

## **Obstacles and Solutions to Internet Jurisdiction A Comparative Analysis of the EU and US laws\***

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**Abstract** :In an era of information technology, businesses, through the use of the boundless Internet, can enter into international electronic contracts from anywhere in the world. The potential for cross-border disputes in electronic contracts is obviously much greater than in a paper-based environment, where a high degree of commercial contracts are domestic in nature. Can the traditional rules on jurisdiction, which are geographically orientated and generally rely on the place of performance, apply to the modern electronic contract disputes? This paper will analyse the EU and US approaches for determining jurisdiction in e-contracting cases and discuss the possibility of proposing specific jurisdiction rules for online contracts.

**Keywords:** *Internet jurisdiction, electronic contracts, general jurisdiction, special jurisdiction, specific jurisdiction, minimum contacts and targeting approach*

### **1. Introduction**

In the era of information technology, any computer, anywhere in the world, connected to the Internet can access a website. Businesses, through the use of the Internet, can enter into electronic contracts with other businesses located in different countries. The potential for cross-border disputes in web contracts is, obviously, much greater than in a paper-based environment, where a high degree of commercial contracts are domestic in nature. Businesses fear that the determination of Internet jurisdiction could be uncertain because unlike paper based contracts, online contracting is not executed in one particular place. Therefore, nations want to be able to ensure the protection of local businesses.

Currently, there are no specific rules in the model laws and conventions dealing with Internet jurisdiction. The UNCITRAL Model Law on Electronic Commerce and the UN Convention on the Use of Electronic Communications in International Contracts do not contain any jurisdiction provisions. However, they determine the time and place of dispatch and receipt of data messages or electronic communication<sup>1</sup> and the location of the parties<sup>2</sup>, giving the connecting factors such as “the place of business”, “the closest relationship to the relevant contract, the underlying transaction or the principal place of business”, or “habitual residence”, which may help to analyse parties’ business location to ascertain jurisdiction.

This paper will analyse the EU and US approaches for determining jurisdiction in e-contracting cases, explain the differences, and discuss whether there is need to propose specific jurisdiction rules for online contracts or whether they can simply apply the general jurisdiction rules that are used in ordinary contracts.

### **2. EU Rules Applied in Cyber Jurisdiction**

In the EU, the EC Directive on Electronic Commerce neither establishes additional rules on private international law nor deals with the jurisdiction of courts.<sup>3</sup> Since the E-commerce Directive does not cover Internet jurisdiction, the Brussels I Regulation,<sup>4</sup> which is based on the old Brussels Convention, performs its role in the absence of the

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<sup>1</sup> Article 15 of the UNCITRAL Model Law on Electronic Commerce, on the report of the Sixth Committee (A/51/628) 16 DECEMBER 1996, available at [www.lexmercatoria.org](http://www.lexmercatoria.org) (last visited 16 August 2007); and Article 10 of the UN Conventions on the Use of Electronic Communications in International Contracts, 2005, available at [www.uncitral.org](http://www.uncitral.org) (last visited 16 August 2007).

<sup>2</sup> Article 6 of the UN Convention on the Use of Electronic Communications in International Contracts.

<sup>3</sup> Recital 23 and Article 1(4) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (thereafter “EC Directive on electronic commerce”).

<sup>4</sup> Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matter (“Brussels Regulation”), see Council Regulation (EC) No. 44/2001, 22 December 2000, *Official Journal L 012, 16.01.2001*, p.1, available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l\\_012/l\\_01220010116en00010023.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf) (last visited on 13 November 2005).

relevant legislations. However, Article 23(2) of the Brussels I Regulation is the only rule that explicitly acknowledges agreements with electronic means. It provides that “any communication by electronic means which provides a durable record of, the agreement shall be equivalent to writing”.<sup>5</sup> It means that a contract stored in a computer as a secured word document (i.e. a read-only document or document with entry password), or concluded by email and click-wrap agreement falls within the scope of Article 23(2) of the Brussels I Regulation. Then, courts will determine jurisdiction of the online contract according to three main types of jurisdiction rules in the Brussels I Regulation: general jurisdiction, special jurisdiction and exclusive jurisdiction.

The general jurisdiction rule under the Brussels I Regulation is that defendants, who are domiciled in one of the Contracting states, shall be sued at the place of their domiciles.<sup>6</sup> One of the key objectives of the Brussels Regime is the harmonization of jurisdictional bases in cases involving proceedings brought against defendants domiciled in the states concerned.<sup>7</sup>

## 2.1 Choice of Court Clauses

A well-drafted contract, which has factual links with more than one country, will contain a choice of jurisdiction or court clause. This is often referred to as an “exclusive” clause, providing that all disputes between the parties arising out of the contract must be referred to a named court or the courts of a named country.<sup>8</sup> Article 23 of the Brussels I Regulation authorises parties to enter into an agreement designating the court or courts to determine such disputes. However, Article 23(1) applies when at least the party, one or more of whom, is domiciled in a member state have agreed that the courts of a member state are to have jurisdiction over disputes arising in connection with a particular legal relationship. Parties can choose courts or specific courts of a country. For example, Company A (in Italy) and Company B (in Germany) have agreed a jurisdiction clause “disputes must be referred to the courts of Germany” in their electronic contracts of sale. Under these circumstances, German courts are designated to have jurisdiction over A and B’s disputes. However, if later on, A and B made another distribution contract without jurisdiction clause (the sales contracts and the distribution agreement are different legal relationships), then the original jurisdiction clause in the sale contract does not confer jurisdiction with regard to a dispute arising under the distribution contract.<sup>9</sup> If the jurisdiction clause includes a choice of a particular court, Article 23 is to confer jurisdiction on that court, but not on other courts in the same country. However, A and B can also choose the other courts, for instance the French court, instead of the Italian or German courts to hear the case, because Article 23 does not “require any objective connection between the parties or the subject matter of the dispute and the territory of the court chosen”.<sup>10</sup> Moreover, A and B can also conclude a further exclusive jurisdiction agreement varying the earlier agreement, because Article 23 is based on the principle of party autonomy and it does not prevent parties from changing their decisions.<sup>11</sup>

However, Article 23(3) includes an exemption to parties, none of whom is domiciled in a member state. In this situation, the chosen courts have discretion to determine the existence and exercise of their jurisdiction in accordance with their own law.<sup>12</sup> The courts of the other members shall have no jurisdiction over the disputes unless the chosen court or courts have declined jurisdiction.

In the e-contracting cases, to insert a choice of jurisdiction clause in the standard terms and conditions on the website can avoid further ambiguity about which court has jurisdiction when disputes arise. For example, the website owner can incorporate a choice of jurisdiction clause into an interactive click-wrap agreement that the buyer needs to click the “I agree” button to assent to it.<sup>13</sup>

## 2.2 General Jurisdiction

Under Article 2 of the Brussels I Regulation, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that state. Furthermore, domicile rules within the Brussels I Regulation govern the domicile of individuals<sup>14</sup> and domicile of corporations<sup>15</sup>. With contracts made over the Internet, it is difficult to determine where the party is domiciled, even though the plaintiff can identify the party and locate the transaction.<sup>16</sup> Article 59(1) of the Brussels I Regulation provides that, as regards natural persons, in order to

<sup>5</sup> Article 23(2) of Brussels I Regulation.

<sup>6</sup> Article 2 of Brussels I Regulation.

<sup>7</sup> Hill (2005), p.71.

<sup>8</sup> Morris, McClean & Beevers (2005), p.87.

<sup>9</sup> *WH Martin Ltd v. Feldbinder Spezialfahrzeugwerke GmbH* [1998] ILPr 794, cited from Hill (2005), p.103.

<sup>10</sup> *Castelletti v. Trumppy* [1999] ECR I-1597.

<sup>11</sup> *Sinochem v. Mobil* [2000] 1 *Lloyd's Rep* 670.

<sup>12</sup> *Ibid.*

<sup>13</sup> Fawcett, Harris & Bridge (2005), p.511.

<sup>14</sup> Article 2 & Article 59 of Brussels I Regulation.

<sup>15</sup> Article 60 of Brussels I Regulation.

<sup>16</sup> Fawcett, Harris & Bridge (2005), p.511.

determine whether a party is domiciled in a particular member state, the court shall apply the law of that state. Article 60(1) lays down that for the purposes of the Brussels I Regulation a company or other legal person or association of natural or legal persons is domiciled at the place where it has (1) its statutory seat or (2) its central administration or (3) its principal place of business.

On the Internet, since the decision of the e-transaction might be made following discussion via video conferencing between senior officers who reside in different states, it has become more difficult to ascertain the location of the central administration.<sup>17</sup> According to the UN Convention on the Use of Electronic Communications in International Contracts (the UN Convention), “the location of the parties”<sup>18</sup> is defined as “a party’s place of business”<sup>19</sup>. If a natural person does not have a place of business, the person’s habitual residence should be deemed as a factor to determine jurisdiction.<sup>20</sup> The UNCITRAL Model Law on Electronic Commerce is the same as the UN Convention, providing that “if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence”<sup>21</sup>. In my view, the person’s habitual residence on the Internet occasion should be treated the same as the traditional off-line rule that general jurisdiction should be connected to the habitual residence of the defendant but not the claimant.

Furthermore, according to the UN Convention, if a party does not indicate his place of business and has more than one place of business, then the place of business is that which has the closest relationship to the relevant contract.<sup>22</sup> The closest connecting factors are those that occur before or at the conclusion of the contract.<sup>23</sup> In my opinion, these factors have no difference from the off-line world, which should also relate to statutory seat, central administration or principal place of business. As a person or legal person doing electronic commerce, his/ her statutory seat, central administration or principal place of business can be checked by the claimant, and the result can be found according to some connecting factors such as the registration of the defendant’s business, licenses, electronic payments and places of delivery of goods or services. This would lead to the following issue: special jurisdiction.

### 2.3 Special Jurisdiction

Article 5 of the Brussels I Regulation derogates from the general principle contained in Article 2, which gives the claimant the opportunity to proceed against the defendant in a member state in which the defendant is not domiciled. Under this provision, it contains seven matters, one of which, Article 5(1), deals with matters relating to a contract. This general rule does not apply to insurance, consumer and employment contracts.<sup>24</sup>

How to ascertain “the place of performance of the obligation in question”<sup>25</sup> is the focal point of how to determine jurisdiction. The place of performance, according to Article 5(1)(b), is the place of delivery of goods (or where it should have been delivered), or the place where the services were provided or should have been provided. Since the place of delivery is a close linking factor to determine special jurisdiction, an electronic contract makes no difference from a paper-based contract when the contract itself involves physical delivery of goods. The difficulty to apply Article 5(1) lies on the interpretation that whether multiple places of delivery are within the scope of the Article 5(1).

Unfortunately, what Article 5(1)(b) does not expressly address is that posed by the situation where, as regards a contract for the sale of goods, there is more than one place of delivery or, in relation to a contract of services, there is more than one place of performance. Problems with regard to multiple places of delivery of goods or provision of services,<sup>26</sup> can be divided by two categories: one is different obligations have different places of delivery, and the other is the relevant obligation have several places of delivery.

At the first category, there are two possibilities: First, disputes concern more than one obligation. Article 5(1) allocates jurisdiction to the courts for each place of performance with regard to the dispute arising out of the

<sup>17</sup> Fawcett, Harris & Bridge (2005), p.511.

<sup>18</sup> Article 6 of the UN Convention on the Use of Electronic Communications in International Contracts, A/RES/60/21, 9 December 2005.

<sup>19</sup> Article 6(1) of the UN Convention.

<sup>20</sup> Article 6(3) of the UN Convention; Article 15(4)(b) of the UNCITRAL model Law on Electronic Commerce.

<sup>21</sup> Article 15(4)(b) of the UNCITRAL Model Law on Electronic Commerce.

<sup>22</sup> Article 6(2) of the UN Convention.

<sup>23</sup> Article 6(2) of the UN Convention.

<sup>24</sup> Article 8-14 of the Brussels Regulation governs insurance; Article 15-17 is about consumer contracts; Article 18-21 provides about employment contracts.

<sup>25</sup> Article 5(1) (a) of the Brussels I Regulation states that “A person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question”. “The obligation in question” means that which is relied upon as the basis for the claim, explained by Morris, McClean & Beevers (2005), p.72.

<sup>26</sup> Hill (2005), p.135.

obligation, which should have been performed at that place.<sup>27</sup> Second, cases involve two obligations with one principal obligation. The courts for the place of performance of the principal obligation have jurisdiction over the whole claim.<sup>28</sup>

At the second category, there are also two possibilities: First, as is noted by the most recent case *Color Drack GmbH v. Lexx International Vertriebs GmbH*<sup>29</sup>, there is a query about “whether the first indent of Article 5(1)(b) of the Brussels I Regulation applied in the case of a contract for the sale of goods involving several places of delivery within a single Member State”<sup>30</sup>, and if so, “whether the plaintiff could sue in the court for the place of delivery of its choice”<sup>31</sup> among all places of deliveries. The Court ruled that the applicability of the first indent of Article 5(1)(b) where there are several places of delivery within a single Member State complies with the regulation’s objective of predictability, and proximity underlying the rules of special jurisdiction in matters relating to a contract.<sup>32</sup> When dispute arises, the defendant should expect that he may be sued in a court of a Member State other than the one where he is domiciled. Although the defendant might not know exactly which court the plaintiff may sue him, he would certainly know that any court, which the plaintiff might choose, would be situated in a Member State of performance of the obligation. As to the question whether the plaintiff can sue in a court of its own choice under Article 5(1)(b), the Court ruled that for the purposes of application of the provision, the place of delivery must have the closest linking factor between the contract and the court, and “in such a case, the point of closest linking factor will, as a general rule, be at the place of the principal delivery, which must be determined on the basis of economic criteria”.<sup>33</sup> If all places of delivery are “without distinction”, and “have the same degree of closeness to the facts in the dispute”<sup>34</sup>, the plaintiff could sue in the court for the place of delivery of its choice.

This first query leads to the second consideration: if the places of delivery were in different Member States, will Article 5(1)(b) still apply? Where the relevant obligation has been, or is to be, performed in a number of places in different member states, following the Advocate General (AG)’s opinion, article 5(1)(b) does not apply to this situation as the objective of foreseeability of the Brussels I Regulation could not be achieved<sup>35</sup>, that is a single place of performance for the obligation in question could not be identified for the purpose of this provision,<sup>36</sup> then, the claimant should turn to Article 2 of the Brussels I Regulation, according to which the court with jurisdiction is that of the domicile of the defendant.

In B2B electronic contracting disputes, can Article 5(1) still apply? If so, how can Article 5(1) be employed to resolve Internet jurisdiction disputes? To answer these questions, it will be first necessary to determine whether an electronic contract is for the sale of goods, or the provisions of services. Next, a distinction will be made between physical goods and digitised goods, physical services and digitised services, and physical performance and digitised performance. This will make it possible to determine the differences and similarities concerning the place of performance between online and offline contracting.

Firstly, is there a contract for the sale of goods, the provision of services or neither? Generally, goods can be ordinary goods with physical delivery and digital goods with performance over the Internet, such as digital books, online journals as well as software programs. With regards software program, there is academic authority in favor of the proposition that software transferred online constitutes “goods” for the purposes of the United Nations Convention on Contracts for the International Sale of Goods (CISG).<sup>37</sup> However, carriage of goods by sea, the provision of financial services, providing Internet access to recipients or designing a website for a company should all be categorized as services. In addition, programming software that meets the buyer’s specific needs should be regarded as providing services. Sometimes, in a complex software development project, a piece of software program can be broken down into self-contained sections so that when there is payment by instalments on completion of milestones, payment will be due from the buyer on completion of each milestone within the framework of a software development contract.<sup>38</sup>

Secondly, how can digitised goods be distinguished from other products? Digitised products are intangible and intangible property is, by its nature, not physically located in a particular state.

<sup>27</sup> Case C-420/97 *Leathertex Divisione Sintetici SpA v. Bodetex BVBA* [1999] ECR I-6747, cited from Hill (2005), p.135.

<sup>28</sup> Case 266/85 *Shenavai v. Kreischer* [1987] ECR 239, cited from Hill (2005), p.135.

<sup>29</sup> *Color Drack GmbH v. Lexx International Vertriebs GmbH* (Case C-386/05), [2007] I. L. Pr. 35.

<sup>30</sup> *Ibid.*, p.456.

<sup>31</sup> *Ibid.*, p.456.

<sup>32</sup> *Ibid.*, p.479.

<sup>33</sup> *Color Drack GmbH v. Lexx International Vertriebs GmbH* (Case C-386/05), [2007] I. L. Pr. 35, p.480.

<sup>34</sup> *Ibid.*, p.473.

<sup>35</sup> *Ibid.*, p.472.

<sup>36</sup> Case C-256/00 *Besix SA v. Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (Wabag)* [2002] ECR I-1699, cited from Hill (2005), p.135.

<sup>37</sup> Fawcett, Harris & Bridge (2005), p.514.

<sup>38</sup> Burnett & Klinger (2005), p.74.

However, the fact that a party has downloaded digitised products onto his computer, so that they are located on his hard drive, does not mean that the relevant *situs* is the place where the computer is presently located. Rather, we must consider the more complex question of where digitized products were located at the time of the purported dealing with them.<sup>39</sup>

Thirdly, what can be the place of performance of the obligation in question in the cyberspace? As discussed earlier, between businesses the place of delivery is usually included by the contract of sale.<sup>40</sup> However, it becomes complicated when parties do not indicate the place of delivery in their contract, because it might involve multiple places of delivery and services might also be provided by the seller's agencies. Furthermore, it would be even more complex when the transaction involves the delivery of digitised good, as there are a number of places where electronic transactions are processed, for example, place of dispatch and receipt, the place where the seller has a specified personal connecting factor and the place where the recipient (i.e. the buyer) has a specified personal connecting.

According to Article 5(1)(b) of the Brussels I Regulation, the place of performance should be deemed to be the place of delivery. Since it is very difficult to ascertain the place of performance with digitized goods involving online delivery, in my opinion, the recipient's place of business should be considered as a connecting factor. This connecting factor might be also compatible with the US jurisdiction tests as discussed below.

### 3. US Jurisdiction Tests

Due to the fact that U.S. companies are at the forefront of Internet technology, litigation regarding e-commerce in the United States is more advanced than anywhere else in the world. Similar to the EU Brussels regime (general and special jurisdiction), U.S. Law has two types of jurisdiction: general and specific. General jurisdiction is jurisdiction over the defendant for any cause of action, whether or not related to the defendant's contacts with the forum state; whereas specific jurisdiction exists when the underlying claims arise out of, or are directly related to, a defendant's contacts with the forum state.<sup>41</sup>

The above notion comes from the landmark case *International Shoe Co. v. Washington*<sup>42</sup>, which indicated that the minimum contacts test has both a general and a specific component.<sup>43</sup> What is meant by "minimum contacts"? It is a requirement that must be satisfied before a defendant can be sued in a particular state. In order for the suit to go forward in the chosen state, the defendant must have some connections with that state. For example, advertising or having business offices within a state may provide minimum contacts between a company and the state.

#### 3.1 General Jurisdiction

Under the most commonly employed minimum contacts test, general jurisdiction is usually premised on "continuous and systematic" contacts between the defendant and the forum so as to make the defendant amenable to jurisdiction without regard to the character of the dispute between the parties.<sup>44</sup> It is clear that if the contacts that are unrelated to the dispute ("unrelated contacts") meet the threshold of being "continuous and systematic", the defendant is amenable to general jurisdiction based upon its contacts with the state.

The most difficult issue in relation to general jurisdiction is the amount of unrelated contacts needed to subject a defendant to *in personam* jurisdiction<sup>45</sup>. That is, the defendant has some continuing physical presence in the forum, usually in the form of offices. There is a question whether "mere" residence, as opposed to domicile or nationality can be a sufficient connection for the exercise of general jurisdiction over an individual defendant.<sup>46</sup> The Second Restatement states that a defendant's residence is sufficient for the exercise of general jurisdiction "unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable."<sup>47</sup> Thus, general jurisdiction results from a party's continuous, systematic and ongoing ties to a certain forum.<sup>48</sup>

<sup>39</sup> Fawcett, Harris & Bridge (2005), p.1301.

<sup>40</sup> Deveci (2006), p.43.

<sup>41</sup> Chik (Spring 2002), 243, p.248-49.

<sup>42</sup> 326 U.S. 310 (1945).

<sup>43</sup> Scoles, Hay, Borchers & Symeonides (2000), p.344.

<sup>44</sup> *International Shoe*, 326 U.S. at 320, 66 S.Ct. at 160, 90 L.Ed. at 104.

<sup>45</sup> Scoles, Hay, Borchers & Symeonides (2000), p.348.

<sup>46</sup> *Ibid*, p.338.

<sup>47</sup> Restatement, Second, Conflict of Laws §30 (1971).

<sup>48</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S.408 (1984).

### 3.2 Specific Jurisdiction

However, specific jurisdiction turns upon the character of the dispute (“related contacts”). That is, if the contact is related to the cause of action, such related-contact jurisdiction is specific jurisdiction, because (unlike general jurisdiction) it is dependent upon the character of the dispute.<sup>49</sup> Specific jurisdiction is often used when a party’s contacts do not fulfil the general jurisdiction criteria, and permits the court to assert jurisdiction over parties to a dispute arising from the parties’ contacts with the State involved.<sup>50</sup> Due to the requirement that the contacts are “related” to the dispute, those contacts may well suffice for jurisdiction in the lawsuit at hand, but may not in another lawsuit relating to the defendant’s activities in another state.<sup>51</sup> Thus, determining whether specific jurisdiction exists in a particular case depends, then, upon two separate considerations. The first is whether the contacts are “related” to the dispute. The second, assuming that the contacts are so related, is whether the contacts are “constitutionally sufficient”.<sup>52</sup>

For the last few years, U.S courts, both state and federal, have been wrestling with the problematic issue of personal jurisdiction in the context of Internet-related activities. In deciding these cases, US courts have been reluctant to view the mere general availability of a web site as a “minimum contract” sufficient to establish specific personal jurisdiction over a non-resident defendant, at least in the absence of other contracts with the forum state.<sup>53</sup> Whether a defendant can be subject to specific jurisdiction in contract cases depends on the entire course of dealing, including “prior negotiation and contemplated future consequences” establishing that “the defendant purposefully established minimum contacts with the forum.”<sup>54</sup>

In practice, when trying to determine whether it has personal jurisdiction over a non-resident defendant, the U.S. court will use a two-step test. First, the court will examine the State’s long-arm statute in order to determine whether there is a statutory basis for allowing that plaintiff to sue the defendant in that forum. In the second step, the court looks for some acts or activities by which the defendant has purposefully availed himself or herself of the privilege of conducting business in that State to such an extent that the defendant should reasonably anticipate being sued there.<sup>55</sup> The second step plays a large role in the jurisdiction calculus, that is, “purposefully” and “reasonableness”.

In addition, specific jurisdiction can also be examined by two factors: exercise of jurisdiction is consistent with these requirements of “minimum contacts” and “fair play and substantial justice”. These can firstly be determined by where the non-resident defendant has purposefully directed his activities or carried out some transaction with the forum or a resident thereof, or performed some act by which he purposefully availed himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws; Secondly, the claim arises out of or relates to the defendant’s forum-related activities; and thirdly, the exercise of jurisdiction is reasonable.<sup>56</sup>

In the *Zippo* case, the Western Pennsylvania District Court expanded on the International Shoe “minimum contact test” by stating that personal jurisdiction for e-commerce companies should be dealt with on a “sliding scale”.<sup>57</sup> That is, the “minimum contacts” test sets forth the due process requirements that a defendant, not present in the forum, must meet in order to be subjected to personal jurisdiction: “he must have certain minimum contracts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>58</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*<sup>59</sup> is emerging as the seminal case on whether an Internet website provides the minimum contacts necessary to establish jurisdiction. *Zippo* introduced a sliding scale to analyse the contacts of potential defendants created by Internet websites. In determining the constitutionality of exercising jurisdiction, the *Zippo* court focused on the “nature and quality of commercial activity that an entity conducts over the Internet”.<sup>60</sup>

The sliding scale approach can be divided into three categories: first, active websites. The defendant enters into contracts with residents of a foreign jurisdiction that involve the repeated transmission of computer files over the Internet.<sup>61</sup> These are grounds for the exercise of personal jurisdiction. Second, passive websites. Passive websites merely provide information to a person visiting the site. They may be accessed by Internet browsers, but do not allow interaction between the host of the website and a visitor to the site. Passive websites do not conduct

<sup>49</sup> Scoles, Hay, Borchers & Symeonides (2000), p.344.

<sup>50</sup> *Ashi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987).

<sup>51</sup> Maloney (1993), p.1265, 1269 – 70.

<sup>52</sup> Scoles, Hay, Borchers & Symeonides (2000), p.300.

<sup>53</sup> Smith, G. J. H. (2002), p.347.

<sup>54</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 479, 105 S.Ct. 2185, 85 L. Ed. 2d 528 (1985).

<sup>55</sup> *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), see also in Mitrani (2001), p.56.

<sup>56</sup> *Ballard v. Savage*, 65 F.3d 1495, 1498 (9<sup>th</sup> Cir. 1995).

<sup>57</sup> See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W. D. pa 1997), at 1124.

<sup>58</sup> *Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310 (1945).

<sup>59</sup> See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W. D. pa 1997).

<sup>60</sup> See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W. D. pa 1997), at 1124.

<sup>61</sup> *CompuServe, Inc. v. Patterson*, 89 F. 3d. 1267 (6<sup>th</sup> Cir. 1996).

business, offer goods for sale, or enable a person visiting the website to order merchandise, services, or files. The defendant has simply posted information on a passive Internet website which is accessible to users in foreign jurisdictions. This is not a ground for the exercise of personal jurisdiction. Third, interactive websites make up the middle of the sliding scale where a user can exchange information with the host computers. In this middle scale, jurisdiction should be determined by the “level of interactivity and commercial nature of the exchange of information that occurs on their web site.”<sup>62</sup> Factors such as online contracting (found on most e-commerce sites) can show a high level of interaction leading to the exercise of jurisdiction. This is the crucial point of the sliding scale analysis. If the activities occurring on a defendant’s website lean more towards the passive side of the scale, personal jurisdiction will not be applied. If, however, the activity slides toward the active side of the scale, personal jurisdiction will likely to be upheld.<sup>63</sup>

As discussed above, the most developed doctrine of US jurisdiction is the *Zippo* sliding scale which encourages inquiry into the level of interactivity of a website. However, in order to avoid that it falls in the middle of the scale, one would have expected the court to provide a rough definition of “interactivity”, but it did not.<sup>64</sup> Moreover, the *Zippo* test with its emphasis on the level of interactivity inherent to a website, has become less relevant given that almost all commercial sites now are “at least highly interactive, if not integral to the marketing of the website owners.”<sup>65</sup>

US courts in accordance with jurisdictional developments abroad, have further developed an alternative approach to determining jurisdiction in E-commerce: an “effects” test, based on the Supreme Court’s decision in *Calder v. Jones*.<sup>66</sup> It permits states to exercise jurisdiction when the defendants intentionally harm forum residents. In applying this “effects” test to Internet cases, U.S courts focus on the actual effects the website has in the forum state rather than trying to examine the characteristics of the website or web presence to determine the level of contact the site has with the forum state.<sup>67</sup> However, an “effect” test will more easily apply to injuries in tort to individuals where injury is localized or intent can be inferred, but not when E-commerce cases involving corporations.<sup>68</sup> Because determining where a larger, multi-forum corporation is “harmed” is a difficult prospect<sup>69</sup>. The court noted that the “effects” test does not “apply with the same force” to a corporation as it does to an individual because a corporation “does not suffer harm in a particular geographic location in the same sense that an individual does.”<sup>70</sup>

Questioning the utility of the *Zippo* and “effects” tests, some US courts have focused on whether there was “something more” needed for the exercise of jurisdiction. Courts further introduced the “targeting test”.<sup>71</sup> The requirement of the “targeting test” is satisfied “when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state”.<sup>72</sup> It has been argued that the targeting-based test is a better approach for the courts to employ than the sliding scale test in *Zippo* when determining jurisdiction in cases involving Internet-based contacts. The targeting test, unlike the other one, places greater emphasis on identifying “the intentions of the parties and the steps taken to either enter or avoid a particular jurisdiction.”<sup>73</sup> Further, the advocates of the targeting test view it as a better and fairer approach for determining whether the defendant reasonably anticipated being haled into a foreign court to answer for her activities in the foreign forum state.<sup>74</sup> This determination is central to the due process analysis articulated by the United States Supreme Court in *World-Wide Volkswagen*: “[T]he defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. The Due Process Clause, by ensuring the ‘orderly administration of the laws,’ gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>75</sup>

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<sup>62</sup> See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W. D. pa 1997), at 1124; see also *Maritz Inc. v. Cybergold Inc.* 947 F Supp 1328 (ED Mo1996).

<sup>63</sup> See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W. D. pa 1997), at 1124.

<sup>64</sup> Boone (Spring 2006), p.241, 258.

<sup>65</sup> Rice (2004), p.11, 52.

<sup>66</sup> *Calder v. Jones*, 465 U.S. 783 (1984), cited from Boone (Spring 2006), 241, 259-260. In *Calder*, a California resident brought suit in California Superior Court against Florida residents who allegedly wrote libellous matter about her in a prominent national publication. In holding that jurisdiction was proper, the Court found “the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California.”

<sup>67</sup> Boone (Spring 2006), p.241, 260.

<sup>68</sup> *Ibid.*, p.241, 261.

<sup>69</sup> Rice & Gladstone (2003), p.601, 629.

<sup>70</sup> *Cybersell, Inc. v. Cybersell, Inc.*, 130 F. 3d 414, 420 (9th Cir. 1997).

<sup>71</sup> *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F. 3d 1082, 1087 (9<sup>th</sup> Cir. 2000).

<sup>72</sup> *Ibid.*

<sup>73</sup> Michael Geist, *Internet Law in Canada* 69 (2d ed. 2001).

<sup>74</sup> *Ibid.*

<sup>75</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

*So how can we ascertain the “targeting” approach in electronic contracts?*

Firstly, it is based on the intention of the defendant: the defendant must “direct” electronic activity into the forum state. Unlike the *Zippo* Approach, “a targeting analysis seeks to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction.”<sup>76</sup> It requires that a defendant specifically aims its online activities at a forum to come under the jurisdiction of that state.<sup>77</sup> This will give courts a solid conceptual basis: a “deliberate or intended action” from which to tackle sophisticated cases and produce consistent results.<sup>78</sup> Secondly, the defendant must intend to engage in business or other interactions (“something more”) in the forum state. Thirdly, the defendant must engage in an activity that created a potential cause of action with regard to a person in the forum state.

According to the three measuring mechanisms above, the “targeting” approach gives more legal certainty over determining Internet jurisdiction. It is suggested that this approach, as well as providing consistency and legal certainty, does not totally preclude the “American propensity toward individualized justice”.<sup>79</sup>

#### 4. Conclusion and Recommendation

In comparison to the EU special jurisdiction approach, the US specific jurisdiction approach is different. Whilst the US employs “Zippo”, “effects” and “targeting” tests, the EU adopted classical general and special jurisdiction approaches concerning special jurisdiction in the Brussels Regulation, in an effort to bolster confidence in E-commerce. Moreover, both the US and the EU have appeared to be applying their individually developed standards of determining jurisdiction in the context of conventional contracts to the jurisdictional problem of e-commerce. It may be necessary either to reform the law by modifying the normal rules on jurisdiction, or to reform the law by introducing a special regime of rules of jurisdiction for cases of electronic contracting. For the former, a new rule could be introduced into Article 5(1)(b) of the Brussels Regulation, which would provide how to define the place of performance for digitised products and services. Some of the scholars have argued that this would be to treat electronic commerce contracts differently from other contracts, which goes against the current philosophy of Article 5(1).<sup>80</sup> In my view, to a broader respect, this would not be contrary to the fundamental principle that contracts can be formed by electronic means. But in a narrower view, electronic contracting or transactions do have their unique characters. However, there is still no clear indication of the creation of a special regime of jurisdiction rules for e-commerce cases. It is a process, which is time and money consuming. Even if efforts were made to draft a specific regulation or convention, it would still take time and efforts to come into force. It is conceivable that in future, the new fast-developing electronic communication industry will develop further high techniques that would clearly indicate that existing laws were no longer suitable or applicable. A special regime of jurisdictional rules for electronic commerce would then be introduced on the ground that traditional territorially based concepts of jurisdiction were not entirely appropriate anymore to regulate cyberspace.

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<sup>76</sup> Berman (2002), p.311, 418.

<sup>77</sup> Aciman & Vo-Verde (2002), 16, 19, and also *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4<sup>th</sup> Cir. 2002).

<sup>78</sup> Boone (Spring 2006), p.241, 266.

<sup>79</sup> *Ibid*, p.241, 274.

<sup>80</sup> Fawcett, Harris & Bridge (2005), p.594.



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