

 [Click to Print](#) or Select '**Print**' in your browser menu to print this document.

Page printed from: [Delaware Business Court Insider](#)

---

# Dutch Company Subject to Delaware Jurisdiction for Breach

Francis G.X. Pileggi, Delaware Business Court Insider

July 2, 2014

A recent decision of the Delaware Court of Chancery has widespread practical utility for business litigators who are interested in the latest iteration of Delaware law on both the breach of a confidentiality agreement, as well as the minimum contacts that suffice for imposing jurisdiction on foreign companies that enter into agreements with Delaware companies.

## Overview

The case of *Sustainable Energy Generation Group LLC v. Photon Energy Projects B.V.*, No. 8524-VCP (Del. Ch. 2014), involved a Dutch company that entered into a nondisclosure agreement for purposes of exchanging confidential information related to the prospect of working together with a Delaware company on solar energy projects in the United States. The parties never actually did business together, but this case arises out of the disclosure by the Dutch company of information provided by the Delaware company in connection with a bond offering by the Dutch company in Europe.

The context of this opinion was a motion to dismiss by the Dutch company based on the argument that Delaware lacked personal jurisdiction over it, and that the initial service of process did not comply with the Hague Convention. The Dutch company also argued that the Delaware business failed to state a claim upon which relief could be granted for its alleged breaches of contract and tortious interference with prospective business relationships. The court dismissed the tortious interference claim but allowed the claims to proceed to trial on the breach of contract, and rejected the arguments regarding ineffective service of process.

## Background

The defendants were the parent and subsidiaries of a Dutch company that developed renewable energy power projects around the world. The Delaware company specialized in developing renewable energy projects. The Dutch company, Photon Energy, approached

the Delaware company, Sustainable Energy Generation Group (SEG), about working together on one or more energy projects in the United States. Photon's key executives met in Wilmington with SEG to discuss a potential business transaction between the parties. Subsequent to the Delaware meeting, the parties continued to discuss a potential transaction and engaged in many discussions by email, phone and Skype between the Delaware offices of SEG and Photon's offices in Europe. During these discussions, the parties agreed to execute a nondisclosure agreement (NDA).

Despite the NDA, after it was signed, Photon acknowledged the disclosure of confidential information about SEG projects in the United States as part of a bond prospectus that Photon distributed in Europe. Photon acknowledged that at least some of the disclosures in the bond prospectus were based on confidential information it received from SEG.

## Long-Arm Jurisdiction Analysis

The court recited the three-step process for determining personal jurisdiction under the Delaware long-arm statute, 10 Del. C. Section 3104(c). The first step was to determine whether Photon "transacted business" in Delaware. Next, the court needed to determine whether the claims "arose from" the transaction of business. Third, the court analyzed whether exercising jurisdiction over Photon comported with due process. Importantly, even though there was a meeting between the parties in Delaware, the court noted that physical presence is not necessary to support a finding of personal jurisdiction under the long-arm statute. The court cited to prior decisions that observed that in light of the superior communications technology available to businesses, physical presence is an anachronistic methodology for determining whether the transaction of business occurred in Delaware. In this case, the court determined that the solicitation of business in Delaware by Photon, and the communications directed to Delaware, in addition to the meetings in Delaware, satisfied the test for "transacting business" in Delaware, as a prima facie matter for purposes of a motion to dismiss.

Next, the court analyzed whether there was a "nexus" between the transaction of business and the cause of action. Relying in part on affidavits submitted, the court found that: (1) the parties exchanged confidential information as part of the activities in Delaware that Photon solicited, and (2) that the communications that Photon directed to Delaware were for the purpose of reaching an agreement to obtain access to the confidential information. Further, the court found that the purpose for Photon contacting SEG was primarily to obtain confidential information as opposed to reaching a partnership agreement with SEG. These "critical steps in the chain of events resulting in the cause of action" sufficed for a prima facie showing that the claims arose out of the transaction of business in Delaware.

The due process requirement was satisfied based on a prima facie showing that Photon purposely availed itself of the privilege of conducting business within Delaware in light of the extensive contacts and negotiations with a company located in Delaware that should have made Photon reasonably anticipate being hailed into court in Delaware, as a result of a dispute arising from those same contacts and negotiations.

Regarding the two subsidiaries named as co-defendants, although the court did not treat seriously what it described as the half-hearted arguments for an application of the conspiracy theory of jurisdiction, the court found that there was a prima facie showing that

there was enough overlap of personnel among the subsidiaries and the parent such that the actions of the parent can be attributed to the subsidiaries "because those who acted on Photon's behalf also were doing so as employees of [Photon Energy Projects B.V.] or [Photon Energy Investment N.V.]." Nonetheless, the court emphasized that there is no presumption that the actions of a parent corporation will be attributed to subsidiaries. Moreover, personal jurisdiction has to be established for each defendant, and there is sufficient case law to establish that for purposes of personal jurisdiction a parent corporation is not deemed to control the actions of a subsidiary.

## **Service of Process**

The court discussed the provision of the Hague Convention, at Article 10(a), regarding the service of initial process of a complaint to a defendant in a foreign country. Although the case law is not well established on the topic, the court found that service by Federal Express, where receipt of service was confirmed by signature, was an acceptable means of providing initial service of process. Moreover, the court cited the Delaware cases and commentary for the position that where the requirements for service of process under the Delaware long-arm statute are satisfied, then so, too, are the service requirements under the Hague Convention.

## **Breach of the NDA**

Based on the "reasonably conceivable" standard of Rule 12(b)(6) for a motion to dismiss in Delaware, the court found that the disclosure of confidential information in the bond prospectus arguably violated the NDA. At this preliminary stage, the court also found sufficient basis for the request for injunctive relief and the possibility of money damages due to the highly sensitive information made available to the public by Photon. Specifically, the court found that it was conceivable that SEG could prove that the disclosures of that information harmed its business in a manner that would entitle it to monetary relief.

As an alternative theory of recovery, SEG also made a claim for misappropriation or conversion of confidential information. The court found that this alternative theory also survived the motion to dismiss. The elements of such a claim include: (1) a right to a property interest in the confidential information; (2) that the defendant wrongfully exerted dominion over the confidential information; and (3) that the plaintiff sustained damages as a result.

## **Tortious Interference**

The court granted the motion to dismiss a claim for tortious interference with prospective contractual relations, which requires: (1) a reasonable probability of a business opportunity or prospective contractual relationship; (2) intentional interference by a defendant with that opportunity; (3) proximate cause; and (4) damages. The court explained in this 43-page decision why SEG did not sufficiently allege a reasonable expectancy in either of the projects in which it claimed that Photon tortiously interfered. The court provides several examples of why this is so. For example, the projects at issue could not have been

completed without the financing provided by Photon and there was no suggestion in the record that SEG had other sources of financing.

In sum, this opinion provides a useful overview of the elements of a breach of an NDA and the circumstances surrounding that breach that would survive a motion to dismiss. Also useful is the discussion of the practical methods that will suffice for initial service of process on a defendant located in a foreign country.

**Francis G.X. Pileggi** is the member-in-charge of the Wilmington office of *Eckert Seamans Cherin & Mellott*. His email is [fpileggi@eckertseamans.com](mailto:fpileggi@eckertseamans.com). He summarizes the corporate and commercial decisions of Delaware courts at [www.delawarelitigation.com](http://www.delawarelitigation.com).

---

Copyright 2014. ALM Media Properties, LLC. All rights reserved.