

UIC John Marshall Journal of Information Technology & Privacy Law

Volume 23
Issue 1 *Journal of Computer & Information Law*
- Fall 2004

Article 1

Fall 2004

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Moritz Keller

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Recommended Citation

Moritz Keller, Lessons for the Hague: Internet Jurisdiction in Contract and Tort Cases in the European Community and the United States, 23 J. Marshall J. Computer & Info. L. 1 (2004)

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ARTICLES

LESSONS FOR THE HAGUE: INTERNET JURISDICTION IN CONTRACT AND TORT CASES IN THE EUROPEAN COMMUNITY AND THE UNITED STATES

MORITZ KELLER†

A. INTRODUCTION / RESEARCH OBJECTIVE

As the well-disposed reader works his¹ way through another article about international Internet jurisdiction, negotiations of a Hague Convention on international jurisdiction and enforcement of foreign judgments in civil and commercial matters are in full swing. If the Hague Conference succeeds in harmonizing the rules of the different legal systems around the globe, or at least creates a minimum standard for legal cases, e-commerce and Internet litigation will benefit greatly.²

† German State Exam in Law 2003, LL.M. University of Wisconsin (Madison) 2004, currently working as Graduate Teaching Assistant at the Justus-Liebig-University, Gießen, Germany and Legal Assistant at Freshfields Bruckhaus Deringer, Dispute Resolution Practice Group while finishing a dissertation project at the Justus-Liebig-University. I would like to thank Prof. Gerald Thain and Prof. Anuj Desai of the University of Wisconsin (Madison) for their guidance in preparing this thesis. This article is a shortened and updated version of my LL.M. thesis.

1. In the following, I will use only one gender solely for stylistic purposes without the intention to discriminate.

2. Jeffrey D. Kovar, *Prepared Testimony, Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments* (Before the House Committee on the Judiciary Subcommittee on the Courts and Intellectual Property, June 29, 2000) in Fed. News Serv. (June 29, 2000).

Although international commerce, trade, and communications are accelerating at a breathtaking pace, and the growth of the Internet promises to make boundaries less and less relevant for commerce, the judicial settlement of transnational disputes remains largely confined to national territories. There is no effective regime for coordinating and enforcing the work of national courts in resolving transnational legal disputes. If this widening gap between the global marketplace and the isolated national court systems is not addressed, it could well slow progress and inhibit growth in trade. The Hague Convention negotiations, if successfully concluded, hold out the promise of addressing this important need.

Id.

Web site owners, e-commerce companies, consumers and newspaper publishers alike want to be able to rely on clear standards for the worst case scenario: a contract or tort lawsuit following the Internet presence that could lead to multinational litigation.

Bearing in mind the complexity of today's multinational litigation which can potentially involve dozens of different legal systems and traditions, one gaping need is obvious: multinational Internet litigation must be governed by clear, unambiguous rules providing needed foreseeability and certainty in order to foster international e-commerce as well as further growth of the Internet. These rules have to be sufficiently certain and unambiguous to provide foreseeability, although they must simultaneously provide flexibility to cover not only cases and technologies used today, but also the technology and trends of the future. This will be achieved if detailed rules are based on more fundamental concepts.

Beyond that, consumers, as the naturally weaker party of a typical e-commerce transaction, need to be assured that they will not have to bear the (financial) burden of litigation in a distant forum if something goes wrong while they are shopping online, in order to gain their trust in e-commerce. Internet publishers as well as businesses and consumers should be provided with a predictable outcome when they raise the question of the scope of jurisdiction in the case of their liability for committing a tort. Thus, we can conclude that workable and reasonable rules for international jurisdiction, especially with regard to Internet-related cases, should first provide foreseeability while also establishing an approach that is flexible enough to include new technologies and developments.

In this article, I will prove that in order to achieve these goals—potentially by adopting a Hague Convention on international jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters—a clear set of provisions built on the foundation of the Council Regulation 44/2001 (EC) of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters must be adopted internationally. This process should be accomplished with an eye specifically toward e-commerce cases. A slightly modified American/Canadian “targeting” approach must be integrated for a solid international solution.

First, I will show that the global character of the Internet does not present an obstacle to regulation. There is no reason to believe that Internet regulation presents a problem, which is not solvable or is extraordinarily different from the problems usually addressed by conflicts of law. Second, by describing and comparing the system of jurisdictional law, and the current solutions as well as proposed approaches for jurisdiction with regard to Internet litigation in tort and contract cases in the

United States and the European Union,³ I will show that the current American doctrine lacks certainty as well as foreseeability while providing ground for developing modern approaches. Therefore, I will show that the European solution provides a better set of rules—especially for consumer contracts—and only the European solution can be used as a foundation for an international solution and best suits today's demands in multinational e-commerce and Internet tort cases.

Third, while comparing the different approaches for e-commerce cases before the background of the Hague Convention, I will show that a slightly modified American/Canadian “targeting” test provides helpful criteria as well as a strong base concept (assessment of knowledge of the access of one's Web site by users from other jurisdictions) with regard to Internet-related litigation and should therefore be integrated into a international solution for multinational litigation. This integration should take place in two provisions. First, to clarify the scope of the provisions on consumer contracts a new paragraph integrating the targeting approach should be added to this provision of the European Community's approach. Second, potential Internet tort litigation due to different standards and concepts in substantive law must be restricted by adding a new paragraph to the provision on jurisdiction in tort cases in the European Community's approach.

In implementing this American/Canadian approach, the subsequent rules will provide foreseeability; the necessary flexibility to include new technologies and developments is ensured as well through the underlying concepts.

As a court taking on a multinational Internet litigation case always has to deal with the question of the recognition and enforcement of a foreign judgment, I will give a short overview on this topics in this context as well.

Fourth, I will give a short outlook on the status of the negotiations of the Hague Convention and point out possible obstacles and problems of the current solutions.

Finally, I will summarize why the drafted solution presented here would be the most applicable and successful.

To illustrate the comparison between the different legal systems and solutions I will employ two hypotheticals.

Hypothetical 1:

3. Both economies are particular important in international e-commerce. See 1Global-Place, *Why Top e-business Ranking is Important*, http://www.1globalplace.com/content/why_isthisimportant.asp (accessed Feb. 9, 2004) (rating top e-business countries: 1. United States, 2. Germany, 3. Japan, 4. Canada, 5. U.K., 6. China, 7. Denmark, 8. Netherlands, 9. Australia, 10. Sweden).

C, a consumer living within country A, surfs the Internet searching for an old LP he wants to buy. Eventually, he finds the LP in the online store of S. S's place of central administration is located in country B also where all activities such as shipping and billing are concluded. C orders and pays immediately, but S never delivers.

Where can C sue?

Modification 1: S delivers, but C never pays. Where can S sue?

Modification 2: S's Web site contains a section "Terms & Conditions" with a choice of forum clause, in which S states that the exclusive forum for all lawsuits regarding his Web site is his home forum.

Modification 3: S's Web site requires the buyer to click on "I agree" after displaying the "Terms & Conditions" before it is possible to order any goods. The "Terms & Conditions" contain a choice of forum clause, which is identical to the clause in Modification 2.

Hypothetical 2:

E, a publisher and editor of a daily Internet newspaper in country A, posts an article on the Internet in which he describes a political scandal in country B, involving bribery. P, a politician in country B, is wrongly accused of accepting bribes in this article.

Where can P sue?

Showing the application of the displayed principles and approaches in these hypotheticals I will assume that the courts in both countries in each case employ one approach to Internet-related litigation to show what that would mean for Internet-litigation worldwide as a concept. Although these hypotheticals represent typical patterns of Internet contracts and torts, it is possible to imagine numerous other examples, which would involve contracts concluded on the Internet and torts which involve Internet behavior. The legal issues at hand that I will discuss in the following article are not only important for those types of cases but for all multinational litigation involving the Internet at any stage of the legal conflict, such as in the pre-concluding negotiation stage of a contract or torts and contracts which only include the usage of Internet communication tools such as video conferencing or P2P applications. Moreover, some results are of such universal importance that the solutions can be applied to all sorts of multinational litigation involving torts and contracts.

As implied from the title of this article, I will restrict my analysis to personal jurisdiction in contract and tort cases, and therefore not discuss any other provisions in this context, which deal with employment contracts, the status of a person or subject matter jurisdiction. Furthermore, as the objective of this article is rather to compare the overall concepts than an in-depth discussion of every requirement, I will concentrate on the issues of importance for the context of my article.

When we look at the questions at hand in multinational litigation concerning the Internet, the first step in analyzing the problem of regulating the Internet must be determining whether it is different from “ordinary” law, or if it is even possible to create laws for the Internet at all.

B. GOOD BYE TO CYBERLAW: INTERNET REGULATION IS NOT A PROBLEM

With the rise of the Internet, one question emerges over all others: is it possible to regulate the Internet, or does a completely independent entity called “cyberspace,”⁴ neither owned nor controlled by anyone, really exist?

In this section, I will give a short overview of the evolution of the Internet as we know it today. The Internet, simultaneously with globalization, strengthens the growth and the ease of international commerce. Therefore, better harmonization within the field of Private International Law is urgently needed. I will show that there is no reason to believe that the Internet cannot be regulated, and that our current legal principles and statutes can be adjusted for use with regard to the Internet. Fulfilling this purpose, I will compare the different positions of the so-called unexceptionalists and exceptionalists and disprove the presumption that there is a self-governed, intangible place called cyberspace, a modern “Wild West.” Finally, I will conclude that, apart from the needed harmonization in Private International Law as a consequence of the enormous Internet-related growth of international commerce, there is no need to treat the Internet as a special entity.

I. THE INTERNET⁵

To understand the problem of regulating the Internet and its global scope, it is essential to understand key background information on the technical organization of the Internet. The Internet can, for the purpose of this article, be defined as a “decentralized” self-maintained networking system that links computers and computer networks around the world, and is capable of quickly transmitting communications.⁶ The In-

4. The term “Cyberspace” was coined by William Gibson in his 1984 novel “Neuromancer.” See generally William Gibson, *Neuromancer*, (Ace Books 1984).

5. The provided information about the Internet is in no way meant to be an accurate technical description of the Internet; the sole purpose is to give the reader the necessary, comprehensible background for the relevant issues discussed later in this article.

6. See *Am. Libraries Ass’n. v. Pataki*, 969 F. Supp. 160, 164. (S.D.N.Y. 1997); Michelle R. Jackson-Carter, Note, *International Shoe and Cyberspace: The Shoe Doesn’t Fit When It Comes to the Intricacies and Nuances of Cyberworld*, 20 Whittier L. Rev. 217, 217 (1998). A more technical definition by some of the most influential technicians in developing the Internet is that the Internet is a:

ternet grew out of the 1969 “ARPANET.”⁷ It was intended as a military network,⁸ mainly to connect the military, defense contractors, and the universities conducting defense-related research via a secure communication channel.⁹ More and more networks, such as the CSNET¹⁰ of the American National Science Foundation, and BITNET¹¹ were created in the following years.¹² By connecting these networks during the following years, the network grew and led eventually to the creation of the Internet as we know it today.

Since the early days of the Internet, its use has increased tremendously.¹³ Today’s Internet backbone, the networks that carry most of the Internet’s data traffic, are operated by private communications companies such as AT&T and MCI.¹⁴ Consumers, businesses, and universities can easily connect to the Internet using an Internet Service Provider (“ISP”). An ISP offers Internet connections using a variety of techniques such as modem dial-up connections, DSL connections, which utilize existing telephone wires, or even through the TV cable network or a satellite connection.

global information system that—(i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.

Barry M. Leiner, et al., *A Brief History of the Internet*, at <http://www.isoc.org/internet/history/brief.shtml> (accessed Nov. 3, 2003).

7. Sometimes the “ARPANET” is also referred to as the “DARPANET.” The Advanced Research Projects Agency (ARPA), the government agency in charge of developing the military defense network, alternated several times between the name Defense Advanced Research Projects Agency (DARPA) and ARPA. The last change was in 1996; the name now remains DARPA. See Barry M. Leiner et al., *A Brief History of the Internet*, at <http://www.isoc.org/internet/history/brief.shtml> (accessed Oct. 31, 2003).

8. Barry M. Leiner et al., *A Brief History of the Internet*, at <http://www.isoc.org/internet/history/brief.shtml> (accessed Oct. 31, 2003).

9. *ACLU v. Reno*, 521 U.S. 844, 850 (1997).

10. Computer and Science Network.

11. Because It’s time NETwork.

12. See generally Dave Kristula, *The History of the Internet*, at <http://www.davesite.com/webstation/net-history.shtml> (accessed Oct. 31, 2003).

13. Jupiter Communications, an IT-related market research company, predicts that there will be 171 million users in the U.S. and 112 million users in Western Europe in 2004, see VeriSign, Inc. at <http://www.1globalplace.com/content/whyisthisimportant.asp> (accessed Oct. 31, 2003); IDC, the International Data Corporation, Inc., another independent market research company, predicts a total of 1 billion Internet users in 2005, see Iconocast, Inc. at http://fusion.babson.edu/html/library/pdfs/ataglance1_011.pdf (accessed Oct. 31, 2003).

14. See generally Dave Kristula, *The History of the Internet*, at <http://www.davesite.com/webstation/net-history5.shtml> (accessed Oct. 31, 2003).

The Internet is a distributed packet-switched network, which means that first, the information resides in multiple locations, not in a single server,¹⁵ and second, the data communicated between two computers in the network is not sent as one undivided file, but in little packets of information.¹⁶ These packets are reassembled into the original data by the receiving computer.¹⁷ Each packet contains the addresses of the sender and recipient in order to route all packets to the proper destination.¹⁸ Presumably, multiple packets originating from the same source will use different routes to reach their destination.¹⁹

A computer that is connected to the Internet is referred to as a host.²⁰ Each host has a unique numerical address, which is called the Internetworking Protocol ("IP") address. The IP address consists of four groups of numbers separated by a period. For example, the IP address of a computer could read: 199.111.66.22.

These IP addresses themselves provide no specific geographical location of the computer bearing a certain address, so that the information provider on the Web²¹ could be virtually anywhere without the other user's knowledge and vice versa. Under certain circumstances, it is possible to find out where the computer is located, but the use of special geolocation software is necessary. Several companies offer this geographic identification technology, claiming rates of accuracy up to ninety-eight percent in naming the country of origin for a specific Internet user.²²

15. Douglas E. Comer, *The Internet Book*, 89-95 (Prentice Hall 1995).

16. See Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, in *Borders in Cyberspace*, 129 (Brian Kahin & Charles R. Nesson eds., MIT Press 1997).

17. *Id.*

18. *Id.*

19. *Id.*

20. Bennett Falk, *The Internet Roadmap*, 12 (Sybex, Inc. 1994); Daniel P. Dern, *The Internet Guide For New Users*, 69 (McGraw-Hill 1994).

21. Since the invention of the World-Wide-Web, the term Web is used interchangeably with the term Internet.

22. See *Geography and The Net: Putting It in Its Place*, in *The Economist*, Aug. 9, 2001 (available at http://www.economist.com/opinion/PrinterFriendly.cfm?Story_ID=729808) (accessed Oct. 31, 2003); see also Michael Geist, *The Shift Toward "Targeting" for Internet Jurisdiction*, in *Who Rules the NET?*, 91, 114 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2003).

Akamai, a network caching service, provides a geographic information service called EdgeScape, which maps user IP addresses to their geographic and network points of origin. This information is assembled into a database and made available to EdgeScape customers. Each time a user accesses a client's Web site, EdgeScape provides data detailing the country from which the user is accessing site, the geographic region within that country (i.e., state or province), and the name of the user's origin network. Similarly, Quova, a California-based company, has developed GeoPoint, which boasts 98 percent and 85 percent accuracy, respectively, at determining Internet surfers' countries of origin and cities. *Id.*

As a consequence of the fact that people more easily remember names as opposed to numbers, a system to assign a name to each host was created.²³ The domain name system ("DNS") assigns each computer a hierarchically structured name.²⁴ A domain name usually consists of at least two alphanumeric fields, separated by a period. These two fields, from left to right, are called second and top-level domain. There are fourteen generic top-level domain names such as ".com" for commercial Web sites or ".org" for Web sites of non-profit organizations.²⁵ In addition, there are two-letter country code top-level domains, e.g. ".de" for Germany, ".uk" for the United Kingdom or ".us" for the United States.²⁶ Although citizens of specific countries are not restricted to the use of the two-letter country code top-level domains, it is very likely that a domain ending with ".de" will be operated by a German company or citizen.²⁷

Using the DNS, a user simply types a domain name such as "www.thecompanysname.com", a so-called Uniform Resource Locator (URL), into the address bar of his browser software²⁸ and the computer will show him the requested document. For example, if a user types in an address such as "http://www.amazon.de", it will give the browser software the following information:

1. the transfer protocol, which is used: "http://";
2. the exact format in which the information will be called up: "www";
3. a second-level domain: "amazon"; and
4. a top-level domain: "de".

Only 3. and 4. are the specific domain name, but the browser needs all the other information to display the Web site correctly.²⁹ The browser will then display the Web site "http://www.amazon.de". An e-mail address using the DNS could be "john.doe@thecompanysname.com". As far as the DNS is concerned, there is no way to determine the geographic location of a Web site by the mere domain name, even when a country code top-level domain is used.

Typical applications using the Internet today include Electronic Mail, Usenet, Telnet, P2P and the World Wide Web. Electronic Mail (e-

23. See Dern, *supra* n. 20, at 73.

24. *Id.*

25. See The Internet Corporation for Assigned Names and Numbers ("ICANN"), *Top Level Domains (gTLDs)*, <http://www.icann.org/tlds/> (accessed Oct. 31, 2003).

26. See ICANN, *Resources for Country Code Managers*, at <http://www.icann.org/cctlds/> (accessed Oct. 31, 2003); see also Internet Assigned Numbers Authority, *Root-Zone Whois Information*, <http://www.iana.org/cctld/cctld-whois.htm> (accessed Oct. 31, 2003) (listing of all two-letter country code top-level domains).

27. *Cf.* The country code ".tv." for Touvalou is widely used by media enterprises all over the world. For example, Viva, a German music TV station uses the Web address <http://www.viva.tv> (accessed Oct. 31, 2003).

28. See Falk, *supra* n. 20.

29. *Id.*

mail), one of the most widely used Internet services, is simply an electronic version of the regular postal service.³⁰ When a user sends an e-mail, a file that contains the message is sent from one computer to another until the recipient is reached.³¹ Usenet offers a variety of newsgroups to users all over the world; one can picture it as a gigantic message board.³² Every subscriber can publish a posting and read the contributions of other subscribers. Telnet refers to a direct connection between two computers or computer networks on the Internet.³³ A more popular service, similar to Telnet, is the so-called peer-to-peer (“P2P”) network,³⁴ which allows the users to share directly the contents of their computers or specific directories on their computers. The most popular Internet service is the World Wide Web.³⁵ With the use of a specific software called an Internet browser,³⁶ such as Internet Explorer, Opera, or Netscape Navigator, a user is able to view digital documents that are located on other computers connected to the Internet. These documents may contain text, pictures, sound, video, or even other software, which is used to create more sophisticated effects when viewing the document.³⁷

The user can navigate through the different pages of a document by clicking on the different links, which will take the user to another page.³⁸ The whole document, located on a specific server with a specific domain address, is referred to as a Web site. The main page is usually called the homepage. The format used to display the documents is called Hypertext Markup Language (“HTML”).³⁹

These documents even allow two-way communication between the Internet user and the provider of the document. The HTML document could, for example, contain a form asking the user for his address, credit card number, and other personal information, or simply ask questions that can be answered by checking boxes in the document with a mouse click. With the use of software scripts in a Web site, it is even possible to use a virtual shopping cart in a Web shop, which means the host computer remembers the items a user has selected to buy during his virtual

30. *Id.* at 114.

31. *Id.*

32. *Id.* at 202-222 (providing a broad overview of the Usenet).

33. *Id.* at 90.

34. See e.g., Kelly Larabee/Jeff Rose, *KaZaA.com Software Downloaded More Than Three Million Times in a Week*, in *Business Wire*, April 18, 2002, (available at LEXIS, News & Business).

35. Kiersten Conner-Sax & Ed Krol, *The Whole Internet: The Next Generation*, 107 (O'Reilly Media, Inc. 1999).

36. Falk, *supra* n. 20, at 180.

37. Comer, *supra* n. 15, at 211-212.

38. Conner-Sax, *supra* n. 35, at 107.

39. Falk, *supra* n. 20, at 180.

visit to the seller's Web site.⁴⁰

Today, the average user can set up a Web shop or a personal homepage within an hour for less than fifty dollars.⁴¹ The above-described features offer the possibility of establishing a Web business, a private homepage, or anything else one might want to publish worldwide with enormous ease and without significant cost. To summarize, it is possible for citizens of nearly every country on this planet to access the Internet and view documents, communicate or do business with people from other jurisdictions at little cost.

II. REGULATING THE INTERNET

As a consequence of the global range and the autonomy of content from its geographical location on the Internet, I have indicated in chapter B.I. that controversy erupts when it comes to the question of the feasibility of worldwide Internet regulation by governments. The different positions held by the legal profession can be divided in two opposing groups: the Regulation Skeptics and the Unexceptionalists.

1. *The Regulation Skeptics*

The position of the first group, the Regulation Skeptics, can be described vividly with the words of John Perry Barlow, a co-founder of the libertarian Electronic Frontier Foundation:

"Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. . . . I declare the global social place we are building to be naturally independent of the tyrannies you seek to impose on us."⁴²

As demonstrated above, opponents of Internet regulation point out that attempts to regulate the Internet suffers from a significant lack of legitimization.⁴³ They explain that traditional concepts of legal regulation are geographically based.⁴⁴ Furthermore, they point out that law-

40. The number of Web shops using this and similar sophisticated software scripts is enormous; nearly every major company makes use of virtual shopping carts and other features. See e.g., <http://www.amazon.com>, <http://www.alternate.net> or <http://www.dell.com> (last accessed Oct. 31, 2003).

41. See e.g., Active Venture Web Hosting, *Homepage*, <http://www.active-venture.com/> (accessed Oct. 31, 2003).

42. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, <http://www.eff.org/~barlow/Declaration-Final.html> (accessed Oct. 31, 2003).

43. See e.g., David R. Johnson & David Post, *Law And Borders - The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1370 (1996); Vinton C. Cerf, *Building an Internet Free of Barriers*, N.Y. Times § 3, at 12 (July 27, 1997).

44. Johnson, *supra* n. 43, at 1369.

making requires control over physical space as a condition for sovereignty and law enforcement, and the "consent of the governed" is necessary to exercise jurisdiction over a citizen.⁴⁵ The opponents of the governmental regulation of the Internet assume that the Internet has torn down territorially based boundaries.⁴⁶ As a result of the speed of a message or any data on the Internet, physical location and barriers are irrelevant.⁴⁷ The opponents of governmental regulation emphasize that Internet users do not know the physical location of the server they access, and do not need to know, because the whole system is indifferent to the physical location of the computers.⁴⁸

In addition, they conclude that the average Internet user is unaware of the fact that the data he transmitted or received might cross borders when it moves through the "virtual space," the Internet, and therefore lacks notice of accessing a different jurisdiction.⁴⁹ Thus, they argue that the Internet has abandoned territorially based boundaries.⁵⁰ Because of the borderless nature of the Internet, any state could claim the right to regulate any conduct on the Internet, but no state can claim legitimacy over another state for that regulation. No state is more legitimate to regulate than the other.⁵¹ *A fortiori*, the application of territorially based jurisdictional concepts is - from their point of view - illegitimate.⁵² This conclusion is, in their opinion, further justified by the fact that Internet users' awareness of a regulation in a specific country could constrain them to comply with the most restrictive regime.⁵³ That would cause spill-over effects in countries with less rigorous laws, which are not justified by the territorial power of a specific regime.⁵⁴

Furthermore, the opponents of regulation argue that it is not feasible to control the flow of electronic information across physical borders.⁵⁵ They stress that all efforts that have been and will be made by regional authorities are condemned to fail because there is no method of detecting or monitoring electrons entering a sovereign's territory.⁵⁶ In addition, if a government imposes rules on the owner of a specific server in its jurisdiction, the owner can easily evade these rules by moving to another, less

45. *Id.* at 1369-1370.

46. *Id.* at 1370.

47. *Id.* at 1370-1371.

48. *Id.* at 1371.

49. Johnson, *supra* n. 43, at 1375.

50. *Id.* at 1371.

51. *See id.* at 1375-1376.

52. *Id.*

53. *See also* John T. Delacourt, *Recent Development: The International Impact of Internet Regulation*, 38 Harv. Int'l. L., 207, 217 (1999).

54. *Id.* at 217.

55. Johnson, *supra* n. 43, at 1372.

56. *See id.*; *see also* Delacourt, *supra* n. 53, at 217-218.

rigorous, jurisdiction.⁵⁷ Due to the absence of physical borders in the Internet, traditional legal principles, such as the principle of territoriality in Copyright and Trademark Law, will no longer work in Cyberspace, as Trademarks and Copyrights from all over the world would conflict.⁵⁸

All of these arguments lead the Regulation Skeptics to one conclusion: Cyberspace must be treated as a completely different “place.”⁵⁹ According to Post and Johnson, Cyberspace deserves to be designated as a place, because sustained available messages constitute “placeness” for Internet users.⁶⁰ There is a border between the real world and Cyberspace. As a user types in a password to access the Internet, they know that they enter a different “place.”⁶¹

As Cyberspace is not functionally identical to interaction in physical space, it is a completely different place,⁶² requiring the development of a new set of rules.⁶³ As the Internet has abandoned territorial borders and Cyberspace is both everywhere and nowhere, only users of the Internet have the authority to govern the Internet.⁶⁴ The “citizens” of the Internet “exist” only in the form of an e-mail address.⁶⁵ They must create new effective legal institutions and their own new legal rules.⁶⁶ The relationship between the law of Cyberspace and the law of the specific countries should be arranged by the principle of comity,⁶⁷ widely used by U.S. courts to decide whether or not they should recognize and enforce a foreign judgment.⁶⁸

2. *The Unexceptionalist’s Point of View*

The assumptions of the Regulation Skeptics have been widely criticized

57. See David G. Post, *Anarchy, State and the Internet: An Essay on Law-Making in Cyberspace*, 1995 J. Online L. art. 3, ¶¶ 39-40 (May 1995) (available at <http://www.wm.edu/law/publications/jol/articles/post.shtml>) (accessed Nov. 3, 2003).

58. See Johnson, *supra* n. 43, at 1368-1369, 1383-1384.

59. *Id.* at 1378-1379.

60. *Id.* at 1379.

61. *Id.*

62. David G. Post, *Against “Against Cyberanarchy,”* in *Who Rules the Net?* 71, 71 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2003).

63. Johnson, *supra* n. 43, at 1384.

64. See *id.* at 1388; see also Delacourt, *supra* n. 53, at 234-235 (“While non-regulation is in many ways the ideal alternative, it is no longer realistic in light of strength of the political forces aligned against it. As a result, a consensual regime of user self-regulation . . . is a sensible compromise position.”).

65. Johnson, *supra* n. 43, at 1401.

66. *Id.* at 1387-1391.

67. *Id.* at 1391-1393.

68. See *Restatement (Third) of Foreign Relations Law of the United States* § 403(1) (1987).

and disputed by the so-called Unexceptionalists.⁶⁹ One of the basic arguments against the Regulation Skeptics can be summarized with the words of Heels and Klau: "Never forget that the Internet is simply a bunch of interconnected wires, with computers at the ends of the wires, and with people in front of the computers."⁷⁰

As demonstrated, the Unexceptionalists point out that the differences between a transaction on the Internet - in Cyberspace - and a transnational transaction are widely overrated by the Regulation Skeptics.⁷¹ Basically, a transaction such as concluding a contractual agreement or committing a tort initiated on the Internet and a transaction initiated in the old-fashioned world of brick and mortar, are fundamentally similar to the extent that both affect people from one jurisdiction dealing with people from another jurisdiction.⁷² This constellation implies nothing new to the legal profession or International Law.⁷³ Traditional legal tools such as the conflict-of-law doctrines and the basic principles of jurisdiction have dealt with similar problems for decades without any serious challenges to their legitimacy.⁷⁴ Furthermore, the Unexceptionalists point out that the argument that a sovereign's authority to regulate is based on territorial power about a subject is, to some extent, outdated, as it is a settled principle in International Law that a nation can control and regulate local effects of extraterritorial acts.⁷⁵ The criticized spill-over effects of multijurisdictional regulations, as the Unexceptionalists show, are a common side effect of the unilateral regulation of transnational activity, which itself is recognized in the European Community as well as in the United States.⁷⁶ As these spill-over effects are unavoidable in an interdependent world, their legitimacy has never been disputed.⁷⁷

In regards to the legitimacy of spill-over regulation of Internet behavior, the Unexceptionalists strongly emphasize that there is no differ-

69. See Goldsmith, Jack, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199 (1998); Lawrence Lessig, *The Zones of Cyberspace*, 48 Stan. L. Rev. 1403 (1996); Timothy S. Wu, Note, *Cyberspace Sovereignty? - The Internet and The International System*, 10 Harv. J.L. & Tech. 647 (1997); Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 Int'l. L. 1167 (1998); Sanjay S. Mody, Note, *National Cyberspace Regulation: Unbundling the Concept of Jurisdiction*, 37 Stan. J. Int'l. L. 365 (2001); Shane A. Orians, *Exercising Personal Jurisdiction on The Internet: The Misapplication of The Asahi Metal Decision to "Cyberspace"*, 24 Ohio N.U.L. Rev. 843 (1998).

70. Erik J. Heels & Richard P. Klau, *Let's Make a Few Things Perfectly Clear: Cyberspace, the Internet, and that Superhighway*, 1995 Student L 15 (1995).

71. See Goldsmith, *supra* n. 69, at 31.

72. *Id.*

73. See Stein, *supra* n. 69, at 1179-1181.

74. See Goldsmith, *supra* n. 69, at 31, 36-41.

75. *Id.* at 37, 62; Mody, *supra* n. 69, at 374-379; Lessig, *supra* n. 69, at 1404-1405.

76. Mody, *supra* n. 69, at 378.

77. *Id.* at 384; Goldsmith, *supra* n. 69, at 62-63.

ence between the cases involving the Internet and "ordinary" cases of regulation of extraterritorial activity.⁷⁸ In addition, the Unexceptionalists emphasize that the lack-of-notice argument of the Regulation Skeptics is flawed because lack-of-notice itself is a very weak limitation in the real world and therefore should not be a matter of great concern in regard to the Internet either.⁷⁹ According to Goldsmith, multiple country involvement and regulation in Internet cases is no different than the regular problems of choice-of-law.⁸⁰ The fear that national regulation will lead to widespread worldwide jurisdiction is exaggerated, as Sanjay Mody observes, because the Regulation Skeptics have not considered the territorial limits of enforcement jurisdiction.⁸¹ Furthermore, Lessig points out that regulation need not be absolutely effective to function effectively.⁸² Lessig states that, if regulation always had to be perfect, there would not be any regulation, whether in regard to the Internet no in real space.⁸³ Moreover, the Unexceptionalists demonstrate that regulation is already happening and the tools to realize the regulation are working at present.⁸⁴ Above all, most authors emphasize that opponents of Internet regulation make the basic mistake of ignoring the fact that actions on the Internet affect real people in the real world.⁸⁵ In fact, as the Unexceptionalists clearly demonstrate, there is no place called "cyberspace," which is distinct from the real, molecular world.⁸⁶ Thus, they conclude, the Internet is nothing more or less than a medium to access data and view communications on a screen;⁸⁷ therefore, the term

78. Goldsmith, *supra* n. 69, at 63 ("Germany's regulation of CompuServe is no less legitimate than the United States' regulation of the competitiveness of the English reinsurance market, which has worldwide effects on the availability and price of reinsurance."); Mody, *supra* n. 69, at 384 ("In short, national cyberspace regulation might produce more wide-ranging and immediate spillover effects than "real-world" regulation, but these effects are different in degree, not in kind.").

79. Mody, *supra* n. 69, at 381; Goldsmith *supra* n. 69, at 66.

80. Goldsmith, *supra* n. 69, at 56-58.

81. Mody, *supra* n. 69, at 388.

82. Lessig, *supra* n. 69, at 1405; *see also* Goldsmith, *supra* n. 69, at 52-53.

83. Lessig, *supra* n. 69, at 1405.

84. Goldsmith, *supra* n. 69, at 50-54; *see also* Wu, *supra* n. 69, at 652.

85. *See* Michael S. Rothman, Student Author, *It's a Small World After All: Personal Jurisdiction, The Internet and The Global Marketplace*, 23 Md. J. Int'l. L. & Trade 127, 137 (1999); Mody, *supra* n. 69, at 366; Jackson-Carter, *supra* n. 6, at 237; Goldsmith, *supra* n. 69, at 70.

86. *See* Stein, *supra* n. 69, at 1175; Richard S. Zembek, Comment: *Jurisdiction and The Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 Alb. L.J. Sci. & Tech. 339, 346-348 (1996); Orians, *supra* n. 69, at 855; Lessig, *supra* n. 69, at 1403 ("They are at a terminal screen, eating chips, ignoring the phone. They are downstairs on the computer, late at night, while their husbands are asleep. They are at work, or at cyber cafes, or in a computer lab.").

87. Stein, *supra* n. 69, at 1175.

“cyberspace” is a misleading and inaccurate description of the Internet.⁸⁸

3. Conclusion

The vast majority of opinions concerning the topic of Internet regulation are at least two years old. By now, it has become obvious that the Internet is a part of everyday life in all industrialized countries of the world. As Allan Stein has put it, the needed “demystification” has begun and has already gone half way.⁸⁹ It has become self-evident that the Internet is regulated every day and that there is no “Cyberlaw” as well. In addition, it is perfectly clear that there is no distinction between the Internet and the “real” world, which requires and justifies a completely different approach to Internet regulation. Nevertheless, the importance of the Internet as a tool for communication as well as global commerce is increasing enormously. As with the invention of the telephone or the automobile, the invention of the Internet has forced society to change⁹⁰ and has triggered a new stage of globalization. With the increasing popularity of the Internet, multinational litigation, involving the Internet, has dramatically increased.⁹¹ Contracts that cross national boundaries are concluded everyday. Torts committed on the Internet by a person in one jurisdiction, which cause harm in another jurisdiction, are now commonplace. Although the legal tools to solve these cases are already available, as Goldsmith has appropriately argued, each jurisdiction’s solutions concerning jurisdiction to adjudicate, choice-of-law, and recognition and enforcement of judgments are different. If there is going to be a problem with the rising number of Internet cases, it will not be a problem of how to solve them but, rather, how to manage the enormous number of cases.

88. With the colorful words of Michael Froomkin:

It seems quite odd to me to want to subject transactions that happen to use a computer to a unique legal system inapplicable to transactions that use telephones, fax machines, vehicular transport, or even shoe leather. We do not find concepts such as “telephonespace” or “autospace” helpful, and for good reason; cyberspace too is not a place, but only a metaphor - often an unhelpful one.

Michael Froomkin, *Symposium on the Internet and Legal Theory: The Empire Strikes Back*, 73 Chi.-Kent L. Rev. 1101, 1106 (1998).

89. Stein, *supra* n. 69 at 1175 (quoting Professor Hal Abelson (Professor of Computer Science at the MIT Media Lab) in the National Public Radio: Morning Edition (Radio Broadcast, April 2, 1996. Transcript #1837-7)).

It’s not a different place anymore. It’s our place . . . People used to talk in the ‘50’s about the folks out there in “TV Land”. All right, there’s no TV Land, and there’s no Cyberspace. There’s just the real world. . . . Can you remember back all the way, gosh, two years ago when people thought you weren’t supposed to put any advertising on the network? And now that’s just so taken for granted, you don’t even question that.

Id.

90. See Goldsmith, *supra* n. 69, at 32.

91. Linda J. Silberman & Allan R. Stein, *Civil Procedure: Theory and Practice*, 160 (Aspen Publishers, Inc. 2001).

With this increasing and evolving transnational and interstate litigation, multinational legal rules in this field of law could foster the growth of international e-commerce and support the ease of transnational litigation.

Summarizing, we can conclude that no specific "Cyberlaw" is needed, although harmonization in the field of jurisdictional law, as well as an unambiguous set of rules for Internet litigation, will serve to manage the effects of the ongoing increase in multinational litigation involving the Internet. In the following chapters, I will highlight the different solutions found in the United States and the European Community to scrutinize which solution should be adapted for an international solution and could be beneficial for the international marketplace with regard to the Internet.

C. JURISDICTION TO ADJUDICATE AND THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE UNITED STATES

I have established that regulation of the Internet is feasible and happening already; I will now examine the recent solutions found in the United States. The *modus operandi* is three-fold: first, I will analyze the principles and landmark cases in the fields of Jurisdiction to Adjudicate and the Recognition and Enforcement of Foreign Judgments, with a focus on contract and tort cases on the Internet. Afterwards I will determine the strengths and weaknesses of the American system with regard to the cases at hand.

I. JURISDICTION TO ADJUDICATE

To understand the American law of jurisdiction, the terminology within the American system has to be clarified. The term "jurisdiction" as used in the American legal profession has many different meanings.⁹² It can refer to the jurisdiction to prescribe, the power of a state to impose its legal rules on a person,⁹³ as well as to the jurisdiction to adjudicate, which is the power of a court to exercise judicial authority over a defendant.⁹⁴ Furthermore, there is a distinction between personal jurisdiction and subject matter jurisdiction. Subject matter jurisdiction is the competency of a court to hear and decide particular categories of cases, the

92. See Luther L. McDougal, III et al., *American Conflicts Law* 5 (5th ed., Transnatl. Publishers 2001).

93. See Stephan Wilske & Theresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet*, 50 Fed. Comm. L.J. 117, 127 (1997).

94. See *id.* at 144-145.

power to exercise judicial authority over the subject of the case.⁹⁵ Personal jurisdiction, on the other hand, refers to the power of a court to impose its decisions on the particular parties in a lawsuit.⁹⁶ As I have mentioned earlier,⁹⁷ the issues of subject matter jurisdiction, as well as jurisdiction to prescribe, will not be discussed in the context of this article.

1. *Personal Jurisdiction*

In this subsection, I will first highlight the traditional requirements for a court to exercise judicial authority over a defendant, then discuss the requirements today. As the research objective has indicated, this article deals with the problem of multinational litigation in Internet-related cases, but most cases and literature in the United States deal with interstate litigation only. This, however, is not an obstacle to the analysis here presented, as U.S. courts treat foreign defendants with regard to the question of personal jurisdiction identical to domestic defendants, although the courts might scrutinize the fairness of litigation in these cases in a more detailed way. Afterwards, I will examine the application of these rules by American courts, and then consider proposed approaches by American courts and legal scholars. Since the American court system is, as opposed to the court system in most European countries, generally divided into state and federal courts,⁹⁸ I will outline the basic requirements of personal jurisdiction for state and federal courts before more deeply analyzing the topic.

For a U.S. state court to exercise proper personal jurisdiction over the parties, two requirements have to be fulfilled. First, the requirement of the jurisdictional statute⁹⁹ of the state has to be met, then the exercise of judicial authority over the defendant must comply with the constitu-

95. Larry L. Teply & Ralph U. Whitten, *Civil Procedure* 42 (University Casebooks 2d 2000); McDougal et al., *supra* n. 92, at 73.

96. *Id.* at 164. Although the term “personal jurisdiction” refers only to the so-called jurisdiction in personam and not to jurisdiction in rem and quasi in rem, it is commonly used with a broader meaning to describe both jurisdiction in personam and jurisdiction in rem. *Id.* Sometimes this broader meaning of “personal jurisdiction” is described as “territorial jurisdiction.” *Id.* To avoid misunderstandings I will use the term “personal jurisdiction” only in this broader sense and will otherwise use the term “jurisdiction in personam.”; see e.g., Jack H. Friedenthal et al., *Civil Procedure* 96 (3d 1999); Teply & Whitten, *supra* n. 95, at 164; McDougal et al., *supra* n. 92, at 41-49. For an explanation of the terms jurisdiction in personam, jurisdiction in rem and jurisdiction quasi in rem see *infra* pp. 1129-50.

97. See *supra* p. 15.

98. See William Burnham, *Introduction to the Law and Legal System of the United States*, 167-195 (West Group 3d 2002).

99. If the provision of the statute or the whole statute deals with jurisdiction over non-resident defendants, these statutes are often called “long-arm” statutes.

tional doctrine¹⁰⁰ of due process.¹⁰¹ Most of the states simply allow jurisdiction to the full extent of the constitution,¹⁰² although some states have enacted explicit and more limited jurisdictional regulations.¹⁰³

U.S. federal courts rely on the Federal Rules of Civil Procedure to establish personal jurisdiction over a defendant.¹⁰⁴ Although it mainly deals with the service of process, Federal Rule of Procedure 4(k) regulates the requirements for federal jurisdiction as well. Federal Rule of Civil Procedure 4(k)(1)(A) states that a federal court has jurisdiction over a defendant who "could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located."¹⁰⁵ Thus, a federal court has to examine the jurisdictional statute of the state as well as the requirements of the Due Process Clause of the Fourteenth Amendment.¹⁰⁶ Beside the two special cases mentioned in Federal Rule of Civil Procedure 4(k) (1)(B) and (C), a federal court has jurisdiction over a defendant, according to Federal Rule of Civil Procedure 4(k)(1)(D), "when authorized by a statute of the United States."¹⁰⁷ Since the 1993 amendment to the rules, a federal court can furthermore exercise jurisdiction over a defendant "who is not subject to the jurisdiction of the courts of general jurisdiction of any state," as long as "the exercise of jurisdiction is consistent with the Constitution and the laws of the United States."¹⁰⁸ As the Due Process Clause of the Fourteenth Amendment applies only to state actions,¹⁰⁹ in this case the federal court has to examine if the exercise of jurisdiction is consistent with the Due

100. U.S. Const. amend. XIV, § 1.

101. Silberman & Stein, *supra* n. 91, at 98; Adam Cizek, *Traditional Personal Jurisdiction and the Internet: Does It Work?*, 7 U. Balt. Intell. Prop. J. 109, 111 (1999); Christine E. Mayewski, Note, *The Presence of a Web Site as a Constitutionally Permissible Basis for Personal Jurisdiction*, 73 Ind. L.J. 297, 299 (1997); Christopher McWhinney et al., *The "Sliding Scale" of Personal Jurisdiction via the Internet*, 2000 Stan. Tech. L. Rev. 1 (2000).

102. Veronica M. Sanchez, Comment, *Taking a Byte out of Minimum Contacts: A Reasonable Exercise of Personal Jurisdiction in Cyberspace Trademark Disputes*, 46 UCLA L. Rev. 1671, 1676 (1999).

103. For a complete overview of the enacted state statutes, see David Thatch, *Personal Jurisdiction and the World-Wide Web: Bits (and Bytes) of Minimum Contacts*, 23 Rutgers Computer & Tech. L.J. 143, 147 n.14 (1997).

104. Katherine Neikirk, Note, *Squeezing Cyberspace into International Shoe: When Should Courts Exercise Personal Jurisdiction Over Non-Commercial Online Speech?*, 45 Vill. L. Rev. 353, 356 (2000).

105. Fed. R. Civ. P. 4(k)(1)(A).

106. McDougal et al., *supra* n. 92, at 92; Richard L. Marcus et al., *Civil Procedure: A Modern Approach* 705 (West Group 3d 2000).

107. Fed. R. Civ. P. 4(k)(1)(D).

108. Fed. R. Civ. P. 4(k)(2).

109. Mark B. Kravitz, *National Contacts and the Internet: The Application of FRCP 4(k)(2) to Cyberspace*, 7 U. Balt. Intell. Prop. J. 55, 58 (1998); Teply, *supra* n. 95, at 300.

Process Clause of the Fifth Amendment.¹¹⁰ Although there is no Supreme Court decision regarding this topic, most commentators and courts agree that the requirements of the Due Process Clause of the Fifth and the Fourteenth Amendment are identical.¹¹¹

As an analysis of all state and federal jurisdictional statutes would go beyond the scope of this article, and, moreover, most states allow jurisdiction to the full extent of the constitutional doctrine of due process, I will analyze the constitutional requirements of personal jurisdiction only. If the requirements for federal courts under Federal Rule of Civil Procedure 4(k)(2) should - at least from the point of view of some courts and commentators - differ from the requirements for state courts or federal courts under Federal Rule of Civil Procedure 4(k)(1)(A), I will show that as well. What follows is a history of the development of personal jurisdiction theory.

a) Personal Jurisdiction: History and Traditional Requirements

In order to examine the current doctrine of personal jurisdiction, it is helpful to emphasize the historical background and to clarify the most important and frequently used terms in this context.

aa) Principles and Terminology before the Ratification of the Fourteenth Amendment

The roots of the United States legal system can be traced back to the Common Law of England.¹¹² In the time before the ratification of the Fourteenth Amendment, a court could exercise judicial authority over a defendant on the basis of presence or consent, which was adopted from the Common Law of England.¹¹³ Another basis of jurisdiction was domi-

110. *Id.*; Dora A. Corby, *Putting Personal Jurisdiction Within Reach: Just What Has Rule 4(k)(2) Done for the Personal Jurisdiction of Federal Courts?*, 30 *McGeorge L. Rev.* 167, 197 (1998).

111. *See id.* at 200; Friedenthal et al., *supra* n. 96, at 167; *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935 (11th Cir. 1997); Kravitz, *supra* n. 109, at 58; *see also* Teply, *supra* n. 95, at 302. (assuming that the Supreme Court would rule similarly, strongly relying on the language in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-703 (1982)); Fed. R. Civ. P. 4 (k)(2').

112. *See* Burnham, *supra* n. 98, at 49.

113. *See* Teply, *supra* n. 95, at 182; Eugene F. Scoles et al., *Conflict of Laws* 283 (3d ed. 2000). This concept of territorial jurisdiction can be traced back to John Locke; *see generally* John Locke, *Two Treatises of Government* (Prometheus 1986) (1690). Locke assumed that individuals hand over their natural autonomy to governments in order to gain the liberties found in an ordered society. Furthermore, Locke stated that by entering a community the individual consented to governance. The ownership of real property and similar acts would - according to Locke - establish tacit consent; *see also* Richard B. Cappalli, *Locke As the Key: A Unifying and Coherent Theory of In Personam Jurisdiction*, 43 *Case W. Res.* 97 (1992) For a discussion of Locke's political theory with regard to the modern doctrines of jurisdiction.

cile in the state; courts could exercise jurisdiction over resident defendants.¹¹⁴ Presence in this context could mean the physical presence of the defendant in the forum (in personam jurisdiction), as well as the presence of the property (in rem jurisdiction) in the forum.¹¹⁵ Today, courts and legal scholars usually distinguish between jurisdiction in personam, jurisdiction in rem, jurisdiction quasi in rem,¹¹⁶ and status jurisdiction.¹¹⁷ As one can see, a differentiation even further than previously mentioned¹¹⁸ with regard to the use of the term "jurisdiction" is usually made on the basis of the judicial action at issue.¹¹⁹ Jurisdiction in rem refers to proceedings in rem, which declare the rights of all persons to a thing.¹²⁰ Jurisdiction in personam, on the contrary, refers to proceedings in personam, whereby a court can impose a personal liability or obligation on a defendant, or require a defendant to act or refrain from doing an act.¹²¹ Jurisdiction quasi in rem, which was defined by the U.S. Supreme Court in *Pennoyer v. Neff*,¹²² refers to actions affecting the interests of particular persons in a thing.¹²³

As status jurisdiction only refers to cases which deal with the personal relationship of persons, most commonly divorce and custody issues,¹²⁴ it is therefore not relevant for the research objective of this article. I will concentrate on jurisdiction in personam, jurisdiction in rem and jurisdiction quasi in rem in the following.

bb) Principles and Terminology in Pennoyer v. Neff (1877)

After the ratification of the Fourteenth Amendment to the Constitution in 1868, these principles of common law were adopted by the U.S. Supreme Court in the landmark decision *Pennoyer v. Neff*.¹²⁵ In addition, the U.S. Supreme Court implemented the principles into the due process doctrine by stating explicitly that the Due Process Clause of the Fourteenth Amendment limits the power of the states to adjudicate cases in-

114. See 1 Robert C. Casad & William M. Richman, *Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts*, 72 (Lexis 3d 1998). The different bases for jurisdiction were often summarized as jurisdiction based on the power of the court over the defendant, the so-called "power theory."

115. See Scoles et al., *supra* n. 113, at 283-284.

116. See Teply, *supra* n. 95, at 164.

117. See Scoles et al., *supra* n. 113, at 292-297.

118. See *supra* pp. 1122-23.

119. See Silberman, *supra* n. 91, at 81.

120. See *Pennoyer v. Neff*, 95 U.S. 714, 724 (1877); Silberman, *supra* n. 91, at 81.

121. See Silberman, *supra* n. 91, at 81; Marcus et al., *supra* n. 106, at 673-674.

122. 95 U.S. 714 (1877).

123. See McDougal et al., *supra* n. 92, at 43. Although Justice Field did not use the term jurisdiction quasi in rem, he described this type of action; see Silberman, *supra* n. 91, at 81.

124. See Scoles et al., *supra* n. 113, at 295.

125. 95 U.S. 714 (1877).

volving nonresident defendants.¹²⁶ In *Pennoyer*, Justice Field delivered the following statement for the court:

One of these principles is that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.¹²⁷

The U.S. Supreme Court held that each violation of the above-mentioned international principles will be a violation of the Due Process Clause¹²⁸ and adopted the terms jurisdiction in personam and jurisdiction in rem as well.¹²⁹ With this decision, Justice Field predefined the principle of territoriality for the following decades in the law of jurisdiction.¹³⁰ In the following, I will examine which requirements must be fulfilled today to exercise authority over a defendant on the basis of the different proceedings.

b) *Jurisdiction in Personam Today*

In *Pennoyer*, the U.S. Supreme Court stated explicitly that the defendant has to be served with process while present in the forum to allow proper jurisdiction in personam.¹³¹ In the years after *Pennoyer* had established this requirement, the courts strongly relied on the consent theory to expand personal jurisdiction.¹³² In *Hess v. Pawlowski*¹³³ the Court stated that a driver has implied consent to the jurisdiction of a state by using the state's motorways.¹³⁴ Furthermore, the Courts found that they had jurisdiction because the company had impliedly consented to its jurisdiction by doing business in the forum state¹³⁵ or by forcing compa-

126. *See id.* at 731.

127. *See id.* at 722 (quoting Joseph Story, *Commentaries on the Conflicts of Laws* (London, Maxwell 1834)).

128. *See id.* at 733.

129. *See id.* at 723-729.

130. *See* Teply, *supra* n. 95, at 182-202.

131. *See Pennoyer*, 95 U.S. at 724.

132. *See* Teply, *supra* n. 95 at 199-202.

133. 274 U.S. 352 (1927).

134. *See id.* at 356-357.

135. *See e.g.*, *Chipman, Ltd. v. Thomas B. Jeffrey Co.*, 251 U.S. 473 (1920); Marcus, *supra* n. 106, at 685-686.

nies to appoint an agent upon whom service could be made.¹³⁶ Facing the problem that corporations could not be present outside the state in which they were incorporated, the courts relied on a corporate presence doctrine to establish jurisdiction, which created a fictional "presence" of a corporation in a state, where the corporation was "doing business."¹³⁷ As these attempts to stress the traditional personal jurisdiction theory required the defendant to bear the burden of the far-reaching long-arm jurisdiction of the states, and the interpretation of the concepts of presence and consent were overly taxed by the courts, it was only a matter of time until the U.S. Supreme Court would accept a case to declare new guidelines for the law of jurisdiction.

aa) Jurisdiction in Personam Based on Contacts

With its famous decision in *International Shoe v. Washington*,¹³⁸ the U.S. Supreme Court reacted to these far-reaching practices by shifting the focus from the presence and consent requirements to the defendant's contacts with the forum state.¹³⁹ Chief Justice Stone delivered the opinion of the court, stating:

"But now (. . .) that due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."¹⁴⁰

These requirements of due process are commonly referred to as the "minimum contacts" test of *International Shoe*. Since the *International Shoe* decision of 1945, the minimum contacts test has been further refined in several decisions by the U.S. Supreme Court as well as lower state courts.¹⁴¹ Today, a U.S. court establishes jurisdiction based on contacts relying on either specific or general jurisdiction.

aaa) Specific Jurisdiction in General

Since the decision in *International Shoe*, the U.S. courts distinguish between specific and general jurisdiction, although the terminology was used for the first time thirty nine years later by the Supreme Court in

136. See Teply, *supra* n. 95, at 182-202.

137. See *Philadelphia & Reading R. Co. v. McKibbin*, 243 U.S. 264 (1917); *International Harvester Co. of America v. Kentucky*, 234 U.S. 579 (1914); see also Friedenthal, *supra* n. 96, at 110-112; Teply, *supra* n. 95, at 199-201 (giving further examples for the fictional evolution of the presence and consent tests for personal jurisdiction).

138. 326 U.S. 310 (1945).

139. Friedenthal et al., *supra* n. 96, at 117.

140. See *International Shoe Co.*, 326 U.S. at 316.

141. Friedenthal et al., *supra* n. 96, at 123.

Helicopteros Nacionales De Colombia S.A. v. Hall.¹⁴² Specific jurisdiction is defined as an exercise of jurisdiction “over a defendant in a suit arising out or related to the defendant’s contacts with the forum.”¹⁴³ General jurisdiction, on the contrary, is defined as the exercise of personal jurisdiction “over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum.”¹⁴⁴ The distinction is of importance because the requirements to be met are different. To establish specific jurisdiction over a defendant, the prevailing¹⁴⁵ test that U.S. courts apply is a three-prong test:¹⁴⁶

1. purposeful availment;
2. arising-out-of or relatedness; and
3. reasonableness.

(1) *Purposeful Availment*

In the “purposeful availment” or “minimum contacts” prong, the court analyzes if the defendant has sufficient contacts with the forum to establish jurisdiction of the court over the defendant. Since the U.S. Supreme Court decision in *Hanson v. Denckla*,¹⁴⁷ the Supreme Court has made clear that “in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State thus invoking the benefits and protections of its laws.”¹⁴⁸

142. 466 U.S. 408, 414 nn. 8-9 (1984). This terminology is usually credited to the Professors von Mehren and Trautman, who introduced the terms in a 1966 article. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harvard L. Rev. 1121, 1135 (1966).

143. See *Helicopteros*, 466 U.S. at 414 n. 8.

144. *Id.* at 414 n. 9.

145. The U.S. courts use several different tests to analyze the due process requirements for jurisdiction. Most refer to these tests as “minimum contacts” test. Sometimes the courts do not appear to use any structured test. Although the three-prong test is to the author’s knowledge the most commonly used test by U.S. courts and legal scholars, there seems to be no conformity in the appliance of the test. Most courts will come to a decision consistent with the Supreme Court’s decisions. The Eighth Circuit, for example, uses a five-factor-balancing test to examine the minimum contacts requirement. See, e.g., *Precision Constr. Co. v. J.A. Slattery Co.*, 765 F.2d 114, 118 (8th Cir. 1985). See generally Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The “But For” Test*, 82 Calif. L. Rev. 1545, 1557 (1994) (discussing the different methods of U.S. courts to examine the minimum contacts requirement). As the question of the application of a specific test is only a question of structure and not of content, I will, for the purpose of this article, use the structure of the three-prong test for my inquiry.

146. See Friedenthal et al., *supra* n. 96, at 140; Margaret Jane Radin et al., *Internet Commerce The Emerging Legal Framework*, 468-469 (1st ed. 2002). See e.g., *Mellon Bank (East) PSFS, N.A. v. Farino*, 960 F.2d 1217, 1221 (3d Cir. 1992).

147. 357 U.S. 235 (1958).

148. *Id.* at 253.

Accordingly, it is not sufficient if the plaintiff or another party initiates the contacts between the defendant and the forum state. On the other hand, the Supreme Court stated in *Burger King Corp. v. Rudzewicz*¹⁴⁹ and *World-Wide Volkswagen v. Woodson*¹⁵⁰ that it would be sufficient if the defendant authorizes the acts of other parties.¹⁵¹ In *Burger King*, the Supreme Court stated, furthermore, that the contacts of the defendant should not be solely "random," "fortuitous," or "attenuated."¹⁵² Rather, the defendant himself has to establish a "substantial connection" with the forum state.¹⁵³ The volitional act by the defendant, which establishes the connection to the forum state, should be of such quality "that he should reasonably anticipate being haled into court here."¹⁵⁴ Although, the Supreme Court in *Hanson* has indicated that foreseeability of suit within the state was linked with the purposeful availment test, it finally established foreseeability as an important factor in jurisdictional analysis in *World-Wide Volkswagen*.¹⁵⁵

Because the application of the minimum contacts prong "cannot be simply mechanical or quantitative,"¹⁵⁶ the test lacks certainty when it comes to rules and standards to decide future cases.¹⁵⁷ What exactly establishes sufficient minimum contacts with the forum state generally has not yet been finally decided or even defined by the Supreme Court, and therefore underlies the discretion of the courts in case-by-case decisions.

Thus, an example for sufficient forum contacts is the mailing of an application and an acceptance letter from a law school to the plaintiff in the forum state without any further contacts between the defendant and the forum.¹⁵⁸ Another example is the lone act of soliciting an insurance contract from outside the forum state with a resident of the forum state.¹⁵⁹ Phone calls and correspondence to the forum state sent by a lawyer to his client were seen as sufficient for establishing minimum contacts, even when all matters the lawyer worked on had no relation to the forum state.¹⁶⁰

149. 471 U.S. 462 (1985).

150. 444 U.S. 286 (1980).

151. David C. Tunick, *Up Close and Personal: A Close-up Look at Personal Jurisdiction*, 29 Creighton L. Rev. 1157, 1221 (1996.)

152. See *Burger King*, 471 U.S. at 475.

153. *Id.*

154. See *World-Wide Volkswagen*, 444 U.S. 297.

155. *Id.*

156. See *International Shoe*, 326 U.S. at 319.

157. See Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. Cin. L. Rev. 385, 392-393 (1998).

158. See *Hahn v. Vermont Law School*, 698 F.2d 48 (1st Cir. 1983).

159. *McGee v. International Life Insurance*, 335 U.S. 220 (1957).

160. *Waterval v. District Court*, 620 P.2d 5 (Colo.1980).

In summary, we can conclude that it takes very little to establish contact to suffice for the purposeful availment requirement; the courts interpret purposeful availment expansively.¹⁶¹

(2) *Arising-Out-of or Relatedness*

To establish specific jurisdiction over a defendant, a U.S. court will further examine if the claim arises out of or is related to the contacts of the defendant with the forum state. In order to find the requirement fulfilled, the courts have applied two general theories of interpretation for the “arise out of or relate to” requirement, the “but for” test, and the substantive relevance-proximate cause test.¹⁶²

According to the “but for”¹⁶³ test, the “arise out of or relate to” requirement is fulfilled when “but for” those activities the cause of action would not have arisen.¹⁶⁴ The immediate cause of the plaintiff’s cause of action is, according to the “but for” test, not the end of the jurisdictional analysis for this requirement.¹⁶⁵ The courts will examine the “cause of the cause” and beyond to establish whether the lawsuit “arises from” the defendant’s activities in the forum.¹⁶⁶

The “but for” test is generally considered the most expansive way to interpret the “arise out of or relate to” requirement.¹⁶⁷ This can be illustrated by the famous case of *Shute v. Carnival Cruise Lines*.¹⁶⁸ In that case, the Ninth Circuit held that the plaintiff’s cause of action for a slip and fall accident aboard the defendant’s cruise ship would not have occurred “but for” the defendant’s advertising for, and sale of, a cruise line ticket in the forum state.¹⁶⁹ Thus, the Ninth Circuit found that the cause of action did arise from the defendant’s activities in the forum state.¹⁷⁰ Despite or maybe because of its expansive interpretation of the “arise out of or relate to” requirement, the “but for” test has gained approval by

161. See Note: *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 Harv. L. Rev. 1821, 1827-1828 (2003) (stating “[I]ndeed, the so-called purposeful availment test often means asking little more than whether the defendant had any contacts with the forum state, beyond those he literally could not control.”).

162. Mark M. Maloney, *Specific Personal Jurisdiction and the “Arise From or Relate to” Requirement . . . What does It Mean?*, 50 Wash & Lee L. Rev. 1265, 1277 (1993).

163. The test is sometimes referred to as the “made possible by” or the “lie in the wake of” test. See *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.3d 1209, 1216 (7th Cir. 1984); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 231 (6th Cir. 1972).

164. See Rose, *supra* n. 145, at 1568.

165. See *Alexander v. Circus Circus Enter., Inc.*, 939 F.2d 847, 853 (9th Cir. 1991).

166. *Id.*

167. See Maloney, *supra* n. 162, at 1277; see also Rose, *supra* n. 145, at 1568-1576 (discussing the problems of the “but for” test generally).

168. 897 F.2d 377, 385 (9th Cir. 1990), *rev’d* on other grounds, 499 U.S. 585 (1991).

169. *Id.* at 386.

170. *Id.*

several circuits. The Ninth, Fifth, and Seventh Circuit have so far applied the test.¹⁷¹

The substantive relevance proximate cause test, on the contrary, employs an interpretation of the requirement at issue, which is stricter. Under this approach, the defendant's contacts must be necessary to the proof of the cause of action, and have substantive relevance to the cause of action.¹⁷² Some courts applied the substantive relevance proximate cause test under the description "proximate cause" test, and reduced it to the proximate cause requirement in tort law.¹⁷³ This test requires that a contact has not only a "but for" relation to the cause of action, but also that the contact is the legal or "proximate" cause of the injury.¹⁷⁴ In addition, the injury must be a foreseeable consequence of the defendant's activities.¹⁷⁵ But, as a contact is the proximate or legal cause of an injury, it is substantively relevant to a cause of action arising from that injury in every case. On the contrary, a contact, which is substantively relevant to the cause of action, may not in every case be a proximate or legal cause of an injury, especially with regard to the "foreseeability" requirement.¹⁷⁶ As there seem to be no differences in the results, most courts do not distinguish between the two tests.

The First Circuit, applying the substantive proximate cause test, decided a case that was factually similar to *Shute v. Carnival Cruise Lines*. In *Pizarro v. Hotels Concorde International*,¹⁷⁷ the plaintiff sued Concorde for injuries as a consequence of a negligent action in the defendant's Aruba hotel. The court ruled that these injuries could not "arise from" the defendant's solicitation of reservations in the forum state, and therefore there is no proximate cause of injury.¹⁷⁸ Thus, the defendant's contacts were insufficient.¹⁷⁹

Although proponents of both approaches could claim that theirs is most likely to be adopted by the U.S. Supreme Court,¹⁸⁰ there is no clear decision on the "arise-out of or relate to" requirement as of yet.

171. *Id.*; *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209 (7th Cir. 1984).

172. *See Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986).

173. *See Maloney, supra* n. 162, at 1282.

174. *See Pizarro v. Hotels Concorde Int'l.*, 907 F.2d 1256 (1st Cir. 1990).

175. *Id.* at 1259.

176. *Cf. Maloney, supra* n. 162, at 1283 (stating that the test are essentially the same).

177. *See Pizarro*, 907 F.2d at 1256.

178. *Id.* at 1259-1260.

179. *Id.*

180. The proponents of the substantive-proximate cause test state, that the Supreme Court's language in *Rush v. Savchuk* supports their approach, whereas the proponents of the "but for" test state that Justice Brennan's opinion in *Helicopteros* strongly supports a but for test or an even more expansive approach. *See generally, Maloney, supra* n. 162, at 1280-1286.

(3) Reasonableness

After a U.S. court has found the first two requirements of the minimum contacts to be satisfied, the third prong, the so-called reasonableness prong, requires the analysis of several different factors.¹⁸¹ The requirement of reasonableness grew out of the *International Shoe* statement that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”¹⁸² Thus, the fundamental question under the Due Process Clause still questions the fairness of forcing the defendant to litigate in a particularly distant forum.

In *Burger King and World-Wide Volkswagen*, the Supreme Court mentioned the factors, which should be taken into account by the court applying the balancing test:

- (1) the burdens on the defendant of a suit within the forum;
- (2) the forum state’s interest in adjudicating the dispute;
- (3) the plaintiff’s interest in obtaining convenient and effective relief;
- (4) the interstate judicial system’s interest in the most efficient resolution of controversies; and
- (5) the shared interests of the several states in furthering fundamental substantive social policies.¹⁸³

Furthermore, the Supreme Court in *Burger King* stated that the reasonableness test could establish jurisdiction “upon a lesser showing of minimum contacts than would otherwise be required” under the purposeful availment requirement.¹⁸⁴ In addition to *Burger King and World-Wide Volkswagen*, the Supreme Court refined the requirements of the reasonableness prong in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*.¹⁸⁵ The Supreme Court found personal jurisdiction unreasonable, because the defendant would need to travel a long distance and submit to the burden of a foreign legal system.¹⁸⁶ Although the Supreme Court has highlighted the factors which should be considered in the reasonableness test, the reasonableness test has been widely criticized because “it has not produced much clarity.”¹⁸⁷ Until today, it had not become clear when a court using the balancing test would find

181. See *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 113 (1986). Some lower courts claim that in federal cases based on the Due Process Clause of the Fifth Amendment no reasonableness test should be made. See *Corby*, *supra* n. 110, at 185.

182. See *World-Wide Volkswagen v. Woodson*, 444 U.S. at 292.

183. *Burger King*, 471 U.S. at 476-477; *World-Wide Volkswagen*, 444 U.S. at 292.

184. *Burger King*, 471 U.S. at 477.

185. 480 U.S. 102 (1986).

186. *Id.* at 114.

187. See McDougal et al., *supra* n. 92, at 67; see also Robert C. Casad, *Symposium - Federal Conflicts of Law: Article: Personal Jurisdiction in Federal Question Cases*, 70 Tex. L. Rev. 1589, 1593 (1992).

the litigation for the defendant fair or unfair and decide if the reasonableness prong requirement is met.

bbb) Specific Jurisdiction: Special Situations

(1) *Intentional Tort Cases: The Effects-Test*

Besides the “ordinary” minimum contacts test, the U.S. Supreme Court has applied two additional approaches to establish jurisdiction over a defendant. The so-called “effects test” for intentional tort cases has been introduced by the Supreme Court in *Calder v. Jones*¹⁸⁸ and *Keeton v. Hustler*.¹⁸⁹ The court constituted the following requirements to establish jurisdiction:

1. intentional tortious act;
2. aimed at the forum state; and
3. harm felt in the forum state, which the defendant knows is likely to be suffered.¹⁹⁰

In doing so, the Supreme Court approved the “forum effects” test of the Second Restatement of Conflicts of Law.¹⁹¹ The Supreme Court did not, however, apply the two or three-prong test established in *Burger King* and *World-Wide Volkswagen*,¹⁹² although essential requirements of personal jurisdiction were cited from these cases.¹⁹³ In this way, the Supreme Court could point out that their decision was consistent with the *International Shoe* standard. The requirements of the minimum contacts test would have been easily met anyway.¹⁹⁴ Thus, the “effects test” should not be seen as an exception from the requirements of minimum contacts, as stated by the U.S. Supreme Court in *International Shoe*, but as a different way to fulfill these requirements in addition to the so-called “minimum contacts” or “purposeful availment” two or three-prong test.¹⁹⁵ The “effects test” has been widely accepted and appreciated in tort litigation. *Calder* has been quoted as the authority for establishing jurisdiction in an enormous number of cases involving a defendant outside the forum state intentional causing harm in the forum state.¹⁹⁶ Furthermore, *Calder* has been cited with approval in trademark and cop-

188. 465 U.S. 783, 787 (1984).

189. *Id.*

190. See *Calder*, 465 U.S. 783 at 789-790; see also Richard Bales & Suzanne Van Wert, *Internet Web Site Jurisdiction*, 20 J. Marshall J. Computer & Info. L. 21, 26 (2001); Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L.J. 1345, 1371 (2001).

191. See *Calder*, 465 U.S. 783 at 787 n. 6.

192. McDougal et al., *supra* n. 92, at 108.

193. See *Calder*, 465 U.S. at 788-790.

194. McDougal et al., *supra* n. 92, at 108.

195. See *supra* Part C. I. 1. b) bb) aaa) (1).

196. See e.g., *Guidry v. United States Tobacco Co.*, 188 F.3d 619 (5th Cir. 1999)

right infringement,¹⁹⁷ antitrust,¹⁹⁸ and unfair competition¹⁹⁹ cases.

(2) *Product Liability: The Stream of Commerce Theory*

Another approach by the U.S. Supreme Court deals with the question of when the “purposeful availment” requirement is fulfilled in product liability cases. The Illinois Supreme Court first established in *Gray v. American Radiator*²⁰⁰ that a manufacturer who puts a product into the stream of commerce, which is sold in the forum state by a third party, is subject to the jurisdiction of that state on the ground of purposeful availment, insofar as the product’s sale in the forum state was foreseeable.²⁰¹ In *World-Wide Volkswagen*, the U.S. Supreme Court stated, on the contrary, that the mere foreseeability that a product could be brought in the forum state is not sufficient to establish purposeful availment.²⁰² The court pointed out that the connection to the forum state should be of such quality “that he should reasonably anticipate being haled into court here.”²⁰³ The court further explained that there must be efforts by the manufacturer or distributor to serve the market for its product in other states to satisfy the purposeful availment requirement of the minimum contacts test.²⁰⁴

In the latest decision dealing with the stream of commerce approach, *Asahi*, the U.S. Supreme Court split on the exact meaning of the stream of commerce approach.²⁰⁵ *Asahi Metal Industry Co., Ltd.*, a Japanese corporation, was the manufacturer of a valve which was sold to a Taiwanese corporation, *Cheng Shin Rubber Industrial Co. Ltd.*²⁰⁶ *Cheng Shin* used the valve to manufacture a motorcycle tire.²⁰⁷ One of these tires exploded in a motorcycle accident in California and *Cheng Shin* was sued in a product liability action by the driver.²⁰⁸ *Cheng Shin* filed a cross-complaint for indemnity against *Asahi*, while the driver had since settled with *Cheng Shin*.²⁰⁹ *Asahi* filed a *certiorari* stating that there were no minimum contacts between *Asahi* and California, the forum

197. See e.g., *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384 (8th Cir. 1991); *Blue Compass Corp. v. Polish Masters of Am.*, 777 F. Supp. 4 (D. Vt. 1991).

198. See e.g., *VDI Techs. v. Price*, 781 F. Supp. 85 (D.N.H. 1991)

199. *Id.*

200. 22 Ill. 2d 432 (1961).

201. *Id.* at 442.

202. See Joseph S. Burns & Richard A. Bales, *Personal Jurisdiction and the Web*, 53 Me. L. Rev. 29, 35-36 (2001).

203. See *World-Wide Volkswagen*, 444 U.S. at 297.

204. *Id.* at 297-298.

205. 480 U.S. 102 (1986).

206. See *Asahi*, 480 U.S. at 102.

207. *Id.*

208. *Id.* at 106.

209. *Id.*

state.²¹⁰ Although the Supreme Court agreed that it would be unreasonable for Asahi to litigate in California because the defendant would need to travel a long distance and submit to the burden of a foreign legal system,²¹¹ the Court disagreed on the question of whether the purposeful availment requirement was met.²¹²

Justice Brennan, joined by three justices, stated that under the stream of commerce theory of *World-Wide Volkswagen*, foreseeability and intent are established through the placement of products into the stream of commerce and therefore the purposeful availment required would be satisfied.²¹³ Brennan emphasized that “the stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distribution to retail sale.”²¹⁴

Justice O’Connor, also joined by three justices, found that, on the contrary, the mere “placement of a product into the stream of commerce” will not support the finding of minimum contacts; rather an additional act is necessary.²¹⁵ Justice O’Connor, interpreting *World-Wide Volkswagen*, pointed out that there must be evidence of a defendant’s intent to direct his activities to the forum state.²¹⁶ She stated that “a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.”²¹⁷

Justice Stevens wrote a third opinion, arguing that the question should not be discussed because the reasonableness requirement was clearly not satisfied.²¹⁸ In addition, he stated that in his opinion the minimum contacts requirement would be satisfied by the fact that Asahi has sold a large number of its product worldwide.²¹⁹ Since the Supreme Court’s decision in *Asahi*, the court has not clarified the requirements of the stream-of-commerce approach.²²⁰

210. *Id.*

211. *Id.* at 114.

212. *Asahi*, 480 U.S. at 102.

213. *Id.* at 117.

214. *Id.*

215. *Id.* at 112. This approach is often referred to as “stream-of-commerce-plus.”

216. *Id.*

217. *Asahi*, 480 U.S. at 112..

218. *Id.* at 121-122.

219. *Id.* at 122.

220. See Christine G. Heslinga, Note, *The Founders Go On-Line: An Original Intent Solution to a Jurisdictional Dilemma*, 9 Wm. & Mary Bill Rts. J. 247, 256 (2000) (stating “. . . the most confusing decision. . .”).

ccc) *General Jurisdiction*

When a court is exercising general jurisdiction over a defendant, the requirements are slightly different than compared to personal specific jurisdiction.

(1) *Minimum Contacts / Purposeful Availment*

To fulfill the purposeful availment requirement for general jurisdiction, equivalent to the test for specific jurisdiction, the court has to find “systematic” and “continuous” contacts.²²¹ The required contacts must show a higher level of activity than is required to establish specific jurisdiction.²²² As the U.S. Supreme Court has so far only decided two general jurisdiction cases, the legal framework lacks clarity.²²³ One example of a contact that satisfies the requirement would be a defendant maintaining an office in the forum state.²²⁴ Contrary to specific jurisdiction, no connection between the contacts of the defendant and the lawsuit is needed; rather, the defendant can be sued for any kind of case in the forum state where “systematic” and “continuous” contacts exist.²²⁵

(2) *Reasonableness*

After a court has found that the minimum contacts requirement for general jurisdiction has been fulfilled, it has to examine the reasonableness requirement as no arising-out-of or relatedness requirement in general jurisdiction exists. Until today, however, the Supreme Court has not stated if the assertion of general jurisdiction requires the fulfillment of the reasonableness prong as described in *International Shoe* and *Burger King*.²²⁶ Due to the fact that a defendant, who has systematic and continuous contacts with the forum state, is unlikely to experience the litigation in the forum state as burdensome, it seems improbable that there would be any doubt about the litigation being unreasonable for the defendant.²²⁷ One can imagine certain circumstances where it might be unfair for the defendant to litigate in this forum. As a consequence of the lack of certainty in the Supreme Court decisions, though, some courts have applied the reasonableness test to the general jurisdiction

221. See *Helicopteros*, 466 U.S. at 408.

222. See McDougal et al., *supra* n. 92, at 58-59; Teply, *supra* n. 95, at 224.

223. Unfortunately, the Supreme Court has not given a clear indication of when the systematic and continuous contacts test will be deemed satisfied or not. See McDougal et al., *supra* n. 92, at 58.

224. See Casad & Richman, *supra* n. 114, at 140.

225. See *Helicopteros*, 466 U.S. at 415, n. 9.

226. See Teply, *supra* n. 95, at 243.

227. *Id.*

analysis.²²⁸

bb) Jurisdiction in Personam Based on Other Concepts

aaa) Presence / Service of Process

After I have displayed the jurisdiction in personam based on contacts, I will examine if jurisdiction based on other rather traditional concepts are still applicable today as well.²²⁹ One may think that jurisdiction in personam based on presence in the forum would have been abolished by the U.S. Supreme Court decision in *International Shoe*. The Supreme Court decision in *Shaffer v. Heitner*²³⁰ seemed to support this presupposition.²³¹ The Court pointed out that all assertions of jurisdiction must satisfy the minimum contacts requirements of *International Shoe*.²³² This led to growing confusion about the status of the other traditional concepts of jurisdiction.²³³

In *Burnham v. Superior Court of California*,²³⁴ the Court finally clarified its position on these traditional bases of jurisdiction, stating that service of process while the defendant is present in the forum state is still a valid basis for asserting jurisdiction.²³⁵ Although the Supreme Court could not agree on a rationale for its ruling, it made clear that the so-called transient jurisdiction can still be exercised.²³⁶ Justice Scalia wrote that personal jurisdiction based on service of process in the forum state "is one of the continuing traditions of our legal system."²³⁷

Justice Brennan wrote in his concurring opinion that service of process in the forum is usually sufficient to establish personal jurisdiction.²³⁸ On the other hand, he pointed out that all assertions of jurisdiction must undergo a minimum contacts analysis.²³⁹

Although it is not clear what the exact requirements are, it can be concluded that the defendant's presence in the forum and service of process in the forum state is still a viable basis for jurisdiction, even if the

228. See, e.g., *Metropolitan Life Insurance Co. v. Robertson-CECO Corp.*, 84 F.3d 560 (2d Cir.), cert. denied, 519 U.S. 1006 (1996); *United Brotherhood of Carpenters & Joiners of American*, AFL-CIO, 688 So.2d 246 (Ala.), cert. denied, 521 U.S. 1118 (1997).

229. For an overview of the application of the traditional concepts of jurisdiction before *International Shoe*, see *supra* nn. 112-129 and accompanying text.

230. 433 U.S. 186 (1977).

231. See Teply, *supra* n. 95, at 204-205.

232. See *Shaffer*, 433 U.S. at 218.

233. See Teply, *supra* n. 95, at 204-205; see also McDougal et al., *supra* n. 92, at 51-52.

234. 495 U.S. 604 (1990).

235. *Id.*

236. *Id.* at 619.

237. *Id.*

238. *Id.* at 628-629.

239. *Id.* at 630-632.

presence is only transient.²⁴⁰

bbb) Domicile

Another traditional basis for jurisdiction is domicile.²⁴¹ The concept of domicile was introduced by the Supreme Court in *Milliken v. Meyer*.²⁴² Domicile is defined by two factors, the intent of an individual to make a particular location a permanent home, and facts indicating that the party had physically located there.²⁴³ A defendant can always be sued in the forum state where his domicile is located, even if he is absent and service of process has to be exercised in another state.²⁴⁴ Although some commentators state that the concept of domicile is a paradigmatic example of general jurisdiction,²⁴⁵ it is at least clear that domicile is sufficient to establish jurisdiction over a defendant.²⁴⁶

ccc) Consent

The third traditional concept for establishing personal jurisdiction over a defendant is consent.²⁴⁷ A defendant can consent to litigation in the forum state in several different ways; in *Pennoyer*, for example, the appearance before the court was interpreted as consent to litigation.²⁴⁸ A more common form of consent to the jurisdiction of a court is a so-called "forum selection" or "choice of forum" clause by the parties to a transaction.²⁴⁹ In *M/S Bremen and Unterweser Reederei v. Zapata Off-Shore Co.*,²⁵⁰ the U.S. Supreme Court upheld such a choice of forum clause. Generally, a U.S. court will enforce such clauses "if the agreement was freely negotiated, unaffected by fraud, undue influence or overweening bargaining power and generally not found unreasonable."²⁵¹ Although in adhesion contracts involving consumers, the consent is often fictional as consumers tend not to read the terms or simply do not understand them,

240. Friedenthal et al., *supra* n. 96, at 108; McDougal et al., *supra* n. 92, at 55.

241. See Silberman, *supra* n. 91, at 85-86.

242. 311 U.S. 457 (1940).

243. Friedenthal et al., *supra* n. 96, at 108.

244. See Silberman, *supra* n. 91, at 85-86.

245. See Tunick, *supra* n. 151, at 1211. See also Casad, *supra* n. 114, at 129 (discussing, if general jurisdiction based on "domicile" has to pass the minimum contacts test).

246. See Casad, *supra* n. 114, at 128; Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 723, 728-733 (1988).

247. See Casad, *supra* n. 114, at 130; *Restatement (Second) of Conflict of Laws* § 32 cmts. a, d, e, f (1971) (discussing the different types of consent).

248. See Silberman, *supra* n. 91, at 86.

249. See Casad, *supra* n. 114, at 131; see also *id.* at 47 (explaining the differences between a prorogation and a derogation clause).

250. 407 U.S. 1 (1972).

251. See Casad, *supra* n. 114, at 50, 52-53.

U.S. courts have upheld even such clauses.²⁵²

The question of whether consent is still an adequate basis for jurisdiction under modern jurisdictional theory is as yet unsolved, as it is with regard to the other traditional concepts of jurisdiction.²⁵³

As I have so far shown for jurisdiction in personam, although there are certain guidelines provided by the U.S. Supreme Court, several issues within the field of jurisdiction remain unsolved or lack certainty and foreseeability especially in determining what exactly is necessary to fulfill the requirements. The next step is to illustrate the current status of in rem and quasi in rem jurisdiction.

c) *Jurisdiction in Rem and Jurisdiction Quasi-in-Rem Today*

Jurisdiction in rem and jurisdiction quasi in rem were strongly affected by *Shaffer* and *Burnham* as well. To understand the evolution of in rem and quasi in rem jurisdiction, both types of jurisdiction must be clarified further.²⁵⁴ Jurisdiction quasi in rem can be divided into two types. The first type settles claims related to the property on which jurisdiction is based (quasi-in-rem type I); the second type seeks to obtain a personal judgment on a claim unrelated to the property on which the jurisdiction is based (quasi-in-rem type II).²⁵⁵ The recovery in the latter type of quasi in rem action is limited to the value of the property.²⁵⁶ The Supreme Court in *Shaffer* stated that the jurisdiction in rem is not jurisdiction over a thing but rather jurisdiction over the interests of the persons in the thing.²⁵⁷ Thus, the Supreme Court in *Shaffer* pointed out that the standard to adjudicate the interests of persons is the minimum contacts test.²⁵⁸ Furthermore, the Supreme Court pointed out that in rem jurisdiction and quasi in rem type I jurisdiction should continue to be a proper basis for jurisdiction.²⁵⁹ Quasi in rem type II jurisdiction, on the

252. See e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Nat'l. Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964); see *Caspi v. Microsoft Network*, 732 A.2d 528 (N.J. 1999) (applying the same standards to cyber contracts); see also *Brower v. Gateway 2000, Inc.*, 246 A.D.2d. 246.

253. See *supra* nn. 234-240 and accompanying text. Cf. *Casad*, *supra* n. 114, at 130 (saying that if the Supreme Court in *Burnham* accepted transient jurisdiction, it has to accept the other traditional concepts of jurisdiction as well).

254. For an explanation of the distinction between jurisdiction in rem and quasi in rem, see *infra* nn. 254-259 and accompanying text.

255. See Silberman, *supra* n. 91, at 81-82; *Casad*, *supra* n. 114, at 180-181.

256. See Silberman, *supra* n. 91, at 82.

257. *Id.*

258. See *Shaffer*, 433 U.S. at 207.

259. See *Casad*, *supra* n.114, at 189 (quoting *Shaffer*, 433 U.S. at 207). The Supreme Court possibly relied on the unspoken assumption that in these cases the property itself is the subject of the dispute, so that the minimum contacts requirement will be fulfilled in any case. *Id.*

contrary, can only be a valid basis for jurisdiction over the defendant when the minimum contacts test is met,²⁶⁰ which seems unlikely in most cases. Summarizing, we can conclude that jurisdiction in rem and quasi in rem within restrictions remain possible basis for jurisdiction.

After this demonstration of the status of personal jurisdiction in the United States today, we see the degree of ambiguity as to which cases would fulfill the minimum contacts requirement to establish jurisdiction over the defendant as it remains ambiguous if the chosen basis for jurisdiction will be accepted by higher courts on appeal because the Supreme Court has so far not established any clear, distinct rules on which to base valid jurisdictional decisions. Unambiguous guidelines when the different requirements of the various tests are fulfilled are missing, as is agreement on the application of the rules set by the Supreme Court.

As a next step, I will give an overview of the application of jurisdictional rules in Internet litigation as well as new proposed approaches, and then show how to apply these rules to the hypotheticals shown in the research objective.

2. *Application of the Requirements to the Internet and New Approaches to Solve Jurisdictional Problems With Regard to the Internet*

In this section, I will analyze the current approaches used by U.S. courts to deal with the application of the requirements of jurisdiction in Internet cases and furthermore display new approaches suggested by legal scholars in recent years.

a) *Application of the Traditional Requirements by U.S. Courts*

First I will examine how U.S. courts apply the traditional legal tools to establish jurisdiction in Internet cases.

aa) *Applying the Minimum Contacts Test*

The American case law concerning Internet jurisdiction is already past its infancy. Since the decisions in *Inset Systems, Inc. v. Instruction Set, Inc.*²⁶¹ and *Compuserve, Inc. v. Patterson*,²⁶² the American courts have accepted that contacts via the Internet can establish minimum contacts.²⁶³ The main question concerned the issue of whether just availability of a Web site on the Internet is enough to be a “minimum contact” with every state or whether additional contacts are necessary.

260. *Id.* (discussing possible exceptions from that rule and showing that it is unclear, what “minimum contacts may mean in this context.”).

261. 937 F. Supp. 161, 163 (D. Conn. 1996).

262. 89 F.3d 1257 (6th Cir. 1996).

263. *See Inset*, 937 F. Supp. at 165; *see also Compuserve*, 89 F.3d at 1257.

In *Inset*, the court stated that the mere availability of the defendant's Web site was enough to subject the defendant to jurisdiction in the forum state.²⁶⁴ The only contact of the defendant with the forum state was the Web site.²⁶⁵ Other courts decided that the availability of a Web site was not sufficient to support jurisdiction over the defendant, but rather that "something more" was required.²⁶⁶ Although it is clear today that contacts on the Internet, including defamation or contract litigation, are sufficient to satisfy the minimum contacts, as well as contacts in the world of brick and mortar, no clear framework defining when minimum contacts on the Internet are sufficient to establish jurisdiction has been established.

bb) The "Zippo" Sliding Scale

In early 1997, the Pennsylvania district court decision in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*²⁶⁷ established a new approach to evaluating Internet contacts. In examining the Internet case law, the court pointed out that the nature and quality of commercial activity on the Internet are the crucial determinants in assessing jurisdiction over the defendant.²⁶⁸ The *Zippo* court employed a "sliding scale" to evaluate Internet contacts.²⁶⁹

On the one end of the spectrum are cases where a defendant clearly conducts business over the Internet, using a Web site considered to be active.²⁷⁰ In these cases, jurisdiction over the defendant is always acceptable. On the opposite end of the scale are cases where the defendant has done nothing more than post information on his Web site. Such a Web site is deemed passive and, according to the *Zippo* scale, establishes no ground for exercising jurisdiction in a distant forum state.²⁷¹ In the middle of the *Zippo* sliding scale are the interactive Web sites, which are neither passive nor active, but which allow the user to exchange information with the host computer.²⁷² As far as interactive Web sites are concerned, the ruling court must examine the level of interactivity and commercial nature in order to decide if jurisdiction is proper.²⁷³ The

264. See *Inset*, 937 F. Supp. at 165.

265. *Id.* at 164-165.

266. For an excellent overview of case law regarding this topic, see Heslinga, *supra* n. 220, at Appendix A; Richard Philip Rollo, Casenote, *The Morass of Internet Personal Jurisdiction: It Is Time for a Paradigm Shift*, 51 Fla. L. Rev. 667, 678-679 nn. 126,127.

267. 952 F. Supp. 1119 (W.D. Pa. 1997).

268. *Id.* at 1127.

269. *Id.* at 1124.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Zippo Manufacturing Co.*, 952 F. Supp. at 1124.

Zippo sliding scale has been widely accepted and cited by U.S. courts.²⁷⁴

cc) *Shifting Away From the Sliding Scale*

The *Zippo* decision, although almost a nationwide standard after its publication, was widely criticized.²⁷⁵ Critics say that nearly all Web sites are “interactive” Web sites according to the *Zippo* scale, and that the scale is therefore of little or no help.²⁷⁶ In addition, they say that the outcome under *Zippo* is unpredictable; consequently, little progress, in comparison to normal minimum contacts analysis, has been made.²⁷⁷

As a result of this criticism, the U.S. courts began to consider other factors such as the effects of online conduct or other facts to find out if the defendant’s conduct was “targeted” at the forum state.²⁷⁸ Furthermore, some courts now state that there is no need for a special Internet-focused test; some have abandoned the *Zippo* test on other grounds.²⁷⁹ Due to the fact that the problem of whether or not a court employs the *Zippo* scale or another analysis has not yet been settled,²⁸⁰ any foreseeable outcome of a court decision is inconsistent.

dd) *The Effects Test*

Another test to establish jurisdiction over the defendant that U.S. courts have employed in Internet-related cases is the effects doctrine.²⁸¹ In *Panavision International, L.P. v. Toepfen*,²⁸² *Nissan Motor Co. v. Nissan Computer Corp.*,²⁸³ and *Blakey v. Continental Airlines, Inc.*,²⁸⁴ the courts used and still use this test to establish jurisdiction over the defendant in online defamation cases such as *Blakey*, as well as in cases such as *Nissan* and *Panavision* with regards to intellectual property (e.g.

274. Geist, *supra* n. 190, at 1348; Tricia Leigh Gray, *Minimum Contacts in Cyberspace: The Classic Jurisdiction Analysis in a New Setting*, 1 J. High Tech. L. 85, 98-99 (2002).

275. See e.g., Bales, *supra* n. 190, at 49-51, 55; Susan Nauss Exon, *A New Shoe is Needed to Walk Through Cyberspace Jurisdiction*, 11 Alb. L.J. Sci. & Tech. 1, 54-55 (2000).

276. See Geist, *supra* n. 190, at 1378-1384; see also Bales, *supra* n. 190, at 32; Todd Leitstein, Comment: *A Solution for Personal Jurisdiction on the Internet*, 59 La. L. Rev. 565, 582 (1999).

277. See Geist, *supra* n. 190, at 1374-1381; Sonal N. Mehta, III, *Cyberlaw: A. Internet Jurisdiction: 1. Domestic: Pavlovich v. Superior Court of Santa Clara County*, 17 Berkeley Tech. L.J. 337, 345-348 (2002).

278. See Geist, *supra* n. 190, at 1374-1381; see also Bales, *supra* n. 190, at 39.

279. See Mehta, *supra* n. 277, at 342-345.

280. Although the *Zippo* sliding scale has been widely criticized and partly abandoned it is still applied. See *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 142 F. Supp. 2d 703 (2003) (applying the *Zippo* scale).

281. See *supra* nn. 188-199 and accompanying text.

282. 141 F.3d 1316 (9th Cir. 1998).

283. 89 F. Supp. 2d 1154 (C.D. Cal. 2000).

284. 751 A.2d 538 (N.J. 2000).

trademark infringement) claims.²⁸⁵

As is evident by list of the highlighted approaches that U.S. courts are most likely to use when it comes to the question of jurisdiction in Internet litigation, it becomes clear that “targeting” or similar approaches are the trend, even while a court’s rationale for its decision is unpredictable

b) Proposed Solutions by the Legal Profession

In addition to the approaches used by U.S. courts to solve the problem of Internet jurisdiction, the same problem has been widely discussed by the legal profession itself. This section will briefly point out the proposed solutions.

aa) Slight Modifications of the Minimum Contacts Test

Several commentators have proposed minor adaptations to the “regular” minimum contacts test in order to adapt it to the challenges that Internet regulation presents to traditional jurisdiction law. Some commentators think that the analysis should be shifted to the reasonableness inquiry.²⁸⁶ They state that the reasonableness prong of the test should undergo detailed scrutiny to prevent unfair assertions of personal jurisdiction.²⁸⁷ With this approach, any Internet contact, including passive Web sites, would satisfy the minimum contacts requirement; the main inquiry will concentrate on whether the forum is fundamentally unfair.²⁸⁸

Another commentator suggests a stricter interpretation of relatedness, the second prong of the minimum contacts test.²⁸⁹ A shift to using the proximate cause approach²⁹⁰ in all Internet cases should, according to this comment, solve the problems in asserting Internet jurisdiction.²⁹¹

285. This does not apply to other intellectual property claims, which are not technically torts.

286. Leonard Klingbaum, Casenote, *Bensuasan Restaurant Corp. v. King: An Erroneous Application of Personal Jurisdiction Law to Internet-based Contacts (Using the Reasonableness Test to Ensure Fair Assertions of Personal Jurisdiction Based on Cyberspace Contacts)*, 19 Pace L. Rev. 149, 188-189 (1998); Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C.L. Rev. 925, 940-941 (1998).

287. See Leonard Klingbaum *supra* n. 286, at 193; see also Stravitz, *supra* n. 286, at 940.

288. See Stravitz, *supra* n. 286, at 940.

289. See Note, *supra* n. 161, at 1843-1844.

290. See *supra* nn. 172-179 and accompanying text.

291. See Note, *supra* n. 161, at 1844.

bb) Modified Effects Tests

Alongside Neikirk, who suggests the use of the effect principle in non-commercial online speech cases,²⁹² Leitstein proposes modifications of the sliding scale as well as the effects doctrine.²⁹³ Leitstein argues that the “passive” classification within the *Zippo* sliding scale should be abandoned and replaced with a “non-commercial” classification.²⁹⁴ Thus, commercial activity on the Internet would most likely result in jurisdiction.²⁹⁵ When it comes to intentional torts, Leitstein suggests a modification of the effects doctrine.²⁹⁶ The “new” effects test would have the following requirements:

- (1) the defendant has committed an intentional act
- (2) that causes significant harm to an individual that
- (3) the defendant knows or should know will be harmed by the activity,
- (4) thereby making suit on the harmful result of that conduct foreseeable.²⁹⁷

Leitstein claims that his approach will establish consistency when asserting personal jurisdiction in Internet cases.²⁹⁸

cc) Three-Level-Hierarchy

Burns and Bales propose another procedure to determine if personal jurisdiction in Internet cases is proper.²⁹⁹ First, they distinguish between a spider-web approach, meaning that jurisdiction everywhere on the Internet is proper, and a highway approach, meaning that jurisdiction is proper only on one defined spot.³⁰⁰ They determine that a highway approach is preferable for practical and legal reasons.³⁰¹ Second, Burns and Bales divide Web contacts into three different levels.³⁰²

The first level, called passive browsing, is not sufficient to establish minimum contact.³⁰³ The second level, purchasing, should establish a rebuttable presumption that personal jurisdiction is proper.³⁰⁴ The defendant, usually the Web site owner/seller, can rebut the presumption showing that he neither intended nor expected that persons from the fo-

292. See Neikirk, *supra* n. 104, at 382-386.

293. See Leitstein, *supra* n. 276, at 585.

294. *Id.* at 584.

295. *Id.*

296. *Id.* at 567.

297. *Id.*

298. *Id.*

299. See Burns, *supra* n. 202, at 46-50.

300. *Id.* at 47.

301. *Id.*

302. *Id.* at 47-50.

303. *Id.* at 48.

304. *Id.* at 48-49.

rum state would make a purchase on his site.³⁰⁵ In addition, the defendant must show that he did not know and could not reasonably be expected to know that purchases were being made from the forum state.³⁰⁶ The third level, large-scale financial transactions, should establish personal jurisdiction over the defendant per se.³⁰⁷ According to Burns and Bales, this is justified because the interactivity between the user and the Web site owner is significantly high in such cases; furthermore, enterprises such as large-scale investment firms and banks usually target their business activities nationwide.³⁰⁸

dd) Stream-of-Commerce-Plus

Another popular approach in the legal profession is the "stream-of-commerce-plus" theory.³⁰⁹ Basically, the approach adopts Justice O'Connor's reasoning in the *Asahi* case.³¹⁰ This approach draws an analogy between the Internet and the stream of commerce of tangible products. It points out that the mere publication of a Web site is akin to the mere placement of a product into the stream of commerce, and is not a sufficient basis for jurisdiction.³¹¹ Rather, they conclude that, analogous to Justice O'Connor's reasoning in *Asahi*, additional conduct directed toward the forum state is necessary to establish jurisdiction.³¹² Examples in *Asahi* of such conduct include: facts indicating an intent or purpose to serve the market in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state.³¹³

305. See Burns, *supra* n. 202, at 48-49.

306. *Id.*

307. *Id.* at 49-50.

308. *Id.*

309. Gwenn M. Kalow, Note, *From the Internet to Court: Exercising Jurisdiction Over World Wide Web Communications*, 65 Fordham L. Rev. 2241, 2269 (1997); Michele N. Breen, Comment, *Personal Jurisdiction and the Internet: "Shoehorning" Cyberspace Into International Shoe*, 8 SETON HALL CONST. L.J. 763, 811-813 (1998); Sonia K. Gupta, Comment, *Bulletin Board Systems and Personal Jurisdiction: What Comports with Fair Play and Substantial Justice?*, 1996 U. Chi. Legal F. 519, 533 (referring to Bulletin Board Systems, a predecessor of the Internet); David L. Stott, Comment, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web site*, 15 John Marshall J. Computer & Info. L. 819, 853 (1997).

310. See Stott, *supra* n. 309, at 853; Gupta, *supra* n. 309, at 533-534; Kalow, *supra* n. 309, at 2269-2271.

311. See Stott, *supra* n. 309, at 854; Kalow, *supra* n.309, at 2269-2271; Breen, *supra* n. 309, at 812.

312. See Stott, *supra* n. 309, at 854; Gupta, *supra* n. 309, at 533-534; Breen, *supra* n. 309, at 812.

313. See Stott, *supra* n. 309, at 841.

ee) Targeting

A more recent approach to jurisdiction in Internet litigation is the “targeting” test, first introduced by Geist.³¹⁴ After analyzing case law and recent developments in the discussion regarding Internet jurisdiction, Geist points out that the crucial issue is whether or not a Web site owner targets a specific forum state.³¹⁵ Furthermore, Geist emphasizes that forum selection clauses as well as geo location software should be included in the inquiry of personal jurisdiction.³¹⁶ Finally, he suggests the following criteria to assess whether a Web site has targeted a particular jurisdiction:

1. contractual agreements;
2. technology; and
3. actual or implied knowledge.³¹⁷

The first step of Geist’s analysis takes into account whether the concerned parties have employed a jurisdictional clause to establish a governing jurisdiction for any occurring litigation.³¹⁸ Geist emphasizes that U.S. courts have found such clauses enforceable as long as the user had to exercise his agreement by clicking on an “I agree” icon.³¹⁹ U.S. courts have also found jurisdictional clauses with consumers enforceable, although they usually exercise a more detailed scrutiny of its validity in these cases.³²⁰ If such a clause exists and meets the above-mentioned criteria of enforceability, it is clear which forum becomes the proper place to sue.

The second criteria in Geist’s test, technology, includes all types of technology, such as geo-location software, user self-identification, or even offline identification (e.g. through credit card data), which a Web site uses to either target or avoid specific jurisdictions.³²¹

The third and last targeting factor considers the knowledge the parties have or should have about the geographic location of their online behavior.³²² According to Geist, the implied knowledge factor will address the tort cases, which usually follow from the *Calder* decision.³²³ The analysis combines all three factors to determine whether the party

314. See Geist, *supra* n. 190, at 1384-1405.

315. *Id.* at 1380-1381.

316. *Id.* at 1385-1402.

317. *Id.* at 1385-1404.

318. *Id.* at 1386-1392.

319. These agreements are commonly called “shrink wrap” agreements. *Id.* Geist points out that cases in which no positive assent is obtained are not likely to be declared enforceable. *Id.* at 1388.

320. *Id.* at 1390.

321. *Id.* at 1393-1401.

322. *Id.* at 1402-1403.

323. *Id.*

knowingly targeted the specific jurisdiction, and therefore whether personal jurisdiction over the defendant can be established.³²⁴

Bales and Van Wert propose a similar approach to personal jurisdiction in Internet cases.³²⁵ First, they adopt Geist's test as a framework for their own solution.³²⁶ The first step of their inquiry, agreement to forum, is identical with Geist's first criterion.³²⁷ The second step relies on the modified effects test by Leitstein,³²⁸ but as one out of three analysis tools rather than as the determining factor of assertion of jurisdiction.³²⁹ The last step considers geolocation software. Bales and Van Wert state that the court should assume that the defendant (Web site owner) uses the most basic technology to determine the location of a specific user, such as a credit card billing address.³³⁰ If an operator fails to use this technology, the court should assume "that operator was willfully blind about the geographical location of users accessing that site and that the operator purposefully availed itself of the rights and privileges of doing business in the forum."³³¹

ff) Miscellaneous

In addition to the above-mentioned proposals to solve the problem of assertion of jurisdiction in Internet cases, Exon suggests the establishment of a register for all Internet users.³³² All users would have to register and select a chosen forum in which to litigate.³³³ Another solution Exon proposes is a "cyberspace" court for all conflicts arising out of Internet behavior.³³⁴

McCarty suggests switching the emphasis back to the "forum notice."³³⁵ Parties using the Internet should display their location; the accessor should submit to a forum by entering electronically.³³⁶ Thus, according to McCarty, the Internet "is reduced to a geographic reality" and courts can use the established personal jurisdiction test.³³⁷

324. *Id.* at 1404.

325. Bales, *supra* n. 190, at 49-55.

326. *Id.* at 50.

327. *Id.* at 50-57.

328. *See* Leitstein, *supra* n. 276, at 585.

329. *See* Bales, *supra* n. 190, at 51.

330. *Id.* at 52-53.

331. *Id.*

332. *See* Exon, *supra* n. 275, at 52.

333. *Id.*

334. *Id.*

335. Darren L. McCarty, Note, *Internet Contacts and Forum Notice: A Formula for Personal Jurisdiction*, 39 *Wm. and Mary L. Rev.* 557, 593-594 (1998).

336. *Id.* at 593.

337. *Id.*

After this short overview we can conclude - that apart from particular approaches – that most solutions require some kind of intentional behavior of the Web site owner toward the forum to expose him to litigation in this forum; we can conclude that a clear trend of a targeting/effect based rationale for asserting jurisdiction in Internet-related cases is established. After I have clarified the terminology used in the United States on several other jurisdictional issues, I will show how these approaches can be applied to the hypothetical introduced in Chapter A.

3. *Other Jurisdictional Issues*

In addition to the fulfillment of the personal jurisdiction requirement, there are several other requirements that must be met in order to exercise judicial authority in the United States, which are usually termed “jurisdictional” requirements.³³⁸ Some of these terms may have another meaning in Europe. Also, the term “jurisdiction” in Europe may include some aspects included under other terms in U.S. law. For this reason, I will briefly explain these terms.

a) *Venue*

The matter of venue determines the specific location where the lawsuit will be conducted.³³⁹ Thus, within a state where personal jurisdiction is established, venue constitutes where a plaintiff can sue.³⁴⁰ Venue is usually defined by statute, e.g. for federal courts 28 U.S.C. §1391.³⁴¹

b) *Service of Process*

Service of process, which means the delivery of a summons to the defendant, must be separated from personal jurisdiction today,³⁴² although it still can establish jurisdiction as in former times.³⁴³ By any definition, though, the terms “service of process” and “personal jurisdiction” should not be used interchangeably today.

4. *Practical Application of the Predominant Approaches*

After I have shown the principles of the law of jurisdiction of the American system, as well as elaborated on the most current approaches to Internet jurisdiction, I will take a close look how these will be employed in deciding the hypothetical cases presented in Chapter A. of this article.

338. Scoles et al., *supra* n. 113, at 318.

339. See Tepley, *supra* n. 95, at 312.

340. See Silberman, *supra* n. 91, at 288-289.

341. *Id.*

342. See *supra* n. 127 and accompanying text.

343. See *supra* nn. 229-240 and accompanying text.

In hypothetical 1, the crucial question for the court to determine would be whether the facts of the case provides sufficient minimum contacts to C's country of residence for C to sue S there. Employing the general jurisdiction approach, C could easily sue S in S's home country. Since there is no other volitional act of S besides his Web site reaching beyond his home country, the question would be more precisely put thus: is the availability of S's Web site in country A enough to assert jurisdiction over S in country A or does C have to sue before a court in country B?

Given that U.S. courts, as well as the legal profession, concentrate more and more on effects-based tests or "targeting" criteria in order to establish jurisdiction over foreign defendants, a court would most likely assert jurisdiction over S in country A if S's Web site provided for the assumption that S wanted to do business in A, and that he targeted A. These criteria could include language, information with regard to A such as shipping prices and delivery estimates for shipping to A, or special offers with regard to consumers from A. Assuming that S's Web site does not explicitly exclude customers from A from offering by using a disclaimer or geolocation software, it is likely that U.S. courts would find jurisdiction in A valid. Assuming these facts, we could conclude that a court in D, a third country, could assert jurisdiction.

We must keep in mind that, although most U.S. courts have switched their emphasis to targeting³ approaches, the variety of approaches is still enormous. Some courts continue to employ a *Zippo* sliding scale, while others refuse to use any Internet-specific approach. Thus, the conclusion comes with the added constraint that it is likely that a court in A using U.S. approaches would assert jurisdiction, but certainty can not be provided. Using the targeting approach, as suggested by Geist, S could easily employ geolocation software or other methods to restrict access and business on his Web site in order to avoid litigating in a distant forum.

Keeping this in mind, we can conclude that, in Modification 1 of hypothetical 1, it is even more likely that a court using U.S. approaches would assert jurisdiction in A as the concept of domicile could be employed to establish jurisdiction in A. As S is the plaintiff in this case, it is likely that S chooses to sue C in B, S's home forum. That a U.S. court will find jurisdiction over C in B hardly seems predictable. A court could view the fact that C ordered from S's Web site as sufficient minimum contact and find the minimum contacts requirement fulfilled; the question would then be if the court found the reasonableness factors fulfilled as well bearing in mind that C is a foreign defendant. As there is not enough case law to make a reliable prediction of the outcome, many options appear to be possible.

In Modification 2 of Hypothetical 1, S tries to avoid such unpredictable outcomes and employs an exclusive choice of forum clause. Given that U.S. courts tend to enforce such choice of forum agreements even if the opposing party is a consumer, it would be likely that S can sue in the courts of his home country, although, because of the missing explicit consent of C in this case, a court might deem this choice of forum agreement unenforceable. Again, no certainty can be provided in regard to the outcome.

Modification 3, finally, which also deals with an exclusive choice of forum clause, can provide S with a predictable outcome. As the consumer must exercise his consent to the "Terms & Conditions," a court would declare this clause enforceable and S could consequently sue in his home forum. Only narrow exceptions, such as overweening bargaining power are given, whereby we can conclude that S could sue in his home forum.

Hypothetical 2 deals with the question of jurisdiction in Internet tort cases. With regard to Internet tort cases, the approaches used within U.S. courts and the proposed approaches by the legal profession deliver a divided picture. Whereas U.S. courts tend to employ the *Calder* effects test, academics within the legal profession prefer a targeting approach or an effects based test. Using the effects test, the question, if the activities where aimed at the forum state, would very likely be answered yes, as E's newspaper is published on the worldwide Internet. This being the crucial point, E would have to litigate in country B. Using the targeting approach, the determination would rest on an assessment of the targeting factors. Did E have implied knowledge that his newspaper is read in B? Did he use technology to keep Internet users from certain countries from accessing his Web site? Assuming that E did not restrict the access of his Web site to certain countries, we must presume that E knows that his Web site is accessible from all over the world. Thus, the targeting test would provide for jurisdiction in E's case as well. Using both approaches, however, E could avoid the danger of litigating in a distant forum, if he uses either geolocation software or a password mechanism to restrict access to his Web site from certain countries' Internet users. Thus, the requirement of "aiming at the forum" or "targeting" would not be fulfilled.

After applying the prevalent U.S. approaches to the Hypotheticals presented, we can conclude that often no predictable outcome is provided, whereas the application of the targeting approach, however, provides better predictability and certainty for both parties, as it requires a seller / publisher to make sufficiently clear on their Web site the countries in which they want to do business, or which country's residents are

allowed to access their publication.³⁴⁴

II. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

As I have described in the research objective, the main issue with regard to international litigation and Internet cases is the question of whether or not a court can exercise jurisdiction over a (foreign) defendant. Closely linked to this problem is the question of whether a judgment rendered in one country will be recognized and enforced by a court in another country where the defendant has his habitual residence or other places where the defendant might have assets. The close connection between the issues of enforcement and personal jurisdiction is founded on the fact that most approaches see jurisdiction of the court, which rendered the judgment, as a mandatory requirement for recognition and enforcement.³⁴⁵ Furthermore, a judgment has no practical value if there is no possibility of enforcing it. For this reason, I will give a brief overview of the law of recognition and enforcement of foreign judgments in the United States.

Recognition and enforcement are closely related, but remain differing terms and concepts. Recognition means that the foreign judgment is recognized in the specific forum.³⁴⁶ Recognition is important when a party seeks to preclude relitigation of a claim or an issue (*res judicata*) as well as for the enforcement of a judgment.³⁴⁷ Before a judgment can be enforced, the forum court must recognize it.³⁴⁸ The act, which actually grants the prevailing party the sought relief, is called enforcement.³⁴⁹ Recognition is a requirement for enforcement, whereas recognition can be granted in a trial without enforcement.³⁵⁰

The recognition and enforcement of sister state judgments between the American states is well regulated by the Full Faith and Credit Clause of Article IV.³⁵¹ Thus, the recognition and enforcement of sister state judgments hardly ever becomes an issue in these cases. In the in-

344. One might consider that certain Web site owners (e.g. individuals with private homepages) do not want to put too much effort in designing their Web site. In those cases, these owners must accept the risk of a lawsuit in a distant forum. With regard to private individuals and small (local) businesses, however, there is little risk of such a lawsuit as the assessment of the "targeting" factors emphasizes knowledge as the crucial factor.

345. See *infra* nn. 361-365 and accompanying text.

346. Louise Ellen Teitz, *Transnational Litigation*, 255 (Michie 1996).

347. *Id.*

348. *Id.*

349. R. Doak Bishop & Susan Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 Int'l. Law. 425 (1982).

350. See Teitz, *supra* n. 346, at 255. In the following, the term "enforcement" will be used in a meaning, which includes the prior recognition of the judgment.

351. U.S. Const. Art. IV, § 1 cl.1 (providing that: "[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.").

ternational context, however, neither a multi-lateral treaty nor a uniform statute within the United States regulates these issues.

1. *Hilton v. Guyot and the "Comity" Principle*

U.S. courts have a moral obligation to enforce foreign judgments, in contrast to their legal obligation to enforce sister state judgments. This is stated in the Full Faith and Credit Clause. The principle of comity which dominates the subject of enforcing foreign judgments was first introduced in the 1895 U.S. Supreme Court decision in *Hilton v. Guyot*.³⁵² The Court stated:

'Comity,' in the legal sense, is neither a matter of absolute obligation, . . . nor of mere courtesy and good will. . . . But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law.³⁵³

Furthermore, *Hilton* provided the following reasons to decline the enforcement of a foreign judgment as an exception to the rule of comity.

- (1) lack of full or fair trial;
- (2) lack of subject matter jurisdiction;
- (3) lack of personal jurisdiction;
- (4) trial under a system lacking impartiality or due process;
- (5) prejudice in the legal system or court; and
- (6) lack of reciprocity with the country, where the judgment was rendered.³⁵⁴

2. *Requirements for Recognition and Enforcement of a Foreign Judgment*

Since the decision in *Hilton*, the law of recognition and enforcement of foreign judgments has developed further; U.S. states today follow one of three approaches.³⁵⁵

a) *Predominant Approaches*

Thirty-one states have adopted the Uniform Money Judgments Recognition Act ("UFMJRA"), which was created in 1962 by the National Conference of Commissioners on Uniform State Laws.³⁵⁶ The UFMJRA

352. 159 U.S. 113 (1895).

353. *Id.* at 163-164.

354. *Id.* at 202-206.

355. See Teitz, *supra* n. 346, at 257-260; Gary B. Born, *International Civil Litigation in United States Courts*, 939-943 (3d ed. 1996); Ved P. Nanda & David K. Pansius, *2 Litigation of International Disputes in U.S. Courts*, 171-173 (2d ed. 2003).

356. 13 U.L.A. 89 (Supp. 2000).

is based on the standards prescribed in *Hilton*.³⁵⁷ The other states have, for the most part, adopted enforcement statutes which largely rest upon the *Hilton* standard and common law, or follow the specific common law. As far as states consider common law or employ solely common law, the Restatement (Third) of Foreign Relation provides the most accurate overview on legal rules concerning the enforcement of foreign judgments.³⁵⁸

Both the Restatement and the UFMJRA state the requirement that the judgment has to be final to be enforced in the U.S.,³⁵⁹ although the UFMJRA also requires that the judgment is conclusive and final.³⁶⁰

b) Grounds for Nonrecognition

The UFMJRA is limited in scope to foreign judgments "granting or denying recovery of a sum of money . . ." ³⁶¹ It provides the following mandatory grounds for nonrecognition:

- (1) lack of due process;
- (2) lack of personal jurisdiction; or
- (3) lack of subject matter jurisdiction.³⁶²

Furthermore it provides the following discretionary grounds for nonrecognition:

- (1) lack of notice;
- (2) fraud in the judgment;
- (3) public policy;
- (4) conflicting judgments;
- (5) forum contrary to a forum selection clause; and
- (6) seriously inconvenient forum.³⁶³

The Restatement, on the other hand, provides only two mandatory grounds for nonrecognition:

- (1) lack of personal jurisdiction and
- (2) lack of due process.³⁶⁴

In addition, the Restatement notes six grounds for nonrecognition, which are at the court's discretion:

- (1) lack of subject matter jurisdiction;

357. See Born, *supra* n. 355, at 941.

358. See *Restatement (Third) of Foreign Relations Law of the United States* §§ 482-487 (1987).

359. See *id.* at § 481 (1); UFMJRA § 2.

360. UFMJRA § 2.

361. UFMJRA § 1.

362. UFMJRA § 4.

363. UFMJRA § 4. Furthermore, some states have adopted a "reciprocity" requirement and therefore the UFMJRA slightly modified. These states are Colorado, Florida, Georgia, Idaho, Maine, Massachusetts, North Carolina, and Ohio.

364. See *Restatement (Third) of Foreign Relations Law of the United States* §§ 482 (1) (1987).

- (2) lack of notice;
- (3) fraud;
- (4) public policy;
- (5) conflicting final judgments; and
- (6) forum contrary to contractual forum selection.³⁶⁵

As one can see, the UFMJRA and the rules of the Restatement (Third) are not identical, but largely similar. In contrast to the grounds for nonrecognition provided in *Hilton*, lack of reciprocity with the country that rendered the judgment is no longer listed as a ground of nonrecognition. The reciprocity requirement, which was adopted explicitly by the U.S. Supreme Court in *Hilton*, has not been explicitly abandoned by the Supreme Court since then. In eight states, an explicit rule in the UFMJRA requires reciprocity.³⁶⁶ However, the requirement has been rejected by a majority of the American legal profession as well as by the UFMJRA and the Restatement in the meantime.³⁶⁷ Thus, one can state on a relatively firm basis that reciprocity is not a ground for nonrecognition in the U.S., with the exception of the eight states that have adopted a reciprocity requirement.

With regard to the requirement of personal jurisdiction, a U.S. court will examine if the court that rendered the judgments had personal jurisdiction over the defendant on the basis of American standards.³⁶⁸ Applying the minimum contacts test and its progeny to foreign judgments can provoke enormous problems for foreign companies, partially because of the completely different systems in civil law countries.³⁶⁹ As I have shown in Chapter C. I. 4., the outcome of multinational litigation in Internet-related cases using U.S. approaches is hardly predictable. Due to the close connection between the question of asserting the personal jurisdiction and the recognition and enforcement of foreign judgments shown above, the field of recognition and enforcement also lacks predictability and foreseeability.

III. WEAKNESSES AND STRENGTHS OF THE AMERICAN SYSTEM

Probably the first and most important characteristic of the American legal system in discussing jurisdiction and the international or interstate litigation in Internet cases is flexibility. In no other country on the globe can an evolution of jurisdictional doctrine equivalent to that of the United States be observed in the last fifteen years. This evolution was

365. See *id.* at § 482 (2).

366. See *supra* n. 363 and accompanying text.

367. See Nanda, *supra* n. 355, at 181-182; Born, *supra* n. 355, at 953-955; *Restatement (Third) of Foreign Relations Law of the United States* § 481 cts. d (1987); McDougal et al., *supra* n. 92, at 316; Maurice Rosenberg et al., *Conflict of Laws*, 225 (10th ed. 1996).

368. See Casad, *supra* n. 114, at 46; Teitz, *supra* n. 346, at 263-264.

369. See *infra* pt. D.

made possible by the fact that the U.S. Supreme Court provides only a framework of requirements to comply with the U.S. Constitution, instead of a set of specific rules. Thus, lower courts could generate new approaches without many restrictions.

But there is also another side of the story, which results from the fact that only a vague framework of rules exists. Even without considering the problem that developed with Internet litigation, the outcome of litigation over jurisdiction issues shows a lack of foreseeability and predictability.³⁷⁰ Most courts do not even speak to the requirements of the Fourteenth Amendment with an unanimous voice.

By adopting the territorial theory, the so-called power theory, in *Pennoyer*, the U.S. Supreme Court adopted an approach which was already outdated in England at the same time.³⁷¹ The further evolution of jurisdictional doctrine in *International Shoe*, *Burger King*, and *Burnham* added many more requirements and tests, where the Court tried simultaneously to construct some sort of "virtual presence" while still upholding the power theory, but also simultaneously tried to adapt new standards to adjust to the modern world. Because of the lack of clear rules and definitions of the requirements of the tests, little certainty exists when it comes to personal jurisdiction.³⁷² The "minimum contacts" test has been especially widely criticized; the jurisdictional doctrine in general is also harshly excoriated.³⁷³ The unpredictability of the out-

370. See *supra* nn 92-345 and accompanying text. See also Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 Cornell L. Rev. 89, 104-107 (1999); Kalow, *supra* n. 310, at 2251-2252 (calling the minimum contacts test "somewhat vague . . . incoherent and uncertain. . ."); Sheehan, *supra* n. 157, at 385-386 (speaking from "inherent flaws" and "uncertainty of its outcome").

371. See *e.g.*, 1 Casad, *supra* n. 114, at 72.

372. Dan Burk, *Jurisdiction in a World Without Borders*, 1 Va. J.L. & Tech. 3, 60 (1997) (calling it a "confusing issue").

373. See *e.g.*, J. Christopher Gooch, Note, *The Internet, Personal Jurisdiction, and the Federal Long-Arm Statute: Rethinking the Concept of Jurisdiction*, 15 Ariz. J. Int'l. & Comp. Law 635, 636-637 (1998) (noting that "the useless nature of the minimum contacts approach"); Bruce Posnak, *The Court Doesn't Know Its Asahi From Its Wortman: A Critical View of the Constitutional Constraints of Jurisdiction and Choice of Law*, 41 Syracuse L. Rev. 875, 898-905 (1990) (stating that the test is "too uncertain"); Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. Davis L. Rev. 1027 (1995) (stating that "American jurisdictional law is a mess. Split opinions, loaded footnotes, and convoluted opinions larded with a fanciful vocabulary that attempts to give halfbaked concepts an aura of reality by dressing them up as or presenting them in the garb of folksy smiles, signal the Justices' inability to devise a satisfactory approach to the simple question where a civil action may be brought."); It is a commonplace that the results of this analysis are fact driven; minor changes in circumstances can change the result. That alone would make prediction in a particular case difficult, but the task is even more formidable because courts cannot agree on which facts matter. A court surveying decisions on a specific recurring jurisdictional issue is likely to find "the case law in a muddle." Russel J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. Davis L. Rev. 531, 540 (1995).

come of the “minimum contacts” test is even aggravated in international cases, as demonstrated by cases such as *Asahi*.

This problem becomes even worse in reference to the Internet. As Harvard law professor David Shapiro, a renowned jurisdiction expert, states: “[t]he problem is unbelievabl[y] complex.”³⁷⁴ Because of the broad variety of approaches used by the courts, the outcomes in general are inconsistent.³⁷⁵ Until now, no workable rule has been found to apply the “minimum contacts” test with regard to the Internet, nor has a new set of rules been employed which would solve the problem. On the other hand, the courts are using a variety of approaches to justify their jurisdiction and to define the requirements of the minimum contacts with regard to the Internet.³⁷⁶ Under these circumstances it is not surprising that many commentators roundly criticize personal jurisdiction in Internet cases.³⁷⁷ For Web site owners who do business on the Internet, publishers of online newspapers, and consumers who write contributions to guest books and newsgroups, there is no certainty in determining where a lawsuit might eventually occur and if a defendant must travel to a distant forum to litigate.

Therefore, we can conclude that because of its significant lack of certainty and foreseeability, the American system is not a good model for an international solution as is being currently negotiated in The Hague. On the other hand, the targeting approach provides a set of helpful criteria to use in Internet-related cases, as well as an underlying fundamental concept (assessment of knowledge of the access of one’s Web site by users from other jurisdictions), for jurisdiction in certain Internet-related cases. Thus, this approach could be used to provide foreseeability, as well

374. See David A. Price, *Executive Update: Lawsuits over Web Sites Plague Companies from Afar*, Investor’s Bus. Daily A4 (Oct. 15, 1996) (available in WESTLAW, 1996 WL 11862853).

375. See Brian E. Daughdrill, Comment, *Personal Jurisdiction and the Internet, Waiting for the Other Shoe to Drop on First Amendment Concerns*, 51 Mercer L. Rev. 919, 942 (2000); W. David Falcon, Jr., *A Nice Place to Visit, But I Wouldn’t Want to Litigate There: The Effects of Cybersell v. Cybersell on the Law of Personal Jurisdiction*, 5 Rich. J.L. & Tech. 11 (1999).

376. See *supra* pp. 1151-55. Heslinga, *supra* n. 220, at 248 (calling it a “widespread uncertainty”); Mehta, *supra* n. 277, at 347-348 (stating that “[r]eviewing the multitude of district court and appellate decisions on personal jurisdiction on the Internet, one is struck by their seeming inconsistencies and apparently random outcomes.”).

377. Rollo, *supra* n. 266, at 667 (calling it a “morass”); see also *infra* n. 402; Jamie Spataro, *Personal Jurisdiction Over the Internet: How International is Today’s Shoe*, 3 PGH J. Tech. L. & Policy 1 (2002) (stating “The current *International Shoe* standard fails to provide Web site operators with such a reliable test . . . personal jurisdiction burdens Web site operators with great uncertainty and potential vulnerability.”); Anindita Dutta, *I. INTELLECTUAL PROPERTY: C. Trademark: 2. Personal Jurisdiction: a) Minimum Contacts: Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 13 Berkeley Tech L.J. 289, 303 (1998) (stating that there is “a chaotic status of case law”).

as the necessary flexibility, to include new technologies and developments in the future if used in the right context.

D. JURISDICTION TO ADJUDICATE AND THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE EUROPEAN COMMUNITY

In the preceding chapter, I have illustrated the main structure, approaches, and rules of the American legal system when it comes to jurisdictional issues with regard to Internet contract and tort cases. In this chapter, I will take a close look at the only other political entity, to a certain extent comparable to that of the United States: the European Community. I will show the regulatory actions taken by the European Community, as well as discuss recent case law by European courts in comparison to those by the United States. As in Section C., I will begin with the jurisdictional issues, followed by a short peek at choice-of-law and the recognition and enforcement of foreign judgments. The main focus, however, will deal with the questions of how and to which extent the two solutions differ. As in Section IV. of the preceding chapter, I will conclude with the specific weaknesses and strengths of the European system.

I. JURISDICTION

1. *Scope of the European Community Regulation*

As most member states of the European Community come from a civil law tradition, codifications is far more important than in the United States. Case law is only relevant insofar as terms and phrases are ambiguous or if the application of the specific rule in the case itself is unclear. Applicable regulations that address the question of a court's jurisdiction in the context of the European Community are the 1968 Brussels Convention on Jurisdiction and Enforcement of Civil and Commercial Judgments and the Council Regulation 44/2001 (EC) of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.³⁷⁸ The latter was enacted in 2000 to replace the Brussels Convention and entered into force on the 1st of March 2002. It replaced the Brussels Convention for all member states except Denmark.³⁷⁹ Although most provisions of the Council Regulation are identical with the provisions of the former Brussels Convention, some significant changes were made.

The first significant difference is that the Council Regulation is binding for all member states with the exception of Denmark, whereas

378. 2001 OJ L 12 [hereinafter Council Regulation].

379. See Council Regulation, consideration 21.

the former Brussels Convention had to be adopted into national law by each member state individually. Furthermore, some substantive changes were made as well. Given that the Brussels Convention is of importance only with respect to the relations of the member states with Denmark, it will not be discussed in this article.³⁸⁰ In the context of the Council Regulation, the terms “jurisdiction” or “jurisdiction of courts” are used assuming the definition of personal jurisdiction in the broader sense as discussed above.³⁸¹ The question of whether a court has subject matter jurisdiction to hear a case is still governed by national law. Furthermore, the Council Regulation applies only to civil and commercial matters; additionally, some areas of law including heritance, bankruptcy, and arbitration are explicitly precluded.³⁸² Of enormous importance is the restriction of the scope of the article provided in Art. 4 (1); the Council Regulation is only applicable if the defendant is domiciled in a member state.³⁸³ Furthermore, the Regulation is not applicable if the case is not connected to more than one member state.³⁸⁴

The Council Regulation makes a general distinction between general, special, and exclusive jurisdiction.³⁸⁵ General jurisdiction applies in all cases, unless otherwise stated, whereas special jurisdiction is applicable only in specific situations. In cases where special jurisdiction applies, the plaintiff can choose between the competent courts of general or special jurisdiction. Exclusive jurisdiction, on the other hand, is literally exclusive: only one court can assert jurisdiction over the defendant. In addition, some national rules of jurisdiction, which are usually deemed exorbitant, are explicitly excluded from being applied to persons domiciled in a member state.³⁸⁶ Using the structure of the Council Regulation in the following, I will examine several relevant types of jurisdiction.

380. Hereinafter the term “member state” is used within the meaning all member states of the European Community without Denmark.

381. See *supra* n. 96 and accompanying text.

382. Council Regulation Art. 1 (2).

383. The rules on exclusive jurisdiction are an exception and applicable in any case, even if the defendant is domiciled outside the European Community.

384. See Bernd von Hoffmann, *Internationales Privatrecht*, 129 (7th ed. 2002).

385. Council Regulation, § 1, Art. 2, § 2, Art. 5.

386. See *id.* at Art.3(2). These not applicable rules are set forth in Annex I of the Council Regulation and include Art. 14 of the French Civil Code (Code civil), Art. 23 of the German Code of Civil Procedure as well as the rules for transient and tag jurisdiction in the United Kingdom. Art. 14 of the French Civil Code allows jurisdiction based on the nationality of the plaintiff whereas Art. 23 of the German Code of Civil Procedure allows jurisdiction based on the location of assets in Germany. See *id.* Annex I. These exorbitant rules of jurisdiction, however, can still be exercised against defendants, who are not domiciled in a member state. This follows already from the substantial national law; but is as a clarification stated in Art. 4(2) of the Council Regulation as well.

2. *General Jurisdiction*

General jurisdiction in terms of the Council Regulation is regulated in Section 1 Art. 2 - 4. Art. 2 states that in civil law countries, the prevalent *actor sequitur forum rei* principle³⁸⁷ provides the general rule for a court to have jurisdiction. This traditional maxim's basic statement, which was already incorporated in the Justinian Code of Roman law, is that the plaintiff must follow the defendant to his forum in order to sue him. In the more modern words of the Regulation: persons domiciled in a member state can be sued in the courts of that member state.³⁸⁸ Similar to the concept of general jurisdiction in the United States, general jurisdiction in the context of the Council Regulation applies in any case; no further connection between the parties is required. The meaning of "domicile" in this context is further explained in Art. 59. Art. 59 states that the court shall use its national law to determine if a party is domiciled in the member state.³⁸⁹ Even though the various regulations in the several member states differ,³⁹⁰ it can be said that it is necessary that the party has its center of life in the member state to fulfill the domicile requirement.³⁹¹ Art. 60 of the Council Regulation states that a company or other legal person or association of natural or legal persons is domiciled where its statutory seat, central administration or principal place of business is located.³⁹²

Apart from this general rule, a court can establish jurisdiction over a defendant only according to sections 2 to 7 of chapter 1 of the Regulation.³⁹³ Thus, the Council Regulation puts a main focus to the *actor sequitur forum rei* rule and, on the contrary to the U.S., this approach clearly favors the defendant (*favor defensoris*).³⁹⁴

3. *Special and Exclusive Jurisdiction*

For the research objective of this article, Art. 5,³⁹⁵ which governs

387. See Jan Kropholler, *Europäisches Zivilprozessrecht* 113 (7th ed. 2002).

388. See Council Regulation, Art. 2(1).

389. See Council Regulation, Art. 59.

390. In Germany, for example, the relevant provisions can be found in the Bürgerliches Gesetzbuch [BGB] Art. 7-9.

391. Art. 36 of the Belgian Code of Civil Procedure, however, is a remarkable exception: according to this provision the domicile of a person is where a person is legally registered (similar to voters registration in the U.S.), even when the person doesn't live there anymore.

392. See Council Regulation, Art. 60.

393. See *id.* Art. 3.

394. *But cf.* Benedikt Buchner, *E-commerce und effektiver Rechtsschutz - oder: Wer folgt wem wohin?*, 2000 EWS 147, 148.

395. Art. 5 constitutes not only a rule for a court to have jurisdiction, but also for venue. See Hoffmann, *supra* n. 384, at 132.

special jurisdiction of courts, *inter alia*, for tort and contract cases³⁹⁶ is of enormous importance besides the general and always applicable rule of Art. 2. Art. 5(1) lays down the regulation for matters relating to a contract.

a) *Contract Cases*

aa) *In General*

aaa) *Jurisdiction of the Courts of the Place of Performance*

Art. 5(1) states - as a general rule - that the court at the place of performance in question shall have jurisdiction. Before applying this general rule, the court, according to the wording of Art. 5(1), must initially consider whether the parties have agreed on a contractual provision defining the place of performance for the obligations of their contract. Such an agreement has to meet the requirements of the substantial national law governing the case at hand.³⁹⁷ If such a valid agreement exists, the court must apply the provision.

When no contractual agreement regarding the place of performance is given, the court must then consider Art. 5(1)(b). Art. 5(1)(b) further defines the place of performance - thus independently from the definitions found in the substantial national law³⁹⁸ - for the sale of goods as the place where the goods under the provision of the contract were delivered or should have been delivered.³⁹⁹ For the provision of services, on the contrary, the place where the services were provided or should have been provided according to the terms of the contract are relevant.

If neither the sale of goods nor the provision of services is the subject matter of the contract, Art. 5(1)(c) provides that the court at the place of performance referring to the general rule of Art. 5(1)(a) shall have jurisdiction. In absence of a definition of the place of performance for these

396. See Council Regulation, Art. 5(1) and (3).

397. An agreement regarding the place of performance must be distinguished from a forum selection clause, which has to meet the requirements of Art. 23 of the regulation. See Kropholler, *supra* n. 387, at 135-136.

398. This provision has been modified in comparison to the Brussels Convention. See Kropholler, *supra* n. 387, at 132. In the Brussels Convention the term "place of performance" was not further defined; therefore the court had to specify the place of performance using the provisions of the substantial law. *Id.* In all countries which took part in the United Nations Convention on the International Sale of Goods [CISG] this led to the application of Art. 57 I. *Id.* Given that Art. 57 I defines the place of performance for payment of the price at the seller's place of business this usually led to the fact that the seller could sue the buyer at the seller's place of business. *Id.* To avoid the disadvantages of this regulation the Council Regulation now provides a different definition of "place of performance" for the cases at hand. *Id.*

399. See *id.* at Art. 5(1)(b).

contracts, the place of performance has to be specified by the court using the provision of the substantial law.

bbb) Forum Selection Clauses

Furthermore, it is possible for the parties of a contract to employ a forum selection clause. Such an agreement, however, must meet the requirements of Art. 23 of the Council Regulation. Art. 23 requires the agreement to be:

- in writing or evidenced in writing; or
- in a form which accords with practices which the parties have established between themselves; or
- in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Electronic communication is deemed equivalent to "writing" as long as a durable record of the agreement is provided.⁴⁰⁰ Apart from this formal requirement, Art. 23 states that such agreements shall establish exclusive jurisdiction of the chosen courts unless the parties have explicitly stated otherwise. If none of the litigants is domiciled in a member state, the court of other member states than the chosen have no jurisdiction unless the chosen courts declined the assertion of jurisdiction.⁴⁰¹

bb) Consumer Contracts

aaa) Jurisdiction in Consumer Contract Litigation

Art. 5(1) is applicable to all kind of contracts; in addition to this general provision, the Regulation provides special rules for specific types of contracts. For the research objective of this article, only the provisions regarding jurisdiction over consumer contracts are of importance and shall be discussed in the following.

Art 15 - Art. 17 govern consumer contracts within the scope of the Council Regulation. In sharp contrast to the rules provided in Art. 5 and Art. 2 of the Regulation, the regulations for consumer contracts follow a completely different approach.

First, Art. 15(1) declares that jurisdiction in consumer contract cases is regulated by Art. 15 - Art. 17 rather than by the general provisions of Art. 2-7.⁴⁰² Second, Art. 16 provides the consumer with the right to

400. See Council Regulation Art. 23(2).

401. *Id.* at Art. 23(3).

402. Article 4 and point 5 of article 5 are exempted from this provision. See *id.* at Art. 15(1).

choose between two places to litigate his action. According to Art. 16, the consumer can either sue the defendant in its domicile or sue in the courts for the place where the consumer is domiciled.⁴⁰³ Third, Art. 16 further states that lawsuits against a consumer can be brought only in the courts of the member state in which the consumer is domiciled. Fourth, in contrast to Art. 23 and its rule for forum selection clauses in contract litigation, Art. 17 forbids any modifications to the jurisdictional rules for consumer contracts by agreement other than those which provide the consumer with additional choices of forum than Art. 16 or are entered into after the dispute has arisen. Another admissible deviation would be a clause which confers jurisdiction to the courts of a member state where both the consumer and the other party are at the time of the conclusion of the contract domiciled.⁴⁰⁴

These jurisdictional rules for consumer contract show, contrary to the treatment of those cases in the United States, not only a clear emphasis on consumer protection but also a remarkable change compared to the jurisdictional rules for contract litigation cases within the European Community in general. Therefore, in the next subsection I will scrutinize the requirements for a contract to be classified as a consumer contract in the context of the Council Regulation.

bbb) Requirements for Consumer Contracts

Art. 15 provides the requirements for a contract to be classified as a consumer contract. First, a consumer, a person who is acting outside his trade or profession, must conclude the contract.⁴⁰⁵

Second, one of the following specific types of contracts must be given:

- a contract for the sale of goods on installment credit terms or
- a contract for a loan repayable by installments, or for any other form of credit, made to finance the sale of goods.⁴⁰⁶

If none of these particular types of contracts is given in the case at hand, the contract can still be deemed a consumer contract if the requirements of the catchall element of Art. 15 (1)(c) are met. To fulfill the requirements of Art. 15 (1)(c), a consumer must conclude a contract with a party who either:

- pursues commercial or professional activity 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

403. With this provision the regulation not only constitutes a rule for the court to have jurisdiction, but as well for venue.

404. Council Regulation, Art. 17(3).

405. *Id.* at Art. 15(1).

406. *Id.* at Art. 15(1)(a) and (b).

the scope of such activities.⁴⁰⁷

These provisions are amended by Art. 15(2) which provides that the Council Regulation is applicable if a party - although not domiciled in the member state - has a branch, agency or other establishment in one of the member states in case a consumer concludes a contract with such a party.⁴⁰⁸ In addition, Art. 15(3) forbids the application of the consumer contract rules to contracts of transport.

Although Art. 15 (1)(a) and (b) are important provisions of the Council Regulation, Art. 15(1)(c), which mainly functions as a catchall element, is by far the most important provision with regard to the application of the consumer contract rules. In contrast to Art. 15(1)(a) and (b) which covers only some very specific cases and accordingly don't need further interpretation, Art. 15(1)(c) and its requirements apply to a broad range of cases. Therefore its requirements will be scrutinized in the following.

Art. 15(1)(c) provides two alternative bases for the application of the consumer contract rules.

First, the consumer contract rules are applicable if the contracting party of the consumer pursues commercial or professional activities in the member state of the consumer's domicile. Accordingly, the contracting party can not be another consumer; this clarification to the Brussels Convention was generally well received by the European legal profession.⁴⁰⁹ Any commercial or professional activity of the other party satisfies this requirement;⁴¹⁰ whereas the second requirement - the contract falling into the scope of this activity - narrows the possible field of application for the provision.

Second, the consumer contract rules are applicable if the other party directs such activities to the member state of the consumer's domicile or to several states including that member state.⁴¹¹ The second requirement - identical to the first alternative - is that the contract falls into the scope of this directed activity. This alternative of Art. 15(1)(c) is meant especially to include e-commerce cases.⁴¹² In their reasoning, the European Commission explicitly stated that the requirement shall be fulfilled

407. *Id.* at Art. 15(1)(c).

408. *Id.* at Art. 15(2). On contrary to the general rule provided in Art. 15 therefore forbids the application of the exorbitant rules of jurisdiction given in Annex I of the Council Regulation against these defendants.

409. See Kropholler, *supra* n. 387, at 226.

410. See Gerald Spindler, *Internationales Verbraucherschutzrecht im Internet*, 2000 MMR 18, 23.

411. Council Regulation Art. 15(1)(c).

412. See Hoffmann, *supra* n. 384, at 142; Burghard Piltz, *Vom EuGVÜ zur Brüssel-I-Verordnung*, 2002 NJW 789, 792.

if a company makes use of an active Web site.⁴¹³ According to this, a Web site is active when the consumer conducts the contract directly online, whereas a Web site which only provides information that leads to the conduction of the contract in another context offline will not fulfill the requirement.⁴¹⁴ The European Commission explicitly declined to adopt the *Zippo* active vs. passive scale, prevalent in the U.S. at the time.⁴¹⁵ According to the European Commission, the interaction with the Web site should not be the crucial factor in determining the application of the consumer contract rules; rather, the stated criteria are the determinants. These findings have been criticized and widely discussed by the European legal profession.

Some commentators draw the conclusion that, according to this statement by the European Commission, every e-commerce company actively engaging in Internet business is subject to jurisdiction in all member states.⁴¹⁶ Others have proposed that Web site owners could post restrictions in the text of their offers and therefore limit their exposure to foreign jurisdictions.⁴¹⁷ They further argue that the use of a language which is not spoken in the member state of the consumer can not lead to exposure to that jurisdiction.⁴¹⁸ One commentator has stated that Art. 15(1)(c) can not be applicable if the seller on his Web site has explicitly or impliedly excluded commercial contacts with consumers of certain countries.⁴¹⁹ Others have criticized the new provisions concerning jurisdiction in consumer contract litigation in e-commerce cases in general.⁴²⁰ They pointed out that it is, at a minimum, an ambiguous situation if the seller is the one who directs their offers to the member state of the consumer's domicile or if it is the consumer who "surfs" on the Web to the seller's Web site, and therefore directs his actions towards the seller's domicile.⁴²¹ In addition, Buchner asserts that the modern consumer is in no need of protection; as a consequence of growing competition, the seller

413. BR-Drucksache 534/99, 15.

414. *Id.* at 16.

415. See Hans-W. Micklitz & Peter Rott, *Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001*, 2001 EuZW 325, 331. The *Zippo* scale is discussed *supra* nn. 267-274 and accompanying text.

416. Reinhold Geimer & Richard Zöller, *Zivilprozessordnung mit Gerichtsverfassungsgesetz und den Einführungsgesetzen mit Internationalem Zivilprozessrecht, EG-Verordnungen, Kostenanmerkungen, Kommentar* 2621 (24th ed. 2004).

417. Peter Gottwald, *Münchener Kommentar zur ZIVILPROZESSORDNUNG; Aktualisierungsband: Zpo-Reform 2002 und weitere Reformgesetze* 852 (Gerhard Lüke & Peter Wax eds., 2d ed. 2002).

418. *Id.*

419. See Micklitz & Rott, *supra* n. 415, at 331.

420. See Buchner, *supra* n. 394, at 151-153.

421. See *id.* at 152.

can be seen as the weaker party.⁴²²

At this point we can conclude that regulation faces similar problems to those of the United States courts in Internet litigation. Some of the comments remind one of similar discussions in the American legal profession; the concept of "directing activities" can be compared to the different "targeting" and similar approaches in the United States.⁴²³

cc) Contracts with Relation to Property

Although it might not happen very often, Internet contracts could deal with the subject of renting immovable property or selling object rights in rem in immovable property. In these rare cases, exclusive jurisdiction provided by Art. 22 of the Regulation applies.⁴²⁴

Art. 22 states that the courts of the member state in which the property is situated shall have exclusive jurisdiction. Exclusive jurisdiction as governed by Art. 22, according to Art. 4(1) of the Council Regulation, applies not only if the defendant is domiciled in a member state, but in all other cases as well.

b) Tort Cases

Art. 5(3) of the Council Regulation governs the other issue at hand, special jurisdiction in Internet tort cases. Art. 5(3) states that the courts in the place where the harmful event occurred or may occur have jurisdiction.

As the European Court of Justice further clarified in its famous decision in *Bier v. Mines de Potasse d'Alsace*, the place where the harmful event occurred (within the meaning of Art. 5(3)) can be either the place where the damage occurred or the place of the event giving rise to it.⁴²⁵ Thus, beyond the wording of Art. 5(3), the plaintiff has the right to choose either to sue the defendant at the place where the damage occurred, or at the place of the event giving rise to the damage (principle of ubiquity).⁴²⁶

This general rule, however, was slightly modified by the European Court of Justice for cases involving defamatory statements in the mass

422. *Id.* Buchner further proposes to employ an online arbitration as a better way to solve conflicts arising out of consumer contracts. *Id.*

423. See *supra* nn. 315-332 and accompanying text.

424. Council Regulation, Art. 22 (providing an exception for short term lease contracts).

425. Case 21/76, *Bier v. Mines de Potasse d'Alsace*, 1976 E.C.R. 1735. Although the decision refers to the 1968 Brussels Convention the given proposition is still valid under the Council Regulation as the provisions are identical. *Id.*

426. *Id.*; see also Hoffmann, *supra* n. 384, at 138.

media, such as the Internet.⁴²⁷ In 1995, the European Court of Justice decided the famous libel case *Shevill v. Presse Alliance*, stating that the place where the event giving rise to the damage occurred is the place where the harmful event originated, and from which the libel was issued and put into circulation. In the case at hand, the place where the publisher of the newspaper in question was established was that place.⁴²⁸ In the Internet context, this place would be the place where the content was published.⁴²⁹ The place where the damage occurred in these cases is, in the opinion of the court, the place where the publication is distributed, provided that the victim is known in those places.⁴³⁰ The right of the plaintiff to choose where to sue is, according to the court, restricted in these cases.⁴³¹ The courts in the place where the publisher is established can award damages for all the harm caused by the defamation, whereas the courts where the publication was distributed and where the victim has suffered injury can award only those damages felt in the specific forum.⁴³²

Employed in the Internet context, the plaintiff could sue in the place where the publisher of the defamatory statement on the Internet is established or where the damage occurred; this is limited, however, to the injury felt in the specific forum. In Internet cases other than libel and defamation cases, the general rule of *Mines de Potasse d'Alsace* can be employed. In trademark infringement or copyright infringement cases this would mean that the victim could sue where the injury occurred - usually the victims' domicile as well as the place where the event that gave rise to the damage occurred (usually the wrongdoers' domicile). The approach chosen by the European Community thus establishes the plaintiff's right to choose; this gives the victim more options than the prevalent approach in the United States. The American effects principle/test can be considered similar to at least one of the forums the victim could choose within the scope of the Council Regulation.

4. *Practical Application of the Rules*

After I have now shown the principles and rules of the law of jurisdiction within the European Community, I will now analyze their practical application with regard to the Hypotheticals presented in the research objective.

427. Case 68/9, *Shevill v. Presse Alliance*, 1995 E.C.R. I-415. For applying these principles in Internet cases, see Peter Mankowski, *Das Internet im Internationalen Vertrags- und Deliktsrecht*, 63 *RabelsZ* 203, 275 (1999).

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

In Hypothetical 1, a court applying the European Community's provisions could find jurisdiction over the defendant either in B, based on Art. 2, or in A, based on Art. 16. It would be C's choice of where to litigate; keeping in mind that the value of the LP is probably less than \$50, however, the only reasonable choice would be to litigate in C's home forum.

Assuming that S explicitly offers delivery to A and that the Web site itself offers the option to order online, a court deciding on Modification 1, Modification 2 or Modification 3 will come to the same finding. If S wants to sue C, he must, according to Art. 16 of the Regulation 44/2001, sue C in C's home forum. The choice-of-forum clauses in Modifications 2 and 3, are, according to Art. 16 and Art. 17, not enforceable because they were concluded before the conflict had arisen. Thus, the Council Regulation provides for clear rules with one exception. Assuming that S's Web site does not explicitly forbid or allow consumers from foreign countries to order, and the language used is a language spoken worldwide such as English, the outcome according to Art. 15 (1)(c) becomes uncertain as the principles and rules are still unsettled.

A court deciding the case in Hypothetical 2, however, would employ either Art. 2 or Art. 5(3) of the Council Regulation. Thus, P would have the choice to sue E either in E's home country or where the harm was felt, P's home country. Contrary to a targeting approach, Art. 5(3) does not provide for a restriction of jurisdiction in Internet torts, so that the harm could be felt anywhere in the world. This problem could become even more significant when one considers trademark or copyright law, wherein the principle of territoriality is used to govern the relation between different nations trademarks and copyrights which are identical or similar.⁴³³

II. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

One of the main ambitions of the 1968 Brussels Convention and its successor, Council Regulation 44/2001, was to achieve cross-border enforcement of judgments in civil and commercial matters with ease. Judgments, which lie beyond the scope of the Council Regulation,⁴³⁴ will be judged by the national law of the member states; the recognition and enforcement procedure described in the following applies only to judgments within the scope of the Council Regulation. As it would go beyond

433. The principle of territoriality secured the fact that, for example, an identical trademark which belonged to company A in country A could exist belonging to company B in country B without complications. As the Internet is available worldwide, the Web site of company A using its (in his home country for his registered and undisputed) trademark would establish trademark infringement in country B.

434. See *supra* pp. 83-86.

the research objective to show the requirements of all E.U. member states of the recognition and enforcement of judgments in civil and commercial matters, I will show the requirements of Regulation 44/2001 for intra-European judgments only.

To achieve its objective of simplifying cross-border enforcement of judgments in civil and commercial matters, several legal measures have been implemented in the Regulation.

First, as a general rule, every judgment rendered in a member state is recognized without any special procedure.⁴³⁵ Second, Art. 34 and Art. 35 provide for some narrow exceptions to this rule. Third, the enforcement of such a judgment can be achieved by simply applying to the court or competent authority.⁴³⁶ The judgment is then declared enforceable without reviewing Art. 34 and Art. 35. Either party can appeal this decision.⁴³⁷

The most important statement of the provisions for recognition and enforcement of judgments is that the jurisdiction of the deciding court is not going to be reviewed during this stage of the process, even if it is obviously wrong.⁴³⁸ This follows from the secluding character of Art. 34 and Art. 35 as well as an *argumentum e contrario* from Art. 35 (1). The jurisdiction of the court can only be reviewed if the provisions on consumer, individual employment, or insurance contracts are affected.⁴³⁹

However, some narrow exceptions to the recognition and enforcement are given.⁴⁴⁰ Art. 34 provides for an important exception, among several others: the public policy exception. If a judgment is manifestly contrary to the public policy in the member state in which recognition is sought, a judgment must not be recognized.⁴⁴¹ The European Court of Justice, though, has stated clearly that this exception can be applied solely in extraordinary and exceptional cases.⁴⁴² The other exceptions of Art. 34 deal mainly with procedural issues, such as the irreconcilability with earlier judgments of the member state, or when the defendant has not had sufficient time to arrange for his defense.⁴⁴³

Overall, we can conclude that it is very likely for a judgment under Regulation 44/2001 to be recognized and enforced in all member states; the exceptions are narrow and not very likely to apply. Furthermore, the

435. See Council Regulation, Art. 33(1).

436. *Id.* at Art. 38 and 39.

437. *Id.* at Art. 43.

438. See Kropholler, *supra* n. 386, at 415.

439. Council Regulation, Art. 35(1).

440. *Id.* at Art. 34 and Art. 35.

441. *Id.* at Art. 34(1).

442. See Case 38/98, *Renault SA v. Maxicar SpA and Orazio Formento*, 2000 ECR-I 2973; Case 7/98; *Krombach v. Bamberski*, 2000 ECR I-1935.

443. Council Regulation, Art. 34.

enforcement process is more of a formality than actual litigation; the court declares a judgment enforceable without further investigation or any actual litigation.

III. WEAKNESSES AND STRENGTHS OF THE EUROPEAN COMMUNITY SYSTEM

As shown in this chapter, the European Community has adopted an entirely different approach in handling jurisdictional issues compared to the United States.

With regard to the different basis for jurisdiction, the Regulation provides that, also in the fields of choice-of-law and recognition and enforcement of foreign judgments, the emphasis of the European Community lies on consumer protection. Whereas the United States relies on market self-regulation rather than on giving the consumer the utmost protection against litigating in a distant forum, especially with regard to forum selection clauses, the European Community makes a strong point for consumer protection.

When it comes to the strengths of the European Community system, one point becomes obvious over all others.

Given that the law of jurisdiction in the European Community is essentially codified and makes use of phrases and terms, which are sufficiently clear, litigation regarding "where to litigate" is marginal. In comparison to the law of jurisdiction in the United States, where it is at the very least unpredictable whether the courts will deem themselves to be competent to hear the case, foreseeability and certainty are warranted. While avoiding unclear phrases and concepts such as "minimum contacts," the 1968 Brussels Convention and its successor, Regulation 44/2001, have made enormous progress in multinational litigation and recognition and enforcement of foreign judgments. Sellers and buyers, consumers and e-business owners alike are provided with a reliable set of rules. Thus, the results have been praised not only by the Europeans, but also by the American legal profession.⁴⁴⁴

As I have shown in Chapter C. and D., a consumer in a member state of the European Community will never lose the advantage of litigating in his own forum. With regards to the imbalance of financial power of the parties in a typical consumer contract case (e.g., a product warranty case or an action for payment), it seems more than reasonable to protect the weaker party by allowing the consumer to litigate in his

444. See Friedrich Juenger, *Federalism: Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 Mich. L. Rev. 1195, 1203-1204, 1210-1212 (1984); Juenger, *supra* n. 402, at 1037-1040; Karl Firsching, *Übereinkommen über das auf vertragliche Schuldverhältnisse anzuwendende Recht* (IPR-VertragsÜ) vom 11.6.1980, 1981 IPRax 37.

own forum. Furthermore, if we consider the financial costs of litigation for the consumer in relation to his financial power and consider the financial costs for a company in relation to their financial power, it becomes clear that the burden for the consumer to litigate in a distant forum would be unequally higher. Therefore, a consumer who does not need to fear distant litigation will engage in online shopping without hesitation attributable to potentially undesirable consequences. Considering these undisputable facts, the solution provided by Regulation 44/2001, favoring the consumer's forum is preferable to addressing the consumer as an ordinary party to a lawsuit.

Keeping in mind that most terms and conditions are not even read by the consumers, not to mention comprehension of these terms without consulting a lawyer, it is reasonable to declare choice-of-forum clauses unenforceable to a certain extent, as the Council Regulation does.

Overall, we arrive at the intermediary conclusion that a codified and reasonably clear system of accepted bases for jurisdiction - with regard to the enormous importance of foreseeability and certainty not only for business owners but as well as for consumers - is strongly preferable to a system of prevailing case law. The emphasis on consumer protection appears to be a reasonable solution as well. Therefore, a concept identical or similar to this should be adopted in the international context of the Hague Conference. Furthermore, we can conclude that the European Communities' rules for handling e-commerce cases as well as Internet torts, namely Art. 15(1)(c), Art. 16, Art. 5(1) and Art. 2 (even though they can be deemed more coherent than most approaches within the American system), need further specification. Especially with regard to Art. 15(1)(c) and its consequence of potential litigation in a foreign forum for an e-commerce owner, it must be clarified under which requirements the Web site owner can be sued in a foreign forum, and how, to which extent, and with which measures this litigation in a foreign forum can be legally avoided. The targeting approach, as proposed by Geist, with some slight modification as to the enforcement of forum selection clauses in consumer contract litigation offers a reasonable set of criteria, as well as a balanced framework, and could therefore establish a reliable approach.

The rules for handling Internet torts provided in Art. 5(3) and Art. 2, however, are sufficiently clear and balanced and should therefore provide a reasonable foundation for a similar provision in the international Hague Conference as well. As some problems in Internet litigation will remain, especially in the fields of law where the principle of territoriality is predominant, slight modifications should be made. Employing Geist's criteria for the targeting approach, an Internet publisher or Web site owner should be provided with the possibility of avoiding litigation in distant forums by implementing measures to keep users from those jurisdictions from accessing the Web site. As the conflict potential is signif-

icantly higher in the fields of law, which employ the principle of territoriality, the required quality of these measures should be higher with regard to these fields of law as compared to other torts such as defamation.

Thus, using the European provisions as a foundation, while implementing the targeting criteria in the rules for torts as well as for consumer litigation a basic concept for jurisdiction and recognition and enforcement of judgments in civil and commercial matters, especially with regard to Internet litigation, an international solution has been found that will establish foreseeability in Internet litigation, as well as ensure the flexibility, to include new technologies and standards in the future. As the next part of this article I will give a short overview of the current proposals and problems of the Hague Convention.

E. PROPOSALS & PROBLEMS: THE CURRENT DRAFTS BY THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW FOR A CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

After the given comparison of the different legal systems with regard to jurisdiction in Internet-related contract and tort cases and recognition and enforcement of foreign judgment, I will show the current status of the negotiations of the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, as well as problems with the different proposals in the U.S. and Europe. In the following, I will show the history of The Hague Convention at first and then point out several current problems and controversies concerning several proposals.

I. HISTORY OF THE HAGUE CONFERENCE AND THE HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

The Hague Conference on Private International Law is an inter-governmental organization based in The Hague, Netherlands, which initiated its first session in 1893 and became a permanent inter-governmental organization in 1951.⁴⁴⁵ The objective of the Hague Conference, according to Art. 1 of its statute is to achieve progressive unification in the field of Private International Law.⁴⁴⁶ The Hague Conference currently consists of sixty-four member states.

445. See Hague Conference, *Infosheet*, <http://www.hcch.net/e/infosheet.html> (accessed Feb. 22, 2004).

446. See Hague Conference, *English Translation Statute*, <http://www.hcch.net/e/conventions/text01e.html> (accessed Feb. 22, 2004).

The negotiations for the Convention on Jurisdiction and Judgments in Civil and Commercial Matters was initiated in 1992 when the Legal Advisor for the U.S. Department of State wrote a letter to the Secretary General of the Hague Conference. The United States had a strong incentive to negotiate an International Convention, as it generally enforces foreign judgments in a more generous way than U.S. judgments are non-reciprocally enforced abroad. The official negotiations began in June 1997 with a two-week meeting of the Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters; another session was held in 1998. It took, however, until October 1999 for the Special Commission to adopt a Preliminary Draft Convention ("PDC").⁴⁴⁷

The PDC strongly relied on the provisions of the 1968 Brussels Convention. This PDC encountered profound concerns of the U.S. government, which therefore refused to accept the 1999 text. Jeffrey Kovar, Assistant Legal Advisor for Private International Law at the U.S. State Department, stated in a letter to the Hague Conference that the United States saw substantial problems with the PDC.⁴⁴⁸ This led to a substantial delay in the negotiations, if not the slow death of the Hague Convention. It was then decided to have a first (drafting) session of the Diplomatic Conference in June 2001 and the final session at a later date. The first session would work through a consensus procedure. In the meantime, informal meetings should take place to achieve progress toward the Diplomatic Conference. Several amendments to the PDC have been proposed, but little consensus on the provisions was achieved.⁴⁴⁹ Thus, as a consequence of the concerns of the U.S. government and the failure of all groups to find a workable solution, negotiations virtually stopped. Although several working groups and the Special Commission are still meeting to work further on the draft, it is highly dubious

447. See Hague Conference, *Preliminary Draft Convention on Judgments*, <http://www.hcch.net/e/conventions/draft36e.html> (accessed Feb. 22, 2004).

448. Jeffrey Kovar stated that the PDC in consequence of fatal defects in structure, approach and detail wouldn't have a chance to be accepted in the US. Letter from Jeffrey D. Kovar to J.H.A. van Loon, *Preliminary Draft Hague Convention on Jurisdiction and the Enforcement of Civil Judgments* (Feb. 22, 2000) (available at <http://www.cptech.org/ecom/hague/kovar2loon22022000.pdf>). He provided a list of substantial problems for the US such as the vague provisions about the scope of the PDC or the provisions about consumer contracts with regard to E-commerce, which the US deem to be a failure. *Id.* Furthermore, he pointed out that the objective to have a real mixed convention wasn't achieved as too many accepted bases of jurisdiction in the US are forbidden under the Convention. *Id.* He alleged many more provisions are likely to evoke a storm of protest in the US and therefore essential changes in the Convention have to be made. *Id.*

449. See ftp://ftp.hcch.net/doc/jdgm2001draft_e.doc (accessed Feb. 22, 2004).

whether the Convention will ever enter into force.⁴⁵⁰ Bearing this in mind, an informal group started working on a slimmed-down draft that covers business-to-business contracts containing choice-of-law or choice-of-forum provisions solely.⁴⁵¹

In summary, we can conclude that the negotiating parties have to adopt a reasonable and practicable approach without giving in to special interest groups⁴⁵² or insisting on their own principles without considering better, well-tested rules. The position of the U.S. Department of State that the draft "follows too closely the structure and content of the Brussels Convention"⁴⁵³ appears to be the main obstacle. In the following, I will give a short overview on the most controversial issues and most current problems with the current draft.

II. CURRENT CONTROVERSIES & PROBLEMS

One of the probably most basic decisions with regard to the Convention is the question of whether a single, double or mixed convention would best meet the requirements of the participating countries. A single convention would establish the basis of jurisdiction, which would be allowed under the convention (the so-called whitelist).⁴⁵⁴ A double convention would not only lay down the allowed basis of jurisdiction but also explicitly forbid certain bases of jurisdiction formerly allowed in the contracting countries (the so-called blacklist).⁴⁵⁵ Examples of forbidden exorbitant bases of jurisdiction in the Convention would include transient and doing business jurisdiction in the United States, jurisdiction based on the location of assets in the forum in Germany, or jurisdiction based on the plaintiff's nationality in France.⁴⁵⁶ A mixed convention would add another category to the mix: bases of jurisdiction which would be allowed in a country, but which would not require enforcement of judgments based on bases of jurisdiction (so-called greylist).⁴⁵⁷ The PDC started, at the urging of the United States, as a mixed convention. This has pro-

450. See Hague Conference on Private International Law, *Future Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, <http://www.hcch.net/e/workprog/jdgm.html> (accessed Feb. 22, 2004) (describing the current status of the Convention).

451. *International*, Washington Internet Daily, Vol. 4 No. 162 (Aug. 21, 2003).

452. See Ted Leventhal, E-commerce: *Internet Providers Challenge Parts Of Jurisdiction; Treaty*, National Journal's Technology Daily (Dec. 5, 2003); Dennis Kelly, *Georgia Regulator at Hague Meeting on International Enforcement of Judgments*, BestWire (Dec. 1, 2003).

453. EU/US: *Contrasting Visions for New Convention on International Law*, European Rpt. No. 2537 (Oct. 21, 2000).

454. See Juenger, *supra* n. 373, at 1041-1042.

455. *Id.*

456. See PDC, Art. 18.

457. See Juenger, *supra* n. 373, at 1041-1042.

voked criticism on the grounds that all countries could try to move "their" forbidden basis of jurisdiction to the greylist; consequently, the Convention will not clarify the current situation and would rather determine the whitelist of allowed jurisdiction to be purely facultative.⁴⁵⁸

One of the main controversies in the negotiations is the question of jurisdiction in consumer contract cases, especially given the background of growing e-commerce. In the 2001 draft, at least seventeen different proposals for Art. 7 can be counted. Basically, the United States and the European Community can not agree on an approach for handling consumer contracts. The European Community emphasizes consumer protection⁴⁵⁹ whereas the United States will not accept such strict consumer protection rules, quoting statements of the e-commerce industry.⁴⁶⁰ The position of the U.S. delegation has been criticized as being heavily pro-business while utterly ignoring the consumers.⁴⁶¹

In the United States, however, some critics seem to think that there is no way whatsoever that the convention, with a draft similar to the one presented, can ever be approved by an American government.⁴⁶² Others, however, point out that there are in fact no problems in adopting a con-

458. See Olivier Tell, *Tentative Draft on the Jurisdiction and the Enforcement of Foreign Judgments: Can a Mixed Convention Work*, A Global Law of Jurisdiction and Judgments: Lessons from The Hague 37, 38 (John J. Barcelo III & Kevin M. Clermont eds., 2002); see in general Peter Nygh, *Report on Work Towards a Proposed Judgments Convention at The Hague*, The Proceedings of the Twenty-First International Trade Law Conference, Sydney, Oct. 1994 (1995).

459. See *supra* pp. 85-90.

460. See Peter D. Trooboff, *Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons*, A Global Law of Jurisdiction and Judgments: Lessons from The Hague, 263, 271 (John J. Barcelo III & Kevin M. Clermont eds., 2002); see also International Jurisdiction and the Recognition and Enforcements of Foreign Judgments in Civil and Commercial Matters Issues Paper 3: International Electronic Commerce, <http://law.gov.au/publications/hagueissue> (accessed Feb. 23, 2004); but cf. Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 Am. Bus. L.J. 531, 567 (2002) (favoring the European Approach); see also Timothy P. Lester, *Globalized Automatic Choice of Forum: Where Do Internet Consumers Sue?: Proposed Article 7 of the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters and its Possible Effects on e-commerce*, 9 New Eng. Int'l. & Comp. L. Annual 431 (2003) (favoring, generally, the Hague but proposing a new amendment); see also Kristen Hudson Clayton, *Comment: The Draft Hague Convention on Jurisdiction and Enforcement of Judgments and the Internet - A New Jurisdictional Framework*, 36 John Marshall L. Rev. 223, 247 (2002) (favoring a Hague Treaty on the foundation of the more reliable European rules).

461. Lester, *supra* n. 460, at 457-458; Dugie Stanford, *E-commerce Treaty Would Give Trade a Boost, Industry Group Says*, Washington Internet Daily Vol.4, No.168 (Aug. 29, 2003).

462. See Ronald A. Brand, *Current Problems, Common Ground, and First Principles: Restructuring the Preliminary Draft Convention Text*, A Global Law of Jurisdiction and Judgments: Lessons from The Hague 76 (John J. Barcelo III & Kevin M. Clermont eds., 2002).

vention which is mostly based on European rules of jurisdiction, and even propose such legislation be enacted in the United States.⁴⁶³

After analyzing the different legal systems in Chapters C. and D., it becomes obvious that another problem in the current draft will certainly be one added basis of jurisdiction for torts. This added provision basically allows jurisdiction over the defendant based on frequent and significant activities of the defendant in the forum. Thus, the clear and unambiguous rule, which has been adopted from the Council Regulation, will become vague. In addition, it has been proposed to add reasonableness factors to the provision on torts. This, again, would destroy any certainty and foreseeability to be gained by adopting the Council Regulation's approach.

Bearing these controversies in mind, not to mention controversies and issues beyond the scope of the research objective of this article,⁴⁶⁴ it becomes clear that The Hague Conference is not likely to succeed if the negotiating parties keep insisting on their respective viewpoints.

G. CONCLUSION

In the introduction of this article, I outlined the research objective and my article with regard to the necessary adoption of rules for multinational litigation in Internet contract and tort cases. I have stated that in order to foster the growth of e-commerce, multinational litigation in Internet contract and tort cases must be governed by rules that provide certainty and foreseeability. This is necessary in order to establish the faith of the consumers participating in international e-commerce, and negate their fear of being left without reasonable access to justice, as well as to deliver a certain set of rules, which e-businesses can use to plan further investments without the shadow of costly, unanticipated litigation. Therefore, I have pointed out, the European Community's law of jurisdiction, as laid down in the Council Regulation, should be the foundation of a multinational solution. In addition, I have pointed out that the implementation of the American/Canadian "targeting" approach, as described by Geist, is necessary to establish and further clarify some basis of jurisdiction. The implementation of these rules furthermore ensures that even the technologies and developments of the future can be included in the application of these rules as the underlying concept of

463. See Kevin M. Clermont & Kuo-Chang Huang, *Converting the Draft Hague Treaty into Domestic Jurisdictional Law*, *A Global Law of Jurisdiction and Judgments: Lessons from The Hague* 192, 197 (John J. Barcelo III & Kevin M. Clermont eds., 2002); Kevin M. Clermont, *Article: Jurisdictional Salvation and the Hague Treaty*, 85 *Cornell L. Rev.* 89 (1999).

464. See generally *A Global Law of Jurisdiction and Judgments: Lessons from The Hague* (John J. Barcelo III & Kevin M. Clermont eds., 2002).

“targeting” (knowledge of the access of one’s Web site by users from other jurisdictions) applies to further developments as well.

In the next chapters, I proved that the regulation of the Internet is feasible, and that there is no need to believe that the Internet is going to be a self-regulatory entity. As a consequence of the fact that communication and interaction found on the Internet are not entirely different from communication and interaction in the real world, the problems of Internet regulation do not differ significantly from other problems in multinational litigation.⁴⁶⁵ Therefore, the problems facing Internet regulation before the background of an ongoing process of globalization and an enormous growth in e-commerce, including cross-border shopping, is more aptly described as the global community’s handling the amount of cases without too much interference and disagreement between the involved countries and parties. To achieve this objective of facilitating this regulation, I have pointed out that a multinational set of rules is necessary and would be supportive of continuing growth in cross-border e-commerce.

The analysis of the American legal system with respect to the provisions of jurisdiction has proven my article correct; with regard to the objective of providing a reliable set of rules for litigation in multinational Internet contract and tort litigation, the American case law and principles of the law of jurisdiction - as a consequence of its remarkable flexibility - do not provide certainty and foreseeability.⁴⁶⁶ For this reason, the American provisions can not provide a reasonable foundation for a multinational solution. The flexibility, which has led to the lack of a predictable outcome in the American law of jurisdiction, has, on the other hand, led to innovative new approaches in evaluating problems with Internet jurisdiction, which are also of further importance.

The analysis of the European legal provisions on jurisdiction in Internet-related tort and contract litigation has shown different results. First, I showed that the provisions of the Brussels Convention and its successor, the Council Regulation 44/2001, have established clear and unambiguous rules. Second, the emphasis on strict rules for consumer protection is preferable. Considering the fact that the consumer is usually the weaker party in a lawsuit and does not have the option to initiate costly litigation in a distant forum, his option to sue at home must be

465. The problems arising out of the principle of territoriality in trademark law and other Intellectual Property issues with regard to the Internet, however, might establish a bigger dimension of controversies.

466. See Patrick J. Borchers, *Symposium Article: A Few Little Issues for the Hague Judgments Negotiations*, 24 *Brooklyn J. Int’l. L.* 157, 160-163 (1998) (speaking about “wild unpredictability” and in consequence of an “enormous volume of litigation”); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 *U. Chi. Legal F.* 171, 198-200 (2001).

provided, as well as the assurance that he will not be sued in a distant forum. For this reason, the provisions on forum selection clauses, when employed in consumer contracts, are preferable as well. Given that most consumers do not read or do not understand the language of the terms and conditions of the agreements, and often are unable to choose another company or Web site, this seems even more reasonable. Third, the provisions on the application range for consumer contracts need further clarification regarding the question concerning when a Web site/e-commerce business "directs its activities" to the consumer's domicile. Fourth, the rules for special jurisdiction in tort cases bear the danger of being too broadly applied in Internet-related cases, although Art. 5(3) provides clear and unambiguous rules.⁴⁶⁷ The danger of overly broad application becomes more significant, considering world-wide jurisdiction in consequence of the place where the damage occurs rule, if we examine the different and often politically driven standards in substantial law when it comes to defamatory remarks. Another major problem appears in fields of law, which employ the principle of territoriality.

With this outcome of the analysis, proof has been furnished that, in consequence of the foreseeability and certainty, the European Community's rules must be the foundation for an international solution,⁴⁶⁸ but have to be improved with regard to the above-mentioned problems. The described advantages of the European approach in consumer protection justify the inclusion of the provisions on consumer contracts in international solutions as well.⁴⁶⁹ To improve the European approach with re-

467. See Thomas Hoeren, *Zivilrechtliche Haftung im Internet*, 1999 Phi 86, 95 (favoring a restraint of the provisions on tort jurisdiction in Internet cases suggesting the consideration of several factors including "aiming"); Mankowski, *supra* n. 427, at 272 (favoring a restriction of the provisions without finding sufficient criteria); see also Julie L. Henn, *Targeting Transnational Internet Content Regulation*, 21 B.U. Int'l. L.J. 157, 174-176 (2001)(favoring a similar targeting approach).

468. See Juenger, *supra* n. 444, at 1203-1205, 1210-1213 (emphasizing the advantages of the European approach to jurisdiction); Juenger, *supra* n. 373, at 1038 (stating that "practice under the [Brussels] Convention might be smoother, more efficient, and more satisfactory than American interstate recognition and enforcement."); see also Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 Brook. J. Int'l. L. 111, 116 (1998) (stating: "[t]he Brussels Convention has been a resounding success. Each and every day of the week, member state judgments are enforced across legal and linguistic barriers with minimal transaction costs."); Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 Am. J. Comp. L. 121, 146, 156-157 (stating that "the Brussels Convention approach is preferable" (speaking about torts) and in comparison to the European approach "jurisdictional practice in the United States is deficient both in fairness and predictability"); see also literature *supra* nn. 373-377.

469. The Transatlantic Consumer Dialogue (TACD), a forum for US and EU consumer organizations supports similar approaches to cross-border litigation with consumers involved, providing the consumer with the right to sue at home to establish access to justice.

gard to its mentioned inherent flaws, I have suggested implementing the U.S./Canadian targeting approach as proposed by Geist,⁴⁷⁰ a product of the flexibility of the American system. This approach, however, would have to be slightly modified, while leaving the underlying basic concept (assessment of knowledge of the access of one's Web site by users from other jurisdictions) untouched. The first targeting criterion, "contractual agreements," would have to be accommodated to the European approach to consumer contracts; the second and third criteria could be adopted unchanged. Implementation of the approach with regard to foreseeability should result in two new paragraphs in a draft for a multinational solution. First, this approach should be implemented to clarify the scope of the application of the rules on consumer contracts. Using the targeting criteria technology and knowledge, it would become certain under which circumstances a Web site or e-commerce company directed its activities to the consumer's domicile. This is especially true, when one considers the impressive accuracy of geolocation software. Second, the targeting approach should be implemented to limit the application of the provision on special jurisdiction in tort cases. Keeping in mind that the publishing of a possible defamatory statement or the use of a trademark under this rule could trigger jurisdiction all around the globe, a Web site owner or publisher should be provided with a method of restricting jurisdiction. This could be achieved by implementing the targeting approach in the form of adding a new paragraph honoring protection mechanisms for a Web site such as geolocation software or a password check. As a result, a Web site owner or publisher who had restricted the access of its Web site to certain countries would not be subject to jurisdiction in other countries, because the Web site simply couldn't be accessed in these countries. For this reason, no damage could occur in these countries and no jurisdiction could be asserted. The implemented targeting rules would have to set clear standards in determining which measures would be deemed sufficient to achieve a restriction in the jurisdiction based on this provision. This standard, however, has to be significantly higher with regard to the issues in intellectual property law such as colliding (identical or similar) trademarks from different countries, which are available on the Internet. Considering a case where an identical trademark is registered in country A and B, the owner of trademark A would have to restrict the access to his Web site to exclude users from country B from his Web site to avoid trademark infringement and jurisdiction under the "improved" European approach. As a trademark infringement can occur through even mere trademark availability, protective measures have to

See TACD, *Jurisdiction on Cross-Border Consumer Contracts*, <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=44> (accessed Feb. 25, 2004).

470. See Clayton, *supra* n. 460, at 427 (favoring an international solution as well as a targeting approach).

make sure that no access to the Web site is granted.⁴⁷¹

Adoption of the European Community's approach with the aforementioned, important improvements is in any case the most reasonable and workable answer to the defiance of multinational litigation in Internet-related tort and contract cases, even if the technological evolution might provide ground for improvement in the future. The goal of instituting a clear set of rules to establish foreseeability and certainty, while simultaneously establishing a concept that provides the flexibility to incorporate future developments, can very likely be achieved as described above. With regard to the current controversies between mostly the European Community and the United States, this recommendation of a combined European/American approach could be what the Hague Conference needs right now to resolve its negotiation problems. As indicated in the title, I have drawn lessons for The Hague on the issue of Internet jurisdiction in contract and tort cases especially with regard to multinational litigation.

471. By suggesting this approach for jurisdiction in trademark infringement and similar intellectual property cases on the Internet I do not intend to provide a solution for the problem of colliding national intellectual property rights on the Internet. A better solution will probably include a new, international framework for intellectual property law with regard to the Internet. See in this context Rochelle C. Dreyfuss & Jane C. Ginsburg, *Symposium on Constructing International Intellectual Property Law: The Role of National Courts: Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 Chi.-Kent. L. Rev. 1065 (2002).