

MAINTAINING THE HOME COURT ADVANTAGE: FORUM SHOPPING AND THE SMALL BUSINESS CLIENT

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Introduction

Though forum shopping – the act of intentionally seeking the most advantageous jurisdiction in which to bring a lawsuit – is sometimes viewed with disapproval by law school procedure professors, in the world of modern business it is a common and important practice. Lawyers who represent businesses must endeavor to keep the cost of potential disputes at a minimum. One important way to minimize expenses is to ensure that the client can bring a lawsuit or defend itself as close to home as possible. Litigating in a distant forum is expensive, risky, and therefore best avoided. As unpalatable as the concept of forum shopping may be to some in theory, it is in fact one key method of ensuring that the client’s limited capital is available for investment in profit-making endeavors.

This article explores several means by which lawyers who represent businesses can increase the likelihood that their clients will stay close to home when they become involved in disputes. It begins by explaining why the issue of personal jurisdiction is worth the small business attorney’s special attention. The article then provides a brief review of the principal concepts of personal jurisdiction, and concludes by outlining strategies for maintaining the home court advantage.

I. Start Forum Shopping Early

The twenty-first century marketplace is one in which even the smallest businesses –closely-held corporations, small partnerships and limited partnerships, family-owned enterprises, and sole proprietorships – are increasingly interacting with vendors, suppliers, distributors, manufacturers, marketers, and customers across state lines and national boundaries. The advent of the internet, videoconferencing, email, and the like has allowed formerly localized operations to enter into regional, national, and even international markets for their goods and services. Business counsel must adapt to this changing environment and be prepared to offer advice on a new set of issues. One

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such issue is the increased cost of legal services attendant to the small business's expanded geographical area of operation. A business can no longer afford to wait until a specific dispute arises to consult with its attorney; nor can it simply deal with lawsuits on a case-by-case basis. Instead, even small businesses must now be proactive and deal with the *potential* for disagreement long before a situation arises.

Consider this example based on an actual case. Broker, a Tennessee corporation, negotiates a deal between Seller, an Arizona corporation, and Buyer, an Oklahoma corporation.¹ Buyer and Broker meet in Tennessee and discuss the terms on which Buyer will accept delivery of and pay for a certain product. Broker is to find the desired product and negotiate a sale on Buyer's terms. From Tennessee, Broker contacts Seller in Arizona by telephone and email and relays to Seller the specifics of Buyer's offer. Seller makes a counteroffer. Broker, still in Tennessee, communicates the counteroffer by telephone and email to Buyer, who has returned to Oklahoma. Buyer accepts the counteroffer. From Tennessee, Broker calls Seller in Arizona and advises of Buyer's acceptance.

Seller's Agent in Arizona modifies the product to Buyer's specifications, and additional work is performed by an independent entity in New Mexico. However, when the product is delivered to Buyer in Oklahoma it does not function properly. Seller refuses to refund any of Buyer's money. Buyer sues Broker in a federal district court in Oklahoma accusing Broker of making material misrepresentations about the condition of the product. The complaint further alleges that Broker pocketed money in excess of the agreed-upon commission. At the same time, Broker sues Seller in Arizona alleging that Seller has not paid Broker its commission. Broker also sues Seller's Agent in Arizona for breach of warranty, breach of contract, and damage to property.²

Broker is now faced with litigation in at least two and possibly three forums hundreds of miles from its office in Tennessee. Even though the courts of Oklahoma most likely lack personal jurisdiction over Broker, Broker must still hire counsel, who will move to have Buyer's case there dismissed. Broker's Tennessee attorney can appear in Oklahoma *pro hac vice*, but a member of the Oklahoma bar must also be hired and associated.³ Broker cannot sue Seller or Seller's Agent in Tennessee because neither has

¹ Assume for this example that each business has an office only in its state of incorporation and that Broker and Seller have no physical presence in any other jurisdiction.

² Even though Seller's Agent has an ongoing relationship with the Seller, it contracted with and made warranties directly to Broker.

³ See OKLA. STAT. tit. 5, chap 1, apx. 1, art. II, § 5 (2005).

any contact with Broker's home state; Broker's case must be filed in Arizona.⁴ Thus, in the Arizona lawsuit, Broker is faced with the difficult choice of either paying for his attorney to become sufficiently versed in applicable Arizona law, or hiring a lawyer in Arizona with whom Broker is neither familiar nor comfortable. Furthermore, Broker's litigation costs will be unusually high because witnesses and relevant documents are spread around the country. Broker will also have to pay travel and lodging expenses for out-of-state lawyers and witnesses. If Broker chooses to use his regular attorney, his counsel will be trying a case in unfamiliar territory against an opponent whose lawyers know the judges, the local court system, and the surrounding community.

The untenable situation outlined above is preventable. The first step is for entities involved in multi-state transactions to anticipate that situations may arise in which the parties are unable or unwilling to fulfill their obligations, and that litigation often arises out of such situations. The attorney for a small business and its clients must communicate; the attorney needs to be accessible, and the client needs to take advantage of counsel's expertise. In the example above, a phone call from Broker to his lawyer should have resulted in the attorney recommending that the deal between the parties be reduced to writing and that the contract contain both a forum selection clause and a choice of law clause. Even if Seller and Buyer would not agree to dispute resolution in Tennessee's courts, counsel may have recommended that Broker insist that any disputes be submitted to arbitration. In other words, the attorney would have provided options that could have saved Broker from facing costly and inefficient litigation.

The attorney and the small business client must be proactive in protecting the home court advantage. Waiting until a lawsuit is filed is insufficient. The lawyer and the client must take steps before transactions are consummated or key decisions are made to make sure that any disputes that arise will be resolved as quickly and cheaply as possible.

⁴ See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that due process requires that a defendant have minimum contacts with a forum before personal jurisdiction will attach).

II. The Law of Personal Jurisdiction – A Quick Review

Personal jurisdiction is primarily a question of equity – when is it fair to make a defendant appear in the courts of a foreign forum?⁵ The seminal case on personal jurisdiction, *International Shoe Co. v. Washington*, established that a defendant must have minimum contacts with the state in which the plaintiff brings the suit so that state courts' exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'"⁶ This principle remains the cornerstone of the law of personal jurisdiction even as the courts have addressed issues raised by the nationalization and globalization of the marketplace.⁷

"Substantial justice" and "fair play" are broad concepts that can be applied just as easily to the internet-dominated commerce of the twenty-first century as to the door-to-door sales era of the 1940s. The determination of whether a court's exercise of personal jurisdiction over a defendant is constitutional often involves a fact-intensive analysis.⁸ The court must examine the nature and the frequency of the contacts between the state and the party over whom jurisdiction is sought; both the quantity and the quality of those contacts are important factors.⁹ For example, a motor vehicle operator driving from Arkansas to North Carolina on an interstate in Tennessee can sue or be sued in Tennessee for injuries arising from an accident there regardless of whether the driver has any other connection with the state; the act of using a Tennessee interstate

⁵ *Id.* at 316.

⁶ *Id.*

⁷ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (holding that the defendant was subject to suit in Florida because of its continuous contacts with the plaintiff's Miami headquarters and because the contract contained a forum selection clause); *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (holding that New York defendants were not subject to personal jurisdiction in Oklahoma when defendants did business only in New York even though the car sold to the plaintiffs was involved in an accident in Oklahoma).

⁸ See, e.g., *Johnson v. Bryco Arms*, 304 F. Supp. 2d 383, 397 (E.D. N.Y. 2004) (listing ten factual criteria for determining whether manufacturers and distributors of firearms are subject to personal jurisdiction in public nuisance cases).

⁹ See, e.g., *Goehring v. Super. Ct.*, 62 Cal. App. 4th 894, 908 (1998).

itself is considered sufficient contact.¹⁰ At the same time, a North Carolina corporation that operates a passive website that is accessible worldwide but that otherwise has no contact with Tennessee (*i.e.*, does not directly solicit sales, maintain offices, have employees, or conduct operations in Tennessee) lacks sufficient contacts with Tennessee to be forced to defend itself in that state.¹¹

State courts determine the propriety of exercising personal jurisdiction by looking first at the state long-arm statute and next at the due process clause of the United States Constitution.¹² For example, in *Chenault v. Walker*, the Tennessee Supreme Court considered the constitutionality of the “conspiracy theory” of personal jurisdiction.¹³ The “conspiracy theory” holds that one conspirator with sufficient contacts with a forum can subject all other conspirators to the personal jurisdiction of that forum even if the co-conspirators otherwise lack sufficient minimum contacts.¹⁴ The court looked first to the Tennessee Long-Arm Statute, which allows state tribunals to exercise personal jurisdiction to the extent permitted by the state and federal constitutions.¹⁵ The Tennessee Code further provides that an individual or entity submits to the personal jurisdiction of Tennessee courts when acting in the state

¹⁰ In fact, by operating a vehicle on a highway in Tennessee, a nonresident driver or owner appoints the Tennessee Secretary of State as his or her agent for service of process. TENN. CODE ANN. § 20-2-203 (2004).

¹¹ See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (stating that the act of “simply post[ing] information on an Internet Web site . . . that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.”).

¹² See *Chenault v. Walker*, 36 S.W.3d 45, 52 (Tenn. 2001) (interpreting the Tennessee long-arm statute).

¹³ *Id.* at 47.

¹⁴ *Id.* at 53. The Tennessee Supreme Court defined the “conspiracy theory” of personal jurisdiction using the elements articulated by the United States District Court for the District of Maryland: “(1) two or more individuals conspire to do [an act], (2) that they could reasonably expect to lead to [a result] in a particular forum, (3) one co-conspirator commits overt acts in furtherance of the conspiracy, and (4) the act is of the type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction [in] the forum state.” (citing *Cawley v. Bloch*, 544 F. Supp. 133, 135 (D. Md. 1982)).

¹⁵ See TENN. CODE ANN. § 20-2-214. See also *Chenault*, 36 S.W.3d at 51. A number of state long-arm statutes authorize the exercise of personal jurisdiction to the extent permitted under the United States Constitution. See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 2004).

through an agent or personal representative.¹⁶ After determining that the “conspiracy theory” of personal jurisdiction was consistent with the state’s long-arm statute, the court evaluated the constitutionality of haling the non-resident conspirators into a Tennessee courtroom. The court held that the “conspiracy theory” did not violate the due process rights of the nonresident defendants.¹⁷ Federal courts sitting in diversity cases use a similar analysis, looking first to the host forum’s long-arm statute and the cases construing it, and then, if the cause could be heard by the courts of that state, determining whether the assertion of personal jurisdiction passes constitutional muster.¹⁸

The constitutional evaluation of the propriety of haling a nonresident into the courts of a foreign jurisdiction requires an analysis of the quality and the quantity of that defendant’s contacts with the state.¹⁹ Defendants with systematic and continuous contacts with a forum are subject to its general jurisdiction; therefore, a claim brought against such a party need not be related to the specific transaction or occurrence at issue in the suit.²⁰ A defendant that is not subject to general jurisdiction may nevertheless be subject to specific jurisdiction to the extent that the defendant has sufficient contacts with the forum state in the context of the underlying claim sufficient to render the exercise of personal jurisdiction constitutional.²¹ Defendants must take some action in

¹⁶ TENN. CODE ANN. § 20-2-214(c).

¹⁷ *Chenault*, 36 S.W.3d at 54-55.

¹⁸ *See, e.g.*, *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 706-707 (8th Cir. 2003) (the court explained: “[a]s we sit in diversity . . . , our analysis of personal jurisdiction involves two steps. We first must consider whether the [forum] would accept jurisdiction under the facts of this case. Then, we must determine whether that exercise of jurisdiction comports with *Constitutional Due Process* restrictions.” (internal citations omitted))

¹⁹ *See, e.g.*, *Anheuser-Busch, Inc. v. All Sports Arena Amusement, Inc.*, 244 F. Supp. 2d 1015, 1020 (E.D. Mo. 2002) (listing the relevant factors as “1) the nature and quality of contacts with the forum state, 2) the quantity of such contacts, 3) the relation of the cause of action to the contacts, 4) the interest [of] the forum state in providing a forum for its residents, and 5) the convenience of the parties.” The first three factors are the most important. *Id.*).

²⁰ *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414-15 (1984) (“Even when the cause of action does not arise out of or relate to the foreign corporation’s activities in the forum State, due process is not offended by a State’s subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.” *Id.* at 414).

²¹ *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

the forum or create a continuing obligation to its residents in order to be brought before its courts. In other words, the defendant must “purposefully avail” itself of the opportunity to act in the state in a way that makes its appearance in the forum’s courts foreseeable.²²

III. Personal Jurisdiction and the Small Business Client – Strategies for Maintaining the Home Court Advantage

In sports, the home team enjoys the home court advantage. The same is true in litigation. The attorney and client most often want to appear in a local courthouse, in front of judges with whom counsel is familiar and subject to rules of procedure and substantive law with which the lawyer typically works.²³ Securing the home court advantage for the client requires good lawyering well before a lawsuit is filed.

How does corporate or business counsel maintain the home court advantage for his client? Because personal jurisdiction analysis is fact-intensive, the lawyer must first learn as much about the client’s business as possible. A lawyer should encourage owners and managers to draft a comprehensive business plan and then review the plan with them.²⁴ The plan should, at a minimum, address the following questions: (1) What services or products does the client provide? (2) What is the client’s target market for those products or services? (3) Where do potential customers, vendors, leads, and prospects reside for purposes of determining personal jurisdiction? (4) What forms of advertising will the client use? (5) Where does the client intend to maintain its principal offices, and in what other locations will it maintain a physical presence? (6) Where will its employees be working? The lawyer and the client should have a list of all of the jurisdictions in which counsel anticipates that a lawsuit could be maintained and then together devise a long-term, cost-efficient plan for handling potential disputes. The lawyer and client should specifically tailor this plan to the business. A small, localized operation, such as a restaurant, which will gear its services toward a geographically specific market, will have different needs than a trucking company with regional or

²² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985); *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

²³ Sometimes the home court actually works a disadvantage. After the disastrous accident at its Bhopal, India facility left scores dead, Union Carbide actively sought to have the case heard in India as opposed to the United States because the company and its legal team considered Indian courts less plaintiff-friendly than their American counterparts. See *In re Union Carbide Corporation Plant Disaster at Bhopal, India*, 809 F.2d 196 (2d Cir. 1987).

²⁴ See generally STEVEN C. ALBERTY, *ADVISING SMALL BUSINESSES*, § 3.3 (2003).

national routes. The restaurant's lawyer should help the client assess the risk of increased legal expenses that would accompany, for example, the launch of an aggressive advertising campaign in another state or a delivery service that crosses state lines. On the other hand, the trucking company's attorney should recommend the use of contracts with its customers, independent contractors, and employees designating the forum or forums in which suits may be maintained. A lawyer might also suggest hiring counsel in the jurisdiction where the client anticipates maintaining a consistent presence.

The use of email and the worldwide web must also be incorporated into the plan. The leading case on personal jurisdiction and the internet is *Zippo Manufacturing Co. v. Zippo Dot Com*,²⁵ in which the United States District Court for the Eastern District of Pennsylvania articulated the "sliding scale" rule and held that the propriety of exercising personal jurisdiction based on cyberspace contact is dependent on the "nature and quality of commercial activity that an entity conducts over the internet."²⁶ On one end of the spectrum is the defendant that actively engages in business over the internet by entering into contracts with foreign residents accompanied by the knowing and repeated transmission of computer files. This defendant is subject to suit in the foreign jurisdiction.²⁷ At the other end is the defendant who operates only a passive internet site that simply conveys information to residents of other states. That defendant's internet activities alone are not sufficient to confer the other states with personal jurisdiction.²⁸ Between the ends of the spectrum are operators of interactive web sites who may be subject to a state's personal jurisdiction depending on the level of interactivity and the commercial nature of that online activity.²⁹ The framework outlined in the *Zippo* case has been widely adopted by the federal circuit courts.³⁰

²⁵ 952 F. Supp. 1119 (W.D. Pa. 1997).

²⁶ *Id.* at 1124.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See, e.g., *Toys 'R' Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003); *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 713 (4th Cir. 2002); *Lakin v. Prudential Securities*, 348 F.3d 704, 710-11 (8th Cir. 2003).

Contract, Contract, Contract

After ascertaining the wants and needs of the small business client, the lawyer should strongly encourage the business to reduce to writing its agreements with vendors, customers, suppliers, and similar parties. A good contract clearly states the rights and responsibilities of each of the signatories and is written in plain language that all of the parties can understand. It should be designed to serve as a roadmap to which the client can refer both to understand its obligations to others and to set its expectations as to the benefits it will receive. In the event of a dispute, the contract provides an opportunity for the parties and their counsel to reach a quick, informal resolution. If direct negotiations fail, it permits arbitrators, mediators, and judges to determine which party is in breach and to fashion an appropriate remedy.

Contracts also provide a key opportunity for a small business to stipulate in advance the jurisdiction in which any disputes will be resolved. A forum selection clause is a contractual provision that designates the court in which a lawsuit must be filed. State and federal courts routinely enforce these provisions so long as they are fair and reasonable.³¹ Forum selection clauses have been construed to be presumptively valid even in standard consumer contracts.³² For example, in *Carnival Cruise Lines, Inc. v. Shute*, the plaintiff, a Washington resident, was injured aboard a vessel owned and operated by the defendant while the ship was in international waters off of the coast of Mexico.³³ The ticket she purchased was accompanied by a contract that provided that all suits against Carnival Cruise Lines were to be litigated in Florida.³⁴ The Supreme Court upheld the forum selection clause even though the clause appeared in a contract of

³¹ See, e.g., *Bentley v. Mutual Benefits Corp.*, 237 F. Supp.2d 699 (S.D. Miss. 2002); *Copelco Capital, Inc. v. Shapiro*, 750 A.2d 773 (N.J. 2000). In *Copelco Capital*, the New Jersey Supreme Court refused to enforce a forum selection clause, but noted that the majority rule was to enforce such provisions because parties to a contract should be permitted mutually to agree on a forum for the resolution of disputes and because forum selection clauses provide a predictable and neutral locus for litigation. 750 A.2d. at 776.

³² See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Bennett v. Appaloosa Horse Club*, 35 P.3d 426 (Ariz. Ct. App. 2001).

³³ 499 U.S. at 588.

³⁴ *Id.* at 587-88.

adhesion where the plaintiff had no bargaining power and could not even have obtained a full refund had she returned the ticket.³⁵

Some who oppose the use of forum selection clauses in consumer contracts where the consumer has little or no bargaining power has criticized *Carnival Cruise Lines*.³⁶ These critics argue that companies use forum selection clauses to increase the consumer's litigation costs to the point where potential plaintiffs either abandon their cases or settle for much less than their cases are worth.³⁷ While the plaintiff has the heavy burden of proving that the forum selection provision is unreasonable,³⁸ forum selection clauses are not enforced when they overreach,³⁹ are unjust or unreasonable,⁴⁰ violate the law or public policy,⁴¹ serve to deprive a litigant of his day in court,⁴² or are otherwise unconscionable.⁴³ Furthermore, courts do consider the disadvantaged

³⁵ *Id.* at 593, 594-95. In 1992, Congress amended 46 U.S.C. section 183(c) to prohibit owners and managers of vessels transporting passengers from contractually limiting their liability for injuries and declared all such provisions to be void. The amendment also voided any clause limiting a passenger's right to bring suit in a "court of competent jurisdiction." The courts are split as to whether the 1992 amendment invalidates forum selection clauses on vessels transporting passengers. *Compare* Smith v. Doe, 991 F. Supp. 781 (E.D. La. 1998) (holding that 46 U.S.C. section 183(c) did not void a forum selection clause contained in a passenger's contract) *with* Yang v. M/V Minas Leo, 1996 U.S. App. LEXIS 2235 (9th Cir.) (stating in dicta that 46 U.S.C. section 183(c) supercedes *Carnival Cruise Lines* and prohibits enforcement of forum selection clauses in passenger contracts).

³⁶ See, e.g., Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum Selection, and The Rehnquist Court*, 40 UCLA L. REV. 423 (1992).

³⁷ *Id.* at 509-10.

³⁸ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

³⁹ *Premium Risk Group, Inc. v. Legion Insurance Co.*, 294 A.2d 345, 346 (N.Y. App. Div. 2002).

⁴⁰ *Id.*

⁴¹ *Boyd v. Ground Trunk W. R.R. Co.*, 338 U.S. 263, 266 (1949).

⁴² *M/S. Bremen*, 407 U.S. at 28.

⁴³ *Premium Risk Group, Inc.*, 294 A.D.2d 345. See also *Boyd*, 338 U.S. 263 (forum selection restrictions on railroad workers are void under the Federal Employer's Liability Act); *Nunez v. Am. Seafoods*, 52 P.3d 720 (Alaska 2002) (forum selection clause held unenforceable in light of a specific federal statute vesting state courts with jurisdiction to hear cases involving injured seamen).

position of the consumer when determining whether or not to enforce forum selection clauses.⁴⁴ For example, in *Bennett v. Appaloosa Horse Club*, the Arizona Court of Appeals held that once the plaintiff proves that a forum selection clause is part of a contract of adhesion, “the court must examine the reasonable expectations of the adhering party and determine whether the [provision] is unconscionable.”⁴⁵ Nevertheless, inconvenience and the increased cost of litigation in a foreign jurisdiction alone are insufficient to render an otherwise valid forum selection clause unenforceable.⁴⁶

Forum selection clauses should be drafted broadly to incorporate any potential dispute that might arise between the parties, including disputes not directly concerning the transaction covered by the contract.⁴⁷ The clauses should *require* that lawsuits be filed in a designated court because clauses that are strictly permissive may not prevent litigation in other forums.⁴⁸ A choice of law clause requiring the application of the chosen forum’s substantive law should accompany the forum selection clause.⁴⁹ Finally, if suit is brought against the client in a forum other than the one set forth in the contract, the client should file a motion to dismiss immediately to prevent the waiver of a personal jurisdiction defense.⁵⁰

The lawyer and client should also discuss the potential benefits of including an alternative dispute resolution arbitration clause in the contract. An agreement between

⁴⁴ See, e.g., *Norwegian Cruise Line v. Clark*, 841 So. 2d 547 (Fla. Ct. App. 2003) (holding a forum selection clause was enforceable because it provided sufficient notice to the consumer of the conditions he was accepting); *Thomas v. Costa Cruise Lines, N.V.*, 892 S.W.2d 837 (Tenn. Ct. App. 1994) (holding a forum selection clause was enforceable because the passenger was provided with an opportunity to reject its terms without penalty).

⁴⁵ 35 P.3d 426, 428 (Ariz. Ct. App. 2001).

⁴⁶ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

⁴⁷ See generally Bruce F. Metge, *Forum Selection Clauses: A Change of Climate*. 40 BOSTON B. J. 7 (1996).

⁴⁸ See, e.g., *Bentley v. Mutual Benefits Corp.*, 237 F. Supp.2d 699 (S.D. Miss. 2002).

⁴⁹ See *Net2Phone, Inc. v. Super. Ct.*, 109 Cal. App. 4th 583 (2003).

⁵⁰ FED. R. CIV. PROC. 12(h)(1).

parties to arbitrate disputes is generally binding.⁵¹ Arbitration can have significant advantages over litigation. It is usually faster, requires less paperwork, allows the parties to exchange relevant information more easily, avoids costly and lengthy motion practice, has fewer and more understandable procedural rules, and has a less complicated system for the introduction of evidence.⁵² The parties can select an arbitrator with specialized knowledge of a relevant subject.⁵³ For example, an arbitrator with significant skill and experience in intellectual property issues is better suited to resolve a dispute over trade secrets than an elected judge who has generalized knowledge of legal theory. Arbitration is also suited to cases that are technically- fact-intensive and therefore difficult to convey to a jury. A jury may not understand the facts in a case involving a complicated securities transaction or in a case that relies on highly technical engineering designs.

Arbitration is procedurally flexible. The parties can customize the process to their own needs.⁵⁴ They choose the arbitrator, the applicable procedural rules, the site of any hearing, and how the case will be presented to the dispute resolution neutral.⁵⁵ The decision of the arbitrator is an enforceable civil judgment.⁵⁶ In the example discussed in Part I, an arbitration clause between the Broker and the other parties could tailor a dispute resolution process to fit the specific needs of the parties. For example, the parties could agree to arbitrate the dispute at a more central location between Nashville and Phoenix. They could also forgo the necessity of appearances by allowing testimony offered through affidavits or by telephone, Internet, or videoconference. Whatever the exact terms of the arbitration clause, Broker would be spared from choosing among the mutually unattractive options of litigating in two distant forums or forfeiting his rights and taking a substantial loss.

⁵¹ See, e.g., 9 U.S.C. § 2 (2004).

⁵² Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future*. 27 WM. MITCHELL L. REV. 745, 748-49 (2000).

⁵³ *Id.* at 749.

⁵⁴ See *id.*

⁵⁵ *Id.*

⁵⁶ See, e.g., TENN. CODE ANN. § 29-5-315 (2004). Tennessee has adopted the Uniform Arbitration Code.

Litigation Strategies

Because the plaintiff initiates the litigation, he makes the preliminary determination of where to hear the case. While the home court is the preferable forum, the plaintiff's counsel should carefully assess the viability of a personal jurisdiction defense before filing suit in the nearest courthouse. A successful personal jurisdiction defense increases the plaintiff's litigation costs – particularly if the plaintiff is forced to engage in discovery on the jurisdiction issue – and delays a decision on the merits.⁵⁷ If, after filing suit, the plaintiff's attorney determines that a meritorious personal jurisdiction defense exists, he should request that the case be transferred, not dismissed.⁵⁸

From the defense perspective, prior to filing a responsive pleading, counsel must determine whether a viable personal jurisdiction defense exists.⁵⁹ Failure to raise the defense immediately by separate motion or in the answer to the lawsuit results in waiver of the defense.⁶⁰ The safest strategy is to file a motion to dismiss prior to making any appearance before the court – even for the purpose of challenging a preliminary injunction.⁶¹ A motion to dismiss should not be filed simply to increase the plaintiff's litigation costs because both the defendant and defense counsel may be subject to sanctions.⁶²

⁵⁷ See, e.g., *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (defendant repeatedly failed to comply with discovery orders while court was attempting to determine whether it had jurisdiction); *GTE New Media Services, Inc. v. Bellsouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000) (holding that plaintiff was “entitled to pursue precisely focused discovery aimed at addressing matters relating to personal jurisdiction.”).

⁵⁸ See 28 U.S.C. § 1404(a) (2004) (permitting a district court to “transfer any civil action to any other district or division where it might have been brought.”).

⁵⁹ See FED. R. CIV. PROC. 12(h).

⁶⁰ See FED. R. CIV. PROC. 12(b)(2), 12(h).

⁶¹ See *Wyrough & Loser, Inc. v. Pelmer Laboratories, Inc.*, 376 F.2d 543, 547 (3d Cir. 1967) (holding that “a party who participates in [a hearing on an application for an injunction] must be deemed to have waived the defense of lack of personal jurisdiction.”).

⁶² See FED. R. CIV. PROC. 11(c).

If there is no personal jurisdiction defense, counsel should consider the viability of a dismissal or transfer on the grounds of *forum non conveniens*. Under this doctrine, a court may be permitted to dismiss or transfer a case even if jurisdiction and venue are proper.⁶³ A case may be dismissed or transferred to another forum when proceeding in the court chosen by the plaintiff would be oppressive and vexatious to a defendant, when a court's own administrative problems render it unable to hear the matter, and, in federal court, when a more suitable forum is available.⁶⁴ However, not all state courts require that an acceptable, alternative forum be available.⁶⁵ Some states have also adopted an intrastate *forum non conveniens* procedure that mirrors its interstate counterpart.⁶⁶

A court considering a dismissal on *forum non conveniens* grounds will examine public factors such as crowded dockets, public interest in local resolutions to local disputes, potential burden on a foreign forum, and the presence of undue forum shopping, along with private factors such as access to evidence and witnesses, cost to the parties, and the ability to enforce judgments.⁶⁷ While courts give deference to a resident's decision to bring an action in his home forum, they are more likely to dismiss or transfer a suit strategically filed in a foreign jurisdiction.⁶⁸ Trial court judges have considerable latitude to weigh public and private factors when deciding the applicability of the doctrine to a case.⁶⁹ Because the propriety of a dismissal or transfer due to *forum*

⁶³ See *American Dredging Co. v. Miller*, 510 U.S. 443, 448 (1994).

⁶⁴ *Id.* Federal courts follow the Restatement (Second) of Conflict of Laws in mandating that an alternative forum be available. However, whether or not that forum is actually willing or able to hear the case is another issue. See David W. Robertson, *Forum Non Conveniens in America and England: A Rather Fantastic Fiction*. 103 LAW Q. REV. 398, 399 (1987).

⁶⁵ See, e.g., *In re: Bridgestone/Firestone and Ford Motor Company Tire Litigation*, 138 S.W.3d 202, 207 (Tenn. Ct. App. 2003).

⁶⁶ See, e.g., MISS. R. CIV. PROC. 82(e), cmt.; *Norfolk & W. Ry. Co. v. Williams*, 389 S.E.2d 714 (Va. 1990) (concluding that trial court's refusal to transfer to another Virginia venue constituted an abuse of discretion).

⁶⁷ See *Gulf Oil v. Gilbert*, 330 U.S. 501, 508-509 (1947).

⁶⁸ See, e.g., *First England Funding, L.L.C. v. Aetna Life Ins. & Annuity Co.*, 790 A.2d 243 (N.J. Super. 2002) (dismissing claims of out-of-state plaintiffs on *forum non conveniens* grounds).

⁶⁹ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

non conveniens requires a fact-intensive analysis, a trial court's decision usually is overturned only for an abuse of discretion.⁷⁰

Forum non conveniens can be applied in cases ranging from local disputes to international litigation. For example, in *Norfolk and Western Railroad Co. v. Williams*, the Virginia Supreme Court upheld an intrastate transfer of the case from Roanoke to Portsmouth.⁷¹ As a basis for its decision, the court cited the inconvenience to the parties and the witnesses, who lived in Portsmouth, should they be required to travel from the Virginia coast to the Appalachians for trial.⁷² Similarly, the Second Circuit Court of Appeals upheld the transfer from the United States to India of a lawsuit arising from the disaster at Union Carbide's Bhopal, India facility.⁷³ The court transferred the suit on the conditions that Union Carbide not challenge the jurisdiction of India's courts, that American discovery rules apply, and that the judgment rendered by the Indian court be deemed enforceable.⁷⁴ *Forum non conveniens* motions are prevalent in international litigation: while American companies desire to try cases in less plaintiff-friendly jurisdictions, foreign plaintiffs push to file their claims in the United States.⁷⁵

V. Conclusion

The goal of for-profit entities is to maximize profits. Fulfilling this objective requires a small business to spend its limited capital on profit-making endeavors and to minimize costs. Litigation, and its accompanying drain on resources, however, is an unavoidable externality, and a good attorney may therefore be indispensable to a small business. To fill this role, the lawyer must appreciate the services the client needs. These services fall into two categories: (1) services that help the client avoid unnecessary

⁷⁰ See, e.g., *Qualley v. Chrysler Credit Corp.*, 217 N.W.2d 914 (Neb. 1974); *Lesser v. Boughey*, 965 P.2d 802 (Haw. 1998).

⁷¹ *Norfolk & W. Ry. Co. v. Williams*, 389 S.E.2d 714, 717 (Va. 1990).

⁷² *Id.*

⁷³ See *In re Union Carbide Corporation Plant Disaster at Bhopal, India*, 809 F.2d 196 (2d Cir. 1987).

⁷⁴ *Id.*

⁷⁵ See Donald J. Carney, *Forum Non Conveniens in the United States and Canada*, 3 BUFF. J. INT'L L. 117, 136-37 (1996).

conflicts with third parties, and (2) services that proactively ensure that disputes are resolved as efficiently as possible. The first category includes drafting contracts that the parties understand. The contract anticipates and addresses potential sources of disagreement. The client must be an integral part of the contract drafting process because the client usually has a better understanding of the business's specific industry and is familiar with the types of circumstances that routinely cause disputes.

The second category includes finding low-cost ways to resolve disagreements, including arbitration and mediation. The attorney should prepare for litigation well before a lawsuit is filed. The client may minimize the cost of litigation by litigating disputes in the court closest to home. Accordingly, the attorney should encourage the client to use written agreements with vendors and customers that include both forum selection and choice of law clauses. If the client retains the lawyer after the transaction is consummated and contracting for the home court advantage is no longer possible, litigation strategy should begin with an analysis of the feasibility of bringing or defending a suit in the business's home jurisdiction. Counsel should consider the following issues: (1) Will the home state have jurisdiction over a foreign defendant if suit is brought on behalf of the client? (2) Is a lack of personal jurisdiction defense viable if the client is sued in a distant forum? (3) Finally, if the court of a distant forum has jurisdiction, is a motion to transfer or dismiss due to *forum non conveniens* appropriate?

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