# INTERNATIONAL COMMERCE IN NEW JERSEY: DUE PROCESS AND THE FREEDOM OF CONTRACT

*John J. Sarno**

## I. INTRODUCTION

In 1981, the New Jersey Legislature declared that the expansion of international trade and commerce was vital to the maintenance and continued growth of a healthy New Jersey economy.[1] A decade later, the number of business failures in the state had doubled and the dollar values of their liabilities had tripled from 1990 levels.[2] While the state's economy continues to be battered by forces substantially outside of its control, many business people and economists believe that international commerce, especially with European and Mexican companies, holds important long-term potential for American companies.[3] Confronted with diminished prospects at home, many New Jersey businesses are exploring emerging global markets to generate profits.[4]

While businesses expect that participation in the global economy will create viable new markets for their products and services, the demands of international commerce will have a sub-

* Associate in the law firm of Robinson, St. John & Wayne, Newark, New Jersey. J.D., Seton Hall University School of Law; M.A., Seton Hall University; B.A., Ramapo College of New Jersey.

1 N.J. STAT. ANN. § 52:27H-22.1 (West 1986).

2 John T. Harding, *Business Failures Doubled in '91*, THE STAR-LEDGER, Feb. 10, 1992, at 23.

3 *Id.*

4 Marian Courtney, *Companies Prospecting in the New Europe*, N.Y. TIMES, Feb. 23, 1992, at N.J. 1.

In 1992, the European Community is scheduled to complete the first stage of its economic integration program. If ratified, the unification will result in creating the world's second largest trading bloc, comprising over 325 million consumers. Already, the European Community represents New Jersey's biggest trading partner, and many hope that because of the state's geography and infrastructure, New Jersey can become to Europe what California is to the Far East. *See Europe in the Nineties*, Division of Commerce and Economic Development, State of New Jersey (1990), at 2.

The world's largest trading bloc will be formed among Mexico, Canada and the United States. The passage and implementation of the North American Free Trade Agreement will create a market comprising 360 million consumers. John T. Harding, *New Free Trade Pact Called Big Boost for Jersey Exports*, THE STAR-LEDGER, Aug. 13, 1992, at 1. New Jersey firms are already planning to enter emerging markets in Mexico. *Id.*

stantial impact on how business is conducted and, ultimately, on how commercial disputes are resolved. Traditional methods of resolving disputes through litigation or arbitration will be altered in the global marketplace, primarily because United States citizens are bound by treaties and conventions that may pose unforeseen hurdles to litigation and alternate dispute resolution. While domestic companies are turning to foreign corporations for new business opportunities, foreign nationals may be immune from suit in the United States when opportunities go sour. Domestic companies may be compelled to engage in costly, time-consuming global litigation to recoup losses, or even to forego any meaningful opportunity to regain such losses, rather than to sue a foreign corporation on its home turf. Alternatively, state courts, particularly in New Jersey, are steadily increasing their jurisdictional reach over foreign corporations.

This Article will consider the constitutional implications of the global economy, with particular emphasis on the expansion of state jurisdiction over international disputes. It will discuss the basis of state power to affect foreign commerce through the exercise of personal jurisdiction over foreign corporations. It will also discuss alternatives to international litigation and the trend toward using international conventions and protocols to resolve commercial disputes.

## II. INTERNATIONAL LITIGATION WITHIN THE CONSTITUTIONAL FRAMEWORK

### *A. The Basis of the State's Jurisdiction over International Commerce*

The Fourteenth Amendment to the United States Constitution provides that the Congress shall regulate commerce among the states and with foreign nations.[5] Although Article One of the Constitution contains language explicitly limiting state interference with foreign commerce,[6] the Commerce Clause does not explicitly limit a state's ability to influence foreign commerce. Thus, restrictions on state power have evolved from the Constitution's negative implications, and by interpreting "these great silences of the Constitution."[7] Although the Commerce Clause does not explicitly limit a state's power to influence foreign com-

---

[5] U.S. CONST. art. I, § 8, cl. 3.

[6] U.S. CONST. art. I, § 10. This provision prohibits states from taxing imports or exports "except what may be . . . absolutely necessary for executing its inspection Laws." U.S. CONST. art. I, § 10, cl. 2.

[7] H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949).

merce, congressional power in the area has been construed as all but exclusive. For example, the Court has stated that "[i]t is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action."[8]

According to James Madison, the role of the national government was to keep the states from engaging in discriminatory, self-protective and retaliatory conduct.[9] According to Madison, without the Commerce Clause "the great and essential power of regulating foreign commerce would have been incompleat, and ineffectual."[10] Thus, the sweep of the national government's power to regulate commerce turned on the states' voluntary relinquishment of their sovereignty when they ratified the Constitution.[11] Observers have noted that the Commerce Clause forms the charter of the greatest economy in the world.[12]

It is clear that if the sweep of the Commerce Clause can prohibit a family farmer from growing a few bushels of wheat for his own use,[13] it seems likely that a state court would likewise be barred from exercising its jurisdiction over a foreign corporation. But, while the Commerce Clause abolished trade barriers erected by the states:

> the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States - a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.[14]

Indeed, Alexander Hamilton explained that the Constitution created concurrent jurisdiction between state and federal courts, but only over "those descriptions of causes of which the State courts have previous cognizance."[15] Hamilton declared that:

> [t]he judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all

---

8 Board of Trustees of the Univ. of Ill. v. United States, 289 U.S. 48, 56-57 (1933) (citations omitted).

9 THE FEDERALIST No. 422 (James Madison).

10 *Id.*

11 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1924).

12 *See generally* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1935).

13 *See* Wickard v. Filburn, 317 U.S. 111 (1942).

14 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

15 THE FEDERALIST No. 82 (Alexander Hamilton).

> subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of one whole, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.[16]

Consequently, New Jersey businesses have traditionally relied upon the state's "long arm rule"[17] to bring recalcitrant nonresidents into court to resolve commercial disputes.[18] Even though "the great and essential power"[19] of the Commerce Clause would otherwise bar a state's act that would interfere with international commerce, the Constitution does not prevent a citizen from invoking the state court's jurisdiction over a foreign corporation. This apparent contradiction establishes the foundation of the federalist system created by the Constitution: co-equal sovereigns exercising concurrent jurisdiction over, among other things, commercial disputes. Although a foreign corporation may be brought into New Jersey to answer allegations of wrongdoing, the power of the legal process is not without limitations. The Constitution, which allows the states to retain concurrent jurisdiction over matters that affect foreign commerce, also restricts the exercise of that jurisdiction. Additionally, treaties, like the Constitution, enjoy the status of constituting the law of the land[20] and may pose additional restrictions on the states.

### *B. The Diminishing Due Process Guarantee*

The Fourteenth Amendment provides, in part, that no state shall deprive any person of a liberty interest without due process of law.[21] The Due Process Clause protects an individual's liberty interest in that an individual is not subject to the judgments of a court that lacks jurisdiction.[22] Although this protection operates to restrict state power, the United State Supreme Court has

---

16 *Id.*

17 N.J. CT. R. 4:4-4(c)(1).

18 Charles Gendler & Co., Inc. v. Telecom Equip. Corp., 102 N.J. 460, 469, 508 A.2d 1127, 1131 (1986).

19 THE FEDERALIST No. 42 (James Madison).

20 U.S. CONST. art. VI, cl. 2.

21 U.S. CONST. amend. XIV, § 1.

22 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73 (1985).

noted that such restriction is "ultimately a function of the individual liberty interest preserved by the Due Process Clause [rather than a function] of federalism concerns.[23] Thus, while New Jersey courts are vested with jurisdiction over foreign corporations "to the uttermost limits permitted by the United States Constitution,"[24] due process requires that the exercise of jurisdiction comport with "traditional notions of fair play and substantial justice."[25]

Such notions have evolved over time, following the realities of the marketplace. In the 1878 case of *Pennoyer v. Neff*,[26] the Supreme Court construed the Due Process Clause as requiring the personal presence of the defendant in the jurisdiction. Almost seventy years later, in *International Shoe Co. v. Washington*,[27] the Court recognized that the requirement of a corporate presence did not comport with the realities of interstate commerce. In its famous statement of the minimum contacts doctrine, the Court determined:

> [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."[28]

While fair play and substantial justice may require that a foreign corporation have some minimal presence in a state before the corporation is forced to defend itself in court, the Supreme Court nevertheless observed in the 1957 case of *McGee v. International Life Ins. Co.*[29] that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."[30] The *McGee* Court further noted:

> [T]his [trend] is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more states and may involve parties separated by the full continent. With this in-

---

23 Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982).

24 Avdel Corp. v. Mecure, 58 N.J. 264, 268, 277 A.2d 207, 209 (1971).

25 Charles Gendler & Co., Inc. v. Telecom Equip. Corp., 102 N.J. 460, 469, 508 A.2d 1127, 1131-32 (1986) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

26 95 U.S. 714 (1878).

27 326 U.S. 310 (1945).

28 *Id.* at 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

29 355 U.S. 220 (1957).

30 *Id.* at 222.

> creasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.[31]

Moreover, as the New Jersey Supreme Court observed, "[w]ith the metamorphosis from a national to an international economy, the expansion of state jurisdiction has special relevance for foreign corporations engaged in commercial activities throughout the United States."[32] Predictably, the internationalization of the marketplace has contributed to the diminution of individual liberty, thus making it easier to be sued in a distant forum,[33] and increasing the states' jurisdiction over foreign commerce. This development has caused some concern that foreign companies will refrain from conducting business in the United States.[34]

### *C. Safeguarding International Commerce*

#### 1. Balancing Commercial Considerations

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[35] the Supreme Court seemingly restricted the ability of a United States citizen to sue a foreign corporation in a state court despite the defendant corporation's substantial contacts with the forum state. In *Helicopteros*, the survivors and representatives of four decedents killed in a helicopter crash in Peru filed suit in Texas. The decedents were employed by a Texas joint venture that purchased the helicopter from a Columbian corporation. The negotiations, as well as the flight training, took place in Texas. The Court found that these contacts collectively were insufficient to justify the state court's jurisdiction over the Columbian corporation.[36] In short, Justice Blackmun's majority opinion determined that "purchases and related trips, standing alone, are not a sufficient basis for a State's assertion of jurisdiction."[37]

---

31 *Id.* at 222-23.

32 *Charles Gendler*, 102 N.J. at 474, 508 A.2d at 1134.

33 *Id.* at 478-79, 508 A.2d at 1136-37.

34 *See* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 425 n.3 (1984) (Brennan, J., dissenting) (examining the Solicitor General's assertion that foreign companies, fearing exposure to general jurisdiction on extraneous causes of action, may refrain from buying in the United States).

35 466 U.S. 408 (1984).

36 *Id.* at 415-17.

37 *Id.* at 417.

In dissent, Justice Brennan advocated the expansion of state jurisdiction over foreign corporations.[38] Striking a balance between commercial benefits and legal obligations, the dissent explained:

> As active participants in interstate and foreign commerce take advantage of the economic benefits and opportunities offered by various States, it is only fair and reasonable to subject them to the obligations that may be imposed by those jurisdictions. And chief among the obligations that a nonresident corporation should expect to fulfill is amenability to suit in any forum that is significantly affected by the corporation's commercial activities.[39]

Although Justice Brennan intended his flexible approach to the Fourteenth Amendment to accommodate the realities of a global market, the *Helicopteros* majority noted that the Due Process Clause continued to curb the expansion of state jurisdiction over foreign corporations.[40] In *Burger King Corp. v. Rudzewicz*,[41] Justice Brennan wrote for the majority and declared that "the Due Process Clause allows flexibility in ensuring that commercial actors are not effectively 'judgment proof' for the consequences of obligations they voluntarily assume in other states . . . ."[42]

The evolution of a flexible due process analysis applied to foreign corporations turns on the recognition that the global marketplace transcends state borders. The New Jersey Supreme Court has commented:

> [F]oreign manufacturers derive benefits from the indirect sale of their products throughout the United States. By increasing the distribution of its products, the manufacturer not only benefits economically from indirect sales to forum residents, but also benefits from the protection provided by the laws of the forum state. . . . A foreign manufacturer that purposefully avails itself of those benefits should be subject to personal jurisdiction, even though its products are distributed by independent companies or by an independent, but wholly-owned, subsidiary.[43]

While companies that engage in international commerce derive

---

38 *Id.* at 422-24 (Brennan, J., dissenting).

39 *Id.* at 423 (Brennan, J., dissenting).

40 *Id.* at 413-14.

41 471 U.S. 462 (1985).

42 *Id.* at 486 (citing McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)).

43 Charles Gendler & Co., Inc. v. Telecom Equip. Corp., 102 N.J. 460, 478-79, 508 A.2d 1127, 1136-37 (1986).

benefits from those states in which their products are distributed, the Due Process Clause has traditionally restricted the exercise of state court jurisdiction over foreign corporations. The demands of international commerce, however, compel a flexible approach to due process considerations, for it would be unfair to allow a foreign corporation to reap economic benefits in a state without holding the corporation accountable for its commercial conduct. As the marketplace becomes increasingly internationalized, the Constitution affords ever more leeway to states for the expansion of their jurisdiction over commercial activity.

### 2. The Attempt To Internationalize Due Process of Law

Though foreign corporations may be amenable to suit in state courts, the Hague Convention has internationalized due process of law by requiring that court papers be translated and served on a central authority.[44] As a multinational treaty formulated in 1964, the Hague Convention has been acceded to or ratified by thirty-two countries.[45] The Hague Convention was intended to provide a simpler way to serve process abroad, to assure that foreign defendants would receive actual notice of a lawsuit and to facilitate proof of service abroad.[46] In *Volkswagenwerk Aktiengesellschaft v. Schlunk*,[47] the seminal interpretation of the treaty, the Supreme Court held that where service on a domestic agent is invalid under state law and the Due Process Clause, service must be made pursuant to the Hague Convention.[48] The Court declared:

> The legal sufficiency of a formal delivery of documents must be measured against some standard. The [Hague] Convention does not prescribe a standard, so we almost necessarily must refer to the internal law of the forum state. If the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Convention applies.[49]

As previously observed, New Jersey courts are vested with jurisdiction over foreign corporations to the outer limits of due process

---

44 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361.

45 *See* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698 (1988).

46 *Id.* at 698-99.

47 486 U.S. 694 (1988).

48 *Id.* at 707.

49 *Id.* at 700.

of law.[50] While service abroad would probably require translating documents and serving a central authority in a foreign country,[51] a foreign corporation's subsidiary may be located in the forum state. It is uncertain whether service of process upon a domestic subsidiary of a foreign corporation complies with due process of law.

The issue of whether a forum state may exercise jurisdiction over a parent corporation based on the forum contacts of its subsidiary originally arose over sixty years ago in *Cannon Manufacturing Co. v. Cudahy Packing Co.*[52] In this 1925 case, the Supreme Court discussed whether a carefully maintained corporate separation between parent and subsidiary must be ignored in assessing the existence of jurisdiction.[53] Declining to base jurisdiction over the parent on the basis of the subsidiary's forum contacts, the Court noted that the use of a subsidiary does not necessarily subject a parent corporation to the jurisdiction of the forum state in which the subsidiary does business.[54] The *Cannon Manufacturing* Court further explained:

> The corporate separation, though perhaps merely formal, was real. It was not pure fiction. There is here no attempt to hold the defendant [parent] liable for an act or omission of its subsidiary or to enforce as against the latter a liability of the defendant.[55]

The reasoning in *Cannon Manufacturing* suggests that a subsidiary's forum contacts may be imputed to its parent only upon piercing the subsidiary's corporate veil. As New Jersey courts have recognized, however, "at the time *Cannon* was decided . . . the applicable test of whether a foreign corporation was subject to *in personam* jurisdiction was the test of presence within the jurisdiction."[56]

Presently, under New Jersey law, serving a foreign parent through a domestic subsidiary when they are separate and distinct entities violates due process of law.[57] The Hague Convention must be used unless the subsidiary's corporate form can be pierced to reach the parent. While service of process implicates the Due Pro-

---

50 *See* Avdel Corp. v. Mecure, 58 N.J. 264, 268, 277 A.2d 207, 209 (1971).

51 *See* Cintron v. W & D Mach. Co., 182 N.J. Super. 126, 128 n.1, 440 A.2d 76, 77 n.1 (Law Div. 1981) (noting that the Hague Convention calls for a "central authority" in each country to accept foreign service requests).

52 267 U.S. 333 (1925).

53 *Id.* at 336.

54 *Id.*

55 *Id.* at 337.

56 Taca Int'l Airlines, Inc. v. Rolls-Royce, Ltd., 84 N.J. Super. 140, 146, 201 A.2d 97, 100 (Law Div. 1964).

57 Gapanovich v. Komori Corp., 255 N.J. Super. 607, 605 A.2d 1120 (App. Div. 1992).

cess Clause,[58] the relevancy of the corporate form seems diminished when the foreign parent has already availed itself of the benefits of the forum state through its domestic subsidiary. The availment of commercial benefits within a particular forum presumably creates the expectation that the foreign parent is amenable to suit in that forum. The requirement of translating documents for service abroad appears unnecessary when the domestic subsidiary has been utilized to benefit the foreign parent. Arguably, it would be consistent with due process of law to treat the domestic subsidiary as the foreign parent's agent for service of process, irrespective of whether it acts as the parent's alter-ego. In any event, under New Jersey law the Hague Convention must be utilized for service of process when the domestic subsidiary maintains a separate and distinct corporate identity from that of its foreign parent.

Because the minimum contacts analysis[59] has long since replaced the actual presence requirement, courts have determined that a clear distinction must be drawn between liability and jurisdictional concepts when considering whether to pierce the corporate veil.[60] To the extent that *Cannon Manufacturing* suggests that substantive piercing standards control jurisdictional analysis, some New Jersey courts[61] have adopted the standard set forth in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS which provides:

> If the subsidiary corporation does an act, or causes effects, in the state at the direction of the parent corporation or in the course of the parent corporation's business, the state has judicial jurisdiction over the parent to the same extent that it would have had such jurisdiction if the parent had itself done the act or caused the effects.
>
> . . . .
>
> Judicial jurisdiction over a subsidiary corporation will likewise give the state judicial jurisdiction over the parent corporation if the parent so controls and dominates the subsidiary as in

---

58 Mississippi Publishing Corp. v. Murphee, 326 U.S. 438, 444-45 (1945).

59 *See supra* note 27 and accompanying text.

60 *See generally* McPheron v. Penn Central Trans. Co., 390 F. Supp. 943, 953 (D. Conn. 1975).

61 *See* Moon Carrier v. Reliance Ins. Co., 153 N.J. Super. 312, 323, 379 A.2d 517, 523 (Law Div. 1977) (applying the Restatement's standard to find that a close relationship between a parent corporation, AT&T, and its wholly-owned subsidiary, New York Telephone Company, alone was insufficient to bring nonresident subsidiary within state court's jurisdiction); Unicon Invs. v. Fisco, Inc., 137 N.J. Super. 395, 401-02, 349 A.2d 117, 121 (Law Div. 1975) (holding that a subsidiary engaging in business in New Jersey and its parent company's high expectations for subsidiary's profits from New Jersey business did not subject parent corporation to New Jersey jurisdiction as guarantor of subsidiary's lease of New Jersey property).

effect to disregard the latter's independent corporate existence.[62]

In *Taca Int'l Airlines, Inc. v. Rolls-Royce, Ltd.*,[63] an action for property damage to aircraft, the plaintiff sued a Delaware subsidiary, which had done business in New Jersey, its Canadian sister corporation and its English parent corporation. The latter two corporations had no independent New Jersey contacts whatsoever; consequently, relying on *Cannon Manufacturing*, they moved to dismiss for lack of personal jurisdiction. The plaintiff opposed the motion by arguing that the subsidiary's operations were so interwoven with those of its foreign parent that its forum contacts should be imputed to the parent.

The court denied the motion. After finding that the subsidiary was "an integral part of the [parent's] economic empire" comprising one cohesive economic unit, the court held that the foreign corporation's ties with the domestic subsidiary constituted sufficient minimum contacts with New Jersey.[64]

In *Cintron v. W & D Machinery Co.*,[65] however, a New Jersey court found that service of process upon a wholly owned domestic subsidiary was ineffective with regard to its West German parent, in view of the plaintiffs' failure to establish that an officer, director, trustee, managing agent or general agent had been authorized to accept service of process in New Jersey. The court reasoned that service can be effected upon the parent through the subsidiary consistent with due process of law only where the subsidiary is a "mere instrumentality" of a parent, as measured by the similarity of officers and directors, the commonality of financial arrangement and the level of control.[66] Accordingly, the *Cintron* court held that due process mandated that service of process be made pursuant to the Hague Convention.

At least with regard to the mass distribution of products by foreign corporations, the New Jersey Supreme Court has entirely disregarded the corporate veil analysis. In *Charles Gendler & Co. v. Telecom Equipment Corp.*,[67] the Supreme Court held that "[a] foreign manufacturer that purposefully avails itself of . . . benefits [in New Jersey] should be subject to personal jurisdiction, even though its products are distributed by independent companies or by an independent,

---

62 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52 cmt. (b) (1971).
63 84 N.J. Super. 140, 201 A.2d 97 (Law Div. 1964).
64 *Id.* at 148, 149, 201 A.2d at 101.
65 182 N.J. Super. 126, 440 A.2d 76 (Law Div. 1981).
66 *Id.* at 131-33, 440 A.2d at 79-80.
67 102 N.J. 460, 508 A.2d 1127 (1986).

but wholly-owned subsidiary."[68] In expanding the jurisdiction of the New Jersey courts, the *Charles Gendler* court recognized that it would be unfair for foreign corporations to insulate themselves while they derived benefits from a global marketplace.[69]

The *Charles Gendler* court adopted the United States Supreme Court's "purposeful availment" test first articulated in *Burger King Corp. v. Rudzewicz*.[70] In *Burger King*, the defendant, a Michigan resident, negotiated a franchise agreement with a Florida corporation and, in so doing, used the mails. He never stepped foot in Florida. The Court found, however, that a Florida court had jurisdiction over the defendant because he had purposefully derived a benefit from Florida by negotiating with a corporation formed under the state's laws. The Court based its conclusion on the premise that "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed."[71]

Although the New Jersey Supreme Court has expanded state court jurisdiction over foreign corporations that distribute products to New Jersey through middlemen, the *Charles Gendler* reasoning could very well be applied to the negotiation of a contract through a domestic subsidiary. Thus, a foreign parent lacking contacts with New Jersey but deriving a benefit from a contract negotiated by a domestic subsidiary with a New Jersey corporation may be haled into a New Jersey court. Under this elastic approach, it is difficult to imagine how the Due Process Clause would continue to act as a restriction on state sovereignty under this scenario. Due to the demands of a national economy, however, minimum contacts is replacing actual presence as a basis for personal jurisdiction. Accordingly, the international marketplace demands a much more elastic approach to personal jurisdiction. The minimum contacts requirement seems outmoded in the age of multinational combinations doing business in the global marketplace.

Ironically, the federalism envisioned by Madison and Hamilton has allowed the state courts to define the contours of the Due Process Clause: "As courts of limited jurisdiction, the federal district courts possess no warrant to create jurisdictional law of their own. . . . [T]hey must apply state law 'except where the Constitution

---

68 *Id.* at 478-79, 508 A.2d at 1137.

69 *Id.* at 479, 508 A.2d at 1137.

70 *Id.* at 470, 508 A.2d at 1132 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985)).

71 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

or treaties of the United States or Acts of Congress otherwise require or provide. . . .' "[72] New Jersey courts may exercise their jurisdiction worldwide, irrespective of treaties that seek to internationalize due process of law.[73] The global marketplace has truly expanded the power of the states to impose their jurisdictional law on international commerce. Although the Due Process Clause may no longer provide a realistic limit on state power, fundamental fairness and convenience to litigants still constitute important considerations.

3. The Inconvenient Forum

The doctrine of *forum non conveniens* permits a court to deny hearing a case despite the existence of jurisdiction in the interests of the litigants and in the interest of justice.[74] The United States Court of Appeals for the Third Circuit has asserted:

> The primary danger against which the doctrine guards is the plaintiff's "temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself," so that he can " 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."[75]

Of paramount concern in *forum non conveniens* analysis is whether

---

[72] Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 711 (1982) (Powell, J., concurring) (quoting 28 U.S.C. § 1652 (1992)).

[73] While the supremacy of a treaty has been "recognized from the beginning," United States v. Belmont, 301 U.S. 324, 331 (1937), it is clear, at least in New Jersey, that the Hague Convention's requirement to translate pleadings and serve them in a foreign country does not limit a litigant's ability to circumvent the convention by serving a domestic corporation irrespective of whether the domestic corporation is located in New Jersey or elsewhere. Indeed, the Third Circuit has noted that the Hague Convention does not affect a state's chosen limits on the jurisdictional reach of its courts. DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 288-89 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981). On the other hand, at least one United States District Court has held that the nature of the *alter ego* analysis used in determining diversity jurisdiction renders it inappropriate for use in the context of the Warsaw Convention. *See In re* Air Disaster Near Cove Neck, N.Y. on Jan. 25, 1990, 774 F. Supp. 725 (E.D.N.Y. 1991).

[74] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504-05, 507 (1947) (tracing the origin, development and application of *forum non conveniens*, and noting that the principle empowers courts "with a discretion to change the place of a trial on various grounds, such as the convenience of witnesses and the ends of justice.").

[75] Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 615 (3d Cir. 1991) (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947)); *see also* Mediterrean Golf, Inc. v. Hirsh, 783 F. Supp. 835, 852-53 (D.N.J. 1991) ("The doctrine of *forum non conveniens* is 'grounded in concern for the costs that must be expended in litigation and the convenience of the parties.' ") (quoting *Lony*, 935 F.2d at 614).

"trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or [whether] the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.' "[76] A court's initial inquiry in deciding to dismiss a complaint on *forum non conveniens* grounds is whether there is an adequate alternate forum to hear the case.[77]

If such a forum exists, a court must consider the various factors set forth by the Supreme Court in *Gulf Oil Corp. v. Gilbert*.[78] These factors fall into two broad categories. One category includes factors relating to the "private interests" of the parties in the context of the litigation: the plaintiff's choice of forum, the ease of accessibility to sources of proof, the availability of compulsory process over unwilling witnesses, the cost of attendance by willing witnesses, the obstacles to a fair trial and the possibility of a jury view of the premises.[79] The other category consists of the "public interest" in the administration of courts and the adjudication of cases: court congestion and other administrative difficulties, placing the burden of jury duty on those having the closet ties to the action, local interest in having the case adjudicated at home and the forum court's familiarity with the applicable law.[80]

Thus, even if a court has jurisdiction over a foreign corporation, it may not choose to exercise it. While the Due Process Clause has been pushed to its outer limits, courts may decline to hear cases if the plaintiff's choice of forum unduly burdens the foreign defendant. While the Constitution has allowed courts to exercise worldwide jurisdiction, courts may use their discretion to limit the burdens on foreign commerce or give effect to the parties' choice of forum.

## III. ALTERNATIVE DISPUTE RESOLUTION

### *A. International Arbitration*

As international trade and commerce develop, political and economic concerns increase the need for prompt and efficient resolutions of business disputes.[81] Arbitration is rapidly becom-

---

[76] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981), *reh'g denied*, 455 U.S. 928 (1982) (quoting Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947)).

[77] Lacey v. Cessna Aircraft Co., 862 F.2d 38, 43 (3d Cir. 1988).

[78] 330 U.S. 501, 508-09 (1947).

[79] *Id.* at 508.

[80] *Id.* at 508-09.

[81] Christine Lecuyer-Thieffry and Patrick Thieffry, *Negotiating Settlement of Dispute*

ing a viable alternative to litigation, which can be expensive and time consuming.[82] Agreements to arbitrate contained in contracts that involve international commerce are governed by federal law.[83]

Many countries are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Arbitration Convention").[84] The Federal Arbitration Act[85] implemented the United States' accession to the Arbitration Convention.[86] In *Scherk v. Alberto-Culver Co.*,[87] the Supreme Court observed that:

> [t]he goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.[88]

Indeed, the *Scherk* Court maintained that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated . . . is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."[89]

The Federal Arbitration Act "reflects a legislative determination of the desirability of arbitration as an alternative to litigation"[90] and, correspondingly, the federal courts have promoted a liberal policy of favoring arbitration.[91] Moreover, "there is nothing discre-

---

*Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 BUS. LAW 577 (1990).

82 *Id.*

83 Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1984).

84 9 U.S.C. § 201 (1988).

85 9 U.S.C. §§ 201-208 (1988).

86 Rhone Mediterranee Compagnia v. Lauro, 712 F.2d 50, 52 (3d Cir. 1983).

87 417 U.S. 506 (1974).

88 *Id.* at 520, n.15.

89 *Id.* at 516. In recognizing the essential nature of international arbitration, the Supreme Court has observed:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

90 Singer Co. v. Tappan Co., 403 F. Supp. 322, 329 (D.N.J. 1975), *aff'd*, 544 F.2d 513 (3d Cir. 1976).

91 *See* Perry v. Thomas, 482 U.S. 483, 489 (1987) (" 'In enacting . . . the federal Act, Congress declared a national policy favoring arbitration and withdrew the

tionary about . . . the [Arbitration] Convention. It states that district courts *shall* at the request of a party to an arbitration agreement refer the parties to arbitration."[92] The Third Circuit has held that the Arbitration Act's policy is best effectuated by an approach that leads to upholding arbitration agreements.[93] Even violations of federal statutes have been ordered to arbitration.[94]

Like domestic arbitration, international arbitration results in a binding decision by a neutral third party. It differs from litigation, however, because the parties agree in advance on the forum and may themselves structure the arbitral process.[95] International arbitration continues to develop as an attractive alternative to global litigation.

### *B. Conciliation*

In addition to arbitration, conciliation is gaining currency as an effective alternative to international litigation.[96] The concept of conciliation resembles arbitration, with both methods using a third party to resolve a dispute. The primary feature of conciliation, however, is that a conciliator recommends an outcome.[97] The recommendation does not bind the parties, although a settlement agreement made between the parties based on the conciliator's recommendations is binding on the parties.[98]

Promulgated by the International Chamber of Commerce (ICC),[99] the Rules of Conciliation and Arbitration (the Rules) apply to international business contracts if the parties so agree in advance. The party requesting conciliation must apply to the Secretariat of the ICC's International Court of Arbitration who appoints a conciliator.[100] The conciliator is then granted broad power to "conduct the conciliation process as he thinks fit,

---

power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' ") (quoting Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)).

92 McCreary Tire & Rubber Co. v. CEAT S.P.A., 501 F.2d 1032, 1037 (3d Cir. 1974).

93 Rhone Mediterranee Compagnia v. Lauro, 712 F.2d 50, 53-54 (3d Cir. 1983).

94 *See generally* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

95 *See generally* Linda C. Reif, *Conciliation As a Mechanism For the Resolution Of International Economic and Business Disputes*, 14 FORDHAM INT'L L.J. 578 (1991).

96 *Id.* at 611.

97 *Id.* at 586.

98 *Id.*

99 ICC Rules of Conciliation and Arbitration, Rules of Optional Conciliation (1990).

100 *Id.* at art. 2 and 4.

guided by the principles of impartiality, equity and justice."[101] If the parties sign a settlement agreement, the Rules provide that it is binding upon them and that the agreement's terms are confidential unless the parties agree otherwise.[102]

### C. *Foreign Judgments*

While a party to the Arbitration Convention, under which arbitration awards can be enforced easily, the United States is not a party to any treaty concerning the recognition of foreign court judgments. To enforce a foreign judgment, a domestic party must initiate a separate proceeding in the United States. Similar to the determination of jurisdiction, the determination of whether a judgment should be given conclusive effect in the United States is governed by state law.[103]

In New Jersey, whether a foreign judgment is entitled to enforcement depends upon whether New Jersey courts will recognize the judgment under the doctrine of comity. Decided by the United States Supreme Court in 1985, *Hilton v. Guyot*[104] remains the leading case on comity. The *Hilton* Court explained that:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[105]

Furthermore, the *Hilton* Court stated that judgments of foreign countries constitute only prima facie, not conclusive, evidence of the plaintiff's claim:

> [J]udgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiff's claim.[106]

---

101 *Id.* at art. 5.

102 *Id.* at art. 6 and 7.

103 Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971).

104 159 U.S. 113 (1985).

105 *Id.* at 163-64.

106 *Id.* at 227. The New Jersey Supreme Court adopted the *Hilton* definition of comity in Fantony v. Fantony, 21 N.J. 525, 533, 122 A.2d 593, 596 (1956).

Thus, even if a domestic corporation undertook the effort to sue a foreign corporation in a foreign forum and prevailed by obtaining a judgment, the judgment may not be enforceable in the United States. On this basis alone, use of the Arbitration Convention, with its predictability of enforcement, comprises an attractive alternative to global litigation.

## IV. TOWARD A UNIFORM COMMERCIAL CODE

While alternate methods of dispute resolution can provide for some degree of predictability in international commercial transactions, the question of which law, foreign or domestic, governs the resolution of a dispute may result in extensive litigation. New Jersey courts[107] have adopted the "governmental interest approach" to choice of law questions:

> This approach requires a two-step analysis. The court determines first the governmental policies evidenced by the laws of each related jurisdiction and second the factual contacts between the parties and each related jurisdiction. A state is deemed interested only where application of its law to the facts in issue will foster that state's policy.[108]

Thus, while holding the power to exercise jurisdiction over a foreign corporation that has had no direct contact with the state, a New Jersey court may be compelled to apply foreign law because the nation in which the foreign corporation resides may have a greater interest in the outcome of the dispute. Applying foreign law to the resolution of a commercial dispute may undermine the purpose of filing suit in a domestic forum, particularly where foreign law limits legal remedies.

To avoid the unpredictability and confusion of a wide variety of foreign legal systems, thirty-six countries, including the United States, have acceded to the United Nations Convention on Contracts for the International Sale of Goods (the Sales Convention).[109] The Sales Convention provides substantive provisions of law for governing the formation of international sales contracts as well as the rights and obligations of buyers and sellers.[110] The Sales Convention applies to all contracts for the sale of goods between parties

---

107 *See, e.g.*, Henry v. Richardson-Merrell, Inc., 508 F.2d 28, 31-32 (3d Cir. 1975) (noting that New Jersey courts first adopted the "governmental interest approach" in Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967) and Pfau v. Trent Aluminum Company, 55 N.J. 511, 263 A.2d 129 (1970)).

108 *Id.* at 32.

109 15 U.S.C. app. (1992).

110 *Id.* at Public Notice 1004.

with their places of business located in the signatory countries, "provided the parties have left their contracts silent as to applicable law."[111]

As noted by Secretary of State George P. Shultz in his Letter of Submittal accompanying the Convention in its presentation to President Ronald Reagan:

> The usefulness of the Convention is enhanced by the fact that its rules were specially fashioned to meet the problems and needs of international trade. Our sellers and buyers now must cope with foreign statutes and code[s] that were prepared a century or more ago, and were designed for domestic sales that bear little resemblance to current international transactions. Even when these problems have been ameliorated by case-law, such developments are often unknown or inaccessible to our lawyers.[112]

In short, the Sales Convention unifies the law of international sales, as the Uniform Commercial Code's Article 2 unifies the law of domestic sales. Such uniformity can only enhance international commerce because it allows parties to factor out the uncertainties of foreign law.

## V. CONCLUSION

The global marketplace is changing the way people do business in New Jersey. With increasing markets comes the increasing possibility of commercial disputes. While litigation may be expensive and time consuming, it nevertheless remains a primary method of dispute resolution. The imperatives of the global marketplace have required courts to expand their jurisdiction over international commerce. Once a bulwark for protecting a person's liberty interest in not being unfairly haled into a distant forum, the Due Process Clause has all but become an illusory limitation on state power. Moreover, by increasing their jurisdiction over foreign parties and by applying a uniform international law, domestic courts are evolving into international tribunals.

As due process protections have diminished, and as litigation costs have become increasingly burdensome, parties have adapted and are exercising their freedom to contract by choosing alternative methods to resolve their commercial disputes. It is clear that as a consequence of increasing state power over com-

---

111 *Id.*

112 *Id.* at Message Accompanying Transmittal, Letter of Submittal from Secretary of State George P. Shultz to President Ronald Reagan (Aug. 30, 1983).

merce and the escalating costs of pursuing traditional legal remedies, individuals have found, and continue to develop, new ways to express their freedom to conduct business and to resolve their differences in the global marketplace.