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Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension

Linda J. Silberman

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ABSTRACT

In this Article, Professor Silberman suggests that comparative law materials can usefully be introduced in the conflict of laws course. She proposes the subject of adjudicatory jurisdiction as a good place to start. She argues that a comparison of the U.S. approach with the English and European approaches (particularly under the Brussels Convention) is evidence of the desirability of a jurisdictional system grounded more on rules and/or discretion rather than on a constitutional standard of reasonableness. She takes issue with the contention of her colleague Professor Andreas Lowenfeld that "reasonableness" has been accepted as an international standard for the assertion of jurisdiction, and she maintains that the English and Europeans show a strong preference for greater jurisdictional precision. Concerns for fairness, she contends, are best treated as matters of discretion and not constitutional principle. The Article concludes that the comparative study of jurisdictional rules not only expands students' knowledge by introducing them to the laws of other countries but also promotes a more informed evaluation of the jurisdiction law of the United States.

Professor Lowenfeld appends a brief response.

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* Professor of Law, New York University School of Law; B.A., University of Michigan, 1965; J.D., University of Michigan, 1968. An earlier version of this paper was delivered at the 1995 American Association of Law Schools Conflicts Panel on January 6, 1995.

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Increasing globalization has and will continue to have an impact on conflict of laws courses.[1] Recent editions and revisions of major conflicts casebooks[2] reflect an increased use of comparative material[3] and also include international law subjects

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1. Indeed, many laws schools now offer more specialized courses or seminars on the issues involved in transnational litigation. A course in international civil litigation will usually cover subjects such as extraterritorial jurisdiction, jurisdiction to adjudicate, international arbitration, taking discovery abroad, suits against foreign states (foreign sovereign immunity), and the act of state doctrine. The arrival of several texts and casebooks on the market should increase the prevalence of transnational litigation courses in the curriculum. *See* GARY B. BORN & DAVIS WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (2d ed. 1992); ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION (1993); RUSSELL J. WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION (1994). The author reviews these texts in Linda J. Silberman, *International Litigation: A Teacher's Guide*, 89 AM. J. INT'L L. 679 (1995) (review article).

2. *See* LEA BRILMAYER, CONFLICT OF LAWS (4th ed. Little Brown 1995); ROGER C. CRAMTON, DAVID P. CURRIE, HERMA HILL KAY, LARRY KRAMER, CONFLICT OF LAWS (5th ed. West 1993); ANDREAS F. LOWENFELD, CONFLICT OF LAWS (Matthew Bender 1986); WILLIS L.M. REESE, MAURICE ROSENBERG, PETER HAY, CASES AND MATERIALS ON CONFLICT OF LAWS (9th ed. Foundation Press 1990).

3. Professor Lowenfeld's conflict of laws casebook, *supra* note 2, has by far the most comparative material. He often includes the foreign counterpart of parallel litigation such as the parallel English litigation in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)—Unterweser Reederei G.M.B.H. v. Zapata Off-Shore Company, [1968] 2 LLOYD'S REP. 158 (U.K. C.A.), and the French decision, Maccoun/Watts v. Lanari/Meyer, Court of Appeal, Aix-en Provence (Oct. 22, 1964), relied upon by the New York Court of Appeals in Watts v. Swiss Bank Corporation, 27 N.Y.2d 270 (1970), to preclude relitigation of the issue of applicable law in a forced heirship claim. Professor Lowenfeld's book also contains substantial sections (including cases) on judicial jurisdiction and

such as extraterritorial jurisdiction,[4] international arbitration,[5] and the act of state doctrine.[6] From the teaching perspective, it is not always clear how to integrate such materials into the basic course, particularly when conflicts is taught as a three-credit course. With respect to the specific treatment of judicial jurisdiction, the pedagogical dilemma is compounded because that subject is often taken up extensively in the first-year civil procedure course. The key is to avoid rehashing traditional jurisdiction doctrine and to reassess the jurisdictional rules in light of choice of law learning. My own technique is to have the students review the basic jurisdictional cases[7] on their own. I

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recognition of judgments in the European Union. A document supplement includes examples of United Kingdom jurisdiction and judgments provisions, as well as several international conventions (*e.g.*, the European Economic Convention on the Law Applicable to Contractual Obligations, the European Economic Convention on Jurisdiction and the Enforcement of Judgments, and the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards).

More limited offerings appear in other books. Cramton-Currie-Kay-Kramer, *supra* note 2, has a short section on the European perspective on choice of law; the Reese-Rosenberg-Hay book, *supra* note 2, includes a lengthy comparative perspective with respect to choice of law in contracts.

4. Professor Lowenfeld's book, *supra* note 2, devotes a separate chapter ("Conflict of Laws on the International Stage") of over one hundred pages to the subject, consciously bringing together the fields of conflict of laws and certain aspects of international law. The new edition of the Brilmayer book devotes a last chapter to "Conflicts in the International Setting," which includes not only the issue of the extraterritoriality of federal statutes but also of the Constitution; in addition Professor Brilmayer offers a section on universal/passive personality jurisdiction. A less extensive, but equally creative, effort is found in the Cramton-Currie-Kay-Kramer materials, *supra* note 2, (using two traditional cases on jurisdiction to prescribe and one constitutional Fourth Amendment case, the latter raising the extraterritorial reach of the U.S. Constitution). The Reese-Rosenberg-Hay book, *supra* note 2, also contains a short section on extraterritorial application of United States law.

5. Both the Lowenfeld and Reese-Rosenberg-Hay books, *supra* note 2, include short sections on international commercial arbitration.

6. The Reese-Rosenberg-Hay materials contain a section entitled, "International Conflicts Cases and the Federal Control of Foreign Affairs," and include *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), along with other cases. The Cramton-Currie-Kay-Kramer book also has a section on the act of state doctrine, which offers *Sabbatino* as well as the more recent *W.S. Kirkpatrick v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990). Professor Lowenfeld's last chapter on "Conflict of Laws on the International Stage" includes material on regulatory conflicts, such as the *Fruehauf* matter (involving the United States Treasury's Foreign Assets Control Regulations), and the act of state doctrine.

7. The basic jurisdictional cases include: International Shoe v. Washington, 326 U.S. 310 (1945); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958); World Wide Volkswagen Corp. v. Woodson, 44 U.S. 286 (1980); Keeton v. Hustler Magazine, Inc., 465 U.S.

then use class discussion time to focus on the most recent Supreme Court cases that involve foreign defendants—*Helicopteros Nacionales de Colombia v. Hall*[8] on general jurisdiction and *Asahi Metal Industry Co. v. Superior Court*[9] on specific jurisdiction. With respect to the more traditional interstate emphasis, I turn my attention to the interrelationship of jurisdiction and choice of law, which itself offers a rich field for discussion.[10]

I. LOOKING AT TRANSNATIONAL ACTIVITIES IN UNITED STATES COURTS

The teaching of *Helicopteros* and *Asahi* is a perfect segue for the conflict of laws professor to bring both a transnational and comparative dimension to the conflicts course. A number of themes emerge. The issue of whether jurisdictional standards are the same or different when the defendant is from a foreign country inevitably arises as part of the discussion of the two cases. It is certainly possible to read the ever-puzzling *Asahi* decision as establishing a specialized jurisdictional standard protective of alien defendants, and the amicus brief filed in that case by the American Chamber of Commerce in the United Kingdom and the Confederation of British Industry took precisely that position.[11] Cases since *Asahi* suggest, however, that the

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770 (1984); and Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). Most casebooks include some, but not all, of these cases as principal cases, with coverage of the omitted cases left to text and note material.

8. 466 U.S. 408 (1984).

9. 480 U.S. 102 (1987).

10. My particular take on this subject is expressed in other writing. *See* Shaffer v. Heitner: *The End of An Era*, 53 N.Y.U. L. REV. 33, 79-90 (1978); *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After* Allstate Insurance Co. v. Hague, 10 HOFSTRA L. REV. 103, 114-19 (1981); *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 583-90 (1991).

For other commentary on the subject, *see* Peter Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9 (1988); Harold G. Maier & Thomas McCoy, *A Unifying Theory of Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249 (1991); Wendy Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529 (1991); Courtland Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. COLO. L. REV. 37 (1988); Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67 (1988).

11. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1987); Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 509 (1993) [hereinafter Silberman, *Developments in International Litigation*].

"reasonableness" prong of the *Asahi* test has not been limited to foreign defendants.[12] In domestic cases, courts also appear to look first at "contacts" and then at "reasonableness," but it is not clear that the "reasonableness" inquiry has added much to the traditional "minimum contacts" test. When courts find the contacts sufficient under the circumstances, they almost always find the assertion of jurisdiction to be reasonable.[13]

As to the developing case law concerning foreign defendants, the reported cases indicate that jurisdiction can usually be asserted over foreign defendants that do not market directly to the forum state if they use distributors in other states of the United States to serve the forum market.[14] There are cases to the contrary, however, particularly when the foreign defendant sells to a U.S. distributor who takes delivery abroad.[15] In addition,

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12. *See* Stephen B. Burbank, *Practice and Procedure: The World in Our Courts*, 89 MICH. L. REV. 1456, 1468-71 (1991) (book review); GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 78 (2d ed. 1992).

13. *See* Linda J. Silberman, *"Two Cheers" For* International Shoe *(and None for* Asahi); *An Essay on the 50th Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 753, 758 (1995).

14. *See, e.g.*, Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610 (8th Cir.) *cert. denied sub nom.* Hosoya Fireworks Co., Ltd. v. Barone, 115 S. Ct. 359 (1994) (Japanese manufacturer of fireworks subject to jurisdiction in Nebraska where plaintiff was injured and manufacturer had used a network of U.S. distributors to place its products in the stream of commerce in the Midwest); Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558 (Fed. Cir.) *cert. dismissed*, 115 S. Ct. 18 (1994) (Taiwanese defendant subject to jurisdiction in Virginia in patent infringement action in which defendant sold fans to a New Jersey company that, in turn, distributed them to U.S. retailers); Tobin v. Astra Pharmaceutical Products, 993 F.2d 528 (6th Cir.), *cert. denied sub nom.* Duphare v. Tobin, 114 S. Ct. 304 (1993) (Dutch drug manufacturer subject to jurisdiction in Kentucky where it used U.S. distributor to distribute drugs throughout the United States, sought FDA approval, and conducted clinical trials in the United States); Uberti v. Leonardo, 892 P.2d 1354 (Ariz. 1995) (Italian firearms manufacturer subject to jurisdiction in Arizona where guns were made to specifications of Massachusetts distributor that served the American market, particularly the West). *See also* Silberman, *Developments in International Litigation, supra* note 11, at 510 n.39 (discussing additional cases).

15. *See, e.g.*, Omeluk v. Langsten Slip & Batbygerri A/S, 52 F.3d 267 (9th Cir. 1994) (Norwegian ship rebuilder who refurbished in Norway boat that would fish off Alaska and New Zealand and be home-ported in Washington not subject to jurisdiction in Washington); Gould v. P.T. Krakatau Steel, 957 F.2d 573 (8th Cir.), *cert. denied*, 113 S. Ct. 304 (1992) (no jurisdiction in Arkansas over Indonesian corporation that sold steel in Indonesia to a New York corporation, that in turn sent steel to Arkansas); Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369 (8th Cir. 1990) (no jurisdiction in North Dakota over a Japanese manufacturer that sold a cam to a United States company that took delivery in Japan and shipped it to Washington, from where it was ultimately sent

there are two interesting defamation cases in which federal circuit courts of appeals have refused to exercise jurisdiction over foreign defendants, paying special attention to their foreign status. In the first case, *Reynolds v. International Amateur Athletic Federation*,[16] the court held that a press release issued by the defendant in Europe about events arising there and republished in the United States by others, although injuring the plaintiff in his home state of Ohio, did not create a constitutionally sufficient connection with Ohio to justify jurisdiction in Ohio. In the second case, *Core-Vent Corp. v. Nobel Industries AB*,[17] the court held that it would be "unreasonable" for California to exercise jurisdiction over foreign academics who published allegedly false and defamatory articles about the California plaintiff's product in a professional journal distributed worldwide. In *Core-Vent*, the Ninth Circuit acknowledged the requisite "purposeful availment" by the defendants in the forum state, but nonetheless concluded that jurisdiction was unreasonable because the defendants were foreign individuals and the plaintiff was an international corporation and could easily sue the defendants in Sweden.

One new development with respect to jurisdiction over non-U.S. defendants is also worth attention. Federal Rule of Civil Procedure 4(k)(2),[18] effective December 1, 1993, expands the reach of federal jurisdiction over foreign defendants in federal question cases. The extended federal reach is premised on the defendant's aggregate contacts with the United States as a whole, but only in situations where no single state is able to exercise jurisdiction over the defendant. Those aggregate contacts must, of course, comport with due process of law requirements, and thus a foreign defendant must have such contacts with the

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to North Dakota). Additional cases are discussed in Silberman, *Developments in International Litigation*, *supra* note 11, at n.40.

16. 23 F.3d 1110 (6th Cir.), *cert. denied*, 115 S. Ct. 423 (1994).

17. 11 F.3d 1482 (9th Cir. 1993).

18. FED. R. CIV. P. 4(k)(2). This rule reads as follows:

> (k) Territorial Limits of Effective Service.
>
> . . .
>
> (2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

United States that are consistent with "traditional notions of fair play and substantial justice."[19]

II. COMPARATIVE STUDY: COMPARING UNITED STATES VIEWS OF JURISDICTION WITH THOSE OF ENGLAND AND THE EUROPEAN COMMUNITY

The more interesting aspect of jurisdiction for the conflict of laws course comes from the use of a comparative perspective.[20] Both *Asahi* and *Helicopteros* can continue as the focus for the discussion. It is often mistakenly assumed that the judicial jurisdiction of United States courts is much more expansive than that of other countries. In fact, not only do other foreign nations provide jurisdictional grounds quite similar to those in the United States, but often the jurisdictional reach of foreign courts is even broader than that of United States courts. By using comparative materials—such as England's Order 11[21] and the Brussels Convention on Jurisdiction and the Enforcement of Judgments (Brussels Convention)[22]—a sense of the international consensus

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19. *See, e.g.*, Pacific Employers Insurance Company v. M/T Iver Champion, 1995 U.S. Dist. LEXIS 6566 (E.D. La. 1995) (relying on Rule 4(k)(2) as an alternative basis for jurisdiction over foreign underwriter and finding sufficient contacts with the United States to make jurisdiction reasonable); Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81 (S.D.N.Y. 1995) (relying on Rule 4(k)(2) as a basis for jurisdiction over English company in antitrust action brought by Danish corporation alleging an impact on domestic commerce, and finding sufficient factual allegations with respect to defendant's contacts with the United States to satisfy due process).

20. Comparative jurisdiction has been explored in a number of articles, *see* Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1 (1993); Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121 (1992).

21. SUP. CT. PRAC., 1995, Order 11 (Eng.) [hereinafter Order 11].

22. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *done* at Brussels, Belgium, Sept. 27, 1968, as amended, 1990 O.J. (C 189) 1, *reprinted in* 29 I.L.M. 1413 (1990) [hereinafter Brussels Convention]. The Brussels Convention is in effect for the twelve states that were members of the European Community (European Union) prior to January 1, 1995: Belgium, Netherlands, Luxembourg, United Kingdom, France, Germany, Italy, Greece, Spain, Portugal, Ireland, and Denmark. A parallel convention, the Lugano Convention, adopts the jurisdiction and judgment recognition principles of the Brussels Convention for the EFTA countries (Austria, Finland, Iceland, Norway, Sweden and Switzerland). Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, *done* at Lugano, Italy, Sept. 16, 1988, 1988 O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620 (1989) [hereinafter Lugano Convention]. Presumably Austria, Finland, and Sweden (the new members of the Union) will become parties to the Brussels Convention in due course.

about jurisdictional grounds can be appreciated. At the same time, the reasons for the continuing objections to United States jurisdiction can be explored—reasons regarding certain aspects of United States procedure, such as juries, discovery, and contingent fees (which are not internationally accepted), as well as United States choice of law rules, which often result in application of U.S. law and usually tilt toward plaintiff-oriented liability and regulatory rules.

That there is a growing consensus about appropriate standards of judicial jurisdiction in the international community is well documented by Professor Andreas Lowenfeld in his 1994 Hague Lectures[23] for the General Course on Private International Law at the Hague Academy of International Law. If one looks at assertions of "specific jurisdiction"—jurisdiction based on links between the defendant's activity, the forum, and the underlying claim—many states seem to agree that the commission of particular acts by a defendant in a state should provide a basis for jurisdiction over the defendant.[24] But Professor Lowenfeld goes further and offers his view that the international consensus on jurisdiction embraces a standard of reasonableness.[25] On this particular point, I take issue with him. I do not think that any fair reading of jurisdictional law in the member states of the European Union or of the Brussels Convention establishes anything like the amorphous reasonableness standard that has been elevated to constitutional principle by the United States Supreme Court. Not only are the English and the Europeans unencumbered by such a constitutional overlay, but their jurisdictional rules also take a more precise and definite form, which substantially decreases litigation over where to litigate.

A. *Comparison to England's Jurisdictional Rules for Specific Jurisdiction*

A few examples illustrate this point. Order 11 (of England's Rules of the Supreme Court) sets forth provisions for leave to "serve out of the jurisdiction."[26] Under Order 11, jurisdiction can

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23. Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness*, 245 RECUEIL DES COURS 23, at 81-122 (1994-I).

24. *See* Brussels Convention, *supra* note 22, and *The Official Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, EC 22 O.J. C 59/1, at 22-28 (5 March 1979) [hereinafter *Jenard Report*].

25. Lowenfeld, *supra* note 23, at 120-22.

26. Order 11, *supra* note 21, is in effect generally in the United Kingdom, except in Scotland, and applies with some variation in a number of other

usually be obtained over non-resident defendants for claims to enforce or to obtain relief in contract resulting from a contract made within the jurisdiction[27] or made through an agent trading or residing within the jurisdiction.[28] Similarly, jurisdiction over a defendant on a claim for breach of contract can be asserted if the breach was committed within the jurisdiction or if performance was prevented within the jurisdiction.[29] Jurisdiction can also be based on a forum-selection clause.[30] These bases of jurisdiction are quite similar to the ones included in many U.S. states' long-arm statutes.[31] Order 11 also provides for jurisdiction over claims in tort that are grounded in acts committed or damage sustained within the jurisdiction.[32] Again, the similarity between the English and the United States assertions of jurisdiction are striking.

In the United States, of course, the statutory bases of jurisdiction still need to be measured against the amorphous constitutional standards of minimum contacts and reasonableness previously discussed. Similarly, in England, the exercise of Order 11 jurisdictional "heads" is not automatic, but is

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Commonwealth states, including New Zealand, several Australian states, and several Canadian provinces.

27. *Id.* Order 11, rule 1(1)(d)(i) provides for leave to serve outside of the jurisdiction if the claim is brought:

> to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which—
> was made within the jurisdiction[.]

28. Order 11, rule 1(1)(d)(ii) provides for service outside the jurisdiction when the contract "was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction. . . ."

29. Order 11, rule 1(1)(e) authorizes service outside the jurisdiction if the claim is brought

> in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction[.]

30. *Id.* Order 11, rule 1(1)(d)(iv) provides for service of the writ out of the jurisdiction in a contract that "contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of the contract[.]"

31. These specific-act statutes are collected in 2 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS, app. E (2d ed. 1991 & Supp. 1995).

32. Order 11, rule 1(1)(f) permits service out of the jurisdiction when the claim is "founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction[.]"

subject to the court's discretion,[33] except in cases falling under the Brussels Convention.[34] Under Order 11, application is made for leave to serve out of the jurisdiction;[35] a variety of factors—akin to a forum non conveniens determination[36]—are appropriate for considering whether to grant such leave and, ultimately, whether to uphold it.[37] In the United States, however, the issue is not one of discretion but of constitutionality. The difference, of course, is significant. To the extent that the issue of the reasonableness of jurisdiction in the United States translates into a constitutional question, the issue is a legal one with no room for an exercise of discretion by the trial judge. In England, by contrast, the court can balance factors and substantial deference will be given to the judgment of the first decisionmaker.[38] Moreover, the discretion aspect is completely

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33. Rule 4(2) of Order 11 states: "No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order." *See also* P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH, PRIVATE INTERNATIONAL LAW 190 (12th ed. 1992). Apparently leave is not required in some other commonwealth jurisdictions. *See id.*

34. Service out of the jurisdiction is appropriate without leave of court in cases arising within the scope of the Brussels Convention. See NORTH & FAWCETT, *supra* note 33, at 210-11, 324.

35. In England, leave is sought by an application to the master, an official of the High Court who handles pre-trial applications. For a discussion of English masters and their role, see Linda J. Silberman, *Masters and Magistrates, Part I: The English Model*, 50 N.Y.U. L. REV. 1070 (1975). The application for leave contains the writ, an affidavit stating that the plaintiff has a cause of action, an explanation as to why the defendant cannot be served within England, and a statement of the appropriate basis of Order 11 jurisdiction. Following service of the writ, the defendant may apply to have the writ set aside, usually first before the master and often later to the judge in chambers. That decision, in turn, may be appealed with leave of court. *See* LOWENFELD, *supra* note 1, at 179.

36. According to Dicey & Morris, such discretion has been required since the first version of Order 11 in 1875. Furthermore, to justify the exercise of discretion, the plaintiff has to show that England is clearly the appropriate forum for the trial of the action, taking into account the nature of the dispute, the availability of witnesses and evidence, and expenses. *See* DICEY & MORRIS, THE CONFLICT OF LAWS 411-12 (Lawrence Collins et al., eds., 12th ed., 1993). *See also* NORTH & FAWCETT, *supra* note 33, at 205-10.

37. *See* Seaconsar Far East Ltd. v. Bank Markazi Jomhouri Islami Iran, [1993] 3 W.L.R. 756 (Eng. H.L.). In addition to establishing forum conveniens, plaintiff must show that there is reason to believe there is a good case on the merits. *Id.*

38. An example of additional factors that might be considered in the exercise of discretion comes from Roneleigh Ltd. v. MII Exports Inc., [1989] 1 W.L.R. 619 (Eng. C.A.). In *Roneleigh*, a New Jersey corporation contracted with an English buyer to ship steel to Turkey. Suit was brought by the buyer in England, and jurisdiction was asserted based on the fact that the contract had been made in England. On the motion to set aside, the judge stated that he would stay the

eliminated in cases that fall under the Brussels Convention—evidencing a preference for clear and predictable rules for the assertion of jurisdiction.

Asahi's constitutional reasonableness check on assertions of jurisdiction in the United States seems redundant; the minimum contacts test itself invokes a consideration of the relationships among the defendant, the state, and the nature of the litigation.[39] Furthermore, the doctrine of forum non conveniens[40] offers the same discretionary limits on United States jurisdiction as Order 11 discretion does in England.[41] Indeed, it is the doctrine of forum non conveniens that seems the more appropriate United States analogue to Order 11 discretion.[42]

The English rules of jurisdiction occasionally provide a broader jurisdictional reach than that of the long-arm statutes of states in the United States. For example, jurisdiction in England is permitted when the contract is governed by English law[43] or when the English court has jurisdiction over one defendant and

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action in favor of New Jersey if the defendant would give an undertaking to pay plaintiff's costs of proceedings in New Jersey taxed in accordance with English principles. The defendant refused and jurisdiction in England was upheld. *Id.* The Court of Appeal found that the judge's consideration of the factor was not "plainly wrong." *Id.* at 625. *See also* DICEY & MORRIS, *supra* note 36, at 317-18.

39. *See* Linda J. Silberman, *Reflections on* Burnham v. Superior Court: *Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 578 (1991) [hereinafter Silberman, *Reflections*].

40. Forum non conveniens is a discretionary doctrine leading to dismissal of a case when it can be more conveniently tried elsewhere. *See generally*, Alex W. Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 399 (1992); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985). For a recent case distinguishing "reasonableness" factors from forum non conveniens considerations, see Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138 (1st Cir. 1995).

41. There may be a difference here on the issue of burden of proof. Under Order 11, the plaintiff must establish that England is the appropriate forum. *See* DICEY & MORRIS, *supra* note 36, at 318, 412-13. However, it is the defendant who usually carries the burden on a forum non conveniens motion both in England, *see id.* at 402, and in the United States. The issue of a convenient forum was always a relevant factor in the exercise of the discretion to grant leave under Order 11, rule 1, but it was not until much later that the English courts applied the doctrine of forum non conveniens to stay an action against defendants who were sued in England as of right. *See id.* at 398-99.

42. *See, e.g*, Silberman, *Reflections*, *supra* note 39, at 569, 581-83.

43. Under Order 11, rule 1(1)(d)(iii) service out of the jurisdiction is permissible for a contract claim when the contract "is by its terms, or by implication, governed by English law[.]"

the party outside the jurisdiction is a necessary or proper party.[44] Interestingly, it is likely that such provisions would not pass constitutional due process standards as established in decisions of the United States Supreme Court.[45]

B. *Comparison to the Rules for Specific Jurisdiction of the European Community Under the Brussels Convention*

The Brussels Convention also provides an interesting comparison of jurisdictional provisions. Special jurisdiction, or what United States courts would call specific jurisdiction, is permitted under the Brussels Convention in matters relating to a contract in courts of the place of performance (but not in courts of the place of contract)[46] and in matters relating to tort in courts of the jurisdiction where the harmful event occurred.[47]

For example, in *Reinwater Foundation v. Mines de Potasse d'Alsace S.A.*,[48] the European Court of Justice upheld an exercise of jurisdiction by a Netherlands court in a suit brought by Dutch nursery operators, who claimed to have suffered damage as a result of chemicals dumped into tributaries of the Rhine in France by French defendants. The defendants argued that the harmful event occurred where the defendants acted, but the Court held

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44. Order 11, rule 1(1)(c) provides for "service out" if the claim is "brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto[.]"

45. On several occasions the U.S. Supreme Court has ignored the multi-party implications of its jurisdictional rulings and insisted that it is a particular defendant's acts that confer jurisdiction and not general convenience for the litigation. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 254 (1958) (indicating that a state does not acquire jurisdiction "by being the 'center of gravity' of the controversy, or the most convenient location for the litigation"). In *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), the plaintiffs argued that jurisdiction over the Colombian defendant should be upheld under a theory of "jurisdiction by necessity." The Court noted that the plaintiffs had failed to show that all three defendants could not be sued together in an alternative forum and, therefore, declined to consider adoption of such a doctrine. *Id.* at 419 n. 13.

46. Article 5(1) of the Brussels Convention provides that a person domiciled in a contracting state can be sued in another contracting state "in matters relating to a contract, in the courts for the place of performance of the obligation in question . . . ." Brussels Convention, *supra* note 22, art. 5(1).

47. Article 5(3) provides for a person domiciled in contracting state to be sued in another contracting state "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred." *Id.* art. 5(3).

48. Case 21/76, Reinwater Foundation v. Mines de Potasse d' Alsace S.A., 1976 E.C.R. 1735, 1 C.M.L.R. 284 (1977).

that jurisdiction could be sustained on the basis of either the act or the injury.[49]

The Brussels Convention also provides for several more expansive jurisdictional provisions than exist in United States law. For example, Article 6(1) of the Convention provides for jurisdiction in the courts of the place where any one defendant is domiciled when there are multiple defendants.[50] Similarly, Article 6(2) of the Convention authorizes jurisdiction over a third-party defendant by the court seized of the original proceedings, unless the third-party proceedings were instituted solely with the object of removing jurisdiction from the otherwise competent court.[51]

It is interesting to think about the leading United States Supreme Court decision, *Asahi Metal Industry Co. v. Superior Court*[52] in this context. In *Asahi,* the California plaintiff was injured in California as the result of a motorcycle accident, which was attributed to a defective motorcycle tire. Zurcher, the plaintiff, sued the manufacturer of the cycle (Honda), the manufacturer of the tire (Dunlop), and the Taiwanese manufacturer of the tire tube (Cheng Shin), but not the Japanese manufacturer of the valve assembly (Asahi). Cheng Shin then filed an indemnification claim against Asahi, joining Asahi as a third-party defendant. Notwithstanding the fact that the main claim had been settled, the California courts exercised jurisdiction over Asahi. The U.S. Supreme Court reversed in a confusing decision. The Court was divided (4-4-1) on the question of whether putting a product into the stream of commerce establishes sufficient minimum contacts for jurisdiction. Despite this disagreement, eight justices joined an opinion holding that the exercise of jurisdiction over an indemnification claim between two foreign companies was unreasonable.[53]

If the facts of *Asahi* arose within the framework of the Brussels Convention, the outcome would be different from that reached by the U.S. Supreme Court. For this purpose, assume that the principal defendants are from one state in the European Community, such as the Netherlands, the third-party defendant is from another Community state, such as Denmark, and the accident occurred in a third Community state, such as Italy.

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49. For a case requiring "direct" harm when economic harm was involved, see Case 220/88, Dumez Batiment S.A. v. Hessische Landesbank (HELABA) (1990), *available in* LEXIS, Intlaw library, Eccase file (discussed in Borchers, *supra* note 20, at 145-46).

50. Brussels Convention, *supra* note 22, art. 6(1).

51. *Id.* art. 6(2).

52. 480 U.S. 102 (1987).

53. Justice Scalia appears not to embrace the "reasonableness" standard.

Jurisdiction in Italy under the provisions of the Brussels Convention would extend to claims asserted against the principal defendants (on the basis of the injury)[54] as well as claims by those defendants against the third-party defendant (either on the basis of the injury or the special provision for third-party proceedings).[55] Note that the jurisdictional provisions of the Brussels Convention apply only to Community domiciliaries and do not necessarily apply to defendants domiciled outside the European Community. Jurisdiction with respect to defendants not domiciled within the Community will therefore depend upon national law. A number of European countries would appear to take jurisdiction over an indemnification claim against a non-Community (e.g. Japanese) third-party defendant (on *Asahi*-type facts) on the basis of "place of the tort" or "more than one defendant" provisions.[56] Italy, for example, appears to authorize jurisdiction in these circumstances under its domestic rules,[57] and England's provision for jurisdiction over additional parties seems to fit such facts.[58] Perhaps more surprisingly, the Japanese Code of Civil Procedure, which provides for jurisdiction at the "place of the tort," also seems to authorize jurisdiction over American defendants who put products into the stream of commerce,[59] thereby reaching a United States third-party defendant in a mirror situation of *Asahi.*

C. *Comparative Study of General Jurisdiction*

The subject of general jurisdiction is somewhat more complicated as a comparative subject. Under the English rules, a person domiciled or residing within the jurisdiction can be served with process either within the jurisdiction[60] or outside the

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54. Brussels Convention, *supra* note 22, art. 5(3).

55. *Id.* art. 6(2).

56. *See Jenard Report, supra* note 24, at C 59/26 - 59/28.

57. *See* CODICE DI PROCEDURA CIVILE [C.P.C.], art. 4(3) (Italy) (stating that a foreigner may be sued before the courts of the Republic "if the claim is related to another which is pending before an Italian court").

58. *See* SUP.CT. PRAC, 1995, Order 16, rule 3(4) (referring to Order 11, rule 1(1)(c)).

59. *See* Kenichiro Hayashida, *Jurisdictional and Applicable Law in Aviation Cases in Japan* (on file with author) [hereinafter Hayashida, *Aviation Cases*] (discussing Judgment of March 27, 1984, Tokiko Okuma v. Boeing Co. [Tokyo Dist. Ct.] (Japan) (holding that suit could be brought in Japan by Japanese families against a U.S. company that had acquired a manufacturer allegedly responsible for defects in a helicopter that crashed in Japan).

60. *See* SUP. CT. PRAC., 1995, Order 10, rule 1. Indeed, even the transient presence of a defendant within the jurisdiction is a basis for jurisdiction, see NORTH & FAWCETT, *supra* note 33, at 182-84, so long as the defendant is not

jurisdiction.[61] Domicile is also a basis for general jurisdiction under the Brussels Convention.[62] Applied to corporations, the rules require additional interpretation. In England, an overseas company that has a place of business within the United Kingdom is subject to jurisdiction there,[63] thus accepting the concept of general jurisdiction. Under the Brussels Convention, only when the "seat of a company" is in the forum state is there a basis for jurisdiction;[64] the establishment of a branch or office confers jurisdiction only if the dispute arises out of the operations of that particular branch or office.[65]

A hypothetical drawn from Professor Lowenfeld's Hague Lectures illustrates the difference between the general English rule and the Brussels Convention.[66] Assume an English businessman purchases a ticket in Spain on Iberia Airlines for a round-trip flight between Madrid and Barcelona. The plane crashes in Spain and the English widow and heirs attempt to sue Iberia in England, where Iberia has a branch office and also operates flights. Under the Brussels Convention, there would not be jurisdiction in England—the contract of carriage was not to be performed in England,[67] the harmful event did not occur in England,[68] and the activities of Iberia Airlines in England are not relevant because the dispute did not arise out of operations of the Iberia branch office in England.[69]

The English rule, applicable to defendants domiciled outside the European Community, is different. Thus, if the defendant airline were Malaysian Airlines, the decedent had been traveling

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domiciled in a Brussels Convention contracting state. The Brussels Convention lists this type jurisdiction as one of the exorbitant bases of jurisdiction and provides that it is not applicable to persons domiciled in contracting states. *See* Brussels Convention, *supra* note 22, art. 3.

61. *See* Order 11, rule 1(1)(a), providing for service outside the jurisdiction when "relief is sought against a person domiciled within the jurisdiction."

62. Brussels Convention, *supra* note 22, art. 2.

63. *See* Companies Act 1985 § 744; *see also* NORTH & FAWCETT, *supra* note 33, at 185-88.

64. Brussels Convention, *supra* note 22, art. 53, provides: "For the purpose of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. However, in order to determine that seat, the court shall apply its rules of private international law." *Id.*

65. Article 5(5) of the Brussels Convention provides for suit "as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated. . . . ." *Id.* art. 5(5).

66. *See* Lowenfeld, *supra* note 23, at 83-87.

67. Brussels Convention, *supra* note 22, art. 5(1).

68. *Id.* art. 5(3).

69. *Id.* art. 5(5).

between points in Malaysia, and the crash occurred in Malaysia, jurisdiction in England over Malaysian Airlines could be asserted on the basis of the establishment of a Malaysian Airlines office in England. Similarly, courts in the United States would exercise jurisdiction in a suit by U.S. citizens against Malaysian Airlines resulting from a crash in Malaysia, if the airlines had a branch office and were doing business in the forum state.[70] Also, in a leading Japanese case, *Goto v. Malaysian Airline System*,[71] involving suit in Japan against Malaysian Airlines by the widow of a Japanese resident traveling between points in Malaysia when the plane crashed in Malaysia, the Japanese Supreme Court sustained jurisdiction on the basis of the defendant's branch office in Japan. The rejection of the concept of general jurisdiction in the Brussels Convention is actually out of step with the national laws of numerous countries, which accept the basic concept even if the criteria for such jurisdiction varies in the individual states.

From the United States perspective, ascertaining whether or not jurisdiction exists in a particular case may turn on the question of the relatedness of the claim. The problem is illustrated by the U.S. Supreme Court decision in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[72] in which beneficiaries of decedents killed in a helicopter crash in Peru brought suit in Texas against the United States-Peruvian joint venture employer, the Texas manufacturer of the helicopter, and the Colombian helicopter service. The Supreme Court held the exercise of jurisdiction by the Texas court unconstitutional because the activities of the Colombian defendant Helicol were not extensive enough to establish general jurisdiction through its "presence" in Texas and the claim was conceded to be unrelated to Helicol's Texas activities so that specific jurisdiction was not considered.

Consider how a *Helicopteros*-type case would be decided under the Brussels Convention. For example, assume a helicopter owned by a Greek company and manufactured in France crashes in Greece while transporting a French citizen to work on the pipeline in Greece. On these facts, would there be jurisdiction in France under the Convention in a suit by the

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70. Of course, if Malaysian Airlines were a foreign state instrumentality within the meaning of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11, general jurisdiction would not suffice and an additional link with the United States would be necessary. *See* Lowenfeld, *supra* note 23, at 84 n.154.

71. Hayashida, *Aviation Cases*, *supra* note 59. The case is reprinted in 26 JAP. ANN. INT'L L. 122 (1983).

72. 466 U.S. 408 (1984).

French widow and heirs against the Greek helicopter company?[73] There is no branch office in France—and even had there been it is unlikely that the claim could be said to arise from activities of the Greek helicopter service in France. No tortious act or injury on the part of the Greek company occurred in France. However, under Article 6(1) of the Brussels Convention, a person domiciled in a contracting state may be sued, when the party is one of a number of defendants, in the courts of the place where one of the defendants is domiciled. Thus, had the French manufacturer been sued in France—as the Texas manufacturer Bell was sued in *Helicopteros*—this provision would have conferred jurisdiction over the Greek company in France. Thus, this Article of the Brussels Convention provides—as it did in the *Asahi* variation—an important expansive jurisdictional reach in multiparty cases.

Interestingly, in the absence of the Brussels Convention, France would have had jurisdiction in the above hypothetical based on the nationality of the plaintiff under Article 14 of the French Civil Code. Under the Brussels Convention, however, nationality jurisdiction is one of a list of "exorbitant" bases of jurisdiction that cannot be asserted against domiciliaries of member states.[74] Other prohibited bases of jurisdiction include German "assets" jurisdiction and English "tag" jurisdiction.[75] These bases of jurisdiction might be viewed as outside internationally acceptable bases of jurisdiction[76] even though Community states are free to use them against defendants from non-Community states.[77]

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73. The hypothetical was used by Professor Lowenfeld in his Hague Lectures. *See* Lowenfeld, *supra* note 23, at 93-94.

74. *See* Brussels Convention, *supra* note 22, art. 3.

75. *See Jenard Report*, *supra* note 24, at C 59/19-20.

76. Several commentators have adopted such reasoning to argue that tag jurisdiction is a violation of international law as applied in transnational litigation. *See* Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 613-16 (1991); Peter Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on* Burnham v. Superior Court of California, 1990 U. ILL. L. REV. 593, 599-600. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 cmt. e & reporter's note 5 (1987). The U.S. Supreme Court's decision in *Burnham v. Superior Court*, 495 U.S. 604 (1990) is not necessarily inconsistent; it upholds jurisdiction based on physical presence in an interstate and not an international case.

77. Indeed, Community members must recognize and enforce a judgment rendered against citizens of states that are not members of the Community on the basis of such jurisdiction, unless a non-member state enters into a treaty with a member state that excepts such recognition and enforcement. *See* Brussels Convention, *supra* note 22, arts. 26, 31, 59.

III. CONCLUSION

What lessons can be drawn from the use and analysis of these comparative materials? Both England's Order 11 and the Brussels Convention offer alternatives for thinking about sensible jurisdictional regimes and both reflect a set of jurisdictional values that are different from those in the United States. It is also useful to ask whether the jurisdictional provisions of the Brussels Convention are appropriate only because the member states of the European Community have ceded some measure of power to a central authority (the European Community) and because there is supranational review of the jurisdictional issues in the European Court of Justice.[78] All of these qualifications suggest that a particular set of jurisdictional rules may work only within a quasi-federal system and not as a panacea for the entire world.

It is unrealistic to think that the U.S. Supreme Court will unravel the past fifty years of its jurisdictional due process jurisprudence on the basis of a little comparative law learning. Still, there is a possibility that the comparative influence may have some effect with respect to future legislative efforts[79] and even some marginal impact on future Supreme Court jurisdictional doctrine.[80] Moreover, as further efforts are made to negotiate multilateral conventions on jurisdiction and judgments in general civil, commercial, and family law matters, an understanding of the various differences in jurisdictional thinking between states may lead to more compromise and cooperation. As students leave law school to take on roles as law clerks, lawyers, and government officials, they should take away some comparative vision. A comparative perspective on conflict of laws and judicial jurisdiction is one place to start.

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78. Interestingly, at the time the Brussels Convention was signed on September 27, 1968, the European Court of Justice did not have the power to review jurisdictional issues. Rather, at that time a Joint Declaration was adopted committing the contracting states to study the question of conferring jurisdiction on the Court of Justice to interpret the Brussels Convention. In 1971, a Protocol conferring this type of jurisdiction was adopted. *See* LOWENFELD, *supra* note 1, at 420-22.

79. *See* Borchers, *supra* note 20, at 153-56.

80. *See* Juenger, *supra* note 20, at 20-23.