



Jurisdiction Over Foreign Entities in the Age of Electronic Commerce

Foreign entities cannot be sued in the courts of the United States simply because they have done business with an American entity. The U.S. Supreme Court has said that for our courts to exercise personal jurisdiction over a nonresident, the nonresident must have "minimum contacts" with the forum state, such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." But the Supreme Court has not spoken on the subject since the Internet was born. What does personal jurisdiction mean in the context of international e-commerce?

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There are two types of personal jurisdiction, "general" and "specific." Courts have general jurisdiction over entities with "continuous and systematic general business contacts that approximate a physical presence in the forum state."¹ *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004), citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). General jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world. *Schwarzenegger*, 374 F.3d at 801.

More frequently, challenges to jurisdiction address specific jurisdiction, which concerns only the facts of the subject dispute. The "minimum contacts" analysis for specific jurisdiction varies state by state, but must at least meet the federal standard developed in *International Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945), *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293 (1980) and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985). This standard is commonly expressed as a three-part test:

- 1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- 2) The claim must be one which arises out of or relates to the defendant's forum-related activities; and
- 3) The exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004). In federal court, a motion to dismiss for lack of personal jurisdiction is brought pursuant to F.R.C.P. 12(b)(2). Responding to the motion, the plaintiff bears the burden of demonstrating prongs (1) and (2) of the test. The defendant must then come forward with a "compelling case" under prong (3) that the exercise of jurisdiction would not be reasonable.

Internet Transactions

¹ To determine whether a defendant corporation has continuous and systematic business contacts with the forum state, the court considers a variety of factors, such as whether the company maintains an office in the forum state, has employees in the forum state, is incorporated or licensed to do business in the forum state, designates an agent for service of process in the forum state, uses bank accounts in the forum state, or markets or sells products in the forum state. *Helicopteros Nacionales*, 466 U.S. at 414-15; *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

When it comes to transactions performed over the Internet, the law of personal jurisdiction is still getting on its feet. The U. S. Court of Appeals for the Ninth Circuit recently handed down a decision, *Boschetto v. Hansing*, 539 F.3d 1011 (9th Cir. 2008), that is noteworthy because it concerns a sale performed exclusively over the Internet. In *Boschetto*, a California resident brought suit over an eBay purchase of a car for \$34,000 from an out-of-state seller, where the buyer arranged via email with the seller for delivery of the car in California. Unhappy with the car, the buyer filed suit in federal court in the Northern District of California, alleging breach of contract, fraud and violation of California's Consumer Protection Act. The buyer tied the dispute to California by alleging that the seller used eBay, a California company, to market the automobile and that eBay acted as a distribution center for the exchange of goods.

The *Boschetto* court found the defendant did not purposefully avail itself of the benefits of California simply by entering a contract with a Californian, noting that under the Supreme Court precedent of *Burger King* a contract alone does not automatically establish minimum contacts in the plaintiff's home forum. 471 U.S. at 478. Instead, the court decided that the jurisdictional effect of the defendant's use of an Internet website depends on how interactive the website is. This principle was first stated in *Zippo Manufacturing Co. v. Zippo.com*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997), as follows:

The likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well-developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases,

the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. (Citations omitted.)

The Ninth Circuit adopted these guidelines in *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997), where the court was persuaded to find no jurisdiction because the defendant's website advertised its services but did not allow parties to transact business via the site.

The *Boschetto* court acknowledged that eBay is interactive, but found it critical that eBay was not the defendant over whom personal jurisdiction was asserted. Further, the court found that the defendant's eBay listing was not part of a broader e-commerce activity. The court said, "At bottom, the consummation of the sale via eBay here is a distraction from the core issue: This was a one-time contract for the sale of a good that involved the forum state only because that is where the purchaser happens to reside, but otherwise created no 'substantial connection' or ongoing obligations there." However, the court cautioned, "That is not to say that the use of eBay digs a virtual moat around the defendant, fending off jurisdiction in all cases." The court noted other cases involving eBay where courts have found jurisdiction in the buyer's forum, such as *Crummey v. Morgan*, 965 So. 2d 497, 500 (Ct. App. La. 2007), *Dedvukaj v. Maloney*, 447 F. Supp.2d 813, 822-32 (E.D. Mich. 2006) and *Malcolm v. Esposito*, 2003 WL 23272406 (Va. Cir. Ct. 2003). In those cases, the court explained, the sellers' use of eBay was regular and systemic, or was a vehicle for broader commercial activity. See also *Attaway v. Omega*, 903 N.E.2d 73 (Ct. App. Ind. 2009) (making a distinction between eBay buyers and sellers, finding jurisdiction in the seller's forum).

A strong concurring opinion in *Boschetto* by Circuit Judge Rymer was even more favorable to the out-of-state defendant, positing that simply listing items for sale on eBay does not amount to purposefully directing activity at California, failing prong (1) of the jurisdiction test. Judge Rymer wrote that the defendant must do "something more" to aim activity expressly at the state, such as individually targeting residents of the state.

Under *Boschetto*, then, courts will ask several questions to determine whether a foreign defendant conducting business exclusively over the Internet can be sued in the United States:

- 1) Does the matter sued upon arise from an engagement with the foreign defendant's interactive website?

- 2) Has the defendant engaged in regular or systemic commerce with residents of the forum via a website, not necessarily its own?
- 3) Has the foreign defendant, through its website or otherwise, targeted persons or businesses in the forum state?

Two district court decisions since *Boschetto* touched on these questions. Both involved individuals suing a website and its owner. *Jeske v. Fenmore*, 2008 WL 5101808 (C.D. Cal. 2008) was a trademark infringement suit brought by a Californian who owned the mark "Ms. America, U.S." against a website that operated and organized national beauty pageants under similar names, and the website's owner who lived in Connecticut. The court found the defendants directed their activities toward California because the subject website is interactive. Beauty pageant contestants paid fees on-line over the website, the website provided participants with information on how to enter pageants, and California was one of the states solicited by the website, particularly because the California titles of "Ms. California," "Ms. Golden State," and "Ms. California Coast" were advertised. For similar reasons, the court decided that the plaintiff's claim arose out of and related to the defendants' forum-related activities, and that the assertion of jurisdiction would be reasonable. Therefore, the court held that it had personal jurisdiction over the defendants.

The second case, *Kruska v. Perverted Justice Foundation, Inc.*, 2008 WL 5235373 (D. Ariz. 2008), was a defamation suit brought by an Arizona resident against an Oregon website whose purpose was to expose pedophiles and sex offenders. The plaintiff sought an order requiring the defendants to cease and desist from publishing her likeness and from stating that she is a convicted child molester and pedophile. The court sided with the defendants, finding no personal jurisdiction primarily because they did not engage "in any kind of affirmative conduct within Arizona that promoted the transaction of business there," and because "there is no evidence that any business or commercial activity was transacted over the website." The court also determined the defendants did not direct their allegedly tortious activity to the forum state of Arizona, as "it is not enough the plaintiff resides in the forum state and may feel the effects there."² The court

² The *Kruska* court acknowledged that under the purposeful direction analysis, personal jurisdiction can be based upon the so-called "effects test" from *Calder v. Jones*, 465 U.S. 783, 784-85 (1984). To meet the effects test, the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered and the forum state. See *Schwarzenegger, supra*, 374 F.3d at 806-807. The effects test can apply only to tort claims.

stated, "The essentially passive nature of *Perverted Justice's* activity in posting a website on the Internet that allegedly defamed plaintiff does not qualify as purposeful availment invoking the benefits and protections of Arizona."

Thus, as between *Jeske* and *Kruska*, personal jurisdiction hinged on both the interactivity of the subject website and the commercial purpose of the site. *See also Stomp, Inc. v. Neato, LLC*, 61 F.Supp. 2d 1074 (C.D. Cal. 1999) (finding personal jurisdiction in patent infringement case over out-of-state company that sold infringing products on-line); *Quokka Sports, Inc. v. Cup Int'l Ltd.*, 99 F.Supp. 2d 1105 (N.D. Cal. 1999) (finding personal jurisdiction in trademark case over New Zealand company whose domain name and website content targeted the American market, U.S. companies advertised on the website and users could purchase a travel package on the website).

Non-Internet and Hybrid Disputes

Any form of communication from a foreign location, such as mail, telephone calls and wire transfers, will support personal jurisdiction where the defendant's contact is continuous or the volume of communications suggests a purposeful interaction with the forum state. In *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995), a case involving a Ponzi scheme, the court exercised jurisdiction over an Austrian bank whose physical contacts with the United States and California were quite limited, because the bank "created numerous ongoing obligations to U.S. residents" by regularly mailing account statements to its U.S. customers and occasionally soliciting new business from them. In *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1399 (9th Cir. 1986), the court exercised jurisdiction over an insurance company headquartered in the Cayman Islands that issued malpractice policies to 22 California physicians – even though the policies were solicited, issued, delivered, and paid for in the Cayman Islands – because an "insurance contract creates continuing obligations between the insurer and the insured."

However, courts have consistently required something more than mere foreseeability of a defendant being haled into court in the forum state. Wire transfers or similar contacts are generally insufficient by themselves to create personal jurisdiction. *See, e.g., Resolution Trust Corp. v. First of Am. Bank*, 796 F. Supp. 1333, 1336-37 (C.D. Cal. 1992).

A trio of cases against British companies helps to draw the line. In *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 816 (9th Cir. 1988), the court held that the mere act of signing a contract in California did not subject a London-based company to California jurisdiction. In *S.H. Silver Co., Inc. v. David Morris Int'l*, 2008 WL 4058364 (N.D. Cal. 2008), the court held that it had no jurisdiction over a

British jeweler who had allegedly taken gems on consignment from a California jeweler and engaged in phone calls, emails, fax, mail, and a wire payment to California, on the basis that conduct most relevant to the plaintiff's claims for breach of contract and fraud took place in London. In contrast, the court in *Harris Rutsky & Co., Ins. Svcs., v. Bell & Clements Ltd.*, 328 F.3d 1122 (9th Cir. 2003), asserted personal jurisdiction over a London insurance agency that had a five-year contractual relationship with a California insurance brokerage. The London agency acted as intermediary between the plaintiff brokerage and British surplus lines insurers, received commissions on premiums paid by the plaintiff, filtered communications between the plaintiff and the insurers, and London employees of the defendant frequently visited California and developed new business in California.

The Test for "Reasonableness" Favors Foreign Defendants

If personal jurisdiction is supported by prongs (1) (purposeful availment or direction) and (2) (claim arose out of forum-related activity), the defendant must demonstrate that jurisdiction would be unreasonable under prong (3), based on the following seven factors:

- 1) the extent of the defendant's purposeful interjection into the foreign state's affairs;
- 2) the burden on the defendant of defending in the forum;
- 3) the extent of conflict with the sovereignty of the defendant's state;
- 4) the foreign state's interest in adjudicating the dispute;
- 5) the most efficient judicial resolution of the controversy;
- 6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and
- 7) the existence of an alternative forum.

Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482, 1487-88 (9th Cir. 1993).

These factors give a big advantage to a defendant from a foreign nation rather than another state. Both the U.S. Supreme Court and the Ninth Circuit have made clear that, when the non-resident defendant is from another country, the court must be especially careful in its exercise of personal jurisdiction. In *Asahi Metal Industry Co. v. Superior Ct.*, 480 U.S. 102, 115 (1987), the Supreme Court held that a California state court could not exercise jurisdiction over a Taiwanese supplier in a tort action arising out of the sale of a component to a Japanese manufacturer. Though the subject accident took place in California, the Court determined there were insufficient contacts between the supplier and the forum, noting, “[T]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.”

Similarly, the Ninth Circuit has cautioned, “litigation against an alien defendant creates a higher jurisdictional barrier than litigation against a citizen from a sister state because important sovereignty concerns exist.” *Core-Vent v. Nobel*, *supra*, 11 F.3d at 1489. In *Core-Vent*, a California company brought libel and antitrust claims against Swedish doctors based on articles they published in international medical journals. The court stated:

Requiring the [defendants] to submit to the jurisdiction of the court would impose substantial burdens on them and would interfere with the sovereignty of a foreign nation. The Supreme Court in *Asahi* indicated that a plaintiff seeking to hale a foreign citizen before a court in the United States must meet a higher jurisdictional threshold than is required when the defendant is a United States citizen. Indeed, commentators have suggested that the international factors were determinative in *Asahi*.

Id. at 1490. See also *Pacific Atlantic Trading Co., Inc. v. M/V Main Express*, 758 F.2d 1325, 1330 (9th Cir. 1985) (“Although there is no evidence in the record that Malaysia has explicitly voiced a sovereign interest in this case, when the nonresident defendant is from a foreign nation, rather than from another state in our federal system, the sovereignty barrier is higher, undermining the reasonableness of personal jurisdiction.”).

Thus, in any challenge to personal jurisdiction, the foreign defendant should stress the unfairness of suit in the U.S. under the seven “reasonableness” factors. The defendant also should submit evidence that it does not have continuous or systematic business contacts in the forum state, to defeat a possible argument by the plaintiff that the

court has general personal jurisdiction. For its part, the plaintiff should investigate the defendant’s operations in the forum state to develop an argument supporting general jurisdiction, even if the plaintiff has not alleged jurisdiction on this basis. In a challenge to jurisdiction, the court will consider not only the pleadings but also affidavits, declarations and sometimes testimony that establishes a prima facie case of jurisdiction, or that refutes the plaintiff’s jurisdictional allegations. See, e.g., *Data Disc, Inc. v. Systems Technology Assocs., Inc.*, 557 F.2d 1280, 1284-89 (9th Cir. 1977).

The Escape Hatch of *Forum Non Conveniens*

Even if a U.S. court has personal jurisdiction over a foreign defendant, it is still possible to have the case dismissed based on the separate doctrine of *forum non conveniens*, under which the court has discretion to dismiss without prejudice or stay a case for the reason that a foreign country can more conveniently resolve the dispute.

A party moving to dismiss on grounds of *forum non conveniens* must show two things: (1) the existence of an adequate alternative forum, and (2) that the balance of “private and public interest factors” favors dismissal. *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir. 1991).

The private interest factors are:

- 1) the residence of the parties and witnesses;
- 2) the forum’s convenience to the litigants;
- 3) access to physical evidence and other sources of proof;
- 4) whether unwilling witnesses can be compelled to testify;
- 5) the cost of bringing witnesses to trial;
- 6) the enforceability of the judgment; and
- 7) all other practical problems that make trial of a case easy, expeditious, and inexpensive.

The public interest factors are:

- 1) the local interest of the lawsuit;
- 2) the court’s familiarity with governing law;
- 3) the burden on local courts and juries;
- 4) congestion in the courts; and
- 5) the costs of resolving a dispute unrelated to the forum.

Id. at 1147.

The U.S. Supreme Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) found that a forum is not inadequate “merely because its laws offer the plaintiff a lesser remedy than he could expect to receive in the United States’ court system.” This is seen in *Lueck v. Sunstrand Corp.*, 236 F.3d 1137 (9th Cir. 2001), where the Ninth Circuit in a plane crash case dismissed under *forum non conveniens* even though the alternative forum of New Zealand offered only a “no fault” personal injury remedy.

Courts focus most of their attention in a *forum non conveniens* motion on the private interest factors. Of these, factors 3 and 4 are very important because they evaluate the parties’ ability to present a complete evidentiary picture to the finder of fact. Courts acknowledge that it is unfair to require a party to litigate where it cannot present relevant evidence.

Public interest factor 2 causes the most confusion, as it involves the complex matter of choice-of-law. However, before getting too bogged down in that analysis, litigants should recognize that the U.S. Supreme Court in *Piper Aircraft* said the doctrine of *forum non conveniens* “is designed in part to help courts avoid conducting complex exercises in comparative law.” 454 U.S. at 451. The Ninth Circuit has said that choice-of-law is only “determinative when the case involves a U.S. statute requiring venue in the U.S.” *Lueck, supra*, 236 F.3d at 1148. Still, the *Lueck* court approved of the lower court’s reasoning that if it kept the case, the court would “likely need to apply and interpret [unfamiliar] New Zealand law.” *Id.* at 1148, n. 6. See also *Leetsch v. Freedman*, 216 F.3d 1100, 1104 (9th Cir. 2001), (“in addition to applying unfamiliar German law, the district court would be required to translate a great deal of that law from the German language”). Therefore, it may be useful to inform the court which country’s law will be applied as to liability, damages and evidence including matters of privilege. In California, choice-of-law is determined by a three-step “governmental interest” analysis. See *Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000).

FNC Motion May Be Brought Late

A motion to dismiss or stay pursuant to *forum non conveniens* arises under the common law and need not be brought at the time of responding to the complaint, unlike an F.R.C.P. 12(b)(2) motion based on lack of personal jurisdiction. In fact, judges sometimes encourage the parties to first perform whatever discovery is necessary to allow the court to make an informed decision regarding the importance and location of witnesses and other evidence, and the relative burden to the parties of litigating in the U.S. forum. Therefore, the plaintiff’s bottom line can be hurt badly by a successful motion to dismiss under *forum non conveniens*. Filing and service fees, mandatory court appearances, and compliance with local pleading and

disclosure rules will seem very expensive if the plaintiff must ultimately start over in another country.

First See What the Contract Says About Forum

Whether plaintiff or defendant, do not forget that a valid forum-selection clause will trump even the strongest argument based on personal jurisdiction or *forum non conveniens*. But the forum-selection clause must be specific. See *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989) (When the term “venue” rather than “jurisdiction” is used to specify forum, the clause will be readily enforced); *Hunt Wesson Food, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987) (holding the phrase, “Courts of California shall have jurisdiction over the parties” to be merely permissive); *Silver v. David Morris, supra*, 2008 WL 4058364 at 4 (contract containing the forum-selection clause did not govern the agreements at issue). The court may also reject a forum-selection clause if it was not entered voluntarily, violates a strong public policy of the forum where suit is brought, or if the designated forum lacks a logical nexus to any of the parties. *America Online, Inc. v. Superior Ct.*, 90 Cal.App.4th 1, 12 (2001); *Doe 1 v. AOL LLC*, 2009 WL 103657 (9th Cir. 2009). So foreign litigants should not be dissuaded from challenging jurisdiction or venue simply because a form contract appears to require suit in the United States.

About the Author

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