Jurisdictional issues in cyberspace

What should Article 7 – Consumer contracts, of the proposed Hague Convention, aim to accomplish in relation to e-commerce?

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Currently there is a proposal for a convention regulating jurisdiction and enforcement of international judgments – the Hague Convention[1]. In 1992, when the work was initiated, no one could foresee the enormous growth of the Internet and the impact this growth has had on the number of contacts occurring between individuals, companies and organisations from different countries. The Internet has considerably complicated the completion of the Convention, but it also augments the importance of the Convention.

Concerns have been raised regarding several issues within the Convention, one being the question of consumer contracts. There has been some debate about how Article 7, regulating consumer contracts, should work in relation to the particular difficulties introduced by e-commerce.

A diplomatic conference, regarding the proposed Hague Convention, was held in The Hague between the 6th and the 20th of June this year. A new draft Convention was presented, replacing the 1999 draft. Article 7 as it appears in the new draft looks considerably different compared to the one found in the 1999 draft. However the changes has come gradually through the Ottawa II meeting[2] and the Edinburgh meeting[3].

The informal working group on consumer contracts, at the diplomatic conference, presented a version[4] of Article 7 containing a basic structure with four[5] different variations. Regardless of which of these four options, or other options not presented by the working group, one choice to support the fundamental question to ask is; What should Article 7 aim to accomplish?

This article will present one possible aim for Article 7, in relation to e-commerce.

Due to its federal structure the United States of America has, for some time, experienced the complications that the borderless structure of the Internet introduces. From this experience the so-called minimum contact test has been adjusted to also encompass Internet related cases. The first part of this article will examine what factors US Courts have taken into consideration while assessing the possibility of ascertaining jurisdiction based upon the minimum contact test. This will be accomplished by a study of US case law.

Based on the identified factors a suggestion will be made as to what Article 7 of the proposed Hague Convention should aim to accomplish in relation to e-commerce.

Finally a hypothetical example will be used to illustrate how the suggestions made in this article would work in an actual case.

Note that the suggestions only aim to make Article 7 more suitable for e-commerce situations.[6] Other initiatives, like some of the ones presented at the Ottawa II and Edinburgh meetings as well as the diplomatic conference in The Hague, are not necessarily contrary to the purpose of the suggestions presented in this article.

The jurisdictional rights of US courts

The jurisdictional rights of US courts are regulated in the Due Process Clause of the 14th Amendment of the American Federal Constitution. A deep analysis of the US Constitution is beyond the scope of this article. However the minimum contact test, discussed below, aims to make sure that the Due Process Clause is not violated. That means that the whole concept of the minimum contact test has its origin in the 14th Amendment of the US Constitution.

A US court has got specific jurisdiction when the facts in the case shows that there is at least a “minimum contact” between the forum and the case. The specific jurisdiction only gives the court jurisdiction over the party in relation to the question at hand, while so called general jurisdiction gives the court jurisdiction over the party in all situations. General jurisdiction does not create any special complications in regard to consumer contracts in e-commerce and will therefore not be discussed here.

The minimum contact test, that constitutes the very base for specific jurisdiction, was first formulated in the **International Shoe Co. v Washington**[7]. The reason for the new jurisdictional rules, stated in the case, was the need for an adjustment to the more mobile society. However since the case was decided in December 1945, the factors affecting the minimum contact test has somewhat changed. Different courts have interpreted the decision differently and thereby either clarified or complicated the issues. Furthermore, different courts have taken different factors into consideration in assessing the minimum contact test. Therefore, it is not entirely clear exactly what factors a certain court would take into consideration. Below is a summary of the different factors that, in at least one case, has been applied by a US court in assessing specific jurisdiction in accordance with the minimum contact test.

First we will look at what was actually stated in the **International Shoe Co. v Washington**[8] case.

"[D]ue 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 must have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."[9]

From this, two factors, affecting the assessment of the minimum contact test, can be identified. The first being *traditional notions of fair play* and the second *substantial justice*.

"Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws, which it was the purpose of the due process clause to ensure."[10]

Here we find the following factors; *Quality of the activity*, *nature of the activity* and also *fair administration of the laws* and *orderly administration of the laws*. However, *fair and orderly administration of the laws* was replaced with *"reasonable" assertion of jurisdiction*, through the **Asahi Metal Industry Co. v Superior Court**[11] case of 1987.

"[S]uch acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit."[12]

This statement once again points out the importance of the nature and the quality and also gives us another factor, used in the minimum contact test, that is *the circumstances of the acts commission*.

Just as with general jurisdiction, *"continuous and systematic" activity* within the forum can give rise to specific jurisdiction.

"'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given."[13]

However, there are two distinct differences from the criteria set in the assessment of general jurisdiction. First of all, in the case of specific jurisdiction, the case at hand must be a direct result of the defendant's *continuous and systematic activity* within the forum, for the assertion of jurisdiction to be proper. That means that *the relation between the act and the claim* is another factor to take into account in the minimum contact test. The importance of this cannot be stressed enough. Secondly, the degree of *continuous and systematic activity* does not have to be as high when it comes to specific jurisdiction, as for the assertion of general jurisdiction, but it should be noted that a *continuous and systematic activity* alone might not be enough to constitute a proper assertion of specific jurisdiction.

Another factor, affecting the assessment of specific jurisdiction in accordance with the minimum contact test is *the burden placed on the defendant to appear at court within the forum.* The relevance of *the burden of defence* was discussed in **International Shoe Co. v. Washington**[14] There it was stated that in certain situations;

"[T]o defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process."[15]

Since **International Shoe Co. v Washington**,[16] the relevance of the *burden of defence* has been further established in US cases.[17] In **Burnham v Superior Court**[18] it was suggested by Justice Brennan, with whom Justices Marshall, Blackmun and O'Conner agreed, that *the possibility for the defendant to predict the assertion of jurisdiction* by the court, should be taken into account while conducting the minimum contact test.

It has also been deemed necessary, for the proper assertion of specific jurisdiction under the minimum contact test, for the defendant to *purposefully avail herself to the forum*. In **Hanson v Denckla**,[19] the Court states that it is always necessary that there be an 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."[20]

However, this *purposeful availment* can consist of a single, random, occurrence just as long as the case at hand arises from that very occurrence. This goes hand in hand with the territorial principle of public international law. Anybody with a physical presence in the forum has purposely availed herself for the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

As stated above there is no doubt that a physical presence, within the forum, fulfils the demand for *purposeful availment*, but in addition to this there are three situations where a defendant, who has never set foot in the forum nonetheless has *purposefully availed herself*.

* Stream of commerce – "[T]he doctrine [of stream of commerce] permits jurisdiction to be asserted over a component parts manufacturer when a good containing its part is purchased in the forum by a consumer who is later injured there by an alleged malfunction of the part."[21]

* When the defendant intentionally causes damage in the forum.

* The **Burger King Corp. v Rudzewicz**[22] situation – Here the defendant had entered into a franchise contract with Florida based, Burger King. Although the defendant argued that his contacts had been with the Michigan district office and that he never been to Florida the Court found that he had intentionally affiliated himself with a Florida entity in a way that satisfied the requirements stated in **Hanson v Denckla**[23].

"Determinative was a combination of factors: the defendant was seen as a sophisticated businessman who had not only solicited the franchise arrangement but had actively negotiated its terms with Burger King's Miami headquarters; the resulting franchise agreement was of high value, long-term, and closely supervised; the contract called for the use of Florida law to determine claims arising under it; and payments were to be made to the Miami headquarters. The failure to make those payments was the basis of the plaintiff's claim."[24]

One of the most influential Internet related case in the US is the **Zippo Manufacturing Company v Zippo Dot Com, Inc**.[25]. In this case the court made an interesting observation in regards to the development of society:

"In **Hanson v Denckla**, the Supreme Court noted that "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase." […], Twenty seven years later, the Court observed that jurisdiction could not be avoided "merely because the defendant did not physically enter the forum state." **Burger King [v Rudzewicz]**."[26]

Just as the Court in **International Shoe Co. v Washington**[27] once found it necessary to adjust the assessment of jurisdictional claims due to technological developments the Court in **Zippo** came to the same conclusion. The pure fact that the Court actually acknowledged that the Internet is a new field and has to be treated as such, made this case somewhat of a landmark case.

The Court made a distinction between different types of websites and divided Internet presence into three separate categories:

"[O]ur review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of

jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[28]

This gives us the following three groups:

* Passive websites – Websites merely distributing information and/or advertisement. Assertion of long-arm jurisdiction is, according to the **Zippo** model, inconsistent with due process for a website with only these characteristics.

* Intermediate websites – Websites that has some degree of interactivity. Each case in this group requires an individual analysis based on the facts in the specific case.

* Interactive websites – Websites used by the defendant to knowingly and repeatedly conducts business over the Internet. In these cases, the exercise of jurisdiction is always consistent with the principles of the minimum contact test of the **International Shoe Co. v Washington[29].**

Passive websites.

As stated in the quotation from **Zippo**, US courts have generally not found an exercise of personal jurisdiction to be constitutionally proper if based solely on the possible access to a defendant's passive website.

However, there are a few cases where the court has not followed this mainstream opinion. In **Inset Systems v Instruction Set**,[30] the Court decided that to exercise specific jurisdiction based the defendant's passive website plus a toll-free number, was in conformity of the minimum contact test.

In coming to this conclusion the Court seems to have taken the following factors into consideration:

* *Reasonably Anticipate* – In accordance with the case **World-Wide Volkswagen Corp. v. Woodson***[31]* and **Burnham v. Superior Court***[32]*, the contact between the defendant and the forum must be such that the defendant would *reasonably anticipate* being taken to court there.

This criteria was, according to the Court, met by the fact that the defendant had *purposefully availed himself to the forum*, in accordance with **Hanson v.Denckla***[33]*, and therefore could anticipate being haled into court within the forum

"In the present case, Instruction has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states. The Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut."[34]

* *Fair Play and Substantial Justice* – This criteria was, according to the Court, satisfied since;

"In the present case, the distance between Connecticut and Massachusetts is minimal. Further, since the present action also concerns issues of Connecticut common and statutory law, Connecticut has an interest in adjudicating the dispute. This being the case, adjudication in Connecticut would dispose of this matter efficiently. Therefore, the court concludes that its finding of minimum contacts in this case comports with notions of fair play and substantial justice."[35]

Inset Systems v Instruction Set gives us a few new factors that a court might take into consideration in determining jurisdiction in accordance with the minimum contact test. First of all the need for *predictability*, which was introduced in the **World-Wide Volkswagen Corp. v Woodson***[36]* case. Secondly, *the degree of interest the forum has in adjudicating* the case. And lastly, the *convenience of the forum*.

From the judgement one cannot clearly see to what degree the toll-free number affected the case. However it should be noted that a toll-free number can be seen as an invitation to interactivity with parties outside the local area, and therefore be an indication of an intended geographically spread market. Of course one can then argue that the whole purpose of having an Internet presence would be to reach beyond the local market.

The Court in **Maritz v Cybergold**[37] introduced, through the application of the five factor test from the Eighth Circuit, yet another interesting factor affecting the minimum contact test – *quantity of contacts*.

"As to the second factor--the quantity of contacts--the Court finds that defendant has transmitted information into Missouri regarding its services approximately 131 times. The information transmitted is clearly intended as a promotion of CyberGold's upcoming service and a solicitation for Internet users, CyberGold's potential customers. This factor suggests that defendant is purposefully availing itself to the privilege of conducting activities in Missouri." [38]

Here it is well worth noticing that the Court states that the "defendant has transmitted information into Missouri regarding its services". This shows that the Court considers a website to be, in some way, broadcasting information to a receiving Internet users. This is of course one possible way to look at it. Another, just as possible way to look at this question is to say that the Internet user "goes" to the website. Supporting this latter opinion is not difficult since a website does not even exist in any perceivable way unless someone actually looks for it.

The question of who seeks whom plays a very important role in relation to jurisdiction on the Internet. If, as the Court did in **Maritz**, one considers that each and every website actually broadcasts information to each and every Internet user, one will come to quite different conclusions to, if the Internet user is deemed to "go" to the website. The importance of this question cannot be overestimated and plays a fundamental role in all cases relating to Internet jurisdiction. As shown above, there is not one universal opinion amongst the courts. However it would be safe to say that the majority of the US courts seem to base their decision on the degree of interactivity between the website and the forum.

Although, as shown in **Maritz** and **Inset Systems v Instruction Set**,[39] some Courts have concluded that an Internet presence might be enough to satisfy the minimum contact test, the majority holds that *something more, in conjunction with the Internet presence* is needed for a proper assertion of jurisdiction.

This *something more* could for example be, as it was in **Heroes Inc. v Heroes Foundation**,[40] a traditional magazine advertisement within the forum. However several times the Court has concluded that the addition of a toll-free number, to a passive website is not enough to constitute such an increase in contacts to justify the exercise of jurisdiction.[41]

Intermediate and interactive websites

As stated in the quote, above, from **Zippo** a website with which "the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet"[42] the assertion of jurisdiction is proper.

Since this represents one end of the spectrum, few conflicts arise from it. It is, of course, the middle area that causes the most disputes. Therefore this analysis will, to a great extent, concentrate on the cases were the degree of interactivity was such that the case would fit into the second category of the **Zippo** model.

In **Hasbro v Clue**[43] the Court concluded that, the fact that, the defendant knowingly did business with a company residing within the forum indicated a *purposeful availment*.

"In this case, Clue Computing purposefully directed its advertising at all the states. It did nothing to avoid Massachusetts. It knowingly worked for Digital, with PTS as an intermediary. In fact, Clue Computer's work for Digital effectively comprised 33-50% of Clue Computing's 1995 annual income. Indeed, Clue Computing has availed itself of the benefits of doing business in the forum state by advertising its work for Digital on its Web site, in an effort to attract more customers. Consequently, unlike the defendant in Accutest, Clue Computing has taken no measures to avoid contacts in the forum state, but rather, has encouraged them. It does not appear that Clue Computing has done anything to avoid jurisdiction in terms of its non-Web (non-advertising) contacts with Massachusetts. Additionally, Clue Computing's Web site is interactive, encouraging and enabling anyone who wishes, including Massachusetts residents, to send email to the company. The nature and quality of commercial activity that Clue Computing conducted over the Internet satisfies the "purposeful availment" due process test."[44]

Furthermore it is worth noticing how the court observes that the defendant did nothing to *avoid contact with the forum*.

The choice of law will not be examined here, but it has to be noted here that, in some cases, *the choice of a specific law*, to govern the contract between the parties, has been used as an indication of *purposeful availment* to the forum.

"In **Compuserve, Inc. v Patterson**, 89 F.3d 1257 (6th Cir. 1996), the Sixth Circuit found that the defendant's contract with the plaintiff, although created and executed electronically, created sufficient contact to satisfy the requirements of personal jurisdiction. The court found that the defendant had indeed "purposefully availed" himself of the privilege of doing business in the forum state when he agreed that forum state law would govern the contract."[45]

However, it is important to note that in **Compuserve, Inc. v Patterson**,[46] the case at hand was a trademark infringement case and, although the alleged trademark infringement was conducted by the contract partner, thereby not at all related to the contract the Court used as a ground for the assertion of jurisdiction.

In **Thompson v. Handa-Lopez, Inc**[47] the Court, in expressly adopting the **Zippo** model, concluded that the defendants gambling website was of the nature described in category three - an interactive website.

In doing so the Court took, the fact that the defendants website was operated for the purpose of *commercial gain,* into consideration.

The *commercial nature* of the website also played an important role in the **GTE New Media Service, Inc. v. Ameritech Corp**.[48] where the Court placed the defendants website in category two of the **Zippo** model.

Furthermore a *continuing and long-term relationship* with a corporation within the forum was accepted as a factor of the minimum contact test, in **Resuscitation Technologies, Inc. v. Continental Health Care Corp**.[49]

The **Zippo** case's three-group model is not totally undisputed. In **Stomp, Inc. v. Neato LLC**[50] the court divided websites into only two categories; Interactive and Passive. Furthermore the Court concluded that the assertion of jurisdiction was proper in relation to the first category but not the latter. The Court also acknowledged two ways, in which a merchant could avoid being subjected to an uncontrollable number of jurisdictions:

"(1) include a disclaimer that it will not sell its products outside a certain geographic area, and, (2) an interactive 'clickwrapo agreement' that includes a choice of venue clause which a consumer must agree to before being allowed to purchase any products."[51]

From this we can conclude that it is possible that a court will take *the merchants measures of protection* into consideration while assessing the rightfulness of the assertion of jurisdiction.

A fairly recent trend is that the court looks at the *actual rather than the possible contact* between the defendant and the forum. The mere fact that a website *can* be accessed by residents of the forum might no longer be a very strong argument for the assertion of jurisdiction. In a number of cases it was required that, a certain number of residents actually *has had contact* with the defendant.[52]

Federal law contra state law.

Having said all this, it should be noted that there is another prerequisite for the jurisdictional claim of a US Court to be proper. The minimum contact test ensures that the jurisdictional claim is proper in relation to the Due Process Clause in the 14th Amendment of the US Constitution, but the assertion of jurisdiction must also be proper in relation to the states internal jurisdictional rules. However, since the states internal jurisdictional rules are different from each other it is not within the scope of this article to give a presentation of them all.

One model that is worth mentioning is that used in California. The Californian long-arm statue simply confers jurisdiction on "any basis not inconsistent with the Constitution of this state or of the United States."[53] In that way the states internal rules becomes the same as the federal ones.

"The U.S. Supreme Court has established standards beyond which the use of these long-arm statutes will be deemed to violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Viewed from the highest level, a state court may acquire valid specific personal jurisdiction over a non-resident defendant only if: (1) the state's long-arm statute provides for jurisdiction under the factual circumstances; and (2) the defendant has had sufficient "minimum contacts" with the state such that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice,"(8) violating the Due Process Clause."[54]

Domestic US cases contra international cases.

The last question of interest, in relation to the US approach to forum jurisdiction, is in what way international cases are treated differently from internal cases.

In the first published international case addressing multi-jurisdictional issues on the Internet, **Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc**.[55], the Court stated that if the Court would prohibit the defendant to operate its website simply because it can be accessed from the US:

"[it] would be tantamount to a declaration that this Court, and every other court throughout the world, may assert jurisdiction over all information providers on the global World Wide Web. Such a holding would have a devastating impact on those who use this global service."[56]

However the Court did claim jurisdiction over the defendant in relation to its contact with US citizens:

"The court held that the defendants could continue to maintain the World Wide Web site, but prohibited the defendants from accepting any subscriptions from customers in the United States."[57]

In the **Perkins v. Benguet Consol. Min. Co**.[58] case it is possible to see some foreign political influences in the Courts decision. However as a general rule international cases should be treated the same way as domestic cases, but with the addition of the principal of international *comity*.

Note that there are different forms of *comity*. The *comity* referred to here is the *comity* of courts, whereby the judges decline to exercise jurisdiction over matters more appropriately adjudicated elsewhere.[59]

What should Article 7 aim to accomplish in relation to e-commerce?

Based on the factors affecting the US minimum contact test the author suggests that the aim of Article 7 of the proposed Hague Convention should be to ensure that:

In any dispute, arising, as a direct result of a businesses activity on the Internet, the consumer may bring a claim in the courts of the State in which it is habitually resident, unless the business has taken appropriate measures to avoid contact with that specific State.

There are certain terms used here that might require some explanation.

First of all it is vital to observe that the words *any dispute* has to be read within the context of the fundamental motivation of Article 7. Obviously only disputes arising from a contractual relation between a business and a consumer is to be covered.

Business and *consumer* both bear the same meaning as they do in the current draft of Article 7.

The phrase *a direct result of a businesses activity on the Internet* is loosely based upon the separations between passive and other (interactive/intermediate) websites, made in the, above-mentioned, **Zippo** case[60] and the **Stomp, Inc. v. Neato LLC** case[61]. A totally passive website can under no circumstances directly result in a contract between a consumer and a business and will therefore not be affected.

Whether the dispute is *a direct result of a businesses activity on the Internet* would have to be decided on a case-by-case basis. However, by looking at the actual facts in the case, there is no foreseeable reason why this would be a problem. It should be fairly easy to determine whether, or not, a contract is a *direct result* of an Internet contact. Here one should, of course, look at the *actual rather than the possible contact*[62]. Furthermore it is

important to notice that it is whether, or not, there was an actual contact in the case at hand, and not if there has been other actual contacts between the business and the forum, that should be determinative. That is not always so in the US cases.

By requiring the dispute to be *a direct result of the business activity on the Internet* several other of the, above-mentioned factors, get fulfilled. If a business enters into an actual on-line contract, for supply of goods or services, with a consumer and this contract leads to a dispute there can be no doubt that the business had *the possibility to predict that the activity could lead to a claim within the forum*[63], that *the relation between the act and the claim is direct*[64], that the activity was of *a commercial nature*[65] and that *the quality of the activity*[66], *the nature of the activity*[67] *and the circumstances surrounding the activity*[68] was such that the assertion of forum jurisdiction would be correct.

However this also lead to that the following of the, above-mentioned factors, are deemed to be irrelevant; *The quantity of contacts with the forum*[69], *a continuous nature of the activity*[70], *a systematic nature of the activity*[71], *additional connection with the forum*[72] and *a long-term relationship to the forum*[73]. Factors like these might have some value in domestic US cases but should not bear any weight in an international context. If factors of this style were to be used to determine jurisdiction, then it would become virtually impossible for a business to predict where it could be deemed to have had a sufficient contact with undesirable forums. By only focusing on whether, or not, there is an actual contact in the case at hand the businesses are given the possibility to actively regulate what forums it risks getting in contact with.

The words *direct result* are not intended to exclude, the consumer protection of Article 7, in situations where only parts of the transaction have taken place over the Internet. If for example the initial contact was established on the businesses website and then the contract was sent to the consumer, as a result of that the consumer stated its address on the business website, the consumer could, certainly, bring a claim in the courts of the State in which it is habitually resident based on Article 7.

It has been questioned whether, or not, the e-commerce business must specifically target the consumers forum for the consumer protection, provided in Article 7, to apply. The answer has to be NO. It simply is not reasonable that a business would avoid the consumer protection of Article 7 by making a global targeting instead of a regional targeting. Why should the one making an offer to all the consumers in the world avoid the consumer protection that a business offering its products to just one market has to take into consideration?

Instead of looking at the targeting, the focus should be on dis-targeting. A business must take *active measures* to avoid contact with the consumer's forum, not to be bound by the consumer protection provided in Article 7. This goes hand in hand with the discussion of the *merchants measures of protection* in **Stomp, Inc. v. Neato LLC**[74], the discussion on whether the defendant made any attempt to *avoid contact with the forum* in **Hasbro v. Clue**[75] and also the discussion on whether the defendant *purposefully avail herself to the forum* in **Hanson v. Denckla**[76].

Based on this it is reasonable for Article 7 to assume that all businesses active on the Internet aim for a global market. This assumption places the burden of proof on the business - the business has got to prove that it has taken *appropriate measures* to avoid contact with the consumer's forum.

So what can be classed as *appropriate measures*? There are several methods to avoid contact with a certain forum. One example would be, for the business, to in the "contracting part" of the website include a menu where the consumer had to indicate the State in which it is habitually resident. The instructions could clearly state that residents of other States than the ones listed in the menu cannot do business on that particular website. By taking appropriate, yet rather simple, measures like that a business could actively regulate what forums it would risk having to defend itself in.

Some of the factors[77] used to determine the assertion of forum jurisdiction, by US courts, relate to the nature, and suitability of the forum. However, it is the opinion of the author that if a business knowingly enters into a contract with a consumer, and is aware of in which State the consumer is habitually residing, it must expect to have to defend itself in the consumer's forum, although this might be inconvenient for the business.

In conjunction with what has been said about the business *appropriate measures* it might be suitable to bring up the question of the businesses good faith. If a business takes *appropriate measures* to avoid contact with a certain forum, but still enters into a contract with a consumer habitually residing in that forum, a business in good faith shall not be affected.

Finally there are a few factors[78], discussed above, based on traditional legal principles. The, in this article, suggested application of Article 7 of the proposed Hague Convention does not in any way offend these traditional legal principles.

Final remarks.

Let us conclude with the following hypothetical example.

An Swedish citizen, living in Sweden, born in Sweden by Greek parents orders a pair of shoes from a Greek company via their website. The language on the website is Greek and all prices stated in the Greek currency Drachma.

The consumer places the order directly on the businesses website and a few weeks later the shoes arrive at the consumers house, in Tyringe Sweden, via the postal service.

Let us now assume the consumer receives two left shoes instead of a proper pair and therefore wishes to bring the case to court since the company refuses to deal with the situation. In what court can the consumer bring the claim?[79]

Giving Article 7 of the proposed Hague Convention the application suggested in this article the question of jurisdiction would have to be dealt with in the following manner:

The plaintiff (the Swedish consumer) has to show that an actual contract between the business and the consumer exists. The consumer has also got to show that, that contract has been breached. Since an actual contract exists it is then assumed that the business aimed to enter into contracts within the consumer's forum, and thereby willingly accepted the risk to have to defend itself in the consumer's forum. The only protection available for a business that has, via its website, entered into an actual contract with a consumer in a foreign forum is to show that the business had taken *appropriate measures* to avoid contact with the consumer's forum. If the business can show that it did take *appropriate measures*, Article 7 should not apply.

In the example used here, it could be argued that having the website in Greek and the prices stated in Drachma is measures to avoid contact with Swedish consumers. However, it is not such *appropriate measures* that can break the presumption created by the existence of an actual contract.

The 1968 Brussels Convention and EC Regulation[80] adopted in December 2000 to update and replace the 1968 Brussels Convention as well as the present, and past, drafts of the proposed Hague convention all focus on the question of whether or not the businesses activity was *directed* to the consumer's forum. In doing so the burden of proof is placed on the consumer. The consumer has to show that the business *directed its activity* to the consumer's forum.

In the example above it might be very difficult for a consumer to show that, although the language used on the website was Greek and the prices stated in Drachma, the website was actually directed to, at least amongst others, Swedish consumers.

Although the result of the suggestions in this article clearly is that a business have got to actively regulate what jurisdictions it wants to do business in, it is the authors hope that this increased burden will be outweigh by the much greater predictability.

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FOOTNOTES

[1] Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (See http://www.hcch.net/e/workprog/jdgm.html last checked on the 21st of June 2001).

[2] Held between February 26 and March 1, 2001.

[3] Held 23rd to 25th of April 2001.

[4] Work Document No 104 E distributed on the 19th of June 2001.

[5] In reality five different options as there is both an option 2A and 2B.

[6] There are also other amendments that have to be made to make Article 7 work as well as possible. For example the inclusion of some form of ADR.

[7] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[8] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[9] *International Shoe Co. v. Washington*, 326 U.S. at 316. (1945).

[10] *International Shoe Co. v. Washington*, 326 U.S. at 319. (1945).

[11] *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

[12] *International Shoe Co. v. Washington*, 326 U.S. at 318. (1945).

[13] *International Shoe Co. v. Washington*, 326 U.S. (1945).

[14] *International Shoe Co. v. Washington*, 326 U.S. (1945).

[15] *International Shoe Co. v. Washington*, 326 U.S. (1945).

[16] *International Shoe Co. v. Washington*, 326 U.S. (1945).

[17] *Burnham v. Superior Court*, 495 U.S. (1990) amongst others.

[18] *Burnham v. Superior Court*, 495 U.S. 604 (1990).

[19] *Hanson v. Denckla*, 357 U.S. 235, (1958).

[20] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

[21] An overview of the law of personal (adjudicatory) jurisdiction: the united states perspective, Margaret Stewart, http://www.kentlaw.edu/cyberlaw/resources/views/usview.html (As found on the 21st of June 2001).

[22] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

[23] *Hanson v. Denckla*, 357 U.S. 235, (1958).

[24]An overview of the law of personal (adjudicatory) jurisdiction: the united states perspective, Margaret Stewart, http://www.kentlaw.edu/cyberlaw/resources/views/usview.html (As found on the 21st of June 2001).

[25] *Zippo Manufacturing Company v. Zippo Dot Com, Inc*. 952 F.Supp. 1119 (W.D.Pa 1997). (As found at http://cyber.law.harvard.edu/metaschool/fisher/domain/dncases/zippo.htm on the 21st of June 2001).

[26] *Zippo Manufacturing Company v. Zippo Dot Com, Inc.* 952 F.Supp. 1119 (W.D.Pa 1997). (As found at http://cyber.law.harvard.edu/metaschool/fisher/domain/dncases/zippo.htm on the 21st of June 2001).

[27] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[28] *Zippo Manufacturing Company v. Zippo Dot Com, Inc*. 952 F.Supp. 1124 (W.D.Pa 1997). (As found at http://cyber.law.harvard.edu/metaschool/fisher/domain/dncases/zippo.htm on the 21st of June 2001).

[29] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[30] *Inset Systems v. Instruction Set* 937 F.Supp. 161 (D.Connecticut, 1996) (As found at http://www.jmls.edu/cyber/cases/inset.html on the 21st of June 2001).

[31] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

[32] *Burnham v. Superior Court*, 495 U.S. 604 (1990).

[33] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

[34] *Inset Systems v. Instruction Set* 937 F.Supp. 165 (D.Connecticut, 1996).

[35] *Inset Systems v. Instruction Set* 937 F.Supp. 165 (D.Connecticut, 1996).

[36] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

[37] *Maritz v. Cybergold* 937 F.Supp. 1328 (E.D. M.O. 1996) (As found at http://www.bodi.com/papers/advertising/sources/maritz.htm on the 16th of November 2000).

[38] *Maritz v. Cybergold* 937 F.Supp. 1328 (E.D. M.O. 1996) (As found at http://www.bodi.com/papers/advertising/sources/maritz.htm on the 16th of November 2000).

[39] *Inset Systems v. Instruction Set* 937 F.Supp. 165 (D.Connecticut, 1996).

[40] *Heroes, Inc. v. Heroes Foundation* 958 F.Supp. 1 (D.C. 1996).

[41] For example; *Shapiro v. Santa Fe Gaming Corp.* No. 97 C 6117, 1998 WL 102677 and *Ragonese v. Rosenfeld* 722 A.2d 991 (N.J. Super 1998).

[42] *Zippo Manufacturing Company v. Zippo Dot Com, Inc.* 952 F.Supp. 1119 (W.D.Pa 1997). (As found at http://cyber.law.harvard.edu/metaschool/fisher/domain/dncases/zippo.htm on the 21st of June 2001).

[43] *Hasbro v. Clue* 994 F.Supp. 34 (D. Massachusetts, 1997) (As found at http://www.bna.com/e-law/cases/hasbro.html on the 16th of November 2000).

[44] *Hasbro v. Clue* 994 F.Supp. 499 (D. Massachusetts, 1997) (As found at http://www.bna.com/e-law/cases/hasbro.html on the 16th of November 2000).

[45] *Hasbro v. Clue* 994 F.Supp. (D. Massachusetts, 1997) (As found at http://www.bna.com/e-law/cases/hasbro.html on the 16th of November 2000).

[46] *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

[47] *Thompson v. Handa-Lopez, Inc* 998 F.Supp. 744 (W.D. Tex. 1998).

[48] *GTE New Media Service, Inc. v. Ameritech Corp*. 21 F.Supp. 2d 27 (D.C. 1998).

[49] *Resuscitation Technologies, Inc. v. Continental Health Care Corp*.1997 WL 148567 (S.D. Ind.).

[50] *Stomp, Inc. v. Neato LLC*, 1999 WWL 635460 (C.D.Cal.).

[51] *Stomp, Inc. v. Neato LLC*, 1999 WWL 635460 (C.D.Cal.).

[52] *Cybersell, Inc. v. Cybersell, Inc*. 130 F.3d 414 (9th Cir, 1997), *Millenium Enterprises, Inc. v. Millenium Music*, LP 33 F.Supp. 2d 907 (D. Or. 1999), *Origin Instruments v. Adaptive Computer Systems* 1999 WL 76794 (N.D.Tex.) and *Scherr v. Abrahams*, 1998 WL 299678, (N.D. I11. 1998).

[53] Calif. Code of Civ. Proc. § 410.10.

[54] Personal Jurisdiction In Cyberspace, George M. Perry (As found at http://www.cmcnyls.edu/MLP/perryf98.HTM on the 16th of November 2000).

[55] Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc., 939 F.Supp. 1032, 1039-40 (S.D.N.Y.1996).

[56] Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc., 939 F.Supp. 1032, 1039-40 (S.D.N.Y.1996).

[57] Litigation In Cyberspace: Jurisdiction And Choice Of Law, A United States Perspective, James P. Donohue (As found at http://www.abanet.org/buslaw/cyber/initiatives/usjuris.html#IIIL on the 21st of June 2001).

[58] *Perkins v. Benguet Consol. Min. Co*. 342 U.S. 437 (1952).

[59] Symeonides S C, Perdue W C, von Mehren A T, *Conflict of Laws: American, Comparative, International* (St. Paul Minn, USA: West Group, 1998) at 553.

[60] *Zippo Manufacturing Company v. Zippo Dot Com, Inc*. 952 F.Supp. 1119 (W.D.Pa 1997).

[61] *Stomp, Inc. v. Neato LLC*, 1999 WWL 635460 (C.D.Cal.).

[62] *Cybersell, Inc. v. Cybersell, Inc*. 130 F.3d 414 (9th Cir, 1997), *Millenium Enterprises, Inc. v. Millenium Music*, LP 33 F.Supp. 2d 907 (D. Or. 1999), *Origin Instruments v. Adaptive Computer Systems* 1999 WL 76794 (N.D.Tex.) and *Scherr v. Abrahams*, 1998 WL 299678, (N.D. I11. 1998).

[63] *Burnham v. Superior Court*, 495 U.S. 604 (1990).

[64] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[65] *GTE New Media Service, Inc. v. Ameritech Corp*. 21 F.Supp. 2d 27 (D.C. 1998).

[66] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[67] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[68] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[69] *Maritz v. Cybergold* 937 F.Supp. 1328 (E.D. M.O. 1996) (As found at http://www.bodi.com/papers/advertising/sources/maritz.htm on the 16th of November 2000).

[70] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[71] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[72] *Heroes, Inc. v. Heroes Foundation* 958 F.Supp. 1 (D.C. 1996).

[73] *Resuscitation Technologies, Inc. v. Continental Health Care Corp*.1997 WL 148567 (S.D. Ind.).

[74] *Stomp, Inc. v. Neato LLC*, 1999 WWL 635460 (C.D.Cal.).

[75] *Hasbro v. Clue* 994 F.Supp. (D. Massachusetts, 1997) (As found at http://www.bna.com/e-law/cases/hasbro.html on the 16th of November 2000).

[76] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

[77] *The convenience of the forum* and *the degree of interest the forum has in adjudicating the case* as stated in *Inset Systems v. Instruction Set* 937 F.Supp. 161 (D.Connecticut, 1996) and *the burden of defending in the forum* as stated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[78] *Traditional notions of fair play and substantial justice* as stated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the reasonableness of the assertion of jurisdiction as stated in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) and *International Comity*.

[79] Obviously one would have to ask questions like; Is the buyer a consumer? And; Is the seller a business? But since these types of questions are not specific for e-commerce they will not be discussed further here.

[80] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters.