

e-commerce law & policy

FEATURED ARTICLE
06/06



cecile park publishing

Head Office UK Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com
www.e-comlaw.com

US jurisdiction over foreign nationals

In a recent ruling by the New York Court of Appeals, it was held that New York state can assert jurisdiction over a Montana resident who allegedly breached a contract by means of an instant message. Kenneth N. Rashbaum, partner at Sedgwick, Detert, Moran & Arnold LLP, examines this case and others to assess whether European corporations can be liable for the transmission of similar electronic communications.

In a case of apparent first impression in the United States, the New York Court of Appeals (the state's highest court) has ruled that New York State may assert jurisdiction over a Montana resident who allegedly breached a contract by means of an instant message sent from Montana to New York.¹ The court held that the instant message cancelling the contract was sent from a "sophisticated institutional trader ... [who had] over the preceding 13 months ... engaged in approximately eight other bond transactions with DBSI's employee in New York"² and that the message constituted sufficient contact with New York to, under these circumstances, permit the court to assert jurisdiction over the Montana Board of Investments.³

The case has received quite a bit of attention outside New York⁴, yet one must question whether, despite the ostensible focus of the case of instant messages, Deutsche Bank Securities, Inc. (DBSI) really alters existing jurisprudence on personal jurisdiction or whether it heralds a new trend toward expanding jurisdiction in matters relating to internet activity.

The significance of this decision in the world of e-commerce is that electronic communications that

have an effect upon conduct in a state within the United States - perhaps a breach of a contract, a fraudulent statement, or a communication resulting in the misappropriation of trade secrets - may be deemed sufficiently significant contact with the state to satisfy a U.S. judge's notion of substantial justice and fair play

There are four requirements for the assertion of U.S. jurisdiction over European nationals: First, the defendant must be a signatory to the Hague Convention, and service of process must be properly effectuated pursuant to the convention's dictates;⁵ second, the electronic communication must have been the operative factor in the cause of action;⁶ third, the foreign national must have deliberately availed itself of the opportunity to do business in the U.S. state, such as by executing or performing a contract;⁷ fourth, the foreign national must have sufficient contacts with the U.S. state so that the assertion of jurisdiction satisfies notions of fairness fundamental to due process.⁸

Assertion of jurisdiction in the non-commercial arena frequently centers on an intentional act expressly aimed at the forum state and that causes harm the defendant is likely to have anticipated in that state.⁹

However, one court has cautioned that the assertion of jurisdiction over a foreign national must be exercised with great care.¹⁰ To further complicate matters, personal jurisdiction asserted by U.S. courts in e-commerce matters remains, according to one state court, "an emerging area."¹¹ The results in these cases are quite fact-dependent and will also vary according to a given U.S. state's long-arm jurisdiction laws.

Yet, the ubiquity of the internet as a vehicle for commerce has, almost

at the pace of changes in business communication technology, pushed U.S. courts to find modes of analysis to keep their footing in this rapidly changing landscape. In the California case of *Hall v LaRonde*¹², the court observed that "the speed and ease of [email] communications has increased the number of transactions that are consummated without either party leaving the office."¹³ In their endeavor to keep up with rapid changes wrought by electronic commerce, some courts have established specific criteria for the assertion of jurisdiction in the internet area. These include the Fourth Circuit's test which considers whether, in addition to the requirements cited above, the claims arise out of electronic activities directed at the State¹⁴; Illinois' "totality of the activities" approach¹⁵; and Utah's "sliding scale," which takes into consideration "that certain types of emails, merely through their nature and quality, may rise to a level that creates a substantial connection between the defendant"¹⁶ and that state.

In this regard, a single electronic communication may be enough for the court to assert jurisdiction, as in *DBSI*.¹⁷ In *Fenn v MLEADS Enterprises, Inc.*, the Supreme Court of Utah, while reversing the extension of jurisdiction held by the lower court, specifically declined to adopt a "blanket one email rule," albeit purportedly for the benefit of defendant corporations who would otherwise "be required to know the laws of each state and be prepared to litigate in all fifty of them."¹⁸

As a backdrop to all these cases are the considerations of fundamental fairness endemic to the concept of due process. In other words, considering the context of the case, would it be fair and reasonable to require the

European national to defend itself in a U.S. court? The course of prior dealings may be taken into consideration, as it was in DBSI (eight prior bond trades consummated over electronic media), and courts may also consider the parties' commercial sophistication and their expectations from the relationship. In *Bombliss v Cornelson*, for example, the Illinois Appellate Court affirmed the assertion of jurisdiction over a defendant who maintained a commercial interactive website for the purchase of pedigreed dogs and in which it invited potential Illinois purchasers to inquire by email directed to a particular address.¹⁹ Utilizing a "totality of the defendants' activities" test, the court determined that, given the defendant's activities in the state, it would not be unreasonable to require it to defend itself in Illinois.²⁰

This decision, though, stands in contrast to *Hanks v Kinetics Group, Inc.*, in which the defendant sent an email to the plaintiff's Louisiana home in order to relocate his work assignment to Puerto Rico, where he was subsequently injured on the job. While the court held that the contract of hire was, in fact, made in Louisiana, it granted the exception to personal jurisdiction on the ground that, since the defendant maintained no offices in Louisiana, and the only contact with that state was the email sent to the plaintiff's home, it would be unfair to require the defendant to defend itself in Louisiana.

The *Yahoo!, Inc.* case eloquently illustrates the dilemma in the assertion of U.S. personal jurisdiction over foreign nationals. *Yahoo!*, a Delaware corporation with headquarters in California, brought suit in federal district court in California against two

There are four requirements for the assertion of U.S. jurisdiction over European nationals

French organizations, *La Ligue Contre Le Racisme et L'Antisemitisme* ("LICRA") and *L'Union des Etudiants Juifs de France* ("UEJF") seeking a declaratory judgment that two interim orders of a French court obtained by these organizations were unenforceable. *Yahoo!* argued for the unenforceability of the court's interim orders directing the company to cease hosting sites relating to Nazi relics and memorabilia and all indices to such sites. The orders had been obtained after *Yahoo!* refused to abide by cease and desist letters sent by LICRA to *Yahoo!*'s offices in California. The Ninth Circuit Court of Appeals affirmed the ruling of the district court that jurisdiction could be asserted over LICRA and UEJF.

Personal jurisdiction over LICRA and UEJF, the court wrote, "is a close question." The court began its inquiry by observing that the essence of the requirement that the defendant have "minimum contacts" with the forum state, a test first enunciated by the United States Supreme Court in *International Shoe Co. v Washington*, is really an inquiry into whether the "exercise of jurisdiction comports with 'traditional notions of fair play and substantial justice'; i.e. it must be reasonable."

The court then reviewed the contacts LICRA and UEJF had with California, including the cease and desist letters and the service of process over *Yahoo!* in California, and concluded that these were insufficient bases for jurisdiction.

But the court upheld the exercise of jurisdiction over the French defendants because it found the defendants had sufficient contacts with California by virtue of the interim orders they had obtained in France. The interim orders were expressly aimed at activities in the

state of California and "direct(ed) *Yahoo!* to perform significant acts in California." The purpose and effects of the orders with regard to California established contacts with that state sufficient to meet the criteria of reasonableness and substantial justice.

Combined with the decision in DBSI and other cases cited above, European corporations would be advised to carefully review electronic communications transmitted within the commercial context to the United States.

Kenneth N. Rashbaum Partner
Sedgwick, Detert, Moran & Arnold LLP,
New York
kenneth.rashbaum@sdma.com

1. *Deutsche Bank Sec. Inc. v. Mont. Bd. of Investments*, No. 71, 2006 N.Y. Lexis 1366 (Ct. App. June 6, 2006).
2. *Id.* at 7.
3. *See id.*
4. John Caher, N.Y. Court Says Long-Arm Jurisdiction Extends to email, THE RECORDER, June 9, 2006 at 2.
5. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, U.S.-Neth., art. I, 20 UST 361.
6. *See DBSI*, 2006 N.Y. Lexis 1366.
7. *See e.g., Yahoo, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006); *Fenn v. MLEADS Enter., Inc.*, No. 20041072, 2006 WL 306645 (Utah Feb. 10, 2006).
8. *See Fenn*, 2006 WL 306645, citing *Int'l Shoe Company v. Washington*, 326 U.S.310, 316 (1945).
9. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984).
10. *See generally In re Automobile Antitrust Cases I and II*, 37 Cal. Rptr. 3d 258 (Ct. App. 1st Dist. 2005).
11. *Bombliss v. Cornelsen*, 824 N.E.2d 1175, 1180-81; (Ill. App. Ct., 3d Dist. 2006).
12. 66 Cal. Rptr. 2d 399 (Ct.App. 2d Dist. 1997).
13. *Id.* at 402.
14. *Dring v. Sullivan*, 423 F.Supp 540, 548 (D. Md. 2006).
15. *See Bombliss*, 824 N.E.2d at 1181.
16. *Fenn*, 2006 WL 306645 at **17.
17. 2006 N.Y. Lexis 1366.
18. *Id.* at **23-24.
19. 824 N.E.2d at 1180.
20. *Id.* at 1181.



cecile park publishing

Head Office UK Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com
www.e-comlaw.com

Registered number 2676976 Registered address 141 Wardour Street, London W1F 0UT VAT registration 577806103

e-commerce law & policy

Many leading companies, including Amazon, BT, eBay, FSA, Orange, Vodafone, Standard Life, and Microsoft have subscribed to ECLP to aid them in solving the business and legal issues they face online.

ECLP, was nominated in 2000 and again in 2004 for the British & Irish Association of Law Librarian's Legal Publication of the Year.

A twelve month subscription is £390 (overseas £410) for twelve issues and includes single user access to our online database.

e-commerce law reports

You can now find in one place all the key cases, with analysis and comment, that affect online, mobile and interactive business. ECLR tracks cases and regulatory adjudications from around the world.

Leading organisations, including Clifford Chance, Herbert Smith, Baker & McKenzie, Hammonds, Coudert Brothers, Orange and Royal Mail are subscribers.

A twelve month subscription is £380 (overseas £400) for six issues and includes single user access to our online database.

data protection law & policy

You can now find in one place the most practical analysis, and advice, on how to address the many problems - and some opportunities - thrown up by data protection and freedom of information legislation.

DPLP's monthly reports update an online archive, which is an invaluable research tool for all those who are involved in data protection. Data acquisition, SMS marketing, subject access, Freedom of Information, data retention, use of CCTV, data sharing and data transfer abroad are all subjects that have featured recently. Leading organisations, including the Office of the Information Commissioner, Allen & Overy, Hammonds, Lovells, BT, Orange, West Berkshire Council, McCann Fitzgerald, Devon County Council and Experian are subscribers.

A twelve month subscription is £355 (public sector £255, overseas £375) for twelve issues and includes single user access to our online database.

world online gambling law report

You can now find in one place analysis of the key legal, financial and regulatory issues facing all those involved in online gambling and practical advice on how to address them. The monthly reports update an online archive, which is an invaluable research tool for all those involved in online gambling.

Poker, payment systems, white labelling, jurisdiction, betting exchanges, regulation, testing, interactive TV and mobile gaming are all subjects that have featured in WOGLR recently.

Leading organisations, including Ladbrokes, William Hill, Coral, Sportingbet, BskyB, DCMS, PMU, Orange and Clifford Chance are subscribers.

A twelve month subscription is £485 (overseas £505) for twelve issues and includes single user access to our online database.

world sports law report

WSLR tracks the latest developments from insolvency rules in football, to EU Competition policy on the sale of media rights, to doping and probity. The monthly reports update an online archive, which is an invaluable research tool for all involved in sport.

Database rights, sponsorship, guerilla marketing, the Court of Arbitration in Sport, sports agents, image rights, jurisdiction, domain names, ticketing and privacy are subjects that have featured in WSLR recently.

Leading organisations, including the England & Wales Cricket Board, the British Horse Board, Hammonds, Fladgate Fielder, Clarke Willmott and Skadden Arps Meagre & Flom are subscribers.

A twelve month subscription is £485 (overseas £505) for twelve issues and includes single user access to our online database.

- Please enrol me as a subscriber to **e-commerce law & policy** at £390 (overseas £410)
- Please enrol me as a subscriber to **e-commerce law reports** at £380 (overseas £400)
- Please enrol me as a subscriber to **data protection law & policy** at £355 (public sector £255, overseas £375)
- Please enrol me as a subscriber to **world online gambling law report** at £485 (overseas £505)
- Please enrol me as a subscriber to **world sports law report** at £485 (overseas £505)

All subscriptions last for one year. You will be contacted at the end of that period to renew your subscription.

Name	<input type="text"/>		
Job Title	<input type="text"/>		
Department	<input type="text"/>	Company	<input type="text"/>
Address	<input type="text"/>		
Address	<input type="text"/>		
City	<input type="text"/>	State	<input type="text"/>
Country	<input type="text"/>	Postcode	<input type="text"/>
Telephone	<input type="text"/>	Fax	<input type="text"/>
Email	<input type="text"/>		

1 Please **invoice me** Purchase order number
Signature Date

2 I enclose a **cheque** for the amount of
made payable to 'Cecile Park Publishing Limited'

3 Please debit my **credit card** VISA MASTERCARD
Card No. Expiry Date
Signature Date
VAT No. (if ordering from an EC country)

Periodically we may allow companies, whose products or services might be of interest, to send you information. Please tick here if you would like to hear from other companies about products or services that may add value to your subscription.

priority order form

FAX +44 (0)20 7729 6093

CALL +44 (0)20 7012 1380

EMAIL dan.towse@e-comlaw.com

ONLINE www.e-comlaw.com

POST Cecile Park Publishing 17 The Timber Yard, Drysdale Street, London N1 6ND