

EXPANDING PERSONAL JURISDICTION OVER FOREIGN  
DEFENDANTS: A RESPONSE TO *OMNI CAPITAL  
INTERNATIONAL V. RUDOLF WOLFF & CO.*<sup>1</sup>

INTRODUCTION

In the aftermath of the Cold War, the United States has emerged as a prominent figure in international economic and political relations. The United States is a major contributor to and receiver of overseas investments, world travel, international trade, and foreign aid programs. Consequently, the increase of international transactions gives rise to an array of international disputes. Rule 4 of the Amended Federal Rules of Civil Procedure responds to the increasing demands of United States nationals attempting to assert jurisdiction over foreign defendants<sup>2</sup> in private international legal transactions. The Amended Rule<sup>3</sup> 4(k), specifically, extends the extraterritorial reach of United States federal courts over foreign defendants by expanding the scope of personal jurisdiction in federal question cases.<sup>4</sup>

The amended rule expands domestic as well as international in-personam jurisdiction<sup>5</sup> in all federal question cases<sup>6</sup> from statewide to “nationwide” jurisdiction of the United States over non-resident and foreign defendants.<sup>7</sup> The analysis under the amended rule focuses on a defendant’s “aggregate”

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1. 484 U.S. 97 (1987).

2. See Amendments to the Federal Rules of Civil Procedure and Forms, *reproduced in* MATHEW BERGER & JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK (1993) [hereinafter AMENDMENTS]. See also Supreme Court of the United States Amendments to the Federal Rules of Civil Procedure and Forms, *reproduced in* UNITED STATES LAW WEEK, Section 3: Supreme Court Proceedings, April 27, 1993. Other significant amendments of Rule 4, regarding the facilitation of judicial service, are not discussed in this article.

3. A rule or amendment is drafted by a special American Bar Association Judicial Committee who report to the Advisory Committee on Civil Rules. The rule or amendment is then revised by the Judicial Conference’s Committee on Rules of Practice and Procedure for Supreme Court approval. The rules are then presented to Congress for review and ratification. See 28 U.S.C. §§ 2072, 2073 (1988). See also Bradley W. Paulson, *Personal Jurisdiction over Aliens: Unraveling Entangled Case Law*, 13 HOUS. J. INT’L L. 117, 143 (1990).

4. See *infra* note 49 and accompanying text.

5. Personal jurisdiction is the power of a court to adjudicate a claim against the defendant’s person. GARY BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 28 (2d ed. 1992).

6. “Federal question jurisdiction consists of all civil suits which arise under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

7. “Non-resident” defendants in this article refers to domestic defendants located inside the United States and outside the forum state where “foreign” defendants are located outside of the United States.

or "nationwide" contacts with the United States as a whole as opposed to contacts with any individual state. The amended rule fills the gap in the former rule which permitted a foreign defendant to evade personal jurisdiction when that defendant had sufficient contacts with the United States but lacked adequate contacts with any one state.<sup>8</sup>

The former rule mandated that foreign defendants meet the contacts requirements of the forum state's long-arm statute. The rule did not contain a general federal long-arm statute which would authorize jurisdiction on the basis of scattered contacts throughout the United States in cases where the foreign defendant did not have the requisite contacts with the forum state.<sup>9</sup> For example, a foreign corporation may do business throughout the United States but not have enough contact with any single state to justify jurisdiction. A defendant, therefore, was not accountable for violations of federal law because of state long-arm requirements.<sup>10</sup>

This Comment examines the newly adopted Federal Rule 4 of Civil Procedure. Part I provides an overview of the former rule and the Supreme Court's call, in *Omni Capital International v. Rudolf Wolff & Co.*, for a federal long-arm statute.<sup>11</sup> Part II discusses the perceived inadequacies of the former rule and evaluates the amended rule's remedy of expanding United States domestic and international personal jurisdiction in federal question cases. Part III analyzes the Due Process protections of the amended rule under domestic law standards, but with heightened scrutiny, however, because of the international implications. Part IV suggests that a defendant may still opt to transfer venue or assert *forum non conveniens* to evade jurisdiction where it is otherwise constitutional. Part V addresses the likely international responses of sovereignty and territoriality comparing other states' jurisdictional provisions and the possible effect of such responses on the recognition and enforcement of foreign judgements.

## I. THE PARAMETERS OF PERSONAL JURISDICTION UNDER THE FORMER RULE AND THE DEMAND FOR CHANGE

Rule 4 governs the assertion of personal jurisdiction in civil actions brought in federal court. Former rule 4(f) of the Federal Rules of Civil Procedure provided for service upon individuals in a foreign country when authorized by statute or by the federal rules.<sup>12</sup> There were two possible

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8. AMENDMENTS, *supra* note 2, at 13, Advisory Committee Notes Subdivision (k).

9. *See, e.g.*, *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 427-28 (5th Cir. 1986).

10. *See infra* note 40 and accompanying text.

11. 484 U.S. 97 (1987).

12. Former FED. R. CIV. P. 4(f). Former rule 4(f) provided in part: "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state." *reprinted in*, BORN &

means to obtain personal jurisdiction over a foreign defendant. The former rule specified that personal jurisdiction of a federal court in a federal question case may either be: (1) defined by the statute which is the subject of the suit; or (2) by the jurisdictional laws of the forum state.

#### A. Application of Former Rule 4

The former rule defined the scope of federal question jurisdiction as “anywhere within the territorial limits of the state in which the district court is held.”<sup>13</sup> Rule 4(f) also conferred federal court jurisdiction on a defendant outside the territory of the United States if such jurisdiction was authorized by the federal statute which was the subject of the suit.<sup>14</sup> Congress has enacted certain federal statutes which themselves permit nationwide contacts for personal jurisdiction.<sup>15</sup>

If the federal statute was silent regarding jurisdiction,<sup>16</sup> Rule 4(e) authorized a federal court to employ the long-arm statute of the state where the federal court was located.<sup>17</sup> The federal courts “borrowed” the state’s long-arm statute because Congress had not enacted a general federal long-arm statute.<sup>18</sup> All states have enacted long-arm statutes which describe the contacts which allow the forum state to exercise personal jurisdiction over non-resident or foreign defendants.<sup>19</sup> These long-arm statutes provide for jurisdiction over a defendant who has specified contacts with the forum state. While most states’ long-arm statutes allow jurisdiction to the fullest extent of Due Process,<sup>20</sup> some states provide a “laundry list” of circumstances which permit a non-resident defendant to be reached.<sup>21</sup> A foreign defendant may

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WESTIN, *supra* note 5, at 794, app. B.

13. *Id.*

14. *Id.*

15. *See, e.g.*, Clayton Act, § 12, 15 U.S.C. § 22; Foreign Sovereign Immunities Act, 8, 28 U.S.C. § 1608; Federal Bankruptcy Rule 7004(d),(i), Security Exchange Act of 1933, § 22, 15 U.S.C. § 77v; Security Exchange Act of 1934, § 27, 15 U.S.C. § 78aa; Sherman Act, 15 U.S.C. § 5.

16. Few Federal statutes provide jurisdictional authorization required by Rule 4. Some courts contend that when Congress provides nationwide jurisdictional provisions in some statutes but not in others; the Congressional intent is to limit jurisdiction according to the forum state’s long-arm statute. *Omni Capital Int’l, Ltd. v. Rudolf Wolff, Co.*, 484 U.S. 97, 105-06 (1987).

17. Former FED. R. CIV. P. 4(e), *reprinted in BORN & WESTIN, supra* note 5, at 794, app. B.

18. *E.g.*, *Omni Capital*, 484 U.S. at 97.

19. BORN & WESTIN, *supra* note 5, at 28, 29.

20. *Id.* at 29. The long-arm statute in California provides that “[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” CAL. CODE CIV. PROC. § 410.10 (1973).

21. BORN & WESTIN, *supra* note 5, at 29. *See E.g.*, District of Columbia Long-Arm Statute, *reprinted in app. A.*, 789.

have been subject to jurisdiction in a state with a broad long-arm statute and immune from jurisdiction in a state with a conservative statute, where the foreign defendant's contacts with each state were identical. Consequently, state long-arm statutes do not provide a uniform approach to federal jurisdiction. Similarly, a foreign defendant may have sufficient contacts with the United States as a whole but lack adequate contacts with an individual state. Federal adjudication, therefore, was restrained by conservative state long-arm statutes.

### B. *Omni Capital International v. Rudolf Wolff & Co.*

The U.S. Supreme Court first addressed the controversy of adopting a general federal long-arm statute in *Omni Capital International v. Rudolf Wolff & Co.* The Court in *Omni Capital* refused to acknowledge any "federal long-arm statute" over foreign defendants or the constitutionality of personal jurisdiction based on an aggregate of contacts with the United States.<sup>22</sup> Rather, the Court, adhering to the doctrine of Separation of Powers, expressly encouraged a legislative enactment to respond to the issue.<sup>23</sup>

The plaintiff in *Omni Capital* brought a private action under the Commodity Exchange Act in a Louisiana federal district court against *Omni Capital International, Ltd.* and *Omni Capital Corporation*, New York corporations that marketed an investment program.<sup>24</sup> Plaintiff investors claimed that *Omni* fraudulently induced them to join in the investment program by misrepresenting certain tax benefits and profits.<sup>25</sup> *Omni* in turn impleaded *Rudolf Wolff & Co.*, a British investment corporation, which was employed by *Omni*, and James Gourlay, a British citizen, who solicited business from *Omni* as *Wolff's* agent.<sup>26</sup> *Wolff* and *Gourlay* moved for dismissal on the ground that the court lacked personal jurisdiction.<sup>27</sup> The District Court agreed that jurisdiction was improper and dismissed the claims because the foreign defendants did not have enough contacts with Louisiana,

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22. *Omni Capital*, 484 U.S. at 106.

23. *Id.* at 107. The Court had previously held in *Asahi Metal Industry Co. v. Superior Court* that "[w]e have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the state in which the federal court sits." 480 U.S. 102, 113 n.2 (1987).

24. *Omni Capital*, 484 U.S. at 99.

25. *Id.*

26. *Id.* *Wolff* and *Gourlay* participated in commodity transactions on the London Exchange. *Id.*

27. *Id.*

the forum state, to support jurisdiction.<sup>28</sup> The Fifth Circuit affirmed and the Supreme Court granted certiorari to resolve the growing conflict<sup>29</sup> regarding the proper criteria for federal jurisdiction in a federal question action.<sup>30</sup>

Omni argued that the Commodity Exchange Act implicitly authorized jurisdiction, but the act did not contain a statutory provision for personal jurisdiction.<sup>31</sup> The Court, therefore, applied the provision of Rule 4 which allows a federal court to borrow the state's long-arm statute.<sup>32</sup> The Court unanimously held that the defendants did not have sufficient contacts with Louisiana to permit the use of its long-arm statute.<sup>33</sup>

Alternatively, Omni contended that the Court should fill the gap in Rule 4 by authorizing extraterritorial service as a matter of federal common law.<sup>34</sup> The Court admitted that it was "not blind to the consequences of the inability to serve process"<sup>35</sup> and a "narrowly tailored service of process provision, authorizing service on an alien in a federal case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the Commodity Exchange Act and other federal statutes."<sup>36</sup> A general federal long-arm statute aggregating contacts with the United State as a whole would have precluded the British defendants from

28. *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 419 (5th Cir. 1986). The district court began its inquiry by aggregating the English defendants' contacts with the United States and concluded that personal jurisdiction was authorized. *Id.* at 418. Subsequently, however, the fifth circuit decided *DeMelo v. Toche Marine* which held that absent a federal statute authorizing jurisdiction, the state's long-arm standard will apply. 711 F.2d. 1260, 1269 (5th Cir. 1983).

29. See *infra* notes 61-65 and accompanying text.

30. *Point Landing, Inc. v. Omni Capital Int'l*, 795 F.2d 415 (5th Cir. 1986), *aff'd sub nom.* *Omni Capital Int'l. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987).

31. "The legislative history also supports the conclusion that Congress did not intend to provide nationwide service of process for private actions under the CEA." *Omni Capital*, 484 U.S. at 105.

32. Former FED. R. CIV. P. § 4(e) - (f).

33. *Omni Capital*, 484 U.S. at 101. "Louisiana's long-arm statute, then in effect, provided in relevant part: A court may exercise personal jurisdiction over a non-resident, who acts directly or by an agent, as to a cause of action arising from the non-resident's (a) transacting any business in this State; (b) contracting to supply services or things in this state; (c) causing injury or damage in this State by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits business, or engages in any other persistent cause of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State. . . ." LA. REV. STAT. ANN. § 13:201 (West 1968). *Id.* at n.4.

34. *Id.* at 103. The Court deferred to Congress which explicitly singles out certain federal statutes to have extended jurisdiction. *Id.*

35. *Id.* at 110.

36. *Id.* "[T]he effect of the majority's decision is to grant jurisdictional immunity to alien defendants who have done business in this country thereby destroying any real possibility of holding them accountable for their violation of federal statutes." *Point Landing*, 795 F.2d at 427 (Wisdom, J., dissenting).

evading federal court adjudication. The Court, however, refused to extend jurisdiction without explicit legislative approval.<sup>37</sup>

The lower courts, in kind, followed the individual state long-arm statutes for conferring federal jurisdiction. These courts, however, developed their own standards in interpreting whether a state's long-arm statute authorized national contacts and whether an aggregate of national contacts was precluded by Due Process. The majority of federal courts follow the methodology of *Omni Capital* and hold that a state's long-arm statute does not confer federal jurisdiction.<sup>38</sup>

## II. THE AMENDED RULE

The former rule has been challenged in various contexts with proposals to broaden personal jurisdiction in federal question cases to an aggregate of contacts with the United States.<sup>39</sup> It was contended that federal adjudication should not be restrained by jurisdictional requirements of individual states.<sup>40</sup> State statutes were, in effect, incorporated into the Federal Rules of Civil Procedure which regulate *federal* court jurisdiction over *federal* question claims.

Many commentators have argued to further extend the aggregate contacts approach to federal cases based upon diversity jurisdiction.<sup>41</sup> Diversity jurisdiction, however, is premised on non-uniform state laws which may be perceived as intruding into foreign affairs.<sup>42</sup> Jurisdiction over state claims remains restricted by state long-arm statutes where as federal law is the law of the United States and the proper forum for measuring contacts should be the United States.

Uniform application of federal law is particularly important in international cases because of the implications of foreign relations. State long-arm statutes which are the basis of federal personal jurisdiction are inconsistent

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37. *Id.* "That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress." *Id.*

38. *See infra* notes 62-63 and accompanying text.

39. *See, e.g.*, Paulson, *supra* note 3; Brian B. Frasch, *National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits*, 70 CAL. L. REV. 686 (1982); Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (Feb. 1983); Note, *Alien Corporations and Aggregate contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470 (1981).

40. *Id.*

41. *See, e.g.*, Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, (1987); Ronan E. Degan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgements Against Alien Defendants*, 39 HASTINGS L.J. 799, 817 (Apr. 1988).

42. "When state courts assert jurisdiction over foreign nationals residing abroad, the possibility of state interference with the nation's foreign affairs arises; when state courts make, or are perceived abroad to make exorbitant jurisdiction assertions, the possibility of interference becomes a very real risk." Born, *supra* note 41, at 30.

and produce an arbitrary application of federal law where some plaintiffs could bring suit and others would have to forego their claims<sup>43</sup> or travel to a distant foreign forum.<sup>44</sup> Uniformity will provide predictability to foreign defendants who conduct business in the United States.

Amended Rule 4 of Federal Civil Procedure significantly expands the boundaries of federal question jurisdiction with respect to defendants located both within and outside the United States.

### A. *Interstate Personal Jurisdiction*

Domestic jurisdiction was previously limited to the territorial boundaries of the state in which the district court was sitting.<sup>45</sup> Domestic jurisdiction of the individual states under the amended rule has been enlarged such that “[s]ervice upon an individual . . . may be effected in any judicial district of the United States.”<sup>46</sup> The amended rule eliminates state territorial boundaries and permits federal jurisdiction to reach any defendant located anywhere in the United States.<sup>47</sup> It is difficult to conceive of a set of facts where a court would be denied jurisdiction over a non-resident domestic defendant because mere citizenship or residency in the United States is sufficient contact for a state’s exercise of jurisdiction regardless of the defendant’s contacts with that state.

### B. *International Extraterritorial Personal Jurisdiction*

The amended rule has more profound implications with regard to foreign defendants where state law no longer precludes federal adjudication. The

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43. See *supra* notes 19-21 and accompanying text. “[T]he national contacts approach would promote greater uniformity of treatment in actions involving federal rights since the jurisdiction of the federal court would not depend upon the liberality or conservatism of the laws of the state in which the court sits.” *DeJames v. Magnificence Carriers, Inc.*, 491 F. Supp. 1276, 1283 (D.N.J. 1980) *aff’d* 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981) (Gibbons, J., dissenting).

44. Many times foreign courts will not recognize a cause of action based upon United States law. See *e.g.*, *Piper Aircraft Co., v. Reyno*, 454 U.S. 235 (1981) (citing *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 78 F.R.D. 445 (Del. 1978) (Ecuador had no codified legal remedy for the unjust enrichment and tort claims).

45. Former FED. R. CIV. P. 4(e). There is an exception of a “100-mile bulge” which applies solely to parties impleaded pursuant to Rule 14 or found to be necessary parties pursuant to Rule 19.

46. FED. R. CIV. P. 4(e). The amended rule retains the 100-mile bulge under Rules 14 and 19 and the provision that jurisdiction is tied to the state court in which the district court is located.

47. The scope of this paper focuses on the international implications of the amended rule. *But see generally* Howard M. Erichson, *Nationwide Personal Jurisdiction in all Federal Question Cases: A New Rule 4*, N.Y.U. L. REV. 1117 (Nov. 1989) (discussing the domestic implications of Rule 4 and the defendant-protective doctrines of venue and *forum non conveniens* which limit the unfairness of the amended rule).

expansion of territorial jurisdiction over foreign defendants is specifically defined in amended rule 4(k) which has replaced rule 4(f).<sup>48</sup> This rule empowers federal courts to exercise territorial jurisdiction over any defendant where an action is brought under federal law.<sup>49</sup> The revised Rule 4(k)(2) fills in the gap that was exploited by foreign defendants who were immune from United States jurisdiction if nationwide contacts were not expressly provided for in a specific statute or the defendant did not have sufficient contacts with the forum state.<sup>50</sup> In essence, Rule 4(k)(2) responds to the *Omni Capital* dilemma by tacitly approving general federal long-arm jurisdiction.<sup>51</sup> A national contacts approach provides uniform guidelines to federal courts in that jurisdiction may be exercised to the fullest extent permitted under due process standards.

### III. DUE PROCESS LIMITATIONS

The United States provides a safeguard to jurisdictional amenability of foreign defendants under the amended rule with the constitutional protection of Due Process. The two-prong test for Due Process analyzes the foreign defendant's "contacts" with the United States and the "reasonableness" of adjudicating in a distant forum.<sup>52</sup> The amended rule shifts the defendant's Due Process protection from a minimum contacts analysis with the forum state to the aggregate contacts with the United States as a whole. Personal

48. Amended Rule 4(f) addresses service upon individuals and the requirements of extraterritorial personal jurisdiction is found in Amended Rule 4(k).

49. Amended Rule 4(k) reads as follows:

(k) Territorial Limits of Effective Service.

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant.

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or

(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. Section 1335, or

(D) when authorized by a statute of the United States.

(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.

AMENDMENTS, *supra* note 2, at 159, subdiv. (k).

50. "In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts, which was incorporated into the federal practice by the former rule." *Id.* at Advisory Committee Notes.

51. The Amended Rule retains the provisions for state long-arm jurisdiction and statutorily defined jurisdiction. AMENDMENTS, *supra* note 2, at 159, subdiv. (k).

52. *International Shoe v. Washington*, 326 U.S. 310, 317 (1945).



jurisdiction over a foreign defendant must also be reasonable to withstand due process scrutiny.

The constitutional requirement of Due Process will curb unjust and exorbitant assertions of international jurisdiction.<sup>53</sup> Due Process protection, which applies to the states through the Fourteenth Amendment, is applicable to the federal courts through the Fifth Amendment.<sup>54</sup> The Court specifically assumed in *Asahi Metal Industry v. Superior Court* that the due process clause was applicable to jurisdiction over foreigners.<sup>55</sup>

The United States Supreme Court first interpreted Constitutional Due Process in the realm of personal jurisdiction in *Pennoyer v. Neff* as a limitation to imposing on state sovereignty and territoriality.<sup>56</sup> This interpretation gave heed to the nation's industrialization process and flourishing interstate trade. This restrictive reading changed into a standard which focuses on a non-resident defendant's contacts with the forum state.<sup>57</sup> The Court in *International Shoe v. Washington* articulated the "minimum contacts" test which is employed in states' long-arm statutes where the defendant is not present within the territory of the forum.<sup>58</sup> *International Shoe* and its progeny<sup>59</sup> have defined the minimum contacts standard as one which conforms to the "traditional notions of fair play and substantial justice."<sup>60</sup> The constitutionality of personal jurisdiction over a foreign defendant is a two-prong analysis of the defendant's contacts with the forum and the reasonableness of the forum.

53. Foreign defendants are entitled to United States due process protection. See *Galvan v. Press*, 347 U.S. 522, 530 (1954).

54. See, e.g., *DeJames v. Magnificence Carriers*, 654 F.2d 280, 292-292 (3d Cir. 1981); *Thos. P. Gonzales Corp. v. Consejo Nacional*, 614 F.2d 1247 (9th Cir. 1980).

55. 480 U.S. 102 (1987).

56. *Pennoyer v. Neff*, 95 U.S. 714 (1877). "[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [N]o tribunal . . . can extend its process beyond that territory to subject either persons or property to its decisions." *Id.* at 722.

57. The focus of Due Process has evolved from sovereignty to the protection of an individual liberty interest. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* 456 U.S. 694, 702 (1982).

58. 326 U.S. 310, 316 (1945).

59. See *Hanson v. Denckla*, 357 U.S. 235 (1958); *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 105 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). The factors considered in these cases for minimum contacts include: the purposeful availment of the defendant who has invoked the benefits and protections of doing business in the forum; the stream of commerce; the cause of action arises from the defendant's activities in the forum; reasonableness.

60. *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

### A. A Foreign Defendant's Contacts with the United States

The Supreme Court has not provided express guidance to resolve Due Process challenges in international federal question disputes. The Supreme Court appears to apply the very same due process analysis in the international context of the defendant's minimum contacts with the forum state as that which developed in domestic cases.<sup>61</sup> Most federal courts similarly follow this domestic standard of the defendant's "minimum contacts" with the forum state in international cases.<sup>62</sup> These courts refused to adopt a national or aggregate contacts test without an explicit statutory enactment<sup>63</sup> and there are few federal statutes which provide for nationwide jurisdiction. A minority of federal courts, however, have liberally construed state long-arm statutes to extend to nationwide contacts.<sup>64</sup> "Due process or traditional notions of fair play and substantial justice should not immunize an alien defendant from suit in the United States simply because each state makes up only a fraction of the substantial nationwide market for the offending product."<sup>65</sup>

Many courts have acknowledged the national contacts approach in cases where the statute proscribes nationwide jurisdiction. In such cases, the federal legislature has expressly authorized national contacts in the statute which is the subject of the claim.<sup>66</sup>

The amended rule's implicit federal long-arm provision supplements the

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61. See *Helicopteros Nacionales De Columbia S.L. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). These cases involving foreign defendants applied the domestic minimum contacts analysis test of state long-arm statutes without addressing whether it was appropriate in the international context. These cases, however, are based on state law claims over foreign defendants.

62. See *De James v. Magnificence Carriers*, 491 F. Supp. 1276, 1278, 1279 (D. N.J. 1980) (claim in admiralty requiring sufficient contacts with the state of New Jersey when applying its long-arm statute); *Grevas v. M/V Olympic Pegasus*, 557 F.2d 65, 68 (4th Cir. 1977) (claim against Panamanian Corp. under Merchant Seaman Act); *Superior Coal Co. v. Ruhrkohle, A.G.*, 83 F.R.D. 414, 417 (E.D. Pa. 1979) (anti-trust and anti-dumping action); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 404, 418 (9th Cir. 1977) (trademark action); *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*, 289 F. Supp. 381, 390 (S.D. Ohio 1967) (claim against Greek corporation for violation of Sherman Act).

63. See *Wells Fargo*, 556 F.2d at 418 (trademark action and neither Nevada long-arm nor Lanham Act can be construed to permit national contacts); *DeJames*, 491 F. Supp. at 1279 (use New Jersey contacts because no federal authority for national contacts); *Superior Coal*, 83 F.R.D. at 418 (nationwide contacts not permitted without statutory authorization).

64. See *Cryomedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287, 290-91 (D. Conn. 1975); *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722, 728 (D. Utah 1973). See also *Frasch*, *supra* note 39, at 694-97 (analyzing cases which apply a nationwide contacts analysis to state long-arm statutes).

65. *Engineered Sports Prods.*, 362 F. Supp. at 728.

66. See *Paulson Inv. Co. v. Norbay Sec., Inc.*, 603 F. Supp. 615, 618 (D. Ore. 1984); *Eng'g Equip. Co. v. S.S. Selene*, 446 F. Supp. 706, 709-10 (S.D.N.Y. 1978).

former rule in cases where the federal statute did not authorize nationwide jurisdiction or the foreign defendant did not have minimum contact with the forum state; thereby expanding personal jurisdiction over foreign defendants.<sup>67</sup>

### B. Reasonableness

Jurisdiction over a foreign defendant who has sufficient contacts with the United States will not withstand Due Process scrutiny if it is not fair and reasonable. The Court in *Asahi Metal Industry Co. v. Superior Court of California*<sup>68</sup> recognized the need for special treatment of foreign defendants in federal courts, but did not articulate any of its specific concerns.<sup>69</sup> The Court asserted that “[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.”<sup>70</sup> The Court stated that jurisdiction over a foreign defendant be “reasonable,” parallel to the domestic analysis.<sup>71</sup> In *Asahi*, that court stated that “[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of

67. The aggregate contacts approach will have a more significant effect on general jurisdiction cases where the defendant’s contacts are unrelated to the controversy and must be “continuous and systematic” such that the defendant is deemed “present” in the United States. See *Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408, 415-16 (1984); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446 (1952). Plaintiffs can aggregate the foreign defendant’s contacts to enlarge the forum to the United States to meet the continuous and systematic threshold. Specific jurisdiction, however, requires fewer contacts with the United States because the cause of action itself “arises from” the defendant’s contact with the United States. See also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

68. 480 U.S. 102 (1987). Plaintiff sued a Taiwanese manufacturer because of a motorcycle accident which arose in California in a California state court. The defendant cross-claimed against *Asahi*, the Japanese manufacturer, claiming that the accident was caused by a defect in the valve system. The plaintiff settled the suit against the Taiwanese manufacturer and only the claim for indemnification remained. The Court held that they did not have personal jurisdiction over the Japanese defendant who did not direct its product to the forum or purposefully avail itself to the laws of California. *Id.* at 112.

69. *Asahi*, like *Helicopteros* and *Perkins*, involved federal diversity jurisdiction based on state law. The Supreme Court has expressed a general concern for international defendants but not in the specific area of federal question jurisdiction.

70. *Asahi Metal Indus. Co.*, 480 U.S. at 115 (quoting *United States v. First Nat’l City Bank*, 379 U.S. 378, 404 (1965) (Harlan J., dissenting)).

71. The second prong of the Due Process analysis is emphasized in *Asahi* of “reasonableness” or “fairness.” Reasonableness is defined in the domestic context as: “the burden on the defendant; the interests of the forum state; . . . the plaintiff’s interest in obtaining relief; . . . the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interests of the several States in furthering fundamental substantive social policies.” *Asahi Metal Indus. Co.*, 480 U.S. at 113 (citing *World-Wide Volkswagen Corp. v. Woodson* 444 U.S. 286, 292 (1980)).

stretching the long arm of personal jurisdiction over national borders.”<sup>72</sup> The Restatement of Foreign Relations also takes the view that jurisdiction over foreign defendants should be reasonable.<sup>73</sup> A reasonableness assessment of due process in international cases, however, may produce arbitrary results in the lower courts because of the Court’s vague interpretation.

### C. Heightened Scrutiny of Extraterritorial Jurisdiction

One suggested remedy is a heightened scrutiny of the defendant’s contacts and the standard of fair play and substantial justice<sup>74</sup> because of the “greater litigation burdens” that a foreign defendant must bear.<sup>75</sup> “[I]nternational assertions of jurisdiction . . . implicate special concerns that call for modification of traditional Due Process standards.”<sup>76</sup> Heightened scrutiny in the international context is necessary to monitor extraterritorial jurisdiction because of foreign relations and foreign commerce considerations.<sup>77</sup> Many lower courts already apply heightened scrutiny to the fairness of asserting jurisdiction over a foreign defendant.<sup>78</sup> “The unifying element in all cases

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72. *Asahi Metal Indus. Co.*, 480 U.S. at 114. The Court held that jurisdiction violated notions of fair play and substantial justice because of the special burdens placed on the foreign defendant where the indemnity claim occurred in Taiwan and the plaintiff was no longer a California resident. *Id.*

73. “A state may, through its courts or administrative tribunals, exercise jurisdiction to adjudicate with respect to a person or thing, if the relationship of the person or thing to the state is such as to make the exercise of such jurisdiction reasonable.” RESTATEMENT OF THE LAW, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 421 [hereinafter RESTATEMENT].

74. Heightened scrutiny was recognized in *Asahi Metal Indus. Co.*: “[T]he Federal interest in Government’s foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state.” *Asahi Metal Indus. Co.*, 480 U.S. at 114.

75. See Born, *supra* note 41, at 26.

76. *Id.* at 20.

77. *Id.* at 28. Exorbitant assertions of jurisdiction may offend foreign sovereigns, provoke diplomatic protests, incite retaliation, interfere with diplomatic initiatives and international agreements. *Id.* at 28-30.

78. The Second Circuit considered four factors in subjecting a foreign defendant to United States jurisdiction: “(1) the extent to which the defendants have availed themselves of the privileges of United States law; (2) the extent to which litigation in the United States would be foreseeable to the defendant; (3) the inconvenience to the defendants of litigating in the U.S.; and (4) the countervailing interest of the United States in hearing the suit.” *Texas Trading & Milling Corp v. Federal Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1982) The Ninth Circuit enumerated seven factors for subjecting a foreign defendant to a forum state’s jurisdiction: “(A) the extent of the purposeful interjection into the forum state . . . (B) the burden on the defendant of defending in the forum . . . (C) the extent of conflict with the sovereignty of the defendant’s state . . . (D) the forum state’s interest in adjudicating the dispute . . . (E) the most efficient judicial resolution of the controversy . . . (F) the importance of the forum to plaintiff’s interest in convenient and effective relief . . . and (G) the existence

is the attempt to define and apply a concept of fairness appropriate to the situation while not straying too far from the principles enunciated in *World-Wide Volkswagen*.<sup>79</sup> Heightened scrutiny of due process would require the foreign defendant to have sufficient, direct, and foreseeable contacts with the United States and that the United States is a reasonable and fair forum under the circumstances.<sup>80</sup>

A predictor of the constitutionality of general "federal long-arm jurisdiction" arising out of the Amended Rule are federal statutes which have built-in provisions for personal jurisdiction that allow consideration of the defendant's contacts with the nation as a whole rather than those of the forum state.<sup>81</sup> The lower courts have consistently held that the statutes with provisions for nationwide contacts comport with due process.<sup>82</sup> Many of these cases where jurisdiction is provided in the statute have applied a heightened scrutiny analysis which consider the specialized fairness concerns of a foreign defendant.<sup>83</sup> Heightened scrutiny of a foreign defendant's aggregate contacts with the United States serves to deter abuse of the amended rule and any exorbitant assertions of jurisdiction.

#### IV. VENUE TRANSFERS AND *FORUM NON CONVENIENS*

Jurisdiction of the United States over foreign defendants may result in undue hardship where a litigant must defend oneself in a foreign and distant forum. The defendant does have an avenue of recourse, however, if jurisdiction is unduly burdensome or inconvenient.<sup>84</sup> Statutory venue transfers and common law *forum non conveniens* provide additional filters for foreign defendants where personal jurisdiction is otherwise constitutional. Venue transfers permit a foreign defendant to transfer jurisdiction to another

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of an alternative forum." *Ins. Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981).

79. Janice Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 TUL. L. REV. 758, 777 (Jan. 1984). See *supra* note 71 and accompanying text.

80. See Born, *supra* note 41, at 34-35.

81. See *supra* note 15 and accompanying text. See *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1315-16 (9th Cir. 1985) (securities fraud suit); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 314-15 (2d Cir. 1981) (Foreign Sovereign Immunities Act); *Go Video Inv. v. Akai Electric Co.*, 885 F.2d 1406 (9th Cir. 1989) (Clayton Act).

82. See generally Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 N.W. U.L. REV. 1, 6 (1984) (contending that the nationwide contacts provisions in federal statutes are unconstitutional if unreasonably burdensome).

83. See *supra* note 78. *Engineered Sports Prods.*, 362 F. Supp. at 729; *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984).

84. It would be unusual for jurisdiction to be inconvenient with improved global transportation and communication systems.

United States district court<sup>85</sup> because a foreign defendant may be sued in any district court where jurisdiction may be exercised.<sup>86</sup> Jurisdiction may be transferred to the foreign forum under a foreign non conveniens analysis.

Many statutes which confer jurisdiction based upon national contacts contain restrictive venue provisions.<sup>87</sup> "In most instances, the venue limitations in federal nationwide personal jurisdiction statutes permit suits in those judicial districts in which the defendant resides, transacts business, does business, is licensed to do business or is found."<sup>88</sup> Accordingly, venue transfers enable defendants who must travel to distant forums to be sued in the forum in which they have the most contacts.<sup>89</sup> "The venue rules should be more restrictive than the constitutional standards for personal jurisdiction and should provide fairly specific rules for channeling litigation to a convenient forum."<sup>90</sup> For example, a Mexican defendant would likely prefer to adjudicate in Texas as opposed to New York.

The doctrine of *forum non conveniens* is a similar tool foreign defendants may use to avoid inconvenient jurisdiction.<sup>91</sup> *Forum non conveniens* is a common law discretionary doctrine which focuses on the defendant's inconvenience of litigating in a foreign forum. The presumption in a foreign non conveniens analysis is to uphold the plaintiff's choice of forum unless an alternative forum<sup>92</sup> is available and both private and public interests deem the alternative forum more convenient.<sup>93</sup> A forum is not more convenient,

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85. "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

86. 28 U.S.C. § 1391(d) (1982).

87. See Fullerton *supra* note 82, at 71-76 (discussing the aforementioned statutory provisions).

88. *Id.* at 74.

89. See *Engineering Equip. Co. v. Selene*, 446 F. Supp. 706, 710 (S.D.N.Y. 1978) (conferring personal jurisdiction over a Monaco corporation in which transfer provision would remedy problems of the plaintiff's forum choice); *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354, 359 (W.D. Mich. 1973) (conferring personal jurisdiction over a Norwegian shipowner under the Death on the High Seas Act but transferring the case to Florida where most of the witnesses resided).

90. Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1612-13 (1992).

91. *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). See Fullerton *supra* note 82, at 35-38, 41-43 (discussing *forum non-conveniens* as part of the fairness concerns under due process as opposed to a separate defense after jurisdiction has been established.) But see *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (inconvenience must be considered but remains a discretionary, nonconstitutional consideration).

92. There is no alternative forum "if the remedy provided by the alternative forum is so clearly inadequate that it is no remedy at all." *Piper*, 454 U.S. at 254.

93. The private interests include the plaintiff's initial choice, the access to evidence and witnesses, and the enforceability of the judgement. The public interest is to avoid conflicts of law and have "local controversies decided at home." *Gulf Oil Corp.*, 330 U.S. at 508-09.

however, because a defendant prefers its substantive laws.<sup>94</sup> Its purpose is to remedy the burden on the defendant of having to litigate in a distant forum.

*Forum non conveniens* and change of venue provide additional safeguards, after a due process test has been satisfied, to the broadened scope of jurisdictional challenges under the Amended Rule.

## V. INTERNATIONAL REACTION

Rule 4(k) is the United States' sole authority for extraterritorial jurisdiction because international jurisdiction does not fall under the auspices of an international treaty. The amended rule unilaterally expands the jurisdiction of American courts over foreign nationals and may be perceived as "exorbitant." This extension of United States power will likely be met with international distrust and opposition.<sup>95</sup>

### A. *Balancing Power after the Brussels Convention*

There is no universal international agreement which restricts the personal jurisdiction of national courts. However, several bilateral and multilateral agreements define the boundaries of jurisdiction to their subscribers. For example, the Brussels Convention on the Jurisdiction of Courts and the Recognition and Enforcement of Judgements in Civil and Commercial Matters sets out the permissible bases of personal jurisdiction of its European Economic Community member states.<sup>96</sup> The treaty bars exorbitant demands of jurisdiction upon foreign defendants.<sup>97</sup>

The United States is not a member of the Brussels Convention and, consequently, does not receive the preferential treatment afforded to its signatories.<sup>98</sup> The United States is, therefore, subject to each nation's

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94. *Piper*, 454 U.S. at 249.

95. Absent a treaty, national sovereigns may distrust jurisdictional assertions because the United States has a different legal system. *See infra* note 116 and accompanying text.

96. The Act implements the European Communities' 1968 Convention on the Jurisdiction of Courts and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, as amended, 21 O.J. EUR. COMM. (No. L 304) 77 (1978), *reprinted in*, 18 INT'L LEG. MAT. 8, 21 (1979) [hereinafter Brussels Convention].

97. Brussels Convention, art. 3. France's Article 14 jurisdiction which states that a "French citizen may summon an alien before a French Court, regardless of the cause of action or where it arose, and regardless of the defendant's domicile or place of business" is prohibited as exorbitant. A French Court is, therefore, automatically vested with jurisdiction if one of the parties is a French citizen. C. PR. CIV. art. 14. Moreover, Article 15 of the code provides that Frenchmen may only be sued in France. Article 23 of the German Code of Civil Procedure is also among the forbidden bases of jurisdiction because it confers jurisdiction over persons who have any property in a jurisdiction and judgments are not limited to the value of the property. ZPO, art. 23.

98. *Id.*

individual jurisdictional provisions even if exorbitant.<sup>99</sup> Rule 4(k), in effect, balances the power in the realm of jurisdiction. It expands the reach of United States nationals who are subject to exorbitant bases of jurisdiction abroad. The United States, however, provides the constitutional protection of “heightened” due process to *all* defendants to limit its own exorbitant assertions of jurisdiction.

International considerations of sovereignty and territoriality limit extraterritorial jurisdiction over foreign defendants. The transition of due process analysis in the international sphere from emphasis on sovereignty to jurisdiction based upon contacts with the forum is not as smooth as it was in the domestic sphere because of such international considerations.<sup>100</sup> The territorial notion of international power underlies assertions of jurisdiction regardless of the defendant’s contacts. Concerns of national sovereignty, however, should be downplayed when a defendant has exceeded the requisite aggregate contacts with the United States. A defendant who purposefully avails himself of the laws of another jurisdiction and thereby derives benefits from such contacts should be estopped from hiding behind the cloak of national sovereignty.

### *B. Incorporating Amended Rule 4(k) into the International Community*

The United States must be prepared for international retaliation where Amended Rule 4 will stimulate other nations to enact similar provisions. Many civil law countries have retaliatory provisions of jurisdiction which “empower national courts to exercise jurisdiction over foreign persons in circumstances where the courts of the foreigner’s home state would have asserted jurisdiction.”<sup>101</sup>

The recognition and enforcement of United States judgements abroad will impact the effectiveness of the amended rule. Absent an international treaty, foreign states are not bound to recognize or enforce a judgement rendered in the United States.<sup>102</sup> Federal courts asserting extraterritorial jurisdiction should consider at the outset whether the judgement will be enforced outside the United States. “Some states require a treaty or proof of reciprocity (e.g. the Federal Republic of Germany), some have no such requirement (e.g.

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99. Brussels Convention, art. 4.

100. See *infra* note 57 and accompanying text, discussing the transition from Pennoyer to International Shoe. In Pennoyer, Justice Field applied principles of international law in defending state sovereignty. 95 U.S. at 722.

101. Born, *supra* note 41, at 15. See also Degnan & Kane, *supra* note 41, at 848-53 (analyzing the jurisdictional practices of foreign countries).

102. Recognition and enforcement of foreign judgements in the United States depends on the law of the enforcing state. The United States does not have uniform federal provisions governing recognition and enforcement of foreign court judgements. RESTATEMENT, *supra* note 73, § 481 comment a. Many states, however, have adopted the Uniform Foreign Money Judgements Recognition Act. 13 UNIFORM LAWS ANNOTATED 261 (1986).



France), and some do not enforce foreign judgements at all in the absence of a treaty. (e.g. The Netherlands)."<sup>103</sup> An aggregate of contacts will expand United States jurisdiction, however, non-recognition and other barriers to enforcement of foreign judgements will curb its effects.<sup>104</sup>

Many sovereigns currently recognize judgements based upon jurisdiction akin to state long-arm statutes where the cause of action arose from contact with the country, but this does not include the United States notion of general jurisdiction contacts.<sup>105</sup> The courts of Germany, Italy, and Japan set out specific bases of jurisdiction similar to United States long-arm statutes<sup>106</sup> which they will recognize reciprocally.<sup>107</sup>

Other nations plainly will not recognize foreign jurisdiction.<sup>108</sup> An aggregate contacts test in England would be futile because England only enforces judgements by a foreign court if the defendant is a resident of the foreign country at the time of the action or the defendant voluntarily submits to jurisdiction.<sup>109</sup> Additionally, an English corporation must have a permanent place of business in the foreign country.<sup>110</sup> "These criteria are narrower than those applied in some jurisdictions and may present an obstacle to the enforcement of judgements from the United States which have been obtained through the application of broad or 'long-arm' rules of jurisdiction of the state concerned."<sup>111</sup> France, similarly, retains exclusive jurisdiction over its nationals without a treaty or voluntary submission.<sup>112</sup>

Consequently, England and France would not recognize jurisdiction based on the minimum contacts standard with an individual state and will likely follow in kind with an aggregate contacts standard with the United States. The countries that do recognize state long-arm jurisdiction, however, do not have provisions for general jurisdiction and would also be hardpressed to recognize and enforce judgements based upon this expansion of United

103. RESTATEMENT, *supra* note 73, at 591, introductory note.

104. *See* Degnan & Kane, *supra* note 41, at 848-53 (comparing other nations' practices of recognition and enforcement of foreign judgements).

105. *Id.* at 849.

106. *Id.* Jurisdiction is proper in Germany, for example, where a tort has been committed or a contract is to be performed. *Id.* (citing Henry P. DeVries & Andreas F. Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 IOWA L. REV. 306, 331 (1959)).

107. A foreign court will recognize and enforce a United States judgement if United States courts would recognize and enforce their judgements under the same circumstances. *See, e.g.,* *Hilton v. Guyot*, 159 U.S. 113 (1895).

108. *See* Degnan & Kane, *supra* note 41, at 849-50.

109. P.M. NORTH & J.J. FAWCETT, *CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW* 349-59 (12th ed. 1992). *See* *Henry v. Geoprosco Int'l Ltd.* Q.B. 726 (U.K. Ct. App. 1976).

110. NORTH & FAWCETT, *supra* note 109, at 350.

111. RONALD A. BRANDT, *ENFORCING FOREIGN JUDGEMENTS IN THE UNITED STATES AND UNITED STATE JUDGEMENTS ABROAD* 94 (1992).

112. FRENCH CODE OF CIV. P. arts. 14-15.

States jurisdiction.<sup>113</sup>

Practically, however, not every assertion of jurisdiction will be met with opposition by a foreign defendant who wishes to continue doing business in the United States. These defendants will often pay their judgements thus dispelling the issue of enforcement. Furthermore, sovereigns will recognize judgements rendered by United States Courts if they want their judgements recognized. International comity will mutually benefit sovereigns in promoting peaceful relations.<sup>114</sup> Comity encourages tolerance, goodwill, and vital cooperation among foreign nations.<sup>115</sup> Foreign nationals may be reluctant to enforce United States judgements despite competent jurisdiction where there are significant differences of law.<sup>116</sup>

The dilemma arises when international sovereigns disfavor unilateral assertions of jurisdiction by the United States outside the auspices of any mutual treaty obligation. According to the Restatement of Foreign Relations, "[t]here is no international law impediment . . . to aggregating a foreign defendant's contacts with the United States as a whole. . ."<sup>117</sup> International judgements should be enforced to encourage international transactions, fairness to the parties who have received favorable judgements, and finality of judgements.<sup>118</sup> The Brussels Convention, for example, obliges its members to recognize and enforce judgements rendered by the courts of its members.<sup>119</sup>

The United States should be encouraged to accede a treaty<sup>120</sup> or negoti-

113. The Brussels Convention also does not provide for general jurisdiction where the defendant's contacts are unrelated to the cause of action. See Degnan & Kane, *supra* note 41, at 851.

114. "Comity in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Piper v. Reyno Aircraft*, 159 U.S. 163, 164 (1981).

115. *Hilton v. Guyot*, 159 U.S. 113 (1875). The United States will not apply the principles of comity where the foreign court lacked personal jurisdiction over the defendant. *Id.*

116. Some of the significant differences of the United States legal system are that the U.S. system includes: strict liability, punitive damages, broader discovery rules, trial by jury, fee shifting to the losing party, contingency fees. . . . *Piper*, 454 U.S. at 353 n.18. See *Solimene v. B. Grauel & Co.*, RIW, 988 (Landgericht, Berlin 1989) Germany would not recognize a U.S. judgement because it violated German public policy. Germany does not have strict liability and their damages are set forth in regulations which are not calculated to punish. *Id.*

117. RESTATEMENT, *supra* note 73, at § 421, Reporter's Note 7.

118. BORN & WESTIN, *supra* note 5, at 745, 746.

119. Brussels Convention, arts. 5-30.

120. The United States' attempt to negotiate a bilateral treaty with England in 1976 for the recognition and enforcement of judgements failed because of significant procedural and substantive differences in the law, such as high United States money damages. See BORN & WESTIN, *supra* note 5, at 743 n.21.

ate a binding framework similar to the European Brussels Convention which will provide for enforcement of both specific and general jurisdiction based upon an aggregate of contacts.<sup>121</sup> The United States recognizes the benefits of such treaties and conventions that serve to codify the international administration of justice. For example, the United States is a signatory of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters which regulates and unifies foreign service of process.<sup>122</sup>

## CONCLUSION

Amended Rule 4(k) of the Federal Rules of Civil Procedure expands the reach of United States federal courts over foreign defendants in federal question cases. The amended rule responds to *Omni Capital* with a general federal long-arm statute where a foreign defendant does not have enough contacts with a particular state to satisfy the state's minimum contacts requirement and the federal statute which is the subject of the federal claim does not provide for nationwide contacts.

Although Rule 4(k) extends United States jurisdiction over foreign defendants, there are several procedural safeguards which will curb its abuse. Foreign defendants are afforded due process protection. Due process is a two prong analysis of the defendant's contacts with the forum and the reasonableness of the forum. A foreign defendant's contacts are measured by his aggregate or nationwide contacts with the United States as a whole as opposed to an individual state. This test has been held constitutional in statutes that have built-in nationwide jurisdictional provisions. The reasonableness of the forum must be balanced with international considerations. Heightened scrutiny of the foreign defendant's contacts as well as the reasonableness of the forum will limit the unfairness of the amended rule. A foreign defendant may also seek the recourse of a venue transfer or an alternative forum under *forum non conveniens*.<sup>123</sup>

Rule 4(k) prevents foreign defendants from evading United States adjudication by carefully scattering their contacts throughout the United States. The English defendants in *Omni Capital* had enough contacts with the United States for jurisdiction under the federal long-arm statute. These

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121. General jurisdiction is not listed in Article 3 of the Brussels Convention as one of the exorbitant bases for denying jurisdiction.

122. See generally Leonard A. Leo, *The Interplay between Domestic Rules Permitting Service Abroad by Mail and the Hague Convention on Service: Proposing an Amendment to the Federal Rules of Civil Procedure*, 22 CORNELL INT'L L.J. 335 (Spring 1989) (discussing the objectives of the Hague Convention to facilitate international litigation with uniform guidelines for service of process).

123. The Advisory Committee noted: "The availability of transfer for fairness and convenience under § 1404 should preclude most conflicts between the full exercise of territorial jurisdiction permitted by this rule and the Fifth Amendment requirement of fair play and substantial justice." AMENDMENTS, *supra* note 2.

defendants probably would have satisfied any judgement rendered against them for purposes of continuing business in the United States. The practical effect of this rule will be felt by United States plaintiffs who are compensated. The problem arises, however, when a foreign defendant does not fulfill the obligation and the United States plaintiff must seek recognition and enforcement abroad. The national laws of England would probably not recognize United States jurisdiction based on nationwide contacts. In addition, many countries, such as England, will perceive this rule as an overextension of United States power. The simple remedy is to enact retaliatory legislation with reciprocal recognition and enforcement or negotiate an equitable agreement to balance the jurisdictional reach of member states.

*Holly A. Ellencrig\**

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