

An aerial photograph of a multi-level highway interchange with several overpasses and ramps. The image is overlaid with a complex digital network of glowing blue lines and nodes, resembling a global communication or data network. Various white icons are scattered across the image, including a globe, a truck, a house, a person, a smartphone, and a server rack. The overall color palette is dominated by blue and white, with the green of the trees visible through the highway structure.

International Conflict of Law: Online Aspects, Part Two *Jurisdictional Issues*

Prepared by:
Bob Ellis
Hennis, Rothstein & Ellis LLP

LORMAN[®]

Published on www.lorman.com - June 2020

International Conflict of Law: Online Aspects, Part Two - Jurisdictional Issues, ©2020 Lorman Education Services. All Rights Reserved.

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ✓ **Unlimited Live Webinars** - 110+ live webinars added every month
- ✓ **Unlimited OnDemands** - Over 3,900 courses available
- ✓ **Videos** - More than 1,900 available
- ✓ **Slide Decks** - More than 3,300 available
- ✓ **White Papers** - More than 2,000 available
- ✓ **Reports**
- ✓ **Articles**
- ✓ **... and much more!**

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

INTERNATIONAL CONFLICTS OF LAW: ONLINE ASPECTS

Jurisdictional Issues

There are no special jurisdictional rules for international online cases. ⁸³

(1) Outbound: International Long-Arm Jurisdiction of American Courts

Outbound jurisdictional issues involve the extent to which courts within the United States may exercise long-arm *in personam* jurisdiction over persons and entities outside the United States. Although some courts are hesitant to find long-arm jurisdiction where the foreign party's contacts with the forum are only online and do not involve physical presence, the same basic "minimum contacts" rules apply for both domestic and international cases.⁸⁴ The one noticeable difference when it comes to international jurisdictional analysis is that although the court must determine personal jurisdiction-based on the long-arm statute of the forum state,⁸⁵ for purposes of determining

⁸³ See generally, Meehan, "The Continuing Conundrum of International Internet Jurisdiction," 31 B.C. Int. & Comp. L. Rev. 345 (2008).

⁸⁴ *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). See, e.g.:

Third Circuit: *Pearce v Mizuho Bank, Ltd.*, No. CV 18-306, 2018 WL 4094812 (E.D. Pa. Aug. 27, 2018) (Japanese online company sued for fraud in connection with Mt. Gox, a prominent bitcoin exchange, was not subject to court's jurisdiction because its contacts with Pennsylvania were too tenuous).

Fourth Circuit: *UMG Recordings, Inc. v. Kurbanov*, No. 1:18-cv-00957, 2019 WL 289800 (E.D. Va. Jan. 22, 2019) (copyright infringement suit against Russian-based defendants dismissed for lack of minimum contacts and thus lack of jurisdiction); *Montblanc-Simplo GmbH v. Ilnitsky*, No. 1:17-CV-415(LMB/TCB), 2018 WL 844401 (E.D. Va. Feb. 13, 2018) (personal jurisdiction over foreign defendant was proper in a trademark infringement action where the defendant operated an e-commerce website which he used to receive payment from, and ship at least one counterfeit item to, a Virginia resident).

Ninth Circuit: *Wilson v. Playtika, Ltd.*, No. 3:18-CV-05277-RBL, 2018 WL 6065658 (W.D. Wash. Nov. 20, 2018) (Israeli company, while not directing its activities at the forum, nonetheless entered into numerous contracts with consumers there who downloaded its app, and therefore was subject to specific jurisdiction in Washington).

A Wisconsin appellate court dismissed a defamation suit brought against an Australian newspaper by an Australian citizen residing in Wisconsin and claiming jurisdiction based on the fact that the allegedly defamatory article was on the newspaper's website that was available in Wisconsin: "[T]he relationship between the defendant and the forum state 'must arise out of the contacts that the 'defendant himself' creates with the forum state. . . . [T]he United States Supreme Court has 'consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff . . . and the forum state.'" *Salfinger v. Fairfax Media Ltd.*, 2016 Wis. App. 17, 367 Wis.2d 311, 330, 876 N.W.2d 160, 169 (2016) (citing *Walden v. Fiore*, 571 U.S. 277, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014)). In *C.W. Downer & Co. v. Bioriginal Food & Science Corp.*, 771 F.3d 59, 63 (1st Cir. 2014), the court, reversing the lower court's ruling, held that a breach of contract claim was related to the Canadian defendant's activities in Massachusetts, and thus long-arm jurisdiction over the Canadian corporation was appropriate: "[T]he parties' contacts were not first-hand and involved no physical presence in Massachusetts, but were by phone, e-mail, and internet over an international border. The district court concluded that it could not exercise personal jurisdiction over the defendant consistently with the Due Process Clause. We conclude to the contrary that the Massachusetts courts do have long-arm jurisdiction. . . ." (Internal citation omitted.) In *Automatic Inc. v. Steiner*, 82 F. Supp.3d 1011 (N.D. Cal. 2015) the court granted the plaintiff's motion for default judgment where the defendant, a resident of the U.K., had abused the notice-and-takedown provisions available to copyright owners under the Digital Millennium Copyright Act by sending false takedown notices to the plaintiff. The court found that the exercise of jurisdiction was proper because the defendant had consented to the plaintiff's terms of service, which specified California law as applicable and courts located within California as having exclusive jurisdiction, and also because the defendant's actions had caused injury in California and thus long-arm jurisdiction (specific jurisdiction) was proper. Similarly, in *Shropshire v. Canning*, 2011 WL 90136 at *5 (N.D. Cal. Jan. 11, 2011), the court denied a Canadian defendant's motion to dismiss a copyright infringement action against him for lack of personal jurisdiction, finding that he "expressly consented to this Court's jurisdiction by filing a DMCA counter-notice." In *Telesocial, Inc. v. Orange S.A.*, 2015 WL 1927697 (N.D. Cal. April 28, 2015), the court denied the defendants' motion to dismiss based on a *forum non conveniens* argument where the defendants, based in France, were accused of violating the Computer Fraud and Abuse Act as well as California law by hacking into the plaintiff's computer system and stealing trade secrets. On the other hand, a physician in Texas who sued a British publishing company for defamation based on articles the company published online was dismissed for lack of personal jurisdiction: "[W]e conclude that the *British Medical Journal's* circulation in Texas, standing alone, is not sufficient to establish personal jurisdiction." *Wakefield v. British Medical Journal Publishing Group, Ltd.*, 449 S.W.3d 172, 186 (Tex. App. 2014).

⁸⁵ See, e.g., *Friedman v. Bloomberg L.P.*, 884 F.3d 83 (2d Cir. 2017) (dismissal because the long arm statute of the forum state, Connecticut, disallowed exercising jurisdiction over certain foreign defendants in defamation actions).

“minimum contacts,” the operative forum is the nation as a whole.⁸⁶ Where a claim against a foreign defendant arises under federal law, Rule 4(k)(2) of the Federal Rules of Civil Procedure, “Federal Claim Outside State-Court Jurisdiction,” applies. “Rule 4(k)(2) has three requirements: (1) the cause of action must arise under federal law; (2) the defendant must not be subject to the personal jurisdiction of any state court of general jurisdiction; and (3) the federal court’s exercise of personal jurisdiction must comport with due process.”⁸⁷

If long-arm jurisdiction over a foreign defendant is permissible, that party must be served before jurisdiction becomes effective. International service of process and service of other legal documents is decidedly different from service within the United States. Rule 4(f) of the Federal Rules of Civil Procedure provides for service of a summons and complaint⁸⁸ to persons outside the jurisdiction, and is worded broadly so as to accommodate changes in both law and technology.⁸⁹ One court summarized the rule (as applied to service via email) this way: “Cases construing Rule 4(f)(3) have held that the rule authorizes courts to permit service of a complaint upon a recalcitrant foreign party by email, particularly when it is evident that the foreign defendant has actual knowledge of the pending lawsuit but has simply avoided service through other means.”⁹⁰ The rule specifically refers to the Hague Convention,⁹¹ to which seventy-five major nations are signatories,⁹² as one method of service.⁹³ The Convention, which was drafted before the era of routine electronic communications, does not provide for any sort of electronic service. Although the Convention is somewhat broadly worded in a way that could accommodate electronic service, many signatory countries, acting pursuant to their rights under the Convention, have set forth instructions placing strict

⁸⁶ “The due process analysis under Rule 4(k)(2) [for international cases] is nearly identical to traditional personal jurisdiction analysis with one significant difference: rather than considering contacts between the [parties] and the forum state, we consider contacts with the nation as a whole.” *Holland America Line Inc. v. Wartsila North America, Inc.*, 485 F.3d 450, 462 (9th Cir. 2007). The same holds true for online cases involving no physical contact with the forum. *AMA Multimedia LLC v. Sagan Ltd.*, No. CV-16-01269-PHX-DGC, 2016 WL 5946051 (D. Ariz. Oct. 13, 2016); *Goes International, AB v. Dodur Ltd.*, No. 3:14-CV-05666-LB, 2015 WL 5043296 (N.D. Cal. Aug. 26, 2015).

⁸⁷ *Plixer International, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 6 (1st Cir. 2018) (affirming specific jurisdiction over a German online company whose sole presence in the U.S. was a website, and whose online terms and conditions specified that German law applied and that all disputes would be subject solely to the jurisdiction of German courts. The company’s website was in English, the company earned \$200,000 in revenue from U.S. customers, and most important, the case, a trademark infringement claim, arose out of federal law).

⁸⁸ Rule 4.1 addresses serving other types of process than a Rule 4 summons (“Service of process is not required to notify a party of a decree or injunction, or of an order that the party show cause why that party should not be held in contempt of such an order.” Notes of Advisory Committee on Rule – 1993) or a Rule 45 Subpoena.

⁸⁹ Rule 4(f) states as follows:

Serving an Individual in a Foreign Country.

Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country’s law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country’s law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

⁹⁰ *UM Technologies, Inc. v. Hilts Global (Cayman) Ltd.*, No. 3:17-CV-1998, 2019 WL 190266 *1 (M.D. Pa. Apr. 3, 2019) (service via email upheld where Cayman Islands defendant used emails to try to negotiate a settlement). The court helpfully includes the following authorities: “*Rio Properties, Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1012 (9th Cir. 2002); *Celgene Corporation v. Blanche Ltd.*, 2017 WL 1282200 (D.N.J. March 10, 2017); *WhosHere, Inc. v. Orun*, No. 1:13-CV-00526-AJT, 2014 WL 670817, at *3 (E.D. Va. Feb. 20, 2014) (citing *Garung v. Malhorta*, 279 F.R.D. 215, 219 (S.D.N.Y. 2011)); *F.T.C. v. PCCare247 Inc.*, 2013 WL 841037 at *3–4 (S.D.N. Y Mar. 7, 2013) (permitting service by email and Facebook); *Facebook Inc. v. Banana Ads, LLC*, 2012 WL 1038752, at *2 (N.D. Cal. Mar. 27, 2012) (referencing cases where service by email did not violate the Hague Convention); *S.E.C. v. Lines*, No. 07 CIV. 11387 (DLC), 2009 WL 3179503, at *1 (S.D.N.Y. Oct. 2, 2009); *Williams v. Advert. Sex LLC.*, 231 F.R.D. 483, 484 (N.D. W. Va. 2005).” *Id.*

⁹¹ Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters of 15 November 1965, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=17. The Hague convention is not well-suited for service by electronic means.

⁹² Hague Conference on Private International law, Status Table, www.hcch.net/index_en.php?act=conventions.status&cid=17.

⁹³ See, e.g., *Automattic Inc. v. Steiner*, 82 F. Supp.3d 1011 (N.D. Cal. 2015), in which a federal court ruled that a UK resident accused of sending frivolous DMCA takedown notices was properly served pursuant to the Hague Convention.

limits on how service may be effected upon any person or entity within their borders—often requiring plaintiffs to rely on notoriously ineffective “central authorities” of the country in question, effectively precluding anything other than old-fashioned service of paper copies.⁹⁴ In countries where Hague Convention limitations do not apply, international service of process via e-mail has been permitted at least since 2000, when a bankruptcy court authorized service of process via e-mail to a defendant in Singapore pursuant to Rule 4(f)(3).⁹⁵ In 2002, a federal court directed that a defendant in Costa Rica be served via e-mail, noting that “service of process ordered under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country.”⁹⁶ In 2005, a federal court permitted e-mail service on a defendant in Australia (not a Hague Convention signatory at the time).⁹⁷ In 2013, international service of process by e-mail and Facebook posting was permitted as a redundant form of service to defendants in India (a Hague Convention signatory) when that country’s designated central authority had allowed the better part of a year to pass without attempting to serve the documents, and when service was actually confirmed.⁹⁸ In 2016, service of process under Rule 4(f)(3) was even allowed via Twitter.⁹⁹ In 2018, e-mail service of process was permitted on a defendant whose foreign whereabouts were unknown. “Although service may be attempted in accordance with international agreements or the foreign country’s service laws, the Court has discretion to order service by ‘means not prohibited by international agreement.’ Fed. R. Civ. P. 4(f)(3). This discretion is not a last resort nor must service have previously been attempted using the methods proscribed by Fed. R. Civ. P. 4(f)(1) and 4(f)(2).”¹⁰⁰ Also in 2018, service via e-mail on a Chinese company was upheld. The company had failed to appear in a federal proceeding alleging DMCA violations. After the default judgment against the company was enforced by freezing its assets in Hong Kong, the company moved to set aside the default, to no avail. ¹⁰¹

(2) Inbound: Foreign Court Jurisdiction over Persons Within the United States

Courts in other countries, of course, sometimes claim jurisdiction over persons and entities located within the United States.¹⁰² Online service providers, whose sites are accessible anywhere in the world, are particularly susceptible to jurisdictional claims of foreign courts. A foreign court’s claim of jurisdiction over an American online service provider, by itself, means little if the American company has no assets in the foreign country and does no business in the foreign country; the American company can raise both procedural and substantive defenses to any attempt by a foreign-court to assert jurisdiction. To the extent that an American online company chooses to appear before a foreign court that is claiming jurisdiction, the American company can raise its jurisdictional and *forum non conveniens* defenses there.

If the foreign plaintiff is a user of the service, the American company can claim that the plaintiff consented to the company’s terms of service, which will invariably contain choice-of-law and forum selection clauses providing that the law of the state where the company is located will govern, and that any disputes must be litigated or arbitrated there. In one such case, a Scottish bed and breakfast owner filed a discovery action in

¹⁰¹ *Nagravision SA v. Gotech International Technology Ltd.*, 882 F.3d 494 (5th Cir. 2018).

¹⁰² Non-U.S. courts claiming jurisdiction over persons and entities in the U.S. should be distinguished from the situation where non-U.S. courts approve service of process on defendants outside the U.S. via an e-mail or social networking service that happens to be located within the U.S. An example of the latter is *MKM Capital Properties Ltd. v. Corbo and Poyser*, No. SC 608 of 2008, ACTCA (Australia) (substituted service via post to Facebook permitted).

Scotland against an American website that featured online reviews, demanding that the site reveal the identity of a reviewer so that the bed and breakfast could sue that person for defamation. The American company appeared and pointed to the fact that the bed and breakfast company had registered with the site, and in doing so had submitted to the American terms of use, including exclusive jurisdiction for any and all legal matters in Massachusetts. The Scottish court not only agreed, but went further: “In the present case, we consider that the appropriate convention is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 18 March 1970. . . . Another procedural route open to the petitioners would be to instruct American attorneys in Massachusetts to act on their behalf to recover the relevant information by local American proceedings.”¹⁰³ Not all foreign courts will take such an approach where a local plaintiff is involved. In one case, a Canadian court rejected the argument¹⁰⁴ that a Canadian website user, by agreeing to American terms and conditions, overrode Canadian privacy protections: “Here, the [Canadian] Privacy Act by its terms confers exclusive jurisdiction on this Court and thereby denies jurisdiction to another court. The section conferring exclusive jurisdiction, s. 4, also states that it is ‘despite anything contained in another Act’. I find . . . it clear that the statutory conferral of jurisdiction on this Court for Privacy Act claims prevails over any Forum Selection Clause in [an American website’s terms of use].”¹⁰⁵ In another, a Canadian court held that jurisdiction over a non-party was appropriate where the non-party, a search engine company, although not having any physical presence in Canada, did sell advertising there.¹⁰⁶

¹⁰³ Clark v. TripAdvisor LLC, 2014 CSIH 110 P869/13, ¶ 19 (Dec. 19, 2014).

¹⁰⁴ Douez v. Facebook, Inc. S122316, ¶ 16 (Vancouver, B.C.) (May 30, 2014): “Facebook argues that this Court should decline to exercise jurisdiction over this claim. This argument is primarily based on the allegation that under the Terms of Use, registered Facebook users have agreed to a choice of jurisdiction based in California. Further, Facebook argues that by the same clause in the Terms of Use users agreed that California law governs which is a factor the Court should weigh in declining jurisdiction.”

¹⁰⁵ *Id.*, ¶¶ 132-133.

¹⁰⁶ Equustek Solutions Inc. v. Google, Inc., 2-15 BCCA 265 (Court of Appeal for British Columbia June 11, 2015): Where “the most important facts on which the injunction application is based—facts concerning the violation of trade secrets and of intellectual property rights—have a strong connection with the Province” (*id.* ¶ 41) and where “Google’s services, which provide a link between the defendant’s products and potential customers, are substantially connected to the substance of the lawsuit,” (*id.* ¶ 51), jurisdiction was proper. The court disregarded Google’s choice-of law and forum selection clauses: “Although those contracts stipulate that disputes will be governed by California law and adjudicated in California courts, the ‘choice of laws’ provision in those contracts does not alter the fact that Google is carrying on a business in this province. . . .” (*id.* ¶ 52, quoting other authority).

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.