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TORT JURISDICTION IN A MULTILATERAL CONVENTION: THE LESSONS OF THE DUE PROCESS CLAUSE AND THE BRUSSELS CONVENTION

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I. INTRODUCTION

The catalyst for this symposium is the undertaking at the Hague Conference on Private International Law to negotiate a multilateral convention on jurisdiction and the recognition and enforcement of judgments.[1] Unlike some of the accompanying

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1. Like other articles in this issue, this one is developed in the context of the negotiations in The Hague Conference on Private International Law toward a global convention on jurisdiction and the recognition and enforcement of judgments. *See, e.g.*, Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOK. J. INT'L L. 7 (1998).

In May 1992, the United States proposed that the Hague Conference on Private International Law take up the negotiation of a multilateral convention on the recognition and enforcement of judgments. *See* Letter from Edwin D. Williamson, Legal Adviser, U.S. Department of State, to Georges Droz, Secretary General, The Hague Conference on Private International Law (May 5, 1992) (distributed with Hague Conference document L.c. ON No. 15 (92)). In October 1992, a Working Group at The Hague, "unanimously recognized the desirability of attempting to negotiate multilaterally through the Hague Conference a convention on recognition and enforcement of judgments." HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS OF THE WORKING GROUP MEETING ON ENFORCEMENT OF JUDGMENTS 184 (Prel. Doc. No. 19, 1992); *see also* HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS OF THE WORKING GROUP MEETING ON ENFORCEMENT OF JUDGMENTS (Hague Doc. L.c. ON No. 2 (93), 1993). The Seventeenth Session of the Hague Conference, held in May 1993, decided to study the matter further through a Special Commission Session. *See* Hague Conference on Private International Law, Final Act of the Seventeenth Session, May 29, 1993, pt. B(2), 32 I.L.M. 1134, 1145. In June 1994, a Special Commission of the Hague Conference recommended the question be included in the Agenda for the future work of the Conference at its Eighteenth Session. *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS OF THE SPECIAL COMMISSION OF JUNE 1994 ON THE QUESTION OF THE REC-

articles, this one focuses on a rather specific aspect of those negotiations: the substance of a provision defining the accepted jurisdictional basis for actions in tort brought against parties from another contracting state.[2] It is my belief that the ability of the delegations in The Hague to achieve consensus on this provision will indicate a great deal about their ability to complete a successful multilateral convention. This belief, and the resulting focus of this Article, follow from certain assumptions I have formed during my participation in those negotiations.[3] Those assumptions include the following:

OGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS 13 (Prel. Doc. No. 1, 1994). In June 1995, the Special Commission on General Affairs and Policy of the Conference recommended to the Eighteenth Session of the Hague Conference (held in October 1996), that the proposal for a judgments convention be adopted as one of the works of that Session. *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS OF THE SPECIAL COMMISSION OF JUNE 1995 ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE 33 (Prel. Doc. No. 9, 1995). In the Final Act of the Eighteenth Session of the Hague Conference on Private International Law, it was decided "to include in the Agenda of the Nineteenth Session the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters." Hague Conference on Private International Law, Final Act of the Eighteenth Session, Oct. 19, 1996, pt. B(1), 35 I.L.M. 1391, 1405. The formal negotiations began in June 1997. *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY RESULTS OF THE WORK OF THE SPECIAL COMMISSION CONCERNING THE PROPOSED CONVENTION ON INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS 3 (Info. Doc., Sept. 1997).

2. My focus here is neither that of a conflicts scholar, nor of an expert in civil procedure. Unlike others providing articles for this symposium, I can claim neither distinction. I come at this discussion from the perspective of a trade lawyer; as one interested in the importance to a transactional practice of predictable methods of dispute resolution. *See, e.g.*, Ronald A. Brand, *Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law, in* THE ECONOMIC ANALYSIS OF INTERNATIONAL LAW (Jagdeep Bhandari & Alan O. Sykes eds., forthcoming 1998); Ronald A. Brand, *Punitive Damages and the Recognition of Judgments*, 43 NETH. INT'L L. REV. 143, 143-86 (1996). I come with a belief that the same economic concepts and theories that underlie our international trade law system and the resulting efforts to create rules on the free movement of goods, services, capital, intellectual property rights and persons, also support the need for the free movement of judgments in order for that trade system to remain true to its principles. Thus, my comments may be those of one on the periphery in terms of the nuances of conflicts of laws and civil procedure. At the same time, however, I hope they represent some of the concerns of the community that would most benefit from enhanced multilateral rules on issues of both jurisdiction and the recognition and enforcement of judgments.

3. The author is a member of the U.S. delegation to the negotiations, and attended the meetings at The Hague in June 1994, June 1995, June 1996 and June 1997.

(1) The successful negotiation of a multilateral treaty on jurisdiction and the recognition and enforcement of judgments will not be an easy task.

(2) The parties participating in the work of the Hague Conference on Private International Law are ready and willing to try hard to make a success of the negotiations, and are serious about the effort.

(3) A successful convention must include rules on direct jurisdiction—a simple convention will not be acceptable.[4]

(4) For the United States, every provision of the convention must be tested against the Fifth and Fourteenth Amendments' Due Process Clauses. We can neither agree to assume jurisdiction over foreign defendants on bases that would not be within the limits of due process, nor accept an obligation to recognize judgments based on jurisdictional grounds that would not be acceptable under the due process jurisprudence of the U.S. Supreme Court.

(5) Lawyers and officials from other nations have difficulty understanding the nuances and ambiguities of our due process jurisprudence.

(6) A successful convention is likely to track the ex-

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4. *See* Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 BROOK. J. INT'L L. 17, 27-28 (1998). A single convention, like the 1971 Hague Convention, deals only with indirect jurisdiction and applies only to the decision of the court asked to enforce a foreign judgment—thus, jurisdiction of the court issuing a judgment is considered "indirectly" by the second court in deciding whether to recognize the judgment of the issuing court. *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, *done* Feb. 1, 1971, 1144 U.N.T.S. 249. Double conventions, like Brussels and Lugano, provide direct jurisdiction rules applicable in the court in which the case is first brought—thus addressing the matter from the outset and preempting the need for indirect consideration of the issuing court's jurisdiction by the court asked to recognize the resulting judgment. *See infra* note 5.

ample of the Brussels Convention,[5] with rules of direct jurisdiction, beginning with a single general basis of jurisdiction—the domicile or habitual residence of the defendant—and then providing specific rules authorizing jurisdiction other than in the state of the defendant's domicile or habitual residence for certain types of cases.

(7) The convention should contain a separate basis of jurisdiction for contract cases, but that jurisdictional basis may be of limited importance given the success of the New York Arbitration Convention,[6] and the tendency of well-advised parties in transnational transactions to resort to arbitration to settle contractual disputes.[7]

Thus, the ability of the delegations at The Hague to reach agreement on a separate jurisdictional basis for tort cases—one that will allow a case to be brought other than in the state of the domicile or habitual residence of the defendant—will be an important test of whether there will be a successful convention. This conclusion, and the assumptions supporting it, explain the choice of tort jurisdiction as the topic for this Article. The particular focus here within that topic is explained by the roles played by the U.S. and European Union legal systems as laboratory examples for a multilateral convention.

The vague concept of due process has led to some confusion, and less than complete certainty, in determining the

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5. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention] (for the consolidated and updated version of this convention and the Protocol of 1971, following the 1989 accession of Spain and Portugal, see 1990 O.J. (C 189) 1, *reprinted in* 29 I.L.M. 1413). The Convention is also subject to the Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, Nov. 29, 1996, 1997 O.J. (C 15) 1. *See also* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, art. 62(1)(b), 1988 O.J. (L 319) 9, 24, *reprinted in* 28 I.L.M. 620, 638 [hereinafter Lugano Convention].

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Arbitration Convention].

7. *See, e.g.*, ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 281-367 (1993); Ronald A. Brand, *Nonconvention Issues in the Preparation of Transnational Sales Contracts*, 8 J.L. & COM. 145 (1988).

existence of jurisdiction over foreign defendants in tort cases in the United States.[8] At the same time, what appears to be a rather simple and functional rule in the Brussels Convention has not always provided clear results.[9] In this Article, I try to determine whether the words used to describe and apply these concepts and rules provide seemingly different semantic starting points that lead to similar results in jurisdictional decisions in tort cases in the United States and Europe, and if so, whether it is possible to work from results back to harmonized language upon which a rule of tort jurisdiction can be constructed for a multilateral convention. The analysis begins with consideration of the history and current application of due process to issues of *in personam* jurisdiction in the United States, with particular focus on the language used to define the relationships considered appropriate to the exercise of jurisdiction. This is followed by a review of cases in which the European Court of Justice (ECJ) has interpreted Article 5(3) of the Brussels Convention; again with attention to the language used to distinguish when tort jurisdiction does and does not exist. In the end, both the interpretations of due process in the United States and of Article 5(3) in Europe focus on connecting factors. While the concepts applied are expressed in different language, the results are arguably similar. Thus, I reach the conclusion that similar results exist from which it may be possible to construct a jurisdictional rule appropriate to a multilateral treaty on jurisdiction and the recognition of judgments.

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8. For examples of some of the criticism of the results of the application of due process concepts to jurisdiction, see 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 (1990); Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027 (1995); Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1 (1993); Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT'L L. 389 (1995).

9. *See, e.g.*, Edwin Peel, *Jurisdiction Under the Brussels Convention*, *in* RESTITUTION AND THE CONFLICT OF LAWS 1, 20-31 (Francis Rose ed., 1995); J.G. Collier, *The Surprised Bank Clerk and the Italian Customer—Competing Jurisdictions*, 55 CAMBRIDGE L.J. 216, 217-18 (1996).

II. DUE PROCESS AND JURISDICTION IN UNITED STATES COURTS

A. *Long-arm Statutes and Due Process Analysis*

Analysis of *in personam* jurisdiction in U.S. courts involves a two-step process. The first step is the application of the state long-arm statute, to determine if there is statutory jurisdiction. These statutes differ, but generally can be categorized as list-type provisions, providing specific bases of jurisdiction,[10] and

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10. New York and Pennsylvania both have such statutes. Section 302 of the New York C.P.L.R., entitled "Personal jurisdiction by acts of non-domiciliaries," provides in part:

> (a) ACTS WHICH ARE THE BASIS OF JURISDICTION. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or,
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.

N.Y. C.P.L.R. § 302(a) (McKinney 1990). Pennsylvania has a rather more complete statute, which adds a constitutional limits provision:

> § 5322. BASES OF PERSONAL JURISDICTION OVER PERSONS OUTSIDE THIS COMMONWEALTH
>
> (a) GENERAL RULE.–A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:
>
> (1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:
>
> (i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

(v) The ownership, use or possession of any real property situated within this Commonwealth.

(2) Contracting to supply services or things in this Commonwealth.

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

(4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

(5) Having an interest in, using, or possessing real property in this Commonwealth.

(6) (i) Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting.

(ii) Being a person who controls, or who is a director, officer, employee or agent of a person who controls, an insurance company incorporated in this Commonwealth or an alien insurer domiciled in this Commonwealth.

(iii) Engaging in conduct described in section 504 of the act of May 17, 1921 (P.L.789, No.285), known as "The Insurance Department Act of 1921."

(7) Accepting election or appointment or exercising powers under the authority of this Commonwealth as a:

(i) Personal representative of a decedent.

(ii) Guardian of a minor or incompetent.

(iii) Trustee or other fiduciary.

(iv) Director or officer of a corporation.

(8) Executing any bond of any of the persons specified in paragraph (7).

(9) Making application to any government unit for any certificate, license, permit, registration or similar instrument or authorization or exercising any such instrument or authorization.

(10) Committing any violation within the jurisdiction of this Commonwealth of any statute, home rule charter, local ordinance or resolution, or rule or regulation promulgated thereunder by any government unit or of any order of court or other government unit.

(b) EXERCISE OF FULL CONSTITUTIONAL POWER OVER NONRESIDENTS.—In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to

the constitutional limits statutes, providing that a court in the state can exercise *in personam* jurisdiction to the limits of the Due Process Clause.[11] The process of applying a list-type long-arm statute is not unlike the application of the jurisdictional rules of the Brussels Convention.[12]

The second step in the United States is the constitutional analysis by which it is determined whether the exercise of jurisdiction allowed by state statute in the particular case is within the limits of the Due Process Clause. Because it usually is a state long-arm statute that is being considered, it is the Fourteenth Amendment we are most often concerned with.[13]

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persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

(c) SCOPE OF JURISDICTION.—When jurisdiction over a person is based solely upon this section, only a cause of action or other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him.

(d) SERVICE OUTSIDE THIS COMMONWEALTH.—When the exercise of personal jurisdiction is authorized by this section, service of process may be made outside this Commonwealth.

(e) INCONVENIENT FORUM.–When a tribunal finds that in the interest of substantial justice the matter should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just.

42 PA. CONS. STAT. ANN. § 5322 (West 1981).

11. California has such a statute. It states, simply, that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973).

12. *See infra* notes 60-76 and accompanying text.

13. Jurisdiction in the federal courts is governed by Rule 4(k) of the Federal Rules of Civil Procedure. This Rule provides three principal jurisdictional authorizations:

(1) Rule 4(k)(1)(A) authorizes a district court to borrow the jurisdictional powers of state courts in the state where it is located;

(2) Rule 4(k)(1)(D) confirms the availability of any applicable federal statute granting personal jurisdiction; and

(3) Rule 4(k)(2) grants district courts personal jurisdiction to the limits of the [Fifth Amendment] due process clause in certain federal question cases.

GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 172 (3d ed. 1996); *see also* FED. R. CIV. P. 4(k). This most often results in the federal court "borrowing" the state statute under Rule 4(k)(1)(A). *See* BORN, *supra*, at 172-97.

B. *The Fourteenth Amendment Due Process Clause and Questions of Jurisdiction*

The Fourteenth Amendment to the U.S. Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law."[14] The discussion of due process and jurisdiction in U.S. courts generally begins with the 1877 case of *Pennoyer v. Neff*.[15] Justice Field's opinion focused on a territorial approach to jurisdiction over the defendant,[16] enunciating what he considered to be "two well-established principles of public law respecting the jurisdiction of an independent State over persons and property:"

> One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . . The other principle . . . is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.[17]

In the 1940 case of *Milliken v. Meyer*,[18] the Court expanded this territorial scope beyond mere presence, holding that, "[d]omicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment."[19] This decision provides a direct parallel to the structure of the Brussels Convention in Europe, in which Article 2 sets out the general rule that the courts of the state of the defendant's domicile shall have jurisdiction.[20]

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14. U.S. CONST. amend. XIV, § 1. This amendment was ratified on July 9, 1868.

15. 95 U.S. 714 (1877). "Rightly or wrongly, *Pennoyer v. Neff*, linked American jurisdictional law with the Fourteenth Amendment's Due Process Clause, and however questionable that linkage may be, it has become part of American conventional wisdom." Friedrich K. Juenger, *Constitutionalizing German Jurisdictional Law*, 44 AM. J. COMP. L. 521, 521 (1996) (book review) (footnotes omitted).

16. *Pennoyer*, 95 U.S. at 720:

> The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.

17. *Id.* at 722.

18. 311 U.S. 457 (1940).

19. *Id.* at 462.

20. *See* Brussels Convention, *supra* note 5, art. 2.

Understanding the current status of due process analysis in jurisdictional decisions begins with two cases: *International Shoe Co. v. Washington*[21] and *World-Wide Volkswagen Corp. v. Woodson*.[22] *International Shoe* opened up jurisdiction beyond the territorial limits of *Pennoyer*, and *World-Wide Volkswagen* furnished language asserting anew the limits of due process, but no longer in narrow terms of territoriality. While neither case involved a defendant from outside the United States, later cases involving foreign defendants have relied on their analyses.

International Shoe involved an action brought in Washington state court by the State of Washington Office of Unemployment Compensation to collect delinquent contributions from a Delaware corporation which had its offices in St. Louis, Missouri. The subject corporation had no offices in Washington, made no contracts there, and maintained no inventory in Washington. It did employ eleven to thirteen salesmen in Washington from 1937 to 1940, all of whose principal sales activities were confined to Washington, and whose combined commissions amounted to more than $31,000 per year.[23]

While *Pennoyer* focused on the presence of the defendant within the jurisdiction as a "prerequisite to its rendition of a judgment personally binding him,"[24] *International Shoe* built on *Milliken v. Meyer*, fundamentally altering the analysis by permitting jurisdiction over nonresidents who were not served while present in the state.[25] Finding something less than presence necessary, the Court stated:

> [D]ue 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."[26]

The need for rules accommodating the fiction of the corporate personality led the Court to focus on the conduct of those

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21. 326 U.S. 310 (1945).
22. 444 U.S. 286 (1980).
23. *International Shoe*, 326 U.S. at 313.
24. *Id.* at 316 (citing Pennoyer v. Neff, 95 U.S. 714, 733 (1877)).
25. *See International Shoe*, 326 U.S. at 316.
26. *Id.* at 313 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

acting on behalf of the corporation.[27] It noted two variables in determining the constitutionality of jurisdiction over non-resident defendants. The first is the extent and intensity of the defendant's activities in the forum state, and the second is the connection between those activities and the cause of action.[28] "Continuous and systematic" activity supports general jurisdiction over a defendant, allowing a court to consider actions against the defendant whether or not they arise out of those activities.[29] A "single isolated" contact, on the other hand will (at most) support only specific jurisdiction, with the requirement that the action arise out of the contact.[30]

One problem with the minimum contacts test of *International Shoe* is that there is no bright line rule for determining when the threshold is crossed on the spectrum from activities which are not sufficient to support jurisdiction to those which are sufficient.[31] The expansion of jurisdictional concepts under *International Shoe* was seen as "attributable to the fundamen-

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27. *Id.* at 316.

28. *Id.* at 316-20.

29. *Id.* at 318 (citations omitted):

> While it has been held . . . that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, . . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.

30. *Id.* at 317 (citations omitted):

> "Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given . . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.

31. *Id.* at 319 (citations omitted):

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less . . . . Whether due process is satisfied must depend rather 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.

tal transformation of our national economy over the years."[32] With the "increasing nationalization of commerce," more and more business was conducted across state lines, and modern transportation "made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."[33] Like the Brussels Convention, state long-arm statutes and the common law process in the United States developed protections for special classes of consumers, such as purchasers of insurance policies, making it relatively easier for them to prove the minimum contacts necessary to establish constitutional jurisdiction over the defendant.[34]

In *Hanson v. Denckla*,[35] Chief Justice Warren retreated somewhat from an expansive approach recognizing the role of corporations and technological advances in transportation and communication, reverting to a territorial orientation: "[I]t 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."[36] Therefore, the contacts with the forum state must be the result of intentional conduct by the defendant directed at that state.

The development of jurisdictional due process analysis continued in *World-Wide Volkswagen Corp. v. Woodson*,[37] a products liability lawsuit brought in Oklahoma based on an automobile accident that occurred in that state. An automobile sold in New York to New York residents was being driven through Oklahoma when the accident occurred. The plaintiff sued both World-Wide Volkswagen Corp. (a regional distributer with its office in New York, who distributed to retail dealers in New York, New Jersey, and Connecticut) and Seaway Volkswagen, Inc. (the retail dealer in New York from whom the car had been purchased).[38] Both of these defendants challenged the jurisdiction of the Oklahoma court.

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32. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957).
33. *Id.* at 223.
34. *See, e.g., id.*
35. 357 U.S. 235 (1958).
36. *Id.* at 253.
37. 444 U.S. 286 (1980).
38. The plaintiffs also sued the manufacturer and Audi NSU Auto Union Aktiengesellschaft, but those defendants did not take the issue of jurisdiction to the Oklahoma Supreme Court. *See id.* at 288 n.3.

World-Wide Volkswagen not only refined and applied the minimum contacts test, but also reintroduced the concept of reasonableness into the due process analysis:

> [T]he defendant's contacts with the forum State must be such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.'" . . . The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there."[39]

This focus on reasonableness led the Court to adopt a type of balancing test of relevant factors:

> [T]he burden on the defendant, . . . will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, . . . the plaintiff's interest in obtaining convenient and effective relief, . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, . . . [40]

As part of the minimum contacts analysis, *World-Wide Volkswagen* focused on foreseeability. The Court began by pointing out that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."[41] However, the court went on to state:

> This is not to say, of course, that foreseeability is wholly irrelevant. But the 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 that he should reasonably anticipate being haled into court there.[42]

Citing *Hanson v. Denckla*, Justice White applied the "purposeful availment" test to a case involving the failure of a product sold in interstate commerce, and raised the later-to-be trouble-

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39. *Id.* at 292 (citations omitted).
40. *Id.* (citations omitted).
41. *Id.* at 295.
42. *Id.* at 297.

some phrase, "stream of commerce:"

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State . . . . The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.[43]

Like the concept of "contacts," which was not troublesome to the *International Shoe* Court because the contacts there were viewed as clearly "systematic and continuous," the concept of a "stream of commerce" into which the defendant intentionally directs its goods was not troublesome to Justice White in *World-Wide Volkswagen*. This was because Justice White did not face an argument that it was the defendants who sent the automobile on its way to Oklahoma and that the defendants received some related benefits as a result. The car found its way to Oklahoma, not in the course of any commercial relationship, but rather because of the conduct of the ultimate consumer.

Two later cases, *Helicopteros Nacionales de Colombia v. Hall*,[44] and *Asahi Metal Industry Co. v. Superior Court of California*,[45] allowed the Court to address truly transnational situations. In each, the Court refused to find sufficient activities to justify jurisdiction over a foreign defendant. In *Helicopteros*, the Court addressed a situation where the contacts were neither as "systematic and continuous" as in *International Shoe*, nor as limited as in *World-Wide Volkswagen*. *Helicopteros* involved a wrongful death action that was brought in Texas state court against a Colombian corporation (Helicol) as the result of a helicopter crash in Peru, causing death to four U.S. citizens and others.[46] The defendant corporation had

43. *Id.* at 297-98 (citations omitted).
44. 466 U.S. 408 (1984).
45. 480 U.S. 102 (1987).
46. *See id.* at 409-10, 412.

sent its chief executive officer to Texas to negotiate the purchase of the helicopters involved in the crash, had purchased other helicopters and accessories there, had sent the corporation's pilots for training there, and had sent management personnel there for training and technical consultation.[47] The Court found "that purchases and related trips, standing alone, are not a sufficient basis for a State's assertion of [general] jurisdiction."[48] Ultimately, it held that the combination of existing contacts did not support the constitutional exercise of general jurisdiction over the foreign corporation.[49]

Asahi brought little clarity and added confusion to the "stream of commerce" language of *World-Wide Volkswagen*. A Japanese manufacturer of valve stems, Asahi, sold them to Cheng Shin, a Taiwanese tire manufacturer, who used them as components in tire tubes, including one that ultimately was incorporated into a motorcycle sold and used in California.[50] When the driver of the motorcycle was injured in an accident, and his passenger killed, the driver brought a products liability claim in California.[51] All defendants other than Asahi settled with the plaintiff, and the only issue remaining was the liability of Asahi to Cheng Shin for contribution.[52] Asahi had not been an original defendant, but had been impleaded by Cheng Shin.[53]

California's long-arm statute authorized the exercise of jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States."[54] Justice O'Connor's plurality opinion adopted a "stream of commerce plus" approach. Thus, a consumer's unilateral action in bringing a product into a jurisdiction would be insufficient to support jurisdiction, and the mere insertion of a product into the stream of commerce, absent some purposeful act availing the defendant of the benefits of the jurisdiction, also should not support constitutional jurisdiction. O'Connor would require "*an action of the defendant purposefully directed toward the forum*

47. *See id.* at 411.
48. *Id.* at 408.
49. *See id.* at 418-19.
50. *See* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 106 (1987).
51. *See id.* at 105-06.
52. *See id.* at 106.
53. *See id.*
54. CAL. CIV. PROC. CODE § 410.10 (West 1973).

State."[55] This portion of the opinion, however, received the support of only three other Justices. Four other Justices would have allowed a simple stream of commerce rule,[56] but the case ultimately was decided by eight Justices agreeing that it was unreasonable to assert jurisdiction over this Japanese defendant simply for purposes of deciding what was now a dispute only with a Taiwanese party.[57]

To a lawyer from a civil law system, accustomed to the relative structure of code-type lists of jurisdictional rules, and reasoning from general principles often more certain than the concept of due process, this trip through U.S. case law must seem rather confusing. Ultimately, however, whether the language used is "minimum contacts," "purposeful availment," "stream of commerce," or any other, the test focuses on two elements: (1) whether there is a sufficient nexus between the defendant and the forum state; and (2) whether the circumstances make it fair and reasonable to exercise jurisdiction.[58]

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55. *Asahi Metal Industry Co.*, 480 U.S. at 112 (emphasis in original).

56. Justice Brennan (joined by White, Marshall and Blackmun), concurred in the result but disagreed with the stream of commerce plus analysis of Part II-A of Justice O'Connor's opinion:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.

Id. at 117 (Brennan, J., concurring in part).

57. "Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair." *Id.* at 116 (Brennan, J., concurring in part).

58. *Helicopteros* indicates the possibility of a third element, superimposed on these two: the connection between the in-state activities and the cause of action. A nexus that might be sufficient if the cause of action was closely connected to it might not be enough if the cause of action was unrelated. Thus,

> When a controversy is related to or "arises out of" a defendant's contacts with the forum, the Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of *in personam* jurisdiction.

Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408, 414 (1984) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)). *Helicopteros* was the first case in which the Supreme Court adopted the distinction between "general jurisdiction," based on the systematic and continuous activities of the defendant in the forum state, and "specific jurisdiction," based on lesser activities in the forum state but requiring that the cause of action have a direct connection with those activities. This distinction had been suggested nearly twenty years earlier. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,*

If we look at results, rather than only at language, the picture is somewhat simpler (at least if we look only at the Supreme Court decisions). Few now argue that the conditions in *World-Wide Volkswagen* should have resulted in a finding of jurisdiction. The distributor and retailer had no connection with Oklahoma other than the fortuitous trip by one of their customers through that state. While it may have been foreseeable that some purchaser of a car in New York would drive to Oklahoma, that is not the foreseeability of due process analysis. This was not enough to make it foreseeable that a New York dealer or wholesaler would be haled into court there.

Similarly, the number of sales persons and level of sales by a Missouri-based company in Washington lend credence to the reasonableness of jurisdiction in *International Shoe*. In *Asahi*, on the other hand (leaving aside the divergent opinions on a "stream of commerce" analysis), it seems reasonable for a U.S. court not to take jurisdiction over a dispute that remains only between Taiwanese and Japanese parties, especially when the product of the Taiwanese party had reached California only as an indirect result of the commercial chain of manufacture and distribution.[59]

Helicopteros may be the more difficult case. The Peruvian corporation there had a number of contacts with the state of Texas, and even though the cause of action (which was based on an accident in Peru) did not arise directly out of those contacts, there was at least an indirect relationship between the purchase of helicopters in Texas, the training of pilots there, and a crash involving those helicopters and those pilots. This case demonstrates two factors that should provide consolation to the foreign party worried about being hauled into U.S. courts. The first is that the Due Process Clause clearly remains a constitutional limitation on the exercise of jurisdiction by U.S. courts. The language of due process, including "minimum contacts," remains primarily jurisdiction-defeating language.

The second factor demonstrated by *Helicopteros* is that the concept of general jurisdiction serves to limit the jurisdictional reach of courts in the due process analysis. Thus, when the

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79 HARV. L. REV. 1121, 1144-64 (1966).

59. *But see* Silberman, *supra* note 8, at 401-02.

activity sued upon does not arise out of the "minimum contacts" that exist, something more than the threshold of activity required for specific jurisdiction must be met. The activity threshold is raised to the "systematic and continuous" level, which has proved more difficult to achieve. While *Asahi* creates difficulty in determining the current application of a "stream of commerce" test, it does combine with *Helicopteros* to indicate that the U.S. Supreme Court won't let a foreign corporation be sued in a state where it has limited activity unless there exists a close connection between the cause of action and the activity.

III. BRUSSELS CONVENTION ARTICLE 5(3) AND ITS INTERPRETATION BY THE EUROPEAN COURT OF JUSTICE

Article 220 of the Treaty of Rome specifically directed the original Member States of the European Economic Community to enter into negotiations to simplify formalities governing reciprocal recognition and enforcement of judgments.[60] This process began in 1959, resulting in the completion of the Brussels Convention in 1968.[61] The Convention has been amended to provide for the accession of each new Member State in the Community.

Most recognition and enforcement treaties are "simple" treaties dealing only with the decision of the court asked to recognize a judgment from another jurisdiction.[62] This follows the "indirect jurisdiction" approach exemplified by the *Restatement (Third) of the Foreign Relations Law of the United States* (*Restatement*) and *Uniform Foreign Money-Judgments Recognition Act* (*Recognition Act*) technique in the United States[63]

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60. *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 220, 298 U.N.T.S. 11, 87, 1973 Gr. Brit. T.S. No. 1, at 69 (Cmd. 5179-II) [hereinafter EEC TREATY]. Article 220 included a direction to simplify the recognition and enforcement of arbitration awards. *See id.* The Brussels Convention deals only with court judgments. A separate Community treaty on arbitration awards has been unnecessary due to the existence of the New York Arbitration Convention, *supra* note 6, to which over eighty states are party.

61. *See, e.g.*, ALAN DASHWOOD ET AL., A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION 3-5 (1987).

62. *See* von Mehren, *supra* note 4, at 17.

63. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481, 482 (1987); UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 263 (1986); *see also* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 265-80 (1991).

The enforcing court does not question whether the court of origination properly exercised its own jurisdiction. Rather the jurisdictional analysis conducted by the enforcing court deals only with whether the court of origination exercised jurisdiction in a manner recognized as appropriate either by the recognizing state or in the applicable convention.

The Brussels Convention is an example of the more complex "double" treaty, providing rules of direct jurisdiction. Thus, rather than listing only the acceptable jurisdictional bases for a recognizable judgment, the Member States limit from the start the jurisdictional bases available in an action against a person domiciled in another Member State.[64] These direct limits on jurisdiction are found in Title II of the Convention.[65] Title III covers issues of recognition and enforcement, providing the general rule that "[a] judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required."[66]

Like the *Restatement* and *Recognition Act* approaches in the United States,[67] the Brussels Convention tempers the general rule of recognition with a list of defenses that justify non-recognition. A judgment "shall not be recognized:" (1) if recognition would be contrary to public policy in the recognizing state; (2) where it is a default judgment given without service in sufficient time to allow preparation of a defense; (3) if the judgment is irreconcilable with a judgment in a dispute between the same parties in the recognizing state; (4) if the judgment necessarily went beyond the civil or commercial issue in dispute and required determination of a matter of status or legal capacity or rights in property arising out of a matrimonial relationship, wills or succession; or (5) if the judgment is irreconcilable with an earlier judgment from a non-Contracting State that is entitled to recognition and is on the same cause of action and between the same parties.[68]

64. *See generally* Brussels Convention, *supra* note 5, arts. 2-18.
65. *See generally id.* tit. II.
66. *Id.* art. 26.
67. *See supra* note 63 and accompanying text.
68. *See* Brussels Convention, *supra* note 5, art. 27.

A. The Bier Case

Article 5(3) of the Brussels Convention provides the following rule for specific jurisdiction in tort cases: "A person domiciled in a Contracting State may, in another Contracting State, be sued . . . . in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred."[69]

The seminal case on the interpretation of Article 5(3) is *Bier v. Mines de Potasse d'Alsace*.[70] A Dutch horticultural business and the Reinwater Foundation sued a French defendant in the court of first instance at Rotterdam. The claim was that the French concern had polluted the waters of the Rhine by the discharge of saline waste from its operations in France, and thus damaged the plaintiff's business, which relied on irrigation from the Rhine river, and forced expensive measures to prevent further damage.[71] When the Rotterdam court held it had no jurisdiction, and the case was appealed to the Gerechtshof in The Hague, that court referred to the ECJ the following question:

> Are the words "the place where the harmful event occurred", appearing in the text of Article 5 (3) . . . to be understood as meaning "the place where the damage occurred (the place where the damage took place or became apparent)" or rather "the place where the event having the damage as its sequel occurred (the place where the act was or was not performed)"?[72]

Unlike the U.S. due process focus on contacts between the defendant and the court asserting jurisdiction, the *Bier* court looked for a "particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings."[73] The court found such a connecting factor at the place where the damage is felt as well as at the place where the event giving rise to the damage occurred.[74] Thus, the ECJ held that,

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69. Brussels Convention, *supra* note 5, art. 5(3).
70. Case 21/76, 1976 E.C.R. 1735, [1977] 1 C.M.L.R. 284.
71. *See id.* 1976 E.C.R. at 1744, [1977] 1 C.M.L.R. at 299.
72. *Id.* 1976 E.C.R. at 1745, [1977] 1 C.M.L.R. at 299.
73. *Id.* 1976 E.C.R. at 1746, [1977] 1 C.M.L.R. at 300.
74. The Court found either place to "constitute a significant connecting factor

in an action brought under Article 5(3), "the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage."[75] This was an expansive reading of Article 5(3), and in that sense parallels the role of *International Shoe* in the United States.[76]

B. The Post-Bier Cases

Four ECJ cases in particular have provided further elaboration on the interpretation of Article 5(3) in *Bier*. The first of these cases, *Kalfelis v. Schröder*,[77] does not comment directly on the locus of Article 5(3) jurisdiction, but rather demonstrates its limited scope. Mr. Kalfelis entered into futures transactions in silver bullion with a Luxembourg bank, through its Frankfurt intermediary. When the transactions resulted in a total loss for Mr. Kalfelis, he brought claims on both contract and tort theories in Germany, and the bank challenged jurisdiction. The decision "observed . . . that the 'special jurisdictions' enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively."[78] Under *Kalfelis*, a court cannot have jurisdiction over the same matter both as a tort matter under Article 5(3) and as a contract matter under Article 5(1).[79] This categorization of ac-

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from the point of view of jurisdiction." *Id.*

75. *Id.* 1976 E.C.R. at 1749, [1977] 1 C.M.L.R. at 301. One of the approaches to Article 5(3) not adopted was the assertion of the Government of the Netherlands and the Commission that a choice of law analysis be applied to questions of jurisdiction such that jurisdiction be available in the state with the "most significant relationship" with the harmful event. While the Court's opinion provided no need to refer directly to this argument, the opinion of Advocate General Capotorti specifically rejected it on the basis that it was "not . . . in accordance with the objective of the Brussels Convention . . . to simplify problems relating to determination of the national court having jurisdiction." *Id.* 1976 E.C.R. at 1755, [1977] 1 C.M.L.R. at 294 (Opinion of Advocate General Capotorti).

76. *See supra* notes 23-33 and accompanying text.

77. Case 189/87, 1988 E.C.R. 5565.

78. *Id.* at 5585.

79. *See id.* at 5585, 5587 (holding that "the concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of

tions demonstrates the primacy of the Article 2 general jurisdictional rule and the accompanying limits on all specific jurisdictional rules, including that for torts found in Article 5(3).

The next case to add gloss on the *Bier* decision is *Dumez France and Tracoba v. Hessische Landesbank.*[80] French parent corporations of German subsidiaries sought compensation in France, alleging that the conduct of German banks in canceling loans to the subsidiaries brought about the insolvency of the subsidiaries. When the lower French courts upheld the German banks' objections to jurisdiction, the Cour de cassation referred that matter for a preliminary ruling to the ECJ. The question presented was whether the dual jurisdictional locus allowed in *Bier* was "to be extended to . . . enable the indirect victim to bring proceedings before the court of the State in which he is domiciled?"[81]

The *Dumez* court contrasted the facts in *Bier* with those in *Dumez.* The judgment in *Bier* "related to a situation in which the damage . . . occurred . . . by the direct effect of the causal agent, namely the saline waste which had moved physically from one place to another."[82] The ECJ noted that, in the case presently before it,

> [b]y contrast, . . . the damage allegedly suffered by Dumez and Oth through cancellation, by the German banks, of the loans granted for financing the works originated and produced its direct consequences in the same Member State, namely the one in which the lending banks, the prime contractor and the subsidiaries of Dumez and Oth, which were responsible for the building work, were all established. The harm alleged by the parent companies, Dumez and Oth, is merely the indirect consequence of the financial losses initially suffered by their subsidiaries following cancellation of the loans and the subsequent suspension of the works.[83]

The limited nature of the Article 5(3) jurisdictional basis, and the lack of a "particularly close connecting factor between the

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Article 5 (1)" and that "[a] court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.").

80. Case C-220/88, 1990 E.C.R. I-49.

81. *Id.* at I-77.

82. *Id.* at I-78.

83. *Id.* at I-79.

dispute and the courts,"[84] when the only harm suffered in the state is "no more than the indirect consequence of the harm initially suffered"[85] elsewhere, led to a finding of no jurisdiction.

Both the Due Process Clause and the jurisdictional scheme of the Brussels Convention serve to protect the defendant domiciled in a Member State. In Brussels, Article 2 first sets forth the general rule of jurisdiction at the defendant's domicile.[86] Next, Article 3 prohibits jurisdiction based on certain Member State statutes, most all of which are designed to expand jurisdiction at the *forum actoris* and thus unreasonably favor the plaintiff.[87] Third, the restrictive reading of all specific bases of jurisdiction limits their use to "reasons relating to the sound administration of justice and the efficacious conduct of proceedings,"[88] and,

> militates against any interpretation of the Convention which, otherwise than in the cases expressly provided for, might lead to recognition of the jurisdiction of the courts of the plaintiff's domicile and would enable a plaintiff to determine the competent court by his choice of domicile.[89]

This combination of factors responds to the necessity "to avoid the multiplication of courts of competent jurisdiction which would heighten the risk of irreconcilable decisions."[90] In the end, the ECJ used the *Dumez* case to limit the plaintiff's option under *Bier* to the place where the event causing the damage occurred and the place where the damage "directly produced its harmful effects upon the person who is the immediate victim of that event."[91]

In *Shevill v. Presse Alliance SA*,[92] the ECJ applied the *Bier* analysis to a defamation case. A French publisher of a

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84. *Id.*
85. *Id.*
86. *See* Brussels Convention, *supra* note 5, art. 2.
87. *See id.* art. 3.
88. Case C-220/88, *Dumez France and Tracoba*, 1990 E.C.R. at I-80.
89. *Id.*
90. *Id.*
91. *Id.* "[W]hilst the place where the initial damage manifested itself is usually closely related to the other components of the liability, in most cases the domicile of the indirect victim is not so related." *Id.*
92. Case C-68/93, 1995 E.C.R. I-415.

newspaper distributed primarily in France published an article about a U.K. national involving her alleged conduct while employed for a summer in Paris. When the individual and her French employer sued for defamation in England, where the law establishes a presumption of damage in libel cases, the French publisher challenged jurisdiction. The House of Lords referred the matter to the ECJ for a preliminary ruling on the application of Article 5(3) of the Brussels Convention. The ECJ found that the analysis in *Bier*,

> made in relation to physical or pecuniary loss or damage, must equally apply, for the same reasons, in the case of loss or damage other than physical or pecuniary, in particular injury to the reputation and good name of a natural or legal person due to a defamatory publication.[93]

The place of the event giving rise to the damage could only be the place where the publisher is established, and the courts of that state have jurisdiction "for all of the harm caused by the unlawful act."[94] The place where the damage occurred, on the other hand, "is the place where the event . . . produced its harmful effects upon the victim."[95]

While suit can be brought in a defamation action in either jurisdiction, the ECJ held that only the court of the publisher's establishment could award damages for all the harm. In other states, damages can be awarded only for the injury caused in the forum state to the plaintiff's reputation. Thus, the disadvantage of having different courts ruling on various aspects of the same dispute is possible, but "the plaintiff always has the option of bringing his entire claim before the courts either of the defendant's domicile or of the place where the publisher of the defamatory publication is established."[96]

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93. *Id.* at I-460.
94. *Id.* at I-461.
95. *Id.*
96. *Id.* at I-462. The ECJ elaborated as follows:
[T]he victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm

In 1995, the ECJ decided *Marinari v. Lloyds Bank.*[97] Mr. Marinari, an Italian domiciliary, was arrested as the result of a referral to the police by the Manchester branch of Lloyds Bank when he had lodged with them promissory notes issued by a province of the Republic of the Philippines in favor of a Beirut company with an exchange value of US $752.5 million.[98] When Marinari was released and returned to Italy, he brought suit for the exchange value of the notes that were not returned, and for compensation for damages suffered as a result of his arrest and damage to his reputation.[99] The bank objected to jurisdiction in the Italian court, and the matter ultimately was referred to the ECJ for a preliminary ruling by the Corte suprema di Cassazione.[100]

The ECJ reiterated its concern that an extension of the *Bier* principle would be contrary to the general principles of the Brussels Convention.[101] Thus, the term "'place where the harmful event occurred,'" although it covers "both the place where the damage occurred and the place of the event giving rise to it," has limits.[102] According to the ECJ, "that term cannot be construed as including the place where, as in the present case, the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State."[103] Thus, the extension of jurisdiction begun in *Bier* is limited to direct damage in the juris-

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caused in the State of the court seised.

Id.

97. Case C-364/93, 1995 E.C.R. I-2719.

98. *See id.* at I-2721.

99. *See id.*

100. *See id.*

101. *See id.* at I-2739. Specifically, the court stated:

> The choice thus available to the plaintiff cannot however be extended beyond the particular circumstances which justify it. Such an extension would negate the general principle laid down in the first paragraph of Article 2 of the Convention that the courts of the Contracting State where the defendant is domiciled are to have jurisdiction. It would lead, in cases other than those expressly provided for, to recognition of the jurisdiction of the courts of the plaintiff's domicile, a solution which the Convention does not favour since, in the second paragraph of Article 3, it excludes application of national provisions which make such jurisdiction available for proceedings against defendants domiciled in the territory of a Contracting State.

Id.

102. *Id.*

103. *Id.* at I-2740.

diction in which the initial damage is suffered.

C. *Summarizing the Language of Tort Jurisdiction Under Article 5(3)*

The language developed in *Bier* and its progeny to address the scope of Article 5(3) tort jurisdiction is both similar to and different from that developed in *International Shoe* and subsequent cases in the U.S. Supreme Court. Beginning with "'the place where the harmful event occurred,'" we find the extension to a plaintiff's option between "'the place where the damage occurred'" and "'the place where the event having the damage as its sequel occurred.'"[104] In *Dumez*, we see the emphasis on a "particularly close connecting factor between the dispute and [the] courts,"[105] and we come upon "indirect consequences" and the "indirect victim."[106] Ultimately, we see the other side of the coin, expressed as the "direct effect of the causal agent," and the place where the damage "directly produced its harmful effects upon the person who is the immediate victim of that event," in *Dumez*.[107] *Shevill* adds concepts of "sound administration of justice and the efficacious conduct of proceedings,"[108] and in *Marinari*, we find further limitation in the language, "financial damage consequential upon initial damage."[109]

IV. CROSS-CURRENTS OR CROSS-PURPOSES: RECONCILING DUE PROCESS WITH "THE STATE WHERE THE HARMFUL EVENT OCCURRED"

For a continental, civil law lawyer, the expansive aspect of *Bier* may seem unsurprising. There is logic in allowing suit where the harm is actually felt. While evidence of the defendant's conduct must be brought from outside the state in which the case will be heard, the evidence of damage will be within the jurisdiction, and both are necessary elements of an

104. Case 21/76, Bier v. Mines de Potasse d'Alsace, 1976 E.C.R. 1735, 1745, [1977] 1 C.M.L.R. 284, 299 (1976).

105. Case C-220/88, Dumez France and Tracoba v. Hessische Landesbank, 1990 E.C.R. I-49, I-79.

106. *Id.*

107. *Id.* at I-80.

108. Case C-68/93, Shevill v. Presse Alliance SA, 1995 E.C.R. I-415, I-459.

109. Case C-364/93, Marinari v. Lloyds Bank, 1995 E.C.R. I-2719, I-2740.

action in tort.[110] To an American more accustomed to the jurisprudence of due process, the decision in *Bier* raises obvious questions. The focus of our Supreme Court's decisions applying due process to questions of jurisdiction generally has not been on the connection between the court and the cause of action.[111] That is more often the subject of provisions of a "list type" state long-arm statute.[112] The due process focus is rather on the nexus between the defendant and the court claiming jurisdiction. This connection was not discussed in the *Bier* decision.

Both due process jurisprudence and the jurisdictional scheme of the Brussels Convention are based on the concept of protection of the defendant. Each is viewed by the principal court interpreting it as limiting the jurisdictions in which a defendant may be sued. With the Brussels Convention, this is accomplished in a three step process: (1) the basic rule of Article 2 provides that suit may be brought at the place of the defendant's domicile;[113] (2) Article 3 then prevents jurisdiction over Community defendants on the basis of exorbitant, plaintiff-friendly rules;[114] and (3) the specific jurisdictional rules contained in the remainder of Title II of the Convention (particularly those in Articles 5 and 6) are interpreted restrictively, to avoid jurisdiction in multiple locations.[115]

Due process analysis also allows suit at the defendant's place of domicile,[116] assuming of course that service of process results in actual notice. The limitations that follow are not as neatly catalogued as is the case in the Brussels Convention. Rather, we must rely on the language of a series of U.S. Su-

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110. *See* Case 21/76, Bier v. Mines de Potasse d'Alsace, 1976 E.C.R. 1735, 1746, [1977] 1 C.M.L.R. 284, 300 (1976) ("Liability in tort, delict or quasi-delict can only arise provided that a causal connexion can be established between the damage and the event in which that damage originates.").

111. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court did use language implicating this relationship, when it referred to the importance of "the relationship among the defendant, the forum, and the litigation" as "the central concern of the inquiry into personal jurisdiction." *Id.* at 204. The focus, particularly in regard to general jurisdiction, has been on the relationship between the defendant and the court.

112. *See supra* note 10.

113. *See* Brussels Convention, *supra* note 5, art. 2.

114. *See id.* art. 3.

115. *See id.* arts. 5-6.

116. *See* Milliken v. Meyer, 311 U.S. 457, 462 (1940).

preme Court decisions that demonstrate the flexibility of the common law.

Another similarity at this point is that both courts have chosen to define the basic concepts they are applying in terms of connecting factors. Article 5(3) will not provide jurisdiction except where there is a connection between the court and the dispute. Further, this connection must be direct, not indirect, and must relate to the harm initially suffered, rather than only some consequential harm. The connection in due process analysis lies between the court and the defendant. Thus the defendant-protection nature of the scheme of jurisdiction is more directly implicated in this aspect of the due process test than in the formulation of the Brussels test under Article 5(3).

A clear example of the difference between the analysis in *Bier* and U.S. due process analysis arises by applying the *Bier* analysis to the facts in *World-Wide Volkswagen*.[117] Taking the *Bier* test literally, if U.S. states operated under a Brussels Convention system, rather than the Full Faith and Credit and Due Process clauses of the U.S. Constitution, then a defective automobile causing an accident and injury in Oklahoma could lead to a case being brought: (1) at the domicile of the defendant under Article 2; (2) at the place where the automobile was manufactured (the event giving rise to the damage) under Article 5(3); or (3) at the place of the accident (the place where the damage occurred), all at the option of the plaintiff.

Thus, the literal language of the *Bier* decision would have allowed jurisdiction in Oklahoma over the New York distributor and retailer. This application of *Bier* to the facts of *World-Wide Volkswagen* demonstrates the jurisdiction limiting function of the Due Process Clause. The clause operates to restrict the plaintiff's choice of forum and thus protects the defendant. As the post-*Bier* cases demonstrate, there is a similar defendant-protection element in the structure of the Brussels Convention. Not only does Article 2 make the general rule jurisdiction in the state of domicile of the defendant, but Article 3 explicitly protects Community defendants from exorbitant, plaintiff-friendly jurisdictional bases otherwise available in the

117. A similar analysis of the facts of *Asahi* indicates that countries such as Italy, England and Japan would likely have assumed jurisdiction there where the U.S. Supreme Court found it inappropriate under a due process analysis. *See* Silberman, *supra* note 8, at 401-02.

Member States, and the principle of restrictive interpretation of the specific bases of jurisdiction that follow in Title II of the Convention further limits the availability of other forums to a plaintiff subject to the Convention.

While the language of the European cases focuses on the court's connection with the dispute, the rationale supporting that language focuses on the protection of the defendant. Thus, it is the lack of connection with the defendant (especially the lack of domicile of the defendant) that is the foundation for the post-*Bier* limitations on Article 5(3) jurisdiction. Like *International Shoe* in the United States, the *Bier* decision provided an apparent expansion of jurisdiction over foreign defendants. Both seem justified by aspects of modern society, whether it be the mobility of persons, the contacts of corporations with multiple states, or the consequences of modern commercial activity on a river that flows through more than one state. Like *World-Wide Volkswagen*, the post-*Bier* cases have demonstrated the limitations on that jurisdictional reach.

What we do not find in the language of the European cases are references to concepts of foreseeability. It is possible, perhaps, to describe the rules on both sides of the Atlantic in terms of: (1) contacts; and (2) fairness or reasonableness. While we are told that foreseeability is not the sole determinant in the United States, we are told that it is important.[118] We are not explicitly told that it has any role in the tort jurisdiction jurisprudence of the ECJ. Yet, it seems that the apparent problematic extensions of *Bier*, suggested above, can be tempered by a simple foreseeability gloss on that case. Certainly it was foreseeable on the *Bier* facts that one who dumps large quantities of saline into the Rhine river in France might be sued for damage caused when the water contaminated by the act was used for horticultural irrigation in the Netherlands; more foreseeable, for example, than that a New York auto dealer who sold an automobile to a New York resident in New York could be sued in Oklahoma for an accident involving that car that occurred in Oklahoma. The foreseeability in *Bier* was more than a possibility; it was a high probability. Contaminants put into the Rhine in France were likely to find their way to Holland and so should a resulting lawsuit. On the other hand, the

118. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

foreseeability in *World-Wide Volkswagen* was at best a mere possibility, and not a probability.

V. CONCLUSIONS FOR A MULTILATERAL JUDGMENTS CONVENTION

What conclusions, if any, can we draw from all this for a multilateral judgments convention? Can a tort jurisdiction provision build on similarities of language and concepts between the U.S. due process analysis for jurisdictional purposes and the ECJ's interpretation of Article 5(3) of the Brussels Convention? I think it can. While I will not recommend specific language here, there are several goals the provision should help achieve and at least two more specific aspects of the provision that may be suggested.

In terms of goals, the provision should combine with others to avoid the possibility of conflicting judgments. This will depend in part on the convention's approach to the question of *lis pendens*, but the bases of specific jurisdiction must also coordinate to avoid the possibility of multiple courts being seized of the same case. A second goal of the provision should be flexibility of application. The *Bier* decision and its progeny in Europe indicate the need for reasoned development of Article 5(3) of the Brussels Convention. The Hague Convention provision on tort jurisdiction should similarly avoid rigid formulations that are unreasonably inclusive or exclusive in nature.[119] A third goal should be a focus on direct injury when the court addressed is not that of the defendant's domicile or habitual residence. The ECJ's limitation of Article 5(3) jurisdiction for all damages to the state in which direct injury occurs is a rational limitation, consistent with the goal of avoiding conflicting judgments and providing reasonable protection of defendants.

The tort provision in the Hague Convention should set forth a jurisdictional test that includes two specific aspects, both of which should facilitate the three goals set forth above. First, the language should require a connection between the defendant and the forum state. This will satisfy both the U.S. Due Process Clause and the test under Article 5(3) of the Brus-

119. This is another reason for preferring a mixed convention approach. *See generally* von Mehren, *supra* note 4.

sels Convention. While it may appear to go beyond the current jurisprudence under Article 5(3), it is at least arguable that the connection between the court and the dispute that is important in the analysis of the ECJ is satisfied by and reasonably parallel to the connection between the court and the defendant. If we are to take seriously the ECJ's statements on the importance of protecting the defendant in the Brussels scheme of jurisdiction, then this approach certainly makes sense.[120] Second, the provision must encompass some concept of foreseeability of litigation. While the result in *Bier* does not "offend traditional notions of fair play and substantial justice," a literal extension of the language of that case would do so. Tempering its extension through a requirement of foreseeability of suit (in the nature of probability rather than possibility) would leave the *Bier*-type results intact, but avoid exorbitant extensions—consistent with the limitations on *Bier* found in subsequent European case law. This factor may also serve to fit the reasonableness and fairness element of the *International Shoe/World-Wide Volkswagen/Asahi* line of cases in the U.S. Supreme Court. Jurisdiction that by its nature is foreseeable, is unlikely to be unreasonable.

The problem, of course, will be in finding appropriate language (in both English and French) to take account of these factors. That I leave for the parties at the Hague Conference on Private International Law.

120. If we consider specific jurisdiction in the terms of U.S. decisions such as *Helicopteros*, then the relationship between the jurisdiction and the cause of action is important also in U.S. law. The court will consider the extent to which the cause of action arises out of the activities of the defendant in the forum state in order to exercise specific, rather than general, jurisdiction. *See supra* note 58. Thus, U.S. concepts of specific jurisdiction are described in language relatively similar to the ECJ's discussion of the relationship between the court and the dispute.