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Jurisdiction Over the Foreign Non-Sovereign Defendant*

RUSSELL J. WEINTRAUB**

If a foreign defendant contests personal jurisdiction, it is likely that the defendant will be asked to submit to discovery concerning its contacts with the forum. There are special problems in ordering a defendant to submit to discovery before deciding that there is jurisdiction over the defendant. These problems are compounded if the defendant claims that the ordered discovery will violate the law of a foreign country. If the defendant's good faith efforts to obey discovery orders on the jurisdictional issue are thwarted by foreign law, it is questionable whether the discovery order should stand or whether any sanction should be imposed on the defendant for noncompliance.

INTRODUCTION

This article explores some problems of obtaining personal jurisdiction over a business organized abroad. The focus is on defendants who are not suable under the Foreign Sovereign Immunities Act of 1976.1 Three issues, in particular, receive attention here.

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1. 28 U.S.C. §§ 1330, 1602-11 (1976). [Thus, this article omits discussion of the special problems of suit under that Act. Most of the issues discussed in this article, however, will also be present in suits under the Act. For example, problems of due process limits on jurisdiction are not removed by the Act. The Act does not
First, recent developments in the law of personal jurisdiction have special relevance for the foreign defendant. Second, it is especially likely that the plaintiff will wish a foreign defendant to submit to discovery on the jurisdictional issue. There are special problems of discovery on this threshold issue. Third, the defendant may claim that discovery will subject the defendant to civil or criminal liability under the law of another country. This impediment to discovery may affect discovery orders and sanctions for failure to comply with those orders.

**Due Process Limitations on Jurisdiction**

The outer limits of personal jurisdiction are marked by the due process clauses of the fifth (federal courts) and fourteenth (state courts) amendments of the United States Constitution. Up to approximately thirty-five years ago, the prevailing theory of in personam jurisdiction was a “power” theory—in order to have jurisdiction over a defendant, the court must be able to exercise physical power over him. *Pennoyer v. Neff* epitomizes this power concept with its statement that a state court can render a valid personal judgment against a nonresident only if he is “brought within its jurisdiction by service of process within the State, or his voluntary appearance.”

The modern development of personal jurisdiction began with *International Shoe Co. v. Washington.* There the United States Supreme Court discarded the old power theory and various fictions that had served as substitutes for that theory. The Court declared that a defendant, though not served within the state, could be subjected to personal jurisdiction if “he [has] certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”

This sounded as though the Court was ready to greatly expand the possibility of obtaining personal jurisdiction over nonresidents. That the Court was moving to extend jurisdiction and minimize the barrier of geographical boundaries was briefly confirmed in *McGee v. International Life Insurance Co.* California was permitted to exercise jurisdiction over a Texas corporation in a suit on the only policy that the Texas defendant had ever

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*2. 95 U.S. 714 (1878).*

*3. Id. at 733.*

*4. 326 U.S. 310 (1945).*

*5. Id. at 316.*

*6. 355 U.S. 220 (1957).*
issued or solicited in California. The court noted that “a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents” and traced this trend to changes in transportation and communication that “have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.”

But McGee represented the high watermark of personal jurisdiction and the tide has been ebbing ever since. Hanson v. Denckla, retreated from the expansive statements in International Shoe and McGee. Florida was forbidden to exercise jurisdiction over a Delaware trustee who had received and acted on instructions mailed from Florida by the settlor of a trust. The trustee had also remitted trust income to the settlor in Florida. Two famous passages from Hanson emphasize the importance of state lines and impose important limits on personal jurisdiction:

However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the “minimal contacts” with that State that are a prerequisite to its exercise of power over him.10

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of a contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.11

The retreat from expansive notions of personal jurisdiction has continued unabated since Hanson, the Court often invoking the famous phrases from the Hanson opinion: “unilateral activity”, “purposefully avails”, “benefits and protections of its laws”. Shaffer v. Heitner placed new limits on the use of quasi in rem jurisdiction, holding that a derivative stockholders’ suit against the directors of a Delaware corporation could not be brought in that state against nonresident directors by exercising quasi in rem jurisdiction over their stock and other corporate rights. The Court expressed doubt whether Delaware had a constitutional basis for personal jurisdiction over the nonresident directors.13

7. Id. at 222.
8. Id. at 223.
10. Id. at 251.
11. Id. at 253.
13. Id. at 216.
cannot be compelled to respond to a derivative stockholders' suit in the state of incorporation, the limits on personal jurisdiction are narrow indeed.\textsuperscript{14}

\textit{Kulko v. Superior Court}\textsuperscript{15} continued the \textit{Hanson} line of cases limiting jurisdiction. A father's acquiescence to his child's desire to move to California to live with the mother was held not to give California courts jurisdiction over the father in a suit to increase support payments. The opinion emphasizes the "unilateral activity", "purposefully avails" language of \textit{Hanson}.

\textit{World-Wide Volkswagen v. Woodsen}\textsuperscript{16} is the latest and perhaps most significant of the cases limiting personal jurisdiction that followed \textit{Hanson}. Plaintiffs purchased an automobile in New York. The following year the family left New York for a new home in Arizona. As they passed through Oklahoma, another car struck their vehicle in the rear, causing a fire which injured the wife and two children. Plaintiffs brought suit in Oklahoma claiming defective design in the placement of the fuel tank. Joined as defendants were the manufacturer, the importer, the regional distributor (who distributed only to dealers in New York, New Jersey, and Connecticut), and the New York retail dealer from whom the automobile had been purchased. The Court held that Oklahoma could not constitutionally exercise jurisdiction over the regional distributor or the dealer, neither of whom conducted activities in Oklahoma.

This result is not very remarkable. What is of special interest is the language in \textit{World-Wide} renewing the call for restrictions on personal jurisdiction. The Court noted that although it was foreseeable that the automobile would cause injury in Oklahoma, this kind of foreseeability would not overcome due process objections:

\begin{quote}
[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there... [Citations omitted]. The Due Process Clause, by ensuring the "orderly administration of the laws," \textit{International Shoe Co. v. Washington},... gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.\textsuperscript{17}
\end{quote}

\textit{World-Wide}'s discussion of foreseeability and predictability has

\begin{footnotes}
\footnote{14. Delaware has, since \textit{Shaffer}, enacted a statute exercising jurisdiction over directors of Delaware corporations in actions related to their duties as directors. 10 Del.C. § 3114 (Supp. 1980). The constitutionality of this statute has been upheld. \textit{Armstrong v. Pomerance}, 423 A.2d 174 (Del. 1980).}
\footnote{15. 436 U.S. 84 (1978).}
\footnote{16. 444 U.S. 286 (1980).}
\footnote{17. \textit{Id.} at 297.}
\end{footnotes}
important implications for the defendant from another country. If the defendant acts abroad it will not be subject to jurisdiction here for the consequences of those acts unless either the effects here are normal or the defendant is engaged in substantial business activities in the United States forum. Take for example injury caused here by a product manufactured abroad. The manufacturer should be subject to jurisdiction here if the item that caused the injury is shipped by the defendant to the United States market in which injury occurs. The manufacturer should also be subject here if it sells the product abroad to a distributor that sells the product here. If, however, the manufacturer's product is sold only abroad and is brought into this country by a buyer, the manufacturer should be subject to jurisdiction only if it conducts substantial business activities in the forum. The Uniform Interstate and International Procedure Act contains a special provision for obtaining jurisdiction over a defendant who causes "tortious injury in this state by an act or omission outside this state." The Act provides for jurisdiction over such a defendant only "if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state." This provision comes close to codifying what World-Wide seems to require. The flaw in this provision is that it draws no distinction between the defendant who ships the product directly into the forum or sells to a distributor for forum sale and a defendant who does not expect its product to reach the forum in the ordinary course of commercial distribution. The defendant whose product is normally sold in the forum should not receive the protection of the additional requirement that it engage "in a persistent course of conduct, or derives substantial revenue" from


20. Jurisdiction is especially justified if the "substantial business activities in the forum" consist of the sale of identical products that the manufacturer did ship into the forum either directly or through a distributor. See Le Manufacture Francaise Des Pneumatiques Michelin v. District Court, 620 P.2d 1040 (Col. 1980); cf. Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507 (4th Cir. 1956) (Judge Sobeloff's hypothetical involving a California tire dealer and a Pennsylvania tourist), cited with approval in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980).


22. UNIF. INTERSTATE AND INT'L PROCEDURE ACT § 1.03(a) (4) (1980).

23. Id.
forum activities if the suit is from claims arising from that product.

*World-Wide* was addressing the interstate product liability suit. There is, however, much reason to extend *World-Wide's* limitations to international jurisdictional problems. It is true that one reason for territorial limits on state-court jurisdiction is missing in the international context. This reason stems from the requirements of federalism, the decent respect for the strongly held policies and concerns of sister states. These requirements are violated if one state exercises jurisdiction over the citizens of another without a reasonable nexus with the defendant or the defendant's course of conduct. This element of federalism is distinct from and in addition to the other reason for territorial limits on jurisdiction—fairness to the defendant. If the defendant's convenience were all that was at issue, a defendant could hardly object to suit in the court of a neighboring state closer to the defendant's home than the nearest court in defendant's home state.

Although the restraints of federalism are absent in a suit against a foreign defendant, the due process requirement of elementary fairness to the defendant remains. Moreover, considerations of international comity fill the gap when federalist concepts are removed. Our courts should not seek jurisdiction that will deprive our system of justice of the decent respect of friendly foreign countries. The harm from judicial overreaching against foreign defendants is likely to be immediate and practical. If the foreign defendant conducts no substantial commercial activities in the United States, the defendant is not likely to have assets here to satisfy a judgment and a substantial unsatisfied judgment is likely to discourage the defendant from future activities here that would place its assets at risk. The “successful” plaintiff, then, will be faced with the necessity of an expensive and difficult attempt to get the United States judgment, based on questionable jurisdictional premises, recognized abroad. As the Ninth Circuit recently said in dismissing a suit against three British defendants for lack of personal jurisdiction, “the foreign-act-with-forum-effects jurisdictional principle ‘must be applied with caution, particularly in an international context.’”

In a suit against a foreign defendant, it is likely that trial will be

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25. Id. at 1344.

in a federal district court. If suit is originally filed in a state court, the defendant will probably remove to federal court. Absent a special federal statute granting jurisdiction over the defendant, such as Section 1330(b) of the Foreign Sovereign Immunities Act of 1976, the federal court's jurisdiction is dependent on the long-arm jurisdiction of the state in which it is sitting. A recent Fifth Circuit opinion raises the question whether the federal court must also follow the state courts' holdings as to proper due process limits on jurisdiction. The federal court cannot be expected to follow a state court beyond what the federal court thinks are proper constitutional limits. But can the federal court cast its due process net further than the state court thinks is proper?

The court in Southwest Offset, Inc. v. Hudco Publishing Co., held that a Texas federal district court had personal jurisdiction over an Alabama buyer of telephone directories printed in Texas by the plaintiff. In doing so, the court first distinguished the leading Texas Supreme Court case, U-Anchor Advertising, Inc. v. Burt. U-Anchor held that due process prevented a Texas court from exercising jurisdiction over an Oklahoma customer of a Texas manufacturer-displayer of advertising signs. The court found more contacts with Texas in Southwest Offset than in U-Anchor. The court, however, went on to state:

"Even if we were to assume arguendo that the facts of this case were closer to those found in U-Anchor, we would not be bound by that court's holding on lack of minimum contacts. This is so because the Texas Supreme Court's holding in U-Anchor was predicated on the due process clause of the United States Constitution, and the federal courts are not bound by state court determinations of what the Constitution requires."

This suggestion that a federal court need not follow state limits on personal jurisdiction when state long-arm process is being used seems very questionable. The state court is unlikely to accede to a federal district or circuit court's views of due process. This will produce the kind of intrastate forum shopping between state and federal courts that has been decried from Erie Railroad

31. 622 F.2d 149 (5th Cir. 1980).
33. 622 F.2d at 152.
34. Id.
v. Tompkins\textsuperscript{35} to Hanna v. Plumer.\textsuperscript{36} The state can decline to exercise personal jurisdiction to due process limits. If the state court wishes to impose its views of constitutional jurisdictional limits on federal courts, it can do so beyond cavil by basing its opinion on the state constitution’s due process clause\textsuperscript{37} or its analogue.\textsuperscript{38}

**DISCOVERY ON THE JURISDICTIONAL ISSUE**

*World-Wide* draws due process limits on jurisdiction to permit “defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”\textsuperscript{39} It is especially likely after *World-Wide* that, when a foreign defendant contests jurisdiction, the plaintiff will wish to obtain discovery from the defendant concerning defendant’s “primary conduct” related to the forum and, therefore, to the jurisdictional issue. On the surface it seems somewhat anomalous to order a defendant to submit to discovery before the court decides that it has jurisdiction over the defendant. On the other hand, the defendant has appeared to contest jurisdiction. The defendant, if it wished, could have stayed away and raised its jurisdictional objections in the form of a collateral attack on the default judgment when enforcement was sought in a sister state\textsuperscript{40} or abroad. In doing so, the defendant would have waived all defenses except lack of jurisdiction.\textsuperscript{41} By appearing and contesting jurisdiction, the defendant grants the court power to bind the defendant by the court's jurisdictional finding.\textsuperscript{42} Therefore, discovery on the jurisdictional issue itself is not beyond the pale. But what is the proper scope of discovery on the jurisdictional issue?

In federal court, when a defendant challenges personal jurisdiction by a 12(b)(2)\textsuperscript{43} motion, the burden of proof is on the plaintiff to establish jurisdiction by a preponderance of the evidence.\textsuperscript{44} Before any discovery is ordered, the plaintiff is required to make a threshold showing of the likelihood of jurisdiction.\textsuperscript{45} After such

\textsuperscript{35} 304 U.S. 64 (1938).

\textsuperscript{36} 380 U.S. 460 (1965).

\textsuperscript{37} Cf. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (California Supreme Court can, under California Constitution, require access to shopping center although access is not required under the United States Constitution).

\textsuperscript{38} See, e.g., Tex. Const., Art. I, § 19 (“due course of the law of the land”).

\textsuperscript{39} World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).


\textsuperscript{41} See Purser v. Corpus Christi State Nat'l Bk., 258 Ark. 54, 522 S.W.2d 167 (1975).

\textsuperscript{42} Id.


\textsuperscript{44} See Marshall Exports, Inc. v. Phillips, 507 F.2d 47 (4th Cir. 1974).

\textsuperscript{45} See Lehigh Valley Ind., Inc. v. Birenbaum, 527 F.2d 87 (2d Cir. 1976).
a showing, whether or not the defendant should be ordered to
submit to discovery to assist the plaintiff in meeting its burden is
a matter of discretion.46 This discretion has been carefully exer-
cised to avoid placing undue burdens on the defendant before a
decision is made that there is jurisdiction over the defendant. In
River Plate Corp. v. Forestal Land, Timber & Railway,47 Judge
Frederick van Pelt Bryan spotlighted the issue by remarking:
"Whether the defendant has shown sufficient to justify the taking
of depositions on the jurisdiction question is not free from
doubt."48 He decided that oral depositions may be taken under
letters rogatory in England and in Argentina,49 but goes on to pro-
tect the defendant by ruling that the defendant is entitled to have
United States counsel present at the depositions because such
counsel would be more familiar with American jurisdictional
standards. The plaintiff, however, shall pay the cost of such coun-
sel, including expenses and attorneys’ fees. This expense is a tax-
able cost to be recouped by the plaintiff if the plaintiff eventually
prevails and recovers costs. In Lehigh Valley Industries, Inc. v.
Birenbaum,50 the court held that "there is a threshold failure here
to establish any basis for finding that [defendant] committed any
tortious activity in New York and that there was no abuse of dis-
cretion below in denying discovery."51 Judge Henry Friendly, in
Leasco Data Processing Equipment Corp. v. Maxwell,52 found
that it was error to dismiss a suit against an English defendant on
the jurisdictional issue before the defendant answered the plain-
tiff's interrogatories. In so holding, Judge Friendly emphasized
that "the burden of answering these would have been slight."53
Judge Irving Kaufman, in Petroleum Financial Corp. v. Stone,54
articulated concern for protecting the defendant from unfair bur-
dens that may attach to discovery on the issue of jurisdiction over
the defendant. He ruled that plaintiff's affidavits were insufficient
to show that the defendant did business in New York and that the
plaintiff was not entitled to take depositions in New York to ob-

46. See River Plate Corp. v. Forestal Land, Timber & Ry Co., 185 F. Supp. 832
(S.D.N.Y. 1960).
48. Id. at 836.
49. Id. at 837-38.
50. 527 F.2d 87 (2d Cir. 1975).
51. Id. at 94.
52. 468 F.2d 1326 (2d Cir. 1972).
53. Id. at 1343.
tain further information on defendant's business activities in New York.

Even if the costs were to be borne by the plaintiff, it would appear that in seeking the depositions for this purpose, plaintiff is attempting to pull itself up by its own bootstraps. Absent the prior finding that [defendants] were doing business in this state,... this court would be exceedingly reluctant to exercise its discretion... to compel parties to come to New York from Texas to determine whether this court in fact has jurisdiction over them.55

Judge Kaufman remarked that the plaintiff could take depositions in Texas.56

SANCTIONS AGAINST A DEFENDANT UNABLE TO COMPLY WITH A DISCOVERY ORDER

Even in cases in which there is no question that the court has in personam jurisdiction over the defendant, the court must exercise great care before imposing sanctions on the defendant for failure to comply with a discovery order if failure is caused because discovery is forbidden by the law of another country. The leading case is Societe International Pour Participations Industrielles et Commerciales, S.A. v. Rogers.57 The plaintiff, a Swiss holding company, was suing under the Trading with the Enemy Act for return of property seized by the Alien Property Custodian. The United States Supreme Court held it error to dismiss the complaint with prejudice for failure to comply with a discovery order when production of the records in issue would violate Swiss penal laws and when the plaintiff had shown its good faith. The plaintiff had obtained waivers enabling it to produce many of the documents requested and had suggested a plan for identifying further relevant documents and seeking their production. The Court held that the production order itself was justified under the circumstances, though the sanction for noncompliance with the order was improper. The Court expressed doubt whether an order to produce would always be appropriate: “We do not say that this ruling [that the trial court was justified in issuing the production order] would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control.”58 On the question of what sanctions, if any, would be appropriate for the failure to produce the Swiss records, the Court indicated that a sufficient sanction might be simply the plaintiff’s resulting inability to rebut evidence against it and perhaps, though not certainly, the drawing of

55. Id. at 353-54.
56. Id. at 354.
58. Id. at 205-06.
inferences unfavorable to the plaintiff on events as to which discovery was not available:

It may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case. It may be that in the absence of complete disclosure by the petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events.59

A recent case applying the Societe International standards is In re Westinghouse Corp.60 The company ordered to produce documents was only a witness, not a party, and there was no question that the court had jurisdiction over the company, which operated a mine in the forum. The court held that it was error to hold the company in contempt for failure to produce Canadian records when production would subject the company to Canadian criminal sanctions and when the company had shown its good faith by seeking waivers from Canadian officials. The court did note that Westinghouse's defense did not stand or fall on the discovery order. Westinghouse could search the records of and depose other uranium companies for the information it desired.61

Combining the reluctance of courts to put unfair burdens on the defendant when ordering discovery on the jurisdictional issue62 with the Societe-Westinghouse protection of parties unable to produce documents because of foreign regulations, an argument can be made against any form of sanction when a foreign defendant is unable to produce documents relating to the jurisdictional issue and failure is caused by defendant's good faith inability to circumvent foreign regulations. This is exactly what the court in Societe may have been referring to in questioning whether sometimes a discovery order is proper at all,63 and even more likely is the case alluded to in which the only "sanction" against the defendant should be the defendant's inability to meet the plaintiff's evidence.64 The double unfairness to the defendant of allowing discovery on the jurisdictional issue plus the inability to comply with the discovery order may preclude any more severe sanction including the shifting of the burden of proof which,

59. Id. at 212-13.
60. 563 F.2d 992 (10th Cir. 1977).
61. Id. at 999.
62. See notes 45-56 and accompanying text supra.
63. 357 U.S. at 205-06.
64. Id. at 212-13.
under Federal Rule 12(b)(2), is on the plaintiff.

CONCLUSION

The United States Supreme Court’s discussion in *World-Wide Volkswagen* of state-court jurisdiction indicates that foreign defendants whose activities abroad cause effects in the United States should not be subject to suit here for claims arising out of those effects unless one of two conditions is met. Either the effects here should be normal or the defendant’s activities in the forum should be so substantial that the defendant could reasonably have expected to be sued in the forum with respect to those claims. This makes it likely that the plaintiff will wish to subject the defendant to discovery concerning forum activities sufficient to provide jurisdiction. Ordering the defendant to submit to discovery before deciding that there is jurisdiction over the defendant is at best a difficult task requiring circumspect concern for preventing harassment of the defendant. When, in addition, defendant demonstrates that the ordered jurisdictional discovery is forbidden by foreign law, discovery is especially questionable. Questions then arise whether the discovery order should stand and what sanctions, if any, should be imposed for the defendant’s refusal to violate foreign law. A key factor in answering these questions should be whether, if the forum does not press its jurisdiction over the defendant, the plaintiff will have another forum in which it may reasonably pursue its claim.

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65. *FED. R. CIV. P. 12(b)(2) (1976).*
67. *444 U.S. 286 (1980).*
68. *See In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1148, 1154 (N.D. Ill. 1979) (orders discovery on jurisdictional issue even though this would require a violation of foreign law, and notes that if it did not have jurisdiction, important United States antitrust policies could not be vindicated).*

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