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Traveling to The Hague in a Worn-Out Shoe

Friedrich K. Juenger*

American jurisdictional law is unique. Other nations—both in the civil and in the common law orbit—have national “long-arm statutes” that delineate the scope of general and specific jurisdiction. These foreign enactments enumerate, in a reasonably clear and concise fashion, the jurisdictional bases available for international litigation, while we rely on such vague and open-ended concepts as “minimum contacts” or “purposeful availment.” Even more importantly, abroad, jurisdiction is not considered to be a constitutional matter.

We are the only country to leave jurisdiction to a motley array of (frequently poorly drafted and construed) state statutes, whose application to specific cases is subject to a vacillating and confused Supreme Court case law. These differences between our jurisdictional notions and those that prevail in the rest of the world are rooted in history.

Civil law countries have long premised jurisdiction on a relationship between the dispute and the forum. In marked contrast, the English common law courts grounded jurisdiction on an official act: the service of process on the defendant. That act conferred *general jurisdiction*, so that a defendant who was served in England was amenable to the common law courts’ jurisdiction, whether or not he or the dispute had any contacts with the scepter’d isle. Those who could not be served in England could not be sued there, however strong the link of the dispute with England might be.

In the nineteenth century, however, it became apparent that these archaic jurisdictional notions no longer suited a country with far-flung commercial activities. Responding to felt necessities, the 1852 Common Law Procedure Act authorized a species of long-arm jurisdiction by conferring discretionary power to serve defendants abroad,¹ a scheme

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1. See Common Law Procedure Act, 1852, 15 & 16 Vict., c. 76, §§ 221, 227 (Eng.).

incorporated in Order 11 of the Rules of the Supreme Court, the United Kingdom’s “long-arm statute.”² Although framed—bowing to tradition—in terms of service of process, it in fact resembles the civil law approach in that it enumerates a list of bases for the exercise of general and specific jurisdiction.

American courts, however, not cognizant of the progress made in the United Kingdom, followed the common law tradition of considering the service of process within the forum as both necessary and sufficient. Amazingly, several decades after the U.K. reform, the Supreme Court, in *Pennoyer v. Neff*,³ not only endorsed that tradition but gave it constitutional stature. Supposedly, that was compelled by the newly adopted Fourteenth Amendment’s Due Process Clause, even though the Fourteenth Amendment’s purpose was the protection of individual liberties rather than state sovereignty.

Pennoyer caused much mischief. It was too broad because it permitted adjudication in states with which the defendant had little or no contacts, as *Grace v. MacArthur* drastically illustrated.⁴ At the same time, it was too narrow. Process servers could not stalk artificial entities that supposedly did not even exist outside the state of incorporation. To adapt the law to the normative force of fact, over the years the Justices condoned a number of contrivances to accommodate jurisdictional necessities, such as the fiction of an “implied consent”⁵ or an equally fictitious corporate “presence.”⁶ Both of these fictions allowed state courts to exercise *general* jurisdiction over corporations that were neither incorporated nor had their principal place of business in the forum.

Tired of fictions, the Supreme Court at long last laid down new principles in its 1945 landmark decision *International Shoe Co. v. Washington*.⁷ In effect, *Shoe* “civilized” *in personam* jurisdiction by recognizing that not only the magic act of service but also a relationship (which the Court confusingly dubbed “minimum contacts”) may enable the forum to adjudicate actions against nonresidents.⁸ Such a relationship exists, of course, whenever the defendant is a forum resident. In the case of a legal entity, the place where it is incorporated or has its principal place of business provides similarly close contacts.

2. See Rules of the Supreme Court, Order 11 (1962) (U.K.).

3. 95 U.S. 714 (1877).

4. See *Grace v. MacArthur*, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (upholding jurisdiction over defendant served while flying over forum state).

5. See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (upholding Massachusetts’ “implied consent” statute).

6. See, e.g., *St. Louis S.W. Ry. Co. v. Alexander*, 227 U.S. 218, 226 (1913) (analyzing a Texas corporation’s “presence” in New York).

7. 326 U.S. 310 (1945).

8. *Id.* at 316.

Despite this new and promising start, *Pennoyer* still rules us from its grave. That case's over-breadth remained intact—service within the forum remained a basis for general jurisdiction.⁹ Also, because *Shoe* endorsed the “implied consent” and “presence” cases, it failed to limit general jurisdiction—as other nations do¹⁰—over nonresident corporations to their principal place of business and the state of incorporation and authorized the exercise of general *in personam* jurisdiction as long as the defendant was “doing business” in the forum state.¹¹

Had the Justices taken the opportunity to glance at foreign jurisdictional practices—at least those prevailing in the United Kingdom—they could have seized the opportunity to align American law with world standards. But instead of drawing a sharp line between general and specific jurisdiction, the *Shoe* opinion envisaged a spectrum of activities ranging from “continuous and systematic” to “single or isolated” acts.¹² Whereas the latter would at best confer specific jurisdiction, the former might authorize the forum to adjudicate causes of action that are unrelated to the defendant's forum activities.

As could have been expected, these weasel words have caused, and to this day continue to cause, serious problems in practical application. Another shortcoming of the *Shoe* opinion is that it left intact tag jurisdiction, to which the Court gave a new lease on life in *Burnham v. Superior Court*.¹³ In consequence, we now have two types of exorbitant general jurisdiction: tag jurisdiction and “doing business” jurisdiction, the second of which cannot even be defined.

Nor does specific jurisdiction present a much rosier picture. Verbiage such as “purposeful availment”¹⁴ or “purposeful direction,”¹⁵ used by the Justices in a series of vacillating and usually split opinions embellishing on *Shoe*'s “minimum contacts,” merely added further confusion. To this day, the Supreme Court has given little guidance on precisely where the line between general and specific jurisdiction over foreign entities should be drawn.

9. See *Burnham v. Superior Court*, 495 U.S. 604, 609 (1990).

10. See Friedrich K. Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1207-08 (1984).

11. See *Int'l Shoe*, 326 U.S. at 317-19.

12. *Id.*

13. 495 U.S. 604 (1990).

14. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

15. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion).

Fifty-five years after *Shoe*, we still do not know when states may assert general jurisdiction over nonresident corporations. Only one Supreme Court decision rendered after *Shoe*, *Perkins v. Benguet Consolidated Mining Co.*,¹⁶ explicitly condoned a state court's exercise of general jurisdiction. But given the unique facts of *Perkins*, this precedent sheds little light on the potential scope of general jurisdiction.¹⁷ In *Helicopteros Nacionales de Colombia, S.A. v. Hall*,¹⁸ the Court dealt with but ultimately rejected the assertion of general jurisdiction. The remarkable aspect of this case is not the majority opinion but Justice Brennan's dissent. In spite of the defendant's tenuous relationship with the forum, he argued that the Texas court could have asserted not only specific but general jurisdiction as well.¹⁹

The Court's skimpy case law leaves unanswered a number of obvious questions. Can anyone injured anywhere by a car manufactured in Wolfsburg, Germany, sue the Volkswagenwerke AG in whatever state offers the best recovery? And, do a subsidiary's activities render the parent amenable to general jurisdiction on any cause of action, wherever it might have "arisen?"

The *Restatement (Second) of Conflicts* is of no help, because it merely reiterates what the Supreme Court said in *Shoe*:

A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise jurisdiction.²⁰

The *Restatement (Second) of Judgments* simply incorporates the *Restatement (Second) of Conflicts* by reference.²¹ Similarly, the *Restatement (Third) of Foreign Relations Law* would subject any foreign individual or entity to general jurisdiction if he, she, or it "regularly carries on business in the state."²² While they purport to set forth principles of international law, the Reporters fail to mention the discrepancy between American and foreign views on that point.

As might be expected, when the American delegation met with the members of the Hague Conference on Private International Law, our

16. 342 U.S. 437 (1952).

17. During the Japanese occupation of the Philippines, the only "presence" the defendant Philippine corporation could be said to have anywhere was in Ohio, from where its president conducted its activities. *See id.* at 447-48.

18. 466 U.S. 408 (1984).

19. *Id.* at 423-24 (Brennan, J., dissenting).

20. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 47(2) (1971).

21. RESTATEMENT (SECOND) OF JUDGMENTS § 5 (1982).

22. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421(2)(h) (1987).

reliance on “doing business” jurisdiction (which has been roundly criticized even in American law journals), struck the representatives of other nations as strange. It was as if we tried to sell to other nations the institution of an Electoral College.

Such resistance is understandable if one considers that jurisdictional quirks are not our only peculiarity. No other country routinely tries civil actions to a jury or authorizes discovery to the extent we do. Most outlaw contingent fees, and many follow the “English rule” that loser pays all.²³ These facets of American practice result in judgments that boggle foreign lawyers’ minds. It could therefore hardly be expected that vague and undefined rules that subject foreign parties to jurisdiction in the U.S. would be easy to sell.

Both tag and “doing business” jurisdiction were relegated to Article 18’s list of outlawed exorbitant bases in the current draft convention, which provides, in relevant part, as follows:

Prohibited grounds of jurisdiction

1. Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and the dispute.

2. In particular, jurisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the following —

.....

e) the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities;

f) the service of a writ upon the defendant in that State. . . .²⁴

23. See *Smith Kline & French Labs., Ltd. v. Bloch*, [1983] 2 All E.R. 72, 74 (Eng. C.A.) (Denning, M.R.) (observing that “[a]s a moth is drawn to the light, so is a litigant drawn to the United States”); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981) (noting reasons that U.S. courts are attractive to plaintiffs).

24. Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Art. 18, available at <http://www.hcch.net/e/conventions/draft36e.html> [hereinafter Draft Convention].

The accompanying report by Professors Peter Nygh and Fausto Pocar explains the reasons for including “doing business” general jurisdiction in Article 18 as follows:

This ground of jurisdiction gave rise to considerable discussion . . . partly because of the difficulty of deciding exactly how far such a flexible connection, one which has to be appraised by the court in each particular case, can be said to extend . . . in . . . situations . . . when the claim has no specific relationship with the activity carried on by the defendant in the State. . . . [T]here is a significant margin of uncertainty in applying it, because of the difficulty of determining the quality and quantity of activity which is needed. . . .²⁵

The Report does, however, leave room for a compromise. Despite the vagueness of the term “doing business,” which is anathema to civilian jurists, the Report would not outlaw it entirely. Instead, the Reporters suggest its use for purposes of specific jurisdiction: “[T]ransacting business’ . . . may reflect a sufficient link between the dispute and the State in which the activity is carried on. . . .”²⁶

However, neither this compromise solution nor the drafters’ attempts to devise more precise jurisdictional provisions than our amorphous “minimum contacts” cum “purposeful availment/direction,” are apt to satisfy those who have a practical interest in jurisdictional matters. Thus the U.S. Department of State’s representative sent a letter to the Secretary General of the Hague Conference in which he criticized various aspects of the draft convention. He wrote, in pertinent part, as follows:

We believe that unless there is a clear, well-defined permitted area of jurisdiction that allows for growth and development in the future, the convention will not have the flexibility it needs to meet the requirements of a changing world. In our view, there should be . . . a substantial permitted area. . . . Regrettably, the current draft creates rigid principles and factors for prohibiting jurisdiction. . . . We detected very limited support for [the draft’s rules on “transacting business”]. . . . Yet even that language may not go far enough to satisfy the litigating bar. . . .²⁷

25. Peter Nygh & Fausto Pocar, Report of the Special Commission 77 (Prelim. Doc. 11), available at <http://www.hcch.net/e/workprog/jdgm.html>.

26. *Id.* at 78.

27. Letter from Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, to J.H.A. Loon, Secretary General, Hague Conference on Private International Law 5, 7 (Feb. 22, 2000) (on file with Professor William S. Dodge).

This language suggests that the State Department is not only concerned about a possible rejection of the draft convention's "transaction of business" provision but would also like to remove "doing business" general jurisdiction from the list of exorbitant bases. In later testimony before a House subcommittee, the Assistant Legal Adviser for Private International Law stated that "after extensive consultations with industry and consumer groups, the private bar, and with government litigators, the Department of State concluded that . . . [the draft convention] is not close to being ratifiable in the United States and cannot be an effective vehicle for final negotiations."²⁸ While insistence on American-style general jurisdiction was not the only reason for this assessment, concerns about limiting its sway did play a role. The State Department's consultations with interested groups revealed their disenchantment with provisions of the draft convention that would curtail either *Pennoyer* tag jurisdiction or protect foreign corporations from American long-arm legislation.

The concern about shortening the long arm is not entirely unreasonable.²⁹ In practice, jurisdictional exorbitance does have its virtues. It can be used as a powerful means of vindicating the interests of parties who have suffered at the hands of foreign torturers and corporations that employed slave labor. In fact, the Hague Conference did take into account the concerns of human rights groups over losing the jurisdictional means to accomplish this end. Proposals that would preserve this means are included as bracketed provisions in Article 18 of the current draft.³⁰ I leave it to others who are better equipped to discuss these reservations and their prospects. I may, however, note parenthetically, that the bracketed text is not limited to tag and "doing business," but includes a panoply of other jurisdictional bases, notably the presence of assets belonging to the defendant within the forum, the nationality of either party, plaintiff's domicile or simple choice, and the defendant's mere presence. With one exception, these options are, however, of no use in an American court as they are at odds with the constitutional constraints our Supreme Court has established.

The possible exception is asset-based jurisdiction. *Shaffer v. Heitner*³¹ meant to abolish the kind of *quasi in rem* jurisdiction that allows the seizure

28. Testimony of Jeffery D. Kovar, Assistant Legal Adviser for Private International Law, U.S. Department of State, Before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives (June 29, 2000), available at http://www.house.gov/judiciary/kova0629.htm#_ftnref2.

29. For some questions about the need for a judgments convention in the United States, see Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111 (1998).

30. See Draft Convention, *supra* note 24, Art. 18(3).

31. 433 U.S. 186 (1977).

of property belonging to the defendant to serve as the foundation for a lawsuit that might deprive the defendant of his rights. In a cryptic footnote, however, the Court left open the possibility of using asset-based jurisdiction “when no other forum is available.”³² Arguably, that would permit the exercise of full *in personam* jurisdiction that is not limited to the value of the assets seized. The panoply of possibilities available to plaintiffs to seek damages for human rights violations is exceedingly broad. In practical application it would amount to universal judicial jurisdiction. The Supreme Court, however, has long since foreclosed this possibility by its “minimum contacts” test, which, being supposedly based on the Due Process clause, cannot be amended by treaty. Once again, at the Hague Conference we find ourselves at odds with the rest of the world.

The Supreme Court got us into this mess and, because it constitutionalized jurisdiction, only the Justices can get us out of it. But that too seems unlikely. It took the Court sixty-seven years to discard the obviously misguided *Pennoyer* principles. For the next fifty-five years it struggled, less than successfully, to make those it adopted in the *Shoe* case work. The Justices, however, seem disinclined to resort to the comparative method in the interest of law reform, something they failed to do in both of these cases. Justice Breyer’s dissent in *Printz v. United States* said that “we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. . . . But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem. . . .”³³ In a footnote, Justice Scalia roundly rebuffed Justice Breyer’s suggestion:

JUSTICE BREYER’s dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution. . . . The fact is that our federalism is not Europe’s. It is “the unique contribution of the Framers to political science and political theory.”³⁴

‘nuff said.

32. *Id.* at 211 n.37.

33. 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

34. *Id.* at 921 n.11 (quoting *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring)).