2011

Jurisdictional Discovery in Transnational Litigation: Extraterritorial Effects of United States Federal Practice

S. I. Strong
University of Missouri School of Law, strongsi@missouri.edu

Jurisdictional Discovery in Transnational Litigation: Extraterritorial Effects of United States Federal Practice

S.I. Strong

7 JOURNAL OF PRIVATE INTERNATIONAL LAW __ (2011)

JURISDICTIONAL DISCOVERY IN TRANSNATIONAL LITIGATION: EXTRATERRITORIAL EFFECTS OF UNITED STATES FEDERAL PRACTICE

S.I. Strong*

A. INTRODUCTION

In the battle for the imagination of the legal community, substantive law has traditionally prevailed over procedural law. For years, the field of civil procedure has struggled to overcome the perception that it is either dull (at best) or of secondary importance (at worst). Furthermore, longstanding beliefs about the intransigence of parochial national procedures have often thwarted attempts to discuss matters of procedure in the international and comparative context.

These assumptions have recently been challenged, however. For example, scholars and practitioners now recognize that "[p]rocedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights".[1] Globalization has inspired an increasing number of cross-border transactions and disputes, leading comparativists to embrace the notion that "[a]dvocates, advisers, and judges must have at least a working knowledge of foreign procedures to be able to frame, anticipate, or decide legal issues that cross national boundaries".[2] As a result, comparative civil procedure has become a promising new field for both academic and practising lawyers.

Transnational litigation poses a particular problem for multinational actors in that both lawyers and parties typically expect foreign civil procedure to mirror that of their home system. The situation is exacerbated when local counsel fails to recognize how unusual a

* PhD (law), University of Cambridge; DPhil, University of Oxford; JD, Duke University. The author, who is admitted as a solicitor in England and Wales and an attorney in New York and Illinois, is Senior Fellow at the Center for the Study of Dispute Resolution and Associate Professor of Law at the University of Missouri.

[1] TO Main, "The Procedural Foundation of Substantive Law" (2010) 87 *Washington University Law Review* 801, 802.

[2] S Dodson, "Comparative Convergences in Pleading Standards" (2010) 158 *University of Pennsylvania Law Review* 441, 444-45.

particular practice may be for non-residents and thus neglects to mention the procedure to the client. The combination of these two factors can lead parties to make major tactical errors simply as a result of a procedural misunderstanding. More information is therefore needed about these unusual and often invisible practices so that clients and counsel can make strategic decisions in full knowledge of the likely ramifications of their actions.

One procedure that needs to be more fully understood at the international level is jurisdictional discovery, a uniquely American device that combines two of the more internationally problematic aspects of United States civil procedure, namely an exceptionally broad view of extraterritorial jurisdiction and an expansive approach to pre-trial discovery. The mechanism comes into play before the court's jurisdiction over the defendant is even established and allows plaintiffs to ask defendants[3] to produce documents and information that can be used to justify the plaintiff's claim that jurisdiction in this court is proper. The procedure, which has been largely overlooked by commentators both in the United States[4] and elsewhere,[5] applies equally to all defendants, regardless of their location. Though used infrequently in the past, jurisdictional discovery against parties based outside the United

[3] Jurisdictional discovery is most commonly ordered against putative defendants, but it can be requested of plaintiffs and third parties as well. This article focuses exclusively on discovery orders directed at named defendants, since those cases are more frequent and the issues are somewhat different than those concerning non-parties and plaintiffs. See, eg, *Linde v Arab Bank, PLC* 262 FRD 136, 145 (EDNY 2009); *In re Baycol Products Litigation* 348 F Supp 2d 1058, 1060 (D Minn 2004).

[4] See SI Strong, "Jurisdictional Discovery in United States Federal Courts" (2010) 67 *Washington and Lee Law Review* 489, 492-94 (discussing why research has been limited). The few existing scholarly works include J Anderson, "Toys 'R' Us, the Third Circuit, and a Standard for Jurisdictional Discovery Involving Internet Activities" (2003) 9 *Boston University Journal of Science and Technology Law* 471; KM Clermont, "Jurisdictional Fact" (2006) 91 *Cornell Law Review* 973; Strong, supra; JEC, Note, "Use of Discovery to Obtain Jurisdictional Facts" (1973) 59 *Virginia Law Review* 533. Internationally oriented analysis by US commentators has been limited to cases involving foreign sovereigns. SR Swanson, "Jurisdictional Discovery Under the Foreign Sovereign Immunities Act" (1999) 13 *Emory International Law Review* 445; JM Terry, Comment, "Jurisdictional Discovery Under the Foreign Sovereign Immunities Act" (1999) 66 *University of Chicago Law Review* 1029.

[5] The device has been scarcely discussed outside the US. See, eg, RG Blum, "American courts and foreign litigants: should American discovery rules apply when a foreigner challenges an American court's jurisdiction?" (2000) 11 *International Company and Commercial Law Review* 114; EP Gay, "Obtaining evidence in England: the role of US counsel" (1997) 5 *International Insurance Law Review* 249.

States is on the rise, leading to confusion and conflicts based on differences in the parties' understanding of proper procedural practice.

This article therefore has several aims. First, it attempts to increase awareness of this exceptional procedural device so that parties based outside the United States can understand the genesis and role of jurisdictional discovery in US federal practice (section B).[6] Second, the article describes what litigants can expect in terms of the practical application of jurisdictional discovery (section C). Third, the article discusses the special means by which multinational actors can avoid or limit jurisdictional discovery, based on recent decisions from the United States Supreme Court (section D). Finally, the article concludes with remarks on the future of jurisdictional discovery in the transnational context (section E).

B. THE GENESIS AND ROLE OF JURISDICTIONAL DISCOVERY IN US FEDERAL COURTS

Like all procedural mechanisms, jurisdictional discovery arose in response to a specific issue, namely the need for every US federal court to confirm that it has jurisdiction over both the defendant and the dispute before it makes an adjudication on the merits.[7] The concept of legitimate jurisdiction is nothing new, although every legal system has its own means of ascertaining and evaluating facts relevant to a jurisdictional determination. Interestingly, many states demonstrate a heightened concern when they are asked to assert jurisdiction over a foreign defendant. Thus, for example, several common law systems, including England and Australia, utilize special service-out proceedings that incorporate various elements that benefit foreign defendants. These pro-defendant components include reversing the normal presumption regarding the propriety of the forum, resolving doubts in favour of the foreign

[6] Although jurisdictional discovery also takes place in state courts, the discussion focuses solely on US federal law for reasons of space.

[7] Federal courts in the United States have only limited jurisdiction, meaning that plaintiffs must demonstrate that both the dispute and the defendant fall within certain prescribed boundaries.

litigant, and requiring claimants to provide full and frank disclosures regarding jurisdictional claims, including the provision of information that might be detrimental to the claimant's jurisdictional assertions.[8] Canada uses a similar system of service out, although Canadian courts demonstrate some scepticism about the merits of a procedure that relies entirely on self-disclosure and therefore permit cross-examination of affiants during any hearing on jurisdiction.[9]

The situation is very different in the United States. For example, US courts do not have different procedures for asserting jurisdiction over foreign versus domestic defendants,[10] nor does the law impose any presumptions in favour of the non-resident party. Instead, the US system permits plaintiffs to name whomever they wish as defendants, without any judicial oversight and subject only to the plaintiffs' good faith belief that jurisdiction is proper.[11] Furthermore, plaintiffs need not even hold any firm evidence that jurisdiction is warranted when they file their claim. Instead, they can wait for the defendant to challenge jurisdiction and then ask the judge for an order of jurisdictional discovery that compels the defendant to produce documents and information regarding relevant jurisdictional facts, including facts adverse to the defendant's position.

This type of approach demonstrates both a high level of distrust regarding the possibility of self-serving disclosures on the part of defendants as well as a bias towards broad access to justice. US courts have expressed concern that other procedures (such as those used in service out) could force courts to dismiss otherwise legitimate claims simply as

[8] See, eg, Civil Procedure Rules (England) [hereinafter CPR] Rs 6.33, 6.36-6.37; Practice Direction 6b, Service out of the Jurisdiction (England); Federal Court Rules (Australia) Order 8, Rs 2-3; *The Hagen* [1908] P 189 (England); C Joseph & PS Selvin, "Service of Process Under United States and English Law", in J Fellas (ed), *Transatlantic Commercial Litigation and Arbitration* (Oxford University Press, 2004) 37, 56, 72.
[9] See OG Chase et al (eds), *Civil Litigation in Comparative Context* (St Paul, Thomson West, 2007) 522-23.
[10] The US uses a slightly different method of service for foreign and domestic defendants, but jurisdiction and service are not linked to the same extent as they are in England, for example. See Federal Rules of Civil Procedure (US) [hereinafter Fed R Civ P] R 4; Sir Lawrence Collins et al (eds), *Dicey, Morris and Collins on The Conflict of Laws* para 11-003 (London, Sweet & Maxwell, 14th edn, 2006).
[11] See Fed R Civ P 11(b).

a result of the defendant's withholding information about jurisdictionally relevant facts.[12] The problem is that this method of establishing jurisdiction appears to be utterly unique, even within the common law tradition. Indeed, Australia's highest court recently refused a request for jurisdictional discovery in the context of a service-out proceeding, claiming that the interests of international comity meant that "a foreign defendant served outside Australia should not lightly be subjected to the jurisdiction of this Court, but more importantly should not have imposed upon him one of the Court's compulsory processes in aid of establishing the jurisdiction itself".[13]

As exceptional as jurisdictional discovery may be, it makes sense when viewed in its historic and domestic context. Interestingly, jurisdictional discovery is not mentioned in any statute or rule of court. Instead, it is an entirely judge-made procedure that is rooted in the policies and procedures reflected in the Federal Rules of Civil Procedure, which were considered ground-breaking at the time of their adoption in 1938. Indeed, jurisdictional discovery did not exist in the United States prior to the adoption of the Federal Rules.[14]

The first reported decision to use the phrase "jurisdictional discovery" was handed down in 1961 and involved two defendants – one British, one Bermudan – who were allegedly subject to the jurisdiction of the US court either by virtue of "doing business" in the forum or as the alter egos of defendants who were indisputably subject to the court's control.[15] When the defendants sought to have the case dismissed, the court held that it had jurisdiction to determine its own jurisdiction, and the fact that the defendants had not yet been properly determined to be "parties" did not allow them to avoid discovery procedures that were analogous to procedures concerning discovery on the merits. Notably, this second

[12] See *Mother Doe I v Al Maktoum* 632 F Supp 2d 1130, 1144 (SD Fla 2007).
[13] *Armacel Pty Ltd v Smurfit Stone Container Corp* [2007] FCA 1928 para 8.
[14] See, eg, Strong, supra n 4, 497-98; JEC, supra n 4, 545.
[15] *General Industrial Co v Birmingham Sound Reproducers, Ltd* 26 FRD 559, 561 (EDNY 1961).

conclusion is precisely opposite to the position taken recently by the Australian Federal Court.[16]

Jurisdictional discovery was used sparingly in subsequent years, but the device gained credibility in 1978 by virtue of the United States Supreme Court's opinion in *Oppenheimer Fund, Inc v Sanders*.[17] There, the Supreme Court cited the seminal decision of *Hickman v Taylor*[18] for the proposition that relevance in discovery is and should be construed broadly, stating that:

> [c]onsistently with the notice-pleading system established by the [Federal Rules of Civil Procedure], discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.[19]

Thus, "where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues".[20] Subsequent federal cases have all affirmed the principle of jurisdictional discovery, and today it is universally accepted that "a federal district court has the power to require a defendant to respond to discovery requests relevant to his or her motion to dismiss for lack of personal jurisdiction".[21]

Jurisdictional discovery is therefore built on three interrelated concepts. First is the idea that courts retain the power to determine their own jurisdiction. This tenet is unremarkable and is reflected in other jurisdictions, including England.[22] Second is the notion of notice pleading, which is somewhat unusual in the world of civil procedure.[23]

---

[16] See *Armacel Pty Ltd v Smurfit Stone Container Corp* [2007] FCA 1928 para 8.
[17] 437 US 340 (1978).
[18] 329 US 495, 500-01 (1947).
[19] *Oppenheimer Fund, Inc v Sanders*, 437 US 340, 351 n13 (1978).
[20] *Ibid.*
[21] *Ellis v Fortune Seas, Ltd* 175 FRD 308, 311 (SD Ind 1997).
[22] See A Briggs & P Rees, *Civil Jurisdiction and Judgments* (London, Informa, 5th edn, 2005) 403-04.
[23] Fact pleading is said to be more common, though some states' interpretation of fact pleading is somewhat lax and perhaps more akin to US notice pleading. See, eg, CPR Rs 16.2, 16.4; ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge University Press, 2006) xlviii-xlix; N Andrews, *The Modern Civil Process* (Tübingen, Mohr Siebeck, 2008) paras 3.04 (describing English "statements of case"(ie, pleadings) and

However, it has been said that pleadings in US cases contain "sufficiently detailed information that a requirement of 'fact pleading' can, in fact, be fulfilled", which suggests that in practice the US approach is not as different from other jurisdictions as is commonly believed.[24] Third is the conclusion, apparently unique to the United States, that first two principles, taken together, must necessarily trigger application of discovery regarding the jurisdictional facts in dispute.

C. JURISDICTIONAL DISCOVERY IN PRACTICE

1. Practical Procedures

Having outlined the genesis and jurisprudential basis for jurisdictional discovery, it is time to discuss the device's practical application. Jurisdictional discovery arises at the beginning of a lawsuit, very soon after process has been served. A defendant who questions the jurisdiction of the US court typically responds to service of process in one of three ways:[25]

> First, [a defendant] may ignore the complaint and summons and then, if a default judgment is issued against her, may challenge the issuing court's jurisdiction in a collateral proceeding (presumably closer to home or other assets) when the plaintiff seeks to enforce the judgment. Second, she may voluntarily waive any lack of personal jurisdiction and submit to the distant court's jurisdiction. Third, she may appear in the distant court to assert the lack of personal jurisdiction. By taking this third route, . . . the defendant submits herself to the jurisdiction and power of the court for the limited purpose of deciding the jurisdictional issue. That court's decision in the jurisdictional issue will be *res judicata* in future proceedings to enforce a judgment. On this third route, the defendant also submits to the procedures of the distant court, including discovery, for orderly resolution of the jurisdictional issue.[26]

Thus, jurisdictional discovery is typically triggered by the defendant's entering a formal objection to the court's jurisdiction under Rule 12(b) of the Federal Rules of Civil

---

noting "[t]here is no need to include . . . any detailed evidence or details of legal argument" in such statements), 3.08.

[24] ALI/UNIDROIT, supra n 23, xlix; see also *ibid*, 7; Dodson, supra n 2, 443, 452.

[25] Recent US Supreme Court decisions have suggested other tactical alternatives in a limited number of cases. See infra notes 104-27 and accompanying text.

[26] *Ellis v Fortune Seas, Ltd* 175 FRD 308, 311 (SD Ind 1997) (citation omitted).

Procedure.[27] At that point, "the trial court has three procedural alternatives: 'it may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions.'"[28] If jurisdictional discovery is ordered, the party against whom the order is made must comply in full. Failure to do so can lead to sanctions ranging from the court's shifting the burden to the defendant to prove that jurisdiction does not exist to deeming certain matters to have been conceded.[29] Courts can even go so far as to conclude that jurisdiction does, in fact, exist, so long as doing so is "fair" and "just" in the circumstances.[30] However, defendants do not simply have to endure burdensome or oppressive discovery orders; should compliance become unduly difficult, expensive, embarrassing or annoying, a party can seek a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, although the definition of burdensomeness is of course viewed from the US legal perspective, which may not be as favourable as a foreign litigant would like.

2. Legal Standards

Once jurisdictional discovery has been requested, the court must consider two related questions: (1) whether jurisdictional discovery ought to be ordered and (2) what the scope of such discovery is to be, if such an order is made. These issues are covered separately below.

(a) Availability of jurisdictional discovery

United States federal courts agree that that "[t]he party seeking [jurisdictional] discovery bears the burden of showing its necessity" as well as the ultimate burden of demonstrating

[27] A federal district court may also raise questions regarding subject matter jurisdiction *sua sponte*, although such a move would be unusual. See *Grupo Dataflux v Atlas Global Group, LP* 541 US 567, 593 (2004).
[28] *Hagen v U-Haul of Tennessee* 613 F Supp 2d 986, 1002 n10 (WD Tenn 2009) (citation omitted).
[29] See Fed R Civ P 37; *Saudi v Marine Atlantic, Ltd* 306 Fed Appx 653, 654 (2d Cir 2009).
[30] *Insurance Corp of Ireland, Ltd v Compagnie des Bauxites de Guinee* 456 US 694, 709 (1982).

that the jurisdiction of the court is proper.[31] Beyond that, little is consistent in this area of law. For example, there is no national consensus regarding the circumstances in which jurisdictional discovery will be granted,[32] despite the claim that matters of procedure are supposed to be uniform across the nation.[33] To some extent, the disparity arises because matters of discovery reside firmly within the discretion of trial court judges, but the disinclination of the US Supreme Court to provide guidance at the national level has proven problematic as well.[34]

Although standards vary widely regarding the availability of jurisdictional discovery, many courts focus on whether a prima facie showing of jurisdiction has been made.[35] However, a number of jurisdictions do not even require that minimal showing to be met.[36] For example, some courts simply look for "a colorable claim of jurisdiction",[37] while other courts have stated that so long as the plaintiff's claims regarding personal jurisdiction are not "clearly frivolous", the judge "should ordinarily allow discovery on jurisdiction in order to aid the plaintiff" in discharging its burden of proof in establishing jurisdiction.[38] Even more lenient are courts that state that "[d]iscovery may be appropriately granted [even] where

[31] *Maersk, Inc v Neewra, Inc* 554 F Supp 2d 424, 440 (SDNY 2008); see also *Freeman v United States* 556 F 3d 326 (5th Cir 2009); CA Wright & AR Miller, *Federal Practice and Procedure* (St Paul, Thomson West, 3d edn, 2010) s 1067.6.
[32] See, eg, *Klein v Freedom Strategic Partners, LL*, 595 F Supp 2d 1152, 1160 (D Nev 2009); *Mother Doe I v Al Maktoum* 632 F Supp 2d 1130, 1144-45 (SD Fla 2007); *Ellis v Fortune Seas, Ltd* 175 FRD 308, 312 (SD Ind 1997).
[33] Fed R Civ P 26, cmt 2000 amend.
[34] Review of issues involving jurisdictional discovery has been sought, but denied, on two separate occasions in the last five years. See Petition for a Writ of Certiorari, *Lowery v Alabama Power Co*, 483 F 3d 1994 (11th Cir 2007), cert denied sub nom *Hanna Steel Corp v Lowery* 128 S Ct 2877 (2008); Petition for a Writ of Certiorari, *Dever v Hentzen Coatings, Inc* 380 F 3d 1070 (8th Cir 2004), cert denied, 543 US 1147 (2005).
[35] See Strong, supra n 4, 524-32 (discussing various standards).
[36] See *GTE New Media Services, Inc v BellSouth Corp* 199 F 3d 1343, 1352 (DC Cir 2000); *Mother Doe I v Al Maktoum* 632 F Supp 2d 1130, 1144-45 (SD Fla 2007); *In re Vitamins Antitrust Litigation* 94 F Supp 2d 26, 35 (DDC 2000).
[37] *Hollins v US Tennis Association* 469 F Supp 2d 67, 70 (EDNY 2006).
[38] *Regan v Loewenstein* 292 Fed Appx 200, 205 (3d Cir 2008); see also *Metcalfe v Renaissance Marine, Inc* 566 F 3d 324, 330, 336 (3d Cir 2009).

pertinent facts bearing on the question of jurisdiction are controverted".[39] These standards are very liberal, and indeed many courts speak of a "qualified right" to jurisdictional discovery.[40]

The availability of jurisdictional discovery may vary somewhat according to the relationship between the parties. For example, "where the facts necessary to establish personal jurisdiction . . . lie exclusively within the defendant's knowledge", discovery will typically be permitted.[41] Jurisdictional discovery may thus be "particularly appropriate where the defendant is a corporation", since the plaintiff – as a "total stranger" to the defendant – "should not be required . . . to try such an issue [ie, jurisdiction] on affidavits without the benefit of full discovery".[42] However, "[i]n cases based on alleged contracts between the parties, it would be an unusual case where the plaintiff should need discovery to show specific jurisdiction linking the defendant and the controversy to the forum", since the plaintiff should already be in possession of the necessary facts.[43]

Regardless of their precise formulations, all of these standards are very plaintiff-friendly, and at first blush it would seem unlikely that a request for jurisdictional discovery would ever be denied. However, "a court cannot permit discovery as a matter of course simply because a plaintiff has named a particular party as a defendant".[44] Thus, a request for discovery that is "based on little more than a hunch that it might yield jurisdictionally relevant facts" may be properly denied,[45] since jurisdictional discovery "is intended to

[39] *Boschetto v Hansing* 539 F 3d 1011, 1011 (9th Cir 2008); see also *Blair v City of Worcester* 522 F 3d 105, 111 (1st Cir 2008) (supporting discovery in cases of "plausible factual disagreement or ambiguity"); *Klein v Freedom Strategic Partners, LLC* 595 F Supp 2d 1152, 1160 (D Nev 2009).
[40] *Eaton v Dorchester Dev, Inc* 692 F 2d 727, 729 n7 (11th Cir 1982); *Williamson v Tucker* 645 F 2d 404, 414 (5th Cir 1981); *Blanco v Carigulf Lines* 632 F 2d 656 (5th Cir 1980); *Chatham Condominium Associations v Century Village, Inc* 597 F 2d 1002, 1012 (5th Cir 1979); *Mother Doe I v Al Maktoum* 632 F Supp 2d 1130, 1145 (SD Fla 2007).
[41] *Hollins v US Tennis Association* 469 F Supp 2d 67, 71 (EDNY 2006).
[42] *Metcalfe v Renaissance Marine, Inc* 566 F 3d 324, 330, 336 (3d Cir 2009).
[43] *Ellis v Fortune Seas, Ltd* 175 FRD 308, 312 (SD Ind 1997).
[44] *Hansen v Neumueller* 163 FRD 471, 475 (D Del 1995).
[45] *Boschetto v Hansing* 539 F 3d 1011, 1020 (9th Cir 2008).

supplement, not substitute for, initial jurisdictional allegations".[46] Similarly, a claim of jurisdiction that appears to be both "attenuated and based on bare allegations in the face of specific denials made by defendants" will not suffice to support an order of jurisdictional discovery, at least where there has been no showing that further discovery would assist in demonstrating that jurisdiction existed.[47] Nevertheless, the general rule appears to be that jurisdictional discovery will be ordered in all but the most extreme cases, and defendants should assume that such discovery is far more likely to be ordered than not.

(b) Scope of jurisdictional discovery

Once jurisdictional discovery has been ordered, courts still must decide its scope, ostensibly "tak[ing] care to ensure that litigation of the jurisdictional issue does not undermine the purposes of personal jurisdiction law in the first place".[48] It is often said that jurisdictional discovery is to be "narrowly tailored" and "limited" to jurisdictional issues[49] and that discovery requests must be shaped so as to be likely to produce information relevant to the jurisdictional inquiry.[50]

Straightforward as these guidelines may seem in theory, in fact they do very little to constrain what turns out to be relatively broad discovery orders. The reason why jurisdictional discovery cannot be easily contained relates to the law regarding federal jurisdiction, which has become increasingly complex and fact-intensive over the last thirty years, both with respect to jurisdiction over the person and jurisdiction over the subject matter of the dispute. Because neither the parties nor the courts know in advance precisely what combination of facts will tip the balance in one direction or the other, plaintiffs often

[46] *Doe I v State of Israel* 400 F Supp 2d 86, 121-22 (DDC 2005).
[47] *Autogenomics, Inc v Oxford Gene Technology Ltd* 566 F 3d 1020, 1023 (Fed Cir 2009).
[48] *Ellis v Fortune Seas, Ltd* 175 FRD 308, 312 (SD Ind 1997).
[49] See, eg, *Toys "R" Us, Inc. v Step Two, SA* 318 F 3d 446, 448 (3d Cir 2006); *Nationwide Mutual Ins Society v Tryg Int'l Ins Co* 91 F 3d 790, 792 (6th Cir 1996).
[50] See, eg, *Freeman v United States* 556 F 3d 326, 342 (5th Cir 2009).

seek production of a great deal of information so as to ensure themselves of a favourable outcome.

Interestingly, these kinds of broad requests for production of documents and information were not the norm when jurisdictional discovery was first developed during the 1960s and 1970s. Instead, jurisdictional discovery quite probably was a narrow, limited inquiry into a few relevant facts. However, two key developments irrevocably altered the scope of the device. First, the types of disputes that appeared in federal court changed radically between 1938 and the late twentieth century, moving from small, local matters to large, complicated, inter-state or international disputes that involved more controversial jurisdictional claims.[51] Second, most of the key judicial opinions regarding federal jurisdiction arose after the 1978 decision in *Oppenheimer* that legitimized jurisdictional discovery as a procedural device in US federal courts.[52] Because the Supreme Court has not yet dealt with the question of what constitutes "limited" jurisdictional discovery in the contemporary context, lower federal courts have been left to fend for themselves in deciding how best to meld the pro-plaintiff, pro-discovery presumptions embodied in the law concerning jurisdictional discovery with increasingly expansive definitions of jurisdictionally relevant facts. District court judges have therefore not been given any theoretical principles that would allow a more restrictive approach and have thus tended to allow discovery of any information that might possibly be relevant to the question of jurisdiction. As a result, jurisdictional discovery has become extremely wide-ranging, despite the claim that the device is – or should be – limited in scope.

For many people, the primary problem with jurisdictional discovery relates to the time, cost and effort involved in producing large amounts of documents and information

[51] Strong, supra n 4, 504.
[52] *Oppenheimer Fund, Inc v Sanders* 437 US 340, 351 n13 (1978). Only one major case on federal jurisdiction predates *Oppenheimer*. See *International Shoe Co v Washington* 326 US 310 (1945) (creating the minimum contacts test for personal jurisdiction).

before the jurisdiction of the court is even established.[53] Although that is indeed disturbing, the device can also lead to other concerns. Issues arise with respect to inquiries regarding both personal jurisdiction and subject matter jurisdiction, as discussed below.

Personal jurisdiction

Personal jurisdiction in US federal courts depends on two types of authority, one legislative and one constitutional. Both must be present for a federal court to assert jurisdiction over a defendant's person or property.

Legislative authority can take one of three forms. First, federal courts can rely on a long-arm statute[54] enacted by the state in which the court sits and "adopt" it into use through Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure. Second, courts can, pursuant to Rule 4(k)(1)(C) of the Federal Rules of Civil Procedure, invoke any jurisdictional grants contained in any substantive federal law on which the plaintiff relies. Third, courts faced with defendants from outside the United States can look to Rule 4(k)(2) of the Federal Rules of Civil Procedure, which creates a type of federal long-arm statute in certain federal question cases. All three types of jurisdiction are relied upon regularly in practice.

Perhaps the most striking problem with jurisdictional discovery in the context of federal courts' legislative authority involves state long-arm statutes, particularly those that enumerate the specific activities that permit personal jurisdiction over the defendant. In some

[53] Space limitations prohibit the reproduction of actual requests for jurisdictional discovery, but the amount of information sought can be extensive. See Strong, supra n 4, 535-57 (containing actual discovery requests filed in US federal court).

[54] State long-arm statutes describe the jurisdictional reach of a particular state court and typically adopt one of two approaches: (1) an expansive view that permits jurisdiction to the fullest extent permitted by the US Constitution (or sometimes both the US Constitution and the state constitution) or (2) a narrower view that lists the specific circumstances in which personal jurisdiction may be asserted. See, eg, California Civil Procedure Code s 410.10 (2006) (extending jurisdiction to the full extent of state and federal constitutional limits); New York Civil Practice Law s 302 (2006) (using the enumerated grounds approach); Utah Code Annotated s 78B-3-201 (2008) (extending jurisdiction to the full extent of the federal constitution).

instances, these statutes require federal courts to undertake complex, fact-specific jurisdictional analyses that mimic the type of inquiries that must be made on the merits.[55]

For example, some state long-arm statutes assert jurisdiction over defendants based on principles of agency or corporate law. Thus, jurisdictional discovery might be sought in a US federal court regarding the existence or scope of an agency relationship or regarding the extent to which an affiliate acted as the alter ego of another corporate entity.[56] However, these issues are not only quite broad, giving rise to extensive (and expensive) discovery, they also go to the defendant's liability on the merits.[57] As such, the defendant is burdened by having to consider merits-based arguments even in advance of any determination on jurisdiction. Furthermore, the plaintiff receives the benefit of early discovery of the defendant's documents and information at a stage when the defendant is not in a position to request similar discovery in return, lest such requests negate the jurisdictional objection.

Another problematic type of federal jurisdiction based on legislative authority involves allegations of a conspiracy involving the defendant. "Conspiracy jurisdiction" – which can be based on state long-arm statutes made applicable in federal court through Rule 4 of the Federal Rules of Civil Procedure or on a jurisdiction-granting federal statute such as the Racketeer Influenced and Corrupt Organizations Act (RICO)[58] – is in some ways even more troubling than jurisdiction based on agency or corporate law, since the ties between the parties and the forum are even more attenuated and nuanced than in cases involving corporate or agency relationships (and thus more difficult to establish through limited discovery).[59]

---

[55] RC Casad & WB Richman, *Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts* (London, Butterworths Legal Publishers, 3d edn, 1998) 14-15; see also *Eaton v Dorchester Dev, Inc* 692 F 2d 727, 733 (11th Cir 1982).

[56] See, eg, *Anderson v Dassault Aviation* 361 F 3d 449, 452-55 (8th Cir 2004); *Doe v Unocal* 248 F 3d 915, 925-31 (9th Cir 2001).

[57] See, eg, *Texas Int'l Magnetics, Inc v BASF Aktiengesellschaft* 31 Fed Appx 738, 739-40 (2d Cir 2002); *Freres v SPI Pharma, Inc* 629 F Supp 2d 374, 383-86 (D Del 2009).

[58] 18 USC s 1964.

[59] See, eg, *Noble Security, Inc v MIZ Engineering, Ltd* 611 F Supp 2d 513, 536-41, 548-53 (ED Va 2009); *Hollins v US Tennis Association* 469 F Supp 2d 67, 72 (EDNY 2006). Courts may also need to undertake

Furthermore, conspiracy jurisdiction reflects the same problems as jurisdiction based on theories involving agency or corporate liability, in that it involves early disclosure of numerous facts that are intimately associated with liability on the merits.[60] Conspiracy jurisdiction also gives rise to various jurisprudential issues that are beyond the scope of this article, including the impropriety of attributing the jurisdictional contacts of one defendant to another.[61]

Difficulties with federal grants of jurisdiction can also arise when foreign sovereigns claim immunity from suit under the Foreign Sovereign Immunities Act (FSIA).[62] As a federal statute containing legislative authority to grant jurisdiction in US federal courts, the FSIA is somewhat unique, in that it links "subject matter and personal jurisdictional questions . . . with immunity questions" and grants foreign states and instrumentalities immunity from suit unless one of several exceptions apply.[63] The problem is that the information that denies the court jurisdiction is typically the same that grants substantive immunity. Thus, FSIA cases – like agency, alter ego and conspiracy cases – result in jurisdictional discovery that overlaps with merits discovery. Cases arising under the FSIA also experience problems because of the "tension between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery".[64] Courts have only "rarely explain[ed] how to conduct

---

jurisdictional discovery regarding subject matter jurisdiction under RICO. *Wiwa v Shell Petroleum Dev Co. of Nigeria Ltd* 335 Fed Appx 81, 84 (2d Cir 2009).

[60] *Noble Security, Inc v MIZ Engineering, Ltd* 611 F Supp 2d 513, 539 (ED Va 2009); *McMullen v European Adoption Consultants, Inc* 109 F Supp 2d 417, 421 (WD Penn 2000); *Ellis v Fortune Seas, Ltd* 175 FRD 308, 313 (SD Ind 1997).

[61] See *Hanson v Denckla* 357 US 235, 253 (1958); A Althouse, "The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis", (1983) 52 *Fordham Law Review* 234, 235.

[62] 28 USC ss 1604-07.

[63] D Epstein et al, *International Litigation: A Guide to Jurisdiction, Practice, and Strategy* s 7.01 (St Paul, Thomson West, 2d edn, 2008)

[64] *Arriba Ltd v Petroleos Mexicanos* 962 F 2d 528, 534 (5th Cir), cert denied, 506 US 956, 113 S Ct 413 (1992).

or manage limited discovery to determine jurisdiction over foreign sovereigns" and have instead resorted to the simple platitude that discovery should be "narrow" or "limited".[65]

All of these examples reflect situations where jurisdictional discovery will likely be considered highly appropriate, since the relevant facts are typically in the exclusive control of the defendant. Furthermore, these examples demonstrate how challenging it can be for courts to craft a narrow discovery order concerning jurisdiction, particularly when jurisdictional and merits issues overlap. In some cases, courts have given up on the task altogether and have instead permitted plaintiffs to address jurisdictional issues as part of discovery on the merits rather than try to issue a suitably limited jurisdictional discovery order.[66] This, of course, has the effect of putting the defendant through the burden of broad discovery before the question of jurisdiction is even settled, an approach that violates "the very right the jurisdictional basis requirements are designed to protect: the right not to have to litigate that case in that forum".[67]

The problems do not end there, however. Legislative authority for federal jurisdiction over the person is only one part of the analysis. Federal courts must also undertake a constitutional inquiry into the propriety of exercising jurisdiction over the defendant.[68] The central inquiry here is one of fairness, which "recognizes both the practical expenses and burdens of subjecting a party to a lawsuit in a distant court".[69] Although the fundamental test regarding the constitutional limits of US federal courts was enunciated in 1945 in *International Shoe v Washington* (ie, the "minimum contacts" test),[70] no one thought at the time to consider the decision's impact on jurisdictional discovery, quite possibly for the

[65] Terry, supra n 4, 1030.
[66] See *Klein v Freedom Strategic Partners* 595 F Supp 2d 1152, 1160 (D Nev 2009).
[67] Casad & Richman, supra n 55, 13.
[68] See Epstein et al, supra n 63, s 6.04.
[69] *Ellis v Fortune Seas, Ltd* 175 FRD 308, 311 (SD Ind 1997).
[70] 326 US 310, 316 (1945) (requiring defendants to "have certain minimum contacts" with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'").

simple reason that at that time jurisdictional discovery had not even begun to develop. Furthermore, when jurisdictional discovery began to achieve some legitimacy in the late 1970s,[71] courts and commentators failed to consider how a purposefully vague and highly fact-specific constitutional analysis[72] would affect jurisdictional discovery. Although that was, in retrospect, a bit of an oversight, it is also true that the more complex constitutional tests for jurisdiction had not yet been developed; that would not happen until the 1980s, with a string of cases beginning with *World-Wide Volkswagen Corp v Woodson*.[73]

These cases have made the constitutional test for jurisdiction increasingly complicated and difficult to apply. Some attempts at clarification have been made, primarily through the differentiation between general jurisdiction and specific jurisdiction, where "general jurisdiction" looks at whether the defendant has established some sort of "presence" in the forum through "continuous and systematic" business activity within the relevant territory and "specific jurisdiction" looks at claims that "arise out of" or "relate to" a defendant's activity in that forum,[74] but the ability to argue both jurisdictional grounds in the alternative means that defendants often need to produce information regarding both types of jurisdiction.[75]

As a result, the current constitutional analysis regarding the propriety of federal jurisdiction involves a multi-factor, fact-specific inquiry that provides little or no guidance as to what information is determinative or even most persuasive.[76] Because the United States

[71] See, eg, *Oppenheimer Fund, Inc v Sanders* 437 US 340, 353-54 (1978).
[72] See, eg, *International Shoe Co v Washington* 326 US 310, 319 (1945) (noting the adjudication of personal jurisdiction "cannot be simply mechanical or quantitative").
[73] 444 US 286, 295 (1980) (noting that courts must find "purposeful contacts" and the "reasonable" exercise of jurisdiction); see also *Asahi Metal Indus Co v Superior Court* 480 US 102 (1987) (plurality opinion) (agreeing that the two-part test in *International Shoe* should be applied but failing to provide a clear description of whether minimum contacts requires the defendant to "purposefully direct" its conduct toward the forum); *Burger King Corp v Rudzewicz* 471 US 462 (1985) (requiring exercise of jurisdiction to be reasonable); *Helicopteros Nacionales de Colombia, SA v Hall* 466 US 408, 414-15 (1984) (distinguishing between specific and general jurisdiction).
[74] *Helicopteros Nacionales de Colombia, SA v Hall* 466 US 408, 414-15 (1984).
[75] See, eg, *Synthes (USA) v GM Dos Reis Jr Ind Com de Equip Medico* 563 F 3d 1285, 1291 (CA Fed 2009).
[76] See FH Easterbrook, "Discovery as Abuse" (1989) 69 *Boston University Law Review* 635, 643-44; LJ Silberman, "'Two Cheers' for *International Shoe* (and None for *Asahi*): An Essay on the Fiftieth Anniversary of *International Shoe*" (1995) 28 *University of California Davis Law Review* 755, 758.

Supreme Court has indicated that "even a single act can support jurisdiction", many district courts are loath to limit jurisdictional discovery on constitutional issues.[77] Furthermore, even if the parameters of the minimum contacts test itself could be discerned and narrowed, the analysis – and the realm of discoverable facts – would nevertheless be subsequently expanded by the need for courts to determine that the exercise of jurisdiction is "reasonable" through the use of various "gestalt factors".[78]

Thus, the constitutional tests regarding the outer limits of US federal courts' jurisdiction has become a leading cause for jurisdictional discovery that extends far beyond any sort of limited inquiry that might have initially been contemplated by those who first developed the device in the 1960s and 1970s. Furthermore, the courts' constitutional inquiries are not limited to the realm of personal jurisdiction alone. Cases that proceed *in rem* and quasi-*in rem* may need to undertake the same kind of constitutional analyses before asserting jurisdiction over the relevant property.[79]

Subject matter jurisdiction

Parties proceeding in US federal courts must do more than establish jurisdiction over the defendant. They must also demonstrate that the court has jurisdiction over the subject matter of a dispute by showing that the claim arises under either US federal or constitutional law.[80]

One of the most common types of federal disputes involves "diversity jurisdiction", which requires both (1) diversity of citizenship (such as that between a citizen of a US state

[77] *McGee v International Life Ins Co* 355 US 220, 223 (1957); see also *Burger King Corp v Rudzewicz* 471 US 462, 475 n18 (1985). Inquiries into subject matter jurisdiction – such as those regarding domicile – can also require a court to a "review of the 'totality of the evidence'", since "no single factor is conclusive". *Comprehensive Care Corp v Katzman* No 09:1375, 2009 WL 3157634 at *2 (MD Fla Sept 26, 2009).
[78] *Burger King Corp v Rudzewicz* 471 US 462, 476-77 (1985); see also *United States v Swiss American Bank, Ltd* 274 F 3d 610, 635 (1st Cir 2001) (Lipez, CJ, dissenting) (discussing the need to use jurisdictional discovery to establish "gestalt" factors); *Tom's of Maine v Acme-Hardesty Co* 247 FRD 235, 239 (D Me 2008).
[79] See *Shaffer v Heitner* 433 US 186 (1977); *Glencore Grain Rotterdam BV v Shivnath Rai Harnarain Co* 284 F 3d 1114 (9th Cir 2002); Casad & Richman, supra n 55, 48; Epstein et al, supra n 63, s 3.05; Clermont, supra n 4, 1004; but see *Burnham v Superior Court of California* 495 US 605, 619-22 (1990) (discussing *Shaffer*).
[80] See US Constitution, art III, ss 1-2.

and a foreign party) and (2) more than $75,000 in dispute.[81] Diversity cases can give rise to several types of jurisdictional discovery. For example, information may be sought to confirm that the jurisdictional minimum exists.[82] Although some calculations (such as those involving the computation of lost wages in a claim for wrongful termination) are merely mathematical and would not require jurisdictional discovery, others involve more complex issues of fact. For example, a plaintiff might seek discovery to demonstrate that the defendant engaged in "'malicious, willful or outrageous' conduct" that would support an award of treble damages, since those damages could be used to help meet the jurisdictional minimum.[83] Unfortunately, this creates the same sorts of problems that were discussed earlier with respect to personal jurisdiction arising under certain state long-arm statutes, where jurisdictional discovery mirrored merits-based discovery.[84]

Discovery can also be sought regarding other aspects of diversity jurisdiction. For example, courts may need to determine whether a corporate or other juridical person is a "citizen" of a particular state or nation.[85] The current test for corporate citizenship states that a corporation will be deemed to be a citizen of the place where it has its "nerve center", meaning "the actual center of direction, control, and coordination".[86] Although there may be times when locating a corporation's "nerve center" is relatively simple, the Supreme Court has recently recognized that there will also be hard cases that require jurisdictional discovery.[87]

---

[81] 28 USC s 1332(a).
[82] See, eg, *Kovacs v Chesley* 406 F 3d 393, 395-99 (6th Cir 2005).
[83] *Anthony v Security Pacific Financial Services Inc* 75 F 3d 311, 317 (7th Cir 1996).
[84] See, eg, *Freeman v United States* 556 F 3d 326, 341-42 (5th Cir 2009); *Wiwa v Shell Petroleum Dev Co of Nigeria Ltd* 335 Fed Appx 81, 84 (2d Cir 2009); *DDB Tech, LLC v MLB Advanced Media, LP* 517 F 3d 1284, 1291 (CA Fed 2008).
[85] See 28 USC ss 1332, 1348.
[86] *Hertz Corp v Friend* 130 S Ct 1181, 1192 (2010).
[87] *Ibid*, 1194; see also *Shawnee Terminal Railway Co v JE Estes Wood Co* No 09:00113, 2009 WL 3064973 at *10 (SD Ala Sept 18, 2009) (claiming plaintiff had provided "selective" evidence vis-à-vis its place of corporate citizenship).

Finally, jurisdictional discovery may be sought regarding aspects of federal subject matter outside the diversity context. For example, discovery may be requested to determine whether a claim falls under a particular federal statute.[88] Again, this type of discovery may not only be burdensome, it may also mirror the kind of discovery that is required on the merits.

(c) International issues

As indicated previously, United States is unlike other common law jurisdictions in that it does not invoke special procedures (such as service out) to assert jurisdiction over foreign defendants. On one level, therefore, it is perhaps unsurprising that US federal courts order jurisdictional discovery equally against all defendants, regardless of the location of the party against whom the order is directed.[89] Indeed, this is consistent with the general tendency of US courts to rely on domestic law and policy to decide legal issues rather than looking to international or comparative legal principles.[90] On another level, however, it appears somewhat incongruous for US federal courts to order jurisdictional discovery against foreign parties in the same manner as they do against domestic parties, given that the United States is a signatory of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention).[91]

The Hague Convention aims "to improve mutual judicial cooperation in civil or commercial matters" by providing "methods to reconcile the differing legal philosophies" of various nations and establishing means of obtaining evidence that "satisfy doctrines of legal

[88] See, eg, *Eaton v Dorchester Dev, Inc* 692 F 2d 727, 730 (11th Cir 1982).
[89] See, eg, *In re Vitamins Antitrust Litigation* 120 F Supp 2d 45, 49 (DDC 2000).
[90] See Dodson, supra n 2, 469; R Michaels, "Two Paradigms of Jurisdiction" (2006) 27 *Michigan Journal of International Law* 1003, 1033-34.
[91] Opened for signature 18 Mar 1970, TIAS No 7444.

sovereignty".[92] Unsurprisingly, the procedures set forth by the Hague Convention differ significantly from those used by US federal courts pursuant to the Federal Rules of Civil Procedure, providing a more certain but more restrictive means of obtaining evidence located abroad. In the years immediately following the United States' accession to the Hague Convention, many US litigants took the view that they should be able to invoke the more liberal mechanisms outlined in the Federal Rules, regardless of the provisions outlined in the Hague Convention. Some but not all US courts accepted that approach, and a conflict arose in the lower federal courts regarding the applicability and scope of the Hague Convention. In 1987, the United States Supreme Court agreed to consider the use of the Hague Convention in cases involving merits discovery (but not jurisdictional discovery) in *Société Nationale Industrielle Aérospatiale v United States District Court.*[93]

After considering several possible interpretations of the Hague Convention and the ramifications that would ensue from each of them, the Supreme Court held that the Convention is nothing more than an optional or "permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad".[94] In other words, although procedures under the Hague Convention "are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention", they are only "one method of seeking evidence that a court may elect to employ".[95] Furthermore, there is no rule that "would require first resort to Convention procedures whenever discovery is sought from a foreign litigant".[96] Thus, US courts may rely solely on the procedures outlined in the Federal Rules of Civil Procedure, even when discovery is sought of a litigant located abroad.

---

[92] Report de la Commission Speciale, 4 Conference de La Haye de droiter international prive: Actes et documents de la Onzieme session 55 (1970), as translated in GB Born & PB Rutledge, *International Civil Litigation in United States Courts* 964 (New York, Aspen Publishers, 4th edn, 2007).
[93] 482 US 522 (1987).
[94] *Ibid*, 536.
[95] *Ibid*, 541.
[96] *Ibid*.

The US approach did not meet with international approval: much to the contrary. Indeed, a Special Commission of the Hague Conference concluded shortly after the decision in *Aérospatiale* that while views may vary internationally as to whether the Hague Convention "occupie[s] the field and therefore exclude[s] application of domestic procedural rules" (ie, whether the Convention is the only possible means by which evidence may be sought transnationally), "the Commission thought that in all Contracting States, whatever their views as to its exclusive application, priority should be given to the procedures offered by the Convention when evidence located abroad is being sought".[97] Notably, the United States has not altered its approach, despite the Special Commission's report.

Although the applicability and scope of the Hague Convention has been severely curtailed in the United States as a result of *Aérospatiale*, the Convention still plays a role in US transnational litigation, primarily in cases involving discovery of non-litigants who are not otherwise subject to the jurisdiction of the court. In those instances, use of the Hague Convention is typically required.[98] Given this line of precedent, one might think that recourse to the Hague Convention would or should be required for jurisdictional discovery, since that process takes place before the court has determined that jurisdiction over the defendant is proper. As such, these putative defendants could be viewed as more akin to non-litigants than to parties to the litigation. That, however, is not the case. Instead, federal courts have consistently followed *Aérospatiale*, concluding that the Hague Convention is merely permissive in cases involving jurisdictional discovery orders directed towards named

[97] Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Convention, April 1989, reprinted in 28 ILM 1556, 1564, 1569 (1989); see also *In re Automotive Refinishing Paint Antitrust Litigation* 358 F 3d 288, 302 (3d Cir 2004).
[98] See, eg, *In re Baycol Products Litigation* 348 F Supp 2d 1058, 1060 (D Minn 2004); *Tulip Computers International BV v Dell Computer Corp* 254 F Supp 2d 469, 474 (D Del 2003); but see *First American Corp v Price Waterhouse LLP* 154 F 3d 16 , 23 (2d Cir 1998).

defendants located abroad.[99] Furthermore, although parties have argued "that a rule of first-resort [to the Hague Convention] is more important for jurisdictional discovery than for merits discovery because the comity interests of the foreign nations are higher before defendants are conclusively found to be subject to the Court's jurisdiction", most US courts have not adopted that view.[100] Instead, *Aérospatiale* applies in full force to questions of jurisdictional discovery, and parties based outside of the United States can expect jurisdictional discovery orders to be issued under the Federal Rules of Civil Procedure in precisely the same way as in purely domestic cases, applying the same procedures, the same standards as to availability and the same determinations as to scope.[101]

As frustrating as *Aérospatiale* may be to foreign parties, the practical effect of the decision is diminished as a result of article 23 of the Hague Convention. That provision allows state signatories to indicate that they will not comply with Convention procedures in cases involving pre-trial discovery. The vast majority of state signatories have made a reservation under article 23, which has the effect of foreclosing numerous US discovery attempts – including jurisdictional discovery requests – that would be unobjectionable under the Federal Rules of Civil Procedure.[102] Thus, even if the United States applied the rule of first resort that was proposed by the Special Commission of the Hague Conference, foreign litigants would still be subject to jurisdictional discovery orders under the Federal Rules of Civil Procedure as a secondary measure. The only way a different result would ensue is if the United States adopted the view that the Hague Convention constituted the sole and exclusive

[99] See, eg, *In re Automotive Refinishing Paint Antitrust Litigation* 358 F 3d 288, 301-05 (3d Cir 2004); *Schindler Elevator Corp v Otis Elevator Co* 657 F Supp 2d 525, 534 (DNJ 2009*); In re Vitamins Antitrust Litigation* 120 F Supp 2d 45, 49 (DDC 2000); *Fishel v BASF Group* 175 FRD 525, 529 (SD Iowa 1997); *Rich v KIS California, Inc* 121 FRD 254, 258 (MDNC 1988).

[100] *In re Vitamins Antitrust Litigation* 120 F Supp 2d 45, 49-50 (DDC 2000) (listing courts that have adopted this approach).

[101] This differs from some state (non-federal) courts, which have been known to require recourse to the Hague Convention in cases where a prima facie basis of jurisdiction over the defendant has not been established. See, eg, *Geo-Culture, Inc v Siam Investment Mgmt* 936 P 2d 1063, 1067 (Or App 1997).

[102] See, eg, *First American Corp v Price Waterhouse LLP* 154 F 3d 16, 23 (2d Cir 1998).

means of obtaining evidence from a foreign litigant. Notably, that approach has not won worldwide adherence and is unlikely to be adopted by the United States.

Therefore, foreign parties who oppose jurisdictional discovery will likely obtain little relief by challenging *Aérospatiale.* Instead, they would do better to attack jurisdictional discovery under principles of domestic law[103] – something that has, interestingly, become more of an option due to several recent decisions from the United States Supreme Court.

D. FOREIGN PARTIES' ABILITY TO LIMIT OR AVOID JURISDICTIONAL DISCOVERY

In the past, parties on the receiving end of an order for jurisdictional discovery have had very few tactical alternatives available to them.[104] However, recent US Supreme Court precedent may offer some relief to foreign parties named as defendants in US federal court. Two possible solutions exist. The first is more of a stop-gap measure, providing only intermittent assistance on a case-by-case basis, whereas the second may provide a long-term answer to the problem of jurisdictional discovery of foreign litigants.

The first solution arises out of *Sinochem International Co v Malaysia International Shipping Corp*, which considered whether federal courts that are faced with several different motions to dismiss have to decide those motions in any particular order.[105] In particular, the issue was whether courts first have to establish that they have both personal and subject matter jurisdiction over a party before they can dismiss the case as a matter of discretion under the doctrine of *forum non conveniens*.[106] In that case, the Supreme Court held that:

[103] That is always the better tactical move in US federal courts, given the preference US judges have for relying on domestic law, even when deciding international legal issues. See Dodson, supra n 2, 469; Michaels, supra n 90, 1033-34.
[104] See supra n 26 and accompanying text.
[105] 549 US 422 (2007).
[106] The US doctrine of *forum non conveniens* is very similar to that used in England. Compare *Piper Aircraft Co v Reyno* 454 US 235 (1981) with *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL).

> [i]f . . . a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground. In the mine run of cases, jurisdiction "will involve no arduous inquiry" and both judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum "should impel the federal court to dispose of [those] issue[s] first." *But where subject-matter or personal jurisdiction is difficult to determine, and* forum non conveniens *considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.*[107]

Thus, "there is no mandatory 'sequencing of jurisdictional issues'", and "[a] district court . . . may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness and judicial economy so warrant".[108]

Notably, only non-US defendants can assert a claim of *forum non conveniens*; domestic defendants seeking similar results must make a motion to change venue under section 1404(a) of title 28 of the United States Code. *Sinochem* therefore provides non-US parties with some tactical means of avoiding or minimizing jurisdictional discovery.[109] Although some questions still remain open – for example, whether a court that wishes to attach a condition to the dismissal of a case pursuant to the doctrine of *forum non conveniens* can do so absent an authoritative ruling on jurisdiction[110] – *Sinochem* nevertheless provides individual litigants with some means of avoiding burdensome jurisdictional discovery.

As useful and welcome as *Sinochem* may be, it is only a limited solution available to foreign defendants on a case-by-case basis. A more widely applicable method of resolving the issue might arise out of a different line of Supreme Court decisions regarding the pleading

---

[107] *Sinochem Int'l Co v Malaysia Int'l Shipping Co* 549 US 422, 436 (2007) (emphasis added) (quoting *Ruhrgas AG v Marathon Oil Co* 526 US 574, 587-88 (1999)).

[108] *Sinochem Int'l Co v Malaysia Int'l Shipping Co* 549 US 422, 431-32 (2007); see also *Ruhrgas AG v Marathon Oil Co* 526 US 574, 578 (1999) (noting no "unyielding jurisdictional hierarchy" regarding the order in which motions to dismiss must be decided).

[109] Although discovery may be sought on issues relevant to the *forum non conveniens* analysis, *Sinochem* suggests that there will be times when the question of forum may be decided on no or limited discovery (as compared to discovery on personal or subject matter jurisdiction).

[110] Some US courts will only dismiss a case under *forum non conveniens* if they can attach certain conditions to the dismissal, such as the defendant's agreement to suit in another jurisdiction. See *Sinochem Int'l Co v Malaysia Int'l Shipping Co* 549 US 422, 435 (2007) (declining to address the issue).

standards necessary to overcome a motion to dismiss for failure to state a cause of action.[111] These cases focus on the identification of the amount and type of factual matter that must be pled under Rule 8(a)(2) of the Federal Rules of Civil Procedure in order to withstand a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules. On its face, Rule 8(a)(2) is quite straightforward, stating simply that the complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief". However, the Supreme Court recently stated in *Ashcroft v Iqbal* that this language results in the imposition of the "plausibility standard", which indicates that:

> [t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. [112]

This line of cases does more that assert a new and arguably heightened standard for motions to dismiss for failure to state a claim. First, the decisions openly challenge "the effectiveness of judicial discretion in managing litigation problems during the pre-trial phase".[113] Since jurisdictional discovery is a highly discretionary pre-trial device, this criticism can be interpreted as applying to both jurisdictional discovery as well as discovery on the merits. Indeed, two of the Supreme Court cases explicitly addressed the problems of pre-merits discovery and refused to countenance a phased system of discovery that would rely on careful judicial management to avoid discovery abuse.[114] Instead, the plaintiffs were forced to defend the motion to dismiss on the evidence that they had in hand.

---

[111] See *Ashcroft v Iqbal* 129 S Ct 1937 (2009); *Tellabs, Inc v Makor Issues & Rights, Ltd* 551 US 308 (2007); *Erickson v Pardus* 551 US 89 (2007); *Bell Atlantic Corp v Twombly* 550 US 544 (2007).
[112] *Ashcroft v Iqbal* 129 S Ct 1937, 1950 (2009) (citations omitted). Although some
[113] RG Bone, "*Twombly*, Pleading Rules, and the Regulation of Court Access" (2009) 94 *Iowa Law Review* 873, 898-99; see also *Bell Atlantic Corp v Twombly* 550 US 544, 559-60 & n6 (2007).
[114] See *Ashcroft v Iqbal* 129 S Ct 1937, 1953 (2009); *Bell Atlantic Corp v Twombly* 550 US 544, 559 (2007).

Second, "[t]he problem of jurisdictional discovery . . . is closely related to the decreased emphasis on the pleadings and the corresponding ascension of the role of pre-trial discovery".[115] Thus, any alteration to US pleadings standards will likely have an inverse effect on jurisdictional discovery. For example, imposing heightened pleading requirements would appear to diminish or eliminate the need for jurisdictional discovery and could possibly result in a procedure that resembled service out proceedings, either with or without the right of cross-examination.[116]

Third, the language of Rule 8(a)(2) of the Federal Rules of Civil Procedure is very similar to that of Rule 8(a)(1), which states that a pleading must contain "a short and plain statement of the grounds upon which the court's jurisdiction depends". Although Rule 8(a)(1) has been said not to apply to facts regarding personal jurisdiction,[117] it does appear to apply to other jurisdictional issues, including subject matter jurisdiction.[118]

The *Iqbal* line of cases therefore suggests that the problem of jurisdictional discovery could be solved by extending the Supreme Court's newly enunciated "plausibility standard" to questions of jurisdiction over the person and subject matter of the dispute.[119] Indeed, one federal circuit court appears to have already made a move in that direction, stating that:

> [t]he plausibility standard applicable to a Rule 12(b)(6) motion to dismiss is, of course, distinct from the *prima facie* showing required to defeat a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction . . . . However, because our inquiries into the personal involvement necessary to pierce qualified immunity and establish personal jurisdiction are unavoidably "intertwin[ed]," . . . we now consider whether in light of the considerations set forth in *Iqbal*'s qualified immunity analysis, Arar has made a *prima facie* showing that personal jurisdiction exists.[120]

---

[115] JEC, supra n 4, 533.
[116] See Strong, supra n 4, 580.
[117] See, eg, *Stirling Homex Corp v Homasote Co* 437 F 2d 87, 88 (2d Cir 1971); *Hagen v U-Haul Co of Tennessee* 613 F Supp 2d 986, 1002 (WD Tenn 2009); *Hansen v Neumueller* 163 FRD 471, 474 (D Del 1995). However, some precedents do suggest the need for sufficient factual pleadings regarding personal jurisdiction. See *Dever v Hentzen Coatings, Inc* 380 F 3d 1070, 1072 (8th Cir 2004), cert denied, 543 US 1147 (2005).
[118] See, eg, *Walden v Bartlett* 840 F 2d 771, 775 (10th Cir 1988).
[119] See Strong, supra n 4, 579-83.
[120] *Arar v. Ashcroft* 532 F 3d 158, 174 (2d Cir 2008) (citations omitted).

Although federal courts have begun to apply *Iqbal* and its predecessors to pending disputes, the United States Congress has expressed discontent with these judicial developments and has moved to eliminate the advances made by the Supreme Court vis-à-vis the plausibility standard.[121] However, none of these legislative efforts has yet been successful, and it is unlikely that such proposals will be enacted.

The author has suggested elsewhere that the plausibility standard could usefully be extended to jurisdictional questions in the context of purely domestic disputes.[122] Notably, a shift in that direction would benefit foreign litigants as much as it did domestic defendants, since US courts do not treat parties differently based on their location. Nevertheless, it is by no means certain that US courts or legislators will decide to extend *Iqbal* to jurisdictional questions in the context of domestic disputes. That conclusion need not be fatal to the interests of foreign litigants, however, since the United States could embrace a more limited type of change by adopting the plausibility standard in transnational proceedings alone.

Such a move would not be uncontroversial. Indeed, some commentators have argued against the creation of different procedural rules for cross-border litigation, claiming that such a regime would unfairly burden individuals and small businesses.[123] However, there are at least two reasons why this sort of procedural shift may make sense in the context of the limited question of jurisdiction.

First, numerous nations already distinguish between methods of asserting jurisdiction over domestic and international defendants, and adopting a similar approach would put the United States well into the mainstream of international civil procedure. Furthermore, the United States could justify such a shift based on its existing jurisprudence. For example,

---

[121] See, eg, Notice Pleading Restoration Act of 2009, S 1504, 111th Cong s 2 (proposing a return to the pre-*Twombly* pleading standard).
[122] *Ibid*, 565-76.
[123] See, eg, GB Born, "Critical Observations on the Draft Transnational Rules of Civil Procedure" (1998) 33 *Texas International Law Journal* 387, 408, 410-11.

states that use special procedures for asserting jurisdiction over foreign parties typically do so out of respect for the rights of foreign litigants and the interests of international comity.[124] Both of those concepts are already reflected in current US law. Indeed, the US Supreme Court itself has stated that:

> American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. . . . In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation.[125]

Second, the international legal community – led by the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) – has recently come out in support of a bifurcated approach to civil procedure. In 2006, the two organizations published the ALI/UNIDROIT Principles of Transnational Civil Procedure, which "are intended to help reduce the impact of differences between legal systems in lawsuits" involving transnational commercial disputes.[126] Although the Principles do not explicitly outline the methods by which jurisdiction may be established and thus may not seem entirely relevant to the current discussion,[127] the fact that the ALI – one of the United States' leading voices in legal policymaking – has come out in favour of specialized procedures for transnational disputes suggests that US courts or legislators might eventually consider moving toward the creation of specialized transnational civil procedures, either on a limited or wholesale basis.

E. CONCLUSION

[124] See, eg, *Armacel Pty Ltd v Smurfit Stone Container Corp* [2007] FCA 1928 para 8.
[125] *Société Nationale Industrielle Aérospatiale v United States District Court* 482 US 522, 546 (1987).
[126] ALI/UNIDROIT, supra n 23 , xxxv.
[127] Nevertheless, the Principles do discuss the proper grounds for jurisdiction (Principle 2), the content of pleadings (Principle 11), and the extent of permissible disclosure or discovery of information (Principle 16), which provides some basis for analysis. *Ibid*, 18-20, 30-31, 36-38.

It has been said that lawyers "tend to overlook their own countries' excesses",[128] and nowhere is this more true than with jurisdictional discovery. Within the United States, the device is seen as part of the natural legal order – somewhat costly and time-consuming, but nevertheless a necessary part of the process of establishing a court's jurisdiction over a person or dispute. It is only when the procedure is brought into the international realm that its truly exceptional nature becomes apparent. Not only does the mechanism combine two of the most internationally criticized aspects of US civil procedure – broad discovery and an expansive concept of extraterritorial jurisdiction – it also requires defendants to submit to potentially burdensome and intrusive procedures before the court has even determined that it has jurisdiction. Furthermore, foreign litigants are given no special protections in United States federal courts, although the recent US Supreme Court decision in *Sinochem* may provide some non-resident defendants with a limited amount of relief from jurisdictional discovery by allowing an alternative means (*forum non conveniens*) of obtaining dismissal of the claim.

The future of jurisdictional discovery in transnational litigation is somewhat unclear, but there are possible signs of change. For example, efforts have been made recently to bring issues relating to jurisdictional discovery to the attention of the United States Supreme Court.[129] Even if the Supreme Court chooses not to address jurisdictional discovery directly, the recent decision in *Iqbal* provides the means for bringing the US more into line with international standards regarding pleadings, which could affect jurisdictional discovery as well. Merits-based discovery abuse has been legislatively addressed in recent years, and it

[128] KM Clermont & JR Palmer, "Exorbitant Jurisdiction" (2006) 58 *Maine Law Review* 474, 475.
[129] See Petition for a Writ of Certiorari, *Lowery v Alabama Power Co* 483 F 3d 1994 (11th Cir 2007), cert denied sub nom *Hanna Steel Corp v Lowery* 128 S Ct 2877 (2008); Petition for a Writ of Certiorari, D*ever v Hentzen Coatings, Inc* 380 F 3d 1070 (8th Cir 2004), cert denied, 543 US 1147 (2005).

may be that jurisdictional discovery will soon catch the attention of the relevant authorities.[130] Finally, the ALI's involvement in the development of the ALI/UNIDROIT Principles of Transnational Civil Procedure may signal a willingness within the United States to consider the development of specialized procedural rules for cross-border disputes.

Despite these intimations of change, there are no immediate proposals on the table that would affect the availability or scope of jurisdictional discovery in transnational litigation. That is not to say that the international legal community should not keep abreast of the issue. Indeed, it is vitally important that the international perspective is heard during any reform efforts, lest the more exceptional aspects of jurisdictional discovery be perpetuated simply due to a failure within the United States to understand how unusual this device is.[131] Furthermore, those involved in cross-border litigation have an incentive to follow US legal developments, given that any alteration of US domestic practices will affect transnational proceedings to an equal degree, at least under current law and practice.

Although reform would be welcome in this area of law, there is much that the international bar can and should do even before such changes are proposed. First and foremost, lawyers engaged in advising multinational actors need to educate themselves about jurisdictional discovery so as to better prepare their clients for the possibility – or even probability – that such an order may be made. In law, the biggest danger is when "you don't know what you don't know", and nowhere is that more true than with questions of procedure, since a single ill-advised procedural decision can have major and irrevocable repercussions.

The second most important thing for international counsel to do follows naturally from the first. Once they have information about jurisdictional discovery in transnational

[130] For example, Rule 26 was amended in 2000 to narrow the scope of discovery and deal with difficulties relating to "divergent disclosure and other practices". Fed R Civ P 26 cmt 2000 amend; SN Subrin & MY Woo, *Litigating in America: Civil Procedure in Context* (New York, Aspen Publishers, 2006) 148-50.
[131] See S Baumgartner, "Is Transnational Litigation Different?" (2004) 25 *University of Pennsylvania Journal of International Economic Law* 1297, 1349.

litigation in hand, lawyers acting for non-US parties need to consider whether the strategic options traditionally offered to clients are indeed the best, given the easy availability of jurisdictional discovery. For example, advocates typically take the view that non-appearance in a foreign lawsuit is a risky endeavour, only to be adopted in the most extreme circumstances. Even if jurisdiction is, in a defendant's mind, clearly not proper, most parties will make a limited appearance so as to obtain a definitive ruling. If, however, entering a limited appearance may and likely will subject a party to a broad order for jurisdictional discovery, a savvy lawyer might conclude that the risks associated with a default judgment are less than those associated with jurisdictional discovery. This might be particularly true if the jurisdictional claims are marginal at best and jurisdictional discovery would require the production of sensitive or confidential information or would mirror the type of disclosures normally associated with discovery on the merits. Given that parties must comply fully with any jurisdictional discovery orders lest sanctions be imposed (including the determination that jurisdiction does, in fact, exist), parties and counsel would be well advised to consider the issues before making a motion to contest jurisdiction. At that point, it is too late to change one's mind, and the court's determination on jurisdiction will be given *res judicata* effect.[132]

This is not to say that non-appearance is warranted in all circumstances. Some litigants may believe that a limited appearance to contest jurisdiction is the preferred alternative because there is a strong possibility that they can prevail on a motion to dismiss for *forum non conveniens* (the *Sinochem* rule). Others may be willing to take the risk of a limited appearance because they believe that the plaintiff will be unable to make out a case for jurisdictional discovery and they prefer to obtain a definitive ruling on jurisdiction. Either

[132] Parties are unlikely to overturn a decision regarding jurisdictional discovery on appeal, given the high degree of deference shown to trial judges in these matters. See, eg, *Patterson v Dietze, Inc* 764 F 2d 1145, 1148 (5th Cir 1985) (stating jurisdictional discovery "will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse").

way, the client must make the decision in full knowledge of both the law and the facts of the case.

As the above suggests, it is impossible to make blanket statements about how to proceed with a jurisdictional objection in the abstract, since each case will turn on its own individual facts. What is likely, however, is that many parties are currently failing to undertake these sorts of analyses at the proper time – ie, prior to entering a limited appearance – because of a lack of appreciation for the role that jurisdictional discovery plays in US federal courts. For years, foreign litigants have been surprised by this highly exceptional procedural device. Now, however, parties and counsel can approach transnational litigation in US federal courts with a full understanding of the scope and availability of jurisdictional discovery, and the role it plays in US federal practice.