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# THE SINGLE CONTRACT AS MINIMUM CONTACTS: JUSTICE BRENNAN "HAS IT HIS WAY"

PAMELA J. STEPHENS\*

## I. INTRODUCTION

In the past ten years the Supreme Court has made major changes in its approach to personal jurisdiction.<sup>1</sup> The Court has forged two independently developed lines of cases into one standard<sup>2</sup> that depends upon *International Shoe Co. v. Washington*.<sup>3</sup> It has addressed personal jurisdiction concerns in the contexts of a single serious tort,<sup>4</sup> a child custody dispute,<sup>5</sup> personal injury liability insurance,<sup>6</sup> and a first amendment challenge.<sup>7</sup> Until 1985, however, the Court had failed, even when presented with the opportunity, to address personal jurisdiction limitations when a nonresident's contact with the forum state consists of a single contract rather than ongoing business activities.<sup>8</sup>

Unaided by the Supreme Court, lower federal and state courts have grappled with this issue and have reached widely varying results, supported by widely varying assumptions about the Supreme Court's current posture.<sup>9</sup> Those results range from a willingness to assert jurisdiction based solely on the existence of a contract be-

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1. For a general discussion of the Supreme Court's changes, see Jay, "*Minimum Contacts*" as a *Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C.L. REV. 429 (1981); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978).

2. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

3. 326 U.S. 310 (1945).

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

5. *Kulko v. Superior Court*, 436 U.S. 84 (1978).

6. *Rush v. Savchuk*, 444 U.S. 320 (1980).

7. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984).

8. See *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907, 909-10 (1980) (White, J., dissenting from denial of certiorari).

9. See *id.* (Justice White cited several examples); Note, *Long-Arm Jurisdiction in Commercial Litigation: When is a Contract a Contract?*, 61 B.U.L. REV. 375 (1981).

tween a resident and nonresident<sup>10</sup> to examinations not only of the contract itself, but also its surrounding circumstances. Courts have considered the relative bargaining power of the parties<sup>11</sup> and the nonresident's status as either the buyer or seller<sup>12</sup> or as the "passive" or "aggressive" party to the contract.<sup>13</sup> The assumptions range from an emphasis on sovereignty concerns and the purposefulness of the defendant's contacts with the forum state<sup>14</sup> to emphasis on reasonableness, fairness, inconvenience to the defendant, and the forum's interest in the litigation.<sup>15</sup>

In *Burger King Corporation v. Rudzewicz*,<sup>16</sup> the Supreme Court finally focused directly on the single contract issue and purported to establish a general standard for the assertion of personal jurisdiction in such cases.<sup>17</sup>

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10. See, e.g., *Mouzavires v. Baxter*, 434 A.2d 988 (D.C. 1981), cert. denied, 455 U.S. 1006 (1982).

11. See, e.g., *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079 (1st Cir. 1973).

12. *Leoni v. Wells*, 264 N.W.2d 646 (Minn. 1978). The court said, "However, our cases have delineated a sharp distinction between nonresident sellers and nonresident buyers. With respect to the latter, an isolated purchase of goods from a Minnesota seller will not by itself subject the buyer to the jurisdiction of Minnesota courts." *Id.* at 647.

13. See, e.g., *Republic Int'l Corp. v. Amco Eng'rs, Inc.*, 516 F.2d 161 (9th Cir. 1975).

14. Cases imposing relatively high standards for the assertion of personal jurisdiction tend to rely on the Supreme Court's decision in *Hanson v. Denckla*, 357 U.S. 235 (1958), and cases that follow *Hanson's* defendant-oriented approach. See, e.g., *Vencedor Mfg. Co. v. Gaugler Indus., Inc.*, 557 F.2d 886, 890 (1st Cir. 1977) (Chief Judge Coffin stated, "There is no doubt that *Hanson* reduces the potential sweep of *McGee*. . . ."); *Anderson v. Shiflett*, 435 F.2d 1036 (10th Cir. 1971) (After *Hanson*, a single contract by a defendant for plaintiff's unilateral performance of contracted personal service in the forum cannot support in personam jurisdiction.); *Southern Machine Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381-82 (6th Cir. 1968) (holding the purposeful availment requirement of *Hanson* to be the sine qua non for in personam jurisdiction).

15. Courts permitting jurisdiction on a lesser showing of contacts frequently rely upon *McGee* and its broad language regarding the fairness or reasonableness of asserting jurisdiction over a defendant who entered into a contract having a significant connection with the forum state. Some recent cases do not even cite *World-Wide Volkswagen* or its rigid two-tiered approach. See *Gold Kist Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375 (5th Cir. 1980); *Pedi Bares, Inc. v. P & C Food Mkts., Inc.*, 567 F.2d 933 (10th Cir. 1977); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972); see also *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149 (5th Cir. 1980); *Empress Int'l, Ltd. v. Riverside Seafoods, Inc.*, 112 Ill. App. 3d 149, 445 N.E.2d 371 (1983).

16. 105 S. Ct. 2174 (1985).

17. *Id.* at 2185. "At the outset, we note a continued division among lower courts respecting whether and to what extent a contract can constitute a 'contact' for purposes of due process analysis." *Id.*

This Article reviews the Supreme Court's post-*International Shoe* decisions to determine what, if any, guidelines the Court had given for personal jurisdiction in single contract cases prior to the *Burger King* case. It also examines lower federal court and state court decisions to establish the range of factual situations presented and the ways courts have dealt with them. The Article highlights the distinction drawn in the cases between specific and general jurisdiction. It also considers in detail the Supreme Court's decision in *Burger King* and its application to future single contract cases. Lastly, the Article focuses on how *Burger King* affects the law of personal jurisdiction as a whole, suggesting that, perhaps in spite of itself, the Court is moving away from sovereignty as the basis for due process concerns in the area and toward a multifactored analysis. Such an analysis considers not only the nonresident's right to a fair and convenient forum, but also the plaintiff's interest in bringing the case in a particular forum and the forum's interest in retaining jurisdiction. The Article also addresses implications for commercial transactions and the increased certainty of jurisdictional consequences.

## II. PERSONAL JURISDICTION IN CONTRACT CASES

### A. *The Supreme Court*

Since its 1945 decision in *International Shoe Co. v. Washington*,<sup>18</sup> the Court has struggled with its interpretation of the "minimum contacts" test. The test, as stated in *International Shoe*, had fairness and reasonableness as its ends, with a consideration of the defendant's contacts with the forum as a means to those ends.<sup>19</sup> The Court's earliest interpretation of the *International Shoe* test was consistent with that approach. *McGee v. International Life Insurance Co.*,<sup>20</sup> a 1957 case, involved a single contract between a California resident and a Texas insurance company. The Court, upon a showing of very slight contacts, found it reasonable for California to assert jurisdiction over the Texas insurance company,

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18. 326 U.S. 310 (1945).

19. *Id.* at 316-17.

20. 355 U.S. 220 (1957).

which maintained no offices, no sales staff, and otherwise did no continuous business in California.<sup>21</sup>

In *McGee*, the Court stressed the forum's strong interest in protecting its citizens (which California had manifested in its statute authorizing service of process on nonresident insurance companies)<sup>22</sup> and the plaintiff's interest in having the case heard in a convenient forum where he was likely to find key witnesses.<sup>23</sup> The conclusion that the defendant would experience little inconvenience also was relevant to the Court's analysis.<sup>24</sup>

Shortly after *McGee*, however, both the Supreme Court's view of the underlying purposes of the due process restrictions on personal jurisdiction and the test itself underwent a major shift in emphasis, if not in doctrine. This shift called into question the continued validity in *McGee*'s holding that a single contract satisfied the minimum contacts test.<sup>25</sup>

Between *Hanson v. Denckla*<sup>26</sup> in 1958 and the cases decided by the Court in 1980, it became increasingly clear that the Court viewed its *International Shoe* standard as a two-step analysis. In fact, in *World-Wide Volkswagen Corp. v. Woodson*,<sup>27</sup> the Court not only articulated this two-step process, but also stated the rationales underlying each stage.<sup>28</sup> The Court stated that any personal jurisdiction determination must first consider whether a nonresident defendant had minimum contacts such that he or she "purposefully availed" him or herself of the benefits and protections of the forum state.<sup>29</sup> To the extent that a defendant could reasonably

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21. *Id.* at 221-23.

22. *Id.* at 221.

23. *Id.* at 223.

24. *Id.* at 224.

25. See *Hanson v. Denckla*, 357 U.S. 235 (1958).

26. In *Hanson*, the Court refused to allow Florida to assert jurisdiction over a Delaware trustee whose sole contact with Florida was that the deceased creator of the Delaware trust moved to Florida and exercised a power of appointment over the trust while in Florida. *Id.* at 238, 251-52. The Court rejected the contention that, as the "center of gravity" of the dispute between the deceased's relatives, Florida was a fair and reasonable forum. *Id.* at 254. Instead, the Court emphasized that no state may assert jurisdiction over a nonresident defendant unless that nonresident has "purposefully availed" him or herself of the "benefits and protections" of the forum state. *Id.* at 253.

27. 444 U.S. 286 (1980).

28. *Id.* at 291-92.

29. *Id.* at 297.

foresee being "haled into court" in the forum state, that foreseeability is evidence of purposeful availment.<sup>30</sup> If such minimum contacts are present, *then and only then* should the reasonableness and fairness of the forum's assertion of jurisdiction be considered.<sup>31</sup> In making this latter determination, the interests of the forum and the plaintiff, as well as the potential burden on the defendant, are relevant.<sup>32</sup>

According to the Court in *World-Wide Volkswagen*, two functions underlie the minimum contacts analysis outlined above: "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."<sup>33</sup> Only the first of these functions, reduced to secondary importance under the Court's "contacts as threshold requirement" analysis, may easily be conceptualized in terms of traditional due process doctrines.<sup>34</sup>

Justice Brennan's dissenting opinion in *World-Wide Volkswagen* and *Rush v. Savchuk* criticized the majority's approach for focusing too "tightly" upon the existence of contacts between the defendant and the forum.<sup>35</sup> "In so doing," he contended, "they accord too little weight to the strength of the forum State's interest in the case and fail to explore whether there would be any actual inconvenience to the defendant."<sup>36</sup> The Court's approach thus failed to focus upon the "essential inquiry" of *International Shoe*, the question of "fair play and substantial justice."<sup>37</sup>

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30. *Id.*

31. *Id.* at 294.

32. *Id.* at 292.

33. *Id.*

34. For an excellent discussion of the flaws in the Court's due process analysis, see Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U.L. REV. 1112 (1981). Professor Redish stated, "One may wonder why a state lacking any interest in a controversy should be allowed to assert jurisdiction over it. But under our constitutional system, the inquiry is not why *should* a state be allowed to take an action, but why *shouldn't* a state be allowed to do so." *Id.* at 1134.

35. 444 U.S. 286, 299 (1980) (Brennan, J., dissenting).

36. *Id.* at 299-300.

37. *Id.* at 300.

Instead of the majority approach, Brennan suggested an approach that would find jurisdictional requirements satisfied when "the forum State has an interest in permitting the litigation to go forward, the litigation is connected to the forum, the defendant is linked to the forum, and the burden of defending is not unreasonable."<sup>38</sup> Brennan's view rejected the majority's defendant focus, which, he maintained, was inherited from *Pennoyer v. Neff*<sup>39</sup> and was based upon a model of society that is no longer accurate.<sup>40</sup>

Subsequently, the Court seemed to acknowledge that its reliance on notions of sovereignty and federalism in *World-Wide Volkswagen* may have been overstated, if not wrong. In *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*,<sup>41</sup> the Court stated:

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.<sup>42</sup>

Between *McGee* and *Burger King*, the Court did not address directly the issue of personal jurisdiction based on a single contract rather than on a single serious tort or a pattern of continuous business activity.<sup>43</sup> The Court's failure to do so when given the opportunity prompted Justice White to dissent to the denial of certiorari in one such case:

The question at issue is one of considerable importance to contractual dealings between purchasers and sellers located in different States. The disarray among federal and state courts noted above may well have a disruptive effect on commercial relations in which certainty of result is a prime objective. That disarray

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38. *Id.* at 302.

39. 95 U.S. 714 (1878).

40. 444 U.S. at 308-09.

41. 456 U.S. 694 (1982).

42. *Id.* at 703 n.10.

43. See *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907, 909-10 (1980) (White, J., dissenting from denial of certiorari).

also strongly suggests that prior decisions of this Court offer no clear guidance on the question.<sup>44</sup>

### B. *Disarray in the Lower Courts*

As Justice White's dissent in *Lakeside Bridge and Steel Co.* suggested, the lower federal and state court decisions regarding assertions of personal jurisdiction in contract cases evidence a great deal of confusion and disagreement.<sup>45</sup> The major source of confusion appears to be uncertainty concerning the continued viability of the *McGee* case. Those courts that treat *McGee* as evidencing a distinct rule for contract cases, a rule requiring a lesser showing of contacts, are much more willing to find personal jurisdiction based upon very slight contacts surrounding a single contract.<sup>46</sup> Those courts that appear to view *McGee* as an aberration or a precedent whose value has been diminished by subsequent case law tend to look for more contacts.<sup>47</sup> It may be most helpful to examine these lower federal and state cases in terms of the principal focus of each court, noting that the range of approaches forms a continuum of lesser to greater contacts, not distinct categories.

#### 1. *The Single Contract Alone as Minimum Contacts*

Although generally criticized and not widely followed, some cases hold that a nonresident who entered into a contract with a resident of the forum automatically subjected him or herself to the personal jurisdiction of the forum's courts.<sup>48</sup> For example, in *Pedi*

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44. *Id.*

45. For general discussions of these lower federal and state court cases prior to the Supreme Court's decision in *Burger King*, see Goodman, *Minimum Contacts and Contracts: The Breached Relationship*, 40 WASH. & LEE L. REV. 1639 (1983); Note, *Minimum Contacts in Contract Cases: A Forward Looking Reevaluation*, 58 NOTRE DAME LAW. 635 (1983); Note, *supra* note 9.

46. See, e.g., *Gold Kist Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375 (5th Cir. 1980); *Pedi Bares, Inc. v. P & C Food Mkts., Inc.*, 567 F.2d 933 (10th Cir. 1977); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972).

47. See, e.g., *Vencedor Mfg. Co. v. Gougler Indus., Inc.*, 557 F.2d 886 (1st Cir. 1977); *Anderson v. Shiflett*, 435 F.2d 1036 (10th Cir. 1971); *Southern Machine Co. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968).

48. See, e.g., *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149 (5th Cir. 1980); *Pedi Bares, Inc. v. P & C Food Mkts., Inc.*, 567 F.2d 933 (10th Cir. 1977); *Mouzavires v.*



*Bares, Inc. v. P & C Food Markets, Inc.*,<sup>49</sup> the United States Court of Appeals for the Tenth Circuit interpreted the Kansas long-arm statute to allow jurisdiction over a nonresident who signed a contract with a resident.<sup>50</sup> The court upheld the statute even though it was the resident plaintiff who solicited the sale to the nonresident defendant.<sup>51</sup>

## 2. Cases That Focus on Characterization of the Parties

Several cases focus upon the parties and their relationship to each other. In some cases, the determining factor appears to be whether the nonresident defendant was a buyer or a seller.<sup>52</sup> In other cases, the court's focus is on whether a party to the contract is aggressive or passive.<sup>53</sup> In buyer/seller cases, courts usually assume the model of aggressive seller and passive buyer, and find that a nonresident buyer's act of entering into a contract, without more, falls short of establishing the level of purposeful availment that would satisfy the minimum contacts test.<sup>54</sup> In the aggressive/passive cases, courts look beyond the labels of buyer and seller and focus instead on the actual relationship between the parties and

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Baxter, 434 A.2d 988 (D.C. 1981), *cert. denied*, 455 U.S. 1006 (1982). *But see* Jadair, Inc. v. Walt Keeler Co., 679 F.2d 131 (7th Cir.), *cert. denied*, 479 U.S. 944 (1982); Aaron Ferer & Sons Co. v. American Compressed Steel Co., 564 F.2d 1206 (8th Cir. 1977). State statutes allowing courts to base jurisdiction over a defendant on contacts arising out of a contract with a resident of the forum usually require more contacts than the contractual obligation before jurisdiction is allowed. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 1973); 4 TENN. CODE ANN. § 20-2-214 (1980); WIS. STAT. ANN. § 801.05(5) (West 1977).

49. 567 F.2d 933 (10th Cir. 1977).

50. *Id.* at 935.

51. *Id.* at 937.

52. *See, e.g.*, Electro-Craft Corp. v. Maxwell Elec. Corp., 417 F.2d 365 (8th Cir. 1969); McQuay, Inc. v. Samuel Schlosberg, Inc., 321 F. Supp. 902 (D. Minn. 1971); Rath Packing Co. v. Intercontinental Meat Traders, Inc., 181 N.W.2d 184 (Iowa 1970); Fourth Northwestern Nat'l Bank v. Hilson Indus., Inc., 264 Minn. 110, 117 N.W.2d 732 (1962); Darby v. Superior Supply Co., 224 Tenn. 540, 458 S.W.2d 423 (1970).

53. Republic Int'l Corp. v. Amco Eng'rs, Inc., 516 F.2d 161 (9th Cir. 1975); American Continental Import Agency v. Superior Court, 216 Cal. App. 2d 317, 30 Cal. Rptr. 654 (1963); Compania De Astral, S.A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954).

54. *See* Fourth Northwestern Nat'l Bank v. Hilson Indus., Inc., 264 Minn. 110, —, 117 N.W. 2d 732, 735-36 (1962); *see also* Electro-Craft Corp. v. Maxwell Elec. Corp., 417 F.2d 365 (8th Cir. 1969). The reason for distinguishing buyers and sellers is "that a nonresident seller subjects itself to the obligation of amenability to suit in return for the right to compete for sales in the Minnesota market. Such reciprocity does not apply to the nonresident buyer." *Id.* at 368.

their activities in preparation for entering into the contract.<sup>55</sup> Again, the purpose of such an inquiry is to determine whether the nonresident defendant purposefully availed him or herself of the benefits and protections of the forum.

### 3. *Single-Contract-Plus Analysis*

The vast majority of cases do not rely upon a single determinative factor, but instead look to all the circumstances surrounding the formation and performance of the single contract. These cases reject the notion that the contract alone establishes sufficient minimum contacts.<sup>56</sup> In addition to the nature and relationship of the parties, courts have considered the following contacts to be important: communications into the state, both by mail and by phone;<sup>57</sup> visits by a nonresident or an agent for purposes of training or inspection;<sup>58</sup> the expectation by the parties that performance (particularly in a manufacturing context) would occur in the forum state;<sup>59</sup> payments to be made to the plaintiff in the forum state;<sup>60</sup> and choice of law provisions designating that the forum's law be applied.<sup>61</sup> The case law does not reveal any pattern that will reliably predict a finding of sufficient contacts.

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55. See, e.g., *Republic Int'l Corp. v. Amco Eng'rs, Inc.*, 516 F.2d 161 (9th Cir. 1975) (involving an active buyer).

56. See, e.g., *Electro-Craft Corp. v. Maxwell Elec. Corp.*, 417 F.2d 365 (8th Cir. 1969); *Agrashell, Inc. v. Bernard Sirota Co.*, 344 F.2d 583 (2d Cir. 1965); *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956); *Oswalt Indus., Inc. v. Gilmore*, 297 F. Supp. 307 (D. Kan. 1969).

57. See, e.g., *Wisconsin Elec. Mfg. Co. v. Pennant Prods., Inc.*, 619 F.2d 676 (7th Cir. 1980); *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971); *Electro-Craft Corp. v. Maxwell Elec. Corp.*, 417 F.2d 365 (8th Cir. 1969).

58. *Wisconsin Elec. Mfg. Co. v. Pennant Prods., Inc.*, 619 F.2d 676 (7th Cir. 1980); *United States Ry. Equip. Co. v. Port Huron & D.R.R.*, 495 F.2d 1127 (7th Cir. 1974); *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079 (1st Cir. 1973).

59. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972).

60. *Burger King Corp. v. MacShara*, 724 F.2d 1505 (11th Cir. 1984), *rev'd on other grounds sub nom. Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985); *United States Ry. Equip. Co. v. Port Huron & D.R.R.*, 495 F.2d 1127 (7th Cir. 1974).

61. *Republic Int'l Corp. v. Amco Eng'rs, Inc.*, 516 F.2d 161 (9th Cir. 1975); see, e.g., *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971). *But c.f. Iowa Elec. Light & Power Co. v. Atlas Corp.*, 603 F.2d 1301, 1304 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Galgay v. Bulletin Co.*, 504 F.2d 1062, 1066 (2d Cir. 1974).

Given the generally accepted framework of the minimum contacts analysis, courts usually purport to consider the "nature and quality" of defendant's activities in the state.<sup>62</sup> In reality, however, the unfortunate consequence of this analysis has been a tendency toward quantifying the contacts rather than an examination of the quality of those contacts as *International Shoe* requires.<sup>63</sup> One can thus find cases with differing results in which the defendants engaged in very similar activities. Consider, for example, two Seventh Circuit decisions, *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*<sup>64</sup> and *Wisconsin Electric Manufacturing Co. v. Pennant Products, Inc.*<sup>65</sup> Personal jurisdiction was held proper in the latter but not in the former. In both cases, the only contacts of the nonresident defendants with the forum states were related to the contract at issue in the case. According to the Court of Appeals for the Seventh Circuit, the difference in result was attributable to visits to the forum by the defendant's agents in *Wisconsin Electric*. The court said, "The two visits by agents of the defendant to Wisconsin are enough, in our opinion, to distinguish this case from *Lakeside*."<sup>66</sup> The court made no attempt to explain why those visits sufficiently altered the defendant's relationship with the forum so as to make it a fair place for trial.<sup>67</sup>

These cases, as well as the cases in the preceding category, view the Supreme Court's position as emphasizing the limits imposed by territoriality and sovereignty concerns, and posit those concerns

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62. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945):

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. . . . 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.

63. See, for instance, *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079, 1082 (1st Cir. 1973), in which the court tallied up one defendant's contacts, five visits made by agents, sixteen documents, and twenty teletype and telephonic messages sent into the forum, and found those contacts sufficient to support personal jurisdiction. The court compared these contacts with another defendant's contacts, three visits, seven documents and nine teletype and telephonic messages, and held the latter defendant's contacts insufficient to support personal jurisdiction. *Id.*

64. 597 F.2d 596 (7th Cir. 1979), cert. denied, 455 U.S. 907 (1980).

65. 619 F.2d 676 (7th Cir. 1980).

66. *Id.* at 677.

67. *Id.* at 677-78.

as preliminary to any consideration of fairness and reasonableness. Even the courts that find personal jurisdiction apparently choose to view *Hanson* and succeeding cases as limitations on the broad jurisdictional reach of *McGee*.

#### 4. *Specific v. General Jurisdiction*

"Claim relatedness" of contacts, in the sense of the claim arising out of or being related to those activities that constitute a defendant's contacts with the forum, has been part and parcel of the minimum-contacts analysis since *International Shoe*.<sup>68</sup> That notion has been characterized by commentators,<sup>69</sup> and lately by the Supreme Court,<sup>70</sup> as one of specific versus general jurisdiction. Specific jurisdiction applies to a claim that arises out of the defendant's activities within the state. General jurisdiction may be asserted when the claim does not arise out of the defendant's contacts or activities in the state, but the defendant has engaged in continuous and systematic activity within the state.<sup>71</sup> Claim relatedness, therefore, impacts on the question of sufficiency of the defendant's contacts; more and "better" contacts are required when the claim is unrelated to those activities.<sup>72</sup>

This issue has seldom been addressed directly by lower courts in a contract setting. In *Hall v. Helicopteros Nacionales De Colombia*,<sup>73</sup> the Texas Supreme Court found sufficient contacts with

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68. In *International Shoe*, the court recognized that personal jurisdiction generally is allowed "when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on." 326 U.S. at 317.

69. See von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) (proposing specific and general jurisdiction as new terms and that a new methodology should replace the traditional in personam, in rem, and quasi in rem characterizations of jurisdiction).

70. *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414 (1984).

71. See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

72. According to the Court in *Helicopteros*, "[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation." 466 U.S. at 414. See also *International Shoe*, 326 U.S. at 318. ("[T]here 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.").

73. 638 S.W.2d 870 (Tex. 1982), *rev'd*, 466 U.S. 408 (1984).

Texas to support jurisdiction in an action arising out of a helicopter crash in Peru.<sup>74</sup> The defendant's contacts related to a contract for transportation services.<sup>75</sup> The United States Supreme Court reversed on the ground that the lower court sought to assert general jurisdiction, which required a greater showing of the defendant's contacts with Texas than was present on those facts.<sup>76</sup>

The action in *Helicopteros* was a tort claim, with jurisdiction based upon contract contacts.<sup>77</sup> That case failed to establish criteria for determining when, if ever, a single contract might serve as the basis for general jurisdiction in such a tort case. Nor did the case resolve the extent to which a single contract and surrounding circumstances would support an unrelated contract claim. The question is whether general jurisdiction and the long-arm statutes that provide for such jurisdiction are appropriate bases for jurisdiction in contract cases.

### 5. *Forum Selection Clauses*

Contract cases obviously differ from tort cases in that the parties may anticipate and provide for a forum in which any disputes between them may be resolved.<sup>78</sup> In *The Bremen v. Zapata Off-Shore Co.*,<sup>79</sup> the Supreme Court approved forum selection contract clauses unless the party objecting to the clause can meet the heavy

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74. *Id.* at 872.

75. *Id.* at 871. The plaintiffs were survivors of four United States citizens killed in a helicopter crash in Peru while working in that country constructing a pipeline. Helicol, the defendant, owned and operated the helicopter. The defendant's contacts with Texas were as follows: The defendant was contacted by one of the principals in the pipeline deal, a joint venture based in Houston, Texas, and asked to supply transportation for the project. In response, Helicol sent its general manager to Texas for negotiations. After reaching agreement on all terms, the parties finally executed the contract in Peru. Helicol did not maintain an office in Texas, had no designated agent for service of process in Texas, was not authorized to do business in Texas, performed no helicopter operations in Texas, and recruited no employees in Texas. *Id.*

76. 466 U.S. at 416.

77. Defendant's contacts with Texas consisted of sending its chief executive officer to Houston to negotiate the contract with the consortium involved; accepting into its New York bank account checks drawn by the consortium on a Texas bank; purchasing helicopters, equipment, and training sessions from a Texas manufacturer; and sending employees to that manufacturer's facilities for training. The contract in the case was executed in Peru. *Id.* at 410-12.

78. See *Republic Int'l Corp. v. Amco Eng'rs, Inc.*, 516 F.2d 161, 168-69 (9th Cir. 1975).

79. 407 U.S. 1 (1972).

burden of showing that its enforcement would be unreasonable, unfair, or unjust.<sup>80</sup> Lower courts have applied that decision without difficulty.<sup>81</sup>

Courts are more concerned about whether a choice of law provision in a contract should be given weight in determining if the defendant has submitted him or herself to the forum's jurisdiction.<sup>82</sup> If a consensus exists in the lower courts that have addressed this question, it seems to be that the "choice of law provision cannot be construed as a voluntary submission by [defendant] to the personal jurisdiction of the [forum] courts in the absence of any express contractual understanding to that effect."<sup>83</sup>

### III. *Burger King* CASE

In 1978, Brian MacShara suggested to John Rudzewicz, the senior partner in a Detroit accounting firm, that they apply to Burger King for a franchise in the Detroit area. MacShara proposed that he serve as restaurant manager and that Rudzewicz supply the investment capital, with an even split of the profits. Rudzewicz agreed and they filed a joint application for a franchise in Burger King's Birmingham, Michigan, district office in the fall of 1978.<sup>84</sup>

Burger King Corporation is a Florida corporation with its principal offices in Miami. The Rudzewicz-MacShara franchise application was forwarded to the Miami headquarters, which entered into a preliminary agreement with them in February 1979. Four months of negotiation ensued, with disputes centering on site-development fees, computation of monthly rent, and the assignment of the franchisees' liabilities to a corporation they had formed. Rudzewicz and MacShara negotiated with both the Birmingham district office and the Miami headquarters. Eventually, they signed the final agreements and commenced operations in an existing facility in Drayton Plains, Michigan.<sup>85</sup>

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80. *Id.* at 9-10, 12, 15.

81. *See, e.g., Republic Int'l Corp. v. Amco Eng'rs, Inc.*, 516 F.2d 161 (9th Cir. 1975).

82. *Id.* at 168.

83. *Agrashell, Inc. v. Bernard Sirotta Co.*, 344 F.2d 583, 588 (2d Cir. 1965).

84. *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174, 2179 (1985).

85. *Id.* at 2180. Under the final agreement, Rudzewicz obligated himself personally to payments exceeding \$1 million over the twenty-year franchise relationship. *Id.* at 2179.

The store prospered during the summer of 1979, but during the recession that fall business declined. Rudzewicz and MacShara were unable to make their monthly payments to Miami as scheduled. Headquarters notified them that they were in default, and, after negotiations between headquarters, the Birmingham office, and the franchisees failed to solve the problems, headquarters terminated the franchise and ordered Rudzewicz and MacShara to vacate the premises. After they refused and continued to operate as a Burger King, Burger King Corporation commenced a diversity action in the United States District Court for the Southern District of Florida in 1981.<sup>86</sup>

Burger King Corporation conducts approximately eighty percent of its business through franchises. It licenses franchisees to use its trademarks and service marks for twenty years and leases the restaurant facility to them for the same term. The franchise system also provides support and guidance in the form of market research, advertising management, accounting, cost-control, and inventory-control. Franchisees pay Burger King a \$40,000 franchise fee and commit themselves to pay monthly royalties, advertising and sales promotion fees, and rent computed on the basis of gross sales. The standard Burger King franchise agreement provides for oversight by the corporation; it also provides that the relationship is established in Miami and governed by Florida law, and it calls for all payments and any relevant notices to be sent to the Miami headquarters. However, the ten district offices perform the day-to-day monitoring of franchisees.<sup>87</sup>

Burger King's complaint against Rudzewicz and MacShara alleged that they had breached their franchise obligations "within [the jurisdiction of] this district court' by failing to make the required payments 'at plaintiff's place of business in Miami, Dade County, Florida,' and also alleged tortious infringement of its trademarks and service marks. . . ."<sup>88</sup> The complaint sought damages, injunctive relief, and costs and attorney's fees. Defendants

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86. *Id.* Burger King also invoked the court's federal question jurisdiction over federal trademark disputes pursuant to 28 U.S.C. § 1338(a). *Id.*

87. *See id.* at 2178-79 and the Court's conclusion that the district offices had "very little" decision-making authority which necessitated direct negotiations with the Miami headquarters. *Id.* at 2179 n.7.

88. *Id.* at 2180.

entered special appearances and argued that because they were Michigan residents and because Burger King's claim did not arise within the Southern District of Florida, the court lacked personal jurisdiction over them.<sup>89</sup>

The district court denied defendants' motions to dismiss and instead held that, pursuant to Florida's long-arm statute, "a non-resident Burger King franchisee is subject to the personal jurisdiction of this Court in actions arising out of its franchise agreements."<sup>90</sup> The district court relied upon Florida statutory language extending jurisdiction to "[a]ny person, whether or not a citizen or resident of this state," who inter alia "[b]reach[es] a contract in this state by failing to perform acts required by the contract to be performed in this state," as long as the cause of action arises from the alleged breach.<sup>91</sup> After the court denied their motions, Rudzewicz and MacShara filed an answer and a counterclaim alleging that Burger King had violated Michigan's Franchise Investment Law.<sup>92</sup>

The three-day bench trial ended with a judgment for Burger King on both counts, a damage award of \$228,875, and an order by the court to "immediately close Burger King Restaurant Number 775 from continued operation or to immediately give the keys and possession of said restaurant to Burger King Corporation."<sup>93</sup> The district court also found that defendants failed to prove their counterclaim and awarded costs and attorney's fees to plaintiff.<sup>94</sup>

Rudzewicz appealed to the Court of Appeals for the Eleventh Circuit, which reversed the district court's judgment.<sup>95</sup> The court of appeals noted that "the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida."<sup>96</sup> Therefore, the court continued,

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89. *Id.* Defendants were served in Michigan pursuant to Federal Rule of Civil Procedure 4. *Id.* at 2180 n.10.

90. *Id.* at 2180.

91. *Id.* at 2177 (citing FLA. STAT. § 48.193(1)(g) (Supp. 1984)).

92. *Id.* at 2180.

93. *Id.*

94. *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1508 (11th Cir. 1984), *rev'd on other grounds sub nom. Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985).

95. *Id.* at 1513.

96. *Id.*



"[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process."<sup>97</sup>

Rudzewicz and Burger King agreed to a compromise under which Rudzewicz waived his right to appeal the district court's finding of trademark infringement and its entry of injunctive relief.<sup>98</sup> Thus, the Supreme Court was not asked to address the extent to which the tortious-act provisions of Florida's long-arm statute constitutionally could extend to out-of-state trademark infringement, but rather was directed only to the question of that statute's constitutionally permissible reach in a contract setting.<sup>99</sup>

The Supreme Court's opinion first reaffirmed the roots of its current personal jurisdiction approach by citing *International Shoe's* minimum-contacts test. The Court quoted the *International Shoe* provision that the "Due Process clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations'."<sup>100</sup> The Court also acknowledged once again the specific versus general jurisdiction dichotomy that has appeared in its recent cases. The requirement that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign" is satisfied in the specific jurisdiction context if the defendant has "'purposefully directed' his activities at residents of the forum, . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities."<sup>101</sup>

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97. *Id.*

98. 105 S. Ct. at 2180 n.11. MacShara did not appeal his judgment. *Id.*

99. The Court initially declined to assume jurisdiction by appeal; instead, it granted petition for certiorari, holding that appellate jurisdiction under 28 U.S.C. § 1254(2) is properly invoked only where a court of appeals "squarely has 'held' that a state statute is unconstitutional on its face or as applied; jurisdiction does not lie if the decision might rest on other grounds." *Id.* at 2181 n.12 (original emphasis). The lower court here was unclear about the basis of the decision. *Id.*

100. *Id.* at 2181-82 (quoting *International Shoe*, 326 U.S. at 319). Interestingly, the Court referred to its decision in *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702-03 n.10 (1982), to reemphasize that "[a]lthough this protection operates to restrict state power, it 'must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause' rather than as a function 'of federalism concerns.'" 105 S. Ct. at 2182 n.13.

101. *Id.* at 2182 (quoting *Shaffer*, 433 U.S. at 218; *Keeton*, 465 U.S. at 774; and *Helicopteros Nacionales De Colombia*, 466 U.S. at 414).

In addressing contract cases in particular, the Court noted that, with respect to interstate contractual obligations, it had emphasized that "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other state for the consequences of their activities."<sup>102</sup> Rejecting the notion that jurisdiction may be avoided merely because the defendant did not physically enter the forum state, the Court stated that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a state in which business is conducted."<sup>103</sup> Under such circumstances, the absence of physical contacts will not defeat personal jurisdiction as long as the defendant has purposefully directed his or her activities toward the residents of another state.<sup>104</sup>

The Court continued to articulate its personal jurisdiction test in terms of two steps: "*Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'*"<sup>105</sup> Relevant to the latter determination are "the burden on the defendant," "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."<sup>106</sup>

Applying these principles, the Court determined that the district court correctly concluded that the assertion of jurisdiction over Rudzewicz did not offend due process.<sup>107</sup> That was so, the Court

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102. 105 S. Ct. at 2182 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)).

103. *Id.* at 2184.

104. *See generally id.* Interestingly, the Court spoke in terms of a "commercial actor's efforts," *id.*, suggesting as it did in *Kulko v. Superior Court*, 436 U.S. 84, 93 (1980), that personal or family disputes will require a different, perhaps more stringent, standard for assertions of personal jurisdiction.

105. 105 S. Ct. at 2184 (quoting *International Shoe*, 326 U.S. at 320 (emphasis added)).

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

107. *Id.* at 2185.

concluded, not because an individual's contract with an out-of-state party *alone* automatically can establish sufficient minimum contacts in the other party's home forum, but rather because this particular contract had a "*substantial* connection" with the state of Florida.<sup>108</sup> The Court indicated that judges should ascertain the nature of the connection by reference to "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing."<sup>109</sup> All of these factors "must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum."<sup>110</sup>

Despite Rudzewicz's lack of physical ties to Florida<sup>111</sup> (according to the record he had never even visited the state) the Court found that by "[e]schewing the option of operating an independent local enterprise, Rudzewicz deliberately 'reach[ed] out beyond' Michigan and negotiated with a Florida Corporation for the purpose of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization."<sup>112</sup> Moreover, the Court stated that Rudzewicz's refusal to make payments as required by contract and his continued use of the Burger King trademarks and confidential business information after notice of termination "caused foreseeable injuries to the corporation in Florida. For these reasons it was, at the very least, presumptively reasona-

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108. *Id.* at 2186 (quoting *McGee*, 355 U.S. at 223) (emphasis in *McGee*). "If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." *Id.* at 2185 (original emphasis).

109. *Id.* at 2186.

110. *Id.*

111. MacShara attended a brief training course in Miami at Burger King University. The court of appeals held that MacShara's presence in Florida was irrelevant to the question of Rudzewicz's minimum contacts with that forum because the two signed contracts with Burger King in their individual capacities. 724 F.2d at 1513 n.14. The Supreme Court was not sure whether that factor was determinative. The Court pointed out that the two franchisees did form a corporation (with which Burger King refused to deal), that they were required to decide which of them would attend the training sessions, and that the Court had previously noted that commercial activities "'carried on in behalf of' an out-of-state party . . . may sometimes be ascribed to the party." 105 S. Ct. at 2186 n.22 (quoting *International Shoe*, 326 U.S. at 320). The Court ultimately concluded, however, that MacShara's visit to Florida was not "pivotal" to the disposition of this case and therefore that it need not define the "permissible bounds of such attribution." *Id.* at 2186 n.22.

112. *Id.* at 2186 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)).

ble for Rudzewicz to be called to account there for such injuries.”<sup>113</sup>

The court of appeals had concluded that, in light of his extensive dealings with the Birmingham office, Rudzewicz had reason to believe that “the Michigan office was for all intents and purposes the embodiment of Burger King.”<sup>114</sup> He therefore had no “reason to anticipate a Burger King suit outside of Michigan.”<sup>115</sup> In rejecting that conclusion, the Supreme Court noted that the contract documents themselves emphasized that the Miami office was Burger King’s headquarters, that Rudzewicz was required to send all relevant notices and payments there, and that the agreements were made in and enforced from Miami.<sup>116</sup> In addition, the parties’ interactions while resolving disputes pre-contract and post-default confirmed that the franchisees knew that the Miami office made the key decisions.<sup>117</sup> Lastly, the Court placed particular weight on provisions in the various franchise documents that provided that all disputes would be governed by Florida law.<sup>118</sup> For example, one document provided in pertinent part:

This Agreement shall become valid when executed and accepted by BKC at Miami, Florida; it shall be deemed made and entered into in the State of Florida and shall be governed and construed under and in accordance with the laws of the State of Florida. The choice of law designation does not require that all suits concerning this agreement be filed in Florida.<sup>119</sup>

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113. *Id.* at 2186.

114. 724 F.2d at 1511.

115. *Id.*

116. 105 S. Ct. at 2186-87. “When problems arose over building design, site-development fees, rent computation, and the defaulted payments, Rudzewicz and MacShara learned that the Michigan office was powerless to resolve their disputes and could only channel their communications to Miami. Throughout these disputes, the Miami headquarters and the Michigan franchisees carried on a continuous course of direct communications by mail and by telephone, and it was the Miami headquarters that made the key negotiating decisions out of which the instant litigation arose.” *Id.* at 2187.

117. *Id.* at 2186-87.

118. *Id.* at 2187.

119. *Id.* (quoting App. 72). The Court acknowledged that in *Hanson v. Denckla*, it stated that “the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction,” but it denied that the language suggested that choice-of-law provisions should be ignored in determining purposeful availment. *Id.* at 2187.

The Court construed such contract language to support its notion that defendant had “‘purposefully availed himself of the benefits and protections of Florida’s laws’ by entering into contracts expressly providing that those laws would govern franchise disputes.”<sup>120</sup>

Finally, the Court addressed the reasonableness of the district court’s assertion of jurisdiction and concluded that the defendant had not “pointed to other factors that can be said persuasively to outweigh the considerations discussed above and to establish the *unconstitutionality* of Florida’s assertion of jurisdiction.”<sup>121</sup>

Justice Stevens, writing in dissent, found “a significant element of unfairness” in requiring this franchisee to defend a case of this kind in Florida:

It is undisputed that respondent maintained no place of business in Florida, that he had no employees in that State and that he was not licensed to do business there. Respondent did not prepare his french fries, shakes, and hamburgers in Michigan, and then deliver them into the stream of commerce “with the expectation that they [would] be purchased by consumers in” Florida. . . . To the contrary, respondent did business only in Michigan, his business, property and payroll taxes were payable in that state, and he sold all of his products there.<sup>122</sup>

The dissent found persuasive the majority opinion for the court of appeals. Justice Stevens agreed that Rudzewicz dealt almost exclusively with the Birmingham, Michigan, office, that the contract was to be performed in the state of Michigan, and therefore that Rudzewicz had no reason to anticipate a Burger King suit in Florida.<sup>123</sup> Thus, the dissent concluded, the assertion of jurisdiction would offend notions of fundamental fairness.<sup>124</sup>

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120. *Id.* (quoting 724 F.2d at 1513 (Johnson, J., dissenting)).

121. *Id.* at 2187-88 (original emphasis).

122. *Id.* at 2190 (Stevens, J., dissenting).

123. *Id.* at 2190-91. The circuit court stated, “Rudzewicz lacked fair notice that the distant corporate headquarters which insulated itself from direct dealings with him would later seek to assert jurisdiction over him in the courts of its own home state.” *Id.* (quoting 724 F.2d at 1511).

124. *Id.* at 2191. “The contracts contemplated the startup of a local Michigan restaurant whose profits would derive solely from food sales made to customers in Drayton Plains. The sale, which involved the use of an intangible trademark in Michigan and occupancy of a

IV. IMPLICATIONS OF *Burger King*A. *For Contract Cases*

Although the Court has left many questions unanswered, the *Burger King* decision offers lower courts some guidance in determining the validity of assertions of personal jurisdiction in contract cases. First, the Court rejected the notion that merely entering into a contract with a resident of the forum subjects a nonresident to the jurisdiction of the forum.<sup>125</sup> Those cases that have interpreted single-act long-arm statutes in such a manner are thus invalidated by the Court's decision.<sup>126</sup> Instead, the Court adopted what is characterized as a "highly realistic" approach that "recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of business transactions.'"<sup>127</sup>

Courts, then, should consider prior negotiations and future consequences surrounding a contract to determine whether the contract has a "substantial connection" with the forum. It appears that a nonresident defendant's participation in a contract that has a substantial connection with the forum will be sufficient to satisfy due process.<sup>128</sup> As the Court acknowledged, such an approach precludes clear-cut jurisdictional rules.<sup>129</sup> That seems contrary to the Court's position in *World-Wide Volkswagen* that the due process clause as manifested by the minimum-contacts test "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."<sup>130</sup> Surely, commercial transactions offer a setting in which predictability of consequence may be of paramount importance. Yet the Court disposes of this concern by repeating the oft-quoted

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<sup>1</sup>Burger King facility there, required no performance in the state of Florida." *Id.* (quoting 724 F.2d at 1511).

<sup>125.</sup> *Id.* at 4546.

<sup>126.</sup> See *supra* notes 48-51 and accompanying text.

<sup>127.</sup> 105 S. Ct. at 2185 (quoting *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943)); see *supra* notes 56-62 and accompanying text.

<sup>128.</sup> 105 S. Ct. at 2186.

<sup>129.</sup> *Id.* at 2189 n.29.

<sup>130.</sup> 444 U.S. at 297.

language that any inquiring into " 'fair play and substantial justice' necessarily requires determinations 'in which few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable.' "<sup>131</sup>

Perhaps the Court is less concerned with providing jurisdictional certainty because in contract situations, particularly those in a commercial context, the parties are free to determine the choice of forum in advance.<sup>132</sup> The franchise agreement at issue in *Burger King* did not include such a choice, but the tone of the Court's discussion, in particular its discussion of the agreement's choice-of-law provisions, seemed to hold the absence of such a forum selection against the defendant.<sup>133</sup>

The Court could reasonably have concluded that the absence of such a clause in contracts drafted by Burger King Corporation and containing several references to the use of Florida law indicated that Burger King did not consider Florida either the obvious or necessary forum choice. Surely, if all the parties, or Burger King alone, intended a Florida forum, they could easily have included a clause providing for it. One can argue, of course, that a court should not infer expectations or intent from the failure to include such a forum selection clause; its absence should be a neutral factor.<sup>134</sup>

The Supreme Court, however, held that references to the use of Florida law in the contract "standing alone would be insufficient to confer jurisdiction," but "when combined with the 20-year interdependent relationship Rudzewicz established with Burger King's Miami headquarters, it reinforced his deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there."<sup>135</sup> Lower courts are left to determine which factors, in addition to choice-of-law boilerplate in a commercial contract, will be sufficient to ascribe expectations to a nonresident who has not consented explicitly in a contract to a particular forum.

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131. 105 S. Ct. at 2189 n.29 (quoting *Kulko v. Superior Court*, 436 U.S. at 92).

132. See, e.g., *id.* at 2187-88 (Court's discussion of choice of law provisions).

133. *Id.*

134. See *supra* note 61.

135. 105 S. Ct. at 2187.

Of continuing concern is the scenario raised by the court of appeals in *Burger King* and underlying the buyer/seller cases.<sup>136</sup> The court of appeals argued that allowing jurisdiction over the defendants in *Burger King* would also allow the exercise of jurisdiction over "out-of-state consumers to collect payments due on modest personal purchases" and "sow the seeds of default judgments against franchisees owing smaller debts."<sup>137</sup> One wonders whether Sears, Roebuck and Company can gain jurisdiction in the northern district of Illinois over its nonresident consumer buyers who have a revolving charge account with the company and who contemplate a long-term relationship with Sears, and whether Sears can strengthen its case merely by including choice-of-law language in its contractual agreements with such customers. The Court's answer to this concern was only that it was not adopting a per se rule, even for franchise cases, and that consideration of the "quality and nature" of a defendant's activities can include considerations of possible "fraud, undue influence, or overreaching bargaining power."<sup>138</sup>

Perhaps most interesting for future personal jurisdiction determinations in contracts cases, the Court appears to have applied the effects test in some form to the facts of this case. The Restatement effects test grants jurisdiction to a state

over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individuals relationship to the state make the exercise of such jurisdiction unreasonable.<sup>139</sup>

This test has had a checkered history in the Supreme Court. In *Kulko v. Superior Court*, the Court rejected the test as inapplicable to the facts of the case since it only "was intended to reach wrongful activity outside of the State causing injury within the State."<sup>140</sup> Although the California Supreme Court relied on the effects test to find jurisdiction over Kulko, the United States Su-

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136. See *supra* notes 52-55 and accompanying text.

137. 724 F.2d at 1510, 1511.

138. 105 S. Ct. at 2189.

139. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971).

140. 436 U.S. at 96.



preme Court's dismissal of the test was rather summary. Some commentators concluded that the Court's rejection had implications beyond the noncommercial family law context of *Kulko*.<sup>141</sup>

In *World-Wide Volkswagen*,<sup>142</sup> a case which certainly would seem to trigger a discussion of the effects test, the Court did not consider it, thus lending credibility to the suggestion that the Court did not consider the effects test viable. The Court applied the effects test, however, in two 1984 decisions, *Calder v. Jones*<sup>143</sup> and *Keeton v. Hustler Magazine*,<sup>144</sup> both of which turned principally on the issue of whether the first amendment provided a substantive limitation on a court's exercise of personal jurisdiction in a libel case.<sup>145</sup> It concluded that "[j]urisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California."<sup>146</sup> At least one commentator has suggested that the Court's various approaches can be reconciled by limiting the use of the effects test to cases involving intentional wrongful conduct outside the forum, which causes an injury inside the forum.<sup>147</sup> Heretofore, that intentional conduct has been tortious.<sup>148</sup>

In *Burger King*, the Court never cited the effects test, but it did cite *Keeton* for the proposition that the "fair warning" to the defendant required by due process "is satisfied if defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities."<sup>149</sup> Moreover, the Court cited the defendant's failure to make required payments and his continued use of

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141. See, e.g., McDermott, *Personal Jurisdiction: The Hidden Agendas in The Supreme Court Decisions*, 10 VT. L. REV. 1 (1985).

142. 444 U.S. 286 (1980).

143. 465 U.S. 783 (1984).

144. 465 U.S. 770 (1984).

145. For a discussion of the substantive legal issues surrounding the possible use of the first amendment as a limitation on personal jurisdiction, see Comment, *Minimum Contacts and the First Amendment: When Should They Meet?*, 35 BAYLOR L. REV. 467 (1983).

146. 465 U.S. at 789 (emphasis added).

147. See McDermott, *supra* note 141 at 45-46.

148. See, e.g., *Calder v. Jones*, 465 U.S. 783 (1984) (tortious out-of-state conduct resulting in libel in forum state); *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984) (same); *World-Wide Volkswagen*, 444 U.S. at 297-98 (endorsing the result in cases like *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 432, 176 N.E.2d 761 (1961)).

149. 105 S. Ct. at 2182 (quoting *Keeton*, 465 U.S. at 774, and *Helicopteros Nacionales De Colombia*, 466 U.S. at 414).

Burger King's trademarks and confidential business information after termination as causing "foreseeable injuries to the corporation in Florida."<sup>150</sup> This resembles effects-test language: activity outside the forum causing injury inside the forum.

This use of the effects test is of little consequence for contracts cases, however. Contrary to statements in the literature, "effects" seem to represent only another type of contact. The effects test is not a substitute for the minimum-contacts test, but rather offers another way of demonstrating such contacts and the fairness and reasonableness of asserting jurisdiction over the absent defendant. In single-contract cases, harmful effects are only one of the circumstances surrounding the making and breaking of the contract that lead to litigation. Harmful effects supply the injury link, which allows the assertion of specific jurisdiction. That the defendant's intended actions had such foreseeable effects also may tend to reinforce a finding of "foreseeability . . . that he [would be] . . . haled into court" in that forum.<sup>151</sup>

### *B. For Personal Jurisdiction Generally*

In some ways, *Burger King* is a more interesting case for what it implies about personal jurisdiction generally than for what it implies about contract cases in particular. In the recent personal jurisdiction cases beginning with *Shaffer v. Heitner*,<sup>152</sup> two trends are apparent. First, the Court, attempting to articulate in a variety of factual settings a unified theory for all assertions of personal jurisdiction, has discarded, for the most part, labels such as in rem and in personam and substituted "general" and "specific" jurisdiction.<sup>153</sup>

Second, the cases apparently reflect an intent to limit expanding lower court interpretations of the minimum-contacts test. Hence, there has been a renewed emphasis on state sovereignty as a limit on assertions of personal jurisdiction.<sup>154</sup> This trend probably

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150. *Id.* at 2186.

151. *World-Wide Volkswagen*, 444 U.S. at 297.

152. 433 U.S. 186 (1977).

153. *See Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414-15 (1984).

154. *See supra* notes 25-33 and accompanying text.

reached its peak in 1980 with *World-Wide Volkswagen*<sup>155</sup> and *Rush v. Savchuk*.<sup>156</sup> In those cases, the Court emphasized that, absent contacts by the defendant, no showing of the defendant's lack of inconvenience or fairness to the plaintiff could serve to justify jurisdiction.<sup>157</sup> The Court stated, "The framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts."<sup>158</sup> However, the due process clause "does not contemplate that a state may make binding a judgment *in personam* against [a] . . . defendant with which the State has no contacts, ties or relations."<sup>159</sup>

Justice Brennan's dissent to *World-Wide Volkswagen* and *Rush* objected to the majority's bias in favor of the defendant contesting jurisdiction.<sup>160</sup> He accused the Court of losing sight of the reason for considering minimum contacts of a defendant, that is, to determine "whether the particular exercise of jurisdiction offends 'traditional notions of fair play and substantial justice.'"<sup>161</sup> Brennan suggested that the minimum-contacts test may be outdated and concluded that "constitutional concepts of fairness no longer require the extreme concern for defendants that was once necessary. Rather, . . . minimum contacts must exist among the *parties*, the contested transaction, and the forum State. The contacts between any two of these should not be determinative."<sup>162</sup>

In that context, it is significant that Justice Brennan wrote the majority opinion in *Burger King*. Although couched in traditional terminology and citing *World-Wide Volkswagen* throughout,<sup>163</sup> the opinion reflected Brennan's previously expressed concerns and ar-

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155. 444 U.S. 286 (1980).

156. 444 U.S. 320 (1980). *Rush* held invalid the *Seider* rule developed in New York and upheld by the Second Circuit. The rule stated that a contractual obligation of an insurance company to its insured was a debt subject to attachment in asserting quasi in rem jurisdiction. *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312 (1966).

157. *Rush*, 444 U.S. at 332.

158. *World-Wide Volkswagen*, 444 U.S. at 293.

159. *Rush*, 444 U.S. at 333 (quoting *International Shoe*, 326 U.S. at 319).

160. See *supra* notes 35-40 and accompanying text.

161. 444 U.S. at 300 (Brennan, J., dissenting) (quoting *International Shoe*, 326 U.S. at 316).

162. *Id.* at 309-10.

163. See, e.g., 105 S. Ct. at 2184, 2185, 2188 n.26.

guably shifted the focus of the Court's attention from the defendant toward a more multifactored analysis. This shift manifested itself in two ways. First, in the first stage of the analysis, the Court appears to have shifted the focus from the defendant's actual contacts with the forum to a consideration of the substantial connection of the franchise agreement itself with Florida<sup>164</sup> and the "manifest interest" of the forum in providing its injured residents with a convenient forum.<sup>165</sup> Second, Brennan echoed the contention in his dissent in *World-Wide Volkswagen* that a showing of contacts creates a presumption of reasonableness that the defendant must overcome in order to resist the forum's assertion of personal jurisdiction.<sup>166</sup>

The majority opinion did not reject the two-stage analysis spelled out by the Court in *World-Wide Volkswagen*, and in fact affirmed that "the constitutional touchstone remains whether defendant purposefully established 'minimum contacts' in the forum State."<sup>167</sup> However, the Court's review of personal jurisdiction began with the statement that the "Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations.'"<sup>168</sup> Next, the Court cited *Insurance Corp. of Ireland, Ltd. v. Compagnies Des Bauxites De Guinee*, seemingly moving away from the strong "federalism" emphasis of *World-Wide Volkswagen*.<sup>169</sup>

In spite of the obligatory citations of *World-Wide Volkswagen*<sup>170</sup> and *Hanson v. Denckla*,<sup>171</sup> the application of law to the facts of the case bears more resemblance to the analysis in *McGee*,<sup>172</sup> a case the Court obviously considers viable precedent,<sup>173</sup> than to the analysis in later cases. Like the dispute in *McGee*, the Court said that

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164. *Id.* at 2181-84.

165. *Id.*

166. *Id.* at 2183-85.

167. *Id.* at 2183.

168. *Id.* at 2181-82.

169. 456 U.S. 694, 702-03 n.10 (1982).

170. 444 U.S. 286 (1980).

171. 357 U.S. 235 (1958).

172. 355 U.S. 220 (1957).

173. "Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." 105

this "franchise dispute grew directly out of 'a contract which had a substantial connection with [the forum] state.'" <sup>174</sup> Looking at the contract itself, the Court found that its choice-of-law provisions indicated that Rudzewicz purposefully availed himself of the benefits and protections of Florida law, even in the absence of physical contacts. <sup>175</sup> Consistent with his view in *World-Wide Volkswagen*, <sup>176</sup> Justice Brennan appeared to evaluate the contacts in terms of what they implied about the fairness of asserting jurisdiction over the defendant. For example, rejecting the notion that Rudzewicz was operating a local Michigan enterprise, Brennan says that Rudzewicz "deliberately 'reached out beyond' Michigan and negotiated with a Florida Corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization." <sup>177</sup> Implicit in that language is the conclusion that the defendant was not the kind of local entrepreneur over whom assertions of jurisdiction might be unfair, but rather that he may fairly be held accountable in a Florida court.

The mixing of the fairness/reasonableness consideration and the contacts/sovereignty analysis simply may reflect the fact that the Court's attempt to separate these policies into two stages was unsuccessful. However, the majority opinion implies something else. In both the *World-Wide Volkswagen* dissent and the *Burger King* opinion, Brennan suggested that a proper application of the minimum-contacts test, one that looked to contacts "among the parties, the contested transaction and the forum State," <sup>178</sup> would create a presumption of reasonableness. A defendant could overcome this presumption only by showing "the presence of some other considerations [that] would render jurisdiction unreasonable." <sup>179</sup> Such a showing, Brennan reasoned, would seldom rise to the level of a constitutional concern. <sup>180</sup> Instead, the Court held, most such con-

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S. Ct. at 2183-84 (original emphasis) (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

174. 105 S. Ct. at 2186.

175. *Id.* at 2187.

176. 444 U.S. 286 (1980).

177. 105 S. Ct. at 2186.

178. *World-Wide Volkswagen*, 444 U.S. at 309-10 (emphasis added).

179. 105 S. Ct. at 2185.

180. *Id.*

siderations could be accommodated by other means; for example, "the potential clash of the forum's law with the 'fundamental substantive social policies' of another State may be accommodated through application of the forum's choice-of-law rules," or "a defendant claiming substantial inconvenience may seek a change of venue."<sup>181</sup>

While considerations of the defendant's inconvenience would seldom, in the Court's view, result in finding jurisdiction unconstitutional, the Court did indicate that consideration of other interests involved—the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient relief, and the judicial system's efficiency interest—may "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."<sup>182</sup>

Where does that leave personal jurisdiction analysis? To deemphasize the importance of the defendant's inconvenience, as the majority opinion does, is consistent with Brennan's expressed desire to move the analysis away from its pro-defendant stance. That stance, as he pointed out, is a remnant of *Pennoyer v. Neff*,<sup>183</sup> a throwback to the days when difficulty of travel and inadequacies of communication may have made suing defendant in a faraway forum inherently unfair in many or even most cases. Assuming, as the majority does, the continued viability of the minimum-contacts test, Brennan appears to have moved the Court ever so slightly toward a multifactored analysis, which considers contacts of all aspects of the litigation to the forum and the reasonableness of asserting jurisdiction based on those contacts. Such an analysis would not overemphasize the tabulation and evaluation of defendant's contacts with the forum. Instead, to the extent such contacts form any threshold to personal jurisdiction, the threshold would be an easy one to cross and the courts could then determine whether subjecting defendants to suit in the forum is fair and reasonable. The next logical step would be a recognition of the interrelation of contacts and reasonableness, as the Court first suggested in *Inter-*

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181. *Id.*

182. *Id.* at 2184.

183. 95 U.S. 714 (1877).

*national Shoe*.<sup>184</sup> Then the Court could eliminate the two-stage analysis of *World-Wide Volkswagen*<sup>185</sup> with its threshold contacts requirement and secondary consideration of fairness factors.

## V. CONCLUSION

*Burger King* represents a shift in the Court's approach. It remains to be seen whether *McGee* and *Burger King* represent only a special approach for contract cases, justified perhaps by the nature of contractual relationships and the potential for discerning parties' intentions and expectations regarding personal jurisdiction from their agreement. However, in making quite liberal use of the whole range of personal jurisdiction cases since *International Shoe*, it is suggested that the Court is speaking with relevance to the personal jurisdiction doctrine in general.

And what it is saying is that the Court will take a less pro-defendant stance, and, although the defendant's connection with the forum state remains a prerequisite for jurisdiction, it is a prerequisite easily met. The result is an emphasis on the fairness and reasonableness of the forum. Such fairness and reasonableness may even, the Court suggests, overcome what might otherwise be considered a tenuous connection between the defendant and the forum.

Such an analysis, with its emphasis on the interests of all the parties, the forum, and the judicial system itself, would bring the Court closer to the approach suggested forty years ago by the Court in *International Shoe*, and would be in accord with principles traditionally associated with the due process clause.

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184. 326 U.S. 310 (1945).

185. 444 U.S. 286 (1980).