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# Internet Contracting and E-Commerce Disputes: International and U. S. Personal Jurisdiction

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**INTERNET CONTRACTING AND E-COMMERCE  
DISPUTES: INTERNATIONAL AND UNITED  
STATES PERSONAL JURISDICTION**

ANNE MCCAFFERTY<sup>†</sup>

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I. INTRODUCTION

Defined as “[a] court’s power to bring a person into its adjudicative process [by asserting] jurisdiction over a defendant’s personal rights, rather than merely over

property interests,”<sup>1</sup> personal jurisdiction, or “in personam” jurisdiction, and its broadly interpreted principles have consistently proven to be a muddy field for courts within the United States. Even more complicated is the application of these principles to foreign defendants. From the mid-nineteenth century decision in *Pennoyer v. Neff*,<sup>2</sup> to the more recent *International Shoe Co. v. Washington*,<sup>3</sup> defendants have been subject to a variety of tests and criteria for determining the most critical of questions in a judicial dispute: where can I be required to litigate?

An inquiry into current personal jurisdiction case law results in a fairly standardized procedure for establishing a forum within the U.S. in contract disputes. Forum selection clauses, while occasionally held to be unconscionable, have proven useful in a variety of industries.<sup>4</sup> Additionally, modern tests determining whether sufficient “minimum contacts” exist with a particular state have invariably been upheld as authoritative.<sup>5</sup> While the involvement of corporations as parties to a suit

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<sup>1</sup> BLACK’S LAW DICTIONARY 709 (8th ed. 2005).

<sup>2</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1878).

<sup>3</sup> *International Shoe v. Washington*, 326 U.S. 310 (1945).

<sup>4</sup> There are several methods for determining the enforceability of forum selection clauses, though the Federal District Court in Rhode Island has instituted a nine-factor test for assessing reasonableness:

1. The identity of the law which governs the construction of the contract;
2. The place of execution of the contract(s);
3. The place where the transactions have been or are to be performed;
4. The availability of remedies in the designated forum;
5. The public policy of the initial forum state;
6. The location of the parties, the convenience of prospective witnesses, and the accessibility of evidence;
7. The relative bargaining power of the parties and the circumstances surrounding their dealings;
8. The presence or absence of fraud, undue influence or other extenuating (or exacerbating) circumstances; and
9. The conduct of the parties.

*D’Antuono v. CCH Computax Systems, Inc.*, 570 F. Supp. 708, at 712 (D.R.I. 1983).

For the purposes of this paper, those situations in which forums selection clauses apply to e-commerce transactions are not considered. This paper focuses instead on contractual situations where forum selection clauses did not exist in the agreement or were held to be unconscionable.

<sup>5</sup> See *International Shoe*, 326 U.S. at 316. See *infra* p. 6 (explanation of the “minimum contacts” test).

instead of individuals leaves an arbiter with a slightly more varied array of outcomes, forum selection may eventually be settled using “traditional notions of fair play and substantial justice.”<sup>6</sup> Most importantly, states have adopted long-arm statutes, allowing courts to acquire jurisdiction over anyone who conducts business within that state. Federal procedures for assessing personal jurisdiction also rely heavily upon these state statutes.

In cases involving international defendants, a variety of bases have been deemed appropriate for a U.S. court to assert personal jurisdiction, including nationality,<sup>7</sup> domicile,<sup>8</sup> “purposeful availment,”<sup>9</sup> and a number of federal statutes.<sup>10</sup>

With the explosion of the Internet and the resulting expansion of international business transactions via the Web, courts have struggled to adapt traditional modes of adjudication consistent with established common, statutory and international law. Internet transactions—now known as e-commerce—involve the “practice of buying and selling goods and services through online consumer services on the Internet.”<sup>11</sup> In a sphere of commerce apparently limitless in its reach, this article explores the modern abyss of personal jurisdiction in e-commerce disputes. An analysis leads to the following proposal: the U.S. should adopt a federal long-arm statute that includes an e-commerce provision, allowing courts to effectively and systematically evaluate the propriety of personal jurisdiction in Internet commerce disputes. The new statute would apply in international cases between the U.S. and its contracting partner states to bolster the effectiveness of the long-arm statute provisions on personal jurisdiction in e-commerce.

To reach this conclusion, an analysis of modern personal jurisdiction is necessary. Section II of this article provides a history of personal jurisdiction in contract cases within the U.S. and outside its boundaries, including traditional methods for resolving disputes and the status of current state long-arm statutes. Section II also addresses issues of cyberspace, including common forms of Internet contracting and the resulting discord arising out of a lack of uniform treatment among e-commerce disputes. Finally, this section takes into account previously published scholarly opinions on the subject of e-commerce and personal jurisdiction.

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<sup>6</sup> See *International Shoe*, 326 U.S. at 316. “Traditional notions of fair play and substantial justice” is more clearly explained in the Restatement (Second) Conflict of Laws: “No rule will be adopted initially unless it is in accord with contemporary views of what is fair and just. So, subject to exceptions stemming from the third factor to be mentioned, a state will lack jurisdiction to try a case in its courts if the advantages which trial in the state would afford one party are greatly outweighed by the hardship and inconvenience which would be suffered by the other.” RESTATEMENT (SECOND) CONFLICT OF LAWS § 24 (1988).

<sup>7</sup> See *infra* note 63 for a discussion of nationality.

<sup>8</sup> See *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (holding that “[d]omicile in [a] state is alone sufficient to bring an absent defendant within the reach of the state’s jurisdiction for purposes of a personal judgment by means of appropriate substituted service.”). See also RESTATEMENT OF THE LAW (SECOND) CONFLICT OF LAWS §11(1) (1988) (“Domicile is a place, usually a person’s home, to which the rules of Conflict of Laws sometimes accord determinative significance because of the person’s identification with that place.”).

<sup>9</sup> See *infra* p.11 for a discussion of purposeful availment.

<sup>10</sup> See *infra* note 87 for a discussion of federal statutes.

<sup>11</sup> BLACK’S LAW DICTIONARY 434 (8th ed. 2005).

In examining these various proposals for a remodeled system, the ultimate conclusion reached is that acceptance of a newly formulated federal long-arm statute and its further application to e-commerce disputes provides the most effective way to resolve this highly complicated problem. Therefore, Section III offers an argument for the adoption of a federal long-arm statute, providing a model statute, explaining its terminology, and showing its international significance.

## II. BACKGROUND

United States courts generally categorize judicial jurisdiction in three ways: those circumstances in which power is asserted based on an individual's person or assets (*in personam*, or personal jurisdiction), those looking to previous claims of interest in specific pieces of property (*in rem* jurisdiction), or occasions in which an individual attempts to take property as collateral for a pending, unrelated claim involving the owner of that property (*quasi in rem* jurisdiction).<sup>12</sup> Though any of these three jurisdictional bases may apply in a given business context, this paper focuses on personal jurisdiction as it relates to the adjudication of contractual relationships made internationally through e-commerce.

In the realm of e-commerce, there are two basic contractual forms: business-to-business and business-to-consumer.<sup>13</sup> Business-to-business contracts include vertically and horizontally integrated markets with businesses buying from and selling to each other.<sup>14</sup> Business-to-consumer contracts, on the other hand, involve the seller of a good or service bringing the contracted thing directly to the consumer, each deriving benefit from the transaction through an exchange of goods or services and money.<sup>15</sup>

For the purposes of this paper, a focus on business-to-consumer contracts will be most constructive, this being the relationship that leads to litigation more often than associations between two businesses. To give this concept weight, especially in the sphere of international business, consider the following scenario: Seller (S) manufactures widgets in his home country of France and advertises them globally through ads circulating various websites. Buyer (B), an individual living in the U.S., is interested in purchasing some of these widgets. Through an electronic agreement (meaning a contract conducted over the Internet, accompanied by party's electronic signature<sup>16</sup>), B contracts to buy several widgets. However, when they arrive, they are defective and do not suit B's intended purpose. The question is, may B successfully bring S to court in the U.S. to recover his losses? Do factors such as S's advertising strategy through the Web affect the outcome? This paper helps to answer these questions, describing the standards involved in adjudicating with foreign defendants where personal jurisdiction over the defendant is made appropriate by the formation of an e-commerce relationship.

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<sup>12</sup> See GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 28 (2d ed. 1994).

<sup>13</sup> E-COMMERCE LAW & BUSINESS § 1.02[A], at 1-5 (Mark E. Plotkin, ed. 2003).

<sup>14</sup> See *id.* § 1.02[A][1], at 1-5.

<sup>15</sup> See *id.* § 1.02[A][2], at 1-9.

<sup>16</sup> Electronic Signatures in Global and National Commerce Act (ESIGN), Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. § 7001 *et seq.*).

To accurately depict the way in which current personal jurisdiction in the U.S. evolved—domestically and internationally—a historical account of this area of law is necessary.

*A. The Evolution of Personal Jurisdiction in the United States*

Traditionally, a court's assertion of personal jurisdiction in the U.S. required the physical presence of the defendant to a suit in the forum state.<sup>17</sup> This geography-bound prerequisite became impractical with the expansion of interstate commerce in the early Twentieth Century, forcing courts to consider cases in which contractual parties were not invariably immediate neighbors. Courts allowed a substantial degree of physical separation between parties, while attempting to safeguard a defendant's rights. The resulting personal jurisdiction standards placed greater emphasis on the Due Process Clause of the Fourteenth Amendment to the United States Constitution,<sup>18</sup> but no longer required a defendant to be physically present within a jurisdiction for personal jurisdiction to be appropriate.<sup>19</sup>

*International Shoe Co. v. Washington*, decided by the U.S. Supreme Court in 1945, significantly changed personal jurisdiction law.<sup>20</sup> *International Shoe* involved a Delaware corporation with its principal place of business in St. Louis, Missouri.<sup>21</sup> Though the company did not have any offices or make sales contracts in the state of Washington, several of the companies' salesmen resided there.<sup>22</sup> The state of Washington brought suit against International Shoe in state court, arguing that the company had made itself amenable to Washington courts by selling shoes there but failing to contribute to the state unemployment compensation fund.<sup>23</sup> International Shoe argued that Washington courts lacked jurisdiction over the company and its salesmen because its activities within that state were insufficient to constitute a "presence" there.<sup>24</sup> In resolving this dispute, the Supreme Court announced the introduction of the "minimum contacts" test, stating that:

[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

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<sup>17</sup> See generally *Pennoyer*, 95 U.S. at 720. As illustrated in this seminal case, Nineteenth Century courts believed that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established." *Id.*

<sup>18</sup> U.S. Const. amend. XIV, § 1.

<sup>19</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.").

<sup>20</sup> See generally *International Shoe*, 326 U.S. at 316.

<sup>21</sup> *Id.* at 313-14.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 314-15.

<sup>24</sup> *Id.* at 315.

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.’<sup>25</sup>

The court reasoned that, if the defendant enjoyed protections afforded by the laws of a particular state during the course of business, and especially if the defendant was able to manipulate the laws of that state to further the defendant's own contractual rights, the state had the prerogative to execute its laws against that individual.<sup>26</sup> In this case, because International Shoe had rendered itself amenable to the Washington courts because of the activities of its salesmen in that State, personal jurisdiction over it was proper.<sup>27</sup> As a result of the *International Shoe* decision, courts find that adjudicatory proceedings subjecting an out-of-state defendant to a particular state's laws comply with due process considerations where that defendant has had systematic and continuous contacts with a forum state.<sup>28</sup> This test, however, did not impart a bright-line application.

The 1980s also brought greater illumination to those still shadowy corners of personal jurisdiction by asking courts to consider whether a defendant has contacts and conducted themselves in such a way as to “reasonably anticipate being haled into court” in the forum state.<sup>29</sup> In *World-Wide Volkswagen Corp. v. Woodson*, the Robinsons, a family that bought a car from a New York car retailer, were driving through Oklahoma when their car was struck, resulting in severe injuries to several family members.<sup>30</sup> The Robinsons brought a products-liability suit in an Oklahoma court against the New York retailer, the importer of the car, and the car's manufacturer, World-Wide Volkswagen Corp.<sup>31</sup> The defendant retailer argued that because it did not have minimum contacts with the state of Oklahoma, being forced to litigate there violated its due process rights.<sup>32</sup> The Supreme Court reasoned that if personal jurisdiction were to be asserted on the basis of minimum contacts, it should also consider a defendant's objective knowledge of the terms of the contract he or she signs.<sup>33</sup> In doing so, potential defendants would be more cognizant as to whether they might be held liable in a particular jurisdiction. By looking to the nature and frequency of his or her contact with a state, a party to a contract can more aptly predict whether the laws of that state apply to them, and are thus given fair warning of the potential for a lawsuit and assured of all necessary due process rights.<sup>34</sup> In this instance, because there was no evidence that any other cars sold by

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<sup>25</sup> *Id.* at 316.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.* at 321.

<sup>28</sup> *See id.* at 320.

<sup>29</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>30</sup> *Id.* at 495-96.

<sup>31</sup> *Id.*

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*

the retailer ever entered Oklahoma, the Court agreed that assertion of personal jurisdiction over the retailer violated its due process rights.

*Burger King Corp. v. Rudzewicz* further clarified this standard of review.<sup>35</sup> In this case, the defendants opened a Burger King franchise in their home state of Michigan, the contracts establishing the franchise providing that the laws of the home state of Burger King, Florida, would govern.<sup>36</sup> Burger King eventually chose to terminate the franchise when business slowed, but the defendants refused to close the restaurant.<sup>37</sup> Burger King brought an action against the defendants in the United States District Court for the Southern District of Florida, alleging breach of franchise obligations.<sup>38</sup> The Supreme Court held that assertion of personal jurisdiction over the defendants pursuant to Florida's long-arm statute was valid.<sup>39</sup> Here, the defendants had derived substantial benefits from their association with a major national restaurant chain and, moreover, that the defendants had voluntarily entered into a "long-term and exacting regulation" of their business from Burger King's headquarters in Florida.<sup>40</sup> Since the defendants had established such a substantial and continuing relationship with that Corporation's offices, and because the franchise contract presumed that litigation in Florida was probable, the Court held that the defendants' due process rights were not infringed by being forced to litigate there.<sup>41</sup>

In deciding *Burger King*, the Court explained that "it is essential 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."<sup>42</sup> Consequently, a defendant cannot be forced to litigate in a state where the defendant only had random or attenuated contacts.<sup>43</sup> Only where the defendant has contacts with the forum state that "proximately result" from actions of the defendant is personal jurisdiction proper.<sup>44</sup>

With evolutions in the status of personal jurisdiction, courts have been given more specific, but still highly elastic, standards by which to analyze forum selection within the U.S. Still, almost nothing has proved more valuable than the introduction of long-arm statutes, which continue the tradition of considering "traditional notions of fair play and substantial justice."<sup>45</sup> This legal creation is, more often than not, the basis for a state court's assertion of personal jurisdiction today.

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<sup>35</sup> See *Burger King Corp.*, 471 U.S. at 465-66.

<sup>36</sup> See *id.*

<sup>37</sup> *Id.* at 468.

<sup>38</sup> *Id.* at 468-69.

<sup>39</sup> *Id.* at 487.

<sup>40</sup> *Id.* at 479-488.

<sup>41</sup> See *id.* at 487.

<sup>42</sup> *Id.* at 475.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *International Shoe*, 326 U.S. at 316.



*B. State Long-Arm Statutes: The Bedrock for Improvement*

State long-arm statutes are enacted by individual states to define instances in which the state court may assert personal jurisdiction over non-resident defendants.<sup>46</sup> These statutes create a presumption that assertion of personal jurisdiction is appropriate, though due process analyses are still necessary on a case-by-base basis to protect the Constitutional rights of defendants. The first state long-arm statute was adopted by Illinois in 1955, following *International Shoe*, and by 1963 each of the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands had adopted some method for asserting jurisdiction over nonresidents.<sup>47</sup>

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<sup>46</sup> See ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS 4-3 (1983). Because Congress has not enacted a federal version of the state long-arm statute, Rule Four of the Federal Rules of Civil Procedure enables federal courts to borrow long-arm statutes of the states in which federal courts are located: “[u]nless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made.” FED. R. CIV. P. 4(e)(1). See *infra* pp. 21-25 for an argument as to why a federal long-arm statute should be adopted.

<sup>47</sup> CASAD, *supra* note 46, at 4-3. In addition to several states adopting their own statutes, the Commissioners on Uniform State Laws enacted a model state long-arm statute under the Uniform Interstate and International Procedure Act in 1963. *Id.* This statute, similar to the one I propose in its breadth, reads as follows:

§ 1.02. [Personal Jurisdiction Based upon Enduring Relationship].

A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, this state as to any [cause of action] [claim for relief].

§ 1.03. [Personal Jurisdiction Based on Conduct].

- 1) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's
  - a) transacting any business in this state;
  - b) contracting to supply services or things in this state;
  - c) causing tortious injury by an act or omission in this state;
  - d) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; [or]
  - e) having an interest in, using, or possessing real property in this state ; [or]
  - f) contracting to insure any person, property, or risk located within this state at the time of contracting].
- 2) When jurisdiction over a person is based solely upon this section, only a [cause of action] [claim for relief] arising from acts enumerated in this section may be asserted against him.

### 1. Types of Long-Arm Statutes

There are three basic approaches to state long-arm statutes. The first, adopted by states such as California and Nevada, are simple and broad.<sup>48</sup> They provide for the power to assert jurisdiction over an individual or corporation so long as that jurisdiction meets due process requirements.<sup>49</sup> The second type usually provides a brief enumerated list of those situations likely to satisfy the “minimum contacts” test. Texas and New York have adopted this form, covering basic business transactions and tortious conduct involving defendants that may result in litigation with nonresidents.<sup>50</sup> The final type of long-arm statute lists, in detail, the situations

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<sup>48</sup> CASAD, *supra* note 46, at 4-6. See generally *Long-Arm Statutes: A Fifty State Survey*, VEDDER PRICE (2003), [http://www.vedderprice.com/docs/pub/64a3d50f-1bf1-4b7d-a238-6b76933afa53\\_document.pdf](http://www.vedderprice.com/docs/pub/64a3d50f-1bf1-4b7d-a238-6b76933afa53_document.pdf). Other states that provide this basic form of long-arm statutes include Wyoming and Rhode Island. *Id.*

<sup>49</sup> *Id.* As an example of this statutory form, California’s long-arm statute reads as follows: “A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” CAL. CODE CIV. PROC. § 410.10 (2011).

<sup>50</sup> CASAD, *supra* note 46, at 4-4. See generally *Long-Arm Statutes*, *supra* note 48. States that follow long-arm statutes like that found in New York include: Connecticut, Georgia, Minnesota, and New Hampshire. *Id.*

As an example of this statutory form, New York’s long-arm statute reads as follows:

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
  - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
  - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

(b) Personal jurisdiction over non-resident defendant in matrimonial actions or family court proceedings. A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if

in which a state court may assert personal jurisdiction over an out-of-state defendant. These statutes, such as the ones found in Ohio and Kentucky, list various forms of business transactions, tortious conduct, usage of personal property, and similar activity by a defendant that may result in a lawsuit over which the state has jurisdiction.<sup>51</sup>

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the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in matrimonial actions accrued under the laws of this state or under an agreement executed in this state. The family court may exercise personal jurisdiction over a non-resident respondent to the extent provided in sections one hundred fifty-four and one thousand thirty-six and article five-B of the family court act and article five-A of the domestic relations law.

(c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

(d) Foreign defamation judgment. The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to section fifty-three hundred four of this chapter, to the fullest extent permitted by the United States constitution, provided:

1. the publication at issue was published in New York, and
2. that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.

N.Y. C.P.L.R., § 302 (McKinney 2011).

<sup>51</sup> CASAD, *supra* note 46, at 4-4. See generally *Long-Arm Statutes*, *supra* note 48. Those states that adopted a lengthy enumerated list include: Alabama, Alaska, Delaware, District of Columbia, Louisiana, Maryland, Massachusetts, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia. *Id.*

As an example of this statutory form, Ohio's long-arm statute reads as follows:

§ 2307.382. Personal jurisdiction

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or goods in this state;
- (3) Causing tortious injury by an act or omission in this state;

## 2. Due Process Considerations

Because state long-arm statutes have the capability of compelling almost any individual to litigate in a state if the state court deems its jurisdiction proper, the U.S. Supreme Court recognizes the importance of due process rights in the application of the statutes.<sup>52</sup> Two types of personal jurisdiction exist in the United States: general and specific.<sup>53</sup> General personal jurisdiction allows a court to adjudicate any claim against a defendant where the defendant has had a sufficient degree of continuous

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(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

(7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.

(8) Having an interest in, using, or possessing real property in this state;

(9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(B) For purposes of this section, a person who enters into an agreement, as a principal, with a sales representative for the solicitation of orders in this state is transacting business in this state. As used in this division, "principal" and "sales representative" have the same meanings as in section 1335.11 of the Revised Code.

(C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

OHIO REV. CODE ANN. § 2307.382 (2011).

<sup>52</sup> See generally Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-1163 (1966) (describing situations in which assertion of personal jurisdiction (specific and general) may place undue burden on defendants) [hereinafter von Mehren]. See generally *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984) (holding that a Texas court lacked personal jurisdiction over a foreign corporation because a representative of the corporation did not have sufficient continuous and systematic contacts to satisfy due process requirements); *Calder v. Jones*, 465 U.S. 783 (1984) (holding that a state court has authority to assert personal jurisdiction over a nonresident defendant when that person committed intentional, tortious acts aimed directly at the forum state).

<sup>53</sup> See von Mehren, *supra* note 52, at 1136.

and systematic contacts with the forum state.<sup>54</sup> Once this type of jurisdiction has been established, that court may hear any claim against the defendant, whether or not it is related to the action that has arisen out of the forum state.<sup>55</sup> Specific personal jurisdiction, on the other hand, only permits adjudication of claims that are related to or arise out of a defendant's contacts with the forum state.

Differentiating between "general" or "specific" jurisdiction provides an additional safeguard in protecting a defendant's due process rights, limiting the extent to which a state court may litigate a matter. In distinguishing the nature of a claim in this way, the hope is that the defendant will not be unduly burdened by being haled into a forum state with which he or she has not had sufficient contact. Specific personal jurisdiction over a defendant is proper where the contract in dispute had a "substantial connection" with the forum state,<sup>56</sup> while assertion of general personal jurisdiction requires a showing that there were continuous and systematic contacts with the forum state.<sup>57</sup> Looking at claims in this way is a crucial aspect of providing fair proceedings, especially when the source and effects of a particular action are difficult to pinpoint, as in e-commerce transactions.

Regardless of whether the personal jurisdiction is specific or general, a defendant must have sufficient "minimum contacts" with the state,<sup>58</sup> indicating that the defendant could reasonably expect to be "haled into court" in that state<sup>59</sup> and it must be shown that adjudication against the defendant in that forum does not offend "traditional notions of fair play and substantial justice."<sup>60</sup>

### C. International Personal Jurisdiction

The previously discussed standards for asserting personal jurisdiction over defendants in litigation between U.S. citizens also apply to cases in which a U.S. court attempts to assert personal jurisdiction over an international defendant. Notwithstanding variations in form, the basic concept is the same: assertion of personal jurisdiction over the defendant cannot violate due process requirements of the U.S. Constitution, nor violate current international treaties.<sup>61</sup> Distinguishing between general and specific personal jurisdiction is a critical part of the analysis in such cases.<sup>62</sup>

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<sup>54</sup> *International Shoe*, 326 U.S. at 320. *See generally* *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952) (holding that general jurisdiction over a foreign corporation was appropriate where the defendant Mining Company continuous and systematic contacts with the forum state in the form of business meetings, payment of salaries, and stock transfers).

<sup>55</sup> *See* BORN, *supra* note 12, at 34.

<sup>56</sup> von Mehren, *supra* note 52, at 1149-50.

<sup>57</sup> *See* ROBERT C. CASAD, JURISDICTION AND FORUM SELECTION § 4.09 (1988). *See generally* *Helicopteros*, 465 U.S. 783.

<sup>58</sup> *International Shoe*, 326 U.S. at 316.

<sup>59</sup> *World-Wide Volkswagen*, 444 U.S. at 297.

<sup>60</sup> *International Shoe*, 326 U.S. at 316.

<sup>61</sup> *See generally* BORN, *supra* note 12, at 35.

<sup>62</sup> *See generally* BORN, *supra* note 12, at 35-95.

### 1. General Personal Jurisdiction

To assert general personal jurisdiction over an international defendant and successfully litigate a dispute with a foreign defendant, the U.S. court must prove that it has jurisdiction based on one of three broad categories: (1) that the individual's nationality,<sup>63</sup> domicile,<sup>64</sup> residence,<sup>65</sup> or, if a business, its incorporation status,<sup>66</sup> exposed the foreign defendant to the laws of the U.S.; (2) that the defendant had continuous and systematic activities within the forum such that it is subject to litigation in the U.S.;<sup>67</sup> or (3) that the "transitory presence" of the defendant within the forum makes personal jurisdiction possible.<sup>68</sup>

There are obvious benefits and detriments that arise out of the use of these criteria as a basis for general personal jurisdiction. For example, though these conditions were put into place to make litigation procedures with foreign defendants more efficient and fair, it is quite possible that even a U.S. citizen residing in a foreign nation might complain that being forced to adjudicate within the U.S. is burdensome, requiring extensive travel and expense.<sup>69</sup> Corporations that have been obliged to litigate in a U.S. forum commonly argue that contracting in an open market makes the corporation liable to litigation virtually anywhere its goods are to

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<sup>63</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §421(2)(d) (stating that "a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted . . . the person, if a natural person, is a national of the state"). See *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (holding that a nation such as the United States could require one of its citizens, who was then traveling in France, to return to it to be charged or to litigate a claim because he was a national of the U.S.).

<sup>64</sup> See *supra* note 8 and accompanying text.

<sup>65</sup> See RESTATEMENT OF THE LAW (SECOND) CONFLICT OF LAWS § 30 (1971). Comment (a) provides factors to be considered in determining whether jurisdiction based on residency is proper, including "(1) the amount of time the individual spends in the state, (2) the nature of his place of abode in the state, (3) his attitude of mind toward the state, as for example, whether he regards it with affection and as a place to which he likes to go whenever possible, and (4) the things he does in the state." *Id.*

Residency as a basis for personal jurisdiction can be particularly problematic in an international dispute, especially when based on an Internet case. For example, in *National Football League v. TVRadioNow Corp. (iCraveTV.com)*, a Canadian corporation that offered pirated TV programs over the Internet was sued for copyright infringement by a U.S. plaintiff hoping to utilize U.S. laws in the litigation. Personal jurisdiction over the Defendant was accomplished by serving the Defendant's sales manager who happened to reside and work for the corporation in Pennsylvania. *Natl. Football League v. TVRadioNow Corp. (iCraveTV.com)*, 53 U.S.P.Q.2d (BNA) 1831, 1834 (W.D. Pa. 2000).

<sup>66</sup> See RESTATEMENT OF THE LAW (SECOND) CONFLICT OF LAWS § 42. See also *Perkins*, 342 U.S. 437; *Helicopteros*, 465 U.S. 783.

<sup>67</sup> See *Perkins*, 342 U.S. 437; *Helicopteros*, 465 U.S. 783.

<sup>68</sup> See *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990) (holding that personal jurisdiction may be properly asserted over a defendant solely on the basis of service of process while a defendant is temporarily physically present in the forum state). See also RESTATEMENT OF THE LAW (SECOND) CONFLICT OF LAWS § 28.

<sup>69</sup> See *Blackmer*, 284 U.S. 421.

be found, and that the “continuous and systematic activities” test is therefore insufficient to satisfy due process requirements.<sup>70</sup>

Other nations also differ greatly from the U.S. on the subject of “transitory presence” or “tag service.” This form of service renders a foreign defendant subject to litigation in any U.S. jurisdiction so long as the defendant is properly served with process in the jurisdiction in which the plaintiff seeks a remedy.<sup>71</sup> Though the U.S. recognizes “tag service” as appropriate, the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters provided a forum for nations like Ireland and the U.K. to disagree, voicing their refusal to recognize the transitory presence of a defendant within a jurisdiction as a basis for asserting personal jurisdiction.<sup>72</sup> There is a concern amongst those nations that “transient” jurisdiction violates customary international law, so U.S. courts have made some efforts to comply with those broadly accepted standards,<sup>73</sup> albeit inconsistently.

## 2. Specific Personal Jurisdiction

For a U.S. court to assert specific personal jurisdiction in an international case, due process necessitates that the foreign defendant “purposefully availed” himself of the laws and protections of the U.S., that the defendant’s contacts with the state gave rise to the litigation, and that forcing the defendant to litigate in the U.S. is objectively reasonable.<sup>74</sup> The U.S. Supreme Court recognized the importance of this

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<sup>70</sup> See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987). See *infra* pp. 11-12. In *Asahi*, the Supreme Court of California held that due process requires that a “substantial connection” be made between the defendant and the forum State which satisfies minimum contacts, and this must come about “by an action of the defendant purposefully directed toward the forum State.” *Id.* at 104. Therefore, mere placement of a product in the stream of commerce is insufficient to meet minimum contacts. *Id.* The U.S. Supreme Court, though it ultimately reversed the order of the Superior Court of California, agreed that due process requires a substantial connection between the defendant and the forum state. See *id.* at 112. However, it further clarified this standard, holding that “the substantial connection . . . between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum state” (emphasis by the Court). *Id.*

U.S. federal courts in international disputes face the issue of whether to apply a “national contacts” test or a “state contacts” test. See generally 2 E-COMMERCE LAW AND BUSINESS (Mark E Plotkin, Bert Wells, and Kurt Wimmer eds., 2003). Though federal courts are limited by the Fifth Amendment in their exercise of personal jurisdiction, federal statutes will often incorporate language allowing exercise of personal jurisdiction over a foreign defendant based on the defendant’s contacts with the U.S. as a whole, and not simply within one state in the U.S. (where it otherwise may not have been allowed to assert jurisdiction because of insufficient contacts within that single district). *Id.*

<sup>71</sup> *Fisher, Brown & Co. vs. Fielding*, 67 Conn. 91, 104 (1895).

<sup>72</sup> Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, art. 3, Sept. 27, 1968, 1972 O.J. (L 299) 32, 8 I.L.M. 229, 232 (1969), as amended by 1990 O.J. (L 189) 1, 29 I.L.M. 1413 (1990), reprinted in 1998 O.J. (C 27) 1 [hereinafter Brussels Convention on Jurisdiction].

<sup>73</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 876 n.207 (1997).

<sup>74</sup> See generally *World-Wide Volkswagen*, 444 U.S. 286.

reasonableness standard in its decision in *Asahi Metal Industry Co. v. Superior Court*.<sup>75</sup> Asahi, a Japanese corporation, manufactured tire valve assemblies and sold the assemblies to Cheng Shin, a Taiwanese corporation that manufactured tire tubes.<sup>76</sup> Approximately twenty percent of the Cheng Shin tire tubes sold in the U.S. were available in California, but following a fatal accident in that State that was attributed to alleged defects in the tire tubes, a products liability action was initiated against Asahi. Asahi argued that it did not have sufficient minimum contacts within the State for it to exercise personal jurisdiction over the Company, and the Supreme Court held:

The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.<sup>77</sup>

The Court found that because Asahi did not purposefully avail itself of activities within the State of California, it did not have sufficient minimum contacts with the State, making personal jurisdiction over the Company impermissible.<sup>78</sup>

Internationally, there are still concerns as to the appropriateness of specific personal jurisdiction under the *Asahi* guidelines. Unease often centers on issues of convenience, differences in procedural and substantive laws among nations, differences in political and social values, and the potential for interference with the sovereignty of other states.<sup>79</sup> Justice Harlan appropriately noted the importance of keeping a rational, unselfish perspective of the rights of the U.S. to impose its own specialized interests in international disputes.<sup>80</sup> He advised in *United States v. First National City Bank* that “[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.”<sup>81</sup>

### 3. Alternative Means of Asserting Personal Jurisdiction in International Cases

Though the previous methods of asserting personal jurisdiction often apply in state courts, federal courts in the U.S. also have specialized means for establishing the right to adjudicate claims against a foreign defendant. Pursuant to Federal Rule of Civil Procedure 4(f), unless there is a federal statute mandating a specific course of action, individuals in foreign countries may be served by a U.S. plaintiff where

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<sup>75</sup> *Asahi*, 480 U.S. 102.

<sup>76</sup> *Id.* at 106-07.

<sup>77</sup> *Id.* at 115.

<sup>78</sup> *Id.* at 115-116.

<sup>79</sup> See BORN, *supra* note 12, at 78.

<sup>80</sup> *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

<sup>81</sup> *Id.*



there is an internationally agreed upon means for service, reasonably calculated so as to give notice to the defendant.<sup>82</sup> The Rule provides for assertion of personal jurisdiction under unique circumstances where jurisdiction over a party concerning a federal claim meets due process qualifications but has no basis under federal or state law.<sup>83</sup> The Rule explicitly references the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents as one of these agreements, which applies “in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.”<sup>84</sup> Therefore, any of the member states to the agreement may assert personal jurisdiction over a foreign defendant through the Convention's mechanisms for providing service of process.<sup>85</sup> On the other hand, Rule 4 also states that if there is no international standard, personal jurisdiction may be accomplished by serving a foreign defendant according to the laws of that nation.<sup>86</sup> This does not preclude a defendant from challenging the constitutionality of a personal jurisdiction claim, but with these methods, there is a greater chance that two nations may agree on how personal jurisdiction is to be asserted in an international case.

The federal government also attempts to gain transparency and predictability in international arenas by providing personal jurisdiction provisions into federal statutes, such as the Clayton Act governing antitrust law.<sup>87</sup> These are especially helpful in adjudicating international cases because the terms supply specific provisions allowing for “world-wide” service of process where the defendant “transacts business” or anywhere that the defendant “may be found.”<sup>88</sup> Not only does this aid U.S. courts in justifying assertion of personal jurisdiction in difficult scenarios, but it also puts foreign defendants on notice of the circumstances through which they may be forced to adjudicate within the U.S. As a practical matter, because statutes like the Clayton Act work in conjunction with Federal Rule 4(k), which mandates that exercise of jurisdiction be consistent with the U.S. Constitution, a due process analysis is still necessary to determine whether assertion of personal jurisdiction over the defendant meets with fundamental fairness requirements.<sup>89</sup> It is

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<sup>82</sup> FED. R. CIV. PRO. 4(f)(1).

<sup>83</sup> DAVID EPSTEIN & JEFFREY L. SNYDER, *INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE AND STRATEGY* § 6.03, at 6-12 (3d ed. 2007).

<sup>84</sup> Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters art. 1, November 15, 1965, 20 U.S.T. 361, 656 U.N.T.S. 163.

<sup>85</sup> *See id.*

<sup>86</sup> FED. R. CIV. PRO. 4(f)(2).

<sup>87</sup> *See* BORN, *supra* note 12, at 99-100. Statutes such as the Clayton Act, 15 U.S.C. §22 (1982), and the federal securities laws, 15 U.S.C. §§77v, 78aa (1982), allow for “world-wide” service of process, while statutes such as RICO, 18 U.S.C. §1965 (1982), only permit “nation-wide” service of process within the U.S. *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See* FED. R. CIV. PRO. 4(k)(2)(B). *See also* Adam B. Perry, Note, *Which Cases are “Such Cases”: Interpreting and Applying Section 12 of the Clayton Act*, 76 *FORDHAM L. REV.* 1177, 1188 (2007).

generally acknowledged, however, that personal jurisdiction is proper so long as the defendant has sufficient aggregate contacts with the U.S. as a whole.<sup>90</sup>

Though these guidelines generally assist courts, personal jurisdiction law is still controversial when applied internationally. Ultimately, these statutes and rules fail to provide predictability because there is little to no communication on the subject of personal jurisdiction with foreign nations, and no set standards for a consistent method of jurisdictional procedure. What further complicates these issues is that personal jurisdiction law as we know it is now being imposed upon by a new giant of industry: the Internet.

#### *D. E-Commerce: Contracting through the Internet*

The explosion of popularity surrounding the use of the Internet is evident in the daily lives of most of the world's citizens as well as the economic census data collected by the U.S. Census Bureau.<sup>91</sup> A history of the growth in U.S. manufacturing shows that e-commerce shipment values practically tripled from 2003 to 2008, and that the total value of manufactured items sold through e-commerce (calculated in millions of dollars) is now almost equal to the dollar amount representing items sold through traditional trading methods.<sup>92</sup> Considering that this census data is already two years old as of the date of this paper, it is likely that e-commerce enterprises have matched, or even exceeded, conventional manufacturing and trade transactions.

As big as e-commerce is in the U.S., international transactions are even greater in comparison. Currently, Western Europe commands the number one spot in retail e-commerce transactions with online retail sales predicted to exceed \$200 billion in 2012.<sup>93</sup> The People's Republic of China (China) is also a contributor, boasting a 22 percent increase in e-commerce transactions from 2009 to 2010, and yielding 4.5 trillion yuan (\$682.16 billion) in profits.<sup>94</sup> Japan, though riding somewhat in the wake of most of the world's retail giants, has also taken advantage of the Internet.<sup>95</sup> Reports maintain that revenues acquired from online sales have increased each year by approximately 17 percent since 2005 with expectations of a 10 percent growth every year for the next five years.<sup>96</sup>

Before addressing the effects of e-commerce growth and the complications that arise out of its litigation, it is important to understand the different methods of Internet contracting.

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<sup>90</sup> Perry, *supra* note 89, at 1218.

<sup>91</sup> See *Annual Survey of Manufactures, and the Economic Census*, U.S. CENSUS BUREAU, (2008), <http://www.census.gov/econ/estats/2008/historical/2008ht1.pdf>.

<sup>92</sup> See *id.*

<sup>93</sup> See Karin von Abrams, *Retail E-Commerce in Western Europe*, EMARKETER (May, 2010), [http://www.emarketer.com/Reports/All/Emarketer\\_2000679.aspx](http://www.emarketer.com/Reports/All/Emarketer_2000679.aspx).

<sup>94</sup> *China's e-commerce transactions exceed 4.5 trillion yuan in 2010*, PEOPLE'S DAILY, <http://english.peopledaily.com.cn/90001/90778/90860/7260847.html> (last visited Jan. 14, 2011).

<sup>95</sup> *E-commerce Takes Off in Japan: Up and Away*, ECONOMIST, <http://www.economist.com/node/16322651> (last visited Dec. 10, 2010).

<sup>96</sup> *Id.*

### 1. Types of E-Commerce Transactions and the Problems Resulting from Their Use

There are three main categories of Internet transactions constituting e-commerce: those agreements with shrinkwrap terms, those with clickwrap terms, and those with browsewrap terms.<sup>97</sup> Shrinkwrap terms are found where a purchaser orders a product that arrives, usually wrapped in plastic, with the seller's contract terms located somewhere in the package.<sup>98</sup> Clickwrap terms require that the buyer click an "I agree" button, thereby consenting to the seller's terms, before a sale is completed.<sup>99</sup> Browsewrap terms are the most flexible, providing that a buyer implicitly agrees to the terms of use on a seller's website without express consent, simply by utilizing the site.<sup>100</sup>

In considering each form of e-commerce transaction, it quickly becomes evident that classic negotiation methods and dispute resolution are not always easily applied to Internet contracts. A popular complaint is that the terms of the contract are unconscionable, resulting in a disproportionate amount of bargaining power for the seller with very little influence for the buyer.<sup>101</sup> Unconscionability is arguably more widespread in Internet contracts as opposed to traditional form contracts because, especially in terms of browsewrap transactions, buyers are not on notice that they are automatically subject to arbitration agreements, since it is unnecessary for them to

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<sup>97</sup> KNAPP, CRYSTAL & PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 193 (6th ed. 2007).

For each of the following terms, electronic signatures have been found to be a valid and enforceable method of agreement to an electronic contract. This has been recognized in such statutes as E-Sign, Electronic Signatures in Global and National Commerce Act (E-SIGN): 15 U.S.C. §§ 7001 *et seq.* (2000) (signed by President Bill Clinton on June 30, 2000, and effective Oct. 1, 2000), UETA, Uniform Electronic Transactions Act (UETA) (approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) on July 23, 1999; as of July 2001, 36 states enacted this Act), and in the EU, by the Directive on a Common Framework for Electronic Signatures. *EU: Directive on a Common Framework for Electronic Signatures, 1999: Directive 199/93/EC of 13 December 1999 on a Community Framework for Electronic Signatures, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:en:HTML>.*

Additionally the United Nations has approved an approach to e-signatures in the Model Law on Electronic Signatures by UNCITRAL. *UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001*, UNCITRAL (April, 2002), <http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>.

<sup>98</sup> *See id.* at 193-94. These terms will often include a caveat that the buyer's failure to return the item within a specified time period confirms that the buyer agrees to abide by the seller's terms of use. *See id.*

<sup>99</sup> *See id.*

<sup>100</sup> *See id.* These terms often appear on the provider's homepage, but it is unnecessary for a user to make any sign of recognition of or agreement with these terms before they are subject to them. *See id.*

<sup>101</sup> *See generally* *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (1998) (holding an arbitration clause as unenforceable as a contract of adhesion where buyers of computers alleged breach of contract (among other things) and had to abide by a terms and conditions agreement with hardly a response from the manufacturer).

explicitly consent to terms.<sup>102</sup> Courts may also struggle with a “chicken or the egg” problem: was it the seller who initiated the contact by offering a product or service over the Internet, or was it the buyer who activated the contract by seeking out the goods?

The litigation process is further complicated because U.S. and international courts do not have a uniform method of applying personal jurisdiction to e-commerce disputes. Two courts within a single U.S. state may even hold differently on a similar matter. For instance, the U.S. District Court for the Western District of Michigan held that a website operated by a nonresident, which did not allow users to make purchases through the home page, but rather promoted sales by providing links to another site, did not provide sufficient contacts with the state for the court to assert personal jurisdiction over it.<sup>103</sup> In contrast, a case decided just the year before in the United States District Court for the Eastern District of Michigan in which the Court held that a nonresident’s website, used to promote sales, did have sufficient contacts with residents of the forum state for the Court to assert personal jurisdiction.<sup>104</sup> The difference here is slight, resting on the respective websites’ level of interactivity and how each one sold its products. As a result, contracting parties lack foreseeability as to how a conflict might be resolved. To address this problem, the United States District Court for the Western District of Pennsylvania formulated a “sliding scale” test, currently adopted by many state courts dealing with e-commerce dispute resolution.

## 2. The Zippo “Sliding Scale” Test

The case of *Zippo Mfg. Co. v. Zippo DOT Com* involved an Internet domain name dispute in which the Plaintiff, having its principal place of business in Pennsylvania, made allegations of trademark dilution and infringement against the Defendant, a California corporation that operated a Web site.<sup>105</sup> The legal question was whether Pennsylvania’s Long-arm Statute could be used to assert personal jurisdiction over Zippo DOT Com (the corporation running the Web site) on the basis that it sold passwords to approximately 3,000 Pennsylvania residents and entered into seven contracts with Internet providers in Pennsylvania over its course of operation.<sup>106</sup> The court found that because the Defendant did more than simply advertise its products in Pennsylvania, and because its contacts with the State’s citizens were not fortuitous since it consciously decided to process those users’ requests for services, Zippo DOT Com conducted e-commerce constituting “purposeful availment” of doing business in Pennsylvania.<sup>107</sup> Specific personal

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<sup>102</sup> See KNAPP, *supra* note 97, at 211.

<sup>103</sup> *Siebellink v. Cyclone Airsports, Ltd.*, No. 1:01-CV-591, 2001 WL 1910560 (W.D. Mich. Nov. 27, 2001).

<sup>104</sup> *Sports Authority Michigan, Inc. v. Justballs, Inc.*, 97 F. Supp. 2d 806 (E.D. Mich. 2000).

<sup>105</sup> *Zippo Mfg. Co. V. Zippo DOT Com*, 952 F. Supp. 1119, 1121.

<sup>106</sup> *Id.* at 1126.

<sup>107</sup> *Id.* at 1125-27. See generally *World-Wide Volkswagen*, 444 U.S. at 295 (holding that the cause of action must not have arisen out of fortuitous circumstances for due process considerations to be satisfied).

jurisdiction requirements were satisfied in this case, therefore allowing the court to assert personal jurisdiction over the nonresident Web site corporation.<sup>108</sup>

In coming to this conclusion, *Zippo* set out what has become known as the “sliding scale” test for determining whether personal jurisdiction over an out-of-state defendant is appropriate in an Internet case.<sup>109</sup> The sliding scale operates as follows: (1) personal jurisdiction is likely proper where a provider openly carries out business over the Internet while knowingly and repeatedly transferring files; (2) personal jurisdiction is probably improper where a provider manages a passive Web site, merely posting information that becomes available to foreign users; and (3) personal jurisdiction and its appropriateness is within the discretion of the court, depending upon the degree to which an interactive Web site engages its users, as well as the commercial nature of the transaction taking place through the site.<sup>110</sup> This test provides a framework for analyzing e-commerce cases, the result being a general improvement in a party's ability to predict the outcome of its Internet contracting dispute.

### 3. Problems with *Zippo*

Even with the guidance the “sliding scale” test provides, there remains a level of subjectivity in the court's decision that is unsettling. Forum states within the U.S. still have a tremendous amount of discretion in determining whether personal jurisdiction is proper, especially in cases involving interactive Web sites. *Zippo* asked whether “Dot Com's conducting of electronic commerce with Pennsylvania residents [constituted] the purposeful availment of doing business in Pennsylvania.”<sup>111</sup> This “purposeful availment” standard is in turn a very elastic one, requiring courts to consider a corporation or individual's intent in operating a Web site to determine if that entity wished to do business in the state.<sup>112</sup> Because sites set up for profit-making purposes normally do not discriminate against customers on the basis of residence, it is very easy to make a blanket assumption that every site operator purposefully avails himself to doing business in every state, so long as that availment results in capital gain.

In cases of international e-commerce transactions, purposeful availment may be especially difficult to prove. Attempts by member states of the European Union and the European Free Trade Area to standardize the means to assert personal jurisdiction—basing requirements on domicile in the absence of a contractual agreement to do otherwise—<sup>113</sup> leaves significant room for conflict. Even with this

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<sup>108</sup> *Zippo*, 952 F. Supp. at 1126-27.

<sup>109</sup> *Id.* at 1124. The *Zippo* Court based this test on the presumption 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.” *Id.*

<sup>110</sup> *Id.* As is evidenced by this test, the level of interactivity a Web site requires is a crucial factor in understanding whether personal jurisdiction is proper over a nonresident defendant.

<sup>111</sup> *Id.* at 1125-26.

<sup>112</sup> *See id.*

<sup>113</sup> *See* Brussels Convention on Jurisdiction, *supra* note 72, art. 2. *See also* Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Dec. 22, 2000, 2001 O.J. (L 12) 1, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:EN:PDF>. This

agreement, some consumers may be able to bring suit in their own nation's courts for breach of contract despite the fact that their country would traditionally not be able to assert personal jurisdiction over the defendant.<sup>114</sup> This applies where the defendant directed attention toward the consumer prior to closing the contract,<sup>115</sup> but, once again, determining whether a plaintiff was actually targeted or merely stumbled into the defendant's broad web of advertising is often difficult to calculate.

It is unfair to subject sellers to this level of awareness and accountability, especially in an age where linking information produced on an original home page to another wholly unrelated Web site is so popular. Conversely, operators of many passive Web sites will not be held liable for harm done when truly at fault, simply because they hold the trump card of claiming lack of calculated engagement. Consequently parties to an e-commerce dispute are still left in the dark, struggling to determine whether or not these many tests ("minimum contacts," "sliding scale," "purposeful availment," etc.) will result in personal jurisdiction being proper.

#### *E. Scholarly Suggestions and International Proposals*

Scholars have offered various suggestions for improving personal jurisdiction analysis in e-commerce disputes. A discussion of these admirable attempts at clarification demonstrates that these goals are simply too lofty and impractical.

##### 1. The "ODR" Approach

In his article *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient and Secure*, Fred Galves proposes implementing Online Dispute Resolution (ODR) to negotiate Internet contract cases, transforming common Alternative Dispute Resolution (ADR) by making it available entirely online.<sup>116</sup> He argues that ODR would be a cost-saving, efficient method for resolving e-commerce disputes, as opposed to traditional litigation and that it would be an improvement over ADR because it would offer a more efficient and informal environment for settlement.<sup>117</sup> To make the system applicable internationally, Galves proposes using the Uniform Commercial Code (UCC) or the United Nations

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second agreement is significant in that it defines the "place of performance" for all EU members (with the exception of Denmark) (art. 5(1)(b)), and also states when and where consumers may sue a seller. *See id.*

A second proposal was made by the EU Brussels Regulation in 1999 in which the assembly decided that jurisdiction over passive Internet sites would not be accepted. Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(1999) 348 final at 16, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0348:FIN:EN:PDF>. The Proposal further states that an online consumer in the EU would be able to bring suit against a Web site operator regardless of where the site is based or whether the operator has purposefully targeted the nation where the consumer is domiciled. *Id.*

<sup>114</sup> *See id.* art. 13-15.

<sup>115</sup> *See id.* art. 13(3)(a).

<sup>116</sup> Fred Galves, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient and Secure*, 2009 U. ILL. J.L. TECH. & POL'Y 1, 6-8 (2009).

<sup>117</sup> *Id.* at 7-8.

Convention for the International Sales of Goods (CISG) as the applicable arbitration law.<sup>118</sup>

Though desirable, this approach lacks follow-through. The UCC is not adopted uniformly by all states.<sup>119</sup> Persons operating out of states that have not adopted various UCC provisions would likely argue issues of fairness. From an international perspective, one of the most marked problems with using the CISG is that it has not been uniformly ratified by all member states, including the UK<sup>120</sup> which, as previously mentioned, makes up a significant percentage of the world's e-commerce transactions. Furthermore, the CISG has been criticized for its use of vague language, such as "fundamental breach" and "reasonable length."<sup>121</sup>

Even if these contentions were immaterial, problems may arise where dispute resolution is forced upon a contracting party. Although ADR is often provided for by contract, and although some persons prefer this form of conflict resolution, others prefer their day in court. A system where parties avoid coming face-to-face may be disagreeable to those who wish to present evidence in a courtroom instead of uploading documents to the Web, or to those who desire to cross-examine witnesses in person instead of over the telephone. The credibility of parties to the dispute or witnesses is also much more difficult to evaluate when the case is resolved online. In short, ODR does not address some of the most basic needs of parties to contemporary contract disputes.

## 2. The ICC E-Commerce Project

Another suggestion similar to Galves' ODR approach is offered by the International Chamber of Commerce (ICC). Fundamental to this proposal is that there should be more industry self-regulation in e-commerce transactions.<sup>122</sup> To

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<sup>118</sup> *Id.* at 9-10.

<sup>119</sup> See generally *Uniform Commercial Code Locator*, CORNELL (Mar. 15, 2004), <http://www.law.cornell.edu/uniform/ucc.html>.

<sup>120</sup> As of 2005, the UK had not ratified the CISG, though Lord Sainsbury, the Under Secretary of State for the Department of Trade and Industry in the House of Lords stated, "the United Kingdom intends to ratify the convention, subject to the availability of parliamentary time. There have been delays in the past for a number of reasons, but we propose to issue a consultation document in the course of the next few months to examine the available options." The Hon. Justice James Douglas, *Arbitration of the International Sale of Goods Disputes under the Vienna Convention* (2006), available at <http://www.cisg.law.pace.edu/cisg/biblio/douglas.html> (paper delivered at the Institute of Arbitrator and Mediators Australia National Conference 2006).

Today, the UK still has not ratified the CISG. The Hon. Justice James Douglas posits that the UK has several fears preventing it from approving the agreement, including "scepticism [sic] about the practical effectiveness of the buyer's remedies provided under the convention compared to the remedies under English law," and "that ratification of the convention in the United Kingdom might lead to a reduction in the number of international arbitrations coming to England." *Id.*

<sup>121</sup> See Koji Takahashi, *Right to Terminate (Avoid) International Sales of Commodities*, 2003 J. BUS. L. 102, 124 (2003).

<sup>122</sup> See *Jurisdiction and Applicable Law in Electronic Commerce, Electronic Commerce Project (ECP)'s Ad hoc Task Force, June 6, 2001*, INTERNATIONAL CHAMBER OF COMMERCE,

accomplish this, the ICC asks that consumers involved in an Internet contract dispute first “make reasonable attempt[s] to utilize a company’s internal customer satisfaction mechanisms” and then proceed to participate in mandatory online alternative dispute resolution programs.<sup>123</sup> Only where these methods fail to conclude the dispute does the ICC allow for litigation in court.<sup>124</sup>

Again, though these methods of resolving conflicts are well intended, it is likely that the plan would be ineffective for the same reasons Galves’ proposition fails. Additionally, the ICC does not propose the location of litigation following customer service measures and arbitration. Parties to a suit would still be left without a settled-upon forum under this method, and it is likely that nations would again have to fight each other to claim personal jurisdiction over the defendant. Ultimately, these alternative means to dispute resolution are impractical.

### 3. The “Notice and State Sovereignty” Approach

A final proposal offers the possibility of abrogating personal jurisdiction considerations of purposefulness and convenience in favor of a sovereign state approach. A. Benjamin Spencer proposes that the U.S. Constitutional reservation of power to the states, in the absence of federal provisions to the contrary, has been lost in the realm of personal jurisdiction and must return.<sup>125</sup> Spencer argues that the procedural requirement of notice and the recognition that states have authority to adjudicate in matters they deem to be of legitimate interest to them are of the utmost importance in determining whether personal jurisdiction is proper.<sup>126</sup> He finally calls for a U.S. Supreme Court decision that reinstates these concerns as paramount in a jurisdiction dispute.<sup>127</sup>

The theory is appealing because it embraces precedent like *International Shoe*<sup>128</sup> while simply shifting courts’ focus to state interest. Yet, when applied domestically and internationally the approach is flawed; it grants extremely broad authority, making it nearly impossible to conceive of a situation where a state or nation would *not* find a particular defendant to be within its jurisdiction. Despite claims that the Supreme Court would not have to abrogate precedent to remain consistent, it appears it would. One of the better-known cases deciding issues of personal jurisdiction is *Asahi Metal Industries Co. v. Superior Court of California*.<sup>129</sup> This case makes clear

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[http://www.iccwbo.org/home/statements\\_rules/statements/2001/jurisdiction\\_and\\_applicable\\_law.asp](http://www.iccwbo.org/home/statements_rules/statements/2001/jurisdiction_and_applicable_law.asp) (last visited Dec. 12, 2010).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 672 (2006).

<sup>126</sup> *See id.* Under state interest analysis, after assuring itself of the sufficiency of notice, a court would engage in a similar, unified inquiry, asking whether the state has a legitimate interest in the dispute such that the assertion of jurisdiction is not arbitrary and is therefore consistent with the due process rights of the defendant. *See id.* at 671.

<sup>127</sup> *See id.* at 670-71.

<sup>128</sup> *See International Shoe*, 326 U.S. 310.

<sup>129</sup> *Asahi*, 480 U.S. 102.



that the burden on the defendant must be taken into consideration in determining whether due process considerations are met.<sup>130</sup> Clearly, if *Asahi* were considered under Spencer's approach, the State of California would be given greater deference, its concerns presiding over those of the defendant's. Because this method would very likely result in precedent being overruled, it is doubtful that the Supreme Court would embrace this suggestion.

### III. ARGUMENT

As the Internet continues to infiltrate other aspects of our daily lives, there must be a consistent method for approaching the issues likely to emanate from its influence. The Obama Administration has expressed a willingness to address international e-commerce concerns through an advisory panel.<sup>131</sup> Cameron Kerry, Department of Commerce general counsel, and Christopher Schroeder, Assistant Attorney General for the Office of Legal Policy for the United States Department of Justice, have stated that The Interagency Subcommittee on Privacy & Internet Policy "will develop principles and strategic directions with the goal of fostering consensus in legislative, regulatory, and international Internet policy realm."<sup>132</sup>

While these suggestions have all lacked some essential requirement authorized by case law and the U.S. Constitution, one method that would satisfy constitutional, state, international, and party concerns would be a statutory standard for the assertion of personal jurisdiction in e-commerce cases. This model statute could be enacted across the United States and incorporated into its international treaties. A practical method for putting this theory into action is to formulate a federal long-arm statute that directly incorporates e-commerce language.

#### A. *The Proposed Statute*

The recommended provision is offered in the following terms:

#### **Personal Jurisdiction over Nonresidents**

"A court within the United States may exercise personal jurisdiction over a person who acts, directly or through an agent, to create a cause of action arising from the person's:

- a) Transacting any business in a state within the U.S.;
- b) Contracting to supply services or goods in a state within the U.S.;
- c) Purposefully engaging in an e-commerce transaction in a state within the U.S. A person may be found to purposefully engage in an e-commerce transaction where:
  - (1) The Web site is commercial in nature;

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<sup>130</sup> See *id.* at 113. The Court explained that, "the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Id.*

<sup>131</sup> *Administration Creates E-Commerce Advisory Panel*, U.S. LAW WEEK (Nov. 2, 2010), 79 U.S.L.W. 1556.

<sup>132</sup> *Id.*

- (2) Contacts made by the defendant via the Internet are active in nature rather than merely passive;
  - (3) A sufficient showing is made that the defendant has had minimum contacts with a state within the U.S.;
  - (4) The claim against the defendant arises out of such minimum contacts;
  - (5) Requiring the defendant to travel to the U.S. to defend an action is reasonable under the circumstances and does not offend fundamental considerations of due process;
- (d) Causing tortious injury by an act or omission in a state within the U.S.”

*B. Statutory Language and Its Meaning*

Essential to this proposal is an understanding the proposed statute’s terminology. The definitions enumerated here might also be incorporated into the Commentary accompanying the statute itself. The following list focuses specifically on the language involved in the e-commerce provision of this long-arm statute:

1. “Person” includes an individual, corporation, business trust, estate, trust, partnership, and any other type of association.”<sup>133</sup>
2. “Purposeful engagement” exists where an action involves the person’s conduct, or is the direct result of the person’s conduct, and it is the person’s objective to engage in that conduct or to cause that result.
3. “Commercial” includes an activity involving the sale or exchange of goods and/or services.<sup>134</sup>
4. “Sufficient” means adequate; of such quality, number, force, or value as is necessary for a given purpose.<sup>135</sup>
5. “Minimum contacts” include those connections that manifest sufficient evidence of activity by a person in a forum state to allow that state to adjudicate against them without offending traditional notions of fair play and substantial justice.<sup>136</sup>
6. “Active” contacts are those contacts that involve (1) directing electronic activity into a state within the U.S., (2) with the intent of engaging in business or other interactions within the State, and (3) where that activity creates, in a person within the a state within the U.S., a potential cause of action cognizable in that state’s courts.<sup>137</sup>

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<sup>133</sup> OHIO REV. CODE ANN. § 2307.381 (2010) (language from the code was adopted to fit this provision).

<sup>134</sup> See BLACK’S LAW DICTIONARY 114 (3d pocket ed.1996) (definition of “commerce”).

<sup>135</sup> BLACK’S LAW DICTIONARY 1474 (8th ed. 2005).

<sup>136</sup> See *International Shoe*, 326 U.S. at 316.

<sup>137</sup> See *Shrader v. Biddinger*, 633 F.3d 1235, 11 (2011).

7. “Passive” contacts are those contacts that result from merely placing information on the Internet without the intent of engaging in business or other interactions within a state within the U.S.<sup>138</sup>

Intrinsic in this proposed statute is the understanding that specific, not general personal jurisdiction is the standard for requiring a defendant to litigate in a state within the U.S. The language of the statute—“to create a cause of action *arising from* [the defendant’s conduct,]”—limits a court’s ability to assert personal jurisdiction, making it proper only where the claim emanates from a defendant’s specific, material contact with the forum state. This measure is implemented to protect the due process rights of a defendant who, under general personal jurisdiction standards, might be unduly burdened by being required to litigate in a forum state with which it had continuous contacts, but of an unsubstantial nature.

To this end, a distinctive characteristic of this proposed statute is its focus on distinguishing “passive” Internet contacts from “active” contacts. The growing trend among courts appears to be that mere maintenance of an Internet site or the posting of information on a site is not enough to subject the operator of the site to personal jurisdiction,<sup>139</sup> but that a defendant “direct[ing] electronic activity into [a] State” with intent to actually engage in business or other interactions in that state is sufficient evidence to assert personal jurisdiction over him or her.<sup>140</sup> In making this proposed statute applicable only to contacts that can be characterized as “active,” the collective decisions of contemporary courts will be codified.

### C. Why This Method Should Be Adopted

It is evident that the U.S. is a leader by example, with such nations as Australia already citing its case law.<sup>141</sup> By codifying language presently used by the judiciary, it will hopefully be an easy transition from courthouse to legislature. This proposed statute incorporates language from several current state long-arm statutes and principal language from *International Shoe*<sup>142</sup> and *Zippo*,<sup>143</sup> two of the most authoritative cases on personal jurisdiction law in the United States. It also focuses

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<sup>138</sup> *Id.* at 11-12.

<sup>139</sup> *See, e.g., Shrader*, 633 F.3d at 13; *Johnson v. Arden*, 614 F.3d 785, 796 (8th Cir. 2010); *Revell v. Lidov*, 317 F.3d 467, 471-76 (5th Cir. 2002).

<sup>140</sup> *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (2002).

<sup>141</sup> An Australian court recognized the significance of the U.S. concept of “world-wide” service of process in its decision in *Dow Jones & Company Inc. v. Gutnick* [2002] HCA 56 (10 December 2002). The Court stated in its opinion that:

If people wish to do business in, or indeed travel to, or live in, or utilise the infrastructure of different countries, they can hardly expect to be absolved from compliance with the laws of those countries. The fact that publication might occur everywhere does not mean that it occurs nowhere. Multiple publication in different jurisdictions is certainly no novelty in a federation such as Australia.

*Id.* ¶ 186.

<sup>142</sup> *See id.*

<sup>143</sup> *See generally Zippo*, 952 F. Supp. 1119.

on specific personal jurisdiction over a defendant, eliminating the broad (and often burdensome) scope that a general personal jurisdiction analysis brings.

This proposal is an improvement over other suggestions involving a major overhaul of current procedure or *stare decisis*. Though it will take time and money, the institution of a federal long-arm statute including e-commerce provisions is likely a much simpler task than creating an entirely new forum for personal jurisdiction dispute resolution. In short, a proposed statute incorporating e-commerce bypasses complications existent in suggestions introduced over the last quarter of a century while still accounting for their high points: simplicity and the consideration of due process.

Another advantage of instituting this federal long-arm statute is that it appears not to conflict with international jurisdictional standards. Rather, it comports with them. As previously stated, Western Europe and China each have a significant impact upon the e-commerce market and, as such, their jurisdictional laws have more relevancy here.

Within the European Union (EU),<sup>144</sup> the Regulation Brussels I governs.<sup>145</sup> Addressing both defendants living within other Member States and those living outside of the EU, it states that persons domiciled in a Member State are to be sued in the courts of that Member State.<sup>146</sup> Where the matter concerns a contract dispute between two entities within the EU, the defendant may be sued in the Member State where the place of performance of the obligation was to take place.<sup>147</sup> In terms of defendants residing outside of the EU, plaintiffs of Member States may assert jurisdiction over a foreign defendant if that defendant has a place of business or residence within the Member State.<sup>148</sup> Where the foreign defendant has no such presence within the Member State, the plaintiff within the EU must apply to his or her local court and request that jurisdiction be asserted over the foreign defendant.<sup>149</sup> That court will only grant permission if the plaintiff proves sufficient grounds for asserting jurisdiction, much like the U.S.'s minimum contacts test.<sup>150</sup> Of course, defendants do have a right to challenge jurisdiction similar to those brought in the

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<sup>144</sup> EU Member States include Austria, Belgium, Bulgaria, Cyprus, The Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

<sup>145</sup> Council Regulation (EC) No 44/2001 of 22 December 2001. This is commonly referred to as "Regulation Brussels I."

<sup>146</sup> *Id.* at Section 1, General Jurisdiction, art. 2(1) ("Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.").

<sup>147</sup> *Id.* at Section 2, Special Jurisdiction, art. 5(A)(1)(a) ("A person domiciled in a Member State may, in another Member State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question.").

<sup>148</sup> Yannis Constantine, *Private International Law and the Questions of Jurisdiction and Enforcement in Litigation Cases with a Foreign Element*, ANTHONY GOLD, [http://www.anthonygold.co.uk/site/ang\\_articles/ang\\_articles\\_commercial/ang\\_articles\\_private\\_international\\_law.html](http://www.anthonygold.co.uk/site/ang_articles/ang_articles_commercial/ang_articles_private_international_law.html) (last visited Feb. 24, 2011).

<sup>149</sup> *See id.*

<sup>150</sup> *See id.*

U.S. in accordance with due process considerations if they deem jurisdiction to be inappropriate or burdensome.<sup>151</sup>

China's civil procedure laws are comparable, mandating that "[a] lawsuit initiated over a contract dispute shall be under the jurisdiction of the people's court in the place where the defendant has his or her domicile or where the contract is performed."<sup>152</sup> The law also provides that, where a particular jurisdiction within China, or even the nation as a whole, has a particular interest in a dispute, specific courts within China may claim jurisdiction.<sup>153</sup>

Comparing the laws of these collective jurisdictions shows that a federal long-arm statute authorizing the assertion of personal jurisdiction over foreign defendants who have established minimum contacts with the U.S. is appropriate in e-commerce cases. The principal concerns of those territories are the sufficiency of the contact between parties arising out of the contract, fairness of process, and the interests of the home state. These important issues are addressed with the proposed federal long-arm statute.

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<sup>151</sup> *See id.*

<sup>152</sup> Law of Civil Procedure (P.R.C.) (Adopted by the Fourth Session of the Seventh National People's Congress on April 9, 1991, promulgated by the Order No 44 of the President of the P.R.C.), Part One, ch. II, Section 2, art. 24. *See also* Part One, ch. II, Section 2, art. 25:

The parties to a contract may choose through agreement stipulated in the written contract the people's court in the place where the defendant has his or her domicile, where the contract is performed, where the contract is signed, where the plaintiff has his or her domicile or where the subject matter is located to have jurisdiction over the case, however, such an agreement may not violate the provisions of this Law regarding jurisdiction by level and exclusive jurisdiction.

<sup>153</sup> *See* Part One, ch. II, Section 1, art. 18: "The grassroots people's courts shall have jurisdiction as courts of first instance over civil cases, unless otherwise stipulated by this Law;"

Art. 19: "The intermediate people's courts shall have jurisdiction as courts of first instance over the following civil cases:

- (1). major cases involving foreign interests;
  - (2). cases that have major impact on the area under their jurisdiction;
- and
- (3). cases under the jurisdiction of the intermediate people's courts as determined by the Supreme People's Court;"

Art. 20: "The higher people's courts shall have jurisdiction as courts of first instance over civil cases that have major impact on the areas under their jurisdiction;"

Art. 21: "The Supreme People's Court shall have jurisdiction as the court of first instance over the following civil cases:

- (1). cases that have major impact on the whole country; and
- (2). cases that the Supreme People's Court deems it should try."

## IV. CONCLUSION

Personal jurisdiction law is an inappropriate standard in its current form to properly service the needs of the Internet's users. Though courts may attempt to utilize traditional means of determining the appropriateness of personal jurisdiction, the time has come to remove e-commerce disputes from the realm of total discretion afforded the courts under customary tests and to create statutory provisions adequately equipped to tackle these issues.

In adopting this statute, courts and parties to a suit will be better able to predict the outcome of disputes, and sellers in particular will have clearer notice of the requirements necessary to hale them into court in another jurisdiction. Referring back to the hypothetical introduced in the Background portion of this paper (in which S, a seller of widgets located in France, contracted electronically with B, a buyer in the U.S.), the application of this proposed federal long-arm statute would significantly clarify S's chances in being required to litigate in the U.S. A U.S. court would consider such factors as whether the website through which the transaction took place was commercial in nature, whether S specifically advertised its products in B's region or merely advertised a link offering to sell the widgets, and whether claim over the defective widgets arose out of the contacts S had with B and the U.S. as a whole. If the evidence proves that S did meet the requirements of the proposed statute, a final inquiry will be made as to whether S's due process rights would be infringed if he were required to litigate in B's forum state. With consistent application, this federal long-arm statute might significantly decrease questions about personal jurisdiction for defendants like S.

Ultimately, adoption of this proposed addition of a federal long-arm statute is a practical approach to resolving disputes over personal jurisdiction in the international e-commerce realm. It requires due process considerations, incorporation of the "minimum contacts" test and concerns of "fair play and substantial justice."<sup>154</sup> With this awareness, personal jurisdiction law may actually be applied in a structured and more predictable manner.

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<sup>154</sup> See *International Shoe*, 326 U.S. 310.