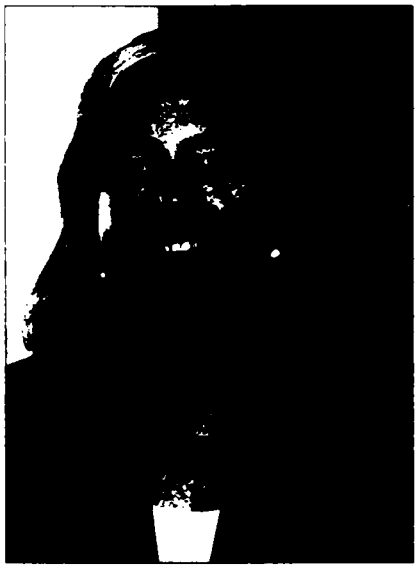
Does the *Shoe* Fit?

Personal Jurisdiction Over Foreign Defendants

By Elizabeth P. Beazley



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In an age where new technologies and high-speed communication systems have enabled people and entities from across the globe to connect with one another, the question arises as to whether the (*International*) *Shoe* still fits when it comes to establishing personal jurisdiction over a foreign defendant. (*Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310; see also *Rice Growers Assn. v. First Nat. Bank* (1985) 167 Cal.App.3d 559, 580 [technological progress in communication and trans-

portation has commensurately decreased the burdens associated with asserting jurisdiction over a non-resident defendant].)

By "foreign" or "non-resident," this article focuses on the exercise of personal jurisdiction over residents of another country, not those who reside in different jurisdictions within the United States. Since much of the jurisprudence applies equally to residents of other states, this article may be useful to those wishing to brush up on their jurisdictional skills generally, but will specifically aid those seeking to inform themselves on issues related to effecting service of process in other countries.

Minimum Contacts: *International Shoe* and its Progeny

California courts employ a two-prong approach when deciding if it is appropriate to exercise personal jurisdiction over a foreign defendant: (1) whether there exists a constitutionally sufficient basis for asserting personal jurisdiction (*i.e.*, the *International Shoe* "minimum contacts" standard); and (2) whether the plaintiff has complied with the applicable rules relevant to the service of process. (*Ziller Electronics Lab GmbH v. Super. Ct.* (1988) 206 Cal.App.3d 1222, 1229.)

As it applies to the first prong, there are several bases upon which a California court may exercise personal jurisdiction over a foreign defendant:

- A defendant may make a general appearance in the matter. (See generally Code Civ. Proc. § 410.50, subd. (a); *Fireman's Fund Ins. Co. v. Sparks Constr., Inc.* (2004) 114 Cal.App.4th 1135, 1145.)
- A defendant may contractually subject itself to jurisdiction in California. (*MillerLeigh LLC v. Henson* (2007) 152 Cal.App.4th 1143, 1149 [forum selection clauses presumptively valid in California].)
- Or, relevant to this article, sufficient "minimum contacts" may exist between the defendant and the forum state such that the exercise of personal jurisdiction over that defendant comports with the Fourteenth Amendment's due process requirements. (*Internat. Shoe Co. v. Washington, supra*, 326 U.S. at p. 316; see also *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1061.)

> *"As the California Supreme Court has recognized, "[T]he 'minimum contacts' test...is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."*

In International Shoe, the Supreme Court emphasized that the requisite minimum contacts must be sufficiently extensive such that the exercise of personal jurisdiction over a nonresident defendant does not offend "traditional notions of fair play and substantial justice" as protected by Fourteenth Amendment Due Process Clause. (*Internat. Shoe Co. v. Washington, supra*, 326 U.S. at p. 316.) A foreign defendant's contacts with the forum state may either be "general" (unlimited) or "specific" (limited). The former allows a California court to exercise general personal jurisdiction over a foreign defendant whose commercial activities affect California on a "substantial, continuous and systematic" basis — even though the lawsuit may be entirely unrelated to the defendant's forum-related activities. (*Perkins v. Benguet Consol. Mining Co.* (1952) 342 U.S. 437, 446-447; *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 446.)

'Absent the presence of an agent or a subsidiary, service is often governed by the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, more commonly known as the "Hague Service Convention."'

For limited jurisdiction, courts focus on whether: (1) a foreign defendant's purposeful availment of the forum state (*i.e.*, whether, based upon its contacts, the defendant could have foreseen being sued in the forum state); (2) the cause of action arises out of or relates to the defendant's activities in the forum state; and (3) the exercise of jurisdiction is otherwise reasonable (*i.e.*, it comports with notions of fair play and substantial justice). (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 477–478; *Vons Cos. Inc. v. Seabest Foods, Inc., supra*, 14 Cal.4th at p. 446; see also *Asahi Metal Indus. Co., Ltd. v. Super. Ct.* (1987) 480 U.S. 102, 114 [the "unique burdens" placed upon foreign national having to defend itself locally "should have significant weight" in assessing the reasonableness of exercising personal jurisdiction].)

Survey of Recent Personal Jurisdiction Decisions

As the California Supreme Court has recognized, "[T]he 'minimum contacts' test...is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present." (*Pavlovich v. Super. Ct.* (2002) 29 Cal.4th 262, 268 [citations omitted].) In particular, with regard to foreign defendants, courts assess the reasonableness of exercising unlimited personal

jurisdiction by balancing the following interests:

- The relative inconvenience of having to defend an action in foreign state.
- The relative availability of evidence and the burden of defense and prosecution in one place or another.
- The ease of access to an alternative forum.
- The interest of the plaintiff in suing locally.
- The interrelated interests the state has in assuming jurisdiction.
- The avoidance of a multiplicity of suits.
- The extent to which the cause of action arose locally.

(*Integral Development Corp. v. Weissenbach* (2002) 99 Cal.App.4th 576, 591.)

Finally, the sovereignty of foreign nations factors into the analysis. Courts "weigh the relevant contacts by the international corporations in this state, considering the interests of other nations as well as our own country's interest in foreign relations." (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 110.)

Here are a couple of examples of relatively recent cases in which jurisdiction over parties from other countries was granted under these rules:

- In an unfair competition case, the Court of Appeal found that requiring a German citizen to defend a California action did not constitute so great an inconvenience as to violate due process because most evidence and witnesses were located in California. (*Integral Development Corp. v. Weissenbach, supra*, 99 Cal.App.4th at p. 592.) In reversing the trial court's decision, the appellate court noted: "[I]n this era of fax machines and discount air travel, requiring [defendant] to litigate in California is not constitutionally unreasonable." (*Ibid.* [internal citations omitted].)
- In a personal injury action arising from the explosion of a trailer tire, the Court of Appeal affirmed the existence of personal jurisdiction over a Japanese tire manufacturer, even though the latter had been brought into the personal injury action by other defendants (trailer owner, truck driver, and truck driver's employer) by way of cross-complaint for indemnity and contribution. (*Bridgestone Corp. v. Super. Ct.* (2002) 99 Cal.App.4th 767, 778.) The court found that the defendants were all California residents, whose common interest in convenient relief was best served by a California forum and that judicial efficiency would be served by litigating all claims in one forum. (*Id.* at p 779; see also *id.* at p. 777 ["We conclude that a manufacturer's placement of goods in the stream of commerce with the expectation that they will be purchased or used by consumers in California indicates an intention to serve the California market 'directly or indirectly' and constitutes purposeful availment if the income earned by the manufacturer from sale or use of its product in California is substantial."] [internal citations omitted].)

By contrast, here are a couple of cases in which jurisdiction was denied:

- In an action brought by a restaurant worker injured by a pasta machine, the Court of Appeal declined to exercise personal jurisdiction over the Italian manufacturer, even though it had sold its machines to a distributor, which maintained an office and sold them in California. (*Carretti v. Italpast* (2002) 101 Cal.App.4th 1236, 1247.) The court reasoned, "we simply cannot say that random sales in Italy to a distributor who happens to have an office in California but may resell its products anywhere is tantamount to an effort to serve the market in state." (*Id.* at p. 1253.)

In an antitrust conspiracy action against a Canadian automobile dealers' association, the Court of Appeal declined to exercise personal jurisdiction, observing that the "mere

foreseeability" that a ban on Canadian exports would prevent California consumers from purchasing Canadian motor vehicles was an insufficient basis to establish personal jurisdiction. (*In re Automobile Antitrust Cases I & II, supra*, 135 Cal.App.4th at p. 122.)

These cases demonstrate that the *International Shoe* still fits to meet the demands of technology, trade, and commerce.

> *'In addition, the Hague Convention allows each signatory state to accept alternative methods of service within its borders.'*

— Service of Process —

Having satisfied *International Shoe*, the California practitioner must serve the foreign defendant. In many cases, foreign corporations are properly served by traditional methods. Since Corporations Code section 2105, subdivision (a)(4), requires all foreign corporations to have a California agent for service of process before they may transact business within the state, their designated agents are listed on the California Secretary of State's website. (See Cal. Sec. of State, *Business Search*, www.kepler.sos.ca.gov.) Alternatively, service may be made on a subsidiary of the foreign corporation located in the state, as these entities are deemed involuntary agents for service of process. (See *Yamaha Motor Co. v. Super. Ct.* (2009) 174 Cal.App.4th 264.)

Absent the presence of an agent or a subsidiary, service is often governed by the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, more commonly known as the "Hague Service Convention." (See Code Civ. Proc., § 413.10 subd. (c).) The Code of Civil Procedure *requires* compliance with the Hague Convention where the defendant resides or has a principal place of business located in one of the Convention's 64 signatory nations. (*Ibid.*) A listing of the signatory nations is available on the Hague Service Convention's website (www.hcch.net/index_en.php?act=conventions.status&cid=17).

Each signatory state must designate a Central Authority for receipt of service (Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters art. 3, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163); this Authority will serve the documents according to that country's procedural service requirements, or the plaintiff's requested method of service if it is compatible with law of the country of service. (*Ibid.*, art. 5.) The Central Authority will always require the defendant's address (*ibid.*, art. 1.) and completion of the following forms: a "Request for Service Abroad of Judicial or Extrajudicial Documents" and a "Summary of the Document to be Served." Both forms are available through the U.S. Department of State's website (www.

travel.state.gov/law/judicial/judicial_680.html).

Where English is not the official language of the service country and the service documents have not been translated, California courts have found service ineffective for lack of adequate notice. (*Julen v. Larson* (1972) 25 Cal.App.3d 325.) Practitioners would be best advised to serve a second translated copy of the requisite service documentation in the official language of the country of service.

"If the Hague Service Convention does not apply, service must be made by means "reasonably calculated to give actual notice as prescribed by the law of the place where the person is served or as directed by the foreign authority...."

In addition, the Hague Convention allows each signatory state to accept alternative methods of service within its borders. (See Hague Service Convention, arts. 8-11, 18.) For example, Spain, France, and Italy permit service on the individual defendant by mail, while Germany, Switzerland and many former eastern bloc countries do not, requiring service to be accomplished through their Central Authorities. (See www.hcch.net/index_en.php?act=conventions.status&cid=17.) Service is not effective if it does not comply with the rules of the applicable signatory country. Thus, service by mail on a defendant residing in Germany is ineffective, even if the defendant has actual notice of the action. (*Porsche v. Super. Ct.* (1981) 123 Cal.App.3d 755 .)

If the Hague Service Convention does not apply, service must be made by means "reasonably calculated to give actual notice as prescribed by the law of the place where the person is served or as directed by the foreign authority...." (Code Civ. Proc., § 413.10 subd. (c).) This includes service by publication if the litigant cannot ascertain the defendant's address after reasonable diligence. (*Ibid.* at § 415.50; *Kott v. Super. Ct.* (1996) 45 Cal.App.4th 1126, 1137-1139.) Since non-signatory countries may not recognize a California judgment where service does not strictly comply with their local laws, a California practitioner may be best served by retaining counsel in the country of service, or alternatively, by engaging a process server that specializes in serving foreign defendants.

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