

## Personal Jurisdiction and Forum Selection

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**C**onstruction contracts: recent U.S. Supreme Court decisions redefine the importance of personal jurisdiction and forum selection clauses.

# Choice of Law Provisions

Successful enforcement of construction contracts depends significantly upon having properly drafted provisions on a variety of issues and concerns. Personal jurisdiction and forum selection clauses have traditionally been well

understood and of little consequence to the majority of construction contractors. Two recent U.S. Supreme Court decisions have reshaped our understanding of such provisions. This article will examine the Supreme Court decisions in *Daimler AG v. Bauman*, 134 S. Ct. 746 (Jan. 14, 2014), and *Atlantic Marine Construction Company, Inc. v. United States District Court For the Western District of Texas*, 134 S. Ct. 568 (Dec. 3, 2013), with regard to personal jurisdiction over foreign corporations and forum selection clauses, respectively. These decisions have narrowed the previously settled understanding of federal court jurisdiction over corporations and disputes among corporations.

Construction companies that deal with out-of-state or international corporations must now reconsider how to go about ne-

gotiating contract provisions because the importance of jurisdictional clauses and forum selection and choice of law provisions have recently received increased attention. These clauses must be reviewed and carefully drafted to avoid unanticipated litigation consequences that may result in significant increased expense. It is additionally important for subcontractors to negotiate jurisdictional terms when entering into agreements with general contractors, and they must recognize the importance that these provisions have on the ability to defend or to enforce the overall terms.

### Personal Jurisdiction

Shortly after the enactment of the Fourteenth Amendment, the U.S. Supreme Court held that a state's jurisdiction over persons reaches no farther than the geo-



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graphic bounds of the forum. *Pennoyer v. Neff*, 95 U.S. 715, 730 (1878). The strict territorial approach in *Pennoyer* resigned to its less rigid understanding during the mid-to-late twentieth century following the Court's landmark decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), by turning focus away from state sovereignty to the relationships involved.

*International Shoe* established the foundation for our modern categorical understanding of personal jurisdiction as either "specific" or "general." General jurisdiction is a court's ability to assert its authority over a party based on the court's general power to adjudicate causes of action not necessarily tied to particular local activities. Specific jurisdiction refers to a court's authority over a party when a claim arises in connection with a party's local activities. In specific jurisdiction, a party's contacts with the forum states are more limited than in general jurisdiction cases, but the specific claim arises out of those contacts. Two recent Supreme Court cases have addressed these categories: *Daimler AG v. Bauman*, 134 S. Ct. 746 (Jan. 14, 2014), involving limitations on general jurisdiction, and *Walden v. Fiore*, 134 S. Ct. 1115 (Feb. 25, 2014), addressing the "minimum contacts" necessary to create specific jurisdiction.

#### **General Jurisdiction: *Daimler AG v. Bauman*, 134 S. Ct. 746 (Jan. 14, 2014)**

A well-drafted contract provision for consent to jurisdiction in a United States district court or state court is a necessity when negotiating contracts with international corporations. Should a dispute arise under such contract, the failure to have a proper jurisdictional clause may foreclose the opportunity to litigate in American courts and the only recourse available to an injured party would be to pursue a cause of action in a foreign venue.

In *Daimler*, the Court limited the availability of general personal jurisdiction over a foreign corporation sued in the United States for its parent/subsidiary relationship with an American corporation. In reaching its decision, the Court notes that after *International Shoe*, cases have largely examined and expanded specific jurisdiction while declining to stretch general jurisdiction beyond its traditionally recognized limits. *Id.* at 758.

General jurisdiction "arises in situations where a sister state corporation or foreign corporation's 'continuous corporate operations within a state are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.'" *Id.* at 754 (citing *International Shoe, supra*, at 318). General jurisdiction may be properly asserted when a corporation's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum state." *Id.* (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, n. 9 [1984]).

The Supreme Court's ruling in *Daimler* has narrowed the scope of general personal jurisdiction. Whether affiliations with a state are sufficient to subject a foreign corporation to the general personal jurisdiction of that state's courts depends entirely upon finding that the corporation is "essentially at home in the forum State." *Daimler*, 134 S. Ct. at 761; *Dunlop Goodyear v. Brown*, 131 S. Ct. 2846, 2851. It has become increasingly difficult to show a corporation 'at home in the forum' for purposes of establishing a court's personal jurisdiction over it.

Assuming, *arguendo*, that the overall context of a dispute supports finding that a corporation qualifies as "at home" in a forum, following *Daimler*, courts will be more hesitant to find sufficient affiliations with a state to establish personal jurisdiction. In this regard, the Supreme Court specifically refused to extend principles of agency theory to the general jurisdiction context. The rejected theory of agency asserted that California courts had jurisdiction over a foreign corporation because the foreign corporation at issue, Daimler AG, and the domestic corporation, Daimler MBUSA, had equal status as subsidiaries of the foreign-based parent corporation, Daimler Chrysler. The Court observed that to extend jurisdiction to a foreign subsidiary based upon such agency theory would make foreign corporations "amenable to suit on any or all claims wherever they have an in-state subsidiary or affiliate [and] would sweep beyond even the 'sprawling view of general jurisdiction' rejected in *Goodyear*." *Id.* at 760; *Goodyear*, 131 S. Ct. at 2856.

Lawsuits against international foreign corporations involve an additional point of analysis. Recognizing that unpredictable applications of general jurisdiction could discourage foreign investment and possibly lead to international friction, the Supreme Court looked to the transnational context of the dispute and evaluated the risks to international comity. *Daimler*, 134 S. Ct. at

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763. The international considerations reinforced their determination that subjecting a foreign corporation to the general jurisdiction of a State court "would not accord with the 'fair play and substantial justice' due process demands." *Id.*; *International Shoe*, 326 U.S. at 316.

The significance of *Daimler AG v. Bauman* is that it serves as a turning point in personal jurisdiction precedent. It tells us that the inquiry is whether a defendant's contacts suffice to permit a court to exercise its jurisdiction. Nothing in the decision indicates that general personal jurisdiction over foreign corporations is completely lost; however, the ability to assert general jurisdiction is greatly reduced and the importance of personal jurisdiction consent and waiver provisions are more important than ever before.

#### **Specific Jurisdiction: *Walden v. Fiore*, 134 S. Ct. 1115 (Feb. 25, 2014)**

A contractual provision consenting to jurisdiction of one or more courts will generally turn the analysis away from "general jurisdiction" and into the distinct category of "specific jurisdiction." While general jurisdiction "permits a court to assert jurisdiction over a defendant based on a forum connection unrelated to the underlying suit,"



specific jurisdiction, or “case-linked” jurisdiction, requires an affiliation between the underlying controversy and the forum state. *Walden*, 134 S. Ct. 1115, n 6. Specific jurisdiction applies when the suit “aris[es] out of or relates[s] to the defendant’s contacts with the forum.” *Helicopteros*, 466 U.S. at 414, n. 8.

The “minimum contacts” necessary to create specific jurisdiction “focuses on

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the relationship among the defendant, the forum, and the litigation.” *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). To elaborate, “[f]or a State to exercise jurisdiction consistent with due process, the defendant’s suit-related conduct must create a substantial connection with the forum State.” *Walden*, 134 S. Ct. at 1121, 1122. Finding substantial connection under this minimum contacts test requires analyzing the defendant’s contacts with the forum state, not the defendant’s contacts with persons who reside there, and “[t]he plaintiff cannot be the only link between the defendant and the forum.” *Id.* at 1122.

When litigation is based upon the parties’ contractual relationship, jurisdiction may be asserted over defendants for having “purposefully ‘reach[ed] out beyond’ their State into another.” *Walden*, 134 S. Ct. at 1122. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479–80 (1985). An individual’s contract with an out-of-state party alone, however, cannot automatically establish sufficient minimum contacts. *Id.* at 1123.

All contracting parties, especially construction contractors, should be mindful of jurisdictional clauses for several reasons when entering into agreements with out-of-state or foreign general or subcontractors. When general contractors fail to include a specific contract provision consenting to jurisdiction in a specified state or federal court, this may result in dismissal of an action against a foreign corporation. Should dismissal not be warranted *per se*, the failure to include the proper contract provisions may nonetheless deprive a corporation of its ability to argue for specific jurisdiction, and the corporation will face the increasingly difficult general jurisdiction analysis. Subcontractors typically enter into agreements with larger corporations that are much more likely to include detailed jurisdictional clauses. It is imperative that subcontractors review these provisions and negotiate their terms to avoid either having to defend themselves in an otherwise unanticipated jurisdiction or losing their ability to seek redress against a foreign corporation.

### Venue

Construction contractors will want to take similar precautions when entering into agreements containing forum selection and choice of law provisions because unexpectedly having to litigate disputes in a foreign jurisdiction has become a greater reality. The Supreme Court decision in *Atlantic Marine Construction Company, Inc. v. United States District Court For the Western District of Texas*, 134 S. Ct. 568 (Dec. 3, 2013), has eroded the established practice for contesting venue in federal district courts when the parties have included a forum selection clause in their underlying contract. With the parties having agreed in advance to litigate disputes in a specified forum, the Supreme Court concluded that federal district courts should not disrupt the parties’ expectations.

### Applicable Statutes: 28 U.S.C. §1391 and 28 U.S.C. §1404

The two federal statutes essential to the venue analysis are 28 U.S.C. §1391 and 28 U.S.C. §1404. Section 1391 defines the districts in which venue is proper to include (1) a district in which any defendant resides, if all defendants are residents of

the state in which the district is located; (2) a district in which a substantial part of the events or omissions giving rise to the claim occurred, or a district in which a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such an action. See 28 U.S.C. §1391(b). Section §1404 provides change of venue “for the convenience of parties and witnesses, in the interest of justice...to any other district or division where it might have been brought or to any district or division to which all parties have consented.” 28 U.S.C. §1404(a). *Atlantic Marine* specifically highlights the importance of 28 U.S.C. §1404(a) with regard to contracting parties’ consent to a particular venue as the pivotal statutory language.

### Motion to Transfer Under 28 U.S.C. §1404(a)

In *Atlantic Marine* the Court held that forum selection clauses will be enforced through a motion to transfer under 28 U.S.C. §1404(a) as the parties have agreed, by contract or stipulation, to the particular forum or district. When presented with a contractually valid forum selection clause, a district court will view the parties to have agreed and “should ordinarily transfer the case to the forum specified in that clause.” *Atlantic Marine*, 134 S. Ct. at 581, n 5.

Conversely, the Court held that a private forum selection clause cannot be used to render an otherwise permissible venue in a specific district improper. In unambiguously holding that federal venue statutes trump contractual provisions, the Court ruled that “if the federal venue statutes establish that suit may be brought in a particular district, a contractual bar cannot render venue in that district ‘wrong.’” *Id.* at 578.

So although the statute dictates whether the venue is correct, when presented with a motion brought under 28 U.S.C. §1404(a), the district court’s proper application “requires that a forum selection clause be ‘given controlling weight in all but the most exceptional cases.’” *Atlantic Marine*, 134 S. Ct. at 579 (quoting *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988)).



Following *Atlantic Marine*, a valid forum selection clause will require district courts to “adjust their usual §1404(a) analysis in three ways.” *Id.* at 581.

### Changes to District Court Analysis of Motions Under §1404(a)

First, if a plaintiff initiates a lawsuit in a venue other than the one specified in the

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contract, the plaintiff’s choice of forum merits no weight because the contracting parties contractually agreed to litigate in a specified forum. Second, a court evaluating a change of venue motion should not consider the parties’ private interests because they waived the right to challenge the contractually agreed upon forum and having to litigate in the agreed forum was foreseeable.

Finally, when a plaintiff, as a party bound by a forum selection clause, fails to honor its contractual obligation and files a lawsuit in a different forum, a proper transfer of venue under §1404 will not carry with it the original venue’s choice-of-law rules. As the Court put it, “a plaintiff who files suit in violation of a forum-selection clause enjoys no such ‘privilege’ with respect to its choice of forum, and therefore it is entitled to no concomitant ‘state-law advantages.’” *Atlantic Marine*, 134 S. Ct. at 583.

In sum, the Supreme Court held that the parties’ noncontractual private interests are of no concern when their contract includes

a valid forum selection clause. *Id.* at 582. District courts may only consider public interest factors in deciding whether to deny a motion to change venue under 28 U.S.C. §1404, and those factors will rarely prevent transfer except in the exception cases. *Id.*

### Recent District Court Decisions Applying *Atlantic Marine*

Following the *Atlantic Marine* decision this past December, several district courts throughout the country have applied its holding to a variety of cases. These decisions are significant because they show a uniform understanding of several key aspects of the Supreme Court decision.

While the Supreme Court failed to list the public factors for district court analysis, several district courts have specifically examined the relevant considerations when deciding a motion to transfer venue. For example, in *United American Healthcare Corp. v. Backs*, 2014 WL 555194 (E.D. Mich. Feb. 12, 2014), a Michigan district court followed the logic of *Atlantic Marine* and denied a motion to transfer venue. The litigation involved a contract dispute between a Michigan corporation plaintiff and an individual California defendant. The contract at issue contained forum selection, jurisdiction, and choice-of-law provisions designating Michigan as the forum. In refusing to entertain the private factors disfavoring a venue transfer, the district court turned to and specified the public factors bearing on the question of whether to transfer venue. Citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981), the district court listed the public factors as including the following: the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Similarly, in the context of form ticket contracts, the U.S. District Court for the Northern District of Texas upheld a forum selection clause and granted a corporate defendant’s motion to transfer venue in accordance with the ticket contract provi-

sion. In *Cline v. Carnival Corp.*, 2014 WL 550738 (N.D. Tex. Feb. 12, 2014), the district court refused to credit arguments regarding the parties’ private interests and concluded that the plaintiffs failed to show that the public interest factors overwhelmingly disfavored transfer.

District courts have also adhered to *Atlantic Marine*’s direction to order transfer to the forum specified in a contract upon receiving a proper motion based on 28 U.S.C. §1404(a). In *Welenco, Inc. v. Corbell*, 2014 WL 130526 (E.D. Cal. Jan. 14, 2014), the district court deemed a motion to change venue under 28 U.S.C. §1404 as a motion for intra-district venue rather than to a state superior court. This decision was reached in light of *Atlantic Marine*’s holding that §1404(a) has no application when a party seeks transfer to a non-federal forum, and since the defendants relied on 28 U.S.C. §1404, rather than the doctrine of forum non conveniens, the lawsuit was properly transferred to another federal district court.

Some courts have avoided following *Atlantic Marine* by highlighting the circumstances and arguments involved. After examining *Atlantic Marine*’s holding and whether to grant a motion to change venue, an Alabama district court applied a different but similar analysis when the plaintiff claimed that the forum selection clause was invalid. In *Bright v. Zimmer Spine, Inc.*, 2014 WL 588051 (N.D. Ala. Feb. 14, 2014), the district court observed that *Atlantic Marine* specifically dealt with a valid forum selection clause, and to determine such validity, it must look to state contract law before enforcing the forum selection clause: “Under such circumstances there should be no question that courts must apply state law pursuant to the ‘twin aims of Erie’ test, under which a court cannot apply a federal rule if doing so would encourage forum shopping or produce inequitable administration of law.” *Id.* (citing *Stewart Organization, Inc., supra*, 487 U.S. at 33-41 (Scalia, J., dissenting)). The Alabama district court granted the defendant’s motion to transfer venue after determining that it could not find that enforcing the forum selection clause violated Alabama’s public policy against forum selection against its citizens.

Another situation involving the application of state law distinguished *Atlantic Marine* based on the nature of the causes

of action. The U.S. District Court for Arizona denied a motion to transfer venue after finding a forum selection clause to be unenforceable as applied. *Anspach v. Meyer*, 2014 WL 345676 (D. Ariz. Jan. 30, 2014). *Anspach* involved a forum selection clause in a confidentiality agreement that identified Kansas federal court as the proper forum for all disputes arising out of breach of the agreement. While an action with a Kansas court was pending for a dispute under the confidentiality agreement, plaintiff filed a separate action in Arizona claiming, among other things, defamation, breach of fiduciary duties, and tortious interference with prospective economic advantage. The Arizona district court opined that while the claims in the two lawsuits were factually related, the language of the forum selection clause controlled only “disputes arising from any breach of this agreement” and plaintiff’s present action sought damages for harm allegedly caused by the defendant’s conduct post-suit in Kansas. *Id.* at 4. After observing that *Atlantic Marine* involved a valid forum selection clause and the present action had no applicable clause, the district court evaluated both the convenience of the parties and the various public interest factors.

Interestingly, a forum selection clause in the context of consumer contracts was found by a Texas district court not to be subject to *Atlantic Marine*’s holding. In *Stewart v. American Van Lines*, 2014 WL 243509 (E.D. Tex. Jan. 21, 2014), the U.S. District Court for the Eastern District of Texas found that *Atlantic Marine* did not alter the court’s analysis of venue because it “dealt with two businesses which can deal at arm’s length.... Such is not the case in the consumer setting.” *Id.* at 2. Since the plaintiff was a consumer, enforcement of the forum selection clause relied upon by the corporate defendants was deemed unreasonable under the circumstances.

## Conclusion

The Supreme Court decision in *Daimler AG v. Bauman* is a turning point in personal jurisdiction precedent. It tells us that the inquiry is whether a defendant’s contacts suffice to permit a court to exercise its jurisdiction. Nothing in the decision indicates that general personal jurisdic-

tion over foreign corporations is completely lost, however, the ability to assert general jurisdiction is greatly reduced.

Provisions in contracts dealing with jurisdiction, such as consents to personal jurisdiction and jurisdictional waiver clauses, have become ever more important when drafting agreements with national corporations or local subcontractors. Failing to negotiate these jurisdictional clauses at the time of contracting will not prevent federal courts from holding all parties to the terms of their agreement. As always, general and subordinate contractors are advised to consult with counsel before agreeing to contractual relationships that call for adjudication in foreign jurisdictions.

Beyond the jurisdictional context, the *Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas* decision highlights the importance of reviewing contract provisions relative to out-of-state and foreign courts. In the presence of a valid forum selection clause, district courts will likely deny motions brought under Fed. Rule Civ. Proc. §12(b)(3) or under 28 U.S.C. §1406. The *Atlantic Marine* decision sets forth a seemingly bright-line rule directing litigants with valid forum selection clauses to seek a federal venue transfer by motion under 28 U.S.C. §1404(a) as the only means for the district courts to enforce a forum provision.

While there may be some exception for individuals contracting with corporate entities in the consumer context, no national authority limits *Atlantic Marine*’s holding. Contractors are again advised to consult with counsel because contracts will require specific provisions to either ensure a particular forum, or alternatively, to avoid having to adjudicate disputes in unfamiliar states or countries. 