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Jurisdiction Over Alien Corporations After *Shaffer v. Heitner*

**INTRODUCTION**

The scope of extraterritorial jurisdiction over alien corporations is an unsettled question since the constitutional standards which limit the assertion of such jurisdiction are currently changing.\(^1\) The Supreme Court decision of *Shaffer v. Heitner*\(^2\) is the primary impetus behind the re-examination of the precepts underlying extraterritorial assertions of jurisdiction. *Shaffer* held that mere attachment of property within a state is not necessarily a constitutionally sufficient basis for jurisdiction over a non-resident defendant.\(^3\) *Shaffer* extends the applicability of a minimum contacts analysis to any extraterritorial assertion of state court jurisdiction, and therefore, establishes that jurisdiction over a non-resident defendant must be premised upon meaningful connections with the forum state.\(^4\)

*Shaffer* will have a significant effect upon the extraterritorial exercise of jurisdiction over alien corporations.\(^5\) Historically, the type of jurisdiction exerted over such non-residents is often characterized as quasi-in-rem. *Shaffer* requires that such assertions of jurisdiction satisfy the minimum contacts criteria.\(^6\) Undoubtedly application of this standard will curtail the permissible scope of jurisdiction over alien corporations which heretofore was predicated largely upon attachment of domestic property.\(^7\) However, such a standard should not necessarily eliminate the only available forum for the plaintiff in the United States. Where an attachment proced-

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3. See notes 34-44 infra and accompanying text.
7. “Thus, although the presence of the defendant’s property in a State might suggest the existence of other ties among the defendant, the state and the litigation, the presence of the property alone would not support the State’s jurisdiction.” (emphasis added) *Id.* at 208-09.

739
ing is the only means available for compelling the appearance of an alien corporation in the United States, the applicable standard for evaluating the constitutionality of the basis for jurisdiction should reflect the unique policy considerations which are present.\textsuperscript{8} Although \textit{Shaffer} itself reserves this question,\textsuperscript{9} the jurisdictional analysis underlying the decision\textsuperscript{10} serves as a guide for its resolution.

This article will attempt to reconcile the treatment of extraterritorial jurisdiction and alien corporations with the evolving constitutional standards in the area. A historical background to the current constitutional standards will precede an analysis of \textit{Shaffer}'s potential impact on such jurisdictional doctrines. This note will discuss the problems involved in applying such doctrines to alien corporations through an examination of the various methods for obtaining extraterritorial jurisdiction over them. Recommendations regarding the proper resolution of such difficulties will then be proposed.

**HISTORICAL BACKGROUND**

The principle that a sovereign possesses inherent adjudicatory power over its domiciliaries is well established in both common and civil law countries.\textsuperscript{11} A corporation is a domiciliary of the state of its incorporation.\textsuperscript{12} Since a corporation itself is a fiction, its presence

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\textsuperscript{8} See notes 88-97 infra and accompanying text.
\textsuperscript{10} The methodology of the Court's jurisdictional analysis is the key to ascertaining whether various future jurisdictional assertions will be considered constitutional. See notes 80-87 infra and accompanying text.
\textsuperscript{11} See generally de Vries & Lowenfeld, \textit{Jurisdiction in Personal Actions—A Comparison of Civil Law Views}, 44 \textit{Iowa L. Rev.} 306 (1959); Hazard, \textit{A General Theory of State-Court Jurisdiction}, 1965 \textit{Sup. Ct. Rev.} 241 (hereinafter cited as Hazard); Ehrenzweig, \textit{The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens}, 65 \textit{Yale L.J.} 289 (1956) (hereinafter cited as Ehrenzweig). The domicile basis provides that a defendant must submit to the jurisdiction of the state of his domicile. "A state which accords privileges and affords protection to . . . [a person] and his property by virtue of his domicile may also exact reciprocal duties." Milliken v. Meyer, 311 U.S. 457, 463 (1940). The domicile basis provides for at least one forum in which every defendant may initially be brought. Although a Court has \textit{in-personam} jurisdiction the defendant may move the Court to decline to exercise it under the doctrine of "forum non conveniens." Gulf Oil Corp. v. Gilbert, 330 U.S. 508, 510 (1947). The doctrine is a discretionary one and involves the weighing of "oppression" inflicted by forum inconvenience upon the defendant.

However, it is interesting to note that for purposes of diversity jurisdiction, the domicile is the state of incorporation and the principal place of business. 28 U.S.C. § 1331 (1976). See Currie, \textit{The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois}, 1963 \textit{U. Ill. L.F.} 533 (hereinafter cited as Currie), contending that it should be explicitly recognized that domicile is either the principal place of business or the incorporation state for \textit{in-personam} jurisdiction purposes. See notes 14-16 infra and accompanying text.
outside the state of its origin is manifested through business activities. When a corporation's activities are extensive and systematic in a state, it may be considered a de facto domiciliary. Accordingly, a sovereign's inherent jurisdictional power may be asserted over a corporation "doing business" in the state. Notwithstanding the corporation's lack of activity in the forum, it may voluntarily submit itself to the sovereign's jurisdictional powers.

13. "Since the corporate personality is a fiction, although a fiction intended to be acted on as though it were a fact, . . . it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf . . . ." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

14. Professor Currie characterizes the corporation that is "doing business" continuously in the forum as a habitual resident so that general jurisdiction is justified. Currie, supra note 12, at 585. See also von Mehren & Trautman, Jurisdiction To Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1141 (1966) (hereinafter cited as von Mehren & Trautman).

15. "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such a manner and to such an extent as to warrant the inference that it is present." (emphasis added). Philadelphia and Reading R.R. v. McKibbin, 243 U.S. 264, 265 (1917). An alien corporation may also be deemed "present" in the United States if it owns subsidiaries here and if it can be shown that the parent controls its subsidiary to the extent that it can be considered a "mere department" of the parent or an "agent" of the parent. Velandra v. Regie Nationale Des Usines Renault, 336 F.2d 292 (6 Cir. 1964) (owning stock in a subsidiary may not alone render the alien parent "present"); Freeman v. Gordon Breach, Science Publishers, Inc., 398 F.Supp. 519 (S.D.N.Y. 1975) (parent and subsidiary were integral parts of a whole sufficient to subject alien subsidiary "present" in the U.S.); Frummer v. Hilton Hotels International, Inc., 19 N.Y.2d 533, 537, 281 N.Y.S.2d 41, 44, 227 N.E.2d 851, 854 (1967); Delagi v. Volkswagen Werk A.G. of Wolfsburg, Germany, 29 N.Y.2d 426, 328 N.Y.S. 2d 653, 278 N.E. 2d 896 (1972).

The corporation which is "doing business" is subject to the general jurisdictional powers of the forum state so that it may be sued on causes of action totally unrelated to the forum. Missouri, K. & T. R. Co. v. Reynolds, 228 Mass. 584, 117 N.E. 913 (1917), aff'd without opinion, 255 U.S. 565 (1918). See Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 262, 115 N.E. 915, 918 (1917) (J. Cardozo): "We hold, further, that jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business here transacted. . . . The essential thing is that the corporation shall have come into the state. When once it is here it may be served." Barrow S. S. Co. v. Kane, 170 U.S. 100 (1898) (personal injury action brought by New Jersey plaintiff against a British steamship corporation for injuries sustained in Ireland; alien "doing business" in forum because of agents and offices there and therefore "present" in forum).

The "doing business" basis has largely expanded and today requires much less than continuous and substantial activity in the forum in some states. See notes 82-87 infra and accompanying text.

Traditionally a state's inherent jurisdictional powers operated when some permanence existed in the relation between the defendant and the forum, until the Supreme Court in *Pennoyer v. Neff* declared that any presence in the forum was a constitutionally sufficient basis for jurisdiction. Consequently *Pennoyer* extended jurisdiction to all persons or property physically located within a state's territory. Any defendant who was found in the forum and personally served there was subject to *in personam* jurisdiction irrespective of the extent or quality of contacts with the state. Similarly, property situated in the state served as a basis to

is distinct from "consent" to quasi-in-rem. Quasi-in-rem objection procedures differ in various states. See notes 22-23 infra. State motor vehicle statutes were originally based on "implied consent," Hess v. Pawloski, 274 U.S. 352 (1927), but are upheld under long-arm statutes today subject to "minimum contacts" tests. See Currie, supra note 12.

Consent to international arbitration must be distinguished from both consent to jurisdiction and consent to choice-of-law. Arbitration is not a judicial proceeding but contractual consent to arbitration before a foreign tribunal is consent to the exclusion of any other remedy. See notes 153-57 infra. Contractual consent to the state law to be applied in the event of a dispute is not consent to the jurisdiction of that state. Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972).


17. "Domicile" and "doing business" both require contacts of a permanent nature. In addition, several courts have considered habitual residence a sufficiently permanent connection with the forum to exercise general jurisdiction over the resident defendant. See von Mehren & Trautman, supra note 14, at 1137 n.32-33; RESTATEMENT (SECOND) CONFLICT OF LAWS § 79 (Tent. Draft No. 3, 1956).

18. Actually, assertions were exercised prior to *Pennoyer* based upon personal service within state boundaries, but this method had never been deemed constitutionally sufficient with the Due Process Clause until *Pennoyer* decided that any defendant transiently in the state could be personally served and thereby subject to the state's general jurisdictional powers. It is interesting to note that *Pennoyer* deemed even these transients as equivalent to an "inhabitant" of the forum. Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

19. 95 U.S. 714 (1877).

20. "One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; . . . The other principle of . . . law [is that] . . . no State can exercise direct jurisdiction . . . over persons or property without its territory," Pennoyer v. Neff, 95 U.S. 714, 722 (1877). For an in-depth discussion of the history of the *Pennoyer* decision and its influence on the traditional bases of *in personam* jurisdiction, see Developments in the Law-State Court Jurisdiction, 73 HARV. L. REV. 909 (1960) (hereinafter cited as Developments); Kurland, The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review, 25 U. Chi. L. REV. 569 (1958) (hereinafter cited as Kurland); von Mehren & Trautman, supra note 14.

21. "The general rule is that every country has jurisdiction over all persons found within its territorial limits. . . . It is not a debatable question, that such actions may be maintained in any jurisdiction in which the defendant may be found, and is legally served with process." Smith v. Gibson, 83 Ala. 284, 284, 3 So. 321 (1887). Thus, in Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959), a non-resident defendant was served while in a plane flying over Arkansas and the court held that service was proper and that personal jurisdiction existed.
either compel a non-resident defendant to appear, and submit generally to jurisdiction of the forum, or lose his property in default.\textsuperscript{22} Although this \textit{quasi-in-rem} procedure was technically an exercise of territorial jurisdiction, in so far as it compelled a nonresident defendant to appear,\textsuperscript{23} it was in effect extraterritorial.\textsuperscript{24}

The Supreme Court explicitly recognized a state’s power to assert jurisdiction extraterritorially in \textit{International Shoe Co. v. Washington}.\textsuperscript{25} The non-resident corporate defendant argued that its business activity did not constitute “doing business,” and therefore it was not susceptible to the state’s territorial jurisdictional powers. The Court held that the state’s inherent jurisdictional power may extend beyond its geographical boundaries \textit{when the cause of action}
arises out of such minimal acts within the forum. Since extra-territorial jurisdiction could not be based upon the sovereign's territorial power, the focus became the relationship between the defendant, the forum, and the cause of action. This requisite relationship for the assertion of extraterritorial jurisdiction was present when "minimum contacts" were shown to exist.

The International Shoe "minimum contacts" test was tempered by the requirement of "fundamental fairness" to the defendant. The Supreme Court in Hanson v. Denckla clearly established that this fairness involved more than a question of practical inconvenience to the defendant. A "fair" assertion of jurisdiction also must be based upon traditional notions of state adjudicatory power which proscribe an infringement upon the sovereignty of another state. Accordingly, that power must depend on a finding of some "minimum contacts" with the forum through which the defendant "purposefully" avails himself of the privileges and benefits of conducting activities relative to the forum.

THE DECISION: Shaffer v. Heitner

In Shaffer v. Heitner, an Oregon resident brought a shareholder
derivative suit in a Delaware state court against directors and officers of a Delaware corporation, having its principal place of business in Arizona. The acts relevant to the cause of action took place in Oregon. Jurisdiction was predicated on attachment of the defendants' stock, which was deemed by statute to have Delaware as its situs. Thus, the plaintiff asserted the classical jurisdictional basis of quasi-in-rem to obtain in-personam jurisdiction over the non-resident defendants.

The defendants argued that the Delaware Court did not have jurisdiction because the defendants lacked the requisite "minimum contacts" with Delaware according to International Shoe. The Court of Chancery refused to apply the "minimum contacts" test stressing that quasi-in-rem and "minimum contacts" were mutually exclusive bases of jurisdiction. The Delaware Supreme Court affirmed. The United States Supreme Court reversed. The Court rejected the traditional notion that a proceeding quasi-in-rem was "against" property and concluded that it was actually "against" the person who owned the property. The court held that since the actual purpose and effect of the quasi-in-rem assertion was to compel the defendant to appear, it constituted an indirect exercise of personal jurisdiction which was violative of the Due Process Clause of the Constitution.

The Court recognized that quasi-in-rem jurisdiction entailed an assertion of extraterritorial jurisdiction, and therefore applied the minimum contacts standard of International Shoe. The Shaffer Court analyzed the contacts that existed between the officers and the state of Delaware, and rejected the argument that Delaware's interest in the action should control when the defendants' activities were unconnected to that forum. The Court further dismissed the

35. Defendants allegedly violated their duty to Greyhound by incurring $13,146,090 in damages in an antitrust suit and a fine for criminal contempt. 433 U.S. 186, 190 n.2 (1977).
40. "[I]f a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible." Id. at 209.
41. "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." Id. at 212. Although the Court used the word "all," it must have been alluding to all extraterritorial assertions, such as quasi-in-rem. This conclusion is most logical, especially when the Court first decided that quasi-in-rem was actually against persons who were absent from the forum. Id.
42. Id. at 212-15.
argument that the acceptance of an office in a corporation formed by Delaware law constituted purposeful availment of the privilege of conducting activities in the forum sufficient for "minimum contacts." The Court instead looked to the relationship between the defendants, the forum, and the cause of action and determined that since "minimum contacts" were lacking jurisdiction did not exist.

Shaffer employs a methodology for jurisdictional analysis which places substance over form. Moreover, the decision establishes that the underlying basis for all extraterritorial jurisdiction must be a meaningful as opposed to purely fictional relationship with the forum. Shaffer reaffirms the time-honored maxim that, "great caution should be used not to let fiction deny fair play, that can be secured only by a pretty close adhesion to fact." Accordingly, while the fictional contacts of a non-resident may provide a component of the requisite jurisdictional basis, the inquiry into whether a constitutionally sufficient basis exists must include the overall quality of the defendant's contacts with the forum.

The Aftermath of Shaffer

Quasi-In-Rem

The immediate result of Shaffer was a reconsideration of the permissible scope, and continuing validity of quasi-in-rem jurisdiction. Shaffer clearly invalidated assertions of quasi-in-rem juris-
diction where the property attached has a fictional situs and is wholly unrelated to the cause of action in the forum. Further, the principles enunciated in *Shaffer* cast doubt on the efficacy of the *quasi-in-rem* form of jurisdiction since it is no longer readily distinguishable from an assertion of extraterritorial *in personam*. Nevertheless, some courts have retained the use of *quasi-in-rem* jurisdiction, and applied a minimum contacts test to determine its constitutionality. Although there is apparent agreement among such courts that the applicable standard is minimum contacts, the substance of the test has been interpreted differently. Consequently there are four distinct variations which have emerged, and each embraces the term “minimum contacts.”

1. Purposeful Availment

The “purposeful availment” test examines the circumstances under which the property was placed in the forum. If the court finds that the property was intentionally placed in the state, the defendant has purposefully availed himself of the privilege of conducting activities in the forum. Under such circumstances, the assertion of

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52. "Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the [forum] and the litigation, the presence of the property alone would not support the State's jurisdiction." (emphasis added) *Shaffer v. Heitner*, 433 U.S. 186, 208-09 (1977).


54. *See* notes 56-70 infra and accompanying text.

55. *See* notes 56-70 infra and accompanying text.

56. *See* Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977). A wrongful death action was brought against the alien corporation to recover damages for death occurring in Turkey. Plaintiff first attempted to predicate jurisdiction under the “doing business” basis. The court said that the quantity of activity in the forum was insufficient to sustain *in personam* jurisdiction. Plaintiff then attached, in 1976, defendant's bank account in New York in an amount which exceeded the value of Plaintiff's *personal* claim against defendant. Defendant moved, in 1977, to dismiss on the ground that the *quasi-in-rem* attachment was unconstitutional under *Shaffer*. The court upheld jurisdiction.

57. *Id.* at 1277. The court admitted that the property attached was wholly unrelated to the plaintiff's cause of action. They narrowed *Shaffer* by noting that in *Shaffer*, the defendants “never set foot in Delaware.” *Id.* The court noted that all *Shaffer* requires is that defendant have "purposefully availed himself of the privileges of conducting activities" in the forum. *Id.* The court next decided that opening an *unrelated* bank account was a sufficiently "purposeful" act. *Id.* at 1278.
jurisdiction is justified on the grounds of implicit consent by the non-resident defendant.\textsuperscript{58} The concept of fairness itself revolves around the expectancies of the property owner.\textsuperscript{59}

2. Quantum of Contacts

The "quantum of contacts" standard\textsuperscript{60} permits an exercise of quasi-in-rem jurisdiction in any state in which property is situated if there is, in addition, some other contact by defendant with the state.\textsuperscript{61} The property is regarded as adding weight to the sum total of contacts.\textsuperscript{62} It is not necessary, under this standard, that there be sufficient, independent "contacts" to justify in-personam jurisdiction, or that the property itself be related to the cause of action.\textsuperscript{63}

3. Degree of Unfairness to Defendant

Another test\textsuperscript{64} relies on the "fundamental fairness" language of

\textsuperscript{58} Id. at 1278. The court quoted Justice Stevens' concurring opinion in Shaffer in determining that attachment of an unrelated bank account should support quasi-in-rem: "If I visit another state, or acquire real estate or open a bank account in it, I knowingly assume some risk that the state will exercise its power over my property or my person while there. My contact with the state, though minimal, gives rise to predictable risks." Following this rule, an alien corporation is subject to jurisdiction in any court in any state in which it owns real estate or other tangible property, regardless of the relation of that property to the cause of action.

\textsuperscript{59} The flaw in this reasoning is that Shaffer recognized that quasi-in-rem is no longer an action "against property," but rather is an indirect action "against persons" who own the property. See notes 39-40 supra and accompanying text. Therefore, it could be argued that one who opens a bank account does not expect the state to exercise power over his person, through his property in the forum.

\textsuperscript{60} In Intermeat, Inc. v. American Poultry Inc., 575 F.2d 1017 (2d Cir. 1978), the New York plaintiff attached an unrelated third-party debt owed defendant in a forum where the debtor was "doing business." The value of the attached debt exceeded the value of Plaintiff's claim against the non-resident defendant for wrongful rejection of shipments of meat. Quasi-in-rem attachment was sustained in light of Shaffer.

\textsuperscript{61} Id. at 1021-22. The court read Shaffer as requiring that defendant have "contacts" with the state. The court said that the "minimum contacts" standard applied to quasi-in-rem, and permits the consideration of the property as one of the several contacts with the state, even if the property is unrelated to the cause of action.

\textsuperscript{62} The court concluded that even though defendant never entered the forum, or negotiated in the forum, or signed the contract there, the sending of the offer by Plaintiff from the forum rendered the contract "if . . . not born in New York, . . . at least conceived [there] . . . [I]t seems evident that the substantial connection of the contract with New York must be considered along with the added factor of the attachment of an intangible within the jurisdiction of the state in weighing the minimum contacts . . . ." (emphasis added) Id. at 1023.

\textsuperscript{63} Id. at 1018-1022 n.5.

\textsuperscript{64} The cases following the approach of weighing unfairness to the defendant stem from the New York case where a non-resident's insurance policy is attached in a forum where the insurer is "doing business." Jurisdiction was originally predicated on the then-stable quasi-in-rem basis. Seider v. Roth, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966). The
International Shoe\textsuperscript{65} and places emphasis on the practical harm to the defendant if the action is maintained in the forum where the property is attached.\textsuperscript{66} In addition, the benefits accruing to the plaintiff are weighed.\textsuperscript{67} Even if the defendant has no other contacts with the state, quasi-in-rem jurisdiction may be permissible.

The first three views above are not overwhelmingly subscribed to. Shaffer is most often interpreted as requiring either that the property be related to the cause of action, or, if the property is unrelated, that a tripartite relationship exist between the defendant, the forum and the cause of action before jurisdiction may be exercised. Thus, the “minimum contacts” test is mainly viewed as requiring more than notice, more than a conglomeration of separately insufficient contacts, and more than general fairness to the defendant. Rather, “minimum contacts” requires a test of relationships.

4. Relationship Between the Property and the Cause of Action

International Shoe’s “minimum contacts” test is most often regarded as requiring a relationship between the defendant, the forum practice has been highly criticized both before and after Shaffer. See generally Reese, The Expanding Scope of Jurisdiction over Non-Residents—New York Goes Wild, 35 Ins. Counsel J. 118 (1968); Comment, Attachment of “Obligations”—A New Chapter in Long-Arm Jurisdiction, 16 Buffalo L. Rev. 769 (1967); Note, New Constitutional Questions Concerning Seider v. Roth, 6 Hofstra L. Rev. 393 (1978). But see Smit, The Enduring Utility of In-Rem Rules: A Lasting Legacy of Pennoyer v. Neff, 43 Brooklyn L. Rev. 600, 621-27 (1977) (Seider—attachments are “reasonable” when limited to only resident-plaintiffs and the face-value of the policy attached); Note, The Constitutionality of Seider v. Roth after Shaffer v. Heitner, 78 Colum. L. Rev. 409 (1978) (since the practice is analogous to “direct action” statutes, which have already been deemed “constitutional,” the practice causes no additional harm that would not be caused defendant anyway).


65. See note 26 supra and accompanying text.

66. 579 F.2d at 200. The court discussed the fact that “direct action” statutes, which name only the insurer as both the real party in interest and the defendant, have been considered constitutional. The court read Shaffer as primarily doing away with fictions and focusing on realities. Id. The court said that in reality, the insurer must bear all the cost of the litigation and since the policy is attached where the insurer is “doing business” it is not inconvenient to him. Id. at 201. Furthermore, the court recognized that even though Defendant had no contacts with the forum, the practical harm to him would be “minimal.” Id. at 198-202.

Such reasoning, nevertheless, is in conflict with Hanson v. Denckla, 357 U.S. 235, 251 (1958), where the Supreme Court stated: “However minimal the burden of defending in a foreign tribunal a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that State that are a prerequisite to its exercise of power over him.”

67. “[T]here has been ‘a movement away from the bias favoring the defendant’ in matters of personal jurisdiction ‘toward permitting the plaintiff to insist that the defendant come to him’ when there is a sufficient basis for doing so.” O’Connor v. Lee-Hy Paving Corp., 579 F.2d 201 (2d Cir. 1978).
and the cause of action. This fourth test, however, requires only a relationship between the *property*, the forum and the cause of action. Even if the defendant's contacts are otherwise insufficient to exercise *in-personam* jurisdiction, courts following this test would permit *quasi-in-rem* jurisdiction under *Shaffer*.

**Analysis**

These variations of the "minimum contacts" test are actually expressions of four interpretations of "fairness." Although "minimum contacts" has been criticized as an elusive and ill-defined concept, the essential guidelines for application of the test are articulated in the *Shaffer* decision. There, the Court evaluated the defendants' contacts, concentrating on *relationships*: "[T]he property is not the subject matter of the litigation, nor is the underlying cause of action related to the property." The Court next stated that the jurisdictional analysis should focus upon the *defendants' acts*. The Court rejected the arguments that fairness and convenience alone should support jurisdiction when defendants lacked other ties to Delaware.

Subsequent to *Shaffer* all assertions of extraterritorial jurisdiction should begin with an inquiry into relationships. The first three views above fail to require any relationship between the property or

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68. See note 27 supra and accompanying text.
69. See National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978). The District Court held that a Delaware corporation, having its principal place of business in New York, may assert jurisdiction over the Nigerian government and a Nigerian bank by the attachment of funds and treasury bills on deposit in New York banks which were directly related to payments due Plaintiff under a letter of credit. "The funds held by Morgan were the source of payments made under the letter of credit or which would have been made but for the disputes which subsequently arose. Therefore, these funds would appear to have a sufficient nexus to plaintiff's cause of action to justify the attachment as a basis for *quasi-in-rem* jurisdiction." *Id.* at 635. The court evaluated Defendant's "contacts" with New York and admitted that entering into a correspondent bank relationship was not alone sufficient contacts to sustain *in-personam* jurisdiction under the transaction-of-business long-arm statute. *Id.* at 637. The court permitted *in-personam* jurisdiction based on the same contacts, but justified it on the basis that the defendant had caused an "effect" in New York. *Id.* at 635-39.
73. *Id.* at 213-15.
74. *Id.*
75. "Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of Pennoyer rest, became the central concern of the inquiry . . . ." *Id.* at 206.
the defendant, the forum, and the cause of action. Accordingly, to the extent that these relationships are not required, such quasi-in-rem jurisdiction conflicts with Shaffer. The fourth view above is consistent with Shaffer's requirement of a relationship to the cause of action, but may conflict with Shaffer's recognition of the extra-territorial nature of quasi-in-rem jurisdiction. Shaffer defined quasi-in-rem as an indirect assertion of jurisdiction over a person. The fourth view above which focuses only on the property's connection to the cause of action, ignores the relationship of the non-resident defendant and therefore may be inconsistent with Shaffer.

It is not totally clear whether the relation of the non-resident defendant's property to the cause of action is a constitutionally sufficient connection to justify a quasi-in-rem assertion, after Shaffer. The Shaffer Court did note that when the property is related to the cause of action, factors contemporaneous with the property will probably render the defendant subject to personal long-arm jurisdiction and therefore, there will be no need to assert jurisdiction quasi-in-rem.

In instances where the non-resident defendant's contacts would not support typical long-arm jurisdiction, but the property in the forum is related to the cause of action, it is arguable that Shaffer would permit a quasi-in-rem assertion based on that property. One argument may point to the difference between quasi-in-rem and in-personam, labelling quasi-in-rem only an indirect assertion over a person, which leaves the defendant with the option of defaulting, and relinquishing no more than the value of the property attached. Shaffer does not strongly support this argument, however, because the Court noted that even a minimally unjustified assertion is nevertheless improper.

A better argument is that a quasi-in-rem assertion is justifiable when the property is related to the cause of action, not because it hurts the defendant "only a little," but because "minimum contacts" exist between the defendant's property, the forum, and the cause of action. It is arguable that Shaffer would permit this separate "minimum contacts" test, applicable to property, to support

76. See notes 39-41 supra and accompanying text.
77. See note 39 supra and accompanying text.
78. See notes 68-70 supra and accompanying text.
79. Cf. RESTATEMENT (SECOND) OF JUDGMENTS §11, Comment c, Illustration 1 (explaining the conflict in reasoning that quasi-in-rem is valid if "minimum contacts" exist, because once "minimum contacts" exist there is no need for quasi-in-rem since in-personam jurisdiction can then be exercised).
quasi-in-rem jurisdiction when in-personam jurisdiction does not otherwise exist.

In most cases, however, when the property is related to the cause of action, but in-personam jurisdiction does not exist under usual long-arm statutes, personal jurisdiction may still exist under the "causing an effect" in the forum approach. Thus, when the non-resident defendant places property in the forum which is substantially related to the cause of action, the defendant may be deemed to have caused an effect in the forum which would be a sufficient basis for in-personam, as opposed to quasi-in-rem, jurisdiction.

Doing Business

The Shaffer decision may also herald a trend towards requiring more meaningful connections between a non-resident corporate defendant, and a forum state before general territorial jurisdiction is established. The traditional requirement of "doing business" is satisfied by systematic and continuous activity by the defendant in the forum state. However, recently this threshold requirement has been relaxed to such an extent that "doing business" can, in effect,

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80. Shaffer v. Heitner, 433 U.S. 186 (1977). The Court first declared that the standards of International Shoe applied and immediately thereafter noted that the property was unrelated to the cause of action. The Court concluded: "Appellants holdings in Greyhound do not, therefore, provide contacts with Delaware sufficient to support the jurisdiction of that state's courts . . .." Id. at 213. It could be argued that such language indicates that if the cause of action were related to the property, such contacts with the forum would then have been sufficient to support jurisdiction quasi-in-rem in Delaware.

81. The 2d Circuit held in Federal Republic of Nigeria v. National American Corp., 448 F. Supp. 622 (1978), that property related to the cause of action was a sufficient contact to render the alien defendant amenable to personal jurisdiction under an "effects" statute. See notes 136-52 infra and accompanying text. It is interesting to note, however, that the court first interpreted Shaffer as permitting quasi-in-rem jurisdiction based on related property in the forum. Id. at 635. Due to the Foreign Sovereign Immunity Act, 28 U.S.C. § 1609 (1977), however, which the court read as precluding quasi-in-rem, the court proceeded to exercise personal jurisdiction based on the defendant's same contacts. The court hinged personal jurisdiction on an exception to the Act, 28 U.S.C. § 1605 (a)(2), which requires that the sovereign-defendant act commercially outside the United States to cause an effect within. Id. at 637. The case exemplifies that in most instances when the property is related to the cause of action, personal jurisdiction will probably exist, relieving the need to base jurisdiction on quasi-in-rem.

82. Traditionally, territorial jurisdiction could not be exercised unless the connections were meaningful. This meaningfulness was derived from the permanence between the forum and the defendant. See notes 11-17 supra and accompanying text.

83. See note 15 supra and accompanying text. For an exhaustive list of varying "doing business" standards, see Wright & Miller, Federal Practice and Procedure: Civil §1067-69; Developments, supra note 20, at 919-23.

84. See, e.g., St. Louis-S.F. Ry. Co. v. Gitchoff, 68 Ill. 2d 38, 369 N.E.2d 52 (1977) (Court exercised personal jurisdiction over Missouri defendant on an unrelated cause of action brought by non-resident Plaintiff. Defendant found to be "doing business" in Illinois by existence of a sales office, seven sales employees and one assistant superintendent expediter;
be an extraterritorial assertion of jurisdiction. The result may be
that jurisdiction is predicated and sustained on tenuous contacts
with a state, where both the plaintiff and defendant as well as the
cause of action are totally unconnected to any activity the defen-
dant may conduct in the forum. Under such circumstances, the
“doing business” contacts are insufficient to qualify the non-
resident as a de facto domiciliary. Therefore, the assertion of jur-
isdiction must pass muster under the minimum contacts test for extraterritorial jurisdiction. This, in turn, should prompt courts
to interpret “doing business” as requiring a more substantial
connection with the forum.

STATE ADJUDICATORY POWER AND ALIENS

The context of jurisdictional assertions over aliens often involves
unique policy considerations. Although greater flexibility may be
required, it is questionable whether entirely different standards are
appropriate. Admittedly, the Due Process Clause of the Four-

85. The metamorphosis of “doing business” from a territorial to an extraterritorial asser-
tion occurs only when jurisdiction is predicated on less-than continuous and systematic
activity in the forum, and the cause of action is unrelated to the defendant's activity in the
state. Thus, if a defendant corporation is not acting to an extent that it can be considered a
“resident” of the forum, any assertion of jurisdiction must thereafter be labelled extraterritor-
ial, and “minimum contacts” are thereafter required before an exercise of jurisdiction is
constitutional.

(S.D.N.Y. 1978). A Delaware corporate defendant had first moved for dismissal on the ground
that attachments were unconstitutional under Shaffer. The court acknowledged that the
quasi-in-rem was improper but then held that the corporation was subject to in-personam
jurisdiction under the “doing business” basis. Defendant’s “activities” sufficient to constitute
his “presence” in New York amounted to the existence of eleven sales men and one sales
manager who resided there. The Company maintained no office in New York. But see, e.g.,
a strict test of “doing business” is required).

87. See notes 11-14 supra and accompanying text.

88. See notes 40-41 supra and accompanying text.

of action is unrelated, a strict test of doing business is required).

90. The policy considerations include federalism, comity, Congressional power to regulate
international affairs and hardships to both the defendant and the plaintiff. See note 89 supra
and accompanying text.

91. The Constitutional protections of freedom of speech and the press are accorded to
aliens residing in this country. Bridges v. Wixon, 326 U.S. 135 (1945). Aliens are entitled to
invoke the Equal Protection Clause, and have been held to have standing under the Civil
teenth Amendment itself has long been interpreted as restricting one State from overexerting its jurisdictional powers so that it does not infringe upon the sovereignty of another State.\(^2\) Obviously if the jurisdictional question only involves a state and another country, the sovereignty of a fellow state can not be offended. Since such a jurisdictional conflict would not involve a question of interplay between states within the federal system, it may be argued that jurisdictional rules governing assertions over domestic defendants are inapplicable.\(^3\) However, this argument assumes that the Due Process Clause is solely a device to regulate interaction among states, and of course such a construction is not strictly accurate. Due process also embodies traditional concepts of fairness which require sufficient contacts with the forum exercising jurisdiction.\(^4\) Thus, the fact that interests of federalism are absent should not obviate jurisdictional due process for aliens.\(^5\) Accordingly, the general standards for jurisdiction over aliens and domestic defendants

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93. Due to the unique status of an alien, the Court permitted "minimum contacts" to be based on the aggregate of the alien—defendant’s United States contacts, as opposed to the alien’s contacts with the particular forum in Engineered Sports Products v. Brunswick Corp., 362 F. Supp. 722, 728 (D. Utah 1973); But see Wells Fargo & Co. v. Wells Fargo Exp. Co., 556 F.2d 406, 418 (9th Cir. 1977):

If policy considerations do indeed dictate that an alien-defendant’s contacts with the entire United States should be aggregated, and if the Constitution does not forbid such a practice—at least where the plaintiff is suing in federal court on a federal cause of action, the Federal Rules should be amended to authorize such a practice. Such a step is, however, not ours to take.

94. See notes 26 and 31 supra and accompanying text.

are similarly tempered by minimal guarantees of fairness.\footnote{96}{"And the fairness of jurisdiction 'is applicable to foreign parties as it is to citizens of this country.'" United States v. Montreal Trust Co., 35 F.R.D. 216 (S.D.N.Y. 1964).}

Notwithstanding such uniformity there are usually practical constraints which must be considered in an analysis of a jurisdictional assertion over an alien.\footnote{97}{\textit{Cf.} Survey, \textit{supra} note 89 (contends that the unique conditions of aliens must not be ignored in a jurisdictional analysis).} An evaluation of the total circumstances surrounding the plaintiff, forum, defendant and cause of action should include unique conditions which are inherent in the factual context involving an alien.\footnote{98}{The analysis should not be one which treats an alien differently \textit{because he is an alien}. Rather, the analysis would consider \textit{all} the relevant factors before jurisdiction is denied or granted.} For example, a plaintiff may be faced with a choice of either traveling across continents to litigate under foreign laws or of obtaining no satisfaction because the alien does not “fit” into any conventional jurisdictional base. As a practical matter, it is necessary for the standard to be flexible enough to provide for such exigencies. To the extent that such a variance itself is compelled by due process, a state remains within the scope of its adjudicatory power.\footnote{99}{See notes 111-135 \textit{infra} and accompanying text.}

\textbf{PROPERTY OWNED BY ALIEN CORPORATIONS IN THE FORUM}

The following hypotheticals will illustrate the unique problems that accompany the application of \textit{Shaffer v. Heitner} to jurisdictional assertions over aliens owning property in the United States. Possible solutions will be presented that attempt to reconcile the rationale of \textit{Shaffer} with these examples of extraterritorial problems.

1. \textit{The Property as Security}.

Assume that an alien corporation's only assets in the United States are property holdings within State Z. Further assume that this alien corporation acts within the borders of States X and Y. The initial question is whether X or Y may assert jurisdiction over the corporation. The problem is somewhat analogous to the domestic jurisdictional dispute from which \textit{Shaffer} arose.\footnote{100}{The \textit{Shaffer} jurisdictional question was a domestic one because it involved two or more states. Thus, the federalism restraints on state adjudicatory power are called into play, and the usual jurisdictional rules should apply. See notes 31-32 \textit{supra} and accompanying text.} The jurisdictional analysis should begin with an examination of the “contacts” to determine if there existed a relationship between the defendant, the forum, and the cause of action.\footnote{101}{See notes 27, 52, 75 \textit{supra} and accompanying text.} Assuming, that “minimum con-
contacts” do exist in State X or State Y, a question arises concerning the property located in State Z. Clearly if the property in State Z is unrelated to the cause of action, this property alone may not serve as a basis for jurisdiction in State Z over the alien corporation. It is important to note, however, that Shaffer recognizes that the property in State Z may constitutionally be attached as security for a judgment rendered in State X or State Y. Such an attachment would thereafter serve as a provisional remedy, as opposed to a basis of jurisdiction.

Despite the fact that such a provisional attachment is constitutional, a plaintiff may be unable to gain pre-judgment access to the defendant’s property in State Z if that state lacks an authorizing statute. Moreover, state statutes which exist may not provide for security attachments unless the cause of action is brought in the attaching state, or the property is owned by one who does business in the state. Such statutes fail to provide broad security attachments, in part, because prior to Shaffer the attachment itself served as a basis for jurisdiction. Legislative action is necessary to revise attachment statutes to include a procedure for attaching a non-resident’s property as security for a judgment rendered in an action pending in another forum.

If State Z does provide by statute for security attachment, the nature of the property’s existence in that state should be examined before attachment ensues. For example, if the property in State Z is a plane which is temporarily in the forum for repairs, it may be labelled “property . . . merely moving through the state in transit to another country.” While attachment in that situation

103. Hence, in Omni Aircraft Sales, Inc. v. Actividades Aereas Aragonesas, S.A., No. 77-4012 (9th Cir., filed Dec. 27, 1977), appeal dismissed per stipulation, No. 77-669 (filed July 20, 1978), the plaintiff Delaware corporation with its principal place of business in Washington, attempted to attach the Spanish defendant’s plane as security for a judgment rendered elsewhere. The District Court, No. 77-4012 (D. Ariz., Nov. 15, 1977), held that Arizona’s statute did not provide for broad attachments of any property located in the forum, unless the action was being brought there. Thus, the court decided that regardless of the constitutionality of the procedure, Arizona did not authorize it and therefore the plaintiff could not utilize it.
104. See note 101 supra; ARIZ. REV. STAT. §§ 12-1521(3); § 12-2401-2412.
may be improper, such a determination should rest on the general principle driven from *Shaffer* that requires property to be in a state as a result of the defendant having “purposefully” placed it there.\(^{107}\) Of course, this rule does not permit a defendant to remove its assets temporarily from a territory to become judgment-proof.\(^{108}\) Moreover, by its very nature such a removal constitutes a purposeful placement.

It follows from the foregoing that the debt of a non-party to an alien defendant may be attached as security if, through the ordinary course of the alien-defendant’s business, removal of the property is imminent.\(^{109}\) This conclusion does not conflict with *Shaffer*’s rejection of the *Harris v. Balk*\(^{110}\) type attachment since it differs from that kind of attachment in two ways. First, in *Harris* the purpose of the attachment was to compel the defendant to submit to jurisdiction.\(^{111}\) In the proposed attachment, the purpose of the attachment is merely to serve as security. Second, in *Harris* the defendant was totally unable to control the situs of the debt, as it was deemed to travel with the debtor.\(^{112}\) Thus, the *Harris* defendant had no reasonable expectation regarding where the attachment might occur. In the proposed attachment, however, unrelated debts may be attached in the place where the debtor is “doing business.” Under this requirement, the defendant would be able to reasonably ascertain where the attachment is likely to occur from the inception of the debtor-creditor relationship.

### 2. Jurisdiction By Necessity

The jurisdictional question becomes increasingly difficult when it cannot be concluded that the alien “acted” in the United States. If an alien corporation acts outside the United States, it will be nearly impossible under most state statutes to conclude that the alien has

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107. *Id.* Examples of property purposefully placed in the State are bank accounts and land.

108. “The primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which the state would not have jurisdiction if *International Shoe* applied is that a wrongdoer should not be able to avoid payment of his obligations by . . . removing his assets to a place where he is not subject to an *in-personam* suit.” *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977).


110. *Harris v. Balk*, 198 U.S. 215 (1905). The Court upheld personal jurisdiction based upon attachment of an unrelated debt owed to the defendant. In determining the situs of the debt, the Court designated that it traveled with the debtor.


112. *See* note 108 *supra.*
the requisite "minimum contacts" to assert in-personam jurisdiction.\textsuperscript{113} For example, the alien may own treasury bills in an account in a New York bank. Assume that the property is unrelated to the cause of action. If it is determined that the Iranian government has blocked all American access to Iranian courts, the case for the application of "jurisdiction by necessity"\textsuperscript{114} emerges as a solution.

When the plaintiff is faced with bringing an action in his domicile, where the alien has placed property, or forfeiting his cause of action, it would appear consistent with the rationale of \textit{Shaffer} to permit the New York Court to exercise jurisdiction. The direct effect of \textit{Shaffer} was to send the plaintiff to another state, not to totally preclude the plaintiff from obtaining any relief. \textit{Shaffer} acknowledged that unrelated property may be attached as security for a judgment rendered in another state.\textsuperscript{115} This itself assumes the existence of another forum. Further, \textit{Shaffer} expressly reserved judgment on the question whether property may suffice as a basis of jurisdiction when "no other forum is available to the plaintiff."\textsuperscript{116} While \textit{Shaffer} concentrates on the defendant's due process, the plaintiff also has due process rights which provide him a right to a forum.\textsuperscript{117} Accordingly, when this right is totally foreclosed by the usual "minimum contacts" test, and by conditions existing in the alien's domicile, the plaintiff should be permitted a forum "by necessity" in the state of his residence.\textsuperscript{118}

It is questionable whether jurisdiction by necessity should be exercised anywhere but the plaintiff's domicile. The plaintiff's state would appear to have sufficient interest in providing its citizens a

\textsuperscript{113} Actually jurisdiction could still be exercised under an "effects" statute, but these are not prevalent in most states for commercial causes of action. See notes 141-43 infra and accompanying text.

\textsuperscript{114} The concept of "jurisdiction by necessity" is not new. See notes 133-35 infra and accompanying text.

\textsuperscript{115} See note 100 supra and accompanying text.

\textsuperscript{116} "This case does not raise, and we therefore do not consider the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977).

\textsuperscript{117} According to Goss v. Lopez, 419 U.S. 565 (1975), a state may by statute create a property right so that the deprivation of the entitlement may constitute a denial of due process. If a state statute confers a cause of action for a wrong but denies all access to any courts, the argument may be made that denial of a forum to adjudicate the cause of action is tantamount to a deprivation of the cause of action.

\textsuperscript{118} In alluding to the "minimum contacts" test, the \textit{Shaffer} Court said, "We believe . . . that the fairness standard of \textit{International Shoe} can be easily applied in the vast majority of cases." 433 U.S. 186, at 211. It may be argued that the Court admitted that in some instances in which the minimum contacts standard could not apply, a substitute standard would be permissible of necessity. See also Hazard, supra note 11, at 255 n.45.
This state interest should provide the "compensatory" contacts to justify jurisdiction when "minimum contacts" and another forum are otherwise non-existent.

If the plaintiff were a resident of Oregon and the treasury bills were in New York, a problem emerges in determining which state should be the "necessity" forum. An apparent solution would be to maintain the action in Oregon, and to attach the New York property as security for a judgment rendered in the Oregon forum. This procedure may be preferable because the "contacts" of the plaintiff's home state and its interest in providing a forum for its residents is presumably greater than the interest of a state in which an alien defendant's unrelated property lies. Arguably, the defendant has more purposefully linked himself to New York, where he chose to place property, than to Oregon where he has no ties. Yet, ultimately Oregon should be the prevailing forum since jurisdiction by necessity is a remedial measure, and not an expression of "minimum contacts."  

3. Gross Unfairness to the Plaintiff

If the alien defendant lacks the requisite "minimum contacts" with any state, under existing long-arm statutes the plaintiff's "choice" may be to either bring the action in a foreign country or not at all. Such a restriction on the plaintiff may often result in gross unfairness to him. Further, the "jurisdiction by necessity" alternative does not directly apply because here the plaintiff does have a

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119. "[I]n a modern independent political regime the lawgiving and law enforcing agencies of that regime, and not of some other, regulate the affairs of persons and property in the territory ruled by that regime." Hazard, supra note 11, at 264.

120. This conclusion is based on the quality and permanence of contacts. A plaintiff's domicile is the state with which he intends to remain permanently. See notes 14-17 supra. Unrelated property, on the other hand, need not even be tangible. However, the property could also be of a permanent nature such as real estate. The case for the state in which the property lies becomes stronger as the permanent connection of the property to the forum increases. See generally Smit, supra note 64 and accompanying text.

121. Arguably, this purposeful link by a voluntary act of the defendant is probably why Shaffer suggested that the state where unrelated property lies, as opposed to the plaintiff's domicile, may suggest a sufficient contact, in some instances.

122. Shaffer rejected fictions and the use of form over substance. See notes 39-41, 45-50 supra and accompanying text. Thus, the necessary result must not be made to fit into a "minimum contacts" niche, if the very need for the remedy arises because the "minimum contacts" standard cannot feasibly be applied in that instance. A similar example of making the base "fit" the traditional assertion can be found in the first days of the motor vehicle statutes. See Hess v. Pawlowski, 274 U.S. 352 (1927). Initially the non-resident driver was said to have "consented" to the state's jurisdiction. This rationale has now been discarded. See Currie, supra note 12.

123. It could be argued that the jurisdiction by necessity principle indirectly applies because at some point the hardships to the plaintiff may leave him no choice but to abandon
forum. Arguably the plaintiff has no guaranteed right to sue in the United States, if he has a forum in another country.\textsuperscript{124} This argument is especially persuasive if the plaintiff does extensive business in the alien-defendant's country, and deals with the alien wholly outside the United States. Requiring such a plaintiff to sue in the alien's country may even be considered an inevitable cost of doing business abroad.\textsuperscript{125} However, the facts of each case should be considered to determine whether or not the plaintiff has the actual jurisdictional "choice" of suing in another country.\textsuperscript{126}

Factors to be considered in this analysis are the resources available to the plaintiff and to the defendant,\textsuperscript{127} the degree of involvement of each party with the other's country,\textsuperscript{128} and the practical hardships in forcing each party to respond in the other's country.\textsuperscript{129} For example, if an alien-corporate defendant owns five million

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\item \textsuperscript{124} This would be supported by the general rule that each individual is not guaranteed the "best" due process, but rather the \textit{extent} of the process that is due is determined by the nature of the property right. There may only be a \textit{denial} of due process when that process which should be accorded, under those circumstances, is denied. \textit{See} Board of Curators v. Horowitz, \textit{\textsuperscript{\textcopyright} U.S.} \textit{\textsuperscript{\textcopyright} 98 S.Ct. 948 (1978)}.
\item \textsuperscript{125} Indeed, the courts have held, similarly, that an alien defendant subjects itself to risk of suit in the United States by doing business here and that this may be allocated as a business expense. \textit{See} Survey, \textit{ supra} note 89, at 373. \textit{See also} Thornton v. Toyota Motor Sales U.S.A., Inc., \textit{397 F. Supp. 476} (N.D. Ga. 1975). There is no apparent reason, therefore, why this logic may not apply to the American plaintiff doing business abroad.
\item \textsuperscript{126} \textit{See} note 121 \textit{ supra} and accompanying text.
\item \textsuperscript{127} Indeed, these are the factors suggested to be considered in any assertion under \textit{International Shoe}. \textit{See} Developments, \textit{ supra} note 20; \textit{see also} Note, \textit{Civil Procedure—Long Arm Statutes—Jurisdiction Over Alien Manufacturers in Product Liability Actions}, \textit{18 WAYNE L. REV.} \textit{1585}, \textit{1595} (1972) [hereinafter cited as Long Arm Statutes].
\item \textsuperscript{128} \textit{See} von Mehren & Trautman, \textit{ supra} note 14; Long Arm Statutes, \textit{ supra} note 125, at 1595.
\item \textsuperscript{129} Cf., Smit, \textit{ supra} note 64 (suggesting that the balancing of these factors is required before \textit{quasi-in-rem}, as opposed to \textit{in-personam} jurisdiction may be exercised).
\end{enumerate}
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dollars worth of farmland in Illinois, this property should be considered as one of the involvements of the defendant with that state.\textsuperscript{130} Assuming a New York resident is injured in France, and his only “choice” is litigating in France, economic realities may force the plaintiff to abandon his cause of action. The question arises whether Illinois could serve as an alternative jurisdiction. The conditions ordinarily contemporaneous with the ownership of land, may suggest that Illinois is an alternative forum.\textsuperscript{131} First, the degree of the plaintiff’s involvements with France should be considered. If the plaintiff was injured during a temporary, personal trip and does not have continuous connection with France, his involvement is minimal. Certainly he has not chosen to project himself into France’s commercial stream. The defendant, on the other hand, has projected himself into the commercial stream of Illinois through investing in land, one of the state’s most valued commodities. In addition, such an investment could be coupled with the existence of other contacts with commerce in Illinois. Where the hardship and inconvenience to the plaintiff so grossly outweighs the hardship and inconvenience to the defendant, it is possible that the “traditional notions of fair play and substantial justice” would not be offended if the defendant is required to submit to jurisdiction in Illinois.\textsuperscript{132}

The general principles of the \textit{Shaffer} decision support such a result, and permit purposefully-owned property to support jurisdiction when to hold otherwise would result in gross unfairness to the plaintiff.\textsuperscript{133} \textit{Shaffer} placed substance over form and examined practicalities. Further, since \textit{Shaffer} emphasized the requirement that the defendant have “purposeful” contacts with the forum state, it is consistent to hold, that if a jurisdictional dispute is between a state and a foreign country as opposed to a state and another state, the due process analysis should weigh the hardships to the parties and consider the degree of involvements of each to the other’s country.\textsuperscript{134} When the defendant has purposefully availed himself of the

\textsuperscript{130} Both Smit, \textit{supra} note 64, and Justice Stevens in his concurring opinion in \textit{Shaffer} suggest that the ownership of land is a sufficient involvement with a forum. \textit{Shaffer v. Heitner}, 433 U.S. 186, 218 (1977).

\textsuperscript{131} Contemporaneous with the ownership of land is usually the availability of American lawyers in the alien’s employ.

\textsuperscript{132} This conclusion would be supported by the significance of owning land, and the state interest in regulating land ownership and by a practical analysis of the factual realities, as opposed to rote formulae for jurisdictional assertions. \textit{See Agricultural Foreign Investment Disclosure Act of 1978}, Pub. L. No. 95-460, 92 Stat. 1263.

\textsuperscript{133} \textit{See} notes 45-47 \textit{supra} and accompanying text.

\textsuperscript{134} This is because if the dispute involves two or more states the federalism aspect of state adjudicatory power comes into play to require “minimum contacts” for extraterritorial
benefits of owning significant property in the forum, that property
may constitute a sufficient basis for exercising jurisdiction espe-
cially when to hold otherwise would submit the plaintiff to gross
unfairness.

Several courts have considered the practical hardships to the
plaintiff if he is forced to go to another country as a result of a denial
of jurisdiction in a state forum, but few courts have explicitly
acknowledged the actual weight that this consideration has played
in upholding jurisdiction in an American court. Instead, the courts
have attempted to “fit” the alien character into a conventional
jurisdictional base. Following the methodology of Shaffer, the pos-
sible hardship to an American plaintiff may occasionally require
that unrelated property, purposefully situated in a state, serve as a
basis of jurisdiction.

CAUSING AN “EFFECT” IN THE FORUM

Contracts and business obligations often arise from communications
by mail and telephone, particularly when the parties are

assertions. See notes 31, 32, 50, 98 supra and accompanying text. When the dispute lacks the
federalism component, all of the circumstances should be considered in the analysis so that
the “fair” result is reached by fact and not fiction.

135. In a case of first impression whether the Washington long-arm statute should apply
to aliens the court concluded: “With the breakdown in international commercial barriers, and
the resulting fact that a substantial portion of goods sold to American consumers today is
manufactured in foreign lands, we would be striking a serious blow at consumer protection if
we did not recognize such jurisdiction. We cannot expect consumers in this state to travel to
other parts of the world to litigate . . . fairness to the foreign manufacturer does not require

136. See generally Survey, supra note 89.

137. The court found that the alien defendant was “doing business” through its subsidi-
ary, when actually the facts revealed that the defendant was not substantially “present” in
the forum. The court instead noted the hardships that would befall the plaintiff to litigate in

jurisdiction over a non-resident defendant whose only contact with the forum was the mailing
of insurance premiums into the state. McGee has been cited for the proposition that physical
presence in the forum is unnecessary when defendant solicits business there nonetheless and
when he has caused an “effect” in the state from which the cause of action arises.

139. Although a telephone call has been held to be a business act in the forum, most courts
hold that this act alone is not a sufficiently purposeful availment to sustain in-personam
countries apart. It is therefore possible for an alien-defendant to cause the American plaintiff serious economic injury, without sending an agent into the forum. As a result, an alien corporation may bring about certain consequences while escaping jurisdiction in the forum.140

Typically, state long-arm statutes require that the defendant perform some physical activity in the forum. However, an "effect" caused in a state may be considered a significant element of the "transaction of business" if it is a foreseeable and natural consequence of the defendant's acts relative to that transaction.141 Some states construe its transaction of business statutes to include such instances in which the defendant causes an effect in the forum from which the cause of action arises.142

Most states have enacted long-arm statutes which authorize jurisdiction over a non-resident defendant who causes a tortious effect in the state.143 It has been suggested that the scope of "effects" statutes be extended to include defendants who cause a direct effect in a state in which they engage in commercial activities and derive commercial benefits.144

jurisdiction. Aaron v. Ferer & Sons Co. v. American Compressed Steel Co., 564 F. 2d 1206 (8th Cir. 1977); but see Empire Abrasive Equipment v. H. H. Watson, Inc., 567 F. 2d 554 (3rd Cir. 1977) (a single phone call soliciting business which would induce Plaintiff to in turn solicit others to fulfill agreement with Defendant may be sufficient contacts to sustain in-personam jurisdiction); Currie, supra note 12, at 569-70; Forsythe v. Overmeyer, 576 F.2d 779 (9th Cir.), cert. denied, 99 S. Ct. 188 (1978).

140. McGee v. International Life Insurance Co., 355 U.S. 220, 222-23 (1957) is often cited for the proposition that increasing international interactions necessitate the expansion of bases of jurisdiction to reach the distant alien. The McGee Court stated, "Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across the state lines... It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." Other courts have dealt with the problem by reasoning that if Defendant benefits from commercial activity involving the State, he should be responsible there. See Barrow S.S. Co. v. Kane, 170 U.S. 100, 107 (1898); Hicks v. Kawasaki Motors Corp., 452 F. Supp. 131, 134 (M.D. Penn. 1978) ("Any other result would permit a foreign corporation to market its product in this state, profit from its sale here and yet retain immunity simply by structuring its business opportunities so as to avoid direct activity in the [forum].").

141. Texas has not enacted a separate "effects" statute, but has interpreted its general long-arm statute to include acts outside the forum which cause either a tortious or commercial effect in the forum. See Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), rev'd on other grounds, 47 U.S.L.W. 4844 (June 26, 1979) (No. 78-759); Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974).

142. Supra note 139.

143. See, e.g., ILL. REV. STAT. ch. 110, § 17(1)(b) (1977). See also Currie, supra note 12. Most statutes are limited to products liability causes of action. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §37, Comment a (1971).

144. Currie, supra note 12; Developments, supra note 20, at 928.
Such an “effects” statute exists in California and provides that this jurisdiction may be exercised only when fair and reasonable. Most recently, the Supreme Court in *Kulko v. Superior Court of California* decided that in the absence of a showing that non-resident, defendant-father either caused physical injury or engaged in commercial activity in California, in-personam jurisdiction could not be exercised under that statute. This holding indicates that the Supreme Court would affirm jurisdictional assertions under “effects” statutes when the defendant causes an effect in the forum as a result of engaging in commercial activity there.

Effects statutes would also provide a means of asserting jurisdiction over alien-defendants who are unreachable under present “doing business” statutes. Under the “doing business” basis an American subsidiary may render its alien parent “present” in the forum if it can be shown that the subsidiary is a “mere department” or an “agent” of the parent. For example, if the alien parent breaches a contract for the sale of cars to be shipped from Italy, a Missouri plaintiff may bring the action in New York, where the subsidiary does business selling bolts, if it can be shown that the parent controls the subsidiary. If, however, the alien successfully shows that the subsidiary is an independent entity, jurisdiction could not be exercised over the alien-parent in New York. Notwithstanding, if the subsidiary sells cars and in fact it can be shown that the alien’s products were sent to the subsidiary, then it is the outlet through which the alien causes the injury. Under the effects approach New York would be a proper forum for a cause of action.

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145. *See Calif. Code Civ. Proc. §410.10, Comment 9 (1970 West); see also Forsythe v. Overmeyer, 576 F.2d 779 (9th Cir. 1978), cert. denied, 99 S. Ct. 188 (1978); Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), rev’d on other grounds, 47 U.S.L.W. 4844 (June 26, 1979) (No. 78-759). In *Great Western* the Court reversed on grounds of venue obviating any need to consider the jurisdictional question. Indeed, the Court admitted that the jurisdictional question is ordinarily considered before the venue question. Nevertheless, the Court labelled the jurisdictional assertion, based on “effects”, a “novel constitutional question” (47 U.S.L.W. at 4846) and decided to consider the venue question first.

146. *Kulko v. Supreme Court of California, 436 U.S. 84, reh. denied, 436 U.S. 908 (1978).* The Court also found that Defendant-father did not “purposefully avail” himself of acting in the forum that would invoke benefits from the state. *Id.* at 1688-99. The action was for breach of an agreement to provide child support. The Court analyzed the “effects” statute and did not intimate criticism of the legislation. Rather, the Court found, in “personal, domestic” relations, application of the “effects” statute was “misplaced.” *Id.* at 96, 97.


148. *Supra* note 15 and accompanying text.

149. *Supra* note 15 and accompanying text.


related to that injury. The alien-parent has benefited from commercial involvement in New York and has caused a direct commercial injury there.

The "effects" approach is consistent with the requirements of Shaffer because the effect must be a consequence of "purposeful" commercial activity, and the cause of action must arise from the commercial injury in the forum. Further, the requisite relationship between the defendant, the forum, and the cause of action exists.

**CONSENT TO JURISDICTION OR ARBITRATION**

A common means of obtaining jurisdiction over an alien corporation is by obtaining that corporation's consent to jurisdiction in a particular forum. Perhaps the greatest assurance of due process exists when the parties have mutually "consented" to jurisdiction or arbitration in a particular forum. Many of the disputes above would be eliminated if all international sales agreements provided for such "consent" clauses. The reasoning inherent in the "consent" basis of jurisdiction is that a defendant may not object to defending in a forum to which he has knowingly consented. The only remaining barriers to effective jurisdiction are similar to the ordinary contractual enforceability issues of equal bargaining power, cohesion and public policy. There are strong policy considerations favoring the recognition of such voluntary agreements, especially in the context of international disputes, and the courts should defer to them whenever possible.

**CONCLUSION**

The due process standards for in-personam jurisdiction are evolving towards the requirement that in all instances the defendant have some meaningful connection to the forum. Shaffer aided in this evolutionary process by rejecting the validity of jurisdiction based

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152. Jurisdiction, supra note 145.
153. See notes 139-43 supra and accompanying text.
154. See notes 7, 27 supra and accompanying text.
157. See note 16 supra.
on fictions, and by affirming the standards of "minimum contacts" for extraterritorial assertions. The standard for jurisdiction should be uniformly applied to domestic and alien defendants. However, that standard must be flexible enough to include a consideration of the unique circumstances surrounding litigation involving an alien defendant.

Alien-owned property, significantly situated in a state, may constitutionally be attached as security for a judgment to be rendered in another forum, if a state statute authorizes the attachment. The remedial alternative of "jurisdiction by necessity" should be acknowledged to enable a plaintiff to bring an action in his domicile when no other forum is available. In addition, when the plaintiff's jurisdictional "choice" is to bring suit in another country, the hardships and inconveniences to each party and the degree of involvement between each party and their adversary's domicile should be weighed. If the balancing reveals that requiring the plaintiff to litigate in another country would result in gross unfairness, the existence of unrelated, alien-owned property in the state may suggest a sufficiently meaningful connection to justify jurisdiction, under the circumstances.

The jurisdictional basis of "doing business" should retain its traditional distinctiveness from extraterritorial jurisdiction. To insure that "doing business" basis retains its territorial nature, the standards should be more strictly applied to require extensive and continuous activity in the forum. When an alien defendant is not "doing business" in the forum, jurisdiction may be exercised under an "effects" statute. State legislatures should consider the desirability of enacting effects statutes to authorize extraterritorial assertions over the defendant who benefits from commercial activity in the forum causing an "effect" from which the cause of action arises.

These means of obtaining jurisdiction are consistent with the rationale of Shaffer. Use of such jurisdictional tools should maximize the plaintiff's ability to reach the corporate alien-defendant, while insuring protection of the defendant's due process rights.

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