The Perils of Going Global: Personal Jurisdiction May Exist for Foreign Companies in US Courts

Lisa Savitt and Amelia Schmidt*

Introduction

Calvin Coolidge, a former American president, stated that 'the chief business of the American people is business'. In today's globalising economy, the chief business of many American and non-American companies is doing business with each other. Correspondingly, an increasingly significant business of the United States courts lies in determining whether foreign businesses are in fact any of their business – in other words, whether a US court can exercise personal jurisdiction over a foreign defendant. When a court must determine whether to exercise jurisdiction over a foreign defendant, the very technological developments and globalising trends that have generally proven a boon to foreign companies doing business in the United States can be used against them in the context of litigation. Both US courts and the US legislature are struggling with this issue, and it is difficult to predict how US law will evolve in this arena. Still, while the outcomes in judicial decisions on this issue have varied, developments in the US legislature suggest that it is likely to become harder rather than easier for foreign defendants to avoid personal jurisdiction in the future.

* Ms Savitt is counsel in Crowell & Moring LLP's International Dispute Resolution group. She has experience representing foreign companies in complex cross-border litigation. Ms Schmidt is a summer associate at Crowell & Moring LLP and will receive her J D from Harvard Law School in May 2010.

This article will begin by summarising the difficulties that foreign defendants may encounter when sued in US courts, explaining in particular the legal framework within which a US court determines whether it may properly exercise jurisdiction over a foreign defendant. Secondly, the article will examine two recent cases involving foreign manufacturers sued for injury caused by defective products. Thirdly, it will go beyond products liability cases with a more general discussion of factors that courts consider in adjudicating the issue of jurisdiction over foreign defendants. Finally, it will highlight recent events within the US Congress that, without leading to actual passage of legislation, do portend eventual legislative activity on this issue.

Challenges for foreign defendants in US courts

Foreign defendants in US courts face obstacles both legal and practical. In terms of practical concerns, if a foreign company is the subject of litigation in the United States, it can incur hefty expenses regardless of the outcome. If the company must pay for legal fees for US lawyers and engage in the lengthy discovery process, which is peculiar to the United States, victory in the end may prove a Pyrrhic one. The process may often cause disruption to the company even as it challenges jurisdiction. Finally, it faces the challenges of navigating an unfamiliar legal system, overcoming language barriers, and possibly facing a jury that is biased in favour of local plaintiffs and harbours suspicions against foreign companies.

Although US courts consider fairness when deciding the jurisdiction question, foreign defendants do not consistently benefit from these considerations. For instance, in one recent case involving a defendant French aerospace company with a subsidiary in the United States, the court treated dismissively the notion that it would be inconvenient for that company to litigate in Arkansas. It acknowledged the 'substantial' distance between France and Arkansas, but concluded somewhat sardonically that the defendant 'has ready access to air transportation for conveniently making the trip'.[1] Considerations of fairness and convenience thus may easily hurt as help a foreign defendant in a given case.

Overview of the analytical framework for personal jurisdiction in US courts

As a matter of law, when assessing a personal jurisdiction claim against a foreign defendant, courts in the United States typically apply the 'long-arm' statute of the forum state, which establishes jurisdiction over foreign

1 *Anderson v Dassault Aviation*, 361 F 3d 449, 455 (8th Cir, 2004).

defendants, and the federal due process requirements of the Fourteenth Amendment to the US Constitution. The states almost uniformly have adopted far-reaching long-arm statutes, so the personal jurisdiction inquiry often rests on the US Constitutional question. US courts have interpreted the Fourteenth Amendment to the Constitution to require, as a matter of due process, that 'minimum contacts' exist between the foreign defendant and the individual state. Courts also examine whether, under the Fourteenth Amendment, assuming jurisdiction will offend 'traditional notions of fair play and substantial justice'.[2]

Generally, in terms of statutory analysis, judicial interpretations of state long-arm statutes differ depending on whether the plaintiff alleges 'specific' or 'general jurisdiction' over the foreign defendant. In a specific jurisdiction analysis, a foreign defendant must have contacts with the forum that are related to the plaintiff's cause of action. In other words, the lawsuit must spring from the foreign defendant's connections to, or actions within, the forum state. In a general jurisdiction analysis, a foreign defendant must have established systematic and continuous contacts with a state, often by 'doing business' in that state.

Overview of specific jurisdiction and the stream of commerce theory

One of the most controversial ways in which a court can assert specific jurisdiction over a foreign defendant is by advancing the 'stream of commerce' theory. The stream of commerce theory posits that a foreign defendant who places goods into the stream of commerce benefits economically from the eventual sale or distribution in the forum state and, thus, avails itself of that state's jurisdiction. Since the US Supreme Court's decision in *World-Wide Volkswagen Corp v Woodson*, in 1980, plaintiffs have often used the stream of commerce theory as a means to hale foreign manufacturers into court in cases while asserting such claims as patent infringement and products liability.[3] However, the issues presented by the application of the stream of commerce theory have engendered a 20-year debate amongst US courts.

In 1987, the US Supreme Court issued a split opinion on the use of the stream of commerce theory of personal jurisdiction in *Asahi Metal Industry Co v Superior Court of California*.[4] Four Justices, led in an opinion by Justice Sandra Day O'Connor, favoured a test that required more than the mere act of placing a product into the stream of commerce in order for a

2 *Burger King v Rudzewicz*, 471 US 462, 476 (1985).
3 See 444 US 286 (1980).
4 480 US 102 (1987).

court to exercise personal jurisdiction over a defendant.[5] The O'Connor faction required that there be some additional action by the defendant 'purposefully directed toward the forum state'.[6] This test has since become known as the 'stream of commerce plus' test. The four Justices led by Justice Brennan, however, took a more liberal approach to personal jurisdiction, opining that no 'additional conduct was needed' and that because a defendant benefited from the sale of the final product in the forum state and the protection of the forum state's laws in regulating and facilitating commercial activity, a foreign manufacturer should reasonably foresee being subject to that state's jurisdiction.[7] These two plurality opinions have left many US courts confused as to what test to apply. Many courts choose not to resolve which opinion is correct and have either (i) determined that a defendant's activities did or did not meet both standards; or (ii) formulated their own hybrid test, often requiring the plaintiff to show that a defendant knew the likely destination of the goods it placed in the stream of commerce.

Overview of general jurisdiction

In general jurisdiction cases, the court focuses on whether the foreign defendant's contacts with the forum state are systematic and continuous. In performing this analysis, courts often look to see whether the foreign defendant corporation is 'doing business' within the state. General jurisdiction typically serves as the justification for bringing foreign defendants into an unfamiliar forum. Foreign corporations often find themselves in the orbit of US courts because of prior business contacts with the foreign state or the activity of the foreign defendant's domestic subsidiary.

In 1984, the US Supreme Court held that a Colombian corporation could not be sued in a Texas court for deaths that occurred in Peru with the crash of a helicopter owned by that corporation.[8] The Supreme Court focused primarily on the issue of general jurisdiction, holding that the defendant had not formed continuous and systematic general business contacts with the state of Texas.[9] It noted that the defendant neither had a place of business nor a licence to do business in Texas.[10] While the defendant sent its personnel to Fort Worth for training as part of its contract with a Texas company, the Supreme Court dismissed this as 'part of the package of goods and services

5 *Ibid,* at 112.

6 *Ibid,* at 112 (citing *Burger King*, 471 US at 476, and *Keeton v Hustler Magazine, Inc*, 465 US 770, 774 (1984)).

7 *Ibid,* at 116–117 (Brennan, J, concurring).

8 *Helicopteros Nacionales de Colombia, SA, v Hall*, 466 US 104 (1984).

9 *Ibid,* at 415–16.

10 *Ibid,* at 416.

purchased by [the defendant] from [the Texas company]'.[11] The defendant also had accepted cheques drawn from a Texas bank, but the court likewise found this insufficient to support a finding of jurisdiction because '[t]here is no indication that [the defendant] ever requested that the cheques be drawn on a Texas bank or that there was any negotiation between [the defendant and the payor company] with respect to the location or identity of the bank on which cheques would be drawn'.[12] It observed, 'common sense and everyday experience suggest that . . . the bank on which a cheque is drawn is generally of little consequence to the payee and is a matter left to the discretion of the drawer'.[13] Furthermore, the court described the payor company's payment of a cheque as 'unilateral activity' that was 'not an appropriate consideration' for finding jurisdiction.[14] Thus, in finding no general jurisdiction, the court engaged in a very fact-specific analysis and considered the realities of commercial transactions, such as unilateral activity on the part of a US company with whom the foreign defendant was doing business, and the absence of negotiation over matters of 'little consequence' to the defendant.

In the years since *Helicopteros* and *Asahi*, courts have likewise engaged in very fact-specific analyses when determining whether to exercise jurisdiction over a foreign defendant. This has led to wildly divergent results among US courts and rendered it virtually impossible to predict whether a court will find personal jurisdiction in a particular case.

Dassault Aviation and *D'Jamoos*: divergent results for foreign manufacturers challenging personal jurisdiction

Recently two courts in the United States reached different results for foreign aircraft manufacturers in wrongful death suits arising from an aeroplane crash. In both cases foreign companies sold aircraft in the United States. In *Anderson v Dassault Aviation*, a lower court's finding that it did not have jurisdiction was reversed by the appellate court.[15] In *D'Jamoos v Pilatus*, the Third Circuit affirmed the dismissal of the case against the foreign manufacturer.[16] Different aspects of these two cases will be addressed throughout the remainder of the article.

In *Dassault Aviation,* the plaintiff, a flight attendant on a business jet, sustained injuries when the jet underwent a series of pitch oscillations on its descent into a Michigan airport. The flight attendant brought an

11 *Ibid,* at 418.
12 *Ibid,* at 416.
13 *Ibid,* at 416–17.
14 *Ibid,* at 417.
15 361 F 3d 449 (8th Cir, 2004), cert, denied, 2004 US LEXIS 7903.
16 566 F 3d 94 (3d Cir, 2009).

action against the manufacturer of the jet, Dassault Aviation, a French corporation, and its wholly owned subsidiary, Dassault Falcon Jet ('Falcon Jet'), which was headquartered in New Jersey. The plaintiff originally brought the action in federal court in Michigan, where she resided and where her employer was based. Dassault Aviation filed a motion to dismiss for lack of personal jurisdiction, which the Michigan court granted. The plaintiff then re-filed the case against Dassault in the Eastern District of Arkansas, where the court dismissed the case for lack of jurisdiction, and from which decision the plaintiff appealed.

The Eighth Circuit reversed the lower court, finding that Dassault had sufficient contacts with Arkansas to support the assertion of personal jurisdiction. Conducting what was essentially a general jurisdiction analysis, the court found that Dassault's distribution system in Arkansas and its marketing activities in that state were proper matters to consider in evaluating whether personal jurisdiction existed.

In the events giving rise to the *D'Jamoos* case, six Rhode Island residents were killed when a small aeroplane crashed in Pennsylvania. The representatives of the victims' estates filed suit in the Eastern District of Pennsylvania against multiple defendants, including Pilatus, the Swiss company that manufactured the aeroplane, and Pilatus' subsidiary, Pilatus Business Aircraft, Ltd ('PilBAL'), which was located in Colorado. The Pilatus defendants filed a motion to dismiss for lack of personal jurisdiction. The plaintiffs opposed the motion and later filed a motion to transfer the case to Colorado.[17] The district court found that there was no jurisdiction in Pennsylvania. The court also denied the motion to transfer. Plaintiffs appealed to the Third Circuit, which upheld the lower court's finding of lack of jurisdiction in Pennsylvania. The Third Circuit also found that plaintiffs had made a prima facie showing that Colorado would have jurisdiction over the Pilatus defendants. Accordingly the Third Circuit vacated the lower court's denial of transfer to Colorado, and remanded the case to the lower court for further adjudication on that issue. The court's belief that plaintiffs had a colorable argument for jurisdiction in another state, however, may well have influenced the court's decision that jurisdiction did not exist in Pennsylvania.

The courts in these cases did not take into account all of the same factors in reaching their respective conclusions. Nonetheless both courts dwelt at length on the presence of these companies' subsidiaries in the United States and the strength of the ties between the foreign parent companies and the US subsidiaries.

17 US law allows a court to transfer an action to a court where the action could have been brought. *D'Jamoos*, 566 F 3d at 106, citing 28 USC § 1631.

Personal jurisdiction through a subsidiary/parent relationship

The opinions in *D'Jamoos* and *Dassault Aviation* present multiple theories by which acts of a domestic subsidiary can subject a foreign defendant to jurisdiction in a particular US forum. For example, the court in *D'Jamoos* found that the actions of Pilatus' subsidiary in the US could be imputed, at least prima facie, to Pilatus based on a theory that it had significant control over the subsidiary, its agent. Equally, a court could determine that a domestic subsidiary's existence is just a formality and that the subsidiary and the foreign parent company are actually one company – also referred as 'alter ego' theory. In such a case, the court may find the defendant does business in the forum state through its subsidiary and will 'pierce the corporate veil'.

The Eighth Circuit in *Dassault Aviation* rejected the district court's conclusions under the alter ego theory, not because it thought the court had misapplied that theory, but because it had relied too heavily upon that theory.[18] While Dassault's subsidiary was not its alter ego, and Dassault's relationship with its subsidiary did not constitute an abuse of the corporate form, the court found that the two companies nevertheless 'have a close, synergistic relationship that … is clearly relevant to the jurisdictional question'.[19] The court found it significant that the majority of the Dassault jets, which were sold worldwide, flew in and out of Arkansas to be completed.[20] Furthermore, the court noted that Falcon Jets, which accounted for a majority of Dassault's revenue, were exclusively sold and leased in the Western Hemisphere through Falcon Jet's Arkansas facility.[21] The court thus looked to numbers, ie, revenue generated and planes flown to Arkansas, as evidence establishing a 'close, synergistic relationship' between the parent and subsidiary.

The court in *Dassault Aviation* went further by examining in general Dassault's 'clear awareness of and interest in its subsidiary's substantial operations in Arkansas'.[22] Part of this interest, the court found, stemmed from the fact that Dassault 'has consistently acted to consolidate the image and operations' of the parent and subsidiary.[23] The court cited language from the parent's annual report describing its presence in the United States, including mention of the fact that its 'largest production site is in Little Rock [Arkansas]'.[24] Additionally, the court pointed out repeatedly that both the CEO and President of the subsidiary were also officers and

18 361 F 3d at 452.
19 *Ibid,* at 453.
20 *Ibid.*
21 *Ibid.*
22 *Ibid.*
23 *Ibid,* at 454.
24 *Dassault Aviation*, 361 F 3d at 453.

directors of the parent, and that the CEO of the subsidiary received all of his compensation from the parent.[25] Finally, it emphasised the similarity between the companies' names, their common logo, a shared directory that included sales reps in Arkansas, joint publications with contact info in Arkansas, and more generally, a 'unified marketing strategy'.[26]

Similarly, the court in *D'Jamoos* only presented the theory of agency as one possible theory on which a Colorado court might find jurisdiction over a foreign parent company based on its relationship with its US subsidiary. Like the court in *Dassault Aviation,* the court in *D'Jamoos* relied in part on empirical evidence to support its conclusion that jurisdiction might exist in Colorado. As in *Dassault Aviation,* the court emphasised the amount of revenue generated by the subsidiary's business activities in Colorado.[27] Furthermore, like the Eighth Circuit, the court in *D'Jamoos* noted that PilBAL completed all PC-12s manufactured by the parent before delivering the planes to customers.[28] The court also emphasised PilBAL's status as the 'source of life' to Pilatus' operations, as it was the only Pilatus subsidiary in the Americas, which constituted 'Pilatus's most significant territory by far'.[29] Thus the extent of success PilBAL had enjoyed in the United States, in addition to its status as the company's only US subsidiary, contributed to a finding of jurisdiction over its foreign parent.

Additionally, the court in *D'Jamoos*, unlike the court in *Dassault Aviation*, emphasised the fact that the jets were manufactured and completed in response to specific orders from customers. The court stated: 'Pilatus … does not manufacture aircraft in the vague hope that someone, somewhere will purchase them; rather, it manufactures aircraft to fill specific, preexisting orders'.[30] As many of these orders were generated by PilBAL's business in Colorado, the court concluded that this 'underscores PilBAL's status as the "source of life" to Pilatus's operations'.[31]

In their dealings with US subsidiaries, then, foreign parent companies should be aware that a court may find jurisdiction over them if it deems the subsidiary to be insufficiently independent from the parent. *Dassault Aviation* and *D'Jamoos*, however, both show that a foreign parent need not treat its subsidiary as a 'shell' company that exists mainly to shield it from liability, nor need it 'abuse the corporate form' in order for a US court to find the parent subject to its jurisdiction.

25 *Ibid,* at 453, 455.
26 *Ibid,* at 454.
27 See *D'Jamoos*, 566 F 3d at 107–08.
28 *Ibid,* at 108.
29 *Ibid,* at 109, citing *Curtis Publishing Co v Cassel*, 302 F 2d 132, 136, 138 (10th Cir, 1962).
30 *Ibid.*
31 *Ibid.*

Examples of the stream of commerce analysis as a tool for finding personal jurisdiction

As discussed above, plaintiffs frequently invoke the stream of commerce theory as a justification whereby the court should find personal jurisdiction over a foreign defendant. The issues presented by the application of the stream of commerce theory, however, have engendered a 20-year debate amongst US courts since the Supreme Court decision in *Asahi*.

The court in *D'Jamoos* rejected the plaintiffs' stream-of-commerce argument in finding that it lacked jurisdiction over Pilatus in Pennsylvania. The plaintiffs pointed to the 'highly mobile nature' of aeroplanes designed for interstate travel as support for their argument that 'it was wholly foreseeable to Pilatus that one of its planes ultimately could cause injury in Pennsylvania'.[32] The court, however, noted that '"foreseeability" alone has never been a sufficient benchmark for personal jurisdiction' under the US Constitution; rather, the defendant need not foresee that a product might end up in a state, but his 'conduct and connection with the forum state' must be of such a level that he could 'reasonably anticipate being haled into court' in that state.[33]

The court also declined to find jurisdiction under the stream-of-commerce theory because Pilatus could not have been expected to anticipate its planes entering Pennsylvania through 'the regular and anticipated path' by which its planes were manufactured and eventually sold.[34] As the court pointed out, the plane that crashed in Pennsylvania had been manufactured by Pilatus, then sold to a French buyer, who sold it to a different Swiss company, which sold it to a Massachusetts company, which sold it to the Rhode Island company that owned the plane when the accident occurred.[35] The court deemed this long chain of 'fortuitous circumstances independent of any distribution channel employed' insufficient to support a finding of jurisdiction over Pilatus in Pennsylvania.[36] Even if Pilatus had sold other planes to buyers in Pennsylvania, the court held, it would have had to sell that particular plane in Pennsylvania in order for the court to find specific jurisdiction under the stream-of-commerce theory.[37]

At the same time, a patent infringement case from the state of Rhode Island demonstrates the long jurisdictional reach that the stream of commerce theory allows US courts to exert. In *Tower Manufacturing Corp v Shanghai ELE*

32 *Ibid*, at 105.
33 *D'Jamoos*, 566 F 3d at 105, citing *World-Wide Volkswagen*, 444 US at 295, 297.
34 *Ibid*, at 106.
35 *Ibid*.
36 *Ibid*.
37 *Ibid*.

Manufacturing Corp, the District Court for Rhode Island adopted the report and recommendation of a magistrate judge who found that Shanghai ELE Manufacturing ('ELE'), a Chinese corporation, was subject to its jurisdiction after the plaintiff, Tower Manufacturing ('Tower'), a Rhode Island electrical manufacturer, claimed that the court had jurisdiction over ELE under the stream of commerce theory.[38] Tower alleged that ELE had infringed on one of its patents by making and selling leakage current detection interrupters (LCDIs) to manufacturers across the globe that then installed the LCDIs in household air conditioning units. These manufacturers in turn sold the units to merchants including numerous US chain retailers such as Home Depot, Lowes and Wal-Mart. Tower presented evidence that air conditioners containing ELE's LCDIs were sold in Rhode Island in a number of retail outlets.

The Magistrate's opinion, adopted by the district court, found that personal jurisdiction existed for a number of reasons. First, the Magistrate made the 'reasonable' inference that ELE designed its LCDI products for the US market, which included Rhode Island. Secondly, ELE directly marketed and sold its products to US manufacturers, allowing the Magistrate to infer that ELE knew that LCDIs would be incorporated into air conditioners that would be sold in the United States, and ultimately, Rhode Island. Thirdly, the Magistrate stated that given the large volume of sales from ELE to air conditioner manufacturers, it 'strain[ed] credulity to suggest that ELE would be unaware of the identity of the manufacturers' major customers and that air conditioners containing' its LCDIs would be sold in US locations like Rhode Island. Finally, the Magistrate concluded the personal jurisdiction analysis by finding that Tower's patent infringement claims arose out of ELE's 'activities' in Rhode Island and that Rhode Island was a reasonable forum for the case given ELE's previous legal actions in Rhode Island regarding an unrelated matter. The relatively thin basis upon which the district court obtained jurisdiction over ELE thus speaks to the breadth of the stream of commerce theory of jurisdiction.

Other facets of the jurisdictional question

In undertaking an inquiry of whether personal jurisdiction exists, courts consider numerous additional aspects of a company's activities. In some cases, if a company sends its products to any one state, the court may deem that the company 'targeted' the United States as a whole, and therefore exerts jurisdiction over that company even if the company never actually sent its products to the state in which that court sits. In other cases, a court may look to a company's website in considering whether to exercise

38 533 F Supp 2d 255 (2008).

jurisdiction. In other cases, having filed a suit in another US court in another state may contribute to a finding of jurisdiction over a company in a different state.

Is the relevant market the entire United States or the state where the litigation is pending?

The decision of the court in *Tower Manufacturing* is not unusual. A Chinese corporation was haled into the federal court of a particular state without any evidence that that foreign corporation specifically intended to do business or distribute its products in that state. The Magistrate premised his decision largely on a series of elastic inferences that ELE must have known that its products would be sold and distributed in the particular forum state. Extended to its logical consequences, the Magistrate's reasoning leaves a foreign manufacturer who produces goods generally geared towards the US market subject to the jurisdiction of every state in the United States.

The notion that a plaintiff may establish jurisdiction by presenting evidence of targeting the US market generally, rather than targeting the particular forum state, has extended beyond stream of commerce cases. Without conducting a stream of commerce analysis, a Florida district court also recently found jurisdiction over a foreign defendant, in a suit brought by another foreign company, by looking to the defendant's contacts with the United States in general rather than with the state of Florida in particular.[39] Both plaintiff and defendant were Salvadoran telecommunications companies. The plaintiff, Americatel El Salvador, S A de C V ('Americatel'), sought to enforce an arbitration award that had resulted from a contractual dispute between the two companies.[40] In *Americatel*, the court found jurisdiction over the defendant company, Compania de Telecomunicaciones de El Salvador ('CTE'), based in part on the fact that CTE had formed contracts with US telecommunications companies, whereby it provided telephone service between the United States and El Salvador.[41] The court held that general jurisdiction was proper because the contracts 'provide for continuous and ongoing business with the American companies and services provided to American citizens'.[42] Even though the contracts between the defendant and US companies had nothing to do with Florida specifically, the court still found jurisdiction over the Salvadoran defendant.

Not all courts have accepted the line of reasoning articulated in *Tower Electric* and *Americatel*. The court in *D'Jamoos*, for instance, rejected the

39 *Americatel El Salvador, S A de C V v Compania de Telecomunicaciones de El Salvador, S A de C V*, 2008 US Dist, LEXIS 32267 (S D Fla, 19 April 2008).

40 *Ibid,* at *1–*3.

41 See *ibid,* at *4–*5.

42 *Ibid,* at *5.

plaintiffs' arguments that Pilatus' efforts to comply with US Federal Aviation Administration (FAA) standards, and the fact that Pennsylvania could not exclude Pilatus planes from its air space, meant that Pilatus had subjected itself to jurisdiction in any state where a crash occurred.[43] The court declined to make such a far-reaching finding, stating that 'Pilatus' efforts to exploit a national market necessarily included Pennsylvania as a target, but those efforts simply do not constitute the type of deliberate contacts within Pennsylvania that could amount to purposeful availment of the privilege of conducting activities in that state'.[44] The court characterised 'any connection of Pilatus to PA' as simply 'a derivative benefit' of Pilatus' attempts to market its products in the United States.[45]

Websites and global business: a cautionary tale

Websites are an invaluable advertising and marketing tool, as the Internet easily reaches overseas markets. The popularity and utility of the Internet as a business tool has led courts to examine whether a foreign defendant's website activity creates sufficient contacts to hale them into a US court. A foreign corporation's earnest efforts to drum up business through the Internet can subject it to liability as a defendant in the famously expensive US legal system.

US courts generally characterise Internet use as falling within three categories, operating on a sliding scale, for the purposes of establishing personal jurisdiction: (i) websites clearly used for transacting business over the Internet, such as entering into contracts and the knowing and repeated transmission of files of information, which suffice to establish minimum contacts; (ii) interactive websites, which allow the exchange of information between a potential customer and the host computer, and which may establish minimum contacts depending on their degree of interactivity; and (iii) passive websites used only for advertising or posting information which have been found to be insufficient to establish minimum contacts unless their use is coupled with additional business activity in the forum.[46] Websites used to transact business and interactive websites are regarded as a fundamental way to increase earnings without incurring significant costs.

At least one US court has considered basic contact information on a website as a sufficient basis for characterising a website as 'interactive' and sufficiently indicative that a foreign defendant 'purposefully availed'

43 *D'Jamoos*, 566 F 3d at 103-04.
44 *Ibid,* at 104.
45 *Ibid.*
46 See *Zippo Mfg Co v Zippo Dot Com, Inc*, 952 F Supp. 1119 (W D Pa, 1997).

itself of the forum state.[47] In *Morris Material Handling, Inc v KCI Konecranes PLC*, the plaintiff, a US holding company involved in the manufacture and sale of industrial cranes, brought a trademark infringement and unfair competition suit against KCI, a Finnish corporation that held a US subsidiary in addition to a number of other subsidiaries around the globe.[48] The court rejected the plaintiffs' argument that KCI exercised a sufficient level of control over its subsidiary to warrant finding jurisdiction, but did find that its ownership of its subsidiaries' allegedly infringing websites warranted such a finding.[49] Although visitors to the sites could not place orders online, the US subsidiary's website provided (i) a 24-hour toll-free hotline; (ii) a link to another company owned by KCI; and (iii) a products and parts index, which, the court surmised, existed 'apparently so the customer will know exactly what to order when he calls the 24-hour toll-free parts hotline'.[50] The court also concluded that the company had 'directed' its websites at US customers insofar as the company had stated that 'a large majority' of customers interested in the crane parts on those websites are in the Western Hemisphere.[51] These website features, in addition to KCI's ownership of all of its companies' websites, led the court to find jurisdiction over KCI based on its Internet activities.

Even a passive website, however, can serve as an electronic brochure, creating visibility for a foreign corporation's brand. Although an Internet presence alone will rarely subject a foreign defendant to liability, accomplishments and developments posted on a company's passive website can be used against it in assessing personal jurisdiction. In *Dassault Aviation*, the Eighth Circuit dwelt on the fact that Dassault jointly operated a website with its Arkansas-based subsidiary, Falcon Jet, that discussed their consolidated efforts and their expansion plans for the Arkansas facility. The website mentioned Dassault's pride in its domestic facility and its importance to the facility's success. The plaintiff even pointed to a timeline published on the site to demonstrate that the subsidiary's contacts with Arkansas dated back several decades. The timeline represented that the Arkansas facility was the 'main completion center for all Falcon jets worldwide'. The website even boasted that the Arkansas facility 'occupies almost half a million square feet and employs more workers than any single Dassault Aviation plant in France'.

The Internet marketing efforts outlined above are standard practice for corporations employing strategic positioning and branding to establish

47 *Morris Material Handling, Inc, v KCI Konecranes PLC*, 334 F Supp 2d 1118, 1125 (E D Wisc, 2004).

48 *Ibid*, at 1120.

49 *Ibid.*

50 *Ibid.*

51 *Ibid.*

a strong international presence. Unfortunately for foreign corporations, such efforts to market to the American consumer may subject them to personal jurisdiction should a claim be filed in the United States.

Filing suits in other courts

Finally, courts may find jurisdiction if a defendant has filed suit in other states in the United States. In *Tower Electric*, for instance, the Rhode Island court considered that the defendant had filed a patent infringement action in a California district court and, in the Rhode Island court, had moved to compel compliance with a subpoena relating to that case. The court concluded that 'the same technology that facilitates ELE's conducting business with customers in the United States . . . equally facilitates ELE's ability to defend itself in Rhode Island'.[52]

Likewise, in *Americatel*, the court considered that CTE had filed two breach of contract suits in Florida district courts, one in 2002 and one in 2004.[53] The court found that these lawsuits 'demonstrate that CTE has availed itself of the protection of American contract law'.[54] If a foreign company wishes to bring a lawsuit in the United States, then a court may turn that action against the company, even several years after the prior litigation, when the company finds itself brought into court and defends itself on lack of jurisdiction grounds.

Recent legislative developments

Over the past two years, both the US House and Senate have held hearings on the issue of expanding personal jurisdiction over foreign defendants in US courts, and last year a subcommittee of the House Judiciary Committee contemplated a bill proposing to do precisely that. These legislative developments have arisen primarily in response to injuries, sometimes fatal ones, inflicted on Americans by defective products manufactured overseas. While no legislation has yet been introduced in the US Congress this year, the Senate held a hearing on the issue in May and it is unclear whether proposed legislation will follow as a result. Nonetheless, the issue of personal jurisdiction over foreign defendants has been a recurring one in the US legislature. Furthermore, statements given in these hearings, as well as the language of last year's bill in the House, indicate that the current legislative mood is disinclined to favour foreign companies.

52 *Tower Electric*, 533 F Supp 2d at 270-71.
53 *Americatel*, 2008 LEXIS at *4–*5.
54 *Ibid*, at *5.

Last year legislation was introduced in the House that would have vastly expanded US courts' jurisdiction over foreign manufacturers. The bill, entitled the 'Protecting Americans from Unsafe Foreign Products Act', would have permitted jurisdiction over a foreign manufacturer 'for injury that was sustained in the United States and that relates to the purchase or use of a product, or component thereof', when the defendant had manufactured that product.[55] Had this bill passed, courts might have extended this language beyond products liability cases into contract disputes, intellectual property disputes, and a myriad of other litigation contexts.[56]

Furthermore, HR 5913 would have permitted jurisdiction if that defendant 'knew or reasonably should have known that the product or component would be imported for sale or use in the United States' or 'had contacts with the United States, whether or not such contacts occurred in the place where the injury occurred'. This development would have eradicated the requirement that a plaintiff show that a defendant have established contacts with a particular forum state rather than with the United States generally. HR 5913 thus would have essentially codified the reasoning of *Tower Electric* and *Americatel*, finding jurisdiction over a defendant who had in any way attempted to do business with the United States generally, rather than in a particular forum state.

Many of the witnesses in the Congressional hearings held before and after the introduction of the bill favoured expanding jurisdiction to such a far-reaching extent. One witness at a 2007 hearing in the House declared: 'We should not handicap our consumers by tying them to the minimum contacts rules of the state courts when, in fact, our commercial reality reflects that we have a national market'.[57] Another observed in both the 2008 and 2009 hearings Justice O'Connor's dicta in *Asahi*, in which the Justice declined to address 'whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorise federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant

55 HR 5913, 110th Cong § 2(a) (2008).

56 'Leveling the Playing Field and Protecting Americans: Holding Foreign Manufacturers Accountable: Hearing Before the Subcomm on Administrative Oversight and the Courts of the H Comm on the Judiciary', 111th Cong (2009) (statement of Victor Schwartz, Chair, Shook, Hardy & Bacon, LLP, on behalf of the Institute for Legal Reform, US Chamber of Commerce), **http://judiciary.senate.gov/hearings/testimony.cfm?id=3857&wit_id=7933** (hereinafter 'Schwartz 2009 Statement').

57 'Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products: Hearing Before the H Subcomm on Commercial and Administrative Law of the H Comm on the Judiciary', 110th Cong 6 (2007) (statement of Thomas L Gowen, Locks Law Firm) (hereinafter 'Gowen Statement').

and the State in which the federal court sits'.[58] The witness characterised this language as 'a little hint' as to where Congress might legislate in this field.[59] A professor from George Washington University Law School, Ralph Steinhardt, similarly praised HR 5913 for its focus on 'basic fairness in a globalised economy rather than on the historic and now commercially irrelevant concerns with state boundaries'.[60] These statements all indicate that Congress is sympathetic to rulings, such as the ones in *Tower Electric* and *Americatel*, that find jurisdiction on the basis that a defendant targeted the United States market in general.

Although HR 5913 never reached a vote, both the language of that bill and the general tenor of the recent Congressional hearings reveal distrust of foreign manufacturers and sympathy for Americans who have suffered injury through use of seemingly 'safe' products. The titles of the hearings and legislation – 'Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products; Protecting Americans from Unsafe Products Act; Leveling the Playing Field and Protecting Americans' – have all suggested a less-than-subtle bias against foreign companies and in favour of US would-be plaintiffs. Senator Sheldon Whitehouse (D-R I) in particular set the tone for the most recent 19 May hearing, describing at length the 'shocking' injuries inflicted on American consumers of foreign-made products such as a contaminated blood thinner, a lead-tainted bracelet that caused the death of a four year old, 'substandard' tires and contaminated pet food.[61] Though the Senator acknowledged that the lead bracelet, for instance, exceeded the Consumer Product Safety Commission (CPSC) lead limit by nearly 165 per cent, the hearings focused on punishing manufacturers after the injury, rather than preventing the injuries in the first place through better enforcement of US safety regulations.[62]

At the hearings, witnesses emphasised the inability of Americans to recover for injuries, even fatalities, caused by defective products when those products were manufactured overseas. Some of the witnesses recounted their experiences representing plaintiffs injured by products manufactured

58 Schwartz 2009 Statement, quoting Asahi, 480 US at 113; 'Protecting Americans from Unsafe Foreign Products Act: Hearing Before the H Subcomm on Commercial and Administrative Law of the H Comm on the Judiciary', 110th Cong 31 (2008) (statement of Victor Schwartz, Shook, Hardy and Bacon, LLP, on behalf of the Institute for Legal Reform of the United States Chamber of Commerce) (hereinafter 'Schwartz 2008 Statement').

59 Schwartz 2008 Statement.

60 'Protecting Americans from Unsafe Foreign Products Act', 110th Cong 41 (2008) (statement of Ralph Steinhardt, George Washington University Law School).

61 'Leveling the Playing Field', 111th Cong (2009) (statement of Sen Whitehouse, Chair, S Subcomm on Administrative Oversight and the Courts) (hereinafter 'Whitehouse Statement').

62 Whitehouse Statement.

by foreign companies, who in turn eluded jurisdiction in US courts. These clients ranged from a mechanic whose arm shattered when an Argentinian-manufactured tire exploded[63] to the mother of a 13-year-old girl who died while riding a Chinese-manufactured electric scooter.[64] A former executive director of the CPSC discussed Aqua Dots, Chinese-manufactured children's beads that caused infants who ingested them to go into comas because the beads were coated with a chemical that acted like GHB, a 'date rape drug'.[65] A law professor at an American University discussed several district court cases finding no jurisdiction over foreign defendants whose products had seriously injured plaintiffs.[66] The general consensus among these witnesses seemed to be that Congress needed to expand personal jurisdiction in order to enable Americans to seek recompense for these injuries.

At the time this article goes to press, no new legislation has been introduced in the Senate following the subcommittee hearing on 19 May. Nonetheless, the statements made in previous hearings strongly suggest a growing sentiment among both Congress and the American public that favours bolstering Americans' ability to sue foreign companies in US courts. If and when legislation is reintroduced addressing this issue, it is likely to make it more difficult for foreign defendants to avoid jurisdiction in the expensive US legal system.

Conclusion

The cases described above demonstrate that foreign defendants may evade jurisdiction in some cases, but any new legislation will likely make it more difficult to do so. With the number of foreign products entering the United States and the subsequent safety issues that arise however, this area will be a source of much more litigation regardless of whether new legislation is passed.

The concept of personal jurisdiction in the United States is complex. Companies who operate globally run the risk that they may be drawn into litigation in the United States – even if they are not physically located in the United States. Cases tend to be very fact intensive, and US courts vary in sophistication in dealing with the myriad legal issues raised in the global environment we live in today. It is imperative to obtain legal advice in the early stages of any business venture that may touch upon US interests so as to limit any potential exposure to liability.

63 Gowen Statement.

64 'Protecting Americans from Unsafe Foreign Products', 110th Cong 19-31 (2008) (statement of Richard R Schlueter, Childers, Buck & Schlueter, LLP).

65 'Protecting the Playroom', 110th Cong 24 (2007) (statement of Pamela Gilbert, Cuneo, Gilbert and Laduca, LLP).

66 'Protecting the Playroom', 110th Cong 80 (21 December 2007, responses from Andrew F Popper, American University, Washington College of Law, to Rep Linda Sánchez, Chair, H Subcomm on Commercial and Administrative Law).