurring in Missouri, Texas, and Florida); *Ticketmaster,* 26 F.3d at 209–12 (holding

have concluded that the exercise of jurisdiction is unreasonable when the plaintiff's and forum state's interests are outweighed by the substantial burden on the defendant and the interference with the sovereignty of a foreign nation, and the defendant's connections with the forum are limited.[59] More surprisingly, several courts have dismissed specific jurisdiction cases, finding jurisdiction unreasonable even though the cause of action arguably arose out of the foreign defendant's contacts in the forum state.[60]

III. THE FORUM NON CONVENIENS LIMITATION ON GENERAL JURISDICTION

A. The Doctrine of Forum Non Conveniens

Forum non conveniens is a nonconstitutional doctrine which permits a trial court to dismiss a case where an alternative forum is available in another country that is fair to the parties and is substantially more convenient for them or the courts.[61] The doctrine varies somewhat from state to state, but most states have adopted an approach similar to that set forth by the Supreme Court in *Gulf Oil Corp. v. Gilbert.*[62] A defendant

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exercise of personal jurisdiction by Massachusetts court violates due process, even though minimum contacts established, because burden on California defendant unreasonable); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 377 (5th Cir. 1987) (finding unreasonable a Texas district court's assertion of general jurisdiction over the defendant Louisiana airplane manufacturer in a products liability action brought by Louisiana plaintiffs with respect to a plane crash in Mississippi); LeBlanc v. Patton-Tully Trans., LLC, 138 F. Supp. 2d 817, 820–21 (S.D. Tex. 2001) (finding unreasonable a Texas district court's exercise of general jurisdiction over a Mississippi defendant company in a personal injury action brought by a Louisiana resident seeking damages for a shipping accident on the Mississippi River); Follette v. Clairol, Inc., 829 F. Supp. 840, 846–47 (W.D. La. 1993) (holding Texas court's exercise of general jurisdiction was unreasonable in products liability action brought by Louisiana plaintiffs against defendants doing business nationwide).

59. *Core-Vent*, 11 F.3d at 1487–90 (finding a California district court's exercise of jurisdiction unreasonable in a defamation action brought by California corporation against two Swedish doctors); Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd., 956 F. Supp. 427, 437–42 (S.D.N.Y. 1996) (finding sufficient minimum contacts by Canadian defendants but dismissing as unreasonable an action brought by a resident of the United States because the burden on the defendant outweighed the plaintiff's and the forum's interests).

60. Benton v. Cameco Corp., 375 F.3d 1070 (10th Cir. 2004) (holding Colorado district court's exercise of jurisdiction unreasonable in action brought by Colorado plaintiff against a Canadian defendant); *OMI Holdings*, 149 F.3d at 1095–98 (holding that the exercise of jurisdiction by a Kansas court in an action brought by an Iowa & Minnesota company against Canadian defendants was unreasonable); *Core-Vent*, 11 F.3d at 1487–90 (holding an exercise of specific jurisdiction unreasonable); Pac. Atl. Trading Co. v. M/V Main Express, 758 F.2d 1325, 1329–31 (9th Cir. 1985) (finding a California district court's exercise of jurisdiction unreasonable in action brought by a German plaintiff against a Malaysian defendant).

61. Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 719 (1st Cir. 1996).

62. 330 U.S. 501 (1947).

filing a forum non conveniens motion seeks dismissal or stay of the action not because the chosen forum lacks jurisdiction but because there is an alternative forum in another state or country which also has jurisdiction and, in addition, is far more convenient.[63]

In assessing whether a forum non conveniens dismissal or stay is appropriate, a court must first determine whether there exists an adequate alternative forum.[64] A forum is adequate if the defendant is subject to personal jurisdiction there and no other procedural bar, such as the statute of limitations, prevents resolution of the merits in the alternative forum.[65] These prerequisites are readily satisfied; typically, a defendant waives any personal jurisdiction or statute of limitations objection with respect to the alternative forum.[66] The possibility of an unfavorable change in substantive or procedural law is ordinarily not a consideration relevant to the forum non conveniens analysis, unless the remedy provided by the alternative forum is "so clearly inadequate or unsatisfactory that it is no remedy at all."[67]

If an adequate alternative forum exists, the next step is to balance a variety of private and public interests associated with the litigation. As identified in *Gilbert*, the factors pertaining to the private interests of the litigants include:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make a trial of a case easy, expeditious and inexpensive.[68]

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63. *Id.* at 506–09; *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249–56 (1981) (stating that convenience is "the central purpose of any *forum non conveniens* inquiry").

64. *Piper Aircraft*, 454 U.S. at 254 n.22; Stangvik v. Shiley Inc., 819 P.2d 14, 17 (Cal. 1991).

65. *Stangvik*, 819 P.2d at 18.

66. *See, e.g.*, *Piper Aircraft*, 454 U.S. at 242. Also typically, the trial court will make such waiver a condition of the forum non conveniens dismissal. *See* Dowling v. Richardson-Merrell, Inc., 727 F.2d 608, 611 (6th Cir. 1984); *In re* Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 867 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987); *Stangvik*, 819 P.2d at 17 n.2.

67. *Piper Aircraft*, 454 U.S. at 254; *Stangvik*, 819 P.2d at 19 n.5. The courts applying this "no remedy at all" exception tend to focus on whether adjudication in the alternative forum is by an independent judiciary applying basic notions of due process, and not on whether the plaintiff will be disadvantaged by the laws of that jurisdiction. *See* Boaz v. Boyle & Co., 46 Cal. Rptr. 2d 888, 894–95 (Ct. App. 1995); Shiley, Inc. v. Superior Court, 6 Cal. Rptr. 2d 38, 42–43 (Ct. App. 1992).

68. *Gilbert*, 330 U.S. at 508. *Gilbert* dealt with the federal common law doctrine

The public interest factors identified in *Gilbert* include the administrative difficulties for courts "when litigation is piled up in congested centers instead of being handled at its origin," the "local interest in having localized controversies decided at home," the burden of jury duty imposed upon the citizens of a community which has no relation to the litigation, and the avoidance of unnecessary problems in conflicts of law or in the application of unfamiliar foreign law.[69] These public and private interest factors are applied flexibly by the courts, without giving undue emphasis to any one element.[70] The balancing of these various factors, as well as ultimate determination of whether to grant or deny the forum non conveniens motion, is typically addressed to the trial court's discretion.[71]

B. Forum Non Conveniens and General Jurisdiction

Due to the highly fact-sensitive nature of each forum non conveniens determination,[72] it is difficult to generalize about how these various private and public interest factors will play out in activities-based general jurisdiction cases.[73] But some general observations are possible. Putting

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of forum non conveniens in federal courts. Most states, by statute or by case law, have incorporated *Gilbert's* private and public interest factors into their forum non conveniens doctrine. *See* Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 U. FLA. L. REV. 361, 394–95 & n.198 (1993) (collecting authorities); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine,* 133 U. PA. L. REV. 781, 831–40 (1985). *Gilbert's* federal common law doctrine is no longer used in domestic federal court litigation because it has been codified and replaced by 28 U.S.C. § 1404(a), but it is still applicable to international litigation where the alternative forum is not in the United States. *See Piper Aircraft*, 454 U.S. at 253–54 (contrasting § 1404(a), a "federal housekeeping measure" designed to allow easy change of venue within a unified federal system, with dismissals on grounds of forum non conveniens (citing Van Dusen v. Barrack, 376 U.S. 612, 613 (1964)).

69. *Gilbert*, 330 U.S. at 508–09.

70. *See Piper Aircraft*, 454 U.S. at 249–50; *Stangvik*, 819 P.2d at 18–19.

71. *Piper Aircraft*, 454 U.S. at 257; *Gilbert*, 330 U.S. at 508–09; *Stangvik*, 819 P.2d at 17.

72. One California court identified twenty-five factors to guide judicial discretion in *forum non conveniens* determinations. Great N. Ry. Co. v. Superior Court, 90 Cal. Rptr. 461, 466–67 (Ct. App. 1970). Another observed that these various factors fit roughly into three broad categories: the relationship of the case and the parties to each forum, concerns of judicial administration, and convenience to the parties and the witnesses. Ford Motor Co. v. Ins. Co., 41 Cal. Rptr. 2d 342, 347–50 (Ct. App. 1995).

73. Another important factor that makes such generalizations difficult is the effect of the nature of the plaintiff's substantive claim. Some claims are based on federal statutes which reflect a strong policy favoring adjudication in the courts of the United States, even when these claims are brought by alien plaintiffs. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103–08 (2d Cir. 2000) (finding the strong policy interest of the United States expressed in the federal Torture Victim Prevention Act in providing a federal forum for aliens for adjudication of international human rights

aside for the moment considerations based on the residency of the plaintiff, most of these factors will likely favor dismissal of an action against a nonresident foreign defendant where the alleged wrongful act and injury occurred in another country.[74] The various public interest factors, such as court congestion, local interest in resolving the controversy, and the preference for applying familiar law, will certainly favor the alternative forum, as will the private interest ones insofar as they are concerned with the ease of access to evidence and the convenience of witnesses.[75]

1. The Importance of the Plaintiff's Residence

In a general jurisdiction case the determinative forum non conveniens factor may well be the residency of the plaintiff. Under traditional forum non conveniens doctrine, there is a strong presumption in favor of the plaintiff's choice of forum where the plaintiff is a resident of the forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum.[76] The

abuses); Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd., 61 F.3d 696, 699–700 (9th Cir. 1995) (identifying various federal statutes to which forum non conveniens is inapplicable); Indus. Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 890 (5th Cir. 1982) (holding that the doctrine of forum non conveniens does not apply to federal antitrust actions). Other claims, such as products liability and other torts, may not implicate such overriding public policy interests. *See, e.g.*, *Piper Aircraft*, 454 U.S. at 257–61 (affirming forum non conveniens dismissal of wrongful death actions brought by Scottish plaintiffs against defendant manufacturers); *Stangvik*, 819 P.2d at 22–27 (affirming stay of products liability actions brought by plaintiffs from Norway and Sweden against California defendant manufacturer of heart valves).

74. Even where the defendant is a resident of the United States, the private and public interest factors will likely favor dismissal where the cause of action and injury occurred in another country. *See* Malcolm J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of* Forum Non Conveniens *in* In re: Union Carbide, Alfaro, Sequihua, and Aguinda, 36 TEX. INT'L L.J. 299 (2001) (criticizing forum non conveniens dismissals in four mass tort actions brought by foreign plaintiffs against transnational corporations).

75. *Cf. Piper Aircraft*, 454 U.S. at 257–61 (reviewing trial court's application of private and public interest factors where cause of action and injury occurred in Scotland, and concluding dismissal appropriate even though the defendants were residents of the United States); *Creative Tech.*, 61 F.3d at 703–04 (upholding forum non conveniens dismissal of copyright infringement action where plaintiff and defendants were residents of Singapore); *Stangvik*, 819 P.2d at 18–27 (reviewing private and public interest factors where injuries occurred in Sweden and Norway, and concluding stay was appropriate even though defendant's allegedly defective product was manufactured in California); Rogge, *supra* note 74 (discussing dismissals in four transnational mass tort actions where defendants were residents of the United States).

76. *See, e.g.*, *Piper Aircraft*, 454 U.S. at 255–56; *Stangvik*, 819 P.2d at 20.

reasons advanced for this rule are that if the plaintiff is a resident of the jurisdiction in which the suit is filed, the plaintiff's choice of forum is presumed to be convenient and the state has a strong interest in assuring its own residents an adequate forum for the redress of grievances.[77]

However, this presumption all but disappears when the plaintiff is not a resident of the forum. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice of forum deserves very little deference.[78] Although more deference is given to the plaintiff's choice of forum when the plaintiff is a resident of the forum state, several courts have granted forum non conveniens dismissals where the private and public interest factors clearly point toward trial in another country and the defendant is a resident of that country.[79] Moreover, even a resident plaintiff's choice of forum may be given little deference in jurisdictions that authorize a *stay* of the action based on forum non conveniens under circumstances where a *dismissal* would not be permitted.[80]

The defendant's residence may also be a factor to be considered in the balance of convenience.[81] If a corporation is the defendant, the state of incorporation and the place where its principal place of business is located is presumptively a convenient forum.[82] In addition, as a matter of public policy, the forum state has an interest in deciding actions against resident corporations whose conduct in the state causes injury to persons in other jurisdictions.[83] However, in a general jurisdiction case where personal jurisdiction is based solely on the defendant's continuous

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77. *See Piper Aircraft*, 454 U.S. at 255; *Stangvik*, 819 P.2d at 20; *see also* Peter G. McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 S. ILL. U. L.J. 191 (1989) (criticizing the reasons for deference to the plaintiff's choice of forum in the doctrine of forum non conveniens).

78. *Piper Aircraft*, 454 U.S. at 255–56; *Stangvik*, 819 P.2d at 20 & n.7.

79. *See, e.g.*, Carey v. Bayerische Hypo-Und Vereinsbank AG, 370 F.3d 234 (2d Cir. 2004); Allstate Life Ins. Co. v. Linter Group Ltd., 994 F.2d 996 (2d Cir. 1993); Howe v. Goldcorp Invs., Ltd., 946 F.2d 944 (1st Cir. 1991); Royal Bed & Spring Co. v. Famossul Industria E Comercio De Moveis, 906 F.2d 45 (1st Cir. 1990); Borden, Inc. v. Meiji Milk Prods. Co., 919 F.2d 822 (2d Cir. 1990); Morrison Law Firm v. Clarion Co., 158 F.R.D. 285, 287 (S.D.N.Y. 1994); H. K. Enters., Inc. v. Royal Int'l Ins. Holdings, Ltd., 766 F. Supp. 581, 583–84 (N.D. Ohio 1991).

80. California appellate courts have ruled that the strong presumption in favor of resident plaintiff's choice of forum is inapplicable where the defendant seeks a *stay* rather than a dismissal, because the court retains jurisdiction pending resolution of the action in the alternative forum. *E.g.*, Century Indem. Co. v. Bank of Am., 68 Cal. Rptr. 2d 132, 134 (Ct. App. 1997); Berg v. MTC Elec. Techs. Co., 71 Cal. Rptr. 2d 523, 531–32 (Ct. App. 1998).

81. *See, e.g.*, *Stangvik*, 819 P.2d at 20–21.

82. *Id.* This presumption is a weak one; a resident defendant may overcome this presumption of convenience by evidence that the alternate jurisdiction is a more convenient place for trial of the action. *Id.* at 21.

83. *Id.* at 21 n.10.

and systematic activities in the forum state, by definition the defendant is not a resident of the forum state. Accordingly, the presumption of convenience to the defendant and the public policy interest of the forum state are simply inapplicable in such actions.

2. Forum Non Conveniens and the "Reasonableness" Inquiry

Another general observation is that the private and public interest factors relevant to the forum non conveniens determination are, to a large extent, the same as those relevant to the due process determination of whether the exercise of personal jurisdiction is "reasonable."[84] But although these two inquiries are similar, a higher showing of inconvenience is required for a due process dismissal than for one based on forum non conveniens.[85] Consequently, a court hesitant to dismiss an action as "unreasonable" on constitutional grounds may nevertheless be willing to do so as a matter of discretion, based on the nonconstitutional doctrine of forum non conveniens.[86] Therefore, in a general jurisdiction case where a foreign defendant's general business activities in the forum are sufficient to establish minimum contacts, the defendant may be unable to present a "compelling case" that personal jurisdiction is unreasonable as

84. *See, e.g.*, Dole Food Co. v. Watts, 303 F.3d 1104, 1116 (9th Cir. 2002) (observing while forum non conveniens and personal jurisdiction analyses overlap, they are by no means identical); Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 150 (1st Cir. 1995) (stating that the doctrine of forum non conveniens and reasonableness factors "share certain similarities, but they embody distinct concepts and should not casually be conflated"). *See supra* text accompanying note 20.

85. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477–78, 483–84 (1985) (indicating that inconvenience to a defendant who has minimum contacts with the forum may be accommodated by a change of venue even though the inconvenience is not so substantial as to establish the unconstitutionality of the forum's assertion of jurisdiction); *Morrison Law Firm*, 158 F.R.D. at 287 (observing that reluctance to dismiss for lack of personal jurisdiction places greater emphasis on forum non conveniens); Kultur Int'l Films, Ltd. v. Covent Garden Pioneer, 860 F. Supp. 1055, 1063–69 (D.N.J. 1994) (finding exercise of personal jurisdiction over British defendant company reasonable, but dismissing based on balance of forum non conveniens factors even though the plaintiff was a forum resident).

86. *See* Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 576–78 (2d Cir. 1996) (Walker, C.J., dissenting) (disagreeing with the court's due process holding that assertion of general jurisdiction is unreasonable but agreeing that it should be dismissed, as a matter of forum non conveniens rather than personal jurisdiction); ROBERT C. CASAD, JURISDICTION AND FORUM SELECTION § 4:24, 87–88 (2d ed. 2003) (observing many courts have in effect found that although the forum chosen by the plaintiff was fundamentally fair enough to satisfy the requirements of due process, the forum was still so seriously inconvenient that the balance strongly favored the defendant's right to dismissal under the doctrine of forum non conveniens).

a matter of due process but may still be able to convince the court to decline to exercise its jurisdiction based on forum non conveniens.[87]

IV. CONCLUSION

The Supreme Court has stated that in "rare cases" the minimum requirements inherent in the concept of fair play and substantial justice will defeat the reasonableness of jurisdiction even though the defendant has purposefully engaged in forum activities.[88] But this cautious statement occurred in the context of specific jurisdiction cases. As lower court decisions recognize, there are good reasons to be less cautious when assessing what constitutes fair play and substantial justice as to nonresident defendants in general jurisdiction cases, where the cause of action has no connection with the forum state.

In several recent cases, the lower courts have indeed imposed a "reasonable" due process limitation on the exercise of activities-based general jurisdiction. In still other cases, these courts have employed the doctrine of forum non conveniens as a significant nonconstitutional limitation on the exercise of general jurisdiction. The residency of the plaintiff remains a significant factor when these courts consider whether or not to dismiss an action, with respect to both the "reasonableness" and the forum non conveniens determinations. However, in the most controversial of the general jurisdiction cases, where neither party is a resident of the forum and the cause of action arose someplace else, the lower courts have not hesitated to dismiss. Although it may be too early to declare that the "reasonableness" and forum non conveniens doctrines have imposed limitations on forum shopping in all activities-based general jurisdiction cases, they have effectively done so in the most controversial of such cases.

87. However, as with the due process inquiry, a court's willingness to dismiss based on forum non conveniens will likely be influenced by the residency of the plaintiff. *See supra* notes 35–43 & 76–80 and accompanying text.

88. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987) (Brennan, J. concurring); *Burger King*, 471 U.S. at 477–78.