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JURISDICTIONAL ISSUES OF E-COMMERCE CONSUMER CONTRACTS IN THE CASE OF ABSENCE CHOICE OF COURT

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TABLE OF CONTENTS

ABSTRACT

In this thesis the approaches to jurisdictional issues of e-commerce consumer contracts in the case of absence choice of court are scrutinized. Since the use of the Internet in the United States of America started earlier and is more advanced than in Europe, I will first elaborate on the jurisdictional issues of e-commerce consumer contracts currently in force in the US. Further, I will examine how jurisdictional questions are dealt with in the Brussels Convention on the one hand and in the Brussels Regulation on the other hand. In both cases, the explanation of theoretical discussions as regards the conditions and peculiarities of jurisdictional approaches will be illustrated. In conclusion, I will make a quick overview of the regime that is currently being drafted by the Hague Conference on Private International Law.

INTRODUCTION

The original purpose of the Internet was merely to have a fast and free exchange of information. Consequently, for a long time, the commercial use of the Internet was limited to small, specialized enterprises. However, the currently increasing mercantile use of the Internet is leading to an increasing number of contracts being entered via the electronic highway, not only between enterprises themselves (business to business transactions) but also between enterprises and consumers (business to consumer contracts). Over the last few years, this evolution has led lawyers to pay close attention to the legal aspects of this new medium, especially in the issues of jurisdiction, since the essential nature of the Internet is that it is not physically tied to any geographical location.

Legal scholars and judges, especially in the US, have long understood that technological progress would lead to jurisdictional change. It is hard to imagine, however, that the courts, no matter how shrewd they are, could predict the jurisdictional problems that electronic commerce would pose. Perhaps the courts today would echo Judge Van Graafeiland of the US Court of Appeals for the Second Circuit who stated that adjudicating over Internet-related matters is "*somewhat like trying to board a moving bus."*[1]

The first to jump on the always-moving-vehicle of "Internet Jurisprudence" were the American courts. The evolution of jurisdictional issues in the Unites States began with the well-know "Inset" case[2], where the court passed a questionable decision finding its jurisdiction only on the ground that the website in question was accessible in the forum state. The approach of "minimum contacts"[3] used in that decision did not gain popularity since it completely disregarded the interests of sellers,

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[1]Judge Van Graafeiland, see Bensusan Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997).

[2] infra note 62.

[3] infra note 65.

who cannot under such circumstances protect themselves from the courts of all countries where their websites can be accessed.

More elaboration on the jurisdictional issues is discussed in the "Zippo"[4] and "Cybersell"[5] decisions. In both cases the courts tried to come up with the most efficient tests that would solve the question of jurisdiction over disputes which are not physically attached to any territory. In the former case the court assessed its jurisdiction based on the "sliding scale"[6] of website interactivity. Although such method is more clear and consistent to the reality of the website architecture than the "Inset" approach, it failed to provide a clear-cut solution for the cases involving corporate litigants.[7] In the latter case the judge applied a 3-part test, which was largely based on the notion of "purposeful availment"(i.e. if the defendant has done some act or consummated some transaction with the forum, he has purposefully availed of the privileges of conducting activities in the forum, thereby invoking it benefits and protections).[8]

The last part of the thesis, dedicated to American approach, is focused on the "targeting" method,[9] that emerged from case law that hashed out the "stream commerce" discussion by the Supreme Court in Asahi Metal Industry Co. v. Superior Court of California.[10] To my mind the concept of "targeting" is the best solution to the theoretical challenge presented by difficulties in localizing conduct in Internet markets.

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[4] infra note 66.

[5] infra note 67.

[6] infra note 72.

[7] infra note 100.

[8] infra note 69.

[9] see section II.4.

[10] Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1987).

In this work, an examination of the EU approach to personal jurisdiction over consumer contracts entered into via the Internet is undertaken. This topic has gained legal attention after the entry into force of the Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.[11] It replaced the Brussels Convention of 1968.[12]

The Regulation maintains the Convention's special consumer protection regime but introduces some modifications as regards its field of application. The first two situations set forth in Art. 13 of the Convention have been maintained in the Regulation (respectively Art. 15.1.a and 15.1.b). However, the third situation with its two additional conditions (the notions of "specific invitation"[13] and "deliberate steps of the consumer in the state in which he is domiciled"[14]) have been removed and replaced by the concept of seller "directing"[15] his activities to a Member State.

Structurally, the thesis is going to be organized in the following manner:

The first Chapter of the work will introduce basic facts and concepts of the Internet, electronic trading and e-commerce jurisdiction. This part explains the categories of e-commerce, legal status of digital products under existing e-commerce laws and general principles of electronic trading and jurisdiction in cyberspace.

The second chapter is going to address US approaches to jurisdictional issues of e-commerce consumer contracts in the case of the absence choice of court. The chapter includes a general historical overview of the case law evolution of jurisdictional matters, the "totality of contacts" method, the

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[11] infra 153.

[12] infra 120.

[13] see section III.2.b.

[14] see section III.2.c.

[15] see section III.3.b.

"effects" test, the "targeting" approach and the "reasonableness" test as the background policy behind all of the above-mentioned approaches.

And finally the third chapter will focus on the EU legislation on jurisdictional issues, covering the Brussels Convention approach, the new regime under the Brussels Regulation and the Hague Convention as an attempt for the international jurisdictional approach.

CHAPTER I.

E-COMMERCE BASICS

I.1 WHAT IS E-COMMERCE

It is a rather difficult task to provide a precise definition of the term e-commerce. In his introductory remarks for "eEurope" Romano Prodi stated: *"These changes, the most significant since the industrial revolution, are far-reaching and global. They are not just about technology. They will affect everyone, everywhere[...]."* [16]

The literature on the subject of electronic commerce contains various descriptions of this notion ranging from broad and extensive, ranging form broad and extensive to rather concise and simple formulations. With a view to provide as accurate as possible picture I will mention a number of such definitions. In a paper published by the European Commission in order to describe the nature of e-commerce and to identify several issues on this topic, the definition used included: "[...] any form of business transaction in which the parties interact electronically rather than by physical exchanges or direct physical contact."[17] Meanwhile, the Ministry of Economic Affairs of the Netherlands published in 1998 a policy paper designed at expanding and improving the use of e-commerce. This program refers in its turn to electronic commerce as covering: "[...] all business transactions that are carried out electronically with a view to improving the efficiency and effectiveness of market and business processes."[18]

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[16] See Romano Prodi, Introductory remarks for "eEurope", a European Commission program designed at speeding up the uptake of digital technologies across Europe, found at <http://europa.eu.int/comm/information_society/eeurope/index_en.htm> Cited from "International Jurisdiction in European Union E-Commerce Contracts", Norel Rosner, University of Groningen, The Netherlands, May 1, 2002.

[17] Electronic Commerce - An Introduction, The Commission of the European Community, 5-7, July 2, 1998<http://cordis.europa.eu/esprit/src/ecomint.htm>.

[18] Ministry of Economic Affairs of the Netherlands, Electronic Commerce Action Plan, The Hague, March 1998, p. 7, at http://www.minez.nl/ Cited from "International Jurisdiction in European Union E-Commerce Contracts", Norel Rosner, University of Groningen, The Netherlands, May 1, 2002.

One of the most concise definitions for e-commerce, specific for the dynamic world of business, has been suggested by Mr. A.P. van Kerckhoven, product development manager at World Online International, formerly a leading Dutch Internet provider: *"E-commerce is the use of telecommunication and computers in order to support trade."*[19]

From the aforementioned definitions one can infer a number of factors that seem to appear on more than one occasion: firstly, e-commerce presupposes the existence of a business transaction; secondly, the parties to such transaction maintain contact through electronic means rather than conventional ways of communication and lastly, e-commerce is designed to create a more efficient business environment.

It is quite obvious that electronic commerce is not limited to Internet. Rather it includes all business transactions carried out through electronic means, for instance the so-called Electronic Data Interchange transactions ("EDI")[20], developed in the 1980's in order to support transactions between suppliers and customers, or teleshopping and pay television. Nevertheless, e-commerce has undergone a remarkable expansion only with the establishment of the Internet as a communication protocol available on a large scale. In fact, in a definition of e-commerce recently used in a working paper of the European Commission, it is only the Internet that is mentioned as the medium where transactions are being concluded: "E-commerce, the buying and selling of goods and services using the Internet."

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[19] From a presentation held with the occasion of the conference entitled "De invloed van informatietechnologie op het recht", Rotterdam, 23 March 2000, Cited from "International Jurisdiction in European Union E-Commerce Contracts", Norel Rosner, University of Groningen, The Netherlands, May 1, 2002.

[20] Electronic Data Interchange, definition taken from wikipedia, found at <http://en.wikipedia.org/wiki/Electronic_Data_Interchange>.

In the dot-com era[21], e-commerce was termed "web commerce" - and denoted the purchase of goods and services over the World Wide Web, usually through secure connections[22] with e-shopping carts and electronic payment services, like credit cards. Today it encompasses a very wide range of business activities and processes, from e-banking to offshore manufacturing and e-logistics.

The constant growing dependence of modern industries on electronically enabled business processes triggered the growth and development of supporting electronic software and hardware systems, including backend systems, applications and middleware. Examples are broadband and fiber-optic networks, customer relationship management software, inventory control systems and financial accounting software.

When the Web first became well-known among the general public, many journalists and experts forecasted that e-commerce would soon become a major economic sector.[23] Although a large number of "pure" e-commerce companies disappeared during the dot-com collapse in 2000 and 2001[24], many ordinary retailers recognized that Internet companies had identified new valuable markets and began to add e-commerce capabilities to their websites. For example, after the collapse of online grocer Webvan, two traditional supermarket chains, Albertsons and Safeway, both started e-commerce subsidiaries through which consumers could order groceries online.[25]

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[21] "Dot-com" companies were the collection of start-up companies selling products or services using or somehow related to the Internet. They proliferated in the late 1990s dot-com boom, a speculative frenzy of investment in Internet and Internet-related technical stocks and enterprises. The name derives from the fact that many of them have the ".com" TLD suffix built into their company name. - information taken from wikipedia, found at <en.wikipedia.org/wiki/Dot_com>.

[22] HTTPS, a special server protocol that encrypts confidential ordering data for customer protection.

[23] Norel Rosner, "International Jurisdiction in European Union E-Commerce Contracts", University of Groningen, The Netherlands, May 1, 2002, found at <http://www.llrx.com/features/eu_ecom.htm>.

[24] The "dot-com bubble" was a speculative bubble covering roughly 1995–2001 during which stock markets in western nations saw their value increase rapidly from growth in the new Internet sector and related fields. The period was marked by the spectacular failure of a group of new Internet-based companies commonly referred to as dot-coms., information taken from wikipedia, found at <http://en.wikipedia.org/wiki/Dot-com_bubble>.

[25] Daniel S. Levine, "Safeway, Albertson's in Webvan land" ,San Francisco Business Times - February 15, 2002 found at <http://www.bizjournals.com/sanfrancisco/stories/2002/02/18/story1.html>.

The emergence of e-commerce also significantly lowered barriers to entry in the selling of many types of goods. Thus many small home-based vendors are now able to use the Internet to sell goods. In order to take advantage of the exposure and setup conveniences small sellers use online auction sites like eBay.com, or sell via large corporate websites like Amazon.com.

E-Commerce generates incredible opportunities, for both vendors and consumers. The ability of sending and receiving data via electronic networks gives vendors favorable means to deliver products including any necessary information directly to the customer with lower cost than normal methods.[26] Meanwhile, consumers gain numerous choices for purchasing goods and services from any market in the world. "This new type of technology not only influences people's way of living, but also leads them to form new behaviors for using such technology to utilize either their businesses or private life".[27]

I.2 CATEGORIES OF E-COMMERCE

Electronic transactions may be concluded between various parties: private enterprises, consumers or public authorities. Depending on the parties participating in the transaction, e-commerce can be subdivided into six distinct categories:

a) Business-to-Consumer (B2C)

[26] Diedrich F, "A Law of the Internet? Attempts to Regulate Electronic Commerce", 2000 (3) The Journal of Information, Law and Technology (JILT). found at <http://elj.warwick.ac.uk/jilt/00-3/diedrich.html>.

[27] "Civil Jurisdiction in International Business to Consumer (B-C) Electronic Commerce Contracts: Comparative Study between European Union and Thai Provisions" Electronic Commerce Resource Center found at <www.ecommerce.or.th/nceb2002/paper/30-Civil_Jurisdiction.pdf>.

Business-to-Consumer commerce, according to Patton "applies to any business or organization that sells its products or services to consumers over the Internet for their own use."[28] In other words, it provides a direct sale between the supplier and in the individual consumer, who acts outside his trade or profession. The first noticeable success of B2C commerce occurred in 1995, when companies like eBay.com and Amazon.com were launched.

b) Business-to-Business (B2B)

Business-to-Business commerce involves online transactions between businesses[29] (both horizontal, i.e. joint venture, and vertical transactions, i.e. wholesalers and retailers), such as to sell, produce goods and services, and transfer payments and capitals. Examples of B2B also include online companies that specialize in marketing strategies, advertising, email companies, internet consultants, website development etc.

c) Consumer-to-Consumer or Peer-to-Peer (C2C/P2P)

Consumer-to-Consumer or Peer-to-Peer is defined as exchanges between or among consumers.[30] These exchanges can involve a third-party mediator, which can facilitate and provide the infrastructure, place and rules for the transactions or exchanges. The most well known examples of C2C commerce are online markets and auctions like Ubid.com, eBay.com, Froogle.com or Auctions.yahoo.com. There consumers can bid for and sell items of any description, for any price, if they comply with standard rules of the intermediary.

d) Consumer-to-Business (C2B)

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[28] Susannah Patton, "ABCs of E-Commerce", October 19, 2006, http://www.cio.com/ec/edit/b2cabc.html.

[29] Thanasankit, "E-Commerce and Cultural Values", 2003, p.152.

[30] Mcgraw-Hill/Irwin, "Introduction to E-Commerce", 2002, p.xiv.

Consumer-to-Business transactions take place when consumers present themselves as buyer groups. These groups may be economically motivated with supply and demand tools, or they can be socially orientated to act in a certain way. Examples of this include CTB and SpeakOut.com.[31] These sites provide consumers with market strategies while businesses use them to gain insight into consumer wants.

5. Business-to-Administration (B2A)

Business-to-Administration commerce involves commercial relations between companies and public bodies (for example when following a government procurement contract). Also known as eGovernment, it has the potential to increase the domestic and business use of e-commerce as traditional services are increasingly being delivered over the Internet. The United Kingdom central government, for example, aims to conduct 100% of it services online. At present time 80% of councils in England now have public eMail and Internet access, with 33% of authorities having at least three services accessible in this form.[32]

6.Consumer-to-Administration (C2A)

The Consumer-to-Administration category has only recently emerged and is of a rather limited application. However, one can imagine that a certain degree of efficiency and effectiveness can be added to government activities if a number of such operations will be concluded on-line (for example in areas of welfare and self-assessed tax returns).[33]

The aim of this work is to research jurisdictional issues of the Business-to-Consumer transactions.

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[31] id.

[32] Different Types of eCommerce: Business-to-Administration. information take from http://www.opportunitywales.co.uk/2-1-3d.htm.

[33] Francesco G. Mazzotta, A guide to e-commerce: some legal issues posted by e-commerce for american business engaged in domestic and international transactions. 2001, page 273.

I.3 LEGAL STATUS OF DIGITAL PRODUCTS UNDER THE EXISTING E-COMMERCE LAWS

Due to their intangible nature, legal scholars asks the question whether or not digital products (e.g. computer software) can be considered as "goods" in the sense of american case law. The same question can be refereed also to Art. 13 of the Brussels Convention,[34] Article 1 of the United Nations Convention for the International Sale of Goods of 11 April 1980[35] and Art. 5 of the EC Convention on the Law Applicable to Contractual Obligations of 19 June 1980.[36] The term "goods" is not defined in any of these three conventions, the question is not dealt with in their preparatory documents and the European Court of Justice has not yet had the opportunity to issue a ruling on this issue.[37]

After examining all possible interpretations, most authors eventually agree that digital products (despite their intangible nature) can be considered as "goods" in the sense of the three aforementioned conventions. They base their opinion on the following grounds:

First, they consider that it cannot be deducted from the conventions that the contracting parties wished to exclude digital products, since they do not exclude immaterial goods in principle.[38]

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[34] infra note 120.

[35] UN Treaty Series vol. 1489, 3.("CISG").

[36] EC Official Journal 26 January 1998, C 27/1 (consolidated version).

[37] M. Foss and L.A. Bygrave, "International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law'", 2000, International Journal of Law and Information Technology (99), at 108.

[38] In their opinion, the exclusion of electricity from the field of application of the Hague Sale Conventions is not indicative for immaterial goods in general, since this exclusion is based on the fact that not all jurisdictions of the Contracting Parties qualify contracts for the supply of energy as sale contracts.

Second, they think that an extensive interpretation of the term “goods” is legitimated by the argument that the three conventions, as all other written laws, have to be interpreted in accordance with changing economic and technical circumstances.[39]

Third, in their opinion, a principal qualification of digital products as “goods” would correspond to the frequent use of the electronic means by enterprises.[40]

Fourth, as regards the CISG, this qualification would also fit in the Convention’s objective mentioned in its preamble, that is: “promoting the development of international trade through uniform rules”.[41]

Fifth, they think that consumer's need for the special protection regime in buying digital products does not significantly differ from his need in buying “traditional” goods. As E. Guldix asserts: “The functional and economical finality of both types of transactions are essentially the same; the medium through which goods are delivered, would merely be of no significance for the consumers' wishes and expectations and the legal status of the goods”.[42]

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[39] M. Fallon, “Le droit applicable à la protection de l'usager sur l'interréseaux dans le contexte communautaire' in P. Nihoul (ed.), Le droit communautaire et les résaux de télécommunication et de télédiffusion, la protection des consommateurs et des entreprises dans la société de l'information (Bundesanzeiger: Cologne 2000) (227) 242, cited from: Frederic Debusseré, International Jurisdiction Over E-Commerce Consumer Contracts in the European Union: Quid Novi Sub Sole? - International Journal of Law and Information Technology at 351, Autumn, 2002.

[40] K. Boele-Woelki, 'Conflictenrechtelijke aspecten van Internetkoopovereenkomsten' in F.W. Grosheide and K. Boele-Woelki (eds.), Europees Privaatrecht. Opstellen over Internationale Transacties en Intellectuele Eigendom (Koninklijke Vermande: Lelystad 1997) (139) 154, cited from: Frederic Debusseré, International Jurisdiction Over E-Commerce Consumer Contracts in the European Union: Quid Novi Sub Sole? - International Journal of Law and Information Technology at 351, Autumn, 2002.

[41] supra note 35, preamble.

[42] E. Guldix, 'Het internationaal privaatrecht in cyberspace' in K. Byttebier. R. Feltkamp and E. Janssens (eds.), Internet en Recht - Internet et le Droit (Maklu: Antwerp 2001) (151) 186; M. Foss and L.A. Bygrave, at. 112, cited from: Frederic Debusseré, International Jurisdiction Over E-Commerce Consumer Contracts in the European Union: Quid Novi Sub Sole? - International Journal of Law and Information Technology at 351, Autumn, 2002.

And finally, sixth, the consequence of not considering digital products as goods would be that a consumer of these products would never be entitled to rely on the special protection regime, which would not comply with the basic objective thereof.[43]

Should digital products not be considered as goods, then some authors argue that their delivery has to be qualified as a supply of "services", so that they still fall within the scope of application of international laws. Legal writers thereby refer to the case law of the European Court of Justice in light of the four freedoms in EU law, according to which each commercial activity has to be qualified as either a good or a service.[44]

I.4 PRINCIPLES OF CONSUMER PROTECTION IN E-COMMERCE

a) General Principles of Consumer Protection in E-Commerce

The global nature and unique characteristics of electronic commerce require governments and businesses to consider new approaches to consumer protection. The speed of transactions, the remoteness of buyer and seller, and the difficulty of authenticating the parties challenged legislators to develop consumer protections schemes that would fit the new "virtual marketplace."[45]

Establishing minimum standards for conduct in e-commerce encourages consumer confidence, fair competition, and economic development around the world.Beginning in 1999 active advocates for consumer rights like Trans Atlantic Consumer Dialog (TACD) urged the Organization for Economic

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[43] id.

[44] id.

[45] The recent example is: Principles of Consumer Protection for Electronic Commerce:A Canadian Framework, Working Group on Electronic Commerce and Consumers, found at <http://www.cba.ca/en/viewdocument.asp?fl=-1&sl=95&docid=263&pg=1>.

Cooperation and Development (OECD) and national legislators to complete and adopt "Guidelines for Consumer Protection in the Context of Electronic Commerce".[46] These principles provide that:

1. Consumers should have transparent and effective protections that are at least at the same level as those afforded in other forms of commerce;
2. Businesses should disclose their legal names and physical locations, and provide consumers with an easy means of contacting them, both online and offline;
3. Marketing material should be clearly identified as such in any electronic format in which it is conveyed;
4. Information about the businesses, the products or services they offer, and the terms of the transactions, including price, delivery, payment, taxes, cost of transportation, duties, etc., should be stated in a clear, conspicuous, accurate and easily accessible manner;
5. Businesses should not make any representations or omissions, or engage in any practices, that are likely to be unfair, deceptive or fraudulent;
6. Businesses should be able to substantiate any claims they make, express or implied;
7. Businesses should develop and implement methods by which consumers can confirm the decision to purchase or withdraw from a purchase before a transaction is completed. Consumers should have no liability for unintentional or erroneous transactions where the business failed to provide an adequate opportunity to correct the error;
8. Businesses should develop and implement methods by which consumers can receive confirmation of their purchases and retain records of the transactions.
9. Businesses must abide by any post-purchase cancellation rights that may be provided by self-regulatory guidelines and the law in consumers' jurisdictions;
10. Businesses should develop and implement methods to prevent identity theft and other frauds and verify that payment is being made by the authorized account holder. The burden of proof regarding authenticity should rest with the business and/or payment systems operator, as appropriate. Consumers should be responsible to notify the appropriate entity promptly once aware of possible theft or loss, and should have no liability for transactions they did not authorize;
11. Consumers' payment and other information that they provide to businesses should be secured from theft or abuse;
12. Consumers should have no liability to pay for products or services that were never delivered or were misrepresented. In those events, electronic payment methods should provide for "charge-back rights" and prompt return of any payments made;

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[46] TACD DOC NO. Ecom 10-99, September 1999, available at <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=39>.

13. Businesses should develop and implement simple procedures for consumers to indicate that they do not wish to receive unsolicited electronic mails (e-mails) and honor their "do not e-mail" requests;
14. Consumers' privacy rights should be respected in accordance with the recognized principles set out in the 1980 OECD Guidelines Governing the Protection of Privacy and Transborder Flow of Personal Data and taking into account the OECD Ministerial Declaration on the Protection of Privacy on Global Networks;
15. Consumers must have methods of redress that are practical, accessible, affordable, timely and enforceable no matter where businesses against whom they have complaints are located;
16. The countries in which consumers reside have the obligation to protect them in e-commerce and must guaranty that there are appropriate means for resolving consumers' disputes. Consumers should never be denied the protections and remedies afforded to them by the laws, rules and regulations of their respective jurisdictions.[47]

Incorporation of this principles to the legislative acts and courts decisions will significantly increase the minimum level of consumer protection and unify the international consumer protection regime.

b) Jurisdictional Principles of Consumer Protection in E-Commerce

Among other initiatives promulgated by TACD the recommendation on "Jurisdiction on Cross-Border Consumer Contracts" [48] is of particular interest in my research. This recommendation sets out important principles and policies that address the issues of effective protection of consumer rights in cases of consumer redress. TACD document states that :

1. Consumers must have access to adequate redress if problems arise after buying goods and services on the Internet. Given the "virtualization" and "de-territorialization" of electronic commerce (e-commerce), new complex questions arise as to which courts and which laws should apply to the transactions.

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[47] id.

[48] TACD DOC NO. Ecom 15-00, DATE ISSUED: February 2000, available at <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=44>.

2. If consumers have to go to court in case of a problem they must have the right to take action before their own national courts. Depriving consumers of access to their own courts in practice is denying them their right to redress.
3. In most e-commerce transactions, consumers already bear a disproportionate risk because business requires pre-payment (for example by credit cards). The supplier will therefore rarely have any reason to want to sue the consumer.
4. Efficient access to courts can obviously not be the only means to ensure that consumers get redress in e-commerce transactions. The typical small value consumer transaction will not be treated by courts. We urgently need alternative dispute resolution schemes, where consumers can file in an easy, cheap and effective way their complaints without going to court. However, it is essential, that in the last event access to courts is possible for the consumer. A framework for international jurisdiction in cross-border consumer transactions is needed.[49]

Although these principles are largely incorporated into European legislation, it still remains uncertain whether the United states case law has one common position to this fundamental jurisdictional provisions.

I.5 GENERAL ASPECTS OF JURISDICTION IN CYBERSPACE

As a general term, jurisdiction refers to “a government's general power to exercise authority over all persons and things within its territory; a court's power to decide a case or issue a decree; or a geographic area within which political or judicial authority may be exercised.”[50]

The term “cyber-jurisdiction" is often used to refer to the internal governance established by the Internet users and operators, however in this work cyber-jurisdiction or jurisdiction in cyberspace will refer to physical government's power and court's authority over Internet users and their activity online.

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[49] id.

[50] Bryan A. Garner, Editor in Chief, Black's Law Dictionary 7th Edition (West Group, 1999).

While online transactions are borderless, the net-users themselves physically reside in a specific country. Under certain conditions, country A, to which such activities are transmitted, can exercise jurisdiction over a person residing in another country B on the basis that the activities of that person reached the country A.

In 1998 the Committee on Cyberspace Law of the American Bar Association launched the jurisdiction project which was aimed at analyzing jurisdictional problems which impact global electronic commerce.[51] The working group has compiled a "Model for Jurisdictional Analysis".[52] and based their research on the traditional principle of jurisdiction. This thesis will apply the same approach to the framework of jurisdictional analysis.

According to the traditional principle, jurisdiction can be divided into three categories: jurisdiction prescribe (legislative jurisdiction); jurisdiction to adjudicate (judicial jurisdiction); and jurisdiction to enforce (executive jurisdiction).

a) Jurisdiction to Prescribe

Jurisdiction to prescribe means a State's authority to make its substantive law applicable to particular persons and circumstances.[53] Given that activities on the Internet can involve several countries, the question arises as to which nation's rules are binding upon activities or persons in cyberspace. For example, German law prohibits the distribution of neo-Nazi propaganda to its citizens. On April 16, 1997, German prosecutors accused the general manager of the German internet service provider

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[51] "Electronic Commerce Transactions:Whose Jurisdiction Applies? Transnational Issues in Cyberspace: A Project on the Law relating to Jurisdiction", press release, August 12, 1998 available at <http://www.abanet.org/duslaw/cyber/initiatives/press.html.>.

[52]id.available at < http://calbar.ca.gov/calbar/pdfs/sections/buslaw/cyberspace/cyberspace- library_1999-9_jurisdictional- aspects-cybersecurities.pdf>.

[53] Restatement (Third) of the Foreign Relations Law of the U.S. 401 cmt. a (1987), at 230-31.

CompuServe of having knowingly allowed images of pornography and neo-Nazi materials to be made accessible to his company's customers.[54]

It is true that the German court can apply its laws to a company engaged in illegal activities within its territory. However, even if the distribution of neo-Nazi propaganda is illegal in Germany, its circulation is not illegal in most countries other than Germany. A more difficult choice of law dilemma would have arisen if neo-Nazi materials are distributed through the Internet by a person who resides outside of Germany.

Another example of jurisdictional problems, occurs when a contract between persons residing in different countries was made entirely via the Internet. Because a transaction on the Internet could have no substantial relationship with any physical place, it is a hard task to specify which nation's law applies to it.

b) Jurisdiction to Adjudicate

Jurisdiction to adjudicate is defined as a "state's authority to subject persons or things to the process of its courts or administrative tribunal, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings".[55] While jurisdiction to prescribe is connected to the choice of law problem, the choice of forum problem in cyberspace arises from the application of jurisdiction to adjudicate.

Even if it is unclear whether a state can establish laws which are applicable to a nonresident defendant who breaks the laws on the Internet, it is technically possible for a country to unilaterally de-

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[54] Judgment of the Munich Court in the "CompuServe Case" (Somm Case), 8340 Ds 465 Js 173158/95 available at http://www.kuner.com/data/reg/somm.html.

[55] supra note 50, 401(b).

clare that its laws are applicable to a nonresident who engages in an activity the laws prohibit. For example, in the Statement on Internet Jurisdiction, the Minnesota attorney general asserted that,*"persons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws."*[56]

Even if a state authority did not assert that its law can be applicable to persons who reside outside of its boundaries, the court in that state would decide if a nonresident defendant could be prosecuted on the charge of breaking one of its existing laws. Therefore,central to this choice of forum issue is the question of what standard can be used by a court to exercise jurisdiction to adjudicate over nonresidents who are sued for illegal activity on the Internet.[57]

c) Jurisdiction to Enforce

Jurisdiction to enforce deals with a State's authority to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through its courts or by use of executive, administrative, police, or other non-judicial action.[58]

Even if court in a country A passes a judgment in a case (jurisdiction to adjudicate) applying its national laws (jurisdiction to prescribe), that state cannot take measures that violate country B's sovereignty. It is a violation of international law for a country to send its agent to other country's territory

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[56] Statement of Minnesota Attorney General on Internet Jurisdiction, available at http://www.jmls.edu/cyber/docs/minn-ag.html, cited from: Masaki Hamano, Comparative Study in the Approach to Jurisdiction in Cyberspace found at <http://www.geocities.com/SiliconValley/Bay/6201/principles.html>.

[57] Masaki Hamano, Comparative Study in the Approach to Jurisdiction in Cyberspace found at <http://www.geocities.com/SiliconValley/Bay/6201/principles.html>.

[58] supra note 50, 401(c).

in order to arrest a person convicted of criminal offense in the country.[59] There are multilateral or bilateral agreements concerning recognition and enforcement of court decisions and arbitral awards, however, it is highly unlikely to expect these agreements to deal with peculiarities concerning jurisdiction to enforce raised by the Internet activities.

To examine jurisdiction in cyberspace as a whole, these three types of jurisdiction should be separately analyzed. However, this work principally deals with jurisdiction to adjudicate. It focuses on the requirements for a court to subject an Internet user residing abroad to proceedings in the court on the basis that the net-user's online activity has a certain connection with the country where the court is located.

[59] For example, the Eichmann case raised an international law issue when Israeli sent agents on to Argentine territory to kidnap Eichmann, who was accused under a law punishing Nazis and their collaborators for crimes against the Jewish people - Covey T. Oliver,Edwin B Firmage, Christopher L. Blakesley, Richard F. Scott,and Sharon A. Williams,"Case and Materials on The International Legal System - Fourth Edition," (Foundation Press, 1995),p.18, p.209.

CHAPTER II.

THE US APPROACH TO JURISDICTIONAL ISSUES OF E-COMMERCE CONSUMER CONTACTS IN THE CASE OF THE ABSENCE CHOICE OF COURT

II.1 EVOLUTION OF THE JURISDICTIONAL ISSUES IN THE US INTERNET CASELAW

The effective development of personal and consumer jurisprudence in the United States began with the Supreme Court's ruling in International Shoe Co. v. Washington[60]. There the Supreme Court moved away from the traditional approach of the defendant's "presence" or "consent" and adopted a new test that focuses on whether the defendant's activities constitute "minimum contacts" with the forum state so that exercise of personal jurisdiction would be consistent with "traditional notions of fair play and substantial justice.[61] The Court based its decision on the assertion of whether the defendant had availed itself of the benefits and protection of the law of the state. The International Shoe Co. Case involved a corporate defendant, but later decisions made it clear that the "minimum contacts" test applied to individual defendants as well.

Because no special law exsited to address jurisdiction issues on the Internet, courts have been forced to apply traditional analyses of jurisdiction to cases in this new environment. Thus the conventional notions of jurisdiction have made a relatively smooth transition into cyberspace.

a) The Inset Case

The early cases that addressed the jurisdiction over cyberspace in the US were quite inconsistent and far away from the technological realities of unexplored medium. One example of such an at-

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[60] International Shoe Co. v. Washington 326 U.S. 310 (1945).

[61] id. at 316.

tempt to embrace the notion of the "borderless Internet" was the decision of the Connecticut Federal Court in the Inset Systems, Inc. v. Instruction Set, Inc.[62]

Even though Instruction Set had no assets in Connecticut and was not conducting business there, the district court determined that it had specific personal jurisdiction over Instruction Set in Connecticut. The court based its determination on "[...]defendant's use of a toll-free telephone number and the fact that there were at the time 10,000 Internet users in Connecticut, all of whom had the ability to access [Instruction Set's] website."[63] It found the advertising to be "solicitation of a sufficient[ly] repetitive nature to satisfy" the requirements of Connecticut's long-arm statute, which confers jurisdiction over foreign companies on a claim arising out of any business in Connecticut.[64]

The court also held that the minimum contacts test of the due process clause of the Fourteenth Amendment was satisfied, reasoning that defendant had purposefully "availed" himself of the privilege of doing business in Connecticut in "directing" advertising and its phone number to the state, simply because subscribers could access the website.[65]

b) The Zippo Case

In 1996 Pennsylvania federal court passed a decision that included an overall analytical approach to test specific personal jurisdiction based on Internet activity. In Zippo Mfg. Co. v. Zippo Dot Com. Inc.[66] the court created a "continuum," or sliding scale, for measuring websites, which fall into one of three general categories: passive, interactive, or integral to the defendant's business.

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[62] Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996), (later cited as " Inset").

[63] id. at 158.

[64] id. at 164.

[65] id. at 171.

[66] Zippo Mfg. Co. v. Zippo Dot Com. Inc 52 F. Supp. 1119, 1124 (W.D. Pa. 1996), (later cited as " Zippo").

The court found its jurisdiction on the fact that the Zippo (a non-resedent California) defendant operated an integral website that had commercial contacts with 3000 Pennsylvania residents and internet service providers.

c) The Cybersell Case

The first time the United States court addressed specific jurisdiction in cyberspace was in Cybersell, Inc. v. Cybersell, Inc.[67] There, the Ninth Circuit Court of Appeals, in contrast to the Inset case, "[rejected] the notion that a home page "purposely avails" itself of the privilege of conducting activities within a jurisdiction merely because it can be accessed there."[68]

In finding an absence of jurisdiction, the Ninth Circuit used a "Zippo-type" analysis. The court used a three-part test for determining whether a district court may exercise specific jurisdiction over a nonresident defendant: "(1) The nonresident defendant must do some act or consummate some transactions with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking its benefits and protections[...] (2) the claim must be one which arises out of or results from the defendant's forum-related activities [...] and (3) exercise of jurisdiction must be reasonable."[69]

Applying these three principles, the Ninth Circuit concluded that the Florida defendant had no commercial activity over the Internet in Arizona. The court found that "posting an essentially passive home page on the Web using the name "Cybersell" was insufficient for personal jurisdiction. Even though anyone could access defendant's home page and thereby learn about its services, that

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[67] Cybersell, Inc. v. Cybersell, Inc.,130 F.3d 414 (9th Cir. 1997), (later cited as "Cybersell")

[68] id. at 420.

[69] id. at 418.

this fact alone is not enough to find that the Florida defendant had deliberately directed its merchandising efforts toward Arizona residents".[70]

II.2 THE "TOTALITY OF CONTACTS" THEORY (ZIPPO TEST)

As previously stated the totality of contracts theory was established by the United States District Court for the Western District of Pennsylvania in Zippo manufacturing co. v. Zippo Dot Com, Inc.[71] There a Pennsylvania based lighter manufacturer sued the defendant Internet news service provider for its use of the Web domains zippo.com, zippo.net, and zipponews.com.

When deciding upon its jurisdiction the court created a "sliding scale" test that focused on the commercial activity that took place over the Internet. The court held that jurisdiction can be "constitutionally exercised" by a web page in direct proportion "to the nature and quality of commercial activity that an entity conducts over the Internet."[72] The court further elaborated on the three categories of the websites: "passive", "interactive" and "integral to the defendants business".

a) "Passive" Websites

The Zippo Court asserted that at the one end of the "sliding scale" are "passive" websites, which serve the purpose of mere advertisements, similar to those in newspapers or magazines. "Passive"

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[70] id. at 419.

[71] supra note 66 at 1121

[72] supra note 66 at 1124

websites do not constitute grounds for the exercise of personal jurisdiction because they do nothing more than make information available to those who are interested in it.[73]

Cases like Mink v. AAAA Development, L.L.C. [74] fall into this category. In Mink, the US Court of Appeals for the Fifth Circuit found that the defendant's website, which contained information about both its products and services, was a "passive" website despite the fact that the site provided users with a printable mail-in order form, email addresses, and a toll-free number.[75] The Mink court noted that the "defendant's site was not interactive enough to support the exercise of jurisdiction because users could not make purchases through the site."[76]

b) "Integral" Websites

As established further in the Zippo case, on the other end of the "sliding scale" are "integral" web-sites, where the operator definitely conducts business over the Internet. In such cases personal jurisdiction is proper because the operator enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, receiving on-line orders and sending confirmation or other messages directly to specific customers, etc.

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[73] There are, however, very few cases that have based personal jurisdiction essentially on website accessibility alone, including : (1) Inset case, discussed at notes 33-36 and accompanying text, and (2) Telco Communications Group, Inc. v. An Apple A Day, Inc., 977 F. Supp. 404 (E.D. Va. 1997). (Relying on Inset to hold that personal jurisdiction existed over defendant for defamation claim solely on basis of website which "could be accessed by a Virginia resident 24 hours a day"); Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc., 1998 U.S. Dist. LEXIS 7819 (C.D. Ill. Mar. 31, 1998) (although court in essence used an "effects" test, saying defendant was aware of impact of infringing mark on Illinois).

[74] Cases like Mink v. AAAA Development, L.L.C. 190 F.3d 333 (5th Cir. 1999) later cited as Mink, (later cited as " Mink").

[75] Id. at 337.

[76] Id.

A vivid example of an "integral" website case where the operator's Internet activities were clearly aimed at a forum was a pre-Zippo decision in CompuServe, Inc. v. Patterson.[77] There, the defendant, a Texas resident, transmitted software that could be downloaded for a fee to CompuServe's Ohio system. Patterson also conducted all of his marketing through CompuServe network system.[78] CompuServe sold software that the defendant felt infringed his copyright, and CompuServe brought an action for declaratory judgment.

Reversing the Ohio district court's refusal to exercise jurisdiction, the US Court of Appeals for the Sixth Circuit found that the defendant's sending of software via the Internet to the plaintiff's servers, with the underlying commercial nature of the relationship between the parties, qualified as "minimum contacts."[79]

c) "Interactive" Websites

The middle category of the "sliding scale" established in the Zippo case ("interactive" websites) falls between "passive" and "integral". In these cases an operator owns and maintains an interactive website, "freely exchanging information with the user regardless of the user's forum state but also not reaching the user's forum state through directed advertising or agreements with forum-specific Internet Service Providers or network servers."[80] To assess the level of "interactivity" and commercial nature of the exchange of information the Zippo court encourages extensive fact-finding.[81] Once such research is conducted, a court is prepared to determine whether jurisdiction is proper.

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[77] CompuServe, Inc. v. Patterson 89 F.3d 1257 (6th Cir. 1996), later cited as " CompuServe").

[78] Id. at 1260-61.

[79] id. at 1265-66.

[80] supra note 66 at 1121-23.

[81] supra note 66 at 1124.

The middle category of the Zippo case is the most problematic one. Although Zippo encourages assessment of website interactivity, it failed to provide even a rough definition of "interactivity". Some legal scholars have noted this insufficiency and several district courts critiqued Zippo for such definitional ambiguity.[82]

To my mind, if the Zippo test is aimed at promoting certainty in the marginal (in-between) cases, it failed to do so, because the broadness and vagueness of the "interactivity" definition will lead to inconsistent results in similar factual circumstances.

Thus the "totality of contacts" test can bring a clear cut solution only when it is undeniably obvious if the website is "passive" or "active", however in the most cases the courts have to deal with disputes that arose from the interactive websites. In those situations the "totality of contacts" test fails to bring about consistent solutions.

II.3 THE "EFFECTS" TEST

A second theory that some courts have adopted when deciding the issue of jurisdiction is the effects test. This approach was based on the Supreme Court's decision in Calder v. Jones.[83] In that case, the court stated that jurisdiction of Californian forum was proper because of the defendants' conduct in

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[82] Michael Geist, Is There a There There? Toward Greater Certainty for Internet Jurisdiction, 16 Berkeley Tech. L.J. 1345, 1362 (2001), at 114 ("The cases that Zippo cited to establish its sliding scale fail to make the rubric of interactivity any more intelligible because none of them relied on it in resolving personal jurisdiction.").

See ESAB Group, Inc. v. Centricut, L.L.C., 34 F. Supp. 2d 323, 330 (D.S.C. 1999) ("[M]erely categorizing a website as interactive or passive is not conclusive of the jurisdictional issue."); Coastal Video Commc'ns Corp. v. Staywell Corp., 59 F. Supp. 2d 562, 571 (E.D. Va. 1999) ("[I]t is not enough to find that an interactive website has the potential to reach a significant percentage of the forum state's population.... Instead, for the contact to be continuous and systematic, there must be proof that the website is actually reaching a portion of the state's population."); Winfield Collection Ltd. v. McCauley, 105 F. Supp. 2d 746, 750 (2000) ("[T]he distinction drawn by the Zippo court between actively managed, telephone-like use of the Internet and less active but 'interactive' websites is not entirely clear to this court. Further, the proper means to measure the site's 'level of interactivity' as a guide to personal jurisdiction remains unexplained.")

[83] Calder v. Jones. 465 U.S. 783 (1984)

Florida had “effects” in California..[84] Also part of the court's rationale centered on the fact that the “defendants were not guilty of mere untargeted negligence, but of intentional [..] actions [...] expressly aimed at California.”[85]

The first time the “effects” test was applied to the assessment of internet jurisdiction was in Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc.[86] There, Illinois Federal District Court cited the Calder case to assert jurisdiction over a defendant, who was accused of infringing trademark rights through his website.[87] He did not sell any products or services directly in Illinois but maintained an informational web page that used allegedly infringing marks. Nevertheless, relying on an “effects” approach, the court held that jurisdiction in Illinois was proper, explaining that “the harm alleged occurred, if at all, in the plaintiff's forum state of Illinois.”[88]

Similarly, in EDIAS Software International, L.L.C. v. Basis International Ltd.[89], an Arizona Federal District Court, citing Calder, found jurisdiction proper over the defendant company because it “had emailed alleged defamatory material about the plaintiff to Arizona, causing harm in Arizona”.[90]

On the other hand in Spacey v. Burgar[91] the California court did not find jurisdiction based on the “effects” test. There the defendant registered the address “kevinspacey.com” without actor Kevin Spacey's authorization. The court lacked jurisdiction over the Canadian defendant; “even though the website focused on celebrities and the entertainment industry, it did not cause any effects in the fo-

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[84] Id.

[85] Id.

[86] Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc., 46 U.S.P.Q.2d (BNA) 1375 (C.D. Ill. 1998).

[87] Id. at 1378

[88] Id. at 1378.

[89] EDIAS Software International, L.L.C. v. Basis International Ltd, 947 F. Supp. 413 (D. Ariz. 1996).

[90] id. at 765

[91] Spacey v. Burgar, 207F. Supp. 2d 1037, 1038 (C.D. Cal. 2001)

rum state".[92] The court also held that the "likelihood that [the plaintiff] would be injured in California, [the forum state], [was] no greater than in [any other state]" since the website can be accessed from "all over the world."[93]

When applying the "effects" test to Internet cases the US courts instead of asserting the characteristics of the website (Zippo approach) focus on the actual, evident effects that the website has in the forum state. Although this method brings about more consistency than the Zippo's test of "sliding scale", the courts have not been completely satisfied with it. The "effects" test fails in many e-commerce cases involving corporations, because it is rather difficult to contend whether a large, multi-forum corporation is harmed by a certain action online.[94]

II.4 TARGETING APPROACH TO JURISDICTION

For the reasons stated in the last paragraphs of sections II.2 and II.3 of this thesis, some US courts have moved to the "targeting" approach in defining jurisdiction over the Internet transactions.

One of the most crucial decisions that both questioned the effectiveness of the Zippo and "effects" tests and helped develop the targeting approach was the ruling in Cybersell, Inc. v. Cybersell, Inc.[95] There, an Arizona corporation was asking the court to establish that a Florida corporation had sufficient contacts with the state of Arizona for the exercise of personal jurisdiction. The US Court of

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[92] id.

[93] Id. at 1046.

[94] See, e.g., Zumbro, Inc. v. Cal. Natural Prods., 861 F. Supp. 773, 782 (D. Minn. 1994) (noting that the effects test "generally has been limited to intentional torts"). But for tortuous injuries to corporations, the test poses considerable problems. See, e.g., Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 420 (9th Cir. 1997)

[95] supra note 67

Appeals for the Ninth Circuit found that “the minimally interactive site, posted by defendant, without any other contact, was insufficient to find jurisdiction over the Florida corporation.[96]

Elaborating on this issue the court refused to apply the “interactivity” of the website test established in Zippo and focused on finding other approaches to jurisdiction assessment. It was stated that the main jurisdictional criteria in the context of Internet is “deliberate, intentional (albeit electronic) activity directed by the defendant corporation towards the forum state”.[97] The court found that the Florida corporation “entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona. The only message it received over the Internet from Arizona was from Cybersell AZ”.[98]

Asserting the “effects” test, the Ninth Circuit pointed out the test's limited applicability in commercial contexts.[99] The court noted that the “effects” test does not “apply with the same force to a corporation as it does to an individual because a corporation does not suffer harm in a particular geographic location in the same sense that an individual does.”[100] Thus, the court concluded that deliberate action, rather than the more problematic notions of “interactivity” and "effects," is the key to e-commerce jurisdictional development.

After Cybersell several courts started applying targeting approach in the context of electronic commerce. In Millennium Enterprises, Inc. v. Millennium Music, L.P.,[101] an Oregon district court

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[96] supra note 67 at 418-20

[97] supra note 67 at 418

[98] supra note 67 at 419

[99] id.

[100] supra note 67 at 420 (quoting Core-Vent Corp. v. Nobel Indus. A.B., 11 F.3d 1482, 1486 (9th Cir. 1993)).

[101] Millennium Enterprises, Inc. v. Millennium Music, L.P., 33 F. Supp. 2d 907 (D. Or. 1999) at 924.

refused to exercise jurisdiction over a South Carolina record store in a trademark infringement suit because the defendant's website was not aimed at consumers in Oregon.[102]

The court raised the standard for finding jurisdiction over a commercial website when it held that "the middle category of the Zippo scale, where fact-finding is necessary to determine the level of commercial interactivity, requires deliberate action aimed at the forum state consisting of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state."[103] Since Zippo does not require deliberate action for a finding of personal jurisdiction, the court by its ruling effectively rejected the Zippo approach, underlining that the post-Zippo case law is "inconsistent, irrational, and irreconcilable."[104]

The main difference between a "targeting" approach and an "effects" test lies in the intention of the defendant. In their book "Refining the Zippo Test: New Trends on Personal Jurisdiction for Internet Activities, Computer & Internet Law" Carole Aciman and Diane Vo-Verde stated that: "whereas an effects framework focuses on whether the defendant could have foreseen its activities impacting a forum state, a targeting analysis requires that a defendant specifically aim its online activities at a forum to come under the jurisdiction of that state.[105] A targeting approach removes much of the uncertainty that accompanies the ambiguous "effects" test.

II.5. "REASONABLENESS" TEST AS THE FOUNDATIONAL APPROACH IN CONCUMER PROTECTION POLICIES

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[102] id at 924

[103] Id. at 921

[104] Id. at 915

[105] Carole Aciman & Diane Vo-Verde, Refining the Zippo Test: New Trends on Personal Jurisdiction for Internet Activities, Computer & Internet Law., Jan. 2002, at 16, 19.

Unlike Europe the US courts for a long time have been struggling in striking a balance between protecting the "weaker" consumers and encouraging the development of small and medium size business. The Internet environment requires a new approach to the rights of e-businesses and e-consumers in light of the mobility of present society, ease of communications and frequency of interstate travel.

The District Court in Stomp, Inc. v. NeatO, LLC[106], for example, noted that "exercising jurisdiction over an Internet trader did not reflect traditional notions of jurisdiction, but contemporary notions of due process, as reflected by Justice Brennan in Burnham v. Superior Court.[107]The court then went on to state that:

> "The Court also recognizes that such a broad exercise of personal jurisdiction over defendants who engage in commerce over the Internet [based on an entity's Internet activities] might have devastating effects on local merchants and small businesses that seek to expand through the Internet. These small businesses make up the backbone of the American economy and should not have to bear the burden of defending suits in distant fora when they mean only to allow local consumers to buy their wares from the convenience of their own homes. This concern must be balanced against the ability of a distant consumer to press its cause against a defendant who uses the Internet to do business within the forum while remaining outside the boundaries of the jurisdiction. Although a Plaintiff who seeks relief from the courts must be willing to overcome many of the hurdles that the litigation process imposes, it is the merchants who seek to sell their goods only to consumers in a particular geographic that can control the location of resulting lawsuits [...]."[108]

One of the ways of balancing the two important policies(e.i. protecting consumers and encouraging business) was attempted through the "reasonableness" test, as the consumer and business protection basis in e-commerce activities. When applying this test, courts have used specific set of factors to assess the "fairness" of the forum selection.

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[106] Stomp, Inc. v. NeatO, LLC, 61 F.Supp.2d 1073 (C.D.Cal. 1999).

[107] id. See also Tech Heads, Inc. v. Desktop Service Center, Inc., 105 F.Supp. 2d 1142, 1152 (D.Or. 2000) (concurring with Stomp).

[108] supra note 16, at 1080-81.

The first factor, used especially by the Ninth Circuit, instructs the court to look at the extent of the defendant's purposeful "injection"(direction) into the forum State's affairs.[109] This feature is practically coextensive with "purposeful availment" criteria, however, its reach may be evaluated independently under the "reasonableness" umbrella. The idea is that the more extensive the "interjection" is, the more reasonable it is to exercise jurisdiction over the defendant in consumer transactions. On the other hand, jurisdiction may be unreasonable if the defendant "has only barely been found to have purposefully availed himself under the minimum contacts approach."[110]

The second criterion examines how heavy a burden is imposed on the defendant if jurisdiction is exercised. The substantive burden according to the "reasonableness" approach constitutes a deprivation of due process.[111] In order for this principle to be applied the defendant (seller) must show an unusual burden because invoking the ordinary inconvenience of litigating in another state will not be enough. Some courts have even emphasized that traders whose acts can cause a tort or who conduct business in another state "must consider the subsequent inconvenience of having to litigate in distant forums before they act".[112] The courts also take into consideration the seller's general resources in having to defend his action in another state.[113]

The third factor of the "reasonableness" test looks at whether, and to what extent, exercising jurisdiction would conflict with the sovereignty of the defendant's State. In cases of electronic commerce the principal claim has been a federal cause of action: in Panavision[114], for example, the alle-

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[109] See Panavision Intern., 141 F.3d 1316; Colt Studio, Inc. v. Badpuppy Enterprise, 75 F.Supp.2d 1104 (C.D.Cal. 1999); Quokka Sports, Inc. v. Cup Intern. Ltd., 99 F.Supp.2d 1105 (N.D.Cal. 1999).

[110] See Expert Pages v. Bukalew [1997 WL 488011, at *4 (N.D.Cal. Aug. 6, 1997)].

[111] Panavision Intern., 141 F.3d at 1323.

[112] See Digital Equipment Corp. v. AltaVista Technology, Inc., 960 F.Supp. 456, 471 (D.Mass. 1997).

[113] In Expert Pages v. Bukalew [1997 WL 488011, at *4 (N.D.Cal. Aug. 6, 1997)], the District Court noted that the defendant's only business, the operation of a website, had not been very successful; he had only twelve paying customers, he was a pro se defendant, resided on the other side of the country and had not had occasion to travel to the forum State since he was very young. The plaintiff company had superior resources and legal expertise.

[114] supra note 111.

gations in support of Panavision's state law claim and those in support of its federal law claim required the same analysis. Such scrutiny would be the same in Illinois or California.[115]As a result, it would seem that where a consumer sued an out-of-state company, this point would indicate in the consumer's favor, since the court would be considering its own consumer protection laws.

The next point to be considered by the court when applying the "reasonableness" test is the forum State's interest in adjudicating the dispute. In a large number of Internet cases courts have emphasized the interest of the State in providing an effective place of redress for their consumers and obtaining jurisdiction over defendants who cause tortuous injury to its citizens within the forum, including intellectual property rights, or breaches of contract concluded with them, especially when the forum State's laws are asserted.[116]

The fifth "reasonableness" consideration instructs the court to evaluate the convenience and effectiveness of relief for the plaintiff and the existence of an alternative forum. There must be more than just a preference on the part of the plaintiff for his home forum but the court should evaluate what consequences the plaintiff would face if it declined jurisdiction. In Mieczkowski v. Masco[117], for example, the District Court held that the plaintiffs had a strong interest in obtaining convenient and effective relief in the courts of the State where the defendant manufacturer's dangerous product had allegedly caused their son's death.[118]

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[115] supra note 111, at 1323.

[116] Tortuous injury - Mieczkowski v. Masco Corp. 997 F.Supp. 782, 786 (E.D.Tex. 1998) where the parents of a three year-old child, asphyxiated when he became entangled in a bunk bed, brought a wrongful death action against the out-of-state manufacturer.
Intelectual property - Digital Equipment Corp. v. AltaVista Technology, Inc., 960 F.Supp. 456, 471 (D.Mass. 1997); Panavision Intern., 141 F.3d at 1323; Quokka Sports, Inc. v. Cup Intern. Ltd., 99 F.Supp.2d 1105, 1113 (N.D.Cal. 1999).
Breaches of contract - Thompson v. Handa-Lopez, Inc., 998 F.Supp. 738, 745 (W.D.Tex. 1998) (disputes involved alleged breach of contract, fraud, and violations of the Texas Deceptive Trade Practices Act); Halean Products Inc. v. Beso Biological Research Inc., 43 U.S.P.Q. 2d 1672, 1676 (E.D.La. 1997).

[117] Mieczkowski v. Masco Corp. 997 F.Supp. 782, 786 (E.D.Tex. 1998).

[118] id. at 785.

Finally, courts also consider the physical location of property of evidence and witnesses for the most efficient judicial resolution of the dispute, however significance of this factor has been greatly reduced due to advances in communication and transportation.

When asserting all 6 criteria cumulatively, I came to conclusion that, “reasonableness” is a flexible instrument for adjusting various measures taken by the parties to the jurisdictional norms. However it is still unclear how courts will use this tool (supplemented by rather conflicting Supreme Court guidance) to strike a balance between the interests of businesses and consumers in e-commerce and between fairness and legal certainty.

CHAPTER III.

THE EU APPROACH TO JURISDICTIONAL ISSUES OF E-COMMERCE CONSUMER CONTACTS IN THE CASE OF THE ABSENCE CHOICE OF COURT

III.1 HISTORICAL DEVELOPMENT OF JURISDICTIONAL ISSUES OF CONSUMER

On contrast to US Internet law development based entirely on the case law, the EU evolution of jurisdictional issues of e-commerce was of legislative nature. Article 293(4) of Treaty Establishing the European Community lays down that "Member States shall [...] enter into negotiations [...] about the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards".[119] As the implementation of this provision, EEC Member States ratified the Convention on Jurisdiction and the Enforcement of Judgement in Civil and Commercial Matters (Brussels Convention) in 1968.[120]The EEC later on was transformed into the EC, and the membership of the Convention grew as the EC's geographical scope broadened.

In 1988, the EU Member States, together with the EFTA states, concluded the Lugano Convention,[121] which is identical to the Brussels Convention. The Brussels/Lugano Conventions addresses the harmonization of Member States' domestic rules on jurisdiction as well as the simplification of the recognition and enforcement of other Member States' judgments. In addition, according to Arti-

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[119] Consolidated Version of the Treaty Establishing the European Community. Amended by Subsequent Treaties (Treaty of Nice), Official Journal C 325 , 24 December 2002, available at <http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html>

[120] EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels 1968, Official Journal L 299 , 31/12/1972 P. 0032 - 0042, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41968A0927(01):EN:HTML> (later cited as "Brussels Convention")

[121] EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano 1988,Official Journal L 319 , 25/11/1988 P. 0009 - 0048, available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:41988A0592:EN:HTML>. (later cited as "Lugano Convention")

cle 1 of the Brussels Convention, the convention is applicable to civil and commercial matters, except from matters concerning the status or legal capacity of individual persons, inheritance issues, bankruptcy, social security and arbitration.[122] Therefore, the Convention applies to most of the commercial activity on the Internet.

To be in tact with the speedy development of e-commerce in the context of the existing Brussels Convention, the European Union Commission in 2000 had recommended some amendments to the issues of jurisdiction in the notions of "defendant's domicile", "close link" and "sound administrative justice", the "place of contract performance" and "the place of tort". Thus, the EU issued the so-called "Brussels Regulation," which took effect on March 1, 2002.[123]

In contrast to a convention or directive, a regulation of the European Union becomes binding in its adopted form without further implementation by the Member States. The EU felt that the need for certainty and uniformity of jurisdictional rules cannot be satisfied by a mere directive, that is why the regulation was passed.[124] While the Brussels Regulation does not alter the main structure of the Brussels Convention, it introduces certain changes that are intended to address the new technological developments relating to e-commerce.

Unfortunately the Brussels Regulation makes less important the ultimate outcome of the Hague Convention on Jurisdiction. The Hague Conference, which aims to make civil judgments enforce-

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[122] supra note 120, Article 1.

[123] Council Regulation on Jurisdiction and the Recognition and Enforcement of in Civil and Commercial Matters EC Official Journal 16 January 2001, L 21/1. (later cited as "Brussels Regulation").

[124] Marco Berliri, The EU Approach on Jurisdiction in Cyberspace Under Regulation 44/2001, Section of International Law and Practice, "LEGAL ISSUES FOR INTERNAT'L BUSINESS ONLINE" (Washington, D.C., May 24, 2001)

able across borders, has been stalled since 1999 due to a disagreement between The United States and the European countries over how business-consumer disputes should be settled.[125]

The conflict arose from the fact that the Treaty would require US companies to defend consumer suits in the country where the consumer resides (if those companies advertised on the web and the advertisement could be accessed by the consumer choice of law clauses), even if the company didn't intend to market to the consumer's forum. Moreover, unlike the situation elaborated in the previous chapter where US courts which when asked to enforce a foreign judgment examine the jurisdiction of the foreign court using US standards of "minimal contacts", the Hague Convention would require US courts to enforce foreign judgments so long as they simply satisfy criteria of the Hague Convention. [126]

The following sections of this thesis will discuss the jurisdictional issues of consumer contracts both under the Convention (which is still applicable in Denmark) and under the Regulation.

III.2 JURISDICTIONAL ISSUES OF E-COMMERCE CONSUMER CONTRACTS UNDER THE BRUSSELS CONVENTION

a) General Principles of the Brussels Convention

The reason of elaborating on the provisions of the Brussels Convention is caused by the fact that the Brussels Regulation did not annul the former and that the Convention (with 1971 Protocol) remain s

[125] The Hague Conference on Private International Law is an intergovernmental organization which was established in 1893. The member countries meet two or three times each year in the Hague, Netherlands, to negotiate and draft multi-lateral conventions in the field of private international law. The [initial] negotiations on the present convection were started based on a proposal put forward by the United States State Department in 1992. To prepare a Preliminary Draft Convention, the Special Commission was held four times; in June, 1997, in March, 1998, in November, 1998, and in June, 1999. In spite of the original plan to complete the Preliminary Draft Convention for submission to the Nineteenth Diplomatic Session of the Conference in the fourth Special Commission held in June, 1999, some provisions were not discussed enough in the Commission, so another Commission was took place from October 25th to 30th. In this Special Commission, the Preliminary Draft Convention was adopted."

[126] Annex II of the Hague Convention

in force in relations between Denmark and the Member States that are bound by the Brussels Regulation.[127]

Thus, before March 1st, 2002, the only international consumer contracts jurisdiction regime in the EU was laid down in articles 13-15 of the Convention on Jurisdiction and the Enforcement of Judgement in Civil and Commercial Matters (as a counterpart for provisions laid down in articles 2 and 5 of the same Convention).[128] The protection regime in those articles aims at avoiding that consumers, as economically weaker and legally less experienced party, have to bring proceedings against the other party in the State in which that party is domiciled.[129] For example, Art. 14 of the Convention prescribes that a consumer may start proceedings against the other party to the contract either in the courts of the state in which that party is domiciled or in the courts of the state in which he himself is domiciled and Art. 15 of the Convention limits the possibility to depart from this provision by an agreement. [130]

However not all consumer contracts are protected by the Art 14 provisions. The scope of the consumer transactions is limited to:

1. a contract for the sale of goods on installment credit terms, or
2. a contract for a loan repayable by installments, or for any other form of credit, made to finance the sale of goods, or
3. any other contract for the supply of goods or services and:

   (a) before the conclusion of the contract, the other party has addressed a specific invitation to the consumer or advertised in the state in which the consumer is domiciled, and

   (b) the consumer has taken the steps necessary for the conclusion of the contract in the state in which he is himself domiciled. [131]

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[127] supra note 123, recital (22),

[128] see Annex 1 - the convention still continues to be in force for Denmark

[129] for example, Shearson Lehman Hutton v. TVB, EU CoJ 19 January 1993, nr. C-89/91 (Rec. 1993. I-139).

[130] (however the chosen state has to be a contracting state to the Convention) - see Annex I of the thesis, Art. 14-15

[131] id.

It is of particular importance for this thesis to elaborate on the last two conditions ("a" and "b") of the Article provision 14(3). These conditions are applicable to e-commerce consumer contracts.

b) The Notion of "Specific Invitation" in the Brussels Convention

Art. 14(3)(a) of the Convention states: "before the conclusion of the contract, the other party has addressed a specific invitation to the consumer or advertised in the state in which the consumer is domiciled."[132] It follows that the first condition for the contract to fall within the field of application of Art. 13 of the Convention is that, before the conclusion of the contract, the other party has addressed a specific invitation to the consumer or advertised in the state in which the consumer is domiciled. This condition aims at protecting so-called "passive" consumers against "aggressive" traders that approach consumers in their "easy chair".

Consequently, "active" consumers (i.e. consumers who come into contact with the seller on their own initiative) are excluded from the special protection regime. The rationale of this condition is that an active consumer could reasonably have expected to have brought the other party to a foreign court in case of a dispute if that other party is domiciled in another state.[133]

An substantial complication is caused by the fact that neither the Convention nor its preparatory documents define the terms "specific invitation" and "advertisement". As the result, legal doctrine is divided into three groups as to whether or not, and to what extent, the distinction between "active" and "passive" consumers can or has to be applied on e-commerce consumer contracts.[134]

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[132] id.

[133] Frederic Debusseré, International Jurisdiction Over E-Commerce Consumer Contracts in the European Union: Quid Novi Sub Sole? - International Journal of Law and Information Technology at 351, Autumn, 2002

[134] id.

The first group of authors is of the opinion that holding a commercial website always complies with the first condition of specific invitation, even if that website is accessible everywhere in the world.[135] According to this point of view, a consumer is thus always "passive", or, as these authors formulate, the distinction between "active" and "passive" consumers in regards to e-consumer contracts has to be abolished. As M. Lubitz states: *"These authors choose for a maximum consumer protection; they deem the protection regime too important for the Internet to be exempted from private international consumer protection law [...]."*[136]

Mankowski adds that there is in fact no contact between the consumer and the website of the other party until that other party, by making a website, has first actively created the possibility for the consumer to come into contact with its website. He compares with advertisements in a magazine that first has to be bought by the consumer in a shop.[137] Stone is of the opinion that sellers who use the Internet do not have to be treated differently from "traditional" traders, and that depriving the e-consumer from the protection regime would imply an arbitrary preference for a certain way of trading, which would run counter to the free market and fair competition in the European Union.[138]

The second group of authors[139] is of the opinion that holding a commercial website never complies with the condition of specific invitation, and thus that a consumer is always "active" and is never entitled to rely on the special protection regime.

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[135] M. Lubitz, 'Jurisdiction and Choice of Law for Electronic Contracts: an English Perspective' (2001) Computer und Recht International (39) at 41

[136] id.

[137] P. Mankowski, 'E-Commerce und Internationales Verbraucherschutzrecht' (2000) MultiMedia und Recht-Beilage, vol. 7 (22) at 24.

[138] P. Stone. 'Internet Consumer Contracts and European Private International Law' (2000) Information & Communications Technology Law (6) 8.

[139] (K. Boele-Woelki, M.V. Polak, Y. Poullet, M.D. Powell, P.M. Turner-Kerr, F. Sweerts, etc.)

When interpreting the phrase “addressing a specific invitation to the consumer or advertising”, they think that it is not the other party but rather the consumer who actively enters the national market of the state in which he is domiciled, since he purposefully surfs to a website. In their opinion, finding goods on the Internet requires a certain level of experience and advertising requires more action than the mere holding of a website. These scholars support their arguments by referring to the fact that the term “advertisement” in Art. 13 of the Convention is provided together with the term “specific invitation”, which, clearly implies an active step on the part of the consumer.[140]

To reinforce their point of view, these authors also refer to the technical functioning of surfing on the Internet: *“If someone surfs to a website, then that person orders his browser to make contact with a Universal Resource Locater (“URL”) and a website address on the Internet, and when the contact is made, then the host server of the URL dispatches the contents of the requested website; the browser thus pulls the information from the Internet and brings it to the surfer's server, whereupon the information appears on the surfer's screen.”*[141]

Secondly, when interpreting the phrase “in the state in which the consumer is domiciled”, the supporters of the second point of view are of the opinion that a website can never be sufficiently directed to a particular state, since a website is accessible everywhere in the world.[142]

A third group of authors (J. Erauw, R. Steennot, L. Rolin Jacquemyns, T. Verbiest, R. Steennot, T. Verbiest, É. Wéry, etc) prefer an in-between point of view and are of the opinion that the special protection regime can never be granted or denied as a matter of fact. They argue in favor of a case-by-case examination. Some of these authors express the impossibility to qualify a consumer as “ac-

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[140] M.D. Powell and P.M. Turner-Kerr, 'Putting the E-in Brussels and Rome' (2000) Computer Law & Security Report (23) at 24

[141] B.W.F. Depoorter, 'Het internationaal privaatrechtelijk probleem op Internet: bevoegde rechter', Cited from “International Jurisdiction in European Union E-Commerce Contracts”, Norel Rosner, University of Groningen, The Netherlands, May 1, 2002.

[142] id.

tive" or "passive" a priori by referring to some types of uncertain techniques that website holders use to attract consumers to their website (for instance by making use of banners, by which consumers are led to another website without having asked for it).[143]

When interpreting the phrase "addressing a specific invitation to the consumer or advertising", the advocates of the "middle-ground" approach think that the degree of activity or passivity of the website holder and that of the consumer have to be evaluated according to the degree of interactivity of the website. In follows, in their opinion, "advertising" requires a certain degree of interactivity between the website and the consumer, so that merely putting commercial information on a website does not constitute an advertisement.[144]

As regards the wording "in the state in which the consumer is domiciled", they are of the opinion that there have to be sufficient ties between the website and the state in which the consumer is domiciled. To their mind, a website must be deliberately targeted on that state.[145] The degree of specific targeting can be evaluated by taking into account some indications like the language of the domain name and the text on the website, the currency that is used, a reference to the tax regime of the goods, a reference in local media to the domain name of the website, etc.

It is clear from above-mentioned that the "middle ground" point of view, as regards both aspects, is mirroring the US approach of "interactivity" and "purposeful availment" discussed in Chapter I of this work.

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[143] R. Steennot, 'Internationaal privaatrechtelijke aspecten van middels internet gesloten (consumenten) overeenkomsten' (2000) DOAR (192) at193-194., Cited from "International Jurisdiction in European Union E-Commerce Contracts", Norel Rosner, University of Groningen, The Netherlands, May 1, 2002.

[144] J.-M. Niemann, 'Webvertisements Covered by Art. 5(2) Rome Convention?' (2000) Communications Law (99) 100.

[145] J.E.J. Prins and S.J.H. Gijrath, Privaatrechtelijke aspecten van elektronische handel. Juridische aandachtspunten voor Internet Service Providers (W.E.J. Tjeenk Willink: Deventer 2000) at 153, J.-M. Niemann, 'Webvertisements Covered by Art. 5(2) Rome Convention?' (2000) Communications Law (99) 100.

c) Deliberate Steps of the Consumer in the State in which He is Domiciled

Art. 14(3)(a) of the Convention states the following condition: "the consumer has taken the steps necessary for the conclusion of the contract in the state in which he is himself domiciled".[146]

In order for the consumer to be entitled to rely on the special protection regime of the Brussels Convention, he must take the steps necessary for the conclusion of the contract in the state in which he is himself domiciled. Some examples of "steps necessary for the conclusion of the contract" are: the typing in of a credit card number, clicking on "ENTER" or on "OK" with the keyboard or the mouse.[147] It is, however, not required that the conclusion of the contract takes place in the state in which the consumer is domiciled.

Some authors point out that there could be problems in respect of evidence, since, in an Internet environment, it is very difficult and sometimes even impossible to find out where the consumer has taken the necessary steps.[148] One of them, for instance, points out that several types of technical operations on the Internet, such as caching, result in the impossibility of being certain about the exact geographical location of the surfer.[149]

III.3 JURISDICTIONAL ISSUES OF E-COMMERCE CONSUMER CONTRACTS UNDER THE BRUSSELS REGULATION

a) General Principles of the Brussels Regulation

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[146] supra note 130

[147] supra note 133 at 100.

[148] A.-M. de Matos, 'Consommation transfrontière: d'un espace cloisonné à un espace judiciaire européen' (2000) Revue Européenne de Droit de la Consommation (151) 183; R. Steennot, loc. cit. 195; S. van der Hof, 'De Internetconsument en het internationaal privaatrecht' (1998) Tijdschrift voor Consumentenrecht (424) 429, Cited from "International Jurisdiction in European Union E-Commerce Contracts", Norel Rosner, University of Groningen, The Netherlands, May 1, 2002.

[149] supra note 138

Council Regulation on Jurisdiction and the Recognition and Enforcement of in Civil and Commercial Matters[150] is a revised version of the 1968 Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments, entered into force on 1st of March 2002 between all Member States of the European Union with the exception of Denmark.[151]

From the general overview of the Regulation it can be noted that Art. 15 of the Regulation maintains the Brussels Convention's special consumer protection regime but introduces some modifications as regards its field of application. It also should be noted that the first two types of contracts provided in Art. 13 of the Convention (that is: "a contract for the sale of goods on installment credit terms, and a contract for a loan repayable by installments, or for any other form of credit, made to finance the sale of goods") have been kept in the Regulation[152].

However, the third stipulation with its two additional conditions (that is: "any other contract for the supply of goods, if before the conclusion of the contract, the other party has addressed a specific invitation to the consumer or advertised in the state in which the consumer is domiciled, and the consumer has taken the steps necessary for the conclusion of the contract in the state in which he is himself domiciled") has been removed and replaced by another one. According to the Regulation, the third stipulation, set forth in Art. 15(3), is the following:

> "[...] in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities".[153]

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[150] supra note 123.

[151] In case of the Kingdom of Denmark the 1978 version of the Brussels Convention will be applicable, as published in Official Journal L 304 , 30/10/1978 p. 0001 – 0073, available online at http://www.jura.uni-sb.de/convention-bruxelles/en/c-textes/brux06a-idx.htm.

[152] Respectively: Art. 15(1) and 15(2) of the Brussels Regulation.

[153] supra note 123, Article 15.

When reading Art. 15(3) of the Regulation, one can notice that the words "contract for the supply of goods" and "contract for the supply of services" have been removed and replaced by the words "in all other cases". Most likely, the EU legislator has wished to give an affirmative answer to the question posed in previous section of whether or not digital products can be qualified as "goods".[154]

b) The new Condition in Consumer Contracts of the Brussels Regulation

It makes sense to further elaborate on the new stipulation applicable to consumer contracts of the Brussels Regulation. This new condition aims at putting an end to the ambiguity in legal doctrine and the legal uncertainty in practice with regard to the question of whether or not e-consumers have to be qualified as "active" or "passive" consumers and consequently whether or not they can rely on the special protection set out in the Regulation. As a result one now only has to consider the question of whether or not the other party directs his activities to, inter alia, the state in which the consumer is domiciled.[155]

The Brussels Regulation repeats the mistake of the Brussels Convention and fails to define the term "directing to". Some explanation, however, can be taken from the comments on its initial proposal for a Regulation where the European Commission said that "the concept of activities pursued in or directed towards a Member State is designed to make clear that provision three of Article 15 applies to consumer contracts concluded via an interactive website accessible in the State of the consumer's domicile."[156]

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[154] M. Foss and L. Bygrave however state that it would have been better to state explicitly in the preparatory documents that digital goods fall within the field of application of the special protection regime, supra note 37, at 136-137.

[155] It should be pointed out that Art. 15(3) of the Regulation does not prescribe that the other party has to direct his website to the consumer as a person but to the state in which the consumer is domiciled.

[156] Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. COM (1999) 348 final, EC Official Journal 28 December 1999, C 376 E/1.

Consequently, in the Commission's opinion, two conditions must be fulfilled for a website to be "directed to" the Member State in which the consumer is domiciled. First, a website must be of interactive nature. This means that the mere passive posting of commercial information on a website cannot be considered as "directing to". Consumers must at least have a possibility to conclude an agreement online. In such a way the European Commission has adopted into European legal doctrine the above-mentioned US concept of the "middle ground" approach of the Zippo test.[157]

Secondly, a website must be accessible in the EU Member State in which the consumer is domiciled. Recital 13 of the Commission's initial proposal explains this condition in the following way: "electronic commerce in goods or services by a means accessible in another Member State constitutes an activity directed to that State".

c) The Uncertainty of the New Condition of the Brussels Regulation

In the Commission's opinion, besides an examination of the degree of "interactivity" of the website, no evaluation should be made of the website's degree of "deliberately targeting to the state in which the consumer is domiciled". This implies that factors like the language, currency or shipping availability used on the website, do not have to be taken into account. Since any website is almost always accessible in all EU Member States, this second condition implies by itself that any website holder who is domiciled in a EU country can be sued in any EU Member State, irrespective of whether or not he wished to do business in that Member State.

However at drafting stage of the Regulation, the European Parliament considered such omission far too unreasonable and proposed an amendment according to which the website's degree of "deliberately targeting to the state in which the consumer is domiciled" have to be taken into account. The

[157] supra, section: "Interactive" Websites.

parliament thought that the mere accessibility of the website in the state in which the consumer is domiciled, would be insufficient. It proposed to amend the aforementioned recital 13 as follows:

> "electronic commerce in goods or services by a means accessible in another Member State constitutes an activity directed to that State where the on-line trading site is an active site in the sense that the trader purposefully directs his activity in a substantial way to that other State".[158]

In addition, the Parliament proposed to amend Art. 15 by adding the following paragraph:

> "The expression "directing such activities" shall be taken to mean that the trader must have purposefully directed his activity in a substantial way to that other Member State or to several countries including that Member State. In determining whether a trader has directed his activities in such a way, the courts shall have regard to all circumstances of the case, including any attempts by the trader to ring-fence his trading operation against transactions with consumers domiciled in particular Member States".[159]

However, in the comments on its amended proposal, the Commission rejected Parliament's proposed alterations, and stated:

> "Parliament proposes a new paragraph to define the concept of activities directed towards one or more Member States, and takes as one of its assessment criteria for the existence of such an activity any attempt by an operator to confine its business to transactions with consumers domiciled in certain Member States. The Commission cannot accept this amendment, which runs counter to the philosophy of the provision. The definition is based on the essentially American concept of business activity as a general connecting factor determining jurisdiction, whereas that concept is quite foreign to the approach taken by the Regulation. Moreover the existence of a consumer dispute requiring court action presupposes a consumer contract. Yet the very existence of such a contract would seem to be a clear indication that the supplier of the goods or services has

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[158] EC Official Journal 17 May 2001, C 146/97, Proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 - C5-0169/1999 - 1999/0154(CNS)) found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:146:0094:0101:EN:PDF>

[159] id. at 98

> directed his activities towards the state where the consumer is domiciled. Lastly, this definition is not desirable as it would generate fresh fragmentation of the market within the European Community".[160]

Finally in a joint EU Council and Commission statement on Articles 15 and 73 of the Regulation, the Commission's point of view was supported by the Council, which stated:

> "In this context, the Council and the Commission stress that the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.."[161]

In my opinion, when asserting the final comments and provisions of the Brussels Regulation, I agree with Frederic Debusseré that the commissions interpretation creates a lot of confusion around the notions of "directing to" and "accessible in". From a logical and linguistic perspective when the wording "directing to" is used, it means that the person who uses it "directs to something" or at least "specializes" in that thing (product or service). On the other hand, the term "accessibility" does not denote by itself a specific direction or connection with something.[162] It would be more efficient, in my view, to parallel the EU notion of "directing to" with the US concept of "purposeful availment". Uniformity of approaches in such crucial aspects would encourage US-EU e-commerce.

I think the Commission's excuse about the apparent clash of concepts "business activity"(US) and "domicile"(EU) is not sufficiently grounded on actual case of the matter. Nothing in the Brussels

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[160] Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial mattes, COM (2000) 689 final, EC Official Journal 27 February 2001, C 62 E/243 found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:062E:0243:0275:EN:PDF>

[161] Statement on Articles 15 and 73 of 14 December 2000, 1st Paragraph, 4th subparagraph, found at: <http://register.consilium.eu.int/pdf/en/00/st14/14139en0.pdf>.

[162] supra note 133, at 365

Regulation prevents the use of the concept “business activity concentrated on” as the single ground for determining jurisdiction. It is logical,that since, according to the Regulation both the consumer and the seller must be domiciled in the EU Member State, the trader should be concentrating his business on the EU Member State where the consumer is domiciled. Hopefully more light will be shed on this dilemma in the future elaborations of the European Court of Justice.

III.4 THE HAGUE CONVENTION - A POSSIBLE WORLD-WIDE REGIME

a) General Principles of the Hague Convention

The Hague Convention on Jurisdictional and Foreign Judgments in Civil and Commercial Matters[163] represents an attempt to solve the jurisdictional problems on the level of the international community. Although there is a strong disagreement between the United States and European counties, which makes the Convention weaker, it still provides some theoretical guidance as to how international convention will try to incorporate basic jurisdictional concepts.[164]

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[163] See Hague Conference Special Commission, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Aug. 11, 2000), <http://cryptome.org/hague-draft.htm> (later cited as the “Hague Convention”)

[164] Status of the convention: Member States are waiting for a draft report to come out from The Hague Conference. The Member States will hash out the report first. Then states will begin to look at ratification. Information taken from: “CPTech's Page on the Hague Conference on Private International Law's Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters”, found at <http://www.cptech.org/ecom/jurisdiction/hague.html>

One of the main purposes of the Convention is to provide for the recognition of judgments delivered in one signatory country by the courts of another signatory country.[165] The drafters of the convention also agree that the treaty should address as many e-commerce issues as possible.[166]

As noted above there is much opposition between the future key signatures of the Convention. For example, the EU countries have strongly advocated for the changes in Article 37, which deals with the relationship between the Hague convention and other convention already in force.[167] Mainly, they force to adopt a provision which would provide for Brussels and Lugano Conventions to take precedence over the Hague Convention in all Member States. These and other disagreements are causing substantial delays in the process of drafting and subsequently adopting the text of the Convention. The United States is particularly suffering from the stalling of the drafting work, since it is not a party to any bilateral conventions with EU states that deal with matters of jurisdiction.

b) Consumer Contracts under the Hague Convention

The most recent version of the Hague Convention draft largely parallels the language of the Brussels Regulation in matters of consumer protection, using the approach to jurisdiction similar to the one of "country-of-destination". Thus Article 7(1) and (2) provide:

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[165] supra note 163, Art. 2

[166] "It is important to note that at no time was it suggested, during the discussions in the Ottawa working group, that electronic commerce should be excluded from the Hague Convention on jurisdiction and foreign judgments. On the contrary, many experts said everything possible should be done to adapt the Convention to the needs of electronic commerce. In this respect, the point was made, as it has been in all the meetings in which we have been able to participate since then, that what electronic commerce needs is certainty and predictability." - Catherine Kessedjian, Electronic Commerce and International Jurisdiction: Summary of Discussions 11 (2000), at 11, available at <http://www.cptech.org/ecom/hague/ottawa2000sum.pdf>

[167] see Annex II of the thesis

1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if

a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and

b) the consumer has taken the steps necessary for the conclusion of the contract in that State.

2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.[168]

The first two clauses of Article 7 reflect Article 14 of the Brussels/Lugano Conventions and Article 16(1) and (2) of the Brussels Regulation, in a way that, a consumer may choose to file an action either in the state of the country of his residence or in the state where the seller is situated. On the other hand the seller, as in the Brussels Regulation can only sue the consumer in the state where he is habitually resident.

At the June 1999 meeting of the Special Commission, a proposal was considered whether or not the Convention should permit consumers to derogate from consumer protection provisions by a choice of forum agreement. A proposal stated: "Article 7 may be departed from by an agreement on jurisdiction which was expressly and specifically consented to by the consumer, after having been expressly and specifically informed : (i.) of the State in which claims may be brought against the other party; and (ii.) that a claim against that party cannot be brought in any other State, if such agreements are expressly permitted under the law of the State in which the consumer is habitually resident".[169]

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[168] supra note 163, Article. 7(1) and (2)

[169] Sate Department, "International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil Matters, Draft Hague Convention Issues", Paper No. 2 - July 1999, available at <http://www.state.gov/www/global/legal_affairs/kessedjian.html>

It was argued later on that the prohibition of concluding such agreements with consumers would burden suppliers with cost of protecting themselves against suits in all counties. It was also asserted that because of the possibly high costs of being dragged into courts of the distant countries, many suppliers would be unwilling to conclude contracts with consumers who reside in far away states.[170] That is why the proposal was unsuccessful and consequently a new version of Article 7 (3) was agreed upon, which states:

> 3. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court -
>
> a) if such agreement is entered into after the dispute has arisen, or
>
> b) to the extent only that it allows the consumer to bring proceedings in another court.[171]

As noted before, the provisions of Article 7 are similar to their counterparts in the Brussels Regulation. What makes the Hague Convention different from the Brussels Regulation though, is the generally favorable approach of the drafters to a "targeting" method.[172] A provision added to a interim draft Convention text illustrates this openness: "Activity by the business shall not be regarded as being directed to a State if the business demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in that State".[173] Thus the drafters at the Hague Conference meetings, though admitting that a targeting approach "is not without its problems," acknowledge that a targeting approach may best inform the needs of e-commerce.[174]

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[170] id.

[171] supra note 163, Art. 7(3)

[172] supra note 166 at 7. Catherine Kessedjian: "Another idea has also been put forward: to include in the rule of conflicts of jurisdiction the concept of a "target" . If the enterprise has specifically targeted consumers in a particular country, it would be consistent to decide that the courts of that country have jurisdiction for consumers residing on its territory.... [T]his [test] is not unanimously endorsed as yet".

[173] Hague Conference Permanent Bureau, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, Interim Text 7, http://www.cptech.org/ecom/jurisdiction/Interim_text.rtf

[174] Avril D. Haines, Hague Conference, The Impact of the Internet on the Judgments Project: Thoughts for the Future, Apr. 2002, http:// www.cptech.org/ecom/hague/hague17feb2002-ah-internet.rtf

It is possible that the Hague Convention may never enter into effect. Nevertheless, the Convention proves the point that targeting analysis has made its way from United States to the world stage and the discussions of the Convention should prove useful to the formulation of any future international jurisdictional convention. Future efforts to create an international jurisdictional agreement will almost certainly include the targeting concepts considered by the Hague Conference.

CONCLUSION

Electronic commerce is growing significantly each year all over the world and there is no reason to doubt that the spread of electronic transactions will continue to grow even faster in the future. Moreover, as the number of Internet users increases globally and consumers and vendors gain more familiarity and comfort in doing business online, Internet markets will play an even more significant role in the economies of nations worldwide. Therefore, the subject of jurisdiction in e-commerce consumer contracts is of great importance in the lives of online vendors, consumers, policy-makers, and governments.

This thesis has discussed the current state of law in both the United States and the European Union concerning the determination of personal jurisdiction in e-commerce consumer disputes. After analyzing different approaches taken by the US courts and EU legislators I suggested that the targeting approach currently evolving in the United States is most capable of solving the jurisdictional challenges caused by the nature of borderless Internet.

For businesses engaged in e-commerce, widespread adoption of the targeting approach would eliminate unreasonable litigation because business owners would be able to limit the geographic areas they target for trade. On the other hand, for the typical Internet consumer, such a targeting requirement would not allow lawsuits in the plaintiff's forum state when all that was accessed by him in his country was a website not intended to do business in that state. Such results will satisfy the policies of consumer protection and business encouragement, and ensure further innovations and expansion of e-commerce.

And finally, the adoption by the European Union of the targeting approach would help bridge the gap between the European and American views on jurisdiction in e-commerce and would provide a framework which could facilitate future American and EU development of the unified international jurisdictional regime.

ANNEX I

EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels 1968

Article 2

Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State. Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 5

A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

3. in matters relating to tort, delict or quasidelict, in the courts for the place where the harmful event occurred;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Contracting State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment, or

(b) could have been so arrested, but bail or other security has been given; provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage;

Article 13

In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section, without prejudice to the provisions of Articles 4 and 5 (5), if it is:

1. a contract for the sale of goods on instalment credit terms, or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods, or

3. any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.

Where the consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This Section shall not apply to contracts of transport.

Article 14

A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.

These provisions shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending.

Article 15

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen, or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section, or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Contracting State, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.

Section 5. - Exclusive jurisdiction

ANNEX II

Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

adopted by the Special Commission on 30 October 1999 amended version

(new numbering of articles)

Article 37 Relationship with other conventions

Proposal 1

1. The Convention does not affect any international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

2. However, the Convention prevails over such instruments to the extent that they provide for fora not authorized under the provisions of Article 18 of the Convention.

3. The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned and to instruments adopted by a community of States.

Proposal 2

1.

a) In this Article, the Brussels Convention [as amended], Regulation [·] of the European Union, and the Lugano Convention [as amended] shall be collectively referred to as "the European instruments".

b) A State party to either of the above Conventions or a Member State of the European Union to which the above Regulation applies shall be collectively referred to as "European instrument States".

2. Subject to the following provisions [of this Article], a European instrument State shall apply the European instruments, and not the Convention, whenever the European instruments are applicable according to their terms.

3. Except where the provisions of the European instruments on --

a) exclusive jurisdiction;

b) prorogation of jurisdiction;

c) lis pendens and related actions;

d) protective jurisdiction for consumers or employees;

are applicable, a European instrument State shall apply Articles 3, 5 to 11, 14 to 16 and 18 of the Convention whenever the defendant is not domiciled in a European instrument State.

4. Even if the defendant is domiciled in a European instrument State, a court of such a State shall apply --

a) Article 4 of the Convention whenever the court chosen is not in a European instrument State;

b) Article 12 of the Convention whenever the court with exclusive jurisdiction under that provision is not in a European instrument State; and

c) Articles 21 and 22 of this Convention whenever the court in whose favour the proceedings are stayed or jurisdiction is declined is not a court of a European instrument State.

Note: Another provision will be needed for other conventions and instruments.

Proposal 3

5. Judgments of courts of a Contracting State to this Convention based on jurisdiction granted under the terms of a different international convention ("other Convention") shall be recognised and enforced in courts of Contracting States to this Convention which are also Contracting States to the other Convention. This provision shall not apply if, by reservation under Article ·, a Contracting State chooses --

a) not to be governed by this provision, or

b) not to be governed by this provision as to certain designated other conventions.

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ANNEX I

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6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Contracting State in which the trust is domiciled;

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Article 13

In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section, without prejudice to the provisions of Articles 4 and 5 (5), if it is:

1. a contract for the sale of goods on instalment credit terms, or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods, or

3. any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and

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Where the consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This Section shall not apply to contracts of transport.

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A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.

These provisions shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending.

Article 15

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen, or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section, or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Contracting State, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.

Section 5. - Exclusive jurisdiction

ANNEX II

Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

adopted by the Special Commission
on 30 October 1999
amended version (new numbering of articles)

Article 37 Relationship with other conventions

Proposal 1

1. The Convention does not affect any international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

2. However, the Convention prevails over such instruments to the extent that they provide for fora not authorized under the provisions of Article 18 of the Convention.

3. The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned and to instruments adopted by a community of States.

Proposal 2

1.

a) In this Article, the Brussels Convention [as amended], Regulation [·] of the European Union, and the Lugano Convention [as amended] shall be collectively referred to as "the European instruments".

b) A State party to either of the above Conventions or a Member State of the European Union to which the above Regulation applies shall be collectively referred to as "European instrument States".

2. Subject to the following provisions [of this Article], a European instrument State shall apply the European instruments, and not the Convention, whenever the European instruments are applicable according to their terms.

3. Except where the provisions of the European instruments on --

a) exclusive jurisdiction;

b) prorogation of jurisdiction;

c) lis pendens and related actions;

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are applicable, a European instrument State shall apply Articles 3, 5 to 11, 14 to 16 and 18 of the Convention whenever the defendant is not domiciled in a European instrument State.

4. Even if the defendant is domiciled in a European instrument State, a court of such a State shall apply --

a) Article 4 of the Convention whenever the court chosen is not in a European instrument State;

b) Article 12 of the Convention whenever the court with exclusive jurisdiction under that provision is not in a European instrument State; and

c) Articles 21 and 22 of this Convention whenever the court in whose favour the proceedings are stayed or jurisdiction is declined is not a court of a European instrument State.

Note: Another provision will be needed for other conventions and instruments.

Proposal 3

5. Judgments of courts of a Contracting State to this Convention based on jurisdiction granted under the terms of a different international convention ("other Convention") shall be recognised and enforced in courts of Contracting States to this Convention which are also Contracting States to the

other Convention. This provision shall not apply if, by reservation under Article ·, a Contracting State chooses --

a) not to be governed by this provision, or

b) not to be governed by this provision as to certain designated other conventions.