JURISDICTION OVER FOREIGN PARTIES

An Overview

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I. INTRODUCTION

Principles, including sovereignty, comity, and fairness, which govern the jurisdiction of a court over parties from different countries, mirror those where the parties are from different states. While these principles served the court system well from the age of the horse and buggy to the introduction of jet airplanes, the realities of the digital age, in which the focus of commerce has become more on ideas than tangible products, in which commerce involving tangible products no longer requires physical presence, and in which the means of communication extend far beyond what was comprehended even two decades ago, allowing instant global communication and commerce, challenge the continued adequacy of the traditional principles.

We are experiencing a modernization of society that renders old concepts of jurisdiction archaic. New uniform rules and standards of conduct are therefore needed to meet the realities of the new world of global digital communication and commerce between the states and among countries. Judicial administration of these rules is, in fact, quickly evolving. In today's world, it would be shocking to find a product and its components solely designed, manufactured, sold, used, or serviced in just one country, much less in only one state in the United States. For that reason, a lawyer, who must ethically work to create as much advantage for his/her client as possible for any litigation, must now consider and advance the modern application of historic concepts of judicial power over issues and parties, which is fast becoming the fifth wheel of sophisticated litigation strategy, without risking an accusation of forum shopping. *See Frydrych v. Wentland*, 252 Mich. App. 360, 363-65, 652 N.W.2d 483, 486 (2002).

In order for any court to have jurisdiction over an action, however, it is clear that both statutory and due process requirements must be satisfied. It is the application of those requirements that necessarily drives litigation strategy and that may be in need of some fine-tuning to meet present litigation realities in the digital age.

II. STATUTORY AUTHORITY

Historically, jurisdiction in U.S. courts evolved under circumstances in which the colonies, and then the states, were divided by formidable distances, cultures, economies, and the impact of a civil war. These divisions were further compounded by a constitutional system of federal courts authorized to address federal questions and to act as an umbrella over the state courts in diversity matters.[1] For any U.S. court, whether state or federal, to have authority to hear a case, it must first have jurisdiction over the parties (in personam jurisdiction) and jurisdiction over the issues before the court (subject-matter jurisdiction). It is, of course, possible that more than one court might meet the jurisdictional requirements, and the parties will then attempt to have the case heard in the court that they hope will be most favorable to them.

However, as the courts have noted, the determination of personal jurisdiction is "more of an art than a science," with the answers almost always being in innumerable shades of grey rather than in black and white. *ICP Solar Techs., Inc. v. TAB Consulting, Inc.*, 413 F. Supp. 2d 12, 21 (D.N.H. 2006) (and cases cited). Without question, the greys are even more dominant, their hues even less distinct, in cases involving a

[1] Actual enforcement of a judicial decision from another jurisdiction is a consideration not covered by this article.

defendant's virtual, rather than physical, presence, making the lawyer's task in determining litigation strategy that much more challenging.

A. Forum Choice

The process of choosing the court, from among those that would have jurisdiction over the parties and issues, is called forum selection.[2] One modern strategy for forum selection, in national as well as international commerce, is preemptive contractual selection, which can take the form of a formal contract, post on a website, entry on a bill of sale, label attached to a product, and so forth. However, because of the possibility of an unequal bargaining position if one of the contracting parties is an unsophisticated consumer, it is important that the forum selection be reasonable, obvious, and understandable.

Although the plaintiff makes the initial forum selection, a defendant may, under certain circumstances, defeat the plaintiff's choice. This frequently happens, for example, where the defendant in a civil action brought in state court has the case removed to federal court. *See* 28 U.S.C. § 1441. It can also happen where a defendant prevails on a claim that the chosen forum is unfairly inconvenient to it. See discussion *infra* on forum non conveniens.

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[2] Forum refers to the physical area within the court's authority. For instance, the forum for a state district court may be a county. The forum for a federal district court will be a wider, multicounty region.

1. State Court

The individual states obtain jurisdiction over nonresidents through their long-arm statutes, which may properly reach as far as is consistent with federal constitutional guarantees of due process of law, the requirements of which are discussed *infra*, but no further. *See, e.g.*, *Elk River, Inc. v. Garrison Tool & Die, Ltd.*, 222 S.W.3d 772, 779-80 (Tex. App.—Dallas 2007, pet. denied); *Research Med., Inc. v. Canadian Cardiovascular Prods., Ltd.*, 917 F. Supp. 767, 769 (D. Utah 1996). Their actual reach, however, extends only as far as they explicitly provide. *See Hart v. D.C. Dep't of Employment Servs.*, 843 A.2d 746, 747 (D.C. 2004) (rejecting argument that, despite party's physical absence from the District, he maintained a continuous "economic and virtual presence" sufficient to bring him within the jurisdiction of the Workers' Compensation Act).

In determining whether an action may be brought in a given state, particularly where there are multiple potential defendants, the attorney will need to address which defendants have sufficient presence in, or contacts with, the state, both for purposes of the initial filing of a lawsuit, as well as for possible impleading of additional parties by the plaintiff and/or defendant, either for purposes of assessing the fault of all potential parties or for purposes of bringing in additional sources for payment of any damages judgment. The attorney will also want to investigate which state, if there is more than one that would have jurisdiction over the parties and the issues, has the most favorable law and might have the most favorable juries. If moving the litigation to another, more-favorable, state involves merely filing in the state in which a defendant is incorporated or resides, jurisdiction is assured. If it involves filing in a state in which the defendant merely does

some business, it is a more complicated task and, because the standard involves balancing a number of factors, the court may find that it is without jurisdiction, resulting in lost time and additional expense.

An opinion by the U.S. Supreme Court reversing a state's highest court gives an indication, however, of the limits for attorneys attempting to invoke state jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). In that case, a Colombian corporation had no office in Texas, but had purchased most of its helicopters and had gotten training for its pilots in Texas. It contracted with a Peruvian alter ego of a joint enterprise, which did have offices in Texas, to provide transportation. A helicopter, flown by one of its pilots, crashed, killing American citizens. The Supreme Court held that the Colombian corporation had insufficient presence in Texas to justify jurisdiction. This effectively destroyed the ability of *any* U.S. forum to remedy the common-law complaint for wrongful death.

In *Helicopteros Nacionales*, the plaintiffs had asserted general jurisdiction, discussed more fully, *infra*, over the foreign defendant. The Court specifically found that "presence" required for general jurisdiction,[3] must consist of more than business visits, even when occurring at regular intervals, and more than purchases, even if occurring at regular intervals—rather, presence must be "continuous and systematic." Importantly, the plaintiffs had failed to raise the issue of whether specific jurisdiction[4] may be invoked where the cause of action merely "arises out of" or is merely "related to" the visits to, or purchases made in, the forum state, and the Court, therefore, declined to revisit that question. *Id.* at 418.

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[3] *See* due process discussion *infra*.

[4] *See* due process discussion *infra*.

The Court, likewise, declined to decide whether the state court would have "jurisdiction by necessity."[5] It found that such a doctrine would be a potentially far-reaching modification of existing law that it should not consider in the absence of a more complete record. It was not clear, for example, from the record whether suit *could* have been brought against all the defendants in either of the two foreign countries whose citizens were being sued. *Id.* at 418-19.

Accordingly, in general, a court must evaluate state jurisdiction under a two-part analysis. First, it must evaluate the long-arm statute of the individual state to determine whether it confers jurisdiction. Second, if it does, then the court must still determine whether the requirements of due process have been met under the particular facts of a given case. The lawyer, in developing the litigation strategy, must likewise evaluate those factors as best he or she can in order to maximize efficiency and minimize expense.

2. Federal Court

Federal jurisdiction, like that of the states, is dependent on statutory authorization, which is, similarly, constrained only by due process or other constitutional requirements.

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[5] The courts have found that in certain very restricted circumstances, such as where a defendant has property in the state which can be attached, a court may exercise jurisdiction, even in the absence of minimum contacts, if the defendant is not subject to suit in any other jurisdiction. *See Ultra Trading Int'l Ltd. v. Ham Long Co.*, No. 05-701-HU, 2005 WL 1653724, at *1-2 (D. Or. July 13, 2005) (and cases cited); *see also City of New York v. Permanent Mission of India*, 618 F.3d 172, 176 (2d Cir. 2010) (action on unpaid property taxes); *U.S. Bank Nat'l Ass'n v. Gunn*, CIV.A. No. 12C-04-149FSS, 2012 WL 2553404, at *1 (Del. Super. Ct. May 25, 2012) (foreclosure action). These cases appear to be limited to situations involving *in rem*-type actions. In any event, it is not clear that they would survive the more recent clarifications on what is required for jurisdiction.

To determine if a federal court has jurisdiction, therefore, an attorney must first determine if there is a statutory basis. The most commonly invoked statutory bases are 28 U.S.C. § 1332 (diversity) and 28 U.S.C. § 1331 (federal question), discussed *infra*.[6]

a. Diversity jurisdiction

Diversity jurisdiction gives the federal courts jurisdiction over controversies between the following parties: (1) citizens of different states, whether or not citizens of a foreign state are brought in as additional parties, (2) citizens of a state and citizens of a foreign state (with certain exceptions), and (3) a foreign state, as plaintiff, and citizens of a state or different states. 28 U.S.C. § 1332. It is well established that in order to confer jurisdiction, diversity must be complete within those parameters. *See, e.g.*, *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1298 (5th Cir. 1985); *Nam Soon Jeon v. Is. Colony Partners*, 892 F. Supp. 2d 1234, 1239-40 (D. Haw. 2012).

The Supreme Court has firmly established that diversity jurisdiction is *not* sufficiently broad to support jurisdiction of actions by foreign plaintiffs, because a foreign plaintiff is not a citizen of a state, although a statutory grant of authority might be sufficient under the "arising

[6] There are also a number of other, more specific, statutory provisions giving the federal district courts jurisdiction over certain particular parties and/or subjects, including the following: 28 U.S.C. § 1333 (admiralty); 28 U.S.C. § 1337 (commerce—except as to matter within the exclusive jurisdiction of the Court of International Trade); 28 U.S.C. § 1338 (patents, plant variety protection, copyrights, and trademarks); 28 U.S.C. § 1350 (civil actions by aliens for torts committed in violation of the law of nations or a treaty of the United States). *See also In re TFT-LCD (Flat Panel) Antitrust Litig.*, 785 F. Supp. 2d 835, 839-44 (N.D. Cal. 2011) (discussing application of the Foreign Trade Antitrust Improvements Act and the Sherman Act to commerce with foreign nations). A comprehensive discussion of each of these provisions, however, is beyond the scope of this article.

under" requirement of Article III of the U.S. Constitution. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492 & n.18 (1983); *see also In re Arrowhead Capital Mgmt. LLC Class Litig.*, 712 F. Supp. 2d 924, 929 (D. Minn. 2010); *Aristocrat Techs., Inc. v. High Impact Design & Entm't*, 642 F. Supp. 2d 1228, 1232 (D. Nev. 2009). The Court reaffirmed, however, that even Article III would be insufficient to confer jurisdiction over an action *solely* between two aliens. *Verlinden B.V.*, 461 U.S. at 496; *see also Nam Soon Jeon*, 892 F. Supp. 2d at 1239-40.

The U.S. Supreme Court, in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), determined that, as to nonfederal issues, the substantive law to be applied in a diversity case would be state law. The Court interpreted the word "laws" in 28 U.S.C. § 1652, known as the Rules of Decision Act, to include both statutory and case law, overturning prior cases that had held that federal courts could create a general federal common law instead of applying the laws of the states. Thus, even in diversity cases, state substantive law is applied in litigation of all state law issues, although the Federal Rules of Civil Procedure and the Federal Rules of Evidence govern all "procedural" matters. *See, e.g.*, *Gasperini v. Ctr. for Humanities*, 518 U.S. 415 (1996).

b. Arising under jurisdiction

As noted *supra*, "arising under" jurisdiction is broader than diversity jurisdiction. Nevertheless, it requires an affirmative, governing, federal law, as well as federal authorization for service.

An example is the federal Bankruptcy Code. Pursuant to Rule 7004 under the Bankruptcy Code, a bankruptcy court may exercise personal jurisdiction over any defendant who has been properly served, allowing for nationwide service of process, so

long as jurisdiction comports with other federal laws. *In re Bozel S.A.*, 434 B.R. 86, 97 (Bankr. S.D.N.Y. 2010). The court in that case explained that due process requirements as to cases arising under federal law are governed by the Fifth Amendment and are substantially similar to those under the Fourteenth Amendment, which governs state long-arm provisions, except that the Fifth Amendment looks at contacts with the United States generally, while the Fourteenth looks at contacts with the forum state. *Id.* at 98-99.

In another case, the court explained that, under the Fifth Amendment, the plaintiff is still required to ground its service of process in a federal statute or civil rule. *Battle Foam, LLC v. Wade*, CIV. No. 10-CV-116-SM, 2010 WL 2629559, at *2 (D.N.H. June 29, 2010). Where there is no statutory basis authorizing national service of process, the Federal Rules of Civil Procedure provide that service must be consistent with the relevant state long-arm statute. *Id*. (citing Fed. R. Civ. P. 4(e)).

In *Battle Foam*, the court explained that the jurisdiction analysis thus comes full circle. When there is no statutory authorization for extraterritorial service, the court must look at the state's long-arm jurisdiction provision, even though the claim arises under federal law. The Fourteenth Amendment, which governs state long-arm statutes, therefore acts indirectly in such federal question cases to require application of the minimum contacts requirement, which governs a state's long-arm jurisdiction. *Id.* at *2, *6 (citing *Helicopteros Nacionales* and concluding that the plaintiff failed to point to *any* evidence supporting minimum contacts).

In cases where (1) no state would have jurisdiction and (2) the exercise of federal jurisdiction would not violate due process requirements, the Rules also allow a federal

court to exercise jurisdiction, so long as the case arises under federal law. *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1218 (11th Cir. 2009) (discussing Fed. R. Civ. P. 4(k)(2)). In that circumstance, the court is entitled to invoke the Rule, without having to analyze the laws of all the states, when the defendant contends that he cannot be sued in the forum state and refuses to identify any other state where he *could* be sued. *Id.* at 1218 n.22; *see also Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 655 (2d Cir. 1979) (no way for the court to know whether the defendant would be amenable to suit elsewhere in the world).

3. Jurisdiction by Necessity

To assert jurisdiction by necessity, a plaintiff must show that not all defendants can be sued in a single forum. *Hamad v. Gates*, No. C10-591 MJP, 2010 WL 4511142, at *5 (W.D. Wash. Nov. 2, 2010) (citing *Helicopteros Nacionales*, finding the plaintiff had failed to meet his burden, noting that jurisdiction by necessity is a potentially far-reaching modification of existing law, and declining to create a new federal common law rule); *McCaffery v. Green*, 931 P.2d 407, 414 (Alaska 1997).

4. Removal Jurisdiction

It is noted that removal jurisdiction is a derivative form of jurisdiction and that removing a case to federal court does not constitute a waiver of objection to jurisdiction. *Concord, Inc. v. Dakota State Bank*, 595 F. Supp. 678, 679-80 (D. Minn. 1984). Accordingly, where the state court in which a case was brought lacks jurisdiction, the

federal court can acquire none upon removal, even in cases where it would have had jurisdiction over a like suit had it originally been brought in a federal court. *Id.* at 680.

In choosing a forum for litigation, whether in drafting a contract or filing an action, a lawyer must determine at least whether the potential claim, or claim, arises out of state or federal law. If it arises under state law and is to be brought in state court, the lawyer must determine whether the governing long-arm statute of the preferred state is sufficient to confer jurisdiction, and, if it has to be brought in federal court, whether there will be complete diversity. If the claim arises under federal law, the lawyer must determine whether there is a federal statute conferring jurisdiction and, if not, whether the governing long-arm statute is sufficient to confer jurisdiction. Because these matters, as noted, are often in the grey, and especially so where a defendant's presence is virtual, there is a need for clarification and a broadened interpretation of the rules in order to meet the jurisdiction challenges of the digital age.

5. Need for Broadened Interpretation

The argument made herein is that the Court, in *Helicopteros Nacionales*, 466 U.S. 408, should have considered the defendant's general national "presence" while using the U.S. economy, thereby allowing federal court jurisdiction if there was no state court with jurisdiction. This authority would have existed under Federal Rule of Civil Procedure 4(k)(2), but for the requirement under the Rule that the claim arise under "federal law." *See Graduate Mgmt. Admission Council v. RVR Narasimba RAJU*, 241 F. Supp. 2d 589 (E.D. Va. 2003). In that case, the second element of Rule 4(k)(2), that the claim arise

under federal law, was readily shown because Graduate Management's five claims—copyright infringement, trademark infringement, dilution, cyberpiracy, and unfair competition—all arose under, and were expressly predicated on, federal statutes.

The problem is that the logic of *Tompkins* requires the choice of state law over federal law any time a claim does not arise under federal law, and *Helicopteros Nacionales* effectively precludes any competent U.S. court—state or federal—from exercising jurisdiction to remedy wrongs that are not addressed by federal statute, but would state a claim under state law, when perpetrated on U.S. citizens by a foreigner, unless there is a state-specific basis for state court jurisdiction. This leaves a large escape hole from accountability for foreign defendants that might have the minimum contacts required with the United States, as a whole, but not with any one individual state.

One potential remedy would be to interpret "federal law," for purposes of Rule 4(k)(2), to include the adoption of a state's common law as part of federal law in litigation where the defendant has taken advantage of the U.S. economy yet has avoided the *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), requirement for a presence in any one state. Could not the federal court interpret 28 U.S.C. § 1652, which provides that the "laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply," as an adoption of state common-law decisions as federal law, at least for purposes of that Rule? Such an interpretation of Rule 4(k)(2) would, moreover, embrace accepted principals of legal interpretation by avoiding an absurd result. Veronica M. Dougherty,

Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation, 44 Am. U. L. Rev. 127 (1994).

In the alternative, could not Congress enact a provision to remedy the loophole? The contrary, and current, situation denies any U.S. court the power to litigate issues arising from or related to the exploitation of the U.S. economy by foreign entities that are not subject to state court scrutiny when the wrong did not arise under federal law.

B. Place of the Conduct

Where the injury or wrong occurred within the United States, U.S. courts, either state or federal, would have jurisdiction so long as other jurisdictional prerequisites are met. There is a presumption against the exercise of extraterritorial jurisdiction by U.S. courts, state or federal, however, over conduct that occurred in the territory of a foreign sovereign. *See Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1662 (2013). The presumption serves to prevent clashes between the nations, particularly in matters that would carry foreign policy consequences. While Congress has the authority to confer extraterritorial jurisdiction, it must do so in clear terms and only where it has the authority to directly regulate the conduct at issue and to provide relief. *Id.* at 1664-65 (comparing jurisdiction under Title VII and the Alien Tort Statute ("ATS")).

In *Kiobel*, the Court concluded that there was nothing in the ATS to indicate an intent to confer extraterritorial jurisdiction over claims by aliens involving conduct that occurred on foreign soil. The Court rejected the argument that the law conferred jurisdiction over "transitory torts" that arise on foreign soil, as well, stating that the only

justification under that doctrine is a well-founded belief that the conduct stated a cause of action in that place, while the question under the ATS was whether a cause of action arises under U.S. law to enforce a norm of international law. *Id.* at 1666. That issue had already been settled, allowing causes of action only where the international law norms are "specific, universal, and obligatory." *Id.* at 1665. The Court was particularly concerned that accepting a broader view would imply that other nations could, similarly, hale U.S. citizens into their courts for conduct on U.S. soil, simply by applying general international law norms. *Id.* at 1669.

By contrast, in a case involving trademarks and names, the court concluded that it had authority for extraterritorial jurisdiction, pursuant to 28 U.S.C. § 1338 and the Lanham Act. *Aristocrat Techs.*, 642 F. Supp. 2d at 1234-38. The court noted that Congress has the power to prevent unfair trade practices by U.S. citizens engaging in foreign commerce, even where some acts have been taken outside the territorial limits of the United States, as long as (1) the alleged violations have created some effect on American foreign commerce, (2) which were sufficient to present a cognizable injury under the federal statute, (3) where the interests of American foreign commerce are sufficiently strong in relation to the interests of other nations to justify the assertion of U.S. jurisdiction. As to the last criterion, the court outlined factors that should be considered in balancing the interests, including the degree of law or policy conflict, the nationalities and places of operation of the parties, expectations for compliance, the degree of purpose to harm or affect American commerce and its foreseeability, and the relative importance of the domestic and foreign conduct alleged. *Id.* at 1236. In that

case, the court concluded that the balance lay in favor of U.S. jurisdiction, notwithstanding that not all parties had significant contacts to the United States, that some conduct occurred outside the United States, and that there might be a conflict with Venezuelan law. *Id.* at 1237; *cf. In re Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712 (D.N.J. 2007) (concluding that level of conduct within United States was insufficient to confer jurisdiction over non-U.S. purchasers' claims under federal securities laws); *see also Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (restriction of jurisdiction).

III. DUE PROCESS REQUIREMENTS

The due process analysis as it relates to jurisdiction is primarily concerned with protecting the liberty interests of nonresident defendants—not those of plaintiffs. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980). The analysis requires consideration of two factors: first, whether the defendant has sufficient contact with the territory (the minimum contacts inquiry) and, second, whether the exercise of jurisdiction over a person having sufficient contacts would be reasonable (the reasonableness inquiry). *E.g.*, *Bozel*, 434 B.R. at 97. The analysis is essentially similar whether the forum is the United States or a particular state, although the former looks at contacts within the entire United States and is governed under the Fifth Amendment, while the latter looks only to contacts within a given state and is governed under the Fourteenth Amendment. *Id.*

A. Minimum Contacts

A given court has authority over parties that have a "presence" within its forum. Generally, presence requires purposeful contact of the defendant itself with the forum jurisdiction and will not be satisfied by unilateral contacts of third parties or contacts by the defendant that are random, isolated, or fortuitous. *Elk River*, 222 S.W.3d at 779. Presence is, thus, determined by "contact" with the forum, but the nature and extent of the contact requirement depends on a number of other factors. As a general rule, jurisdictional requirements can be satisfied, for purposes of specific jurisdiction, where the claims before the court are related to the party's activity in the forum, and the party has presence in the forum, as defined by minimum contacts requirements, and, for purposes of general jurisdiction, where the claims before the court are not related to the party's activity in the forum, but the party has a continuous presence there.

The problem, of course, is that when the rules governing jurisdiction were formulated, the only kind of meaningful presence was physical presence. *See Bancroft & Masters, Inc. v. Augusta Nat'l Inc.,* 223 F.3d 1082, 1086 (9th Cir. 2000) (engaging in commerce with residents of forum state is not, without more, activity that approximates *physical presence* within the state). With the advances in technology in today's world, virtual presence can be just as meaningful, just as relevant, as physical presence.

Relying on the language from *International Shoe*, 326 U.S. 310, one court has stated that it has never been doubted that minimum contacts may be established by a defendant's *virtual presence* in the jurisdiction. *SEC v. LovesLines Overseas Mgmt.*, Misc. No. 04-302 (RWR)(AK), 2007 WL 581909, at *2 (D.D.C. Feb. 21, 2007); *see also Baig v. Coca-Cola*

Co., No. 08 C 4206, 2009 WL 1470176, at *5 (N.D. Ill. May 27, 2009) (noting lack of either physical or virtual presence in state and lack of business relationship with other party or any other entity in state), *reconsideration denied*, No. 08 C 4206, 2009 WL 2371535 (N.D. Ill. Jul 28, 2009); *cf. Hart*, 843 A.2d at 747 (in a case involving a question of jurisdiction over a plaintiff, the court deferred to a director's reasonable interpretation of the statutory language as referring to the duration and frequency of an employee's actual physical presence rather than his virtual presence). Recently, however, the Supreme Court declined to address the issue, finding that the case before it did not present the questions of "whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State." *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014). Unfortunately, those are the very questions that need to be answered for the Internet age.

1. Generally

As noted *supra*, specific jurisdiction refers to jurisdiction over causes of action that either arose from or are related to a defendant's actions within the forum, while general jurisdiction refers to the power to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose. *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.15 (1985); *Oldfield*, 558 F.3d at 1221 n.27. For both categories, there is a requirement for certain minimum contact, or contacts, "with the forum state," as opposed to mere contact with the person claiming injury. The nature and extent of contact required in order to support jurisdiction differs, however, as to specific and general jurisdiction.

a. General jurisdiction

The standard for establishing general jurisdiction is, appropriately, quite high. *Brooks v. Scott*, No. C09-758-RSL-JPD, 2010 WL 2132064, at *3-4 (W.D. Wash. Apr. 9, 2010), *report and recommendation adopted,* No. C09-758-RSL, 2010 WL 2102823 (W.D. Wash. May 25, 2010). The U.S. Supreme Court addressed the test for presence that is necessary for a court's authority to exercise personal jurisdiction over a party in *International Shoe*, 326 U.S. 310.[7] In that case, the defendant did not have an office, nor did it store inventory in the forum. The salesmen would enter the territory of the forum to take orders but did not live there. The Court determined, however, that there were sufficient facts to support general jurisdiction in a lawsuit seeking the payment of state unemployment tax. The Court established the test of "continuous and systematic" presence by a defendant purposefully availing itself of the benefits and privileges of doing business in the forum jurisdiction, and that has been the backbone of jurisdictional issues ever since.

In today's modern commerce involving Internet actions and transactions, "presence" can be a complex issue. In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), in which the issue was actually specific jurisdiction,[8] the court adapted the standard under *International Shoe* to the new digital environment of

[7] Authorities failing to find necessary presence include *Bowles v. Ranger Land Sys.*, No. 12-51255, 2013 WL 2666731 (5th Cir. June 14, 2013); *McFadin v. Gerber*, 587 F.3d 753 (5th Cir. 2009), *cert. denied*, 562 U.S. 827, 131 S. Ct. 68, 178 L. Ed. 2d 23 (2010); *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602 (5th Cir. 2008); and *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) (distinguishing *Calder v. Jones*, 465 U.S. 783 (1984)).

[8] *See* discussion *infra*.

the Web by crafting a "sliding scale test" for determining the sufficiency of a defendant's presence. While some courts have applied the *Zippo* sliding scale test to questions of general jurisdiction, as well,[9] other courts have found its application to be arbitrary.

The Seventh Circuit has been consistently hesitant to fashion a special jurisdictional test for virtual, Internet-based, cases, concluding that "[u]sing a separate test for Internet-based contacts would be inappropriate" because the traditional minimum contacts analysis "remains up to this more modern task." *Telemedicine Sols. LLC v. WoundRight Techs., LLC*, 27 F. Supp. 3d 883, 891 (N.D. Ill. 2014) (citing *uBid, Inc. v. The GoDaddy Grp., Inc.,* 623 F.3d 421, 431 n.1 (7th Cir. 2010)). Under Seventh Circuit case law, the relevant inquiry essentially "boils down" to whether the defendant has purposely exploited or in some way targeted the forum state's market. *Id.* (and cases cited); *see also ICP Solar Techs.*, 413 F. Supp. 2d at 21 (looking at purposeful efforts to target the state's retail market).

The Eleventh Circuit has noted that simply applying the traditional analysis to Internet activity would require looking at (1) whether the defendant directed Internet activity into the forum, (2) whether an Internet contact arising therefrom gave rise to the cause of action, and (3) whether the exercise of jurisdiction over the defendant would be constitutionally reasonable. *Oldfield*, 558 F.3d at 1220 (citing A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-*

[9] Federal courts sitting in Texas, for example, have adopted the *Zippo* rationale. *Mieczkowski v. Masco Corp.*, 997 F. Supp. 782 (E.D. Tex. 1998); *Mink v. AAAA Dev. LLC*, 190 F.3d 333 (5th Cir. 1999). *See generally* Eric C. Hawkins, *General Jurisdiction and Internet Contacts: What Role, If Any, Should the* Zippo *Sliding Scale Test Play in the Analysis?*, 74 Fordham L. Rev. 2371 (Mar. 2006).

Mediated Contacts, 2006 U. Ill. L. Rev. 71, 86-103 (2006)).

In *Oldfield*, the court concluded that the foreign defendant's Internet contacts with the United States were related to the plaintiff's claim only in the sense that but for the availability of the website, the plaintiff would not have traveled to Costa Rica; boarded the fishing boat, which was not owned by the defendant; and suffered an injury. The court stated the question as "whether the injury Oldfield suffered—while aboard a fishing vessel that Pueblo neither owned nor operated—was a foreseeable consequence of his viewing the Parrot Bay Village website, reserving a room at the resort, and arranging for a fishing trip run by someone else." *Id.* at 1223. The court found that, thus stated, it was obvious that the connection was too remote to satisfy the relatedness requirement. *Id.*

The *Oldfield* formulation, however, reflects the test for *specific* jurisdiction, implicitly implying that general jurisdiction cannot be based on virtual presence. This is consistent with the Supreme Court's recent holding in *Daimler* that the test for jurisdiction over a foreign corporation is whether its "affiliations" with the state are so continuous and systematic as to essentially render it "at home" in the forum. 134 S. Ct. at 761 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915, 919, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796, 803 (2011)); *see also Teva Pharm. Indus. v. Ruiz*, 181 So. 3d 513, 516-22 (Fla. Dist. Ct. App. 2015) (citing *Daimler* and *Goodyear* and remanding for due process minimum contacts determination on specific jurisdiction), *reh'g denied* (Dec. 8, 2015). Whether a defendant can be considered "at home" in a given forum appears to depend, in part, on whether the defendant is a corporation or an individual.

i. Corporations

Although one federal district court has stated that virtual presence that approximates physical presence, or being "at home" within the state, justifies the exercise of general jurisdiction, it also noted that the kinds of facts to be considered include the location of control-group offices, the location of corporate records, and the location of corporate operations supervision. *Sensory Techs., LLC v. Sensory Tech. Consultants, Inc.*, No. 1:13-CV-834-SEB-DKL, 2013 WL 5230700, at *3 (S.D. Ind. Sept. 17, 2013) (concluding there was insufficient evidence to support general jurisdiction); *Prakash v. Altadis U.S.A. Inc.*, No. 5:10CV0033, 2012 WL 1109918, at *30-31 (N.D. Ohio Mar. 30, 2012) (same). The location criteria are, of course, ultimately, simply indicators, again, of physical presence.

ii. Individuals

In a case involving a foreign individual, another federal court found that the individual's contacts were sufficiently continuous and systematic to justify the exercise of general jurisdiction. *Bozel*, 434 B.R. at 97-100. The court concluded that the facts that the individual was listed as the registered agent, director, or managing member of three corporate entities in the forum state, that his official professional address was within the forum, that meetings were held in the forum state, and that he had opened a bank account in the state were sufficient to establish general jurisdiction, even though he was not always physically present when conducting business. The most important fact, in the court's view, was that the individual had purposely availed himself of the protections afforded by United States law by signing and filing a bankruptcy petition in the state. *Id.* at 98-99.

Clearly, in that case, there was a significant physical presence, even if it was not continuous. It appears that, although the courts state that general jurisdiction can be based on virtual presence, they are exceedingly reluctant to actually find general jurisdiction without at least some facts showing physical presence, as well.

b. Specific jurisdiction

As noted, specific jurisdiction refers to jurisdiction over causes of action that either arose from, or are related to, a defendant's actions within the forum. A single act or transaction by a defendant in a foreign state can be sufficient to subject that defendant to a suit there for damages arising therefrom where the defendant has purposefully conducted activity within the forum and, where a single act is insufficient, specific jurisdiction can still be based on the totality of contacts. *Willbros USA, Inc. v. Certain Underwriters at Lloyds of London*, 2009 OK CIV APP 90, ¶ 19 & n.14, 220 P.3d 1166, 1172 & n.14. The totality of contacts when the injury arises from one of those contacts may, thus, be sufficient to support specific jurisdiction, even if it is insufficient to support the "presence" necessary for general jurisdiction. Where an injury arises out of an Internet contact, rather than from the unrelated activity of a defendant who just happens to have an Internet presence, specific jurisdiction should clearly apply, no less than it would from an injury arising from conduct involving physical presence.

In *Zippo*, contracts were made almost exclusively over the Internet. The company had no offices, employees, or agents present in the forum. Advertising was done through the Internet. The court set out a sliding scale for determination of the necessary presence

for court jurisdiction, with clear indicia of doing business over the Internet within the jurisdictional territory of the court, such as transfer of files and contracts with residents, at one end; merely passive posting of information on the Internet, such as advertisement, without interaction, at the other end; and varying degrees of interaction on the website in between. Under the *Zippo* standard, the doing of business is sufficient to support specific jurisdiction; mere advertisement is not; and apparently everything in between requires balancing of all the circumstances, which makes it very difficult for lawyers to determine whether jurisdiction will lie in the in-between circumstances.

Other courts have similarly categorized websites that are fully interactive and used for transacting business as supporting jurisdiction; websites that allow only exchange of information between a potential customer and a host computer as those as to which jurisdiction is determined by the degree of interactivity; and passive sites used only for advertising, as failing to support jurisdiction. *Elk River*, 222 S.W.3d at 781.

As noted, the Supreme Court recently, in *Walden*, declined to address the issue of how virtual presence might translate to minimum contacts. It did, however, revisit the issue of minimum contacts for purposes of specific jurisdiction generally, clarifying that the conduct alleged must connect the defendant not just to a plaintiff within the forum, but to the forum itself in a "meaningful way." 134 S. Ct. at 1123-24. In so doing, the Court reaffirmed its decision in *Calder v. Jones*, 465 U.S. 783 (1984), while, at the same time, curtailing expansive interpretations of the *Calder* "effects test," which applies in tort cases, as discussed below. *Id.*; *see also Bittorrent, Inc. v. Bittorrent Mktg. GMBH*, No. 12-CV-02525-BLF, 2014 WL 5773197, at *5-6 (N.D. Cal. Nov. 5, 2014) (citing and discussing *Walden*).

Since, in most cases, a defendant's conduct involves an interaction with an individual, as opposed to the state, it is difficult to untangle exactly what is required to connect the conduct with the *state* for purposes of jurisdiction. In post-*Walden* cases, however, the courts have continued to apply *Zippo* in the context of virtual contacts. In one case, citing *Walden*, the court noted that personal jurisdiction is generally proper where a defendant has conducted online business with forum residents or directed business into the forum. *D.light Design, Inc. v. Boxin Solar Co.*, No. 13-CV-05988-EMC, 2015 WL 7731781, at *2 (N.D. Cal. Dec. 1, 2015) (finding no bar to jurisdiction) (and cases cited). By contrast, in another case, the court concluded that a single posting from and to a different jurisdiction, where the website did not allow users to enter into contracts, was insufficient to support jurisdiction. *Orton v. Pines*, CIV.A. No. G-15-25, 2015 WL 1637863, at *4-5 (S.D. Tex. Apr. 13, 2015).

The requirements for jurisdiction, it should be noted, also seem to be specific to the type of claim brought, thus further complicating the analysis required by the lawyer.

2. Requirements Based on Type of Claim

a. Contract claims

In cases arising out of contracts, it is clear that where a defendant purposefully conducted activities within the state, personal jurisdiction is not defeated by lack of physical presence and the court would have specific jurisdiction. *See, e.g.*, *Willbros*, 2009 OK CIV APP 90, ¶ 22, 220 P.3d at 1173. In that case, the court found that visits to the state and the stream of communications were sufficient—in fact, the court stated that calls and letters alone may sufficient.

In another case, the court noted that formation of a contract is ordinarily just an intermediate step between business negotiations and the execution of the agreement of the parties. *Research Med.*, 917 F. Supp. at 771. In *Burger King Corp.*, which involved a contract issue, the Supreme Court had outlined four factors for consideration in determining the minimum contacts question: (1) the course and location of prior negotiations, (2) the place and nature of contemplated future consequences, (3) the location and extent of future contacts under the terms of the agreement, and (4) the actual course of dealing. *Id*. at 771-72 (citing *Burger King Corp.*, 471 U.S. at 479). All of those cases pre-date *Walden*, however.

In a post-*Walden* case, after reviewing *Walden* and other cases, the court determined that extensive e-mail and telephone communications between the parties did not suffice for jurisdiction where the communications had no relation to the forum state as a state, it was not alleged that any business was to be conducted in the state, and there was no evidence that the defendant had any physical presence in the state or a history of sales there, or any other, unrelated, contacts with the state such as might support general jurisdiction. *N.A. Water Sys. ex rel. Veolia Water Sols. & Techs. N. Am. Inc. v. Allstates Worldcargo, Inc.*, No. 2:13-CV-1507, 2014 WL 5022536, at *3 (W.D. Pa. Aug. 12, 2014). Moreover, as to specific jurisdiction, the court seemed to indicate that a contract, without more, is not enough; that contract contacts must be initiated by the defendant; that communications in negotiating a contract may be relevant, but they are not determinative; and that the physical aspects of the contract, such as manufacturing, shipping of merchandise, or other performance, must occur within the forum state. *Id.* at *4-5 (and

cases cited). Because none of the work under the contract was to be performed in the forum state, and because the claim arose from allegations of insufficient packaging in Mexico and damage during transportation of equipment from Mexico to different state, the court found no basis for specific jurisdiction.

Thus, while contracts entered into over the Internet should be essentially equivalent to those formed through calls and letters, the contract alone may now be insufficient, requiring, again, a consideration of multiple factors which makes it difficult for a lawyer to determine whether a particular court will find jurisdiction.

b. Tort claims generally

Normally, personal jurisdiction over tort claims requires significantly fewer "forum contacts" than are required for contract claims, so long as it was the forum contacts that directly caused the injury. *Research Med.*, 917 F. Supp. at 771 n.1. The analysis of specific jurisdiction in actions involving tort claims generally applies the "effects" test derived from *Calder*, which evaluates whether a defendant purposefully directed his activities at the forum by (1) committing an intentional act, (2) that was aimed at the forum state, (3) knowing that it was likely that harm would be suffered in the forum state. *Williams Bus. Servs., Inc. v. Waterside Chiropractic, Inc.*, No. C14-5873 BHS, 2016 WL 2610249, at *3 (W.D. Wash. May 6, 2016) (citing *Calder* and *Walden*); *see also Oldfield*, 558 F.3d at 1221 n.28 (the Eleventh Circuit has noted that while the usual minimum contacts test is applicable to negligence claims, the test is different in the case of intentional torts, in which the "effects" test applies).

In a post-*Walden* case, the *Williams* court noted that some district courts have concluded that *Walden* implicitly overruled *Washington Shoe* or, at least, put its continuing validity in question. *Williams Bus. Servs.*, 2016 WL 2610249, at *4 (and cases cited). The court reiterated that the focus must be on a defendant's contacts with the forum state, not with a particular resident of the state. Finding that there was an absence of any evidence regarding the defendant's contacts with the state, aside from its contacts with the plaintiff, or of any intentional act aimed at the state, and that there was, therefore, no basis for specific jurisdiction.

Where an intentional tort is involved, the tortfeasor has affirmatively established minimum contacts with the state in which the injury occurred if it knew at the time that the victim would be injured in that state. *Coblentz GMC Freightliner, Inc. v. Gen. Motors Corp.*, 724 F. Supp. 1364, 1369-70 (M.D. Ala. 1989), *aff'd*, 932 F.2d 978 (11th Cir. 1991). In the typical intentional tort case, it is both fair and reasonable to hale the tortfeasor to the victim's home forum. *Id.* at 1371-72.[10]

In *Panavision*, the court interpreted the requirement that a defendant must have taken a deliberate action toward the forum state to include efforts purposefully directed

[10] There are, of course, special cases, subject to somewhat different analyses. For example, in *Bittorrent*, the court noted that cybersquatting has always been subject to a different personal jurisdiction analysis, in which courts routinely exercise specific jurisdiction where the defendant's alleged conduct "amounts to a scheme targeted at a trademark owner designed to extort money from the mark owner for domain names that capitalize on typographical errors and user confusion." 2014 WL 5773197, at *6 (citing *Facebook, Inc. v. Banana Ads LLC,* No. CV 11-03619-YGR (KAW), 2013 WL 1873289, at *4 (N.D. Cal. Apr. 30, 2013) (conduct was aimed at Facebook *and* the forum)). These cases all relied on the test set out in *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1318-24 (9th Cir. 1998), *holding modified on other grounds by Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

toward forum *residents*. 141 F.3d at 1320. In that case, it found the alleged scheme to extort money by registering the plaintiff's trademarks as the defendant's domain names was sufficient. *See also Telemedicine*, 27 F. Supp. 3d at 891 (issue is whether the defendant purposefully exploited or targeted the forum state's market). At least one court has concluded that the *Panavision* analysis still stands, even after *Walden*. *Bittorrent*, 2014 WL 5773197, at *6.

c. Products liability claims

In the case of products liability claims, the courts have recognized that "foreseeability" of an effect in a particular place is not sufficient to satisfy due process, rather the defendant's conduct and connection with the jurisdiction must be such that it should reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp.*, 444 U.S. at 297; *Coblentz GMC/Freightliner*, 724 F. Supp. at 1368. Thus, mere purchase of a product, or other unilateral activity, by the plaintiff is insufficient to establish minimum contacts between the defendant and the place of the activity.

Personal jurisdiction in products liability cases may be acquired under the "stream of commerce" doctrine, which provides jurisdiction when a manufacturer or distributor delivers products into the stream of commerce, seeking to serve the market in the forum state and with the expectation that the products will be purchased by consumers in the forum jurisdiction. *World-Wide Volkswagen Corp.*, 444 U.S. at 298. The doctrine establishes only specific jurisdiction, however. *Elk River*, 222 S.W.3d at 781 (no jurisdiction in Texas, where accident occurred in Nebraska and product was placed into commerce in Canada).

Lawsuits against manufacturers of unreasonably dangerous products (because of their design, manufacturing, or marketing) can sometimes be revived by escaping unfavorable law in a state or foreign country by a selection of another forum. In today's web commerce, companies might have in personam presence in almost all jurisdictions if their sites are interactive enough.

3. Analysis of Presence Requirements

The opinions concerning personal jurisdiction are extremely divergent in logic and outcome, even though it is rare that the standards established in *International Shoe*, and if the Internet is involved, in *Zippo*, will not be referenced. An authoritative work that collects cases on requirements for "presence" necessary for general or specific jurisdiction is Eric C. Hawkins, *General Jurisdiction and Internet Contacts: What Role, If Any, Should the* Zippo *Sliding Scale Test Play in the Analysis?*, 74 Fordham L. Rev. 2371 (Mar. 2006). Although it provides a well-reasoned analysis on the new issues of jurisdiction among the states, its logic falters somewhat in its conclusion. The point is made that specific jurisdiction can be determined through the *Zippo* sliding scale, but that there is a split among jurisdictions on applying *Zippo* to general jurisdiction. This is undoubtedly true. The author of that article argued that using the sliding scale in determinations related to general jurisdiction can be a burden on commerce and potentially an injustice to foreign parties, so the traditional requirement that a "defendant's contacts with the forum [be] sufficiently continuous, systematic, and substantial to justify subjecting the defendant to the suit in the forum on an unrelated

matter" should be applied. This, however, appears to raise a distinction without a difference. After all, the *Zippo* query as to whether a virtual presence is interactive or merely passive, itself, addresses the question of significant, continuous presence in both website and nonwebsite cases.

The Third Circuit has addressed the limits and scope of *International Shoe* and *Zippo* and of necessary "presence" in the forum. *Toys 'R' Us Inc. v. Step Two SA*, 318 F.3d 446 (3d Cir. 2003). The court supported the right of the plaintiff to discovery where the plaintiff has made the required threshold showing, before a district court dismisses for lack of personal jurisdiction. On the other hand, in *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002), the court concluded that the sliding scale was not well adapted to general jurisdiction, because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous, and systematic contacts required—"while it may be doing business *with* Texas, it is not doing business *in* Texas." *Id.* at 471. The court noted that although the maintenance of a website is a continuous presence everywhere in the world, the contacts of the defendant with the State in the case before it were not substantial. (Note: The court's semantics determining "substantial" is akin to a lover's declaration, "You say you love me . . . but are you in love with me?" The response to the rhetorical distinction can have significant repercussions without the advantage of clear definitions.)

Given the complexity of determining "presence" in modern times which involves actions and transactions by virtual means, it appears that what is needed at this point is a better framework, or set of definitions, to work from in evaluating the question of general

jurisdiction—an adaptation of the initial physical presence requirement that was formulated when actions and transactions were carried out with physical presence, to the reality of modern actions and transactions, which are often carried via virtual presence. The obvious place to start is with the original formulation and what it was intended to achieve.

The initial test required a "continuous and systematic" presence by a defendant purposefully availing itself of the benefits and privileges of doing business in the forum jurisdiction, or purposely targeting a state's retail market. Although much of the discussion has focused on the "presence" statement, physical presence was simply an easy way to measure whether the party had purposefully availed itself of the benefits and privileges of doing business in the jurisdiction or purposely targeted its markets. The seemingly more important part of the test was the purposeful availment part.

It would seem that when a defendant does virtually what would require a systematic and continuous presence if done physically, that should be sufficient to support general jurisdiction. In other words, if a defendant has the virtual equivalent of a local office or sends the virtual equivalent of salespersons into the state on a widespread and continuous basis, such activity should constitute a virtual presence. While this might appear to "expand" the jurisdiction of the courts, in reality it would not, because the statutory requirements still have to be met. It would, however, simplify and clarify the standard by which the due process component of jurisdiction is determined and would bring to that analysis the realities of the Internet age.

B. Reasonableness

Litigation in a foreign state, and especially in a foreign country, is always burdensome for the foreign party—but it is not always *unfairly* burdensome. *Research Med.*, 917 F. Supp. at 772-73. To a great extent, the question of reasonableness is answered by the minimum contacts analysis. *See id.* In addition, however, the courts must ensure that the exercise of jurisdiction comports with traditional notions of fair play and justice.

Generally, that inquiry requires evaluating seven factors, all of which must be balanced, but none of which is determinative. *Panavision*, 141 F.3d at 1323. Those factors are: "(1) the extent of a defendant's purposeful interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum 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." *Id.* (citing *Burger King Corp.*, 471 U.S. at 476-77).

1. Litigation Involving Citizens of a "Foreign" State

A state generally has a manifest interest in providing a convenient forum to its residents for litigating wrongs inflicted by out-of-state actors, as do the injured residents. *Willbros USA*, 2009 OK CIV APP 90, ¶¶ 29-30, 220 P.3d at 1174-75. This interest is especially high where there is no other state that could serve as the forum. *Id.* ¶ 31, 220 P.3d at 1175.

2. Litigation Involving Citizens of a Foreign Country

In addition to the consideration in cases between residents of different states, in cases involving a foreign country defendant, that court is required to consider any unique burdens on the defendant who must defend itself in foreign legal system and the policies, both procedural and substantive, of the other country whose interests will be affected, as well as the interests of the United States in its foreign relations policies. *Bozel*, 434 B.R. at 100-01; *DowElanco v. Benitez*, 4 S.W.3d 866, 871-74 (Tex. App.—Corpus Christi 1999, no pet.). Once minimum contacts have been established, however, the interests of the plaintiff and those of the forum will often justify even serious burdens on an alien defendant. *Bozel*, 434 B.R. at 100-01. At that point, the burden is on the defendant to present a compelling case that jurisdiction would be unreasonable. *DowElanco*, 4 S.W.3d at 873.

Although the courts should exercise great care in extending jurisdiction into the international field, it is only in highly unusual cases that mere inconvenience would rise to the level of a constitutional concern. *Willbros USA*, 2009 OK CIV APP 90, ¶ 27, 220 P.3d at 1174. Even the possibility of conflict with a foreign sovereign is not dispositive, as such a doctrine would effectively prevent suit against any foreign national in a U.S. court. *Id.* ¶ 32, 220 P.3d at 1175. A due process concern is raised only when the burden on a defendant is incommensurate with the protections and benefits received. *Oldfield*, 558 F.3d at 1221 n.29.

On the other hand, actions against foreign sovereigns are governed by the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1330, 1602-1611. Under the Act, a foreign sovereign is generally immune from the jurisdiction of U.S. courts, state and federal,

except under specific exceptions thereunder, including waiver of immunity; actions based on commercial activities in, or having a direct effect in, the United States; and certain other actions. *Verlinden B.V.*, 461 U.S. at 488-89 & n.11. Those actions that are allowed may be brought either in state or federal court. *Id.* at 489.

IV. SERVICE OF PROCESS

A. State Long-Arm Statutes

Requirements for service on nonresidents are set forth in each state's laws, generally in their Rules of Civil Procedure.

B. Federal Rules

There are some rules that allow the court to obtain personal jurisdiction over a defendant beyond the federal court jurisdictional limits, provided that the defendant has a sufficient connection with the forum, including the following:

1. 100-mile bulge: A special 100-mile bulge provision (Federal Rule of Civil Procedure 4(k)(1)(B)) allows for out-of-state service.

2. Third-party defendants: Third-party defendants (Federal Rule of Civil Procedure 14) may be served within the bulge.

3. Indispensable parties: So-called "indispensable parties"—that is, persons needed in the action for just adjudication and whose joinder will not involve subject-matter jurisdiction problems—may also be served if they are within the bulge.

4. Federal question suit: Rule 4(k)(2) allows a federal question suit to be brought against any foreign person or organization who cannot be sued in any state court.

5. Multidistrict litigation: Singular determination of joint issues of common facts for multiple parties

6. Class action: Representatives resolving issues for all members of a class.

Rule 4(f) provides that service on persons in foreign countries may be had by any internationally agreed means reasonably calculated to give notice or any other means not prohibited that comports with due process. *See Stream SICAV v. Wang*, 989 F. Supp. 2d 264, 277-80 (S.D.N.Y. 2013) (extensive discussion of Rule 4).

C. The Hague Convention

Service of process in some cases involving foreign country defendants will be governed by the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965 ("Hague Service Convention"), [1969] 20 U.S.T. 361, T.I.A.S. No. 6638. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988). The Hague Service Convention contemplates service of summonses and complaints by mail directly on citizens of signatory nations, so long as that nation does not explicitly object. *Coblentz GMC/Freightliner*, 724 F. Supp. at 1372-73 (since Sweden had not objected to section applied, service pursuant to Convention, which also comported with Federal Rule 4(i)(1)(D), was not defective); *see also Gurung v. Malhotra*, 279 F.R.D. 215, 217-21 (S.D.N.Y. 2011); *BP Prods. N. Am., Inc. v. Dagra*, 236 F.R.D.

270, 271-73 (E.D. Va. 2006); *Popular Enters. v. Webcom Media Grp., Inc.*, 225 F.R.D. 560, 563 (E.D. Tenn. 2004).

V. FORUM NON CONVENIENS

A motion asserting forum non conveniens can be used to combat the filing of a suit in another state, by requesting the transfer of the case to another state or country, thereby undoing any advantage gained by filing in another jurisdiction. Courts grapple with the equity of such a move. Although the courts give homage to the right of the plaintiff to select a forum, the case may well be transferred unless the transfer would be a death penalty for the cause of action.

In one of only a few Supreme Court decisions to deal with the doctrine of forum non conveniens, the Court decided that federal district courts need not establish jurisdiction prior to dismissing transnational litigation on the basis of forum non conveniens. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). Although narrow in scope, the decision resolved a significant circuit split over the proper application of the forum non conveniens doctrine and has important procedural implications.

In a much earlier case, the Supreme Court first provided federal courts with a nonexclusive list of private factors to consider when determining whether a forum non conveniens motion should be granted. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The Court also set forth the public interest factors to be considered, reasoning that "*[j]ury duty is a burden that ought not to be imposed upon the people of a community which has*

no relation to the litigation." *Id.* at 508. Further, "[i]n cases which touch the affairs of many persons [in an alternate forum], there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only." *Id.* at 509. The relevant public interest factors include (1) the familiarity of the courts with the governing law; (2) the interest of any foreign nation in having the dispute litigated in its own courts; and (3) the value of having local controversies litigated locally. *See also Am. Dredging Co. v. Miller*, 510 U.S. 443, 457 (1994) (stating that what is prescribed for federal courts in terms of forum non conveniens, at least in certain contexts, is not applicable to the states).

The forum non conveniens battle typically will be won or lost at the private interest factor stage, however. These factors get to the heart of the matter: Does it make sense to try this case here? All things being equal, should we not disrupt the plaintiff's choice of forum? Or is this really a foreign dispute that has no business in a U.S. court? The relevant considerations outlined by the Court in *Gulf Oil Corp.* include (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; (3) the possibility of view of premises; and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive. These factors have been rephrased and applied many times by different federal courts.

Courts faced with a forum non conveniens claim are to apply a two-step inquiry: First, they must determine whether an adequate alternative forum exists; second—if it does, the court must balance the public and private factors to determine the more

appropriate forum. *State St. Bank & Trust Co. v. Inversiones Errazuriz, Limitada*, 230 F. Supp. 2d 313, 318-23 (S.D.N.Y. 2002). It is frequently the case that factors asserted by one side will apply equally to the other party, in reverse. *Id.* at 320 n.8.

General differences in the law in the alternative forum will not bar application of the forum non conveniens doctrine *even where the amount of potential recovery is drastically different. Compañia Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F.3d 189, 202 (4th Cir. 2009) (deciding not to pursue a claim in the alternative forum and thereby allowing statute of limitations to run did not make alternative forum inadequate or unavailable), *cert. denied*, 558 U.S. 1112 (2010). Adequacy of the alternative forum generally will be found provided that the plaintiff is not completely deprived of all remedies. *Brokerwood Int'l, Inc. v. Cuisine Crotone, Inc.*, 104 F. App'x 376, 384 (5th Cir. 2004). However, many jurisdictions consider effectively giving a death penalty to a claim by granting a motion forum non conveniens to be unacceptable. *ElcomSoft, Ltd. v. Passcovery Co.*, 958 F. Supp. 2d 616, 618 (E.D. Va. 2013), *reconsideration denied*, No. 2:13CV18, 2013 WL 6705188, at *1 (E.D. Va. Dec. 19, 2013).

When the statute of limitations has expired in an alternative forum, the forum is not adequate, and dismissal for forum non conveniens would be inappropriate. *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312, 316 (4th Cir. 1984); *see also Lynch v. Hilton Worldwide Inc.*, Civ. No. 11-1362 (JBS/AMD), 2011 WL 5240730 (D.N.J. Oct. 31, 2011); *Francois v. Hartford Holding Co.*, Civ. Act. Nos. 2000/0112, 2001/0009, 2010 WL 1816758 (D.V.I. May 5, 2010), *aff'd*, 424 F. App'x 138 (3d Cir. 2011); *D'Elia v. Grand Caribbean Co.*,

Civ. Act. No. 09-cv-1707 (NLH)(KMW), 2010 WL 1372027 (D.N.J. Mar. 30, 2010); *DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796 (4th Cir. 2013); *In re BP Shareholder Deriv. Litig.*, Civ. Act. No. 09-cv-01722-PAB-BNB, 2011 WL 588046 (S.D. Tex. Nov. 23, 2011); *Greene v. Brown & Williamson Tobacco Corp.*, 72 F. Supp. 882 (N.D. W. Va. 1947); *Via v. GE Co.*, 799 F. Supp. 837 (W.D. Tenn. 1992); *Prince Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215 (10th Cir. 1991); *Van Slyke v. Worthington*, 265 N.J. Super. 603, 628 A.2d 386 (Law Div. 1992).

Some courts have conditionally granted forum non conveniens motions subject to the requirement that the defendant waive any statute of limitations defense. *Carijano v. Occidental Petrol. Corp.*, 643 F.3d 1216 (9th Cir. 2011), *reh'g denied,* 686 F.3d 1027 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1996, 185 L. Ed. 2d 865 (2013); *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1381 (11th Cir.) (conditioning dismissal order in favor of Italian forum by requiring defendants to waive statute of limitations defense), *reh'g denied sub nom. King v. Brega*, 347 F. App'x 555 (11th Cir.), *cert. denied sub nom. Forsman v. Cessna Aircraft Co.*, 558 U.S. 881, 130 S. Ct. 324, 175 L. Ed. 2d 138 (2009); *Reed v. Norfolk & W. Ry.*, 635 F. Supp. 1166, 1168 (N.D. Ill. 1986) (recognizing inequity of not allowing plaintiff to reinstate claim in more convenient forum after statute of limitations had run and requiring defendant to waive statute of limitations defense for set period of time). Florida requires that a defendant so stipulate. Fla. R. Civ. P. 1.061(b); *see also Armadora Naval Dominicana, S.A. v. Garcia*, 478 So. 2d 873, 876 (Fla. Dist. Ct. App. 1985) ("[Under Florida law,] [a] dismissal based on [forum non conveniens] is always conditioned upon the defendant's willingness to submit to the jurisdiction of the

foreign court and to waive defenses such as the statute of limitations which would deprive the foreign court of jurisdiction.").

VI. CHOICE OF LAW

A. As Between States

Each state has its own choice-of-laws law. In *Williams v. State Farm Mutual Automobile Insurance Co.*, 229 Conn. 359, 641 A.2d 783 (1994), the court held that the substantive rights and obligations arising out of a tort controversy are determined by the law of the place of injury, or *lex loci delicti*. This position used to be universally accepted, but now far less than half of the American jurisdictions hold to this historic position. Conflicting opinions have addressed this issue. *Lex fori*, the law of the court, and *lex loci delicti commissi*, the law of the place where the tort was committed, have been considered. Forum courts address their laws to determine whether the requested jurisdiction for transfer allows a remedy and whether the use of the laws of the new forum would be fair. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); *see also Myers v. Hayes Int'l Corp.*, 701 F. Supp. 618 (M.D. Tenn. 1988).

The majority of the states' Restatements now modify the *lex loci delicti* law in favor of *terms of interests, significant relationships, and influencing considerations*. *Grant v. McAuliffe*, 41 Cal. 2d 59, 264 P.2d 944 (1953); *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954); *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957).[11] The *Restatement (Second) of Conflict of Laws* ("*Restatement*") enumerates the

[11] One argument that can be made if a lawsuit for damages occurring in Texas

following factors as relevant to the choice-of-law determination:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability, and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Restatement § 6(2) (1971 & Westlaw database updated Oct. 2014).

Section 145 lists the factual matters to be considered when applying section 6 to a tort case. "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most

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is filed in another state is that Texas has abandoned the *lex loci delicti* doctrine, codified in Texas Revised Civil Statutes article 4678, and replaced it with the "most significant relationship test," as enunciated by the *Restatement (Second) of Conflict of Laws* ("*Restatement*") as it relates to causes of action sounding in tort. *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979).

The case of *Sico North America, Inc. v. Willis*, No. 14-08-00158-CV, 2009 WL 3365856 (Tex. App.—Houston [14th Dist.] Sept. 10, 2009, no pet.) (mem. op.), affirmed the abandonment of *lex loci delicti* while discussing a conflicts-of-laws question between Minnesota and Texas addressing the statute of repose. "[T]he law of the state with the most significant relationship to the particular substantive issue will be applied." *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex.), *opinion withdrawn on other grounds and substituted with Smithson v. Cessna Aircraft Co.*, 665 S.W.2d 439 (Tex. 1984). Texas has adopted the standards and factors set forth in sections 6 and 145 of the *Restatement* to determine choice of law in tort cases. *See Gutierrez*, 583 S.W.2d at 318.

Texas follows *World-Wide Volkswagen Corp.*, 444 U.S. 286, holding that the accident site is not determinative for "forum presence" when the place of injury is fortuitous. *See also Torrington Co. v. Stutzman*, 46 S.W.3d 829, 849 (Tex. 2000) (citing Restatement § 145 cmt. *e*).

significant relationship to the occurrence and the parties under the principles stated in § 6." *Id.* § 145(1). "These contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id.* § 145(2). In that regard, the court should consider the following factors:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Id.

A plaintiff is presumed, of course, to have brought its action in the forum whose laws are most advantageous to it. As a general rule, a state has minimal interest in the litigation where none of the parties is a resident of the state and has no interest in affording greater recovery rights to a foreign party than those afforded by that party's home forum. *Frydrych*, 252 Mich. App. at 363-65, 652 N.W.2d at 485-86. In order for the choice of law of a particular state to meet constitutional standards, that state must have sufficiently significant contacts creating a state interest, such that application of its laws will not be arbitrary or otherwise fundamentally unfair. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, *rehearing denied*, 450 U.S. 971, 101 S. Ct. 1494, 67 L. Ed. 2d 623 (1981); *In re Seagate Techs. Sec. Litig.*, 115 F.R.D. 264, 269-70 (N.D. Cal. 1987).

Where a federal court is faced with the choice-of-law issue, it must look to the choice- of-law rules of the forum state on the issue. *Brenner v. Future Graphics, LLC*,

258 F.R.D. 561, 571-72 (N.D. Ga. 2007) (when there is no statute involved, a state may apply its common law, rather than the foreign law).

B. As Between a State and a Foreign Country

As a general matter, the *Restatement* provides that its rules apply to conflicts of laws between a state and a foreign country, as well. Restatement § 10. A state may not, however, extend the effect of its own laws beyond its borders if it would destroy or impair foreign contract rights—even if contrary to local public policy. *Holderness v. Hamilton Fire Ins. Co. of N.Y.*, 54 F. Supp. 145, 147 (S.D. Fla. 1944).

C. As Between the United States and a Foreign Country

The *Restatement* likewise provides that its rules are to apply to conflicts between the laws of nations, although it acknowledges that there may be other factors in a particular case that would lead to a different result. Restatement § 10; *see also Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996 (2d Cir.) (securities action was properly dismissed in favor of an Australian forum when any judgment would have to be enforced in Australia, where alleged fraudulent activity occurred in Australia, and where witnesses and other sources of proof were located in Australia), *cert. denied*, 510 U.S. 945 (1993).

In *Gutierrez*, 583 S.W.2d 312, the court, in rejecting *lex loci delicti*, declared that it would not enforce a foreign law that violates good morals or natural justice or is prejudicial to the general interest of Texas citizens. The parties to that negligence lawsuit resided in El Paso but drove into Mexico and were involved in an automobile accident.

The lawsuit was brought in the United States but was dismissed because the laws of Mexico were so dissimilar from the laws of Texas as to make application impossible.

VII. STATUTE OF LIMITATIONS

One critical reason for the out-of-state filing could be to acquire a better statute of limitations. (For a comparison of the various statutes of limitations, see Nolo, *Chart: Statutes of Limitations in All 50 States*, http://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html (last visited Aug. 15, 2016)).

The statute of limitations of the state in which the lawsuit is filed should apply (*lex fori* and not *lex loci*). *Sun Oil Co v. Wortman*, 486 U.S. 717 (1988). A meritorious lawsuit that could be lost by application of a state's statute of limitations, for example, might still survive by filing it in another jurisdiction. *See also* Charles R. Schwartz, *Conflicts of Law—Shopping for a Statute of Limitation*—Sun Oil Co. v. Wortman, 37 U. Kan. L. Rev. 423 (1989); *Jinks v. Richland County*, 538 U.S. 456 (2003).

Most jurisdictions treat statutes of repose as substantive law, allowing statutes of repose to change to the law of another jurisdiction if the lawsuit is transferred. In contrast, statutes of limitations are treated as procedural and follow the case if it is transferred to another jurisdiction. *California v. Copus*, 309 S.W.2d 227, 231-32 (Tex.), *cert. denied*, 356 U.S. 967 (1958); *also see Cadle Co. v. Wilson*, 136 S.W.3d 350 (Tex. App.—Austin 2004, no pet.) (noting that the difference between statute of limitations and a statute of repose is that a statute of limitations is a procedural device limiting the remedies available from a cause of action, whereas a statute of repose gives rise to a substantive right to be free from

any possibility of liability after a legislatively determined period). Statutes of repose differ from statutes of limitations in that the deadlines imposed by statutes of repose are enforced much more strictly. The operation of statutes of limitations can be avoided or *tolled* by a number of *equitable* factors, such as the *minority* of the injured party or the attempts by a *tortfeasor* to conceal evidence of responsibility.

All statutes of limitations are, in a general sense, statutes of repose, but there are obviously some distinctions between the two. *Bramblett v. Nick Carter's Aircraft Engines, Inc.*, No. 294, 1991 WL 12284 (Tenn. Ct. App. Feb. 7, 1991) (statute of repose is substantive, and statute of limitations is procedural); *White v. Marlin Firearms Co.*, No. 379725, 1996 WL 704378 (Conn. Super. Ct. Nov. 27, 1996) (statute of repose is different from statute of limitations). Some statutes of limitations, for example, begin to run only when the injury complained of is discovered. A statute of repose, by contrast, can cut off a cause of action before it "accrues," before the underlying injury is discovered. *Trinity River Auth. v. URS Consultants, Inc.-Tex.*, 889 S.W.2d 259, 261, 263 (Tex. 1994) ("Unlike traditional limitations provisions which begin running upon accrual of a cause of action, a statute of repose runs from a specified date without regard to accrual of any cause of action," and may "potentially cut off a right of action before it accrues."), *reh'g overruled* (June 22, 1994).

Clearly, while considerations of statutory authority and minimum contacts are paramount in developing a litigation strategy on forum, there are many other factors that a lawyer must evaluate and weigh as well. He or she must also evaluate service of

process rules, the inconvenience of the forum to the defendant, choice of law provisions, and limitation of action laws, hoping to see through the grey lines that the court will see. This can be a formidable task—particularly as to claims involving the Internet. It would be a great improvement to the efficiency, stability and credibility of the judicial system if those lines could be more clearly defined *before* claims are brought.

VIII. ILLUSTRATIVE CASES INVOLVING MONGOLIA

There are few cases on jurisdiction involving Mongolia. In one case involving Mongolia, the court evaluated the effect of the Foreign Sovereign Immunities Act, which provides that foreign states shall be immune from the jurisdiction of the United States courts, unless one of the enumerated exceptions provided under the Act should apply. *Sakhrani v. Takhi*, No. 96-CV-2900(KMW)(RLE), 1997 WL 33477654 (S.D.N.Y. Sept. 10, 1997). Although the case was brought against Takhi, not the government, the court noted that the Act defined a foreign state, in pertinent part, to include any corporate entity whose majority ownership interest is owned by the foreign state. Because the Mongolian government owned sixty-five percent of Takhi's shares at the time, the court concluded that Mongolia was immune in U.S. courts and that Takhi was an instrumentality of the Mongolian government and entitled to immunity under the Act unless one of the exceptions applied. The court looked at two possible exceptions—the waiver exception of §1605(a)(1) and the commercial exception of §1605(a)(2). *Id*. at *3-7.

The court first stated that the waiver exception is to be narrowly construed. It then noted that the contract in issue had been signed in Mongolia and provided that Mongolian

law was to govern disputes or defaults. It concluded that the choice of law provision did not support finding any implied waiver, and certainly not under unambiguous circumstances, as required even when the choice of law is that of a third country. *Id.* at *3-4. On the other hand, since the Act defines commercial activity as either the regular course of commercial conduct or a particular commercial transaction or act carried on in the United States by a foreign state having substantial contact with the United States, the court had no problem finding that Takhi's contract for marketing, sales and distribution of its garment products in the United States easily came within the immunity exception. The court noted that Takhi was acting as a private player in the market, not taking public governmental acts, and that performance would be partly in the United States. *Id*. at *4-5. The court concluded that it, therefore, had subject matter jurisdiction over the case.

Nevertheless, the court concluded that it did not have personal jurisdiction over Takhi because, in addition to subject matter jurisdiction, service of process must be satisfied, and that requirement had not been met. It explained that the Act provides the exclusive means for satisfying service of process requirements, reasonably calculated to provide actual notice. Although the court noted that substantial compliance is sufficient where the defendant receives actual notice and is not prejudiced by the lack of technical compliance, it found that the plaintiff in the case had failed to establish that Takhi had, in fact, received actual notice. *Id.* at *6-7.

In another case, in which a Massachusetts citizen brought an action in Massachusetts for tortious business interference alleging that he had been injured in Massachusetts, the court refused to dismiss in favor of litigation in Mongolia. *Neelon v. Krueger*, 63 F. Supp.

3d 165 (D. Mass. 2014). As an initial matter, the court found that dismissal in favor of Mongolia was unwarranted because the defendants had not met their burden of showing the adequacy of Mongolia's courts. It noted, first, that they had not provided any affidavit or exhibit to show that a claim for tortious business interference was even cognizable in Mongolia, much less from a person familiar with Mongolian law and able to verify its reading. It noted, second, that the defendants had not indicated that they would submit to Mongolian jurisdiction or provided any information about Mongolia's jurisdictional rules, the availability of service of process, or the applicable statute of limitations—or that they would agree to waive any statute-of-limitations defense. *Id.* at 175.

Additionally, the court found that convenience and efficiency did not favor dismissal in favor of litigation in Mongolia. Looking at the private interests involved, the court noted that the defendants had identified no documentary evidence that they believed was located in Mongolia and not available to them or any difficulty in obtaining such evidence. It also noted that, while the number of witnesses in Mongolia was greater than elsewhere, which could support litigation in that forum, there was no forum in which all key witnesses could be compelled to attend, there was no evidence that the witnesses in Mongolia had been asked to appear voluntarily in the case, that many of the key Mongolian witnesses shared knowledge of a single event, and that translators would be necessary in each of the potential fora. In fact, in Mongolia, both parties would have to use translators, risking greater juror confusion and trouble judging credibility. *Id*. at 177.

Finally, the court concluded that there were no public interest factors strongly favoring Mongolia. It noted that there was no evidence as to the relative congestion or

speediness of the Mongolian civil docket, as compared with that in Massachusetts, that the case was not localized in Mongolia, given that the key causes of action arose from statements made in Canada and harm suffered in the United States, and that, while the alleged factual predicate underlying those statements had occurred in Mongolia, Mongolia's interest in the parties and the cause of action was minimal. Finally, the court noted that no party to the litigation was Mongolian, and Mongolian law would not govern the dispute. *Id*. at 177-78. Accordingly, the court concluded that Massachusetts had the stronger interest in the case, that there was no unfairness in asking Massachusetts citizens to serve as jurors in the case, and that Massachusetts would be the less inconvenient forum.

IX. CONCLUSION

Society expands as technology, by its very nature, continues effectively to shrink the historic considerations of distance and differences between societies and cultures and traditional jurisdictions. Decades from now, it will be a matter of curiosity to observe the past territorial drama between different jurisdictions. Much like the *Uniform Commercial Code* helped U.S. commerce rise above differences in business law among the states, courts will migrate toward the reconciliation of local laws. In the meantime, it is the duty of advocates to find ways to maneuver their clients into the best forum for law and political environment. This endeavor is in the hands of the plaintiff's lawyer for the first move in litigation, and then shifts to the defendant's lawyer to mitigate or change the forum advantage acquired by the plaintiff. The considerations, some of which have been addressed *supra*, are many and complex, particularly in the context of Internet activity.