



January 1990

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Recommended Citation

Sharon N. Freytag et al., *Conflict of Laws*, 44 Sw L.J. 489 (1990)
<https://scholar.smu.edu/smulr/vol44/iss1/17>

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CONFLICT OF LAWS

by

Sharon N. Freytag*, James P. George** and Michelle E. McCoy***

CONFLICTS of laws occur when foreign elements appear in a lawsuit. Nonresident litigants, incidents in sister states or foreign countries, and lawsuits from other jurisdictions represent foreign elements that may create problems of judicial jurisdiction, choice of law, or recognition of foreign judgments, respectively. This Article reviews Texas conflicts of law during the Survey period from late 1988 through 1989, discussing cases from Texas state and federal courts. The Article excludes cases involving federal-state conflicts, criminal law, intrastate matters such as subject matter jurisdiction and venue, and conflicts in time, such as the applicability of prior or subsequent law within a state.

During the Survey period, judicial jurisdiction developments included the Fifth Circuit's adherence to the stream of commerce standard of *Bean Dredging Corp. v. Dredge Technology Corp.*,¹ despite its rejection by a plurality of the United States Supreme Court.² Also in *Schlobohm v. Schapiro*,³ the Texas Supreme Court modified the Texas jurisdictional formula to parallel the federal constitutional standard.⁴ The Texas formula, previously set out in *O'Brien v. Lanpar Co.*,⁵ specifically provided for the assertion of specific jurisdiction only when the nonresident defendant's acts or transactions in Texas gave rise to or were connected with the cause of action. In *Schlobohm*, the court recognized that the previous formula was incomplete because it did not reflect the concept of general jurisdiction. The court therefore modified the *O'Brien v. Lanpar* formula to state that jurisdiction may be exercised over a nonresident defendant with continuous and systematic contacts with Texas, even if the cause of action does not arise from a specific contact.⁶

Choice of law analysis continued its development under the most signifi-

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1. 744 F.2d 1081 (5th Cir. 1984).

2. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

3. 784 S.W.2d 355 (Tex. 1990).

4. 784 S.W.2d at 358. See *infra* notes 62-75 and accompanying text for an analysis of the new Texas standard.

5. 399 S.W.2d 340 (Tex. 1966).

6. 784 S.W.2d at 358.

cant relationship test, with noteworthy decisions involving usury, statutes of limitation, the act of state doctrine, and the requisites for pleading foreign law. The area of foreign judgments endured a third ruling that the Uniform Foreign Country Money Judgment Recognition Act⁷ is unconstitutional, based on its failure to provide expressly for a plenary hearing prior to enforcement.

I. JUDICIAL JURISDICTION

To assert jurisdiction over a nonresident defendant, a plaintiff must ensure that the defendant is amenable to the jurisdiction of the court and that jurisdiction has been properly invoked through valid service of process on the defendant. In diversity cases a determination of amenability necessitates two inquiries: (1) Is the defendant amenable to service of process under a long-arm statute or rule of the forum state? (2) Is the assertion of jurisdiction consistent with due process?⁸

A. Texas Federal Courts

In *Irving v. Owens-Corning Fiberglas Corp.*,⁹ the Fifth Circuit upheld personal jurisdiction over a Yugoslavian corporation that supplied asbestos to an American broker who subsequently sold the asbestos to a Texas company. Various plaintiffs brought products liability actions against twenty-one companies, including the Yugoslavian corporation Jugometal Enterprise for Import and Export of Ores and Metals ("Jugometal"). Jugometal had allegedly supplied asbestos to the Uvalde Rock Asphalt Company in Houston from the 1950s through the early 1970s. Marcus Irving, a former Uvalde employee and one of the 106 plaintiffs, sued Jugometal under theories of strict liability, negligence and breach of warranty for respiratory injuries allegedly linked to asbestos exposure that occurred during his employment at Uvalde. The district court dismissed each of the actions against Jugometal for lack of personal jurisdiction.¹⁰

Yugoslavian trade laws prohibited the company that mined the raw asbestos from selling the asbestos in foreign countries. Jugometal, having the necessary export licenses, purchased asbestos from the mining company and sold it to Huxley Development Company ("Huxley"), an American broker. Uvalde bought the asbestos from Huxley.¹¹ Although no evidence indicated

7. Tex. Civ. Prac. & Rev. Code Ann §§ 36.001 - 36.008 (Vernon 1986).

8. The two inquiries essentially collapse into one because the Texas Supreme Court has interpreted the Texas long arm statute to reach to the very limits of due process. *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978). The United States Supreme Court divides the constitutional inquiry into two parts: whether the non-resident defendant purposefully established minimum contacts with the forum state and whether the exercise of jurisdiction resulted in fair play and substantial justice. *Asahi*, 480 U.S. 102, 108-09, 113 (1987).

9. 864 F.2d 383 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 83, 107 2.Ed. 49.

10. *Id.* at 384.

11. Jugometal supplied about 5,000 metric tons of asbestos to Uvalde each year between 1956 and 1970. "These purchases represented all of Uvalde's asbestos supply during this time." *Id.* at 384.

that Jugometal knew Uvalde was the ultimate purchaser, Jugometal shipped asbestos to Houston approximately every two months for fifteen years.¹² The contract between Jugometal and Huxley required Jugometal to ship the asbestos to Houston, in bags labeled "Houston-Huxley," and the parties agreed to split the cost of quality control testing at a Houston laboratory. The contract between Jugometal and the mining company stated that Jugometal would store and ship the asbestos, prepare invoices, collect payment, and transfer payment to the mining company after deducting a one percent commission.

Reviewing the district court's dismissal of the action against Jugometal¹³ the Fifth Circuit noted that plaintiff Irving had the burden of establishing personal jurisdiction over Jugometal under a two prong test.¹⁴ First, Jugometal must have had sufficient minimum contacts with Texas, the forum state. Second, the exercise of jurisdiction over Jugometal must not have offended "traditional notions of fair play and substantial justice."¹⁵

In assessing Jugometal's contacts with Texas, the Fifth Circuit discussed the stream of commerce theory established in *World-Wide Volkswagen Corp. v. Woodson*¹⁶ and upheld by the United States Supreme Court in *Asahi Metal Industry Co. v. Superior Court*.¹⁷ The Fifth Circuit observed that Justice O'Connor's plurality opinion in *Asahi* rejected the conclusion of *Bean Dredging Corp. v. Dredge Technology Corp.*¹⁸ that mere foreseeability that a product in the stream of commerce would find its way to the forum state established personal jurisdiction.¹⁹ Nonetheless, an equal number of justices in *Asahi* refused to require additional conduct beyond that considered sufficient under the *Bean Dredging* standard.²⁰ As a result, the Fifth Circuit applied the *Bean Dredging* foreseeability test and rejected Jugometal's argument that its role in the supply chain was too minor to support the district

12. "[T]he contract between Huxley and Jugometal, dated November 24, 1959 . . . identified Jugometal as the "seller" and Huxley as the "buyer" of the asbestos." *Id.*

13. Initially, the Fifth Circuit noted that to establish personal jurisdiction the plaintiff must satisfy both the Texas long arm statute and the due process requirements of the fourteenth amendment. *Id.* at 385. As the Texas long arm statute, TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986), "reaches as far as the federal constitutional requirements of due process will permit," the Fifth Circuit proceeded directly to the due process analysis. *Irving*, 864 F.2d at 384 (citing *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985)).

14. *Irving*, 864 F.2d at 384. The court observed that the plaintiffs need only present a prima facie case for personal jurisdiction because Jugometal predicated its motion to dismiss solely on affidavits and depositions, and the court did not hold an evidentiary hearing. *Id.*

15. *Id.* at 385 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

16. 444 U.S. 286 (1980). In *World Wide Volkswagen Corp.*, the Court decided that assertion of jurisdiction over a non-resident corporation is proper if the corporation delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state. *Id.* at 298. The court rejected the argument that the plaintiffs' unilateral action of driving their car into Oklahoma was sufficient to establish personal jurisdiction in Oklahoma over the New York dealer and the East Coast wholesaler who sold the car. *Id.* at 295-96.

17. 480 U.S. 102 (1987).

18. 744 F.2d 1081 (5th Cir. 1984).

19. *Asahi*, 480 U.S. at 110.

20. *Id.* at 116-21.

court's exercise of personal jurisdiction under the stream of commerce doctrine.²¹ The Fifth Circuit held that Jugometal's marketing efforts,²² combined with its explicit ties to Houston, should have given Jugometal reason to anticipate use of its product in Texas and reason to expect it could be brought into a Texas court.²³

The court focused on the following facts in upholding personal jurisdiction over the Yugoslavian corporation: Jugometal held itself out as the seller under the contract with Huxley; Jugometal conveyed the asbestos to a freight forwarder for shipment to Houston; Jugometal shared the cost of quality control testing for a Houston lab; Jugometal was debited for bag-cleaning charges at a Houston company; and Jugometal accepted and processed payments for the asbestos. The fact that Jugometal did not know that Uvalde was the ultimate user did not defeat the district court's exercise of jurisdiction.²⁴

Applying the second prong of the personal jurisdiction test, the court concluded that subjecting Jugometal to the jurisdiction of the Texas court did not offend traditional notions of fair play and substantial justice.²⁵ The court considered the burden on the defendant, the interest of the forum state, the plaintiff's interest in convenient and effective relief, the judicial system's interest in efficient resolution of controversies, and the states' shared interest in promoting fundamental social policies.²⁶ The fact that the litigation involved 106 consolidated asbestos claims against twenty-one defendants for injuries arising in Texas and linked to asbestos distributed by Jugometal justified the heavy burden placed upon the Yugoslavian corporation in defending these lawsuits in Texas.²⁷

In *WNS, Inc. v. Farrow*²⁸ the Fifth Circuit held that a Texas district court could constitutionally exercise personal jurisdiction over Georgia residents who obtained a franchise from a Texas corporation.²⁹ In March of 1986 the Farrows, residents of Georgia, contacted WNS at its Houston office to apply

21. *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 387 (5th Cir. 1989). As predicted by commentators, the decision in *Asahi* has raised questions about the direction of the stream of commerce theory of personal jurisdiction.

22. "Jugometal authorized Huxley [to find] American buyers for Yugoslavian asbestos throughout the United States. Although this effort produced only one buyer . . . Uvalde, Jugometal nonetheless derived economic benefits from it and placed no geographic limits on Huxley's efforts." *Id.*

23. *Id.*

24. *Id.* at 384. The court noted that "even a nonresident defendant's out-of-state activities can establish the necessary minimum contacts if those activities have 'reasonably foreseeable consequences' within the forum state." *Id.* at 386 (citing *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081, 1083). The court pointed out that "Jugometal's contacts with Houston gave Jugometal more reason to foresee that its product was being sold in [Texas]." *Id.* at 387.

25. *Id.* at 387.

26. *Id.* (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 104 (1988)).

27. *Id.* The court noted that the litigation involved "Texas plaintiffs using a local forum to pursue compensation for alleged injuries that occurred in Texas." *Id.* at 388.

28. 884 F.2d 200 (5th Cir. 1989).

29. *Id.* at 204.

for a Deck the Walls franchise.³⁰ The Farrows traveled to Houston later that month to meet with WNS employees for a formal interview³¹ and to negotiate a franchise agreement.³² After returning to Georgia, the Farrows mailed two cashiers checks to WNS to satisfy their financial obligations under the franchise agreement. Mrs. Farrow later attended a training seminar in Houston to learn how to operate a Deck the Walls franchise.

WNS sent the Farrows a copy of the franchise agreement, but only Mrs. Farrow signed it.³³ When WNS received the agreement containing only one signature, WNS informed the Farrows of its understanding that both Farrows were applying for the franchise. Nonetheless, Mrs. Farrow alone operated the Georgia Deck the Walls franchise until April 1987 when WNS discovered that Mr. Farrow had been operating a competing framing store in Georgia in violation of the franchise agreement. WNS took possession of the franchise and ultimately brought a fraud and breach of contract action against the Farrows in Texas state district court. WNS alleged that the Farrows misrepresented their intentions when they applied for the Deck the Walls franchise. The Farrows removed the case to the United States District Court for the Southern District of Texas, which granted the Farrows' motion to dismiss for lack of personal jurisdiction.³⁴

On appeal, the Fifth Circuit considered only whether the district court had specific jurisdiction over the Farrows because of the Farrows' contacts with Texas.³⁵ To satisfy its burden of establishing contacts sufficient to invoke jurisdiction,³⁶ WNS submitted an affidavit by its director of store planning.³⁷ Because the court decided the jurisdictional issue on the basis of

30. "WNS is a Texas corporation located in Houston which licenses the Deck the Walls trade name and franchises a comprehensive system for opening and operating a Deck the Walls store." *Id.* at 201.

31. WNS required each applicant to travel to Houston for an extensive formal interview as part of the process of becoming a Deck the Walls franchisee.

32. "The Farrows [contended] that they traveled to Houston merely for a 'social visit' to learn more about the virtues of the company from the WNS staff. WNS assert[ed], however, that in addition to negotiating and structuring a franchise agreement . . . the Farrows also completed an application for a Georgia franchise of Deck the Walls." *Id.* WNS also claimed that the parties negotiated specific terms for a franchise agreement, a loan/lease agreement, and a sublease agreement.

33. Following the one-week training session in Houston, which Mr. Farrow did not attend, Mrs. Farrow also signed an authorization to occupy certain leased premises for the Deck the Walls franchise in Georgia which designated both the Farrows as franchisees. Mr. Farrow did not sign the document.

34. *Id.*

35. *Id.* at 202-203. Specific jurisdiction is established when the lawsuit arises out of, or relates to, the defendant's specific contacts in the forum. In contrast, general jurisdiction refers to jurisdiction over defendants who maintain "continuous and systematic" contacts in a particular forum. *InterFirst Bank Clifton v. Fernandez*, 844 F.2d 279, 283 (5th Cir. 1988), *opinion withdrawn in part on denial of rehearing on other grounds*, 853 F.2d 292 (1988).

36. The party who seeks to invoke the jurisdiction of the district court bears the burden of establishing sufficient contacts with the forum state by the nonresident defendant. *WNS*, 884 F.2d at 203 (citing *D.J. Invs., Inc. v. Metzler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 545 (5th Cir. 1985)).

37. The affidavit of the director of Store Planning stated:

At all times during the negotiation and interview process, the training process, and the transfer of possession and operations . . . until Mrs. Farrow contacted us in the latter part of May, 1986 stating otherwise, WNS acted upon the belief,

facts contained in the affidavits, WNS only had to present a prima facie case of personal jurisdiction.³⁸ WNS argued that it met this standard by alleging that the Farrowes made fraudulent misrepresentations in Texas and by showing that the Farrowes had substantial contractual connections with Texas by virtue of their negotiations with WNS concerning the Deck the Walls franchise. The district court rejected WNS' argument, reasoning that because this case concerned future performance and the alleged breach occurred in Georgia, WNS had to show that the Farrowes did not intend to keep their promises to WNS at the time they applied to become Deck the Walls franchisees.³⁹ The Fifth Circuit reversed, holding that WNS established a prima facie case of personal jurisdiction by alleging, with affidavit support, that the Farrowes committed fraud through their activities in Texas.⁴⁰

In *Schwegmann Bank & Trust Co. v. Simmons*,⁴¹ the Fifth Circuit upheld a Louisiana district court's exercise of personal jurisdiction over Simmons, a Texan who invested in a limited partnership formed to purchase real estate in Texas. The trial court had entered summary judgment against Simmons, holding him liable for the face value of his promissory note, together with interest, attorneys' fees and costs. Simmons appealed, contending that the Louisiana district court lacked personal jurisdiction over him.

The partnership in which Simmons invested had as its general partner a corporation whose principal office was located in Shreveport, Louisiana. Simmons' participation in the venture was memorialized by a subscription agreement that was delivered to the Louisiana general partner and a promissory note payable to the Louisiana general partner. The general partner subsequently endorsed Simmons' note to a related company, which in turn endorsed Simmons' note to the Bank of Commerce of Shreveport, Louisiana, as security for a loan. Schwegmann Bank & Trust Company agreed to participate in the loan, and Schwegmann acquired the promissory note in 1986

based on the *Farrowes' fraudulent representation at the interview in Houston and subsequent thereto*, that both the Farrowes were applying in good faith for a Deck the Walls franchise which they intended to operate in compliance with the terms of the Franchise Agreement.

884 F.2d at 203 (emphasis in original). Further, in their original petition, WNS specifically alleged fraud on the part of the Farrowes in representing to WNS in Houston that they desired to become Deck the Walls franchisees. The plaintiff also listed numerous contacts by the Farrowes with WNS in Texas.

38. *Id.* The party who bears the burden need only present a prima facie case for personal jurisdiction; proof by a preponderance of evidence is not required. Moreover, on a motion to dismiss for lack of personal jurisdiction, uncontroverted allegations in the complaint of the plaintiff must be taken as true, and conflicts between the facts contained in the affidavits of the parties must be resolved in favor of the plaintiff. *Id.* at 204. (citing *D.J. Invs.*, 754 F.2d at 545-46).

39. *Id.* While the Farrowes disputed the fact that they did not intend to keep their promise to WNS at the time they applied to become Deck the Walls franchisees, WNS maintained otherwise. For the purposes of determining whether the district court had personal jurisdiction, the court favored the version of the facts advanced by WNS. *Id.* (citing *D.J. Invs.*, 754 F.2d at 545-46).

40. *Id.* at 203. The Court did not address whether the Farrowes' contacts with Texas satisfied the due process requirement of "minimum contacts."

41. 880 F.2d 838 (5th Cir. 1989).

after the Bank of Commerce began to experience financial difficulties. Although Simmons initially attempted to relinquish his partnership interest, he later changed his mind and made interest payments on the note to Schwegmann in Louisiana until April 1987.

In an action by Schwegmann to enforce the note, the district court found that it was neither unreasonable nor unfair to require Simmons to defend this claim in Louisiana because he had purposefully availed himself of the benefits of conducting business in that state.⁴² The court reasoned that because Simmons knew his note would be used as collateral for financing the partnership, he could have foreseen that the note would be negotiated to a Louisiana entity. The Fifth Circuit affirmed,⁴³ emphasizing that Simmons delivered his subscription agreement to Shreveport and gave the Louisiana general partner his power of attorney.⁴⁴ Moreover, Simmons' promissory note provided that it would be governed in all respects by Louisiana law and that all principal and interest payments on the note would be made in Shreveport.

In *Tandy Corp. v. Comus International, Inc.*⁴⁵ a Texas federal district court held that it had neither specific nor general *in personam* jurisdiction over a New Jersey corporation.⁴⁶ The case involved a dispute over the rights to sell a device for testing telephone lines. Plaintiff Tandy, a Delaware corporation doing business in Texas through its primary headquarters in Fort Worth, has approximately 6,000 Radio Shack outlets throughout the United States.⁴⁷ Tandy sold line testing devices in its Radio Shack outlets, which were manufactured by a Korean company under the trade name "Archer." Defendant Comus owned a patent covering a similar device.⁴⁸ Tandy brought a declaratory judgment action in a Texas federal district court to have the Comus patent declared invalid.⁴⁹ Comus is a New Jersey corporation with its principal place of business in New Jersey. It has no Texas office and is not licensed to conduct business in Texas. Comus' only Texas activity consisted of selling mercury switches to Tandy and another Texas purchaser.⁵⁰ Comus moved to dismiss the action for lack of jurisdiction, con-

42. *Id.* at 840 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

43. *Id.*

44. *Id.*

45. 704 F. Supp. 115 (N.D. Tex. 1987).

46. *Id.* at 119.

47. Two hundred and ten of these outlets are in New Jersey, the location of defendant Comus' primary place of business.

48. Comus, however, did not manufacture or sell the products. The patent had been licensed, and the licensees of the patent distributed the product directly to the public. None of the licensees were in the State of Texas, nor were they subsidiaries or affiliates of Comus.

49. Comus filed a patent infringement action in the United States District Court for the District of New Jersey contending that the production, use, and sale of the Archer telephone line tester infringed upon its patent. "Although Tandy's action in [Texas] was filed five days before Comus' New Jersey action, service was made on the same day for both [actions]. Comus had no notice of Tandy's action prior to being served." *Id.* at 116-17. In the Texas federal district court, Tandy also sought "to enjoin Comus from instituting further proceedings." *Id.* at 116.

50. Comus manufactures mercury switches. These switches are sold to companies who place the switches in equipment, which is then sold to the general public. "Tandy is one of

tending that it did not have sufficient minimum contacts with Texas.⁵¹

The district court concluded that it could not exercise specific jurisdiction because the mercury switches sold by Comus in Texas had no connection to the telephone testing device at issue. Since the court lacked specific jurisdiction, it examined the nature of Comus' contacts with Texas to determine whether Comus had continuous and systematic contacts to satisfy the due process requirements for general jurisdiction.⁵²

Comus was not licensed to do business in Texas, nor did it maintain any business office, bank accounts, phone listings, or salespeople in Texas. It did not lease or own Texas property, and its limited advertising was in national registers not specifically directed at Texas customers. Comus' only contact with Texas involved sales of mercury switches to Tandy and one other Texas customer. The court thus concluded that Comus had not engaged in continuous and systematic activity in Texas sufficient to support general jurisdiction.⁵³

B. Texas State Courts

1. Amenability

In *Schlobohm v. Schapiro*,⁵⁴ the Texas Supreme Court recognized that the Texas formula for personal jurisdiction was incomplete and modified the formula to ensure compliance with the federal constitutional standard.⁵⁵

these customers and received approximately 3,000 switches per month . . . [at] a Tandy repackaging facility in Fort Worth. Comus' other Texas customer received approximately 3,000-5,000 switches per year." *Id.* at 117.

51. Alternatively, Comus moved to transfer the action to the United States District Court for the District of New Jersey.

52. *Id.* at 118 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). In *Tandy* the court discussed two Fifth Circuit decisions that considered the contacts necessary for a district court to invoke its general jurisdiction. *Id.* See *Petroleum Helicopters, Inc. v. Avco Corp.*, 804 F.2d 1367 (5th Cir. 1986) (defendants' activities in forum state did not establish general jurisdiction); *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773 (5th Cir. 1986) (defendants' contacts *in toto* sufficient to constitute continuous and systematic contacts required by due process).

53. *Tandy*, 704 F.Supp. at 119. As the Texas court lacked personal jurisdiction over Comus, the court ordered the case transferred to the United States District Court for the District of New Jersey for possible consolidation with the action filed by Comus in New Jersey. *Id.* If a federal district court finds that there is a want of jurisdiction, the court may transfer the action to any other federal district court having jurisdiction. See 28 U.S.C. § 1631 (1988).

54. 784 S.W.2d 355 (Tex. 1990).

55. The three parts of the Texas formula as enunciated in *O'Brien v. Lanpar Co.*, 399 S.W.2d 340, 342 (Tex. 1966), track the elements of the jurisdictional tests that have evolved in United States Supreme Court decisions. The first part of the Texas formula reflects the requirement that a defendant purposefully avail himself of the benefits of the forum and reasonably expect to be called to court there. See *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The third part of the Texas formula reflects the fair play and substantial justice prong of the jurisdictional test and specifies the factor that Texas considers important in the fair play analysis, which is separate and distinct from the minimum contacts analysis. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Prior to *Schlobohm*, the second part of the Texas formula reflected the concept of specific jurisdiction by focusing on whether the cause of action arose from, or was connected with, the purposeful act or transaction addressed in the first prong. *O'Brien*, 399 S.W.2d at 342. See note 65 *infra*.

Schlobohm involved an action against a Pennsylvania defendant for nonpayment of rent. In July of 1984, Rolf Schapiro ("Schapiro"), a Pennsylvania resident, invested \$10,000 in a corporation named Hangers, Inc., formed by his son Douglas, a resident of Dallas, to establish dry cleaning stores in office buildings. Schapiro received stock in the corporation and became its sole director. Although Schapiro did not participate in the incorporation, he conducted Hangers' first meeting in Dallas. Schapiro also guaranteed some of the leases for the cleaning outlets.

In late 1984, Schlobohm leased a building to Hangers for a term of 60 months. Douglas, as president of Hangers, negotiated and signed the lease. Schapiro did not participate in the negotiations, did not guarantee this particular lease, and had no personal contact with Schlobohm either prior to or during the lease term.

During this same time, in November of 1984, Schapiro loaned \$30,000 of his personal funds to buy equipment for expansion of Hangers. Schapiro later visited Dallas and signed a promissory note to obtain financing for the rest of the plant. Throughout Schapiro's involvement with Hangers, he frequently provided funds to cover payroll and other expenses and eventually became the sole shareholder and sole director of the corporation. Schapiro discontinued his relationship with Hangers, however, when the business began to decline.

In August 1986, Hangers ceased paying rent on the building leased from Schlobohm. Schlobohm then brought suit for nonpayment of rentals from August 1986 to the end of the lease term in 1989. Schapiro specially appeared, and the trial court sustained Schapiro's challenge to jurisdiction.

The court of appeals affirmed, finding that Schapiro's contacts with Texas were too minimal to allow the exercise of personal jurisdiction.⁵⁶ Because Schapiro was not a party to the lease between Hangers and Schlobohm, the court began its personal jurisdiction analysis by inquiring whether Schapiro's contacts with Texas constituted the kind of continuous and systematic contacts that would justify the assertion of general jurisdiction.⁵⁷ Schlobohm argued that Schapiro's extensive commercial transactions in Texas were sufficient to satisfy the minimum contacts requirement.⁵⁸ The court of appeals disagreed, holding that Schapiro's trips to Dallas in August 1984 and in January 1986 could not be regarded as contacts of a continuous

56. 759 S.W.2d 470 (Tex. App. — Dallas 1988), *rev'd*, 784 S.W.2d 355 (Tex. 1990).

57. 759 S.W.2d at 473 (citing *Zac Smith & Co. v. Otis Elevator Co.*, 735 S.W.2d 662, 663 (Tex. 1987)).

58. Schapiro's contacts as set out by the court of appeals were as follows:

1. On August 15, 1984, as the sole director of Hangers, Schapiro conducted the first meeting of the directors at the corporation's registered office in Dallas.
2. Schapiro remained the sole director until his resignation at the end of 1985.
3. In November 1984, Schapiro loaned Hangers money for the down payment on the equipment to be installed in the premises leased from Schlobohm.
4. In December 1984 or January 1985, Schapiro became the sole stockholder in Hangers.
5. On January 18, 1985, Schapiro came to Dallas and obtained a \$136,702.10 loan in his

and systematic nature.⁵⁹ The court further stated that although Schapiro came to Dallas to obtain a loan on behalf of Hangers in January 1985, that single contact, unconnected with Schlobohm's claim for amounts due under the lease, could not support jurisdiction over Schapiro.⁶⁰ Justice Hecht, dissenting, concluded that Schapiro conducted himself in such a way that he could reasonably have expected to answer for his conduct in a Texas court.⁶¹

The Texas Supreme Court began its analysis of whether the lower courts properly dismissed the action by noting that the Texas long arm statute authorized the exercise of jurisdiction.⁶² The court then turned to the constitutional inquiry.⁶³ After summarizing the federal constitutional test of due process,⁶⁴ the court compared the Texas formula for exercising personal jurisdiction.⁶⁵ Although the three part Texas formula reflected the pur-

individual capacity with MBank to purchase the equipment. All equipment leased by Schapiro to Hangers was collateral for the loan.

6. Schapiro continually deposited money in the Hangers' account for the payroll and expenses.

7. In January 1986, Schapiro came to Dallas with his wife to visit his children "hoping we could get some information [about Hangers]."

8. On March 1986, while in Pennsylvania, Schapiro entered into a security agreement with MBank to secure Hangers' debts. Schapiro assigned \$10,000 from his personal account to cover Hangers' insufficient funds checks.

Also, Schapiro took his medical specialty board examination in Dallas approximately 25 years ago and attended a workshop in San Antonio representing his Pennsylvania hospital. 759 S.W.2d at 472-73.

59. *Id.* at 473; *See Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 416-17 (1984).

60. *Schlobohm*, 759 S.W.2d at 473.

61. *Id.* at 474-476. Justice Hecht stated:

On this record I cannot imagine how Schapiro could have invested hundreds of thousands of dollars in a Dallas business run by his son, served as the sole director and shareholder of the corporation for most of the period in question, advanced the business money on a weekly or monthly basis for almost two years, had "endless communications" with the business, made two trips to Dallas to see the business, sent his accountant to inspect it two other times, negotiated a \$136,000 loan from a Dallas bank to buy equipment to lease the business, guaranteed some of the business' leases, and kept the corporate records with his personal attorney and never reasonably expected that he might be subject to suit in Texas I see nothing unfair or offensive in requiring Schapiro to answer in a Dallas court for the actions he freely took here.

Id. at 476. Justice Hecht, now a member of the Texas Supreme Court, did not take part in that court's decision in *Schlobohm*.

62. *See TEX. CIV. PRAC. & REM. CODE ANN.* art. §§ 17.041-.069 (Vernon 1986). The court found that jurisdiction was authorized by the "other acts" language of §§ 17.042 which placed Schapiro within the "doing business" requirement of the long arm statute.

63. *Schlobohm*, 784 S.W.2d at 357.

64. *Id.* at 357-58.

65. The Texas formula provides that in order for a Texas court to have specific jurisdiction over a nonresident defendant:

1. The nonresident defendant or forum corporation must purposefully do some act or consummate some transaction in the forum state;
2. The cause of action must arise from, or be connected with, such act or transaction; and
3. The assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the law of the forum state afforded the respective parties, and the basic equities of the situation.

O'Brien v. Lanpar Co., 399 S.W.2d 340, 342 (Tex. 1966).

poseful availment component of the minimum contacts analysis and the fair play and substantial justice prong of the federal constitutional standard, the second part of the Texas formula reflected only the concept of specific jurisdiction, without specifically including the concept of general jurisdiction. The Texas Supreme Court noted that this incomplete Texas formula could give litigants the false idea that jurisdiction may be premised only on an act or transaction of the defendant in Texas that gives rise to a cause of action.⁶⁶ The court thus modified the Texas formula to indicate that jurisdiction may also arise from the defendant's continuous and systematic contacts with Texas, even if the cause of action does not arise from a specific contact.⁶⁷ The Texas Supreme Court observed that this modification does not change Texas law but simply clarifies that jurisdiction may be based upon either single or numerous contacts between the forum and the defendant.⁶⁸

Applying the modified standard to the facts of *Schlobohm*, the court initially analyzed the second part of the formula, whether jurisdiction was premised on continuing and systematic activity or on a cause of action that arose from isolated activity.⁶⁹ The court noted that this inquiry did not allow defendants to select certain contacts they believe pertinent to the jurisdictional issue; rather, all contacts must be considered in determining whether there is a pattern of continuous and systematic activity. Under this approach, the court concluded that Schapiro had a continuous relationship with Texas.⁷⁰

The court's second inquiry focused on whether Schapiro purposefully directed his activities toward Texas.⁷¹ The Texas Supreme Court, after considering Schapiro's extensive involvement in Texas, found it difficult to believe that Schapiro could have been surprised by litigation in Texas and held that Schapiro clearly purposefully availed himself of the benefits of Texas law.⁷² Having determined that Schapiro had the requisite minimum contacts, the court further held that the exercise of jurisdiction over Schapiro by a Texas court would not offend traditional notions of fair play and substantial justice.⁷³ It, therefore, reversed the decision of the court of

66. *Schlobohm*, 784 S.W.2d at 358.

67. *Id.* The second prong of the Texas test now reads:

(2) The cause of action must arise from, or be connected with, such act or transaction. Even if the cause of action does not arise from a specific contact, jurisdiction may be exercised if the defendant's contacts with Texas are continuing and systematic.

Id. at 358.

68. *Id.* at 358.

69. *Schlobohm* relied on Schapiro's numerous and continuous actions to support his position that the negotiation and signing of the lease, an activity in which Schapiro did not directly participate, nevertheless subjected him to jurisdiction. Schapiro urged the court to consider only certain "primary" contacts in determining whether he was subject to jurisdiction in a Texas court: his negotiation for the equipment loan and his status as sole stockholder of Hangers. *Id.* at 359.

70. *Id.*

71. *Id.* (citing *World-Wide Volkswagen*, 444 U.S. at 297.)

72. *Id.* at 359.

73. *Id.*

appeals and remanded to the trial court for a trial on the merits.⁷⁴

The modification or clarification of the personal jurisdiction standard by the Texas Supreme Court may help to prevent its misapplication. The court of appeals in *Schlobohm* commented that Schapiro's acts in the forum, while numerous, were unconnected with the cause of action and held that the acts were not continuous and systematic. Perhaps *Schlobohm* will encourage Texas courts to apply the general jurisdiction analysis properly.

In *Southern Clay Products, Inc. v. Guardian Royal Exchange Assurance, Ltd.*⁷⁵ English China Clays, an English company, obtained a liability insurance policy from Guardian, an English insurance company with its principal place of business in England. The insurance policy covered English China Clays and its American subsidiaries for liability occurring anywhere in the world.⁷⁶ Southern Clay, one of the subsidiaries and a Texas corporation, had its principal place of business in Texas.

A Southern Clay employee died in an employment-related accident in Texas. The deceased's family filed wrongful death actions against Southern Clay in federal and state courts in Texas. Guardian refused to participate in the settlement, and Southern Clay Products, along with English China Clays, English China Clays Overseas Investments, Ltd., and Gonzales Clay Corporation (the "Clays"), brought suit against Guardian in a Texas court to enforce the insurance agreement.⁷⁷

Guardian specially appeared, claiming that the insurance agreement was strictly between two English companies and was negotiated and implemented in England. Guardian therefore claimed it had insufficient contacts with Texas, and the trial court dismissed the claim on the ground that Guardian negated every possible basis for personal jurisdiction.⁷⁸

On appeal, the court applied the *O'Brien* three-pronged test to determine the constitutional reach of the court's jurisdiction over defendants with only a single or few contacts with Texas.⁷⁹ The court of appeals noted that the insurer's agreement to cover accidents occurring anywhere in the world included those occurring in Texas and indicated that Guardian intended to

74. *Id.*

75. 762 S.W.2d 927 (Tex. App.—Corpus Christi 1988, writ granted).

76. The insurance policy was issued in 1980. A 1981 endorsement to the policy extended coverage to companies within the United States, including Southern Clay. Guardian provided insurance to the American subsidiaries of English China Clays with the understanding that the subsidiaries would obtain underlying insurance from American insurers. Southern Clay obtained underlying coverage from United States Fire Insurance Company ("U.S. Fire"). During the course of the underlying lawsuit, Southern Clay settled with the family of the deceased, and U.S. Fire satisfied the claims. U.S. Fire, being subrogated to the rights of the Clays, was the real party in interest in the Texas insurance suit.

77. The Clays claimed that Guardian was the primary insurer and should therefore reimburse U.S. Fire for the amounts paid in the settlement of the underlying lawsuit. Guardian claimed that its liability extended only to excess coverage.

78. *Id.* at 929. Under Texas law, a nonresident defendant has the burden to negate all bases of personal jurisdiction. *Id.* (citing *Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 438 (Tex. 1982)).

79. *Id.* at 930 (quoting *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 664 (Tex. 1987)).

serve the Texas market.⁸⁰ The court concluded its jurisdictional analysis with a discussion of foreseeability and acceptance of the risk of litigation in a particular forum.⁸¹ The court stated that Guardian had assumed the risk of accidents occurring in foreign jurisdictions because Guardian had specifically agreed to cover U.S. subsidiaries. Therefore, Guardian had sufficient notice that a substantial subject of insurance was regularly present in the United States and sufficient notice that it might be brought into any court where a United States subsidiary was located and a covered accident occurred.⁸²

The court in *Guardian* appears to have exercised specific jurisdiction; thus, the decision in *Schlobohm* concerning general jurisdiction should not affect the *Guardian* holding.⁸³ Notably, despite the *Schlobohm* court's concern that the second prong of *O'Brien* might lead litigants to conclude that a cause of action must arise from or be connected with a foreign defendant's contacts with Texas, the *Guardian* court acknowledged the viability of the concept of general jurisdiction in Texas before the Texas Supreme Court clarified the *O'Brien* test.⁸⁴

In *Luker v. Luker*⁸⁵ the Texarkana court of appeals held that mere possession of a Texas driver's license does not constitute purposeful availment of the benefits and protections of the laws of Texas.⁸⁶ The plaintiff, a Texas resident, while riding in a car driven by the defendant, a Louisiana resident, was injured in an automobile accident in Louisiana. The plaintiff brought suit in Texas, and the defendant specially appeared to contest jurisdiction.

80. *Id.* at 931 (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

81. *Id.* at 930. The court discussed several federal court cases applying the due process analysis to a nonresident insurance company. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (upholding California court's personal jurisdiction over Texas insurer and discussing fairness of requiring insurer to answer claims in distant forum); *Rossmann v. State Farm Mut. Auto. Ins. Co.*, 832-F.2d 282, 286 (4th Cir. 1987) (distinguishing different types of insurance as giving rise to varying ranges of foreseeable forums where claim might arise); *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 721 (D.C. Cir. 1986) (where insured distributes products nationwide, broad scope of risk is part of insurer's calculations in issuing policy and insurer should be held to answer in any forum where it could reasonably expect products to be sold); *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980) (where loss arises from subject of insurance regularly present in forum and insurer has not limited coverage to specified jurisdictions, insurer is fairly subject to in personam jurisdiction).

82. *Southern Clay*, 762 S.W.2d at 929, 932.

83. The Texas Supreme Court has granted the application for writ of error in *Guardian Royal Exchange Assurance, Ltd. v. English China Clays P.L.C.*, 32 Tex. Sup. Ct. J. 495, 496 (1989). The points of error include:

POINT OF ERROR NO. 3

THE COURT OF APPEALS ERRED AS A MATTER OF LAW WHEN IT CONCLUDED THAT GUARDIAN ROYAL SHOULD HAVE FORESEEN BEING HALED INTO COURT IN TEXAS TO DETERMINE THE MEANING OF AN ENGLISH POLICY ISSUED IN ENGLAND TO AN ENGLISH PARENT COMPANY AND ITS SUBSIDIARIES SOLELY ON THE BASIS THAT THE POLICY PROVIDED WORLDWIDE COVERAGE.

84. *Southern Clay*, 762 S.W.2d at 932.

85. 776 S.W.2d 624 (Tex. App.—Texarkana 1989, writ denied).

86. *Id.* at 625.

The defendant was licensed to drive in Texas but had not yet obtained a Louisiana driver's license although she was a Louisiana resident and had been living in Louisiana for five months prior to the accident. The defendant drove to her parents' home in Texas, spent the night, and drove the plaintiff to a doctor's appointment in Louisiana the next morning. The accident occurred during the drive back to Texas. The trial court granted the defendant's motion to dismiss for lack of personal jurisdiction.

On appeal, the plaintiff argued that the defendant purposely availed herself of the benefits of Texas because she was operating a motor vehicle by authority of a Texas driver's license and that Texas could properly entertain the suit because the defendant transported the plaintiff out of the state with intent to return her to her home in Texas. The court of appeals affirmed the trial court's judgment dismissing the action for lack of jurisdiction,⁸⁷ noting that the plaintiff failed to meet the first prong of the three-prong test determining whether a non-resident defendant is subject to in personam jurisdiction.⁸⁸ Because mere possession of a Texas driver's license is not a "purposeful availment," the court could not constitutionally exercise jurisdiction over the defendant.⁸⁹

2. Service of Process

In *Carjan Corp. v. Sonner*⁹⁰ a nonresident corporation appealed from a default judgment, alleging that the attempted service of process under the long arm statute⁹¹ was ineffective to subject the corporation to *in personam* jurisdiction in Texas. Sonner was injured in Texas at a bowling alley owned and operated by Carjan. The court rejected Carjan's argument that service should have been made on the person in charge of Carjan's bowling alley⁹² and determined that service on the Secretary of State was proper.⁹³ The court found, however, that the subsequent actions of the Secretary of State, did not comply with the statute.⁹⁴ The statute requires that upon receiving

87. *Id.*

88. *Id.* See *supra*, notes 71-72 and accompanying text.

89. *Luker*, 776 S.W.2d at 625. Moreover, the defendant negated all further bases of personal jurisdiction. The cause of action did not arise out of any act occurring in Texas, and there was no evidence of continuous and systematic contacts. Although the defendant once lived in Texas and currently had relatives living in Texas, she travelled to and from Texas only three or four times a year.

90. 765 S.W.2d 553 (Tex. App.—San Antonio 1989, no writ).

91. TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041 - 17.045 (Vernon 1986). Section 17.044(a)(1) provides for substituted service. If a nonresident corporation does business in Texas and has failed to appoint an agent for service, service may be accomplished by service on the Secretary of State. *Id.* § 17.044(a)(1).

92. *Carjan Corp.*, 765 S.W.2d at 554. To be authorized to do business in Texas, a foreign corporation must appoint an agent in Texas for service of process. TEX. BUS. CORP. ACT. ARTS. ANN. arts. 8.01, 8.08 (Vernon 1980 & Supp. 1990). The clear language of the statute provides that service of process on the person in charge of the nonresident's local place of business is authorized only if the nonresident is not required by statute to designate or maintain an agent for service of process in Texas. TEX. CIV. PRAC. & REM. CODE ANN. § 17.043 (Vernon 1986). Therefore, service on the person in charge of Carjan's bowling alley was not authorized.

93. *Carjan Corp.*, 765 S.W.2d at 554.

94. *Id.* at 555.

process directed to a nonresident corporation, the Secretary of State must forward the citation to the defendant's home office.⁹⁵ The record established that the citation was only sent to defendant's last known mailing address. Since defendant's last known mailing address was not the same as the home office address, the court set aside the default judgment because of the Secretary of State's noncompliance with the long arm statute.⁹⁶

In *Bank of America v. Love*⁹⁷ the San Antonio court of appeals set aside a default judgment entered against Bank of America ("the Bank") because the record did not indicate that process was served on the Bank at its home office.⁹⁸ The plaintiff, a Texas resident, alleged that the Bank could be served at a post office box address in California.⁹⁹ The records of the Secretary of State recited that the citation and petition were sent by certified mail to the post office box address, without stating that the address was the Bank's home office address. The return receipt was sent to the Secretary of State, purportedly bearing the signature of the Bank's agent, but it did not indicate that the address was that of the Bank's home office. The Bank failed to file an answer, and the trial court entered a default judgment.

On appeal, the Bank complained that the trial court erred in entering a default judgment because service was defective and the trial court, therefore, lacked jurisdiction. The appellate court held that, in order to support a default judgment following substituted service, the pleadings must allege facts that, if true, would establish amenability to service of process.¹⁰⁰ In addition, the plaintiff must prove that the defendant was served in the manner required by the statute.¹⁰¹ The court held that because the plaintiff did not strictly comply with the rules governing substituted service of process, the default judgment entered by the trial court was void.¹⁰²

In *Chaves v. Todaro*¹⁰³ a Houston court of appeals set aside a default judgment entered against an individual nonresident defendant.¹⁰⁴ The *Todaros*

95. TEX. CIV. PRAC. & REM. CODE ANN. § 17.045(a).

96. *Carjan Corp.*, 765 S.W.2d at 555. The Court noted that substituted service is valid only if there has been strict compliance with the statutory requirements. *Id.* (citing *Houtex Managing Gen. Agency, Inc. v. Hardcastle*, 735 S.W.2d 520, 522 (Tex. App.—Houston [1st Dist.] 1987, writ ref. n.r.e.)). The plaintiff bears the burden of showing compliance with the long arm statute. *Whitney v. L & L Realty Corp.*, 500 S.W.2d 94 (Tex. 1973). There was no indication in the plaintiff's petition that the address in the petition was *Carjan's* home office. *Carjan Corp.*, 765 S.W.2d at 555.

97. 770 S.W.2d 890 (Tex. App.—San Antonio 1989, writ denied).

98. *Id.* at 891-92.

99. "The Texas long-arm statute provides that a non-resident defendant may be served by substituted service on the Secretary of State." *Id.* at 891 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 17.044). "The Secretary of State shall require a statement of the non-resident's name and home office address, and the Secretary shall immediately forward the process to the non-resident." *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 17.045(a)).

100. *Id.*

101. *Id.*

102. *Id.* The court noted that to uphold jurisdiction over the Bank, it must assume that the post office box described in the pleadings was, in fact, the Bank's home office. *Id.* The court could not assume this fact without violating the rule that no presumptions will be indulged in favor of the validity of a default judgment. *Id.* at 892.

103. 770 S.W.2d 944 (Tex. App.—Houston [1st Dist.] 1989, no writ).

104. *Id.* at 946.

filed suit against Chaves seeking a deficiency judgment following Chaves' default on a promissory note executed in the purchase of an apartment project. The Todaros served the original petition on the Secretary of State, who mailed the citation to Chaves at a designated office address in Brazil. Chaves did not file an answer, and the trial court entered a default judgment.

On appeal, Chaves argued that the Todaros did not strictly comply with the Texas long-arm statute¹⁰⁵ because the record did not show that the Secretary of State ever required Chaves' home address. The court stated that when an individual nonresident has been sued, the individual's home address must be given to the Secretary of State, and a copy of the process must be mailed to that address.¹⁰⁶ Since the Todaros did not strictly comply with the procedure prescribed by the Texas long-arm statute, the trial court did not acquire personal jurisdiction over Chaves.¹⁰⁷ Accordingly, the appellate court set aside the default judgment and remanded the case to the trial court.¹⁰⁸

II. FORUM NON CONVENIENS

In *Camejo v. Ocean Drilling & Exploration*¹⁰⁹ the Fifth Circuit affirmed the district court's dismissal of the plaintiff's wrongful death and survival claims arising out of a diving accident in Brazil.¹¹⁰ The decedent, a Brazilian citizen and resident, was employed by a Brazilian entity as a diver in connection with mineral exploration and died in a diving accident in Brazilian territorial waters. His widow, also a Brazilian citizen and resident, brought an action in Texas based on general maritime law, the Jones Act,¹¹¹ and Texas wrongful death and survival statutes.¹¹² The district court dismissed the plaintiff's claims based on the doctrine of *forum non conveniens*.

Following a discussion of the evolution of *forum non conveniens*¹¹³ the

105. See *supra* note 95 and accompanying text.

106. *Chaves*, 770 S.W.2d at 946.

107. *Id.*

108. *Id.*

109. 838 F.2d 1374 (5th Cir. 1988).

110. *Id.* at 1381.

111. 46 U.S.C. § 688 (1982 & Supp. III 1985).

112. Mrs. Camejo originally filed suit against eight defendants in a state district court in Houston, Texas. One of the defendants removed the suit to a federal district court in Houston based on 28 U.S.C. § 1441(d) and the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602-1611 (1982). The federal district court dismissed one defendant, and the Fifth Circuit dismissed four of the other defendants prior to oral argument pursuant to an agreement between the plaintiff and those defendants. *Camejo*, 838 F.2d at 1375. Following the district court's dismissal of the defendant against whom the federal admiralty claim was asserted, the plaintiff sought to remand the case to the state district court where it was originally brought. The Fifth Circuit noted that even if no federal admiralty claim remained in the case, the district court still retained pendent jurisdiction over the state claim and could dismiss the state claims under the doctrine of *forum non conveniens*. *Camejo*, 838 F.2d at 1377. The remaining defendants filed a motion to dismiss on the grounds of *forum of non conveniens*, and the court granted the defendants' motions subject to certain conditions. *Camejo*, 838 F.2d at 1376 n.4

113. Until 1987 the Fifth Circuit applied a modified *forum non conveniens* analysis in admiralty cases. Before addressing the issue of *forum non conveniens*, a court was to engage in a choice of law analysis to determine whether American or foreign law applied. If American law applied, the district court would generally retain jurisdiction, but if foreign law applied, the

Fifth Circuit noted that it could reverse the district court's dismissal only if the lower court's actions constituted a clear abuse of discretion.¹¹⁴ The Fifth Circuit held that the defendants clearly met their burden of establishing that an adequate and available forum existed and that private and public interests weighed heavily in favor of having the trial in the foreign forum.¹¹⁵

The plaintiff did not dispute the existence of an adequate alternative forum.¹¹⁶ Therefore, the Fifth Circuit turned to the district court's balancing of the public and private interest factors set forth by the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*¹¹⁷ and upheld the district court's dismissal of the action for several reasons. First, the employer was a Brazilian entity. In addition, Brazil was the scene of the accident and all of the information regarding the plaintiff's damages was in Brazil. Furthermore, compulsory process for Brazilian witnesses was unavailable in a Texas forum, and the cost of bringing Brazilian witnesses to Texas was very high. In sum, Brazil had a great interest in determining a case involving the death of one of its citizens, while Texas had no comparable interest.¹¹⁸ The Fifth Circuit noted that the balance in this case so strongly favored the defendant's position that it had no trouble upholding the district court's refusal to exercise its jurisdiction to decide the pendent state claims against the remaining defendants.¹¹⁹

The Fifth Circuit observed in *Camejo* that the Texas Supreme Court had

court would proceed to the *forum non conveniens* analysis set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). In 1981 the Supreme Court held that a court need not perform a choice of law analysis before its *forum non conveniens* analysis. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). The Fifth Circuit concluded that its two-prong admiralty *forum non conveniens* analysis was not inconsistent with *Piper* and continued to approve the two-prong test until July 21, 1987 when they determined that a uniform approach to *forum non conveniens* analysis "best served litigants and courts." *Camejo*, 838 F.2d at 1379. They thus overruled the cases that used a modified analysis for suits under the Jones Act and general maritime law. *Camejo*, 838 F.2d 1379 (citing *In Re Air Crash Disaster*, 821 F.2d at 1164 n.25).

114. *Camejo*, 838 F.2d at 1379. The appellate court's duty is only to "review the lower court's decision-making process and conclusion and determine if it is reasonable. . . not to perform a *de novo* analysis." *Id.* (quoting *In Re Air Crash Disaster*, 821 F.2d at 1167).

115. *Id.* The defendants submitted detailed motions for dismissal on the grounds of *forum non conveniens*, and the plaintiff did not contest any of the defendants' statements regarding this issue.

116. In determining whether an available and adequate forum exists, the district court must engage in a two part analysis. First, a foreign forum is "available" when all parties and the whole case come within the jurisdiction of that forum. Second, a foreign forum is "adequate" when the parties will not lose all their remedies or be treated unfairly, even though they may receive less benefits than they might receive in an American court. *Id.* at 1380 (citing *In Re Air Crash Disaster*, 821 F.2d at 1165).

117. 330 U.S. 501 (1947). Private interest factors include ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witness, possibility of view of premises, the enforceability of a judgment if obtained, and other practical problems of trial. *Camejo*, 838 F.2d at 1380 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). Public interest factors include administrative difficulties and the local interest in having localized controversies decided at home. *Camejo*, 838 F.2d at 1380.

118. *Camejo*, 838 F.2d at 1380.

119. *Id.* at 1381. Although the Supreme Court noted that courts should not disturb the plaintiff's choice of forum unless the balance strongly favors the defendants, *Gulf Oil*, 330 U.S. at 508, the Supreme Court has also held that a foreign plaintiff's choice deserves less deference. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 267 (1981).

hinted that it might view § 71.031 of the Texas Civil Practices and Remedies Code as precluding a *forum non conveniens* analysis in a personal injury or wrongful death case filed in Texas.¹²⁰ The Fifth Circuit observed, however, that such a position would not change the analysis in maritime cases because state courts must apply the *forum non conveniens* rule of general maritime law in any case brought by foreign citizens who invoke admiralty jurisdiction.¹²¹

III. CHOICE OF LAW

A. Contracts

In *Aerospatiale Helicopter Corp. v. Universal Health Services, Inc.*¹²² the Dallas court of appeals held that where a contract expressly provided that disputes would be governed by the laws of a particular state, the provision would be given effect if the contract bore a "reasonable relation" to the chosen state and there was no countervailing public policy of the forum state.¹²³ In this case, the contract was executed in Nevada and designated Texas law as controlling. The court noted that the public policy of the forum state must be balanced against the parties' right to choose their own law.¹²⁴ Because Texas was the forum and the parties had chosen Texas law, a conflict between public policy and the choice of law provision did not arise.¹²⁵

In *Cook v. Frazier*¹²⁶ the Fraziers sued for usury when their high-interest tax shelter was rendered useless by federal income tax reforms. The Fraziers bought timeshare properties in Utah and Arkansas for personal use, investment, and tax shelter purposes. The Fraziers formed a husband-and-wife partnership to hold the properties in order to qualify for a tax deduction.

The contract regarding the Arkansas properties designated Utah law as controlling. The interest rate on the contracts was 179% for the first 14 years and 45% for the next 16 years. The Fraziers deducted the interest from their federal tax returns for several years until the deductions were

120. *Camejo*, 838 F.2d at 1382. On March 28, 1990, after this Article went to press, the Texas Supreme Court rejected the doctrine of *forum non conveniens* in personal injury and death cases. In a 5-4 ruling in *Dow Chem. Co. v. Alfaro*, 786 S.W. 2d 674 (Tex. 1990), the Court held that the language of § 71.031 of the Texas Civil Practice and Remedies Code, which permits foreign plaintiffs with personal jurisdiction over defendants to seek damages in Texas courts in cases involving death or personal injury, does not permit a trial court to relinquish jurisdiction under the doctrine of *forum non conveniens*. The holding that the Texas statute supercedes the judicially created doctrine of *forum non conveniens* prompted seven separate opinions - Justice Ray for the majority, two concurrences and four dissents. The dissenters predict that if the Texas Legislature does not rewrite § 71.031 and reinstate the doctrine of *forum non conveniens*, Texas will become "the courthouse for the world" and an "irresistible forum for all mass disaster lawsuits." 786 S.W. 2d at 690, 707. Because of the restraint of the printing deadline, the *Dow Chemical* decision cannot be discussed in detail in this issue of the *Texas Survey*.

121. *Id.*

122. 778 S.W.2d 492 (Tex. App.—Dallas 1989, no writ).

123. *Id.* at 449.

124. *Id.*

125. *Id.*

126. 765 S.W.2d 546 (Tex. App.—Fort Worth 1989, no writ.).

disallowed. When the Fraziers brought an action against the sellers for usury, the sellers pleaded the inapplicability of Texas usury law because of the choice of Utah law in both the Utah and Arkansas contracts. Utah had no applicable usury law, but Texas did.¹²⁷ The court held that the parties' choice of Utah law was reasonable as to the Utah property, but not reasonable as to the Arkansas properties.¹²⁸ The court noted that this result would have been reached even if the contracts had no choice of law clauses.¹²⁹

If the court's decision was fair,¹³⁰ fairness was obtained through back-door reasoning. The court incorrectly quoted *Duncan v. Cessna Aircraft Co.*¹³¹ as merely holding that "Texas choice of law rules provide that the law of the state with the most significant relationship to the issues in question will be applied to resolve those issues."¹³² *Duncan* does provide that the most significant relationship test applies to choice of law questions in Texas, but its holding is limited to those choice of law questions in which the parties have not made a valid choice of law agreement.¹³³ Thus, the *Cook* court should have noted that *Duncan* requires honoring valid choice of law agreements, and then analyzed the parties' choice of Utah law to see if it was proper in regard to both the Utah and Arkansas properties.

Duncan also mandates depeceage, that is, choice of law analysis on an issue-by-issue basis. *Duncan*, therefore, required the court to analyze the Utah and Arkansas properties separately. By incorrectly stating the choice of law rule, the court forced itself to find that Texas had the most significant relationship, despite the contractual choice of Utah law. The court ultimately reached the correct outcome, however, by noting that Texas honored valid choice of law agreements as long as reasonably related to the contract.¹³⁴

Although the court awkwardly applied Texas choice of law rules, it correctly noted that the parties' choice of Utah law was not itself a connection with Utah for choice of law purposes.¹³⁵ The validity of the parties' choice of Utah law was upheld as to the Utah properties because of Utah's significant connection as the property situs. By the same reasoning, the Arkansas contract had no connection to Utah because the property in question was in

127. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon 1987)).

128. *Id.* at 550.

129. *Id.* at 551.

130. Although the court reached the same conclusion that it would have had it properly applied *Duncan* and the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS, this is not to say the result was fair. Because the Fraziers contracted for and intended usurious interest, a better result would have been to cancel the contract, rather than award the Fraziers a windfall under Texas usury law for contracts to which they intentionally entered.

131. *Cook*, 765 S.W.2d 549 (citing *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984)). *Duncan* states that "in all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." *Duncan*, 665 S.W.2d at 421 (emphasis added).

132. *Cook*, 765 S.W.2d at 549.

133. *Id.*

134. *Id.*

135. *Id.*

Arkansas. However, the court arguably erred by discussing the situs of the properties as providing a choice of law rule. The court cited the maxim of *lex loci rei sitae*¹³⁶ which provides that title to realty is governed by the law of the state in which it is located. Although the same result is obtained in applying the most significant relationship test from Restatement (Second) of Conflict of Laws sections 6 and 189,¹³⁷ the maxim's standard was arguably overruled in *Duncan*, when the court held that the most significant relationship test would apply to all choice of law issues in Texas courts, other than those governed by a valid choice of law agreement.

The court properly refuted defendant's invocation of Texas Business and Commerce Code section 1.105(a),¹³⁸ which would have upheld the parties' choice of Utah law for the Arkansas properties. The court noted that because the sale of land was involved, section 1.105(a) did not apply.¹³⁹ The court further noted that even if section 1.105(a) applied, it would not help the defendant.¹⁴⁰ The fact that section 1.105(a) allowed the parties to choose the substantive law of another state as shorthand for the terms of their contract did not mean that the parties could circumvent Texas usury law by choosing Utah law, which had little or no relation to the contract.¹⁴¹

In *Thomas C. Cook, Inc. v. Rowhanian*,¹⁴² plaintiff Rowhanian sued for reimbursement of travelers checks that he purchased in Iran and then lost in New York City. The case was litigated under claims of deceptive trade practices, implied warranty, and breach of contract, all under Texas law. Plaintiff won only on the breach of contract claim. *Rowhanian* has no choice of law analysis, and appears in this Survey only because the authors are puzzled as to why the court applied Texas law. The only connection to Texas was that Rowhanian established Texas residency sometime after losing the checks in New York.¹⁴³ Rowhanian, however, was not a resident of Texas when he purchased the travelers checks in Iran. He had not even established a Texas residence when he lost the checks on an elevator in New York. It appears that New York law would have been the logical choice, because the checks were lost in New York and Thomas C. Cook, Inc., had offices in New York.

The result reached in *Rowhanian* is appropriate, however, to the extent that Texas contract law is similar to New York law. However, Rowhanian's purchase of travelers checks violated an Iranian law forbidding the removal

136. *Id.* at 550. The court may have felt obligated to rely on the old *lex loci* standard because some Texas precedents call for its application. Because the Texas Supreme Court has apparently chosen to adopt the RESTATEMENT (SECOND) OF CONFLICTS OF LAW section by section instead of *in toto*, there is no clear authority for applying § 189. This left the *Cook* court to rely on the older standard.

137. The court cited § 189 as additional support. *Id.*

138. *Cook*, 765 S.W.2d at 550-51.

139. *Id.* at 551.

140. *Id.*

141. *Id.*

142. 774 S.W.2d 679 (Tex. App.—El Paso 1979, writ denied).

143. Conversation with Craig Albiston, Law Offices of Thomas R. Beech (attorney for Thomas C. Cook, Inc.) Houston, Texas (Jan. 17, 1989).

of money from Iran. By permitting Rowhanian to prevail on his breach of contract claim, the court enforced a contract right that was illegal where the contract was made. This is not to suggest that Iran law was the only possible choice of law. It does illustrate, however, the hazards of applying Texas law to cases that lack the minimal connection required by the due process clause.¹⁴⁴

In *Uniwest Mortgage Co. v. Dadecor Condominiums, Inc.*¹⁴⁵ the parties' choice of Colorado law to govern a loan was upheld where the lender had a principal place of business in Colorado, and the payments were made in Colorado.¹⁴⁶ Plaintiff sued for usury, arguing that Texas law should apply because the primary obligor and guarantor were both from Texas. These contacts were not sufficient to overcome the parties' choice of Colorado law, thus defeating plaintiff's usury claim.¹⁴⁷ *Uniwest* is noteworthy for its proper application of Section 187 of the Restatement (Second) of Conflict of Laws, which requires that the forum state have a materially greater interest than the state the parties chose, before forum public policy can defeat the contractual choice of law. Last year in *DeSantis v. Wackenhut Corp.*,¹⁴⁸ the Texas Supreme Court apparently ignored the Restatement's requirement that a materially greater interest be present in order to unseat a contractual choice of law.

In *Adams v. Gates Learjet Corp.*¹⁴⁹ Kansas law was applied to a suit for reimbursement of the costs of aircraft modifications made to meet airworthiness requirements.¹⁵⁰ The court found that Kansas had the most significant relationship to the claim,¹⁵¹ reasoning that the manufacturer and designer of the aircraft, the manufacturers of modification kits, and the Federal Aviation Administration office responsible for overseeing the modifications were all located in Kansas.¹⁵² In addition to these contacts, the court observed Kansas's strong interests in having its law govern an issue concerning manufacturers located in Kansas.¹⁵³ The court also noted that the application of Kansas law would result in certainty, predictability, and uniformity.¹⁵⁴

*Commercial Credit and Control Data Corp. v. Wheeler*¹⁵⁵ applied the rule that a person who moves to Texas may invoke the Texas statute of limitations to a claim arising out of state, if that person had lived in Texas twelve

144. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-20 (1985); *Home Insur. Co. v. Dick*, 281 U.S. 397 (1930).

145. 877 F. 2d 431 (5th Cir. 1989).

146. *Id.* at 436.

147. *Id.*

148. 31 Tex. Sup. J. 616 (1988) (motion for rehearing still under consideration). See Freytag, Bush & George, *Conflict of Laws, Annual Survey of Texas Law*, 43 Sw. L.J. 431, 448 n.136 (1989).

149. 711 F.Supp. 1374 (N.D. Tex. 1988).

150. *Id.* at 1375.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. 756 S.W.2d 769 (Tex. App.—Corpus Christi 1988, writ denied).

months preceding the filing of the action.¹⁵⁶ In this case, defendants bought a mobile home in Maryland in 1974 on a 72-month finance agreement. They sold it in California in 1976 without informing the finance company. Neither the defendants nor their transferees made further payments on the mobile home, and the finance company repossessed the mobile home in 1977. Defendants moved to Texas in 1982, and were sued in 1984 by the finance company for the deficiency on the mobile home debt. Defendants successfully invoked the four-year Texas limitations period.¹⁵⁷

*Duff v. Union Texas Petroleum Corp.*¹⁵⁸ concerns the act of state doctrine, a choice of law rule under international law requiring that courts in the United States recognize the independence of other nations and not sit as an overseer to their actions taken within their boundaries.¹⁵⁹ Union Texas Petroleum (UTP) contracted with Pluspetrol for a joint offshore drilling bid that gave Pluspetrol the right to take up to ten percent of UTP's interest, if UTP won the bid. UTP got the contract for offshore drilling, off the Ivory Coast in Africa. The Ivory Coast Minister of Mines, however, refused to recognize Pluspetrol's claim to 10% of the oil and gas concession, explaining that the Ivorian Government did not want partners participating in the concession with less than a 15% share. UTP asked the Ivorian Government to reconsider, but it refused. Pluspetrol assigned its claim against UTP to Duff, who then sued for breach of the agreement. UTP pleaded that Ivory Coast law required them to breach the agreement with Pluspetrol, and that the act of state doctrine required the court to acknowledge the Ivory Coast Government's action. The Texas trial court disagreed with UTP and held that there had been no act of state that required UTP's breach. The court of appeals affirmed, noting that the act of state doctrine is merely "a judicially created doctrine of restraint"¹⁶⁰ that did not apply to the instant case because the Ivory Coast was not a party, and that Duff was not challenging the validity of a foreign government's expropriation of this property. The court further noted that the facts did not parallel other cases involving the act of state doctrine.¹⁶¹ The court of appeals erred in holding that the act of state doctrine is limited to the challenging of the validity of a foreign government's expropriation of property.¹⁶² No harm was done in the instant case, however, because the same result would have been reached had the act of state doctrine been applied, since the court also found that plaintiff suffered no damages.¹⁶³

156. *Id.* at 771 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.067 (Vernon 1986)).

157. *Id.*

158. 770 S.W.2d 615 (Tex. App.—Houston [14th Dist.] 1989, no writ).

159. See *The Paquete Habana*, 175 U.S. 677 (1900).

160. *Duff*, 770 S.W.2d at 621.

161. *Id.*

162. See *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E.2d 798 (1938) (New York Court of Appeals applied act of state doctrine as defense to breach of contract under similar facts).

163. *Duff*, 770 S.W.2d at 621.

B. Torts

In *Daugherty v. Southern Pacific Transportation Co.*¹⁶⁴ the Texas Supreme Court held that it was not a prerequisite that a party plead another state's law or regulation before the Texas courts could take judicial notice of it.¹⁶⁵ The court specifically stated that a trial court is not required to take judicial notice of federal laws and regulations, however, because it is within the court's discretion to determine if the notice requirement of Texas Rules of Civil Evidence 202 had been met.¹⁶⁶

In this suit for wrongful death, plaintiff requested that the trial court take judicial notice of federal Occupational, Safety and Health Administration (OSHA) regulations.¹⁶⁷ The trial court refused to take notice because the regulations had not been plead by the plaintiffs. In declining to require Texas courts to take notice of federal law, the supreme court invalidated a long line of Texas appellate cases,¹⁶⁸ as well as the overwhelming body of authority throughout the United States.¹⁶⁹ The supreme court relied in part on *Tippett v. Hart*,¹⁷⁰ in which it had earlier stated that Texas courts were not obligated to take judicial notice of federal laws and regulations.¹⁷¹ *Tippett* held that a requirement which mandated Texas courts to take notice of such laws and regulations was unnecessary and overbroad.¹⁷²

In *Daugherty*, the Texas Supreme Court also noted that the language of Texas Rule of Evidence 202 required documentation of the federal regulations as a condition of judicial notice.¹⁷³ The Texas evidentiary rule addressing judicial notice expressly included in its purview of acceptable judicial notice subjects the laws of the sister states.¹⁷⁴ It is the position of the authors that because federal law is not foreign to Texas, it is not addressed by Texas Rule of Evidence 202. *Daugherty* may be correct in holding that a party wishing to obtain judicial notice of federal law must produce copies of such laws, especially for federal regulations that may not be readily available to the state trial court or the opposing counsel. *Daugherty* probably goes too

164. 772 S.W.2d 81 (Tex. 1989).

165. *Id.* at 83.

166. *Id.* See *infra*. note 173 and accompanying text.

167. 29 U.S.C. §§ 651-678 (1982 & Supp. III 1985).

168. See, e.g., *Riverside Nat'l Bank v. Lewis*, 572 S.W.2d 553, 558 (Tex. App.—Houston [1st Dist.] 1978), *rev'd in part, aff'd in part*, 603 S.W.2d 169 (Tex. 1980); *Lyon Van Lines, Inc. v. Ogden* 503 S.W.2d 632, 636 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

169. *Daugherty*, 772 S.W.2d at 83.

170. 501 S.W.2d 874 (Tex. 1973).

171. *Id.* at 875.

172. *Id.* The clarification by the Supreme Court was in response to a statement made by the lower court that Texas courts were "required to take judicial notice of the administrative rules and regulations adopted by all federal departments, boards and commissions pursuant to statute. *Id.* (citing *Tippett v. Hart*, 497 S.W.2d 606 (Tex. Civ. App.—Amarillo 1973, writ denied)).

173. *Daugherty v. Southern Pac. Transp. Co.*, 772 S.W.2d 81, 83 (Tex. 1989). The pertinent part of Texas Rule of Evidence 202 states: "A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary." TEX. R. CIV. EVID. 202.

174. TEX. R. CIV. EVID. 202.

far, however, in holding that Texas courts may refuse to take judicial notice of federal law if they determine that Texas Rule of Evidence 202 has not been met.

In *Jackson v. S. P. Leasing Corp.*¹⁷⁵ the court of appeals held that the Jones Act¹⁷⁶ precluded a foreign seaman's lawsuit for injuries sustained in another country's territorial waters. Plaintiff Jackson, a Honduran seaman, sued for injuries he suffered while working aboard an American-owned vessel for a Panamanian corporation. The injuries occurred while the vessel was in the territorial waters of Mexico. Jackson brought his action under the Jones Act but argued on appeal that the Texas Open Forum Act controlled the case.¹⁷⁷ The Texas Open Forum Act allows claims to be brought in the Texas courts for personal injuries suffered by foreign citizens in a foreign country. The court stated in dicta that the Jones Act preempted the Texas Open Forum Act.¹⁷⁸ The court noted that a 1982 amendment to the Jones Act was designed to preclude foreign plaintiffs from forum shopping in the United States.¹⁷⁹ The court also found that the preemption under the Jones Act did not deny due process or equal protection to Jackson.¹⁸⁰

The court in *Brown Services, Inc. v. Fairbrother*¹⁸¹ addressed the specificity required when pleading choice of law. Fairbrother was injured while working on a derrick in Trinidad's territorial waters. His petition, filed in Texas district court, claimed relief under "general maritime law, the Jones Act¹⁸² . . . 'any and all other applicable law.'"¹⁸³ The trial court applied Texas workers compensation law. Defendant Brown Services appealed, claiming that Texas law was not properly plead.¹⁸⁴ The court of appeals held that pleading "any and all other applicable law" was sufficient notice of plaintiff's intent to claim under Texas law or any other law that would support a judgment in his favor.¹⁸⁵ The court further held that if the pleading

175. 774 S.W.2d 673 (Tex. App.—Texarkana 1989, writ granted).

176. 46 U.S.C. § 688(b) (1982 & Supp. III 1985).

177. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986).

178. *Jackson*, 774 S.W.2d at 675.

179. *Id.*

In short, [the 1982 amendment] denies a Jones Act remedy and any other remedies under general maritime law to a foreign seaman in the offshore drilling industry when the seaman is injured in another country's territorial waters, unless neither the country where the injury occurred nor the seaman's home country provides a remedy.

Jackson, 774 at 675 (citing *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1376-77 (5th Cir. 1988)). Jackson's suit was brought solely under the Jones Act (46 U.S.C. § 688). That act specifically denies a remedy to foreign seamen who are injured while working on offshore drilling rigs. Because Jackson based his claim on this Act and did not plead or present the Texas Open Forum Act claim, TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986), at the trial court, the Texas Open Form Act claim was not considered.

180. *Id.* at 675-76.

181. 776 S.W.2d 772 (Tex. App.—Corpus Christi 1989, no writ).

182. 46 U.S.C. § 688 (1982 & Supp. III 1985).

183. *Fairbrother*, 776 S.W.2d at 773.

184. It should be recognized that defendant failed to make a special exception at trial to the application for worker's compensation laws. The court stated that "in the absence of special exceptions, the petition will be liberally construed to support the judgment." *Id.* at 774.

185. *Id.* at 775.

was defective, the defects must be raised by special exception at trial in order to be considered on appeal.¹⁸⁶ Reaching the opposite conclusion, *Knops v. Knops*¹⁸⁷ held that defendant's motion requesting the court to take judicial notice of "the common law, public statutes and court decisions of the state of New Mexico" was insufficient.¹⁸⁸

IV. FOREIGN JUDGMENTS

Foreign judgments of other countries and sister states create Texas conflicts of laws in two ways: (1) their local enforcement, and (2) their preclusive effect on local lawsuits. Foreign judgments include sister state and foreign country judgments, but do not include federal court judgments from other states, because those judgments are enforced as local federal court judgments.¹⁸⁹ Texas recognizes two methods of enforcing foreign judgments: the common law method of using the foreign judgment as the basis of a local lawsuit,¹⁹⁰ and the more direct procedure under the uniform foreign judgments acts.

A. Enforcement

Since 1981 Texas has used two uniform acts to recognize and enforce foreign judgments, although their adoption did not displace the common law enforcement method.¹⁹¹ The Uniform Enforcement of Foreign Judgments Act (UEFJA)¹⁹² provides for Texas enforcement of non-Texas judgments that are entitled to full faith and credit. This includes sister judgments as well as foreign country money judgments that Texas recognizes under the Uniform Foreign Country Money Judgment Recognition Act (UFCMJRA).¹⁹³ The legislature recodified both acts in 1985 and incorporated them into the Civil Practice and Remedies Code with no significant changes.

The most significant case in this Survey period is *Plastics Engineering Inc. v. Diamond Plastics Corp.*¹⁹⁴ in which another court of appeals held the UFCMJRA unconstitutional.¹⁹⁵ The court held that the UFCMJRA's failure to provide for a plenary hearing in which the defendant can challenge the recognition of a foreign judgment violated due process requirements.¹⁹⁶

186. *Id.* at 774.

187. 763 S.W.2d 864 (Tex. App.—San Antonio 1988, no writ).

188. *Id.* at 867.

189. See 28 U.S.C. § 1963 (1982).

190. The underlying mandate for common law enforcement is the full faith and credit clause of the United States Constitution. The Uniform Enforcement of Foreign Judgment Act specifically reserves the common law method as an alternative. See TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (Vernon 1986). There were no pertinent cases during the Survey period. See George and Pedersen; *Conflict of Laws, Annual Survey of Texas Law*, 41 Sw. L.J. 383, 430-33 (1987).

191. See TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (Vernon 1986).

192. TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-35.007 (Vernon 1986).

193. TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001-36.008 (Vernon 1986 and Vernon Supp. 1990).

194. 764 S.W.2d 924 (Tex. App.—Amarillo 1989, no writ).

195. *Id.* at 927.

196. *Id.*

The court noted the lack of authority interpreting the UFCMJRA and examined the only two cases that have considered this question.¹⁹⁷ In *Hennessy v. Marshall*¹⁹⁸ the Dallas court of appeals was faced with the issue of recognizing an English default judgment. Because UFCMJRA provided no means of challenging this judgment, the *Hennessy* court inferred the drafters' intent that UFCMJRA section 36.005 provided for a plenary hearing.¹⁹⁹ In *Detamore v. Sullivan*²⁰⁰ the court of appeals disagreed with *Hennessy* and held that the UFCMJRA's lack of an express hearing provision rendered it unconstitutional.²⁰¹ The *Detamore* court believed that inferring the right to a plenary hearing was improper judicial legislation.²⁰² The *Plastics Engineering* court concurred with *Detamore* and held the UFCMJRA unconstitutional.²⁰³ Although the court did not discuss the judgment creditor's recourse, the judgment creditor would be entitled to file a common law action and presumably use the foreign action for summary judgment based on *res judicata*. Late in the Survey period, yet another court of appeals held the UFCMJRA unconstitutional on identical grounds in *Don Dockstader Motors Ltd. v. Patel Enterprises*.²⁰⁴

*Hill Country Spring Water, Inc. v. Krug*²⁰⁵ offers a good discussion of challenging the jurisdiction of the sister state in which the foreign judgment was rendered. The court noted that a defendant against whom a sister state judgment has been filed under the UEFJA may challenge the sister state's jurisdiction by showing that service of process was defective under the law of the other state,²⁰⁶ or by proving that he was not subject to in personam jurisdiction in that state.²⁰⁷ The foreign judgment at issue was entered in Ohio. The court, therefore, examined both Ohio's service and defendant's amenability to jurisdiction there, and found both to be in order.²⁰⁸

Defendant *Hill Country Spring Water* also challenged the constitutionality of the UEFJA on the same grounds under which the UFCMJRA was held unconstitutional, that is, because it failed to provide a hearing in which defendant could assert his defenses. The court held that it would not consider the validity of the UEFJA where the defendant had suffered no harm.²⁰⁹ At the trial court level, the defendant had obtained a temporary restraining order, filed a petition to set aside the judgment, an application to stay the judgment, and a motion for summary judgment. According to the court of appeals, these procedural devices negated defendant's claim that

197. *Id.* at 925.

198. 682 S.W.2d 340 (Tex. App.—Dallas 1984, no writ).

199. *Plastics Eng.*, 764 S.W.2d at 926 (citing *Hennessy*, 682 S.W.2d at 343).

200. 731 S.W.2d 122 (Tex. App.—Houston [14th Dist.] 1987, no writ).

201. *Plastics Eng.*, 764 S.W.2d at 926 (citing *Detamore*, 731 S.W.2d at 122).

202. *Detamore*, 731 S.W.2d at 1248).

203. *Id.*

204. 776 S.W.2d 726 (Tex. App.—Corpus Christi 1989, writ granted.)

205. 773 S.W.2d 637 (Tex. App.—San Antonio 1989, writ denied).

206. *Id.* at 639.

207. *Id.*

208. *Id.* at 639-40.

209. *Id.* at 641.

there was no means of challenging the judgment under the UEFJA.²¹⁰ One would assume that these same procedural devices were also available to the defendants in the *Detamore* and *Plastics Engineering* cases.

In addition to the general uniform acts discussed above, the Revised Uniform Reciprocal Enforcement of Support Act (RURESA)²¹¹ provides more specifically for the enforcement of sister-state child support judgments. *Nunez v. Nunez*²¹² involved a husband who moved to Texas, followed by the wife's registration of an Illinois judgment ordering child support. The Illinois judgment identified three children of the marriage, all under eighteen years old. The settlement agreement attached to the Illinois judgment referred to the three children, but stated that support would only be paid for the two minor children. An Agreed Order to Modify Child Support stated that child support would be paid for the "minor children" of the marriage. The husband argued that the foreign order was fatally vague. The court of appeals disagreed, holding that the husband was required to pay support for all three children under the full faith and credit clause.²¹³ The husband's only defenses would be those relating to the original decree, such as procedural defects or lack of jurisdiction.²¹⁴ The court further held that it had jurisdiction to confirm the Illinois support order even though one child for which support was due had reached eighteen.²¹⁵

B. Preclusion

The United States Constitution requires that Texas courts give full faith and credit to the judicial proceedings of sister states.²¹⁶ In addition to providing the basis for enforcing sister state judgments in Texas, the full faith and credit clause precludes relitigation of legal issues or claims in Texas Courts through the doctrine of *res judicata*.²¹⁷ Under stricter standards, preclusion is extended to foreign country judgments according to the longstanding policy against repetitive litigation. The 1989 Survey period produced no significant cases regarding preclusion.

210. *Id.*

211. TEX. FAM. CODE ANN. §§ 21.01-21.43 (Vernon Supp. 1990).

212. 771 S.W.2d 7 (Tex. App.—San Antonio 1989, writ denied).

213. *Id.* at 9-10.

214. *Id.* at 9.

215. *Id.*

216. U.S. CONST. art. IV, § 1.

217. *Res judicata* includes claim preclusion (merger and bar) and issue preclusion (direct and collateral estoppel).

