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JURISDICTION IN SINGLE CONTRACT CASES

Timothy D. Brewer

INTRODUCTION

In 1945 the United States Supreme Court caused an upheaval in the law of in personam jurisdiction with its decision in *International Shoe Co. v. Washington*.

That decision approved the exercise by a state court of in personam jurisdiction over a defendant which was not physically present within the state. Unfortunately, *International Shoe* left undefined the extent to which in personam jurisdiction over non-residents might be exercised.

With the increase in ease of transportation and communication has come an increase in interstate commerce. A jurisdictional question has developed around contracts negotiated by residents of different states. The contracts may have been negotiated by mail, telephone, or telegraph without either party ever physically entering the other's home state. The exercise of jurisdiction in cases arising from breaches of such contracts raises questions left undecided by *International Shoe*. This article discusses those questions and seeks to provide guidance in answering them. First, though, a brief review of the development of the law of in personam jurisdiction should be made.

HISTORICAL REVIEW OF IN PERSONAM JURISDICTION

At common law the exercise of jurisdiction over a defendant required either physical power over his person or his voluntary ap-
The execution of a judgment likewise required the seizure of the defendant's person or property. From this basis American courts developed a territorial approach to jurisdiction which recognized jurisdiction only if the defendant received service of process within the geographic territory of the court or if he consented to the exercise of jurisdiction. This territorial approach to jurisdiction was adopted by the United States Supreme Court in 1877 in *Pennoyer v. Neff*.

*Pennoyer* involved an ejectment action brought by Neff to remove Pennoyer from land located in Oregon. Pennoyer claimed title to the land under a sheriff's deed acquired at an execution sale. The sale had been held to enforce a default judgment acquired by one Mitchell against Neff while Neff had been outside of Oregon. Service in Mitchell's action against Neff had been by publication in an Oregon newspaper. The United States Supreme Court ruled the default judgment invalid because Neff had been outside Oregon at the time of the judgment's entry and had not been served with process within the state. The Court clearly stated the territorial theory of jurisdiction:

"And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."

The territorial theory's reliance upon physical presence and consent did not provide a sufficiently broad basis of in personam jurisdiction. Expansion of the basis of jurisdiction necessarily followed. The first expansion came with the allowance of jurisdiction over domiciliaries who were absent from the forum state and were served with process outside of the forum state. The duty to respond to suits was viewed as part of the price of the rights and benefits of domicile.

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4. See *McDonald* and *Michigan Trust Company*, supra note 3.


6. *Id.* at 734.

7. *Id.* at 722.


The expansion of jurisdictional bases continued with the development of the theory of implied consent. Under this theory a defendant, by acting within the forum state, was held to have consented to the exercise of jurisdiction over him. This theory was first applied to corporations based on the conducting of business in the forum state. Later the implied consent theory was expanded to include individuals. The implied consent of individuals, like that of corporations, arose from their actions within the forum state.

For corporations the implied consent theory was carried a step further. The transacting of business by a corporation within a state was eventually viewed as making that corporation actually "present" within that state. This theory rejected an earlier view of corporations as being located only in their state of incorporation.

The strict territorial theory of jurisdiction stated in Pennoyer had thus been substantially weakened prior to the International Shoe decision. While not expressly overruling Pennoyer, International Shoe effectively ended the territorial theory of jurisdiction and replaced it with a more flexible standard based on minimum contacts.

International Shoe was an action brought by the State of Washington against a Delaware corporation to collect unpaid contributions to the state unemployment compensation fund. The corporation maintained no offices in Washington. It did, however, dispatch salesmen to the state to solicit orders. The orders were transmitted to St. Louis, Missouri, where they were accepted by the corporation. The company then shipped the goods to the purchasers in Washington. The Washington Supreme Court ruled that this course of conduct was sufficient to constitute doing business in the state and to make the corporation subject to the state's jurisdiction.

The United States Supreme Court noted that courts no longer needed physical power over the defendant to exercise jurisdiction over him. In place of the Pennoyer requirement of physical presence the Court stated a new standard:

12. Id. at 356-57.
15. International Shoe, 326 U.S. at 316.
16. Id. at 311.
17. Id. at 314.
18. Id. at 316.
[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

Applying this standard the Court found that the corporation had sufficient contacts with Washington to allow the state to exercise jurisdiction.

The language used in International Shoe, while obviously expanding the scope of in personam jurisdiction, was so general that no firm limits on the expansion could be discerned. A look at the cases which followed International Shoe is necessary to understand the decision's impact.

The extent to which International Shoe had expanded jurisdiction became apparent in McGee v. International Life Insurance Co.

That suit was commenced in California by a beneficiary of a life insurance policy issued by a Texas corporation to a California resident. The Texas insurance company had assumed an Arizona insurance company's insurance obligations, one of which was a policy owned by the California resident. The Texas company notified the California resident of the assumption and issued a new policy to him in California. The insured continued to pay the insurance premiums by mail from his California home. This was the Texas company's only contact with California. The California court based its jurisdiction on a California statute which subjected foreign insurance companies to suit in California on insurance policies with California residents.

Noting the trend toward expansion of the permissible scope of jurisdiction, the Supreme Court approved the exercise of jurisdiction by California. The Court found that the suit was based on a contract which had substantial connection with the state. The Court cited the hardship which would be placed on the beneficiaries if they were forced to litigate in another state. Also, the Court pointed out California's interest in providing redress to its

19. Id. (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
20. Id. at 320.
23. 355 U.S. at 222.
24. Id. at 223.
25. Id.
26. Id.
The Court's decision in McGee seemed to indicate that the interest of the plaintiff was superior to that of the defendant when determining jurisdiction. The Court, while noting that the exercise of jurisdiction placed a burden on the defendant, emphasized that denying jurisdiction would place a greater burden on the plaintiff. This emphasis on the plaintiff's interest was rejected in Hanson v. Denckla.

Hanson involved a dispute over a trust established in Delaware by a Pennsylvania resident. The settlor later moved to Florida where she died. The residuary beneficiaries under her will brought suit in Florida to have the trust invalidated. The trust beneficiaries subsequently commenced an action in Delaware to have the trust ruled valid. The residuary beneficiaries received a favorable verdict in the Florida litigation and pleaded it as a bar to the Delaware court action. The Delaware court refused to give full faith and credit to the Florida judgment on the grounds that the Florida court did not have jurisdiction over the trust or the trustee. The United States Supreme Court was called upon to decide if the Florida court had jurisdiction.

The Supreme Court ruled that the Florida court had not had in personam jurisdiction over the trustee. The Court emphasized that the trustee had done no act in Florida nor exercised any privilege there. The Court rejected the argument that the settlor's and beneficiaries' Florida domicile and their actions there were sufficient to allow jurisdiction over the trustee. The Court emphasized its focus on the defendant's acts when it stated: "[I]t is essential in each case that there be some act by which the defendant purposefully

27. Id.
28. Id. at 224.
29. Id. at 223. The Court stated: These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum - thus in effect making the company judgment proof. Often the crucial witnesses - as here on the company's defense of suicide - will be found in the insured's locality.

31. Id. at 238.
32. Id. at 254.
33. Id. at 251.
34. Id. at 252.
35. Id. at 253-54.
avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”

This reliance on the defendant's acts and the use of the “purposefully avails” standard was affirmed in *Kulko v. Superior Court.* In that suit a New York resident was sued by his ex-wife, a California resident, in a California state court for modification of their divorce decree. The divorce had been granted in Haiti and incorporated a property settlement executed by both parties in New York. The California court exercised its jurisdiction over the New York resident because he allowed his daughter to live in California with her mother. This was viewed as purposefully availing himself of the benefits and protections of California's laws. Additionally, the California court ruled that the New York resident by his acts had caused an effect in California so that jurisdiction could be had under the effects test.

The Supreme Court ruled that the California court acted improperly in exercising jurisdiction. The Court found that the New York resident had derived no benefit from California. The Court noted California's interest in protecting its minor residents, but found that this interest was insufficient to allow jurisdiction.

*World-Wide Volkswagen Corp. v. Woodson* also turned upon the “purposefully avails” test. The action was brought against the wholesale and retail sellers of a car that was involved in an accident in Oklahoma. New York residents had purchased the car in New York. While moving to Arizona, the owners were injured in the Oklahoma accident. They commenced a products liability action in Oklahoma. The Oklahoma Supreme Court found that although the retailer's market area extended only into New York, New Jersey, and Connecticut, the retailer did derive benefit from Oklahoma in

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36. *Id.* at 253 (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).
38. *Id.* at 94.
39. *Id.* at 96. Under the effects test one is subject to the jurisdiction of the forum state if he has caused effects in the forum state. This is true even if the effects were caused by actions taken outside the forum state. *See, Restatement (Second) of Conflict of Laws* § 37 (1971).
40. 436 U.S. at 92.
41. *Id.* at 96.
42. *Id.* at 98. The Court also rejected the effects test as a basis for jurisdiction in this suit. The test was intended to apply either to wrongful acts causing physical injury or property damage or to commercial transactions. The New York resident's actions did not fall within either of these categories and therefore did not bring the effects test into play. *Id.* at 96-97.
43. 444 U.S. 286 (1980).
that its goods were used there. On the basis of this benefit the court ruled that the retailer was subject to Oklahoma jurisdiction.\textsuperscript{44}

In reversing this determination, the Supreme Court emphasized that the retailer had done nothing to avail itself of the benefits of Oklahoma law.\textsuperscript{45} The retailer closed no sales, performed no services, and carried on no activities of any type in Oklahoma.\textsuperscript{46} The Court also rejected an argument that jurisdiction should be permitted because it was foreseeable that the automobile would be used in Oklahoma. The Court explained:

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.\textsuperscript{47}

Here, the defendants had done nothing which would make it foreseeable that they would be haled into Oklahoma’s courts.\textsuperscript{48}

\textit{World-Wide Volkswagen} is the last Supreme Court decision on in personam jurisdiction, and, thus, the cases from \textit{International Shoe} through \textit{World-Wide Volkswagen} set out the general rules of in personam jurisdiction. Those decisions, however, will not be the end to the Supreme Court’s work in this area. Too many questions remain unanswered for the court to retire.\textsuperscript{49} Let us now turn to an investigation of one of those unanswered questions.

\textbf{ILLUSTRATION OF THE CONFUSION REMAINING IN SINGLE CONTRACT CASES}

As previously stated in this article, one type of case which has continued to cause confusion in the exercise of in personam jurisdiction is the single contract case. The single contract case arises from the breach of a contract between the residents of different states. Neither party has any contact with the other, or with the other’s home state, except this single contract. The issue in such cases is whether the home state of one of the contracting parties may exer-

\begin{thebibliography}{99}
\bibitem{44} \textit{Id}. at 290-91.
\bibitem{45} \textit{Id}. at 295.
\bibitem{46} \textit{Id}.
\bibitem{47} \textit{Id}. at 297.
\bibitem{48} \textit{Id}. at 298.
\bibitem{49} See Justice White’s dissent to the Court’s denial of certiorari in Lakeside Bridge & Steel Co. v. Mountain State Construction Co., 445 U.S. 907 (1980).
\end{thebibliography}
cise jurisdiction over the nonresident party. This admittedly difficult issue has resulted in confusing, and conflicting, decisions.

An example of this confusion can be seen in the Seventh Circuit Court of Appeals' decisions in two recent single contract cases. The first decision came in *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.* Lakeside, a Wisconsin corporation, brought suit in Wisconsin against Mountain State, a West Virginia corporation. The action arose from an alleged breach of a contract between Lakeside and Mountain State. Under the contract Lakeside was to provide Mountain State with materials to be used in a construction project in Virginia.

Neither corporation had offices or agents in the other's home state nor had any contact with the other's home state except this single contract. The negotiation of the contract had been conducted entirely by telephone and mail except for an initial solicitation by Lakeside's agents visiting Mountain State's West Virginia office. The original purchase order was prepared in West Virginia by Mountain State. Lakeside modified the order at its offices in Wisconsin and returned it to Mountain State. Mountain State acquiesced to the modification.

Lakeside manufactured the materials at its plant in Wisconsin. The goods were shipped to Mountain State under the following contract terms: "F.O.B. SELLERS PLANT MILWAUKEE, WISCONSIN with freight allowed to rail siding nearest project site." Mountain State accepted the materials and incorporated them into its construction. It refused, however, to pay the purchase price claiming that the materials were defective. Lakeside filed suit to recover the purchase price.

The Seventh Circuit ruled that Mountain State was not subject to in personam jurisdiction in Wisconsin. The court's decision turned heavily on the requirement established in *Hanson v. Denckla* that "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The court ruled that Mountain State had not availed itself of Wisconsin's benefits and protections by contracting with a Wisconsin corporation.

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51. 597 F.2d at 598. The capitalized portion of the shipping term was printed. The remainder in lower case letters had been added by typewriter.
52. *Id.* at 604.
53. *Hanson*, 357 U.S. at 253.
54. The court explained its decision as follows:
One year after Lakeside, the Seventh Circuit decided another single contract case, Wisconsin Electrical Manufacturing Co. v. Pennant Products, Inc. Wisconsin Electrical involved the breach of a contract to purchase a computer system. Pennant, a New York corporation, had first contacted an Ohio corporation, Fred D. Pfening Company, to acquire the system. Pfening contacted Wisconsin Electrical, a Wisconsin corporation, to get component parts. Eventually, Pfening suggested that Pennant deal directly with Wisconsin Electrical.

Just as in Lakeside, neither Pennant nor Wisconsin Electrical maintained offices or agents in the other's home state or had any contact with the other's home state except this single contract. Also, all negotiation between the parties took place by telephone or by mail, except for two visits to Wisconsin by Pennant's agents. A contract was eventually signed, but Wisconsin Electrical was unable to perform on time. Wisconsin Electrical brought suit because of the resulting dispute.

Although these facts are strikingly similar to the facts in Lakeside, the Seventh Circuit ruled that Pennant was subject to in personam jurisdiction in Wisconsin. The distinguishing factor relied upon by the court was the two visits by Pennant's agents to Wisconsin. On the basis of these two visits the court found that Pennant had purposefully availed itself of the benefits and protections of Wisconsin law, thus satisfying the requirement of Hanson v. Denckla.

The conflicting outcomes of the Seventh Circuit's decisions in Lakeside and Wisconsin Electrical illustrate the difficulty courts have had with single contract cases. The Wisconsin Electrical court's reliance on the two visits also illustrates the way some courts have turned to a mechanical counting of contacts to determine jurisdiction. In short, the cases illustrate the need which courts have for

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55. 619 F.2d 676 (7th Cir. 1980).
56. Id. at 679.
57. Id. at 677.
58. Id. at 677-78.
59. 597 F.2d at 603.
a unified approach to deciding jurisdiction in single contract cases.\textsuperscript{59}

**EXISTING JURISDICTION TESTS**

In an attempt to develop a unified approach, several circuits adopted tests setting forth the factors to be considered in determining whether jurisdiction could be exercised. Although all of the tests are derived from the Supreme Court's decisions on jurisdiction, the tests varied in complexity. The circuits, in applying their tests, also differed in the jurisdictional value given to facts common to all single contract cases. This section will discuss the three main tests which have developed.

The Fifth Circuit Court of Appeals developed a dual test for determining jurisdiction.\textsuperscript{60} The two factors of this test were: (1) whether an affirmative act of the defendant had established a minimum contact with the forum, and (2) whether it was fair and reasonable to require the defendant to come into the state and defend the action.\textsuperscript{61}

The Sixth Circuit Court of Appeals developed a three requirement test jurisdiction.\textsuperscript{62} The requirements were:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.\textsuperscript{63}

The Eighth Circuit Court of Appeals developed a five factor jurisdiction test.\textsuperscript{64} Three of the factors were considered primary: (1) the quantity of contacts, (2) the nature and quality of the contacts, and (3) the source and connection of the cause of action with

\textsuperscript{59} The Supreme Court passed up an excellent opportunity to provide guidance when it denied certiorari in the Lakeside case. 445 U.S. 907 (1980). Justices White and Powell dissented from this denial and issued a rare written dissent to it noting the conflicts between the various state and federal decisions in single contract cases. \textit{Id.} at 909-10. Justice White argued that certiorari should have been granted to provide guidance on the issue. \textit{Id.} at 910-11.

\textsuperscript{60} Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974). The Tenth Circuit Court of Appeals follows the same test. Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933, 937 (10th Cir. 1977).

\textsuperscript{61} 495 F.2d at 494.

\textsuperscript{62} Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968).

\textsuperscript{63} \textit{Id.} at 381.

\textsuperscript{64} Aftanase v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965).
those contacts. The two remaining factors were secondary: (4) the interest of the forum, and (5) convenience. The First Circuit Court of Appeals also adopted this five factor test.

The three tests, while differing in complexity, are all restatements of the same basic principles established by the Supreme Court. The Fifth Circuit's test is essentially a quote of the Supreme Court's language in International Shoe and Hanson. The Sixth Circuit's and Eighth Circuit's tests are simply further delineations of the components of those principles. In applying the three tests the circuits have consistently looked to the same factors. The inconsistency between cases from different circuits, and within individual circuits, has resulted from the jurisdictional value given particular facts common to all single contract cases.

The next section of this article combines the previous three tests into a unified test. The application of that test to facts common to all single contract cases, and the jurisdictional weight which should be given to those facts is then discussed.

A THREE STEP TEST OF JURISDICTION

Development of any unified test is a difficult task because International Shoe and the later Supreme Court cases set up only general principles. Each turned upon the concerns particularly relevant to its facts. The task is also difficult because the law of jurisdiction is incapable of being reduced to mechanical rules. Jurisdiction simply cannot be placed against a yardstick and measured.

Thus, a unified approach which presents rules of jurisdiction against which a set of facts could be measured, will not be used in this article. Instead, it will attempt to provide a guide to direct the investigation and insure that all relevant factors are considered and a reasoned decision is made.

A unified approach to the determination of jurisdiction would consist of an investigation of the following three steps:

1. Whether the defendant purposefully availed itself of the benefits and protections of the forum state's laws.

65. Id. at 197.
66. Id.
67. Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079, 1083 (1st Cir. 1973).
2. Whether the cause of action arose from the defendant's actions connected with the forum state.
3. Whether the exercise of jurisdiction would be consistent with fair play and substantial justice.

These issues must be considered in sequence and each must be answered affirmatively before the next may be considered. All must be answered affirmatively before the exercise of jurisdiction is proper.

These three steps are derived from *International Shoe* and its progeny. Step one is the "purposefully avails" requirement established in *Hanson v. Denckla*. Step two, the connection requirement, comes from *International Shoe* and from *Hanson*. Together, steps one and two determine the existence of the minimum contacts as required by *International Shoe*. Finally, step three is taken from *International Shoe*.

**APPLICATION OF THE THREE STEP TEST**

The three steps of this jurisdiction test are intended to lead the determination of jurisdiction to a review of all relevant factors present in a single contract case. Each step is intended to review certain factors. This section explains what the objective of each step is.

**Step One:** Whether the Defendant Purposefully Availed Itself of the Benefits and Protections of the Forum State's Laws.

This step may be broken into two components. First, the defendant must have performed some affirmative act which causes consequences within the forum state. Second, the defendant's acts must have been purposefully or foreseeably connected with the forum state so that the defendant intended to be protected by the forum state's laws. Each of these components will be discussed separately.

The acts of the defendant which create consequences in the forum state do not have to be physically performed in the state. Simple communication by mail should be sufficient. Not all com-

71. 326 U.S. at 319.
72. 357 U.S. at 251-52.
73. 326 U.S. at 316.
munications with those within a state, however, will satisfy this requirement.\footnote{77}{Hanson v. Denckla, 357 U.S. 235 (1958).}

In single contract cases the negotiation and execution of the contract are always present. During negotiation the defendant has directed communications into the forum state. Execution creates the needed consequences due to the resulting performance of the contract by the plaintiff in the forum state. The first component of the first step is therefore satisfied in most single contract cases.

The second component is more difficult to fulfill. The defendant's acts must have purposefully affected the forum state or the applicability of the forum state's laws must have been foreseeable from the defendant's acts. The simple fact that the plaintiff is located in the forum state is not sufficient to satisfy this component.\footnote{78}{World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Hanson v. Denckla, 357 U.S. 235 (1958).}

The defendant's own acts must connect him with the forum. On this issue the circuits are in sharp conflict. One view holds that the defendant's entry into a contract which is substantially certain to be performed by the plaintiff in the forum state is sufficient to satisfy this requirement.\footnote{79}{Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933 (10th Cir. 1977); In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365 (8th Cir. 1969); Aftanase v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965).}

The defendant in such cases is presumed to be aware that the plaintiff will perform the contract in the forum state. An intent to be benefitted by the forum state's law is imputed to the defendant from this knowledge. The contrary view rejects this reasoning and holds that the performance of the contract by the plaintiff in the forum state creates no ties between the defendant and that state.\footnote{80}{Mountaire Feeds, Inc. v. Agro Impex, S.A., 677 F.2d 651 (8th Cir. 1982); Iowa Electric Light and Power Co. v. Atlas Corp., 603 F.2d 1301 (8th Cir. 1979); Lakeside Bridge & Steel Co. v. Mountain State Construction Co., 597 F.2d 596 (7th Cir. 1979); Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973); Anderson v. Shiflett, 435 F.2d 1036 (10th Cir. 1971).} These cases view the plaintiff as being free to perform the contract in any state. The plaintiff's choice of the forum state is entirely its own and in no way affects the defendant.

Neither approach can be relied upon to produce satisfactory results in all instances. In those cases in which the defendant contracted for the production of goods or the performance of services with a plaintiff whose only plant is located in the forum state, it is reasonable to impute to the defendant the knowledge that its con-
tract will create consequences in the forum state. In contracts in which the plaintiff is simply acting as a broker of goods acquired from others, the plaintiff is not as limited to performance in the forum state. In such cases the defendant should not be bound by the plaintiff's choice of the place of performance. If the plaintiff is the purchaser and is to receive the goods or services in the forum state, then the defendant would have actual, rather than simply implied, knowledge that the forum state would be affected by the contract. The investigation of this second component therefore will require a review of the contract terms, e.g., shipment terms, references to places of performance, designated sources of goods, and of the parties.

If both components of step one exist, the defendant has purposefully availed himself of the benefits of the forum state's laws. An investigation of step two would then follow. If, however, either of step one's components is not met, the defendant has not purposefully availed himself of the benefits of the forum state's law. Step two need not be investigated in that case because step one has been answered negatively.

Step Two: Whether the Cause of Action Arose from the Defendant's Actions Connected with the Forum State.

This step is the easiest of the three to decide in single contract cases. Suits for breach of contract certainly arise from the activities surrounding the negotiation, execution, and performance of the contract. Assuming that the step one investigation ended with the conclusion that the defendant by making the contract had availed itself of the benefits and protections of the forum state, then a claim for breach of that contract would arise from the acts.81 Similarly, tort actions arising from the same acts which created the contract would also have the necessary connection.82 In single contract cases, then,

81. See In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d at 229.
82. Id. at 231. The plaintiff in In-Flight brought suit on the dual basis of breach of contract and damage to business reputation. Id. at 222. Both causes of action arose because the defendant stopped payment on a check given to the plaintiff as payment for goods delivered by the plaintiff to the defendant under a contract of sale. Id. at 222-23. The court ruled:

Both acts and their consequences were made possible only by Van Dusen's transaction of business with In-Flight, by its entering into a contract with In-Flight. Under the circumstances we believe that the cause of action for damage to business reputation grew directly from the transaction of business in Ohio.

Id. at 231.
Step two will always be answered affirmatively. Therefore, we turn to step three.

Step Three: Whether the Exercise of Jurisdiction Would be Consistent with Fair Play and Substantial Justice.

This step provides the flexibility inherent in the *International Shoe* approach to jurisdiction. Here a weighing and balancing of factors must be made. Although no definitive scale for this weighing and balancing can be established, the factors to be weighed and balanced can at least be identified. The major factors were identified by the Supreme Court in *World-Wide Volkswagen Corp.* 83 Those factors were: (1) the burden placed on the defendant in defending in the forum state, 84 (2) the forum state's interest in adjudicating the lawsuit, 85 (3) the plaintiff's interest in obtaining convenient relief, 86 (4) the interstate judicial system's interest in obtaining efficient resolution of controversies, 87 and (5) the shared interest of the states in furthering fundamental substantive social policies. 88

**Burden of Defendant**

The first factor mentioned, the burden placed on the defendant, is of course the most important. 89 A review of this factor must begin with an investigation of the defendant's economic ability to defend the suit in the forum state. 90 A small business operating at a single location in its home state may not have the resources necessary to defend an action in a distant state. Conversely, a large corporation with operations in numerous states would be prepared to litigate in other than its home state. Litigation which would create an undue hardship on the former would be an acceptable burden for the latter.

In reviewing the burden placed on the defendant, courts commonly look to the defendant's status as buyer or seller in the trans-

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83. 444 U.S. at 292.
84. *Id.*
86. Kulko v. Superior Court, 436 U.S. 84, 92 (1978). The consideration of the plaintiff's interest is restricted by his ability to select the forum in which to pursue his claim of relief.
90. See also In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 234 (6th Cir. 1972).
action. Sellers are traditionally viewed as the dominant party in a transaction and considered more able to defend themselves in a foreign jurisdiction. Buyers are viewed as passive parties unaccustomed to traveling beyond the confines of their home state. The solicitation by a non-resident seller of goods to be brought into the forum state is viewed as a more significant contact with the forum state than a solicitation by a non-resident purchaser of a purchase of goods to be shipped outside the forum state. Sellers, then, are more likely to be found to be subject to foreign jurisdiction. This distinction, while perhaps valid in some instances, should not be accepted as controlling. Instead, the court should look behind the status of the parties to their involvement in the contractual transaction.

Buyers are often categorized by courts as active or passive. A buyer who actively participates in the transaction as by initiating negotiations, specifying the design of the goods, or monitoring the seller’s performance is viewed as more closely connected with the forum state and more subject to its jurisdiction than a buyer who simply places an order for goods and accepts delivery. This is a valid distinction, but should be expanded to apply to sellers as well as buyers.

**Forum State’s Interest**

The forum state will always have an interest in providing redress for its residents. Additionally, the forum state will have an interest in deciding a suit involving a contract calling for production of goods, performance of services, or other contractual performance

91. Aaron Ferer & Sons v. Diversified Metals Corp., 564 F.2d 1211 (8th Cir. 1977).
within the state. If the plaintiff is not a resident of the forum state or if the contract is not to be performed there, then the forum state does not have an interest in adjudicating the action and is unable to hear the litigation.

**Plaintiff’s Interest**

This factor focuses upon the plaintiff’s economic ability to pursue its claim in another state. This economic investigation would be the same as that made of the defendant’s ability to litigate in the forum state.

**Interstate Judicial System’s Interest**

This factor closely parallels the investigation made in a consideration under the doctrine of forum non-conveniens. The issue here is whether the forum state can efficiently litigate the cause of action. The availability of witnesses, the cost of obtaining witnesses, and access to demonstrative evidence are all factors which must be

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96. In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d at 232; O'Hare Int'l Bank v. Hampton, 437 F.2d 1173, 1177 (7th Cir. 1971).
98. See Kulko, 436 U.S. at 92; McGee, 355 U.S. at 223.
99. See McGee, 355 U.S. at 223. The doctrine of forum non conveniens allows a court to decline to exercise jurisdiction even though the court properly has both jurisdiction and venue over the case. Reyno v. Piper Aircraft Co., 630 F.2d 149 (3d Cir. 1980), reversed 454 U.S. 235 (1981). The refusal to hear the case must be based upon a determination that another court, which also has jurisdiction and venue over the case, would be a more convenient court to hear the case. In determining whether a more convenient forum exists the court must consider both the private interests of the litigants and the public interest. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). The factors which must be reviewed in a consideration of the litigants' private interests are:

[T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Id. at 508.

Also to be considered is the enforceability of any resulting judgment. Id. The factors of public interest include: the necessity of applying foreign law; court congestion; imposing jury duty upon the people of a community having no interest to the litigation. Id. at 508-09.

This doctrine has been modified somewhat for federal courts by 28 U.S.C. § 1404(a) (1976). That section states: “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.” This provision expanded upon the doctrine of forum non-conveniens and allowed transfer upon a lesser showing of inconvenience. Norwood v. Kirkpatrick, 349 U.S. 29 (1955). The factors to be reviewed to determine if transfer was proper remained unchanged by the statute, however. Id. at 32.
considered. No one factor is controlling. Again, a balancing of competing concerns must be made.

**States' Interest In Fundamental Substantive Social Policies**

This factor considers the effect that granting or denying jurisdiction would have on social policies. An example of this is the Supreme Court's decision in *Kulko*. The California court based its finding of jurisdiction upon the father's consent to his daughter living with her mother in California.\(^{100}\) The Supreme Court was concerned, among other things, that upholding this decision would place an undue burden on family relations.\(^{101}\)

A similar fear is expressed in single contract cases. The fear is that allowing jurisdiction will interfere with and discourage interstate trade.\(^{102}\) The presumption is that businesses will be hesitant to enter into contracts with businesses located in other states because of the possibility of being pulled into litigation in the other state. The reverse of that presumption, however, is equally true. A corporation might be hesitant to contract with a foreign corporation for fear that it could not obtain jurisdiction over the foreign corporation and would have to litigate in the foreign corporation’s home state. Thus, unless some special policy applies to the facts of a particular case, this factor should not affect the jurisdictional decision.

**CONCLUSION**

Single contract cases pose a special jurisdictional problem. The flexibility inherent in the *International Shoe* doctrine prohibits the development of mechanical rules to settle this jurisdictional problem. When faced with this problem, courts must be careful to investigate the case fully and make the decision based upon a consideration of all factors. The framework set out in this article will help guide courts through this process to a well-reasoned decision.

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\(^{100}\) *Kulko*, 436 U.S. at 89, 94.

\(^{101}\) *Id.* at 98.

\(^{102}\) *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596 (7th Cir. 1979); *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079, 1085 (1st Cir. 1973).