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Not at Home with “At-Home” Jurisdiction

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NOTE

NOT AT HOME WITH “AT-HOME” JURISDICTION

*Kate Bonacorsi**

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INTRODUCTION

A US citizen is an executive at Ford Motor Company in Argentina.¹ While out sailing with his Argentine wife, and their four children, they are abducted by pirates.² When the husband is unable to provide enough money for ransom, the pirates torture the family, killing the wife and children.³ As it so happens, the pirates were secretly funded by a Mercedes Benz executive, an Argentine national, in Argentina.⁴ Can the husband, the sole survivor, bring a claim under the Torture Victim Protection Act (the “TVPA”) on his own behalf, and a claim under the Alien Tort Statute (the “ATS”) on behalf of his family against Mercedes (the German parent corporation) in a United States court?⁵

The US Supreme Court’s January 2014 decision in *Daimler AG v. Bauman* suggests that the answer is no, for lack of personal jurisdiction.⁶ In the United States, personal jurisdiction, or the power to subject an individual to the judgment of the court, must comply with the Due Process Clause of the Fourteenth Amendment of the Constitution.⁷ Personal jurisdiction is one half of what is known as adjudicative jurisdiction—the government’s power to “subject a person or thing to the process of its courts or administrative

1. *See* Goodyear Dunlop Tires Operations, S.A., v. Brown, 131 S. Ct. 2846, 2851 (2011) (where plaintiffs were US citizens).

2. *See id.* (plaintiffs’ children were on a soccer trip to France).

3. *See id.* (children were killed in a bus accident outside of Paris resulting from a blown tire).

4. *See id.* (tire that caused the accident was manufactured by Goodyear).

5. *See id.* (parents of the children brought wrongful death claims against Goodyear in North Carolina state court); Torture Victims Protection Act, 28 U.S.C. § 1350 (1991) (allows filing of civil claims against individuals, who acting in an official capacity for any foreign nation, committed torture or extrajudicial killing); Alien Tort Statute, 28 U.S.C. § 1350 (1948) (permits filing of civil claims against an alien for torts only).

6. *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 (2014) (holding general jurisdiction typically only proper when defendant is domiciled in the forum); *see also* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (asserting that the ATS does not apply extraterritorially).

7. *See* *Pennoyer v. Neff*, 95 U.S. 714, 733-35 (1877) (establishing the Fourteenth Amendment Due Process Clause as the limit on *in personam* jurisdiction); *see also* *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (delineating the “minimum contacts” test for personal jurisdiction under the Fourteenth Amendment).

tribunals.”⁸ Adjudicatory jurisdiction, as a concept of international law, also encompasses subject matter jurisdiction—namely, the power of a court to entertain the subject matter of the claim—and is only proper when both are present.⁹

In *Daimler*, the Supreme Court addressed the scope of general personal jurisdiction, one of two forms of personal jurisdiction recognized by US courts.¹⁰ Looking to the EU’s jurisdictional rules for guidance, the Court clarified its standard for general jurisdiction, holding it is only proper when the defendant is domiciled in the forum state.¹¹ Yet, in trying to harmonize US personal jurisdiction doctrine with international law, the Court went too far and placed US plaintiffs, like the husband from the example above, at a disadvantage.¹²

Before *Daimler*, such plaintiffs could bring their claims under theories of general jurisdiction.¹³ The plaintiffs argued that the

8. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(h) (1987) (explaining jurisdiction to adjudicate). See generally Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1123-25 (1966) (discussing adjudicative jurisdiction generally) [hereinafter von Mehren, *Jurisdiction to Adjudicate*].

9. See, e.g., A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 617-18 (2006) (asserting that adjudicatory jurisdiction requires both subject matter jurisdiction and personal jurisdiction); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(h) (1987) (same).

10. *Daimler*, 134 S. Ct. at 760-63 (describing the Court’s jurisprudence in the area); see also *Walden v. Fiore*, 134 S. Ct. 1115, 1122-23 (2014) (outlining specific personal jurisdiction, the other form of personal jurisdiction).

11. *Daimler*, 134 S. Ct. at 760-61 (citing European Parliament and Council Reg. 1215/2012, Arts. 4(1), 63(1), 2012 O.J. (L. 351) 7, 18) (emphasizing general jurisdiction is only proper over corporation in forum of its “statutory seat,” “central administration,” or “principal place of business”); see Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81, 83 (2013) (discussing the Court’s unclear standard for general jurisdiction); see also Linda J. Silberman, *Jurisdictional Imputation in DaimlerChrysler AG v. Bauman: A Bridge Too Far*, 66 VAND. L. REV. EN BANC 130, 130-31 (2013) (same); John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court’s Decisions in Goodyear Dunlop Tires and Nicastro*, 90 WASH. U. L. REV. 1707, 1718-19 (2013) (describing how application of the “systematic and continuous” test leads to a lack of clarity) [hereinafter Drobak, *Personal Jurisdiction in a Global World*].

12. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (2011) (Ginsburg, J., dissenting) (illustrating how US plaintiffs are disadvantaged); Drobak, *Personal Jurisdiction in a Global World*, *supra* note 11, at 1737 (same).

13. See, e.g., *Hess v. Bumbo Intern. Trust*, 954 F. Supp. 2d 590, 593-94 (S.D. Tex. 2013) (finding general jurisdiction supported by systematic and continuous business activities); Patrick J. Borchers, Note, *The Problem with General Jurisdiction*, U. CHI. LEGAL. F. 119, 121-29 (2001) (describing general jurisdiction as “doing business jurisdiction” and how lower

defendant's pervasive business activities in the forum justified general jurisdiction.¹⁴ No longer an option, these plaintiffs now have to bring their claims abroad, sacrificing all of the benefits of the US court system.¹⁵ Due to the increased cost of litigating abroad, however, such plaintiffs likely will drop their claims altogether, a particularly unfair result because the Mercedes of the world have liability insurance.¹⁶ As Justice Sotomayor stated in *Daimler*, this reinforces the proposition that some corporations are simply "too big to fail."¹⁷

Looking to the international rules for personal jurisdiction, just as the Court did in *Daimler*, there are situations where defendants may be sued in a court even when they are not domiciled in the country.¹⁸ That is the case even outside of what is known in the United States as specific personal jurisdiction.¹⁹ For instance, many countries, particularly civil law countries, have provisions specifically designed to provide their citizens relief.²⁰ In France, jurisdiction is proper when the plaintiff is a French national, regardless of where the

courts apply it); Mary Twitchell, Article, *Why We Keep Doing Business with Doing-Business Jurisdiction*, U. CHI. LEGAL F. 171, 172 (2001) (same); Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319, 340 (2002) (noting that many corporations, like Siemens, Phillips, Daimler-Chrysler and Novartis, have a large presence in the U.S. even without principal place of business or place of incorporation).

14. See generally *Goodyear Dunlop Tires v. Brown*, 131 S. Ct. 2846 (2011) (rejecting this approach); see also Meir Feder, *Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 675 (2012) (describing the approach in lower courts). But see Drobak, *Personal Jurisdiction in a Global World*, supra note 11, at 1726 (explaining that plaintiffs nonetheless tried this when specific jurisdiction not possible).

15. See, e.g., *Nicastro*, 131 S. Ct. at 2791 (where US plaintiff was forced to litigate his claims abroad or forfeit them entirely); see also Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems an American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 37 (1996) (articulating that US plaintiffs are particularly disadvantaged because they lose out US courts, known as "plaintiffs' heaven" because of contingency fee arrangements and jury trials).

16. Drobak, *Personal Jurisdiction in a Global World*, supra note 11, at 1732-33 ("People in business should buy liability insurance . . ."); Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913 (1985) (same).

17. *Daimler AG v. Bauman*, 134 S. Ct. 746, 764 (Sotomayor, J., concurring).

18. See, e.g., CODE CIVIL [C. CIV.] art. 14 (Fr.) (jurisdiction proper when plaintiff is French national); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 23 (Ger.) (jurisdiction proper when defendant has property in Germany).

19. See, e.g., *Nicastro*, 131 S. Ct. at 2787-88 (describing specific jurisdiction).

20. See Kevin M. Clermont & John R.B. Palmer, *French Article 14 Jurisdiction, Viewed from the United States*, (Cornell Law Faculty Publications), Paper 13 at 3 (2004) ("[N]ations tend to give their own people a way to sue at home, at least when the home country will be able to enforce the resulting judgment."); see also Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 607 (2012) (discussing how France provides forums for its own citizens to obtain relief).

parties are domiciled.²¹ Germany takes a slightly different approach, allowing jurisdiction on the basis of property within the country (quasi in rem).²²

This Note will explore and compare personal jurisdiction in the United States and the European Union. Part I will explain personal jurisdiction doctrine in the United States as it evolved through the Supreme Court's interpretation of the US Constitution. Part I will also survey the jurisdictional rules in the European Union, focusing specifically on Germany, France, and the United Kingdom. Part II will compare the differences between US personal jurisdiction and rules of other nations. Finally, in arguing that US plaintiffs are at a disadvantage as compared to their EU counterparts, Part III will endorse a more expansive approach to US personal jurisdiction, incorporating internationally accepted bases of personal jurisdiction.

I. WHAT IS PERSONAL JURISDICTION?

Part I of this Note explores the framework for personal jurisdiction in the United States and the European Union. Part I.A will describe the US approach to personal jurisdiction, derived from the Due Process Clause of the Fourteenth Amendment, and the "minimum contacts" test, as delineated by the Supreme Court in *International Shoe Co. v. Washington*.²³ Part I.B will explore personal jurisdiction in the European Union, highlighting its statutory foundation. Since EU law only regulates litigation as between Member States, a foray into the specific jurisdictional rules of Member States is necessary in order to explain how courts treat non-EU defendants. This Note will focus on the jurisdictional rules of Germany and France, civil law countries, as well as England, a common law country.

21. See CODE CIVIL [C. CIV.] art. 14 (Fr.) (permitting jurisdiction based on nationality); see also C. CIV. art. 14 (Luxembourg) (jurisdiction is proper when the plaintiff is a citizen of Luxembourg); [BW] CIVIL CODE, art. 3 (Neth.) (providing general jurisdiction when applicant is Dutch).

22. See ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 23 (Ger.); but see *Shaffer v. Heitner*, 433 U.S. 186, 212 (1976) (concluding property in the forum does not displace minimum contacts requirement).

23. U.S. Const. amend. XIV, § 1 ("[Nor] shall any State deprive any person of life, liberty, or property, without the due process of law . . ."); *International Shoe v. State of Washington*, 326 U.S. 310, 316 (1945) (holding personal jurisdiction is proper only when a defendant has sufficient "minimum contacts" with the forum state).

A. *Personal Jurisdiction Analysis in the United States*

This Section of the Note begins with a description of the *International Shoe* test for personal jurisdiction. It will then discuss its application in cases of specific jurisdiction and general jurisdiction. Finally, this Section explains the role reasonableness has come to play in US personal jurisdiction doctrine.

1. The *International Shoe* Test

The modern test for personal jurisdiction in the United States is the “minimum contacts” test, whereby a defendant must have “certain minimum contacts” with the forum such that asserting jurisdiction does not offend due process.²⁴ In *International Shoe*, the Supreme Court held that a nonresident corporation met the minimum contacts standard through its business contacts with Washington; thus personal jurisdiction over the corporation was proper.²⁵ The Court has held that the minimum contacts test is satisfied when defendants “purposefully avail” themselves of the forum state.²⁶ The Court reasoned that such defendants—those who seek out the privileges of a forum state’s laws by doing business there—should “reasonably anticipate” being forced to litigate there as well.²⁷

2. Specific vs. General Jurisdiction

In *International Shoe*, the Court contemplated two forms of personal jurisdiction, specific and general jurisdiction, based on the nature of contacts a defendant had with the forum.²⁸ Specific jurisdiction exists when the cause of action arises from the

24. *Int’l Shoe*, 326 U.S. at 316 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (holding jurisdiction must comport with “traditional notions of fair play and substantial justice.”).

25. *Id.* at 320 (noting that the business contacts were systematic and continuous).

26. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (“[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and privileges of its laws.”). *But see Drobak, Personal Jurisdiction in a Global World*, *supra* note 11, at 1730 (noting that the purposeful availment requirement does not replace the minimum contacts test for personal jurisdiction).

27. *Burger King v. Rudzewicz*, 471 U.S. 462, 487 (1985) (finding the nature their contractual relationship with Burger King meant defendants should have expected that litigation would take place there).

28. *Int’l Shoe*, 326 U.S. at 317 (describing what are now known as specific and general personal jurisdiction).

defendant's conduct within the forum, whereas general jurisdiction is present when the defendant's activities are so pervasive in the forum state that jurisdiction is distinct from any specific activities which give rise to the suit.²⁹

In 2011, recognizing a lack of clarity in its personal jurisdiction jurisprudence, the Supreme Court attempted to define both specific and general personal jurisdiction.³⁰ In *J. McIntyre Machinery Ltd. v. Nicastro*, a specific jurisdiction case, Robert Nicastro, a scrapyard employee in New Jersey, injured his hand with a metal shearing machine manufactured by J. McIntyre, a UK company.³¹ Nicastro's employer purchased the machine from an independent distributor that sold McIntyre's products in the United States.³²

In a plurality opinion, the Supreme Court rejected the stream of commerce theory elucidated by the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*, and embraced by the New Jersey court below.³³ Instead, the Court focused on purposeful availment, or rather, the lack thereof.³⁴ While a defendant's knowledge that its products may be purchased within the forum state occasionally indicates purposeful availment, the Court explained, it does not displace the main inquiry: "whether the defendant's activities manifest an intention to submit to the power of a sovereign."³⁵

29. *Id.*; see also *J. McIntyre Mach. Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2010) (distinguishing general jurisdiction from specific personal jurisdiction); see, e.g., Drobak, *Personal Jurisdiction in a Global World*, *supra* note 11, at 1725 ("When the cause of action does not 'arise out of or relate to' the forum activities, the connections between the defendant and the forum have to be at their highest—hence the 'at home' requirement of *Goodyear Dunlop Tires*. Likewise, when the cause of action is somehow related to the forum, the defendant's connection to the forum can be something less than having its 'home' there.").

30. See *Nicastro*, 131 S. Ct. at 2788 (delineating specific personal jurisdiction); *Goodyear Dunlop Tires v. Brown*, 131 S. Ct. 2846, 2853-54 (2011) (delineating general personal jurisdiction).

31. *Nicastro*, 131 S. Ct. at 2786 (noting it was just one of four J. McIntyre machines in New Jersey).

32. *Id.* (describing the company's distribution chain).

33. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.").

34. *Nicastro*, 131 S. Ct. at 2786 (pointing out intentional conduct on the part of the defendant was necessary); see *World-Wide Volkswagen*, 444 U.S. at 297-98 (same).

35. *Nicastro*, 131 S. Ct. at 2788; see also *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014) (emphasizing that the strength of defendant's intentional affiliation with the forum state is to be the central inquiry in specific jurisdiction cases).

Without showing McIntyre specifically targeted the New Jersey market, personal jurisdiction was not proper.³⁶

The same day it handed down its decision in *Nicastro*, the Court decided *Goodyear Dunlop Tires v. Brown*, where it attempted to clarify the standard for general personal jurisdiction.³⁷ In *Goodyear*, two thirteen-year-old US citizens were killed in a bus accident that occurred outside of Paris, France, the result of a blown-out tire.³⁸ The parents of the children, also US citizens, filed a wrongful death suit in North Carolina state court against Goodyear USA, Goodyear Turkey, Goodyear France, and Goodyear Luxembourg.³⁹

Aside from Goodyear USA, which never contested personal jurisdiction, the remaining defendants did not conduct any business in North Carolina.⁴⁰ The Supreme Court determined Goodyear's tire sales made in North Carolina through intermediaries were too "sporadic" to justify general jurisdiction.⁴¹ According to Justice Ginsburg, announcing the new test for general jurisdiction, Goodyear was "in no sense at home" in the forum state.⁴²

3. Reasonableness

While the minimum contacts approach focuses on the strength of the defendant's affiliation to the forum, a court may look to other factors to determine whether assertion of personal jurisdiction would be reasonable.⁴³ As outlined by the Supreme Court in *World-Wide Volkswagen*, these factors include: 1) the burden on the defendant, 2) the forum State's interest in adjudicating the dispute, 3) the plaintiff's interest in obtaining convenient and effective relief, 4) the interstate

36. *Nicastro*, 131 S. Ct. at 2788 (explaining that a prediction of where its goods may end up was not enough).

37. *Id.* (holding a corporation must be "at home" in the forum state for general jurisdiction to be proper).

38. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 U.S. 2846, 2857 (2011) (mentioning the boys were in France for a soccer trip).

39. *Id.* at 2857 (noting the parents brought claims against tires manufacturer).

40. *Id.* at 2852 (noting the tires designed by the European defendants were specifically designed for European market).

41. *Id.* at 2857.

42. *Id.* at 2857 (further explaining that the flow of a defendant's goods "may bolster an affiliation germane to specific jurisdiction," but not general jurisdiction); see also Erichson, *supra* note 11, at 81-83 (arguing for the "home state" standard); Silberman, *Jurisdictional Imputation*, *supra* note 11, at 130-31 (same).

43. See *World-Wide Volkswagen*, 444 U.S. at 292-95 (describing the factors); see also *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 115-16 (1987) (analyzing these factors in the international context).

judicial system's interest in obtaining the most efficient resolution of controversies, and 5) the shared interest of the several States in furthering fundamental substantive social policies.⁴⁴ While the *World-Wide Volkswagen* factors have been used in a variety of cases, they are particularly important when alien defendants are brought to court in the United States.⁴⁵

In *Asahi Metal Industrial Corp. v. Superior Court of California*, a specific jurisdiction case, the Court analyzed the *World-Wide Volkswagen* reasonableness factors in the international context.⁴⁶ After a motorcycle accident in California, the plaintiff sued the Taiwanese manufacturer of the motorcycle's tire tube, Cheng Shin Rubber Industrial Company.⁴⁷ The company then filed a cross-complaint for indemnification against Asahi Metal, which manufactured the tube's valve assembly.⁴⁸

In its plurality opinion, the Court explained that even if personal jurisdiction of Asahi was proper under the stream of commerce theory, it was nonetheless unreasonable.⁴⁹ The Court cited several of the *World-Wide Volkswagen* factors, including the serious burden on Asahi if forced to litigate in California and California's limited interests in adjudicating the claim, especially considering the only claim left was one for indemnification.⁵⁰ Finally, regarding the

44. See *World-Wide Volkswagen*, 444 U.S. at 292-95 (suggesting California's interest in adjudicating the claim would have been greater if the original claim of products liability remained).

45. See *Asahi*, 480 U.S. at 115-16 (analyzing reasonableness of jurisdiction over a foreign corporation using the factors set out in *World-Wide Volkswagen*); *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting) ("Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field . . ."); see also Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 30 (1987) ("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 jurisdictional assertions, the possibility of interference becomes a very real risk.").

46. *Asahi*, 480 U.S. at 105-06 (claim involved Japanese and Taiwanese parties).

47. *Id.* at 106 (headquartered in Taiwan).

48. *Id.* (headquartered in Japan).

49. *Id.* at 114 (assessing the *World-Wide Volkswagen* factors); see generally Silberman, *supra* note 11, at 128 ("An injury in the forum state allegedly caused by the foreign manufacturer justifies jurisdiction there for several reasons: the state has a strong regulatory interest in accidents that occur within its jurisdiction, litigation convenience is best served in an action at the place of injury, and a foreign defendant in these circumstances can expect to defend a suit in forum where it has been in a chain of activity that causes an injury there.").

50. *Asahi*, 480 U.S. at 114-15 (analyzing each factor with respect to the facts of the case and determining it was still unclear whether California law would even govern the claim). *But see* Silberman, *supra* note 11, at 132 (suggesting burden on an alien defendant may be better

scope of a court's adjudicatory power in the international context, the plurality cautioned that broad assertions of personal jurisdiction implicate "the interests of other nations."⁵¹ The Court concluded that a reasonableness analysis appropriately balances such interests, as well as any interests the US government may have, managing foreign relations being just one them.⁵²

4. *Daimler AG v. Bauman*

In 2013, two years after *Goodyear* was decided, the Supreme Court granted certiorari in *Daimler AG v. Bauman* to clarify the elusive "at home" standard.⁵³ The plaintiffs, twenty-two Argentine citizens, brought claims against the German corporation Daimler for human rights abuses that took place during Argentina's "Dirty War" in the 1970s.⁵⁴ The claims were filed over thirty years later in the Northern District of California under the ATS.⁵⁵ The claims were swiftly dismissed by the district court for lack of personal jurisdiction.⁵⁶

On appeal, the Ninth Circuit reversed, finding the assertion of general personal jurisdiction proper because Daimler's subsidiary, Delaware corporation Mercedes-Benz USA, had sufficient contacts with California.⁵⁷ As predicted by many, the Supreme Court reversed the Ninth Circuit, deciding Daimler was not amenable to suit in

addressed through a "nuanced doctrine of *forum non conveniens* that leaves discretion to the trial court"); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 56 (2006) (same).

51. *Asahi*, 800 U.S. at 114-15.

52. *Id.* at 115; *see also* Born, *supra* note 45, at 35 ("Before asserting jurisdiction over foreign persons, US courts should give careful scrutiny to the defendant's relationship to the forum, paying especial attention to jurisdictional claims likely to offend foreign sovereigns.").

53. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (mentioning that the Ninth Circuit's decision embraced an even broader view of general jurisdiction than rejected by the Court in *Goodyear*); *see, e.g.*, *Hess v. Bumbo Intern. Trust*, 954 F. Supp. 2d 590, 593-94 (finding general jurisdiction over out of state defendant proper even though not at home there). *See generally* Borchers, *supra* note 13 (characterizing general jurisdiction as "doing business jurisdiction").

54. *Daimler*, 134 S. Ct. at 751 (describing the history of the violence).

55. *Id.* (noting claims were also brought under the Torture Victims Protection Act, as well as California and international law claims).

56. *Id.* at 752 (finding Daimler's contacts with California did not support assertion of general jurisdiction).

57. *Id.* (applying a modified agency test which allowed the subsidiary's contacts to be imputed to the principal).

California.⁵⁸ Even considering Daimler's US subsidiary's contacts, Daimler was not at home in California.⁵⁹

The Court also eliminated any ambiguity left by the *Goodyear* holding: general jurisdiction is only proper where contacts are systematic and continuous *such that* the corporation is at home in the forum, i.e., domiciled.⁶⁰ The Court asserted that systematic and continuous business activities alone were not sufficient for general jurisdiction.⁶¹ Justice Ginsburg concluded, “[a] corporation that operates in many places can scarcely be deemed at home in all of them.”⁶²

Justice Ginsburg did not stop there, however.⁶³ In response to Justice Sotomayor's concurring opinion, which argued for dismissal of the claims on reasonableness grounds alone, Justice Ginsburg specifically rejected *Asahi* as applicable in general jurisdiction cases, albeit in a footnote.⁶⁴ She explained that it was only appropriate in specific jurisdiction cases where contacts with the forum were typically more attenuated.⁶⁵ As for general jurisdiction cases, Justice Ginsburg asserted, “When a corporation is genuinely ‘at home’ in the forum state, however, any second-step inquiry would be superfluous.”⁶⁶

58. *Id.* (holding Daimler was not at home in California); *see also* Erichson, *supra* note 11, at 82 (arguing the case was an “easy jurisdictional question on its facts”); Silberman, *supra* note 11, at 129-30 (same).

59. *Daimler*, 134 S. Ct. at 760.

60. *Id.* at 761-63 (reasoning that place of incorporation and principal place of business are “paradigmatic” bases for domicile); Drobak, *Personal Jurisdiction in a Global World*, *supra* note 11, at 1719 (noting that requiring “systematic and continuous” contacts alone leads to “too much uncertainty”).

61. *Daimler*, 134 S. Ct. at 761.

62. *Id.* at 762 n.20; *see also* von Mehren, *Jurisdiction to Adjudicate*, *supra* note 8, at 1141-42 (“General adjudicatory jurisdiction over corporations and other legal persons could be exercised by the community with which the legal person had its closest and most continuing legal and factual connections. The community that chartered the corporation and in which it has its head office occupies a position somewhat analogous to that of the community of a natural person's domicile and habitual residence. If a corporation's managerial and administrative center is in a state other than its state of incorporation, presumably general jurisdiction should exist in either community.”).

63. *See Daimler*, 134 S. Ct. at 762 n.20 (addressing reasonableness).

64. *Id.* (explaining why reasonableness was not appropriate in general jurisdiction cases); *id.* at 764-65 (Sotomayor, J., concurring) (cautioning that it would be “imprudent” for the Court to decide such an issue, especially when neither party briefed the issue).

65. *Id.* at 762 n.20 (noting that the fewer the contacts the heavier the burden on the defendant being forced to litigate in the United States).

66. *Id.*

Through application of the minimum contacts approach, courts have distinguished between two categories of cases—those of general personal jurisdiction and those of specific personal jurisdiction.⁶⁷ If a defendant is domiciled in the forum state, personal jurisdiction is proper for any type of claim.⁶⁸ US courts have specific jurisdiction over a defendant when the dispute arises from the defendant's in-state contacts.⁶⁹ In such cases, courts may look to whether defendants purposefully avail themselves of “privileges and benefits” of the forum state's laws.⁷⁰ Finally, a court hearing a specific jurisdiction case may look to whether the assertion of jurisdiction is nonetheless unreasonable.⁷¹

B. Personal Jurisdiction in the European Union

This Section will begin with an outline of the development of jurisdictional rules in the European Union. When non-EU defendants are involved in the litigation, however, Member States are free to craft their own jurisdictional rules. So, the second part of this Section will be further divided into three subsections to examine the jurisdictional rules of Germany, France, and England.

1. The Brussels Convention

Unlike the US approach to personal jurisdiction, which evolved through the US Supreme Court's interpretation of the US Constitution, the European Union takes a statutory approach.⁷² The Brussels I Regulation (the “EU Regulation”) now governs all Member States, excluding Denmark, for all commercial and civil matters.⁷³ The EU Regulation not only defines the scope of jurisdiction for

67. See *Int'l Shoe Co.*, 326 U.S. at 319-20 (delineating two categories of personal jurisdiction).

68. See, e.g., *Daimler*, 134 S. Ct. at 762 (holding general jurisdiction only proper when defendant is domiciled in the forum).

69. See, e.g., *Nicastro*, 131 S. Ct. at 2788 (finding in-state contacts not sufficient for assertion of specific jurisdiction).

70. See *id.*

71. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-95 (describing each of the reasonableness factors).

72. See, e.g., Council Regulation 44/2001 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, 2001 O.J. (L 012) art. 60 [hereinafter EU Regulation] (laying out the bases for personal jurisdiction in the European Union).

73. EU Regulation, *supra* note 72, art. 1(3) (establishing jurisdictional standards for the European Union); *but see* 2012 O.J. (L 351) 1 (EU) (taking effect in 2015).

Member States but it also establishes the enforcement of those judgments.⁷⁴

Article Two of the EU Regulation provides that EU defendants may be sued, “whatever their nationality,” wherever they are domiciled.⁷⁵ For persons, domicile constitutes their residence; for corporations, domicile is defined as its statutory seat, central administration, or principal place of business.⁷⁶ A plaintiff of one Member State may only sue a defendant of another Member State pursuant to the EU Regulation, without consideration of the forum’s own personal jurisdiction laws.⁷⁷

Section Six of the EU Regulation describes when a Member State’s court has “exclusive jurisdiction,” regardless of where a party is domiciled.⁷⁸ When the claim involves immovable property, courts of that state have exclusive jurisdiction.⁷⁹ If the claim involves patents, trademarks, or designs, exclusive jurisdiction lies wherever registration took place.⁸⁰

The EU Regulation also provides “special jurisdiction” for specific types of claims.⁸¹ For example, special jurisdiction for contract claims is proper in the state where the performance is due.⁸² For tort claims, special jurisdiction allows claims to be brought where the harm occurred.⁸³ For disputes arising out of a specific business establishment, claims may be brought in the state of that establishment.⁸⁴ When a suit has multiple defendants, special

74. EU Regulation, *supra* note 72, at art. 1(1) (explaining the purpose of the EU regulation).

75. *Id.* at art. 2(1).

76. *Id.* at art. 60(1) (permitting jurisdiction when defendant is domiciled in the forum state).

77. *Id.* at art. 3(1) (requiring that the EU Regulation govern any intra-EU disputes).

78. *Id.* at art. 22.

79. *Id.* at art. 22(1) (delineating exclusive jurisdiction and when it is proper).

80. *Id.* at art. 22(4) (describing the basis for exclusive jurisdiction).

81. *Id.*

82. *Id.* at art. 5(1)(a) (regulating jurisdiction for contract claims).

83. *Id.* at art. 5(3) (providing jurisdiction over tort claims); *see also* Case 21/76, *Reinwater Foundation v. Mines de Potasse d' Alsace S.A.*, 1976 E.C.R. 1735, 1 C.M.L.R. 284 (1977) (holding that jurisdiction was proper either where the tort occurred *or* where its effects were felt).

84. EU Regulation, *supra* note 72, at art. 5(5) (describing proper jurisdiction for specific transactions); *see also* EU Regulation, *supra* note 72, at art. 15(2) (setting forth when jurisdiction over consumer contracts is proper).

jurisdiction allows the claim to be brought in any state a defendant is domiciled.⁸⁵

As demonstrated above, jurisdiction is straightforward when the claims involve only EU parties.⁸⁶ Pursuant to Article 4 of the EU Regulation, however, “[i]f the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.”⁸⁷ Thus, if a claim involves a US defendant, the Regulation’s rules for jurisdiction do not apply, and the Member State who seeks jurisdiction over the defendant must apply its national laws.⁸⁸

2. Personal Jurisdiction in Germany

As a civil law country, statutory law also governs personal jurisdiction in Germany.⁸⁹ Under the German Code of Civil Procedure, the *Zivilprozessordnung* (the “ZPO”), there are two bases for jurisdiction: general and specific.⁹⁰ If general jurisdiction is proper over a defendant, any type of claim may be brought against them in that court.⁹¹ When defendants are domiciled in Germany, general jurisdiction is proper.⁹² For corporations and similar legal entities (i.e., partnerships), general jurisdiction exists when their statutory seat is in Germany.⁹³

85. *Id.* at art. 6(1) (requiring the claims to be closely connected).

86. *See, e.g., id.* (codifying each of the jurisdictional rules).

87. *Id.* at art. 4(1).

88. *Id.*

89. *See* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] (Ger.) (codifying the German jurisdictional rules); Christopher B. Kuner, *Personal Jurisdiction Based On The Presence Of Property In German Law: Past, Present, And Future*, 5 *TRANSNAT’L LAW* 691, 696 (1992) (citing Christof von Dryander, *Jurisdiction in Civil and Commercial Matters Under the German Code of Civil Procedure*, 16 *INT’L L.* 671, 673 (1982)) (describing civil law implications on personal jurisdiction); *see also* Michael Molitoris & Amelie Abt Noerr Stiefenhofer Lutz, *Comparative Study of “Residual Jurisdiction” in Civil and Commercial Disputes in the EU National Reporter for: Germany*, available at http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_germany_en.pdf (providing extensive background information on how personal jurisdiction operates in Germany).

90. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], §§ 12-19, 20-34 (Ger.) (delineating bases of general jurisdiction).

91. *See id.*; Christof von Dryander, *supra* note 89, at 675 n.24 (1982) (identifying rules for general jurisdiction under the ZPO).

92. *Zivilprozessordnung* [ZPO] [Code of Civil Procedure], § 12 (Ger.) (subject to exceptions §§ 15-16).

93. *Id.* at § 17 (defining domicile for corporations).

The broadest basis for general jurisdiction in Germany is Section Twenty-Three of the ZPO, which grants general jurisdiction over any defendant alien or domestic, natural person, or legal entity owning property in Germany.⁹⁴ The burden is on the plaintiff to make out each element of Section Twenty-Three, including the specific location of the property.⁹⁵ Since the property may be tangible *or* intangible,⁹⁶ debts and legal claims are included.⁹⁷ For proper Section Twenty-Three jurisdiction, the property does *not* need to be connected to the claim in question.⁹⁸ As explained by Gary Born, a noted scholar in the area, “a Russian may leave his galoshes in a hotel in Berlin and may be sued in Berlin for a debt of 100,000 Marks because of presence of assets within the jurisdiction.”⁹⁹

While Section Twenty-Three may not be used against other EU defendants, it may be asserted against foreign defendants such as US citizens.¹⁰⁰ Acknowledging the breadth of Section Twenty-Three, Germany’s highest court, the *Bundesgerichtshof* (the “BGH”), has imposed one limitation: the suit must have a “sufficient national connection.”¹⁰¹ In that case, the British plaintiff sued a Turkish bank

94. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 23 (Ger.) (permitting quasi in rem jurisdiction); see von Dryander, *supra* note 89, at 678 (illustrating the broad effects of Section Twenty-Three).

95. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 23 (Ger.); see also Kuner, *supra* note 89, at 697 n.39 (citing Judgment of July 13, 1987, BGH, 9 IPRax 166 (1989)).

96. See von Dryander, *supra* note 89, at 680 (citing Judgment of April 7, 1902, Reichsgericht, 51 RGZ 163) (holding account book provides sufficient basis for assertion of Section Twenty-Three jurisdiction).

97. Kuner, *supra* note 89, at 698 n.47 (citing Jan Kropholler, *Internationale Zuständigkeit*, in 1 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 183, 323 (1982)) (illustrating examples of intangible assets).

98. Kuner, *supra* note 89, at 698 n.50 (citing Reinhold Geimer, INTERNATIONALES ZIVILPROZEBRECHT 259 (1987)) (outlining courts application of Section Twenty-Three jurisdiction) (citing Reinhold Geimer, INTERNATIONALES ZIVILPROZEBRECHT 259 (1987)).

99. Born, *supra* note 45, at 14-15 (citing Nadelmann, *Jurisdictionally Improper Fora*, XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 321, 329 (1961)) (emphasizing the potentially broad reach of Section Twenty-Three jurisdiction) (citing Nadelmann, *Jurisdictionally Improper Fora*, XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 321, 329 (1961)).

100. See Silberman, *supra* note 13, at 322 (demonstrating Section Twenty-Three’s impact on non-EU defendants); von Dryander, *supra* note 89, at 682 (EU Regulation limits scope of Section Twenty-Three).

101. Yearbook of Private International law Vol XII 2010 p. 279 n. 88 (citing BGH 2.7.1991) (describing the court imposed limits on section Twenty-Three) (citing BGH 2.7.1991); see, e.g., Mark/Ziegenhain, NJW 1992, 3062, 3065 (noting that courts may consider presence of registered offices, location of evidence, and business contacts).

for a claim relating to a construction project in Libya.¹⁰² The plaintiff alleged jurisdiction was proper since the defendant owned property in Germany worth DEM 150,000.¹⁰³ The defendant argued its property was worth at most one tenth of that amount, and that the claim should nonetheless be dismissed because there was no connection to Germany.¹⁰⁴

While jurisdiction was initially found proper, the German appeals court, the *Oberlandesgericht*, reversed, finding the plaintiff, the applicable law, and the evidence lacked any relation to Germany.¹⁰⁵ The court posited four situations where the relation requirement would be met: 1) plaintiff resides in Germany, 2) facts of the claim are most closely connected to Germany, 3) German law will apply, or 4) plaintiff has a “worthy” interest in German judgment.¹⁰⁶

The BGH affirmed the judgment, holding Section Twenty-Three jurisdiction is proper only when there is a “sufficient connection” to Germany, aside from defendant’s property.¹⁰⁷ The Court determined such a limit was necessary to effectuate the rule’s original purpose: providing German creditors with a means to sue defendants who moved frequently so as not to establish domicile.¹⁰⁸ Section Twenty-Three’s current formulation, the Court reasoned, allowed forum-shopping, which could create friction with other nations.¹⁰⁹

Examining the ZPO’s rules for specific jurisdiction, it must first be noted that only property-based claims may be brought.¹¹⁰ Specific jurisdiction exists when the cause of action arises out of a

102. Judgment of Aug. 6, 1990, OLG Stuttgart, 1990 RIW 829 (holding jurisdiction was improper).

103. *Id.* (holding the property was not sufficient for jurisdiction); *The Currency Converter*, CoinMill.com http://coinmill.com/DEM_EUR.html#DEM=150000 (last visited Oct. 10, 2014) (converts to roughly EU€76,700).

104. *Judgment of Aug. 6, 1990, OLG Stuttgart, supra* note 102, at 829 (dismissing the claim).

105. *Id.* (determining jurisdiction was not proper since the claim was wholly unrelated to Germany).

106. *Id.* (suggesting situations where a claim would have the necessary connection to Germany).

107. Judgment of July 2, 1991, BGH, 1991 NJW 3092.

108. *Id.* (affirming judgment of appeals court).

109. *Id.* (addressing concerns by statute’s over usage).

110. *See id.*; Henry P. de Vries & Andreas F. Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 Iowa L. Rev. 306, 331 (1959) (explaining how these claims usually arise from specific transactions).

residence,¹¹¹ a branch location,¹¹² location of property,¹¹³ location of contractual performance,¹¹⁴ or the place where a tort was committed.¹¹⁵ Branch location, as a basis for special jurisdiction, expands the scope of jurisdiction over non-EU corporations because formal “domicile” is not required.¹¹⁶ Specific jurisdiction is proper, however, only when the cause of action arises from the business of that particular branch.¹¹⁷ As defined by the ZPO,

[A] place of business serving the operation of a factory, a trade enterprise, or any other commercial establishment, and from which transactions are directly concluded, all actions that relate to the operation of the place of business may be brought against that person at the court of the location at which the place of business is situate [sic].¹¹⁸

The BGH has addressed this form of jurisdiction as well, shedding light on its scope.¹¹⁹ In that case, a German shipping company brought a claim against a Dutch cooperative at its German branch.¹²⁰ The defendant’s business was to obtain rebates from the German Federal Railway and give them to the cooperative’s members.¹²¹ The German company claimed rebates that were past due.¹²² The court of appeals dismissed the claim, noting that although the claims arose from the Dutch company’s branch in Germany, the German branch did not independently and directly enter into the agreements for rebates with its members.¹²³ The BGH reversed the

111. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 20 (Ger.) (explaining that presence alone not sufficient for proper jurisdiction).

112. *Id.* at § 21 (pointing out that branch location is a basis for special jurisdiction).

113. *Id.* at § 23 (permitting jurisdiction in Germany when defendant owns property there).

114. *Id.* at § 29 (contract jurisdiction); *see, e.g.*, von Dryander, *supra* note 89, at 685 (discussing how jurisdiction is determined in contract disputes).

115. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 32 (Ger.) (defining tort jurisdiction); von Dryander, *supra* note 89, at 690 (including forum where effects from tort are felt).

116. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 21 (Ger.); von Dryander, *supra* note 89, at 677 (explaining the effects of this basis for jurisdiction).

117. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 21 (Ger.) (outlining jurisdiction pertaining to a specific branch location).

118. *Id.*

119. Judgment of July 10, 1975, Bundesgerichtshof, 1977 NJW 2142 (holding jurisdiction is proper where the branch independently and directly enters into contracts).

120. *Id.* (describing the origins of the claim which involved breach of contract).

121. *Id.* (identifying scope of defendant’s business operations).

122. *Id.* (explaining the background of the claim).

123. *Id.* (conceding the branch did help calculate rebates for its members).

court of appeals, holding that so long as a branch independently and directly entered into *any* contracts, jurisdiction was proper.¹²⁴

3. Personal Jurisdiction in France

In France, the rules for personal jurisdiction are codified in the Civil Code as well as the New Code of Civil Procedure, which was adopted in 1975.¹²⁵ The statutory rules permit general, “all-purpose” jurisdiction over defendants who are domiciled in France.¹²⁶ French law defines “domicile” as the place where the defendant has its principal establishment.¹²⁷ General jurisdiction is also proper if the defendant appears to be domiciled in France and leads the plaintiff to believe it was his real domicile.¹²⁸

As for specific jurisdiction, Article Forty-Six of the New Code defines the proper bases for jurisdiction depending on the type of claim.¹²⁹ For contract claims, the plaintiff may bring suit in a court where the defendant is domiciled, as explained above, or where performance of the contract is due.¹³⁰ Courts have emphasized jurisdiction is proper in the forum where performance actually took

124. *Id.*

125. NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] arts. 42-48 (Fr.), available in English at Code of Civil Procedure, Legifrance.gouv.fr, 4-5 (Sept. 30, 2005), http://195.83.177.9/upl/pdf/code_39.pdf; see CODE CIVIL [C. CIV.] arts. 14-15 (Fr.), translated in *The French Civil Code 4* (John H. Crabb rev. ed., trans., 1995) http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_france_en.pdf (delineating personal jurisdiction under French law); see also Masahisa Deguchi & Marcel Storme, *THE RECEPTION AND TRANSMISSION OF CIVIL PROCEDURAL LAW IN THE GLOBAL SOCIETY: LEGISLATIVE AND LEGAL EDUCATIONAL ASSISTANCE TO OTHER COUNTRIES IN PROCEDURAL LAW 262-67* (2008), available at http://books.google.com/books?id=s2YrtoiyGcYC&pg=PA262&lpg=PA262&dq=adoption+of+the+new+code+of+civil+procedure+france&source=bl&ots=Aqfo7vMHtv&sig=v0J3fq_95ymubTIx56qDPo0p2AI&hl=en&sa=X&ei=glxDU4KtJKyB0QGE-oHYCA&ved=0CD4Q6AEwAw#v=onepage&q=adoption%20of%20the%20new%20code%20of%20civil%20procedure%20france&f=false (detailing the origins of French civil procedural law and the adoption of the New Code).

126. NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 42 (Fr.) (providing that defendant’s domicile in France makes jurisdiction in a French court proper over any claim).

127. See *id.* at art. 102; see also Cass. Civ. 2ème, Jan. 23, 1958, JCP G 1958, IV, 30 (explaining domicile for corporations at its registered, or statutory, seat).

128. See Cass. Civ. 1ère, Jan. 31, 1968, Bull. civ. I, no. 41 (describing how jurisdiction may be proper even if defendant is not actually domiciled).

129. NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 46 (Fr.).

130. Pierre Raoul-Duval & Marie Stoyanov Gide Loyrette Nouel, *Comparative Study Of “Residual Jurisdiction” In Civil And Commercial Disputes In The EU National Report For: France*, at 7, available at http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_france_en.pdf (explaining proper bases for jurisdiction in contract cases) (citing Cass. Civ. 2ème, Jan. 18, 2001, Bull. civ., II, no. 10).

place or was intended to take place, not simply where the parties contracted.¹³¹

Jurisdiction for tort claims is also outlined in Article Forty-Six.¹³² A plaintiff may bring a tort claim in one of three places: where the defendant is domiciled, where the tort occurred, or where the damage was suffered.¹³³ In situations where the damage is suffered in several states, French courts may opt to split the proceedings accordingly.¹³⁴ Specific jurisdiction can also be asserted over a corporation's local branch when two conditions are met.¹³⁵ First, the branch must be truly autonomous.¹³⁶ Secondly, the dispute must arise from the operations of that specific branch.¹³⁷

Articles Fourteen and Fifteen of the Civil Code are the "privileged" rules of jurisdiction, since they only apply to French nationals.¹³⁸ Article Fourteen provides, "[a]n alien, even if not residing in France, may be cited before French courts for the performance of obligations contracted by him in France with a French person; he may be called before the courts of France for obligations contracted by him in a foreign country towards French persons."¹³⁹ While this basis for jurisdiction may not be used against other EU defendants, by virtue of the EU Regulation, it may still be asserted

131. Duval & Nouel, *supra* note 130, at 7 (noting that courts often take practical considerations into account).

132. NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 46 (Fr.) (defining when tort jurisdiction is proper).

133. *See id.* (outlining the three sources for tort jurisdiction).

134. Duval & Nouel, *supra* note 130, at 8-9 (citing Court of Appeal, June 30, 1984, HRM Duchess of Windsor v. Sanchez Gomez, Rev. crit. DIP 1985) (noting that courts prefer to split these claims then resolve them together).

135. *Id.* (citing Cass. Civ. 1ère, June 18, 1958, Rev. crit. DIP, 1958, 754) (explaining requirement for specific jurisdiction).

136. *Id.* (citing Nancy Court of Appeal, Dec. 2, 2002, JCP G, 2004, IV, p. 1808) (noting that branch must be able to enter into independent agreements).

137. *Id.* (citing Cass. Civ. 1ère, Nov. 15, 1983, pourvoi no. 82-12.626).

138. NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 14 (Fr.); Duval & Nouel, *supra* note 130, at 17 (explaining the operation of Articles 14-15).

139. NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 14 (Fr.). *See generally* Clermont & Palmer, *supra* note 20 (discussing the historical basis of Article 14 basis and its current application in French courts).

against US defendants.¹⁴⁰ Article Fifteen likewise provides jurisdiction when the defendant is a French national.¹⁴¹

4. Personal Jurisdiction in the United Kingdom

The United Kingdom follows the common law approach, where legal rules are largely developed through case law.¹⁴² Following the adoption of the EU Regulation, the United Kingdom passed the Civil Jurisdiction and Judgments Act 1982 (the “1982 Act”), which incorporated much of the EU law, and applies to England, Scotland, Wales, and Northern Ireland.¹⁴³ For jurisdictional rules, specifically, they are codified in the Civil Procedure Rules (the “CPR”).¹⁴⁴

Just like the European Union, domicile provides a basis for general jurisdiction in the United Kingdom.¹⁴⁵ General jurisdiction is also proper in UK courts when a defendant, even an alien, is served process in the United Kingdom.¹⁴⁶ Because this “tag” jurisdiction is prohibited under the EU Regulation, it may only be asserted against non-EU defendants.¹⁴⁷

140. See EU Regulation art. 4 (permitting EU member states to craft their own jurisdictional rules in cases not involving EU defendants); see also Born, *supra* note 45, at 14 (surveying the jurisdictional rules of other nations).

141. NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 15 (Fr.) (providing jurisdiction when the defendant is a French national).

142. Brian Pearce, Note, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A US-E.U. Comparison*, 30 STAN. J. INT’L L. 525, 536 (citing STEPHEN O’MALLEY & ALEXANDER LAYTON, EUROPEAN CIVIL PRACTICE 9-10 (1989)) (“Although the Supreme Court [of Judicature of England and Wales] is of statutory origin, having been established by the Supreme Court of Judicature Act 1873, its jurisdiction has never been comprehensively defined by statute.”); see also Chris Woodruff & Karen Reed, *Comparative Study Of “Residual Jurisdiction” In Civil And Commercial Disputes In The EU National Report For: England*, at 2, available at http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_england_en.pdf (providing extensive detail into the background of civil procedure in England).

143. Woodruff & Reed, *supra* note 142, at 2 (explaining the basis for jurisdiction in England); Civil Jurisdiction and Judgments Act of 1982 (codifying the rules of jurisdiction).

144. Woodruff & Reed, *supra* note 142, at 2 (describing the codification of the civil procedure rules). See generally Civil Procedure Rules (“CPR”).

145. CPR Part 6(B) para 3.1 (permitting jurisdiction over any claim when the defendant is domiciled in the UK).

146. H.R.H Maharanee Seethadevi Gaekwar of Baroda v. Wildenstein [1972] 2 W.L.R. 1077 (describing so-called “tag” jurisdiction); see also *Colt Industries Inc v Sarlie*.

147. See Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws Course*, 28 VAND. J. TRANSNAT’L L. 389, 405 (1995) (noting tag jurisdiction is prohibited against EU defendants); *id.* (citing The Official Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, EC 22 O.J. C 59/1, at C 59/19-20) (also prohibiting the use German ZPO Twenty-Three and Article 14 against other EU domiciliaries).

For jurisdiction over a defendant served *outside* of the United Kingdom, the claimant must provide a proper basis for the suit under the CPR.¹⁴⁸ For contract claims against non-UK defendants, jurisdiction is proper when the contract was made in the United Kingdom, was made through an agent in the United Kingdom, is governed by UK law or a UK court is stipulated, or when the contractual breach occurs in the United Kingdom.¹⁴⁹ For tort claims, jurisdiction is proper when damage was suffered within the United Kingdom *or* the act occurred in the United Kingdom.¹⁵⁰ Additionally, the CPR provides that when a plaintiff is seeking an injunction against a defendant whose conduct is taking place in the United Kingdom, jurisdiction is proper.¹⁵¹ Jurisdiction is also proper when the defendant is a required party to a claim already served on a defendant in the United Kingdom.¹⁵²

Finally, UK courts permit a form of “doing business” jurisdiction, codified in both the Companies Act of 2006 and the CPR.¹⁵³ Under the Companies Act, service is proper on an “overseas company”—registered in the United Kingdom, if it is left, or sent by mail, to “any place of business of the company.”¹⁵⁴ The CPR adds a little clarity, providing that jurisdiction over a non-UK company is proper when it is served at “any place within the jurisdiction where the corporation carries on its activities or any place of business of the company within the jurisdiction.”¹⁵⁵ Though courts generally have agreed a sufficient connection to the UK forum is required, precisely what is required is unclear.¹⁵⁶

148. CPR Part 6(B) (applies when service occurs outside of the jurisdiction).

149. CPR Part 6(B) para. 3.6(b) (noting that jurisdiction is also proper when the contract is made by an agent living in the United Kingdom).

150. CPR Part 6(B) para. 3.9(a)-(b) (providing basis for tort jurisdiction).

151. CPR Part 6(B) para. 3.2 (explaining when jurisdiction is proper over a claim for injunction).

152. CPR Part 6(B) para. 3.4 (delineating when jurisdiction is proper over required parties).

153. Companies Act 2006, § 1139(2)(b); CPR Part 6.9 (allowing service on a corporate defendant).

154. Companies Act 2006, § 1139(2)(b).

155. CPR Part 6.9 (allowing service on a corporate defendant).

156. *See, e.g.*, *South India Shipping Corp. v. Export-Import Bank of Korea* [1985] 1 W.L.R. 585 (allowing service on an office where only incidental activities were carried out under an earlier version of the Company Act). *But see* *Rakusens Ltd v. Baser Ambalaj Plastik Sanayi Ticaret AS*, [2001] E.W.C.A. Civ. 1820 (Court of Appeal) (holding that agent of the company is not enough).

In fact, the Civil Division of the Royal Courts of Justice has addressed the dueling authorities on proper jurisdiction over non-English companies.¹⁵⁷ In *Lakah Group v. Al Jazeera Satellite Chanel*, the appeals court set out to determine whether the corporate defendant had been properly served under either the CPR or the Companies Act.¹⁵⁸ Noting that the lower court determined the Companies Act presented a higher standard than the CPR, the court found that the determination ultimately did not matter because the CPR—the lower standard—had not even been met.¹⁵⁹ In affirming the lower court’s judgment that service was not proper, the appeals court agreed that a corporation’s “transient or irregular connection” to the forum would not suffice.¹⁶⁰

II. *A COMPARISON OF APPROACHES*

Part II of this Note will compare personal jurisdiction doctrine in the United States to personal jurisdiction in the European Union, focusing on Germany, France, and England. Part II.A will focus on the differences in the sources of personal jurisdiction rules, and the rationale underlying their creation. Part II.B will discuss the differences in general jurisdiction. Part II.C explores how specific jurisdiction cases are handled differently in the United States and the European Union. Finally, Part II.D will discuss the role reasonableness plays in US courts and EU courts. As will be demonstrated below, the US minimum contacts approach is more restrictive than the European statutory approach.

A. *Source and Rationale*

The differences between personal jurisdiction in the United States and the European Union largely are accounted for by fundamental differences in the source of the rules and the reasons behind them.¹⁶¹ In the European Union, jurisdictional rules often are

157. *Lakah Group v. Al Jazeera Satellite Chanel*, [2003] E.W.C.A. (civ.) 1781 (acknowledging the Companies Act and the CPR both contain jurisdictional rules governing overseas companies).

158. *See id.*

159. *See id.*

160. *See id.*

161. *See* von Dryander, *supra* note 89, at 673 (jurisdiction is a product of statutory interpretation, not constitutionality); *see, e.g.*, Silberman, *Observations, supra* note 20, at 607-09 (noting the differences in rationale between the US and the EU).

geared toward providing a forum for EU plaintiffs to obtain relief.¹⁶² In France, Article Fourteen clearly does this.¹⁶³ Germany's Section Twenty-Three does not.¹⁶⁴ Section Twenty-Three specifically was enacted to ensure German creditors, not just any German plaintiff, had a forum to obtain relief against non-German debtors.¹⁶⁵

As for the source of jurisdictional rules in the European Union, these rules are codified by national legislatures in official civil code, like the New Code of Civil Procedure in France, and Germany's ZPO.¹⁶⁶ These rules provide clarity for plaintiffs trying to decide where to bring a suit, and notice to defendants as to where they may be sued.¹⁶⁷ The court's role is simple: determine whether or not a statutory basis for jurisdiction applies.¹⁶⁸

On the other hand, US personal jurisdiction doctrine is derived from the Constitution—to be more specific, the Due Process Clause of the Fourteenth Amendment.¹⁶⁹ To satisfy due process, the relationship between the *defendant* and the forum must be sufficiently

162. See Silberman, *Observations*, *supra* note 20, at 607 (noting French Article 14 does this explicitly); Luxembourg Civil Code art. 14 (permitting jurisdiction based on nationality of the plaintiff); Dutch Code of Civil Procedure art. 126(3) (same).

163. See CODE CIVIL [C. CIV.] art. 14 (Fr.) (“French National . . .”); see also Clermont & Palmer, *supra* note 20, at 3 (noting that French article merely does it on the basis of “Frenchness”).

164. See ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, BUNDESGESETZBLATT [BGBl.] 3202, as amended, § 23 (general jurisdiction attaches when defendant has property in Germany).

165. Kuner, *supra* note 89, at 696 (explaining purpose of section Twenty-Three jurisdiction); von Dryander, *supra* note 89, at 680 (same).

166. See Silberman, *Observations*, *supra* note 20, at 609-10 (discussing the clarity of EU rules given their statutory nature, and the lack of “residual” constitutional constraints”). See generally EU Regulation; ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], (Ger.); CODE CIVIL [C. CIV.] (Fr.); CPR (England).

167. See Silberman, *Observations*, *supra* note 20, at 609-10 (discussing the clarity of EU rules given their statutory nature, and the lack of “residual” constitutional constraints”). See generally EU Regulation; ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], (Ger.); NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] (Fr.); CPR (England).

168. See CODE CIVIL [C. CIV.] art. 14 (Fr.) (court determines whether the plaintiff is French); see also Silberman, *Observations*, *supra* note 20, at 609-10 (describing the ease of this process).

169. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[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.’”).

strong.¹⁷⁰ In contrast to the European Union, the focus is on fairness to defendants, not providing plaintiffs access to local courts.¹⁷¹

Under the US system, courts are required to make a factual determination each and every time in determining whether jurisdiction comports with due process.¹⁷² Courts must review the scope of a defendant's activities in the forum, and decide if they have the necessary minimum contacts.¹⁷³ Even if the contacts are sufficient, a defendant may then argue that the assertion of jurisdiction is nonetheless unreasonable, providing them with yet another safeguard.¹⁷⁴

Calling the minimum contacts approach "amorphous" and "imprecise," scholars have recognized its negative impact on jurisdictional certainty.¹⁷⁵ At the very least, the approach stands in stark contrast to the EU approach, where codified rules allow courts to quickly determine whether jurisdiction is proper.¹⁷⁶ Outside of the judicial process, the EU Rules streamline the process for both plaintiffs and defendants.¹⁷⁷

170. *See id.* at 320 (measuring the strength of defendant's contacts to the forum state); *Walden v. Fiore* 134 S. Ct. 1115, 1123 (2014) (reiterating the importance of the defendant's affiliation with the forum state); Silberman, *Observations*, *supra* note 20, at 607 (noting this difference).

171. *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring in the judgment) (noting defendant focus).

172. *Int'l Shoe*, 326 U.S. at 316 (finding that jurisdiction must comport with "traditional notions of fair play and substantial justice").

173. *Id.*; *see also Burger King v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) ("The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations."); *Nicastro*, 131 S. Ct. at 2794 (Breyer, J., concurring) (noting the difficulty in this approach)

174. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 115-16 (1987) (explaining how the factors are to be considered).

175. Drobak, *Personal Jurisdiction in a Global World*, *supra* note 11, at 1722; A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 *DENV. U. L. REV.* 325, 328 (2010).

176. *See, e.g.*, NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 46 (Fr.); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], §§ 12-34 (Ger.). *But see* Silberman, *Judicial Jurisdiction*, *supra* note 147, at 397-98 (noting discretion occasionally plays a role in English Courts).

177. *See* CODE CIVIL [C. CIV.] art. 14 (Fr.) (court determines whether the plaintiff is French); *see also* Silberman, *Observations*, *supra* note 20, at 609-10 (describing the ease of this process).

B. General Jurisdiction

General jurisdiction operates, for the most part, the same way in the United States as it does in the European Union.¹⁷⁸ Domicile is the accepted basis for such jurisdiction.¹⁷⁹ When a defendant is domiciled in the forum state, jurisdiction is proper over *any* type of claim.¹⁸⁰

Given the freedom to craft their own jurisdictional rules when it comes to non-EU defendants, Member States have embraced sources of general jurisdiction beyond domicile.¹⁸¹ Examples of this can be found in German Section Twenty-Three, French Article Fourteen, and English “doing-business” jurisdiction.¹⁸² Since each one is classified as exorbitant under the EU Regulation, they may not be asserted against EU defendants.¹⁸³ Where non-EU defendants are concerned, however, these bases of jurisdiction make it easier for German, French, and English nationals to sue at home.¹⁸⁴ The impact of this becomes apparent after revisiting *Goodyear* with the European rules in mind.

In *Goodyear*, the US Supreme Court dismissed the wrongful death claims of the US plaintiffs, holding personal jurisdiction over the non-US defendants was improper because they were not at home in the forum state.¹⁸⁵ What if the case concerned German plaintiffs and non-EU defendants, such as Goodyear USA (so that Section Twenty-Three would apply)?¹⁸⁶ So long as the defendant had property

178. *See, e.g.*, *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (holding that domicile is required for general jurisdiction); EU Regulation at art. 2(1) (same).

179. *See, e.g.*, *Daimler*, 134 S. Ct. at 760 (holding that domicile is required for general jurisdiction); EU Regulation at art. 2(1) (same).

180. *Compare Daimler*, 134 S. Ct. at 760 (explaining domicile provides jurisdiction over any type of claim), *with* EU Regulation at art. 2(1) (same).

181. *See, e.g.*, CODE CIVIL [C. CIV.] art. 14 (Fr.) (jurisdiction based on nationality); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 23 (Ger.) (jurisdiction based on property in Germany).

182. *See* Code Civil [C. CIV.] art. 14 (Fr.); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 23 (Ger.).

183. *See* EU Regulation Annex 1 (bases of jurisdiction not permitted against other EU domiciliaries); EU Regulation art. 4(1) (noting these bases for jurisdiction may be asserted against non-EU defendants).

184. *See* EU Regulation art. 4(2) (Member States own jurisdictional rules apply when defendants are non-EU); *see, e.g.*, *Clermont & Palmer, supra* note 20, at 17 (“Each country’s exorbitant jurisdiction constitutes a way to allow its own people to sue at home when they can recover at home, which is usually so much easier than suing abroad.”).

185. *Nicastro*, 131 S. Ct. at 2857 (dismissing the claims).

186. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 23 (Ger.) (jurisdiction proper when defendant owns property in Germany).

in Germany, for example, an office worth US\$150,000, personal jurisdiction would be proper.¹⁸⁷ The same would satisfy a court of England under “doing business” jurisdiction.¹⁸⁸ In France, the office could burn down and jurisdiction still would be proper.¹⁸⁹ A French plaintiff is all that is required.¹⁹⁰

Article Fourteen goes even further than that, occasionally permitting general jurisdiction based solely on the *domicile* of the plaintiff, a practice explicitly endorsed by several other Member States.¹⁹¹ In *Guggenheim v. Helion*, the French trial court combined EU Regulation Article 4(2) with French Article Fourteen to reach this very result.¹⁹² Since Article 4(2) grants EU-domiciled plaintiffs access to the jurisdictional rules of their forum State, US plaintiffs residing in France successfully asserted Article Fourteen jurisdiction over a non-EU defendant.¹⁹³ Keeping this proposition in mind, a French court would find jurisdiction proper in *Goodyear*, regardless of nationality, so long as the plaintiffs lived in France.¹⁹⁴ In the United States, jurisdiction is not proper solely based on nationality of the plaintiff, much less their domicile.¹⁹⁵

187. *See id.*

188. *See* CPR Part 6.9 (requiring any fixed place of business). *But see* Companies Act of 1985 (U.K.) (requiring place of business and sufficient connection).

189. CODE CIVIL [C. CIV.] art. 14 (Fr.) (requiring French plaintiff); *see also* Luxembourg Civil Code art. 14 (same); [Rv] CODE OF CIVIL PROCEDURE, art. 126(3) (Neth.) (same).

190. *See* CODE CIVIL [C. CIV.] art. 14 (Fr.) (requiring French plaintiff).

191. *See* [Rv] CODE OF CIVIL PROCEDURE, art. 126(3) (Neth.) (permitting jurisdiction based on plaintiff’s domicile); Drobak, *Personal Jurisdiction in a Global World*, *supra* note 11, at 1746 (citing EU Regulation) (noting countries outside of the United States allow jurisdiction based on domicile of the plaintiff); Fond. Solomon R. Guggenheim v. Helion, Cass. Civ. 1e, July 3, 1996, 124 *Journal Du Droit International* 1016 (1997) (holding jurisdiction on basis of plaintiff’s domicile was proper).

192. Fond. Solomon R. Guggenheim v. Helion, Cass. Civ. 1e, July 3, 1996, 124 *Journal Du Droit International* 1016 (1997) (finding Article 14 jurisdiction properly asserted over non-EU defendant by French resident); *see, e.g.*, Clermont & Palmer, *supra* note 20, at 13 (“Another effect of the Brussels Regulation is to extend the remaining privilege of suing in French courts based on Article 14 jurisdiction to all domiciliaries of France, not just French nationals.”).

193. *Id.* (applying the EU Regulation in conjunction with Article 14).

194. *See id.*

195. *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014) (holding that domicile is required for general jurisdiction). *But see* Drobak, *Personal Jurisdiction in a Global World*, *supra* note 11, at 1726 (noting courts allowed US plaintiffs to use general jurisdiction in the past in order to sue at home).

C. Specific Jurisdiction

Rules for specific jurisdiction—those granting jurisdiction over certain causes of action—can be found in both the United States and the European Union.¹⁹⁶ Within their national rules for civil procedure, Germany, France, and England also provide for specific jurisdiction.¹⁹⁷ In those countries, certain events trigger jurisdiction by statute.¹⁹⁸ Under the US minimum contacts approach, however, there is no triggering event for specific jurisdiction.¹⁹⁹

Section C is divided into two subsections, each discussing a unique feature of US specific jurisdiction analysis. The first will discuss the role discretion plays in determining whether contacts are sufficient to justify personal jurisdiction. The second will discuss the unique requirement of purposeful availment.

1. US Courts Retain Discretion

As explained above, in the European Union, specific jurisdiction is statutorily granted.²⁰⁰ Codified rules dictate when certain types of claims may be brought within the forum.²⁰¹ In the United States, the assertion of specific personal jurisdiction must still satisfy the constitutional standard of due process through a showing of minimum contacts.²⁰² As set forth by the Supreme Court in *International Shoe*, specific jurisdiction exists when the cause of action arises from the defendant's in-state contacts.²⁰³

As *Nicastro* makes evident, specific jurisdiction may not be easy to establish, even for plaintiffs domiciled in the United States.²⁰⁴

197. NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 46 (Fr.) (describing proper basis for tort jurisdiction).

198. *Id.* (describing proper basis for tort jurisdiction).

199. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011) (examining factors which may be relevant to the assertion of personal jurisdiction).

200. *See* NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 46 (Fr.) (describing proper basis for tort jurisdiction); *see, e.g.*, EU Regulation art. 5(3) (harm and effects).

201. *See* NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 46 (Fr.) (describing proper basis for tort jurisdiction); *see, e.g.*, EU Regulation art. 5(3) (harm and effects).

202. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945) (explaining what due process requires).

203. *See id.* at 317 (describing specific jurisdiction).

204. *See Nicastro*, 131 S. Ct. at 2788 (holding personal jurisdiction over UK defendant was improper); Drobak, *Personal Jurisdiction in a Global World*, *supra* note 11, at 1729 (explaining the negative effects *Nicastro* has had on personal jurisdiction analysis from a plaintiff's perspective).

Using its discretion in deciding the jurisdictional question, the Court in *Nicastro* held personal jurisdiction over the UK defendant was not proper absent a showing of specific intent.²⁰⁵ The Court considered other factors in the record as well, including the fact that other machines were sold across the United States, a few even in New Jersey, but nonetheless found intent dispositive.²⁰⁶ The outcome was considered by commentators to be unfair, wrongly decided, and to one scholar to be “viscerally upsetting.”²⁰⁷

Sometimes, however, the Court’s multi-step review of the record comes out the other way, demonstrating the unpredictability inherent in the minimum contacts approach.²⁰⁸ For example, in *Burger King v. Rudzewicz*, where two franchise owners of a Burger King in Michigan defaulted on payments, the Court found specific jurisdiction proper in Florida because Florida law governed their franchise agreement.²⁰⁹ The Court further explained that the franchise owners’ continuing relationship with the brand’s Miami headquarters over a twenty-year period reinforced their “deliberate affiliation” with the forum.²¹⁰

As demonstrated above, the European Union does not concern itself with the strength of an “affiliation” to the forum.²¹¹ The bases for specific jurisdiction are explicitly set out in the European rules with respect to any type of claim, and a court must simply determine if one applies.²¹² To illustrate the effect of this difference, it is helpful to revisit a US case with European jurisdictional rules in mind.²¹³

205. *See Nicastro*, 131 S. Ct. at 2788 (requiring plaintiff to show defendant intended its products enter the New Jersey market specifically).

206. *See id.*

207. *See* Drobak, *Personal Jurisdiction in a Global World*, *supra* note 11, at 1729 (“The finding of a lack of personal jurisdiction in *Nicastro* is the worst result in any personal jurisdiction case”); Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S.C. L. REV. 637, 638-41 (2012) (calling it wrongly decided); John Vail, *Six Questions in Light of Nicastro*, 63 S.C. L. REV. 517, 517 (2012) (calling the decision “viscerally upsetting”).

208. *See, e.g., Burger King v. Rudzewicz*, 471 U.S. 462, 482 (1985) (holding specific jurisdiction proper).

209. *Id.* at 482 (noting that their franchise agreement outlined this).

210. *See id.*

211. *See, e.g.,* EU Regulation (laying out the bases for personal jurisdiction in EU courts).

212. *See* EU Regulation art. 5 (explaining when specific jurisdiction is proper).

213. *See, e.g., Burger King*, 471 U.S. at 482 (1985) (personal jurisdiction proper in Florida where contractual performance was due in Florida). *But see* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2784 (2011) (personal jurisdiction improper where defendant did not intend for its products to end up in New Jersey).

For example, had *Burger King* been adjudicated in a European court, the court would have come to the same conclusion, albeit in a one-step analysis.²¹⁴ The court would merely look at the franchise agreement signed by the defendants, and easily determine that franchise payments were due to the franchise headquarters in Florida.²¹⁵ That fact alone would satisfy the jurisdictional rules of Germany, France, and England, without any further findings.²¹⁶

2. Purposeful Availment

In specific jurisdiction cases, it is common for US courts to ask whether the defendant has purposefully availed itself of the forum state.²¹⁷ This requirement is noticeably absent from the European rules for jurisdiction.²¹⁸ To demonstrate this fact, pretend *Nicastro* occurred in France, and a French national was injured by an English product.²¹⁹ Jurisdiction would have been proper since the tort occurred in France.²²⁰ Furthermore, had the tort occurred outside of France, and the defendant was not an EU domiciliary, Article Fourteen would have provided the French plaintiff access to French courts.²²¹

Purposeful availment particularly impacts specific jurisdiction cases that are based on products liability claims, given the sometimes-broad application of the stream of commerce theory.²²² To illustrate this point, revisiting *World-Wide Volkswagen* is instructive, where the

214. Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 29 (Ger.); NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 46 (Fr.); CPR Part 6(B) para. 3.6(b) (England).

215. See *Burger King*, 471 U.S. at 482 (explaining factual background).

216. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 29 (Ger.) (jurisdiction proper where performance of contract is due); NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 46 (Fr.) (same); CPR part 6(20) (same).

217. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2784 (2011) (finding this point dispositive to plaintiff's claims).

218. Wendy Perdue, *Purposeful Availment*, 98 NW. U. L. REV. at 461-62 (describing this practice); see also Drobak, *Personal Jurisdiction in a Global World*, *supra* note 11, at 1731 n.108 (noting this does not displace the minimum contacts test).

219. See *Nicastro*, 131 S. Ct. at 2795 (explaining how the defendant was injured).

220. NOUVEAU CODE DE PROCÉDURE CIVILE [C.P.C.] art. 46 (Fr.) (jurisdiction proper where tort occurred); see also ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 32 (Ger.) (same); CPR Part 6(B) 3.9(a)-(b) (same).

221. French Article 14 (jurisdiction proper when plaintiff is a French national); Clermont & Palmer, *supra* note 20, at 14 (noting one reason for such jurisdiction is to provide French citizens access to French courts).

222. See Drobak, *Personal Jurisdiction in a Global World*, *supra* note 11, at 1730-32 (explaining this); Perdue, *supra* note 218, at 462 (same).

plaintiffs filed a products liability action against defendants for injuries sustained in an automobile accident in Oklahoma.²²³ The Supreme Court accepted the alien defendants' argument that its product, an Audi, ended up in Oklahoma through the plaintiff's actions alone.²²⁴ Finding the defendants never purposefully availed themselves of the "privileges and benefits" of Oklahoma law, the Court held the assertion of personal jurisdiction was improper.²²⁵

In the European Union, as explained above, specific jurisdiction does not consider purposeful availment.²²⁶ Specific jurisdiction is permitted where statute provides, without requiring courts to measure contacts.²²⁷ If the accident in *World-Wide Volkswagen* occurred in Germany, France, or England, jurisdiction would have been proper, on the basis that the tort, more specifically the harm, occurred within the forum.²²⁸

D. Reasonableness

Though it is now clear that reasonableness only plays a role in specific jurisdiction cases in the United States, there is debate among scholars about the role reasonableness plays in jurisdictional analysis outside of the United States.²²⁹ Again, focusing on Germany, France, and England, it is clear that reasonableness, insofar as it balances various interests, is not considered in determining whether personal

223. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980) (describing the background of the action).

224. *World-Wide Volkswagen*, 444 U.S. at 299 (holding personal jurisdiction over defendant improper).

225. *See id.* at 295, 299.

226. NOUVEAU CODE DE PROCEDURE CIVILE [C.P.C.] art. 46 (Fr.) (jurisdiction proper where tort occurred); *see also* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 32 (Ger.) (same); CPR 6(20) (same).

227. NOUVEAU CODE DE PROCEDURE CIVILE [C.P.C.] art. 46 (Fr.) (jurisdiction proper where tort occurred); *see also* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 32 (Ger.) (same); CPR 6(20) (same).

228. NOUVEAU CODE DE PROCEDURE CIVILE [C.P.C.] art. 46 (Fr.) (jurisdiction proper where tort occurred); *see also* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 32 (Ger.) (same); CPR 6(20) (same).

229. *See* Silberman, *supra* note 11, at 130 (arguing reasonableness is not a factor); Born, *supra* note 45, at 19 (noting that a reasonableness analysis is a growing trend in transnational litigation).

jurisdiction is proper.²³⁰ The closest any of these countries come is the limitation placed on Section Twenty-Three of the ZPO.²³¹

While requiring a “sufficient connection” to Germany does not require any balancing of interests, as in the United States, the BGH acknowledged that the requirement was necessary to avoid creating “friction” with other countries.²³² This was a concern noted by the Court in *Asahi*, and other cases since.²³³ Following *Daimler*, reasonableness analysis in the United States is now limited to specific jurisdiction cases, a non-exorbitant basis for jurisdiction.²³⁴ In Germany, the “sufficient connection” requirement is reserved for the exorbitant Section Twenty-Three jurisdiction.²³⁵

As demonstrated in Part II, the US minimum contacts approach to personal jurisdiction is fundamentally more pro-defendant, and thus restrictive for plaintiffs than the European approach.²³⁶ Germany, France, and England each allow bases of general jurisdiction beyond domicile, the US plaintiff’s only option following *Daimler*.²³⁷ With respect to specific jurisdiction, the US minimum contacts approach is not only more restrictive, with its requirement of purposeful availment, but the reliance on judicial discretion stands in stark contrast to the statutory approach embraced in Europe.²³⁸

III. A NEW APPROACH TO US PERSONAL JURISDICTION

Defendant-oriented, the US minimum contacts approach to personal jurisdiction is more restrictive than the approach taken by the European Union, Germany, France, or England.²³⁹ This places US

230. See *supra* Part I.B (discussing personal jurisdiction rules in the European Union).

231. Judgment of July 2, 1991, BGH, 1991 NJW 3092 (requiring a sufficient connection to Germany).

232. *Id.*

233. See, e.g., *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 114 (1987) (using reasonableness analysis in the international context to avoid creating friction with other nations); *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 (2014) (noting other nations’ retaliatory jurisdictional rules).

234. See *Daimler*, 134 S. Ct. at 762 n.20 (asserting that reasonableness is not appropriate in general jurisdiction cases).

235. Judgment of July 2, 1991, BGH, 1991 NJW 3092; see also Silberman, *supra* note 11, at 131 (noting reasonableness analysis is more appropriate in general jurisdiction cases).

236. See *supra* Part II (demonstrating that under EU jurisdictional rules US cases would have come out in favor of EU plaintiffs).

237. See *supra* Part II.B (comparing general jurisdiction in the U.S. and the European Union).

238. See *supra* Part II.C (describing differences in specific jurisdiction).

239. See *supra* notes 186-94 (demonstrating how the US approach is more restrictive).

plaintiffs at a disadvantage in obtaining relief as compared to their EU counterparts, who have access to codified rules, which are applied predictably and consistently.²⁴⁰ Following the Supreme Court's decision in *Daimler AG v. Bauman*, US plaintiffs are worse off now than ever before.²⁴¹

Part III.A will address the far-reaching and negative impact the Court's decision in *Daimler* will have on the ability of US plaintiffs to sue at home. Part III.B will argue for a new approach to personal jurisdiction, one that incorporates international law norms, called "the national contacts approach." Part III.C will discuss the positive impact the proposed national contacts approach will have on personal jurisdiction in the United States.

A. *Daimler: A Step Too Far*

Now, more than ever, US plaintiffs lack the jurisdictional means to hale alien defendants into US courts.²⁴² Prior to *Goodyear* and *Daimler*, courts were asserting general personal jurisdiction over defendants who had systematic and continuous contacts with the forum state—commonly known as US "doing business" jurisdiction.²⁴³ In *Goodyear*, the Court explained that general jurisdiction is proper only when a defendant is "at home" in the forum.²⁴⁴ With lower courts still unsure about the proper scope of general jurisdiction, the Court tried once again in *Daimler AG v. Bauman*.²⁴⁵

Justice Ginsburg, writing for the Court, looked to jurisdictional rules of the European Union and asserted that "at home" meant the defendant was domiciled in the forum state.²⁴⁶ Justice Ginsburg's analysis continued by attacking Justice Sotomayor's concurrence,

240. *See supra* note 166 and accompanying text (outlining the codified rules in the European Union).

241. *See supra* notes 15-17 and accompanying text (explaining that without courts' uneven application of general jurisdiction plaintiffs will be forced to take these claims abroad losing benefits of US legal system).

242. *See supra* note 60-61 and accompanying text (explaining general jurisdiction only proper where defendant is domiciled in the forum state).

243. *See supra* note 53 (explaining how some courts applied loose standard for general jurisdiction).

244. *See supra* note 42 and accompanying text (delineating the at home standard).

245. *See supra* note 53 and accompanying text (attempting to clarify the unclear standard).

246. *See supra* note 60 and accompanying text (holding domicile required for general jurisdiction).

which would have dismissed the case on reasonableness grounds alone.²⁴⁷ She asserted that reasonableness is not a proper consideration in general jurisdiction cases.²⁴⁸

The Supreme Court's opinion in *Daimler* will have serious consequences for US plaintiffs.²⁴⁹ As explained above, general jurisdiction occasionally served as a jurisdictional basis of last resort.²⁵⁰ When US plaintiffs could not make showings sufficient for specific jurisdiction, especially in cases against non-US corporations, courts allowed plaintiffs to make a showing of the defendant's "continuous and systematic" business activities in the forum state.²⁵¹ Reasonableness then acted as a safety valve for the defendants.²⁵² If jurisdiction was truly unreasonable, courts could decline it on that basis alone, just as Justice Sotomayor urged the Court to do in *Daimler*.²⁵³

General jurisdiction, the sole door to relief for US plaintiffs when the minimum contacts approach was otherwise too narrow, is now officially closed.²⁵⁴ Losing the benefits of the US judicial system, with its contingency fees and jury trials, US plaintiffs will be forced to litigate such claims abroad.²⁵⁵ This is in stark contrast to similarly situated EU plaintiffs, who often have no trouble finding a forum for redress at home.²⁵⁶

B. *The National Contacts Test*

In light of *Daimler* and the prevailing international rules for personal jurisdiction, it is time for the United States to reconsider

247. See *supra* note 64 and accompanying text (cautioning that the Court's decision will have unforeseen impact).

248. See *supra* note 64 and accompanying text (explaining when reasonableness is appropriate).

249. See *supra* note 64 and accompanying text (closing the door on general jurisdiction).

250. See *supra* note 14 and accompanying text (explaining how general jurisdiction was used when plaintiffs could not make the requisite showing of contacts for specific jurisdiction).

251. See *supra* note 14 and accompanying text (demonstrating that systematic and continuous activities was essentially used as a test for general jurisdiction).

252. See *supra* note 43 and accompanying text (describing the role reasonableness played).

253. See *supra* Part I.A.4 (deciding the case on reasonableness alone).

254. See *supra* note 60 and accompanying text (holding domicile required for general jurisdiction).

255. See *supra* note 15 and accompanying text (describing benefits of US legal system).

256. See *supra* note 20 and accompanying text (explaining jurisdictional rules in Europe which allow plaintiffs to sue at home).

personal jurisdiction.²⁵⁷ Free from the constitutional underlay embodied in the minimum contacts approach, “the proposed national contacts test” shifts the focus away from the defendant, focusing instead on providing forums for US plaintiffs to obtain relief.²⁵⁸ Based in part on the *Asahi* factors and in part on internationally accepted principles of jurisdiction, the national contacts approach provides predictability on one hand and the discretionary ability to limit exorbitant assertions of jurisdiction on the other.²⁵⁹

The first prong of the national contacts approach asks the court to address the “accepted” bases of jurisdiction.²⁶⁰ The Supreme Court has already shown a willingness to align itself with international jurisdictional norms in adopting domicile as a basis for general jurisdiction.²⁶¹ As it currently stands, US-style specific jurisdiction remains an outlier in the international field, especially with regards to purposeful availment.²⁶² Following the predictable and straightforward EU rules, tort jurisdiction is proper under the national contacts approach when the act occurs in the forum, or if its effects are felt in that forum.²⁶³ For a contract claim, the court determines if the breach occurred in the forum or whether the contract was made in the forum.²⁶⁴

This approach seeks to resolve the unfairness felt by US plaintiffs as demonstrated in cases like *Nicastro*.²⁶⁵ Through the national contacts approach, a US citizen injured on US soil will always have a forum for relief, no matter who, or what, the defendant is.²⁶⁶ The fact the injury occurred in the United States would be

257. *See supra* Part I.B (outlining jurisdictional rules of other nations).

258. *See supra* note 20 and accompanying text (discussing the European rationale behind personal jurisdiction).

259. *See supra* notes 50-52 and accompanying text (discussing *Asahi* reasonableness).

260. *See supra* notes 81-84 and accompanying text (discussing accepted bases of jurisdiction in the European Union).

261. *See supra* note 75 and accompanying text (adopting paradigmatic examples of domicile in the European Union).

262. *See supra* Part II.C.2 (discussing unique features of US specific jurisdiction).

263. *See supra* note 83 and accompanying text (describing tort jurisdiction in the European Union).

264. *See supra* note 82 and accompanying text (describing contract jurisdiction in the European Union).

265. *See supra* note 220 (demonstrating unfairness in *Nicastro*).

266. *See supra* note 83 and accompanying text (describing the place of harm as always sufficient for jurisdiction).

enough to establish proper jurisdiction, without concern for minimum contacts or purposeful availment.²⁶⁷

When the first prong of the national contacts approach does not apply, that is when there is no accepted basis for jurisdiction, courts will move to the second prong of the national contacts approach, which incorporates *Asahi* reasonableness and the balancing of interests.²⁶⁸ The court would first determine what the US interests are in adjudicating the dispute.²⁶⁹ This could be a state's interesting in regulating motor vehicles.²⁷⁰ There may even be some instances where enforcing human rights abroad is a salient US interest.²⁷¹ Yet, as the name suggests, the national contacts approach gives considerable weight when the plaintiff is a US national, an approach taken by other countries.²⁷²

While this resembles French Article Fourteen jurisdiction in that US nationals are given preference by virtue of their "American-ness," there is a critical difference: a built-in safety valve to limit the effects of exorbitant jurisdiction.²⁷³ To borrow from Justice O'Connor in *Asahi*, courts next will consider the "interests of other nations" to make sure adjudication in a US court does not cause tension with other nations.²⁷⁴ This is where the court's discretion comes into play, a traditional feature of the US judiciary.²⁷⁵

When US interests are high, which will always be the case with a US plaintiff, and interests of other nations are low, jurisdiction is proper.²⁷⁶ If something like *Goodyear* were to happen again, where US plaintiffs bring a claim in US court for a tort that occurred in a different country, the national contacts approach would permit personal jurisdiction.²⁷⁷

267. See *supra* note 220 and accompanying text (describing tort jurisdiction in the European Union).

268. See *supra* notes 50-52 (discussing *Asahi* reasonableness).

269. See *supra* note 50 and accompanying text (discussing US interests).

270. See *supra* note 50 and accompanying text (discussing US interests).

271. See *supra* note 52 and accompanying text (discussing federal interests).

272. See *supra* note 164 and accompanying text (discussing Section Twenty-Three jurisdiction).

273. See *supra* note 235 and accompanying text (explaining how reasonableness operates as a safety valve for defendants).

274. See *supra* note 51 and accompanying text (explaining the interests of other nations come into play when their nationals are hailed into US courts).

275. See *supra* note 205 and accompanying text (describing the discretionary role of US courts).

276. See *supra* note 233 and accompanying text (discussing *Asahi* reasonableness).

277. See *supra* notes 189-90 and accompanying text (discussing *Goodyear*).

In a situation where US interests are low, for example in the case of an indemnity claim involving only alien parties, a court will decline jurisdiction without even considering the interests of other nations.²⁷⁸ Under the proposed national contacts approach, *Asahi* would be decided the same way.²⁷⁹ Without a US party, or a state regulatory interest, there is simply no reason for a US court to adjudicate the dispute.²⁸⁰

Though scholars have debated about the applicability of a reasonableness analysis in courts outside of the United States, it is important to emphasize its role under the national contacts approach.²⁸¹ It is purely used as a way to limit exorbitant jurisdiction when US interests are lacking a safety valve for defendants.²⁸² Thus, while the national contacts approach embraces the spirit of Article Fourteen, for example, it does not adopt it entirely.²⁸³

C. Impact of the National Contacts Approach

If adopted, the national contacts approach will put US plaintiffs on equal footing with plaintiffs around the world.²⁸⁴ At the most fundamental level, the national contacts approach decouples jurisdictional analysis from constitutional due process.²⁸⁵ Courts will no longer be burdened by measuring a defendant's contacts with the forum state.²⁸⁶ In the vast majority of cases, the courts will not use their discretion at all.²⁸⁷ Determining jurisdiction under the first prong of the national contacts approach is as simple as EU courts

278. *See supra* notes 50-51 and accompanying text (explaining the Court's decision in *Asahi* was partly based on lack of US parties).

279. *See supra* notes 50-52 and accompanying text (declining jurisdiction over the defendant because it was unreasonable).

280. *See supra* notes 50-51 and accompanying text (discussing the reasonableness factors in *Asahi*).

281. *See supra* note 229 and accompanying text (debating the role reasonableness plays in jurisdictional analysis).

282. *See supra* note 43 and accompanying text (describing the role reasonableness played).

283. *See supra* note 139 and accompanying text (discussing French Article 14).

284. *See supra* Part III.B (discussing the national contacts approach).

285. *See supra* note 24 and accompanying text (explaining the minimum contacts approach foundation in due process).

286. *See supra* note 24 and accompanying text (describing the minimum contacts approach).

287. *See supra* note 166 and accompanying text (explaining statutory foundation of jurisdictional rules in the European Union).

determining whether there is a statutory basis for jurisdiction.²⁸⁸ A judge is merely asked to determine the type of claim and where the harm or breach occurred.²⁸⁹ As for the second prong, the existence of a US plaintiff makes the assertion of jurisdiction an easy one since the US interests in adjudicating the dispute are quite high.²⁹⁰ Outside of that, US courts will retain a small amount of the discretion they once had to determine whether jurisdiction is nonetheless unreasonable.²⁹¹

CONCLUSION

Embracing the concept of international harmonization, the United States Supreme Court limited the scope of general jurisdiction in *Daimler AG v. Bauman*. However, in doing so, the Court closed off one of the few remaining avenues for US plaintiffs to obtain relief in US courts. By asserting that reasonableness plays no role in general jurisdiction, and alien defendants are only “at home” where they are domiciled, the Court once again favored defendants to the detriment of US plaintiffs.

One way to fix the unfairness to US plaintiffs is to create a new test for personal jurisdiction, one decoupled from Constitutional Due Process, focused instead on alignment with international law norms. The national contacts approach, detailed above, accomplishes these goals in a straightforward and predictable manner.

For example, a US citizen, his Argentine wife, and their four children are kidnapped by pirates while sailing off the coast of Argentina. Secretly funding these pirates was the large, multi-national corporation, Mercedes, headquartered in Germany. The pirates kill everyone but the husband. May he bring his claims against Mercedes in the United States? The answer, under the national contacts approach, is undoubtedly, yes.

288. *See supra* note 212 and accompanying text (noting EU courts typically lack discretion in jurisdictional decisions).

289. *See supra* note 212 and accompanying text (noting EU courts typically lack discretion in jurisdictional decisions).

290. *See supra* notes 50-51 and accompanying text (discussing what happens when federal interests are involved).

291. *See supra* notes 50-51 and accompanying text (discussing what happens when federal interests are involved).

