



FACULTY OF LAW
University of Lund

Jesper Engman

U.S. Internet Contracting and Jurisdiction

Master thesis
20 points

Patrik Lindskoug

Private International Law

Spring 2008

Table of Contents

SUMMARY	1
PREFACE	2
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Background	4
1.2 Research Objective	5
1.3 Scope & Limitations	5
1.4 Disposition	6
1.5 Sources	6
2 CONTRACTS	7
2.1 Types of Contracts	7
2.1.1 Shrinkwrap	7
2.1.2 Clickwrap	8
2.1.3 Browsewrap	8
2.2 Uniform Commercial Code	8
2.2.1 Applicability	9
2.2.2 Formation of Contract	10
2.2.3 Forum Selection	10
2.2.4 Consumer Contracts	10
2.3 E-commerce Regulation	11
2.3.1 Uniform Computer Information Transactions Act	11
2.3.2 Uniform Electronic Transactions Act	12
2.3.3 Electronic Signatures in Global and National Commerce Act	13
2.4 International Regulation	13
2.4.1 Convention on Contracts for the International Sale of Goods	14
2.4.2 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards	14
3 JURISDICTION	15

3.1	Introduction	15
3.2	Court Jurisdiction Fundamentals	15
3.3	Personal Jurisdiction	16
3.3.1	Specific Jurisdiction	17
3.3.2	General Jurisdiction	18
3.4	Traditional Concepts	19
3.5	Consent – Forum Selection Clauses	20
3.6	Constitutional Considerations	21
3.7	Long Arm	21
3.8	Federal Jurisdiction	22
3.9	International Regulation	23
3.10	Summary	23
4	CASE LAW	25
4.1	Introduction	25
4.2	Jurisdiction on the Internet	25
4.2.1	The <i>Zippo</i> Sliding Scale Test	25
4.2.2	Sliding Scale Test & Something More	26
4.2.3	General Jurisdiction	27
4.2.4	Sliding Scale Test Astray	28
4.2.5	Rejections of the Sliding Scale Test	28
4.2.6	Effects Test	28
4.3	Shrinkwrap Cases	29
4.3.1	Early Developments	29
4.3.2	A New Interpretation	29
4.3.3	Notice of Terms	30
4.3.4	Time of Contract	31
4.3.5	Divergent Views	31
4.3.6	Time of Notice	32
4.3.7	Unconscionable Terms	33
4.3.8	Terms of Use	33
4.4	Browsewrap Cases	33
4.4.1	Notice of Terms	34
4.4.2	Repeat Visits	34

4.4.3	Lack of Contract	35
4.5	Clickwrap Cases	36
4.5.1	Unconscionable Terms	37
4.5.2	Public Policy	38
4.5.3	Challenging Browsewrap	38
4.6	Summary	38
4.6.1	Jurisdiction	39
4.6.2	Shrinkwrap	39
4.6.3	Browsewrap	40
4.6.4	Clickwrap	41
5	DISCOURSE	42
5.1	Introduction	42
5.2	Jurisdiction	42
5.2.1	Introduction	42
5.2.2	Cyberjurisdiction	42
5.2.3	Modified Effects Test	43
5.2.4	Modifications to Minimum Contacts	43
5.2.5	Stream-of-Commerce-Plus	44
5.2.6	Targeting	44
5.2.7	New Test Based on Existing Doctrine	45
5.2.8	Reformed Jurisdictional Doctrine	45
5.2.9	European Style International Jurisdiction	46
5.3	Internet Contracts	47
5.3.1	Introduction	47
5.3.2	Virtual Representation	48
5.3.3	Improvements to Disclose of Terms	49
5.3.4	Reasonably Communicated Test	49
5.3.5	Terms of Use & Battle of Electronic Forms	50
6	FUNDAMENTAL LEGAL ISSUES	51
6.1	Introduction	51
6.2	Demarcation	51
6.3	Contract Law	51
6.3.1	Principles of Contract Law	52
6.3.2	Participation of Contracting Parties	53

6.3.3	The Signature	53
6.3.4	Predictability	54
6.4	Integrity of the Legal Disciplines	54
6.5	Attempts to Solve Legal Issues with Technology	55
7	CONCLUSION	57
7.1	Introduction	57
7.2	Jurisdictional Doctrine	57
7.3	International Jurisdiction Considerations	58
7.4	Contracts	59
	BIBLIOGRAPHY	60
	TABLE OF CASES	62

Summary

The thesis examines jurisdiction in the United States in contractual relationships established over the Internet. The presentation is divided into six chapters and the first pair describes Internet contract types and the evolution of the jurisdictional doctrine. The second pair of chapters is a mix of descriptive and analytical content regarding case law and the debate in the legal community. The last pair of chapters is predominantly analytical and identifies some fundamental legal issues and the conclusions.

The importance of UCC, as something like a national sales law, is covered in conjunction with the review of the relevant contract types. National and international e-commerce regulation is limited in scope but still important and commented.

The precedence driven evolution of jurisdictional doctrine is covered with special consideration is afforded to aspects of particular relevancy to Internet contracting and jurisdiction. The constitutional requirements and the federal legal system of the United States creates an interesting dynamic to the benefit of the inquiry.

The chapter on case law is primarily intended as descriptive in nature but the considerable uncertainty interpreting these opinions introduce an analytical element. The *Zippo* sliding scale test and subsequent development is described together with alternative approaches. The case law for shrinkwrap, browsewrap, and clickwrap contracts is scrutinized and the scope is not strictly limited to only jurisdictional aspects.

The chapter describing the debate in the legal community is a hybrid with the most prevalent ideas and some bold and innovative approaches.

Issues of fundamental legal importance are discussed in the fifth chapter, these are issues of grave concern and may have an impact on the long-term development including the integrity of legal instruments and use of technology in the legal process.

A number of recommendations are issued including abandoning the *Zippo* sliding scales test in favor for a traditional jurisdictional inquiry with some adjustments such as introducing proximate cause, targeting considerations, and an effect test. It is also suggested to discontinue any use of the browsewrap contract.

Preface

This thesis has been in the works for many years. I have during this time lived in the United States and have worked on the thesis in many places around the country.

I want to thank Patrik Lindskoug for supervising this work. Modern technology offered invaluable means of communication but a pinch of patience was, at times, needed to connect and make it work.

I owe a debt of gratitude to friends and colleagues who engaged in discussions on technology, jurisdiction, and particular aspects of US law.

The staff at the Library of Congress in Washington, DC furnished continuous first class help to navigate and retrieve materials from the incredible collection.

The final and most important thanks goes to my wife Heather and daughter Johanna. I would not be the person I am without their unconditional love and support. I am grateful for their understanding, patience, and willingness to accommodate for all the hours in libraries.

Seattle, Washington, December 5, 2007

Jesper Engman

Abbreviations

A.B.A. J. E-Report	ABA Journal E-Report
Am. J. Comp. L.	American Journal of Comparative Law
Am. U. L. Rev.	American University Law Review
Bus. Law.	The Business Lawyer
Cal. L. Rev.	California Law Review
EULA	End user license agreement
Fed. R. Civ. P.	Federal Rules of Civil Procedure
Fla. B. J.	Florida Bar Journal
Harv. L. Rev.	Harvard Law Review
ISP	Internet service provider
John Marshall J. of Comp. & Info. Law	John Marshall Journal of Computer & Information Law
Minn. L. Rev.	Minnesota Law Review
NCCUSL	National Conference of State Legislatures
U. Ark. Little Rock L. Rev.	University of Arkansas at Little Rock Law Review
UCC	Uniform Commercial Code
UCITA	Uniform Computer Information Transactions Act
UETA	Uniform Electronic Transactions Act

1 Introduction

1.1 Background

Only a modest part of the potential of the Internet has yet been realized but the large volume of activity and technologies converging on the Internet produce a high level of dependency on it by our society.

The growing utilization of the Internet by business, government, and individuals is a mutually reinforcing process. Internet usage appears to have reached a critical mass and the growth could be powered by expectations alone in the current paradigm.

The technological development has been nothing but astonishing and is achieving an unimaginable capacity. The capacity of the Internet appears to be scalable and the recurring predictions of an impending meltdown have still eluded the doomsday prophets.

It is not surprising that legal issues related to Internet activity are underdeveloped. The Internet is still a recent invention - the usability and the underlying technology is still developing rapidly. More attention ought to be afforded these issues in the legal community to ensure that legal uncertainty will not curtail economic development on the Internet.

Internet offers a mechanism with low transaction costs, high standardization, low start-up costs, and accessible markets. It is already a marketplace open for business and transactions are conducted in a relatively uncertain environment. It remains to be seen if the increasing Internet transaction volume will spur progress on legal issues and create a richer case law. The only silver lining to this slow maturity process is to provide the legal system with ample opportunity to evaluate direction and methods thoughtfully.

The open and borderless nature of the Internet represents an inherent challenge for the legal system which is built on the premise of sovereign administrative entities with a strong affiliation and reliance on governmental institutions. The basic premise of the legal system will not change with the Internet but the new situation requires a new mindset in order to adapt.

Challenges to adapt to advancements in technology are nothing new, especially not regarding communication technology. Questions similar to what is posed today on account of the Internet were brought about with the introduction of other technology such as the telephone, telex, and fax. There is, however, one major difference - scope and speed. The Internet put the development in overdrive by virtually worldwide coverage and by eliminating many geographic references or rendering them unreliable. The

lack of control over the Internet by any one party ensures a continuous organic growth and high level of innovation but comes at the expense of predictability.

What court will hear a case is a fundamental question and this thesis examines a particular aspect of jurisdiction on the Internet. It is an issue of importance from both a legal and a practical point of view. The cost and inconvenience associated with legal proceedings in a distant jurisdiction affect the basic cost-benefit calculation of resolving controversies.

There is no silver bullet solution to the exercise of jurisdiction. Too aggressive exercise of jurisdiction may create a jurisdictional anarchy and, on the other hand, over-reluctance to exercise jurisdiction could, in effect, deny access to justice and promote lawlessness on the Internet. Neither extreme is, obviously, in the interest of anybody.

The most illustrative dangers of too expansive exercise of jurisdiction can be found in the area of defamation. For example, the High Court of Australia assumed jurisdiction, in *Gutnick v. Dow Jones*¹, over a US defendant regarding a controversy in an article published on the Internet. The only tangible connections to Australia were the geographic location of the plaintiff and the fact that the article, along with all other content available on the Internet, was accessible in Australia. If the ruling is applied consistently online freedom of speech would be reduced to the lowest common denominator of freedom worldwide.

1.2 Research Objective

The question under consideration in this thesis is how US courts determine jurisdiction for transactions negotiated and concluded on the Internet. The impact of contractual obligations is important and inseparable from the general jurisdictional issue. This mix of fundamental jurisdictional questions and contracts necessitates exploring both areas in tandem. Due to the exclusionary nature of arbitration, jurisdictional repercussions are considered.

1.3 Scope & Limitations

This work does not include a general introduction to US law and there is no general presentation of contract law. Some background on jurisdiction is covered due to the inseparable nature of the historic background and current law.

A number of legal areas of great practical importance are touched upon in passing to advance the presentation of the primary issues. This includes

¹ Dow Jones & Company Inc. v Gutnick [2002] HCA 56 (10 December 2002)

torts, enforcement, arbitration, international law, copyright and other intellectual property rights.

Issues related to evidence represent a big challenge in a digital world where even the most basic circumstance is hard to prove effectively, but these matters are excluded.

1.4 Disposition

The introduction, in the present chapter, includes a general introduction to the subject matter as well as the research objective. This chapter also covers the scope and limitation and a brief comment on the sources.

The types of contracts relevant for online activity are described in the second chapter, including certain aspects of US contract law specifically relevant to Internet contracting. The jurisdictional doctrine is surveyed in the third chapter and the relevant case law is reviewed and analyzed in the fourth chapter. The case law is summarized in the last part of the chapter with and an assessment of the present state of the case law.

The debate among legal scholars is presented in the fifth chapter including a critique of the current state of affairs, alternative school of thoughts, and proposals. A few fundamental legal issues at stake are identified in the sixth chapter. The descriptive and analytical parts are synthesized in the conclusion of the seventh chapter.

1.5 Sources

Research on the Internet was an important tool in the course of this work but an effort was made to primarily rely on traditional sources. As predicated by the US legal system, precedence is a substantial and important source of law in general and the primary source in this case.

Articles in law journals are the second most important source. Books have been approached with some caution because of the limited volumes available and the tendency for books to become outdated fast in this changing environment. As with any emerging area, the debate among scholars is of particular interest and the discourse is captured more effectively in law reviews than in books.

Immediate access to the Library of Congress was invaluable and the sheer volume of material on US law is impressive and the means to find and access information excellent. The massive collection of materials available promotes this request.

2 Contracts

2.1 Types of Contracts

There are currently two methods available for parties to enter into contracts on the Internet, namely browsewrap and the clickwrap contracts. Both contract types are developed from the shrinkwrap contract which is also covered below.

Internet technology can be used in contract negotiations as a means of communication such exchanges over email, emailing signed contracts, and use of third party systems such as escrow services. The use of Internet technology in this way may either go down the path of a traditional written contract or an electronic contract.

2.1.1 Shrinkwrap

Shrinkwrap contracts were originally created by the software industry in order to facilitate selling software in retail stores and still reserve certain intellectual property rights but its use is no longer limited to the sale of software. This is not strictly an electronic contract type and the terms are usually conveyed in print and transferred into the possession of the offeree.

The printed terms are generally included in the packaging delivered with the product, or its representation, and the buyer is considered to accept the terms by breaking the packaging and subsequently use the product.

The buyer may not even be aware of any additional terms at the time the fundamental terms, foremost the price, are negotiated. The buyer is usually provided an option to cancel the contract in its entirety within a specific period of time for a full refund if the terms are not agreeable.

A sample shrinkwrap contract situation would start with a customer purchasing a box with software on a CD or DVD disc in a retail store. Some of the terms such as version of the software program including selected features and support are printed on the box. The price is negotiated in the store and the merchant may add additional conditions. The user comes home and opens the box and finds additional contract terms printed on materials inside the box. A notice on the box stating that the user agrees to the terms inside the box by breaking the shrinkwrap packaging was common but this practice has been refined over the years and breaking of the shrinkwrap has generally been replaced by breaking the packaging around the disc in the box. Nowadays is often additional procedures added such as to include a separate activation process and features of the clickwrap contract which is discussed below.

Shrinkwrap agreements present a challenge due to its deviation from the traditional process to negotiate the terms before the contract is concluded.

2.1.2 Clickwrap

A clickwrap contract is concluded when an offeree indicates assent to the terms by clicking on a button or some other device designated and labeled to provide an expression of consent. This is an explicit and affirmative action in response to the terms of a proposed contract. The standard contracting process is adhered to and assent to the terms occurs at the same time as the parties enter into the contract or it may occur before the contract is concluded.

The terms may be presented directly in conjunction with the action to manifest consent, either in a separate text area requiring the user to scroll the text area to take part of the entire text or presented directly on the page. An alternative is to provide a link to the terms but this makes the terms less accessible and weakens the consent.

The clickwrap process is setup so the offeree is required to consent to the terms in order to proceed with the transaction. The negotiation is thus limited to a "take it or leave it" situation.

2.1.3 Browsewrap

Browsewrap agreements do not include an explicit declaration of consent. Instead, the terms are posted on the website and agreement to these is formed implicitly by use of the website. The terms may be presented in a variety of ways and with a variable degree of visibility. It is, for instance, common to place a link on the template of a website labeled "Terms and Conditions".

Besides the lack of manifest consent is it uncertain if the offeree even noticed the terms and much less loaded the terms on the screen.

2.2 Uniform Commercial Code

The Uniform Commercial Code (UCC) is a model law enacted by the US states and implemented with minor differences. It is, in effect, the national sales law with the exception for Louisiana.

The UCC was conceived in the early fifties. It is generally hailed as a phenomenal success and Karl Llewellyn is saluted as the principal

architect.² The UCC was designed to be a living document and updated periodically. It represents a departure from the legal tradition by placing a relatively larger importance on the articles of the UCC at the expense of precedence.³

The UCC is a modern and complete sales law and it last revised 2003. A few particularly relevant aspects of the UCC are addressed below.

2.2.1 Applicability

The UCC apply to the sale of goods.⁴ Somewhat surprisingly has the question if software qualifies as sales of goods, in the context of UCC, not been definitely resolved and the courts approach this fundamental question inconsistently.⁵

There is nothing in the UCC to support the notion that software is covered under Article 2. Not even the most extensive interpretation of “goods” would include the right to use software – the right is not moveable and not even tangible. The drafting of a statute specifically for software contracts is a further indication UCC should not be applicable but that kind of *e contrario* reasoning is, of course, far from conclusive.

The application of UCC on hybrid contracts with a mix of goods and services is also dubious. The most common approach is to determine the predominant element in the transaction.⁶ Another alternative is to bifurcate the contract and only apply UCC to the portion of the contract involving goods.⁷

It is possible to apply UCC by order of analogy.⁸ Such an approach may be valid for hybrid and software contracts alike. There are some indications, if

² See e.g. James J. White & Robert S. Summers, *Uniform Commercial Code* 3 (3rd ed. 1988), p. 5;

³ See Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 Am. Bankr. L.J. 173, 204-206 (2000).

⁴ UCC § 2-102 and further defined in § 2-105 (2003).

⁵ See e.g. *Wachter Management Co. v. Dexter & Chaney, Inc.*, 144 P.3d 747, 748 (Kan. 2006).

⁶ Emmie West, *Construction Contracting: Building Better Law with the Uniform Commercial Code*, 52 Case W. Res. L. Rev. 1067, 1070-1073 (2002).

⁷ *Id.* at 1074-1075.

⁸ General on statutory analogy, see e.g. Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 Vill. L. Rev. 305, 312 (2003); Dan Hunter, *Reason is too Large: Analogy and Precedent in Law*, 50 Emory L.J. 1197, 1233-1236 (2001); Robert E. Keeton, *Statutory Analogy, Purpose and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park*, 52 Md. L. Rev. 1192, 1194-1203 (1993).

only vague, of support for this in the Code.⁹ The alternative to the UCC is to use common law.

2.2.2 Formation of Contract

The parties are free to conclude a contract by expressing agreement in whatever manner they see fit including by conduct.¹⁰ The offer may be conducted in an equally flexible fashion.¹¹ Incomplete terms do not undermine the validity of the contract.¹²

By comparison, regular contracts may according to the *Second Restatement of Contracts* be formed without an explicit verbal or written agreement as long as the offeree has "reasonable opportunity to reject" and "reason to know" of expected compensation.¹³

Introduction of new terms with an acceptance are considered a proposal for additional terms. Additional terms does not adversely affect the integrity of the acceptance unless expressly conditional on assent to the terms.

The additional terms are subject to agreement or may automatically become part of the contract under certain conditions for merchant contracts. This provision is sometimes referred to as the "battle of forms" rule.¹⁴

2.2.3 Forum Selection

There is no general forum selection provision in the UCC but there is a limitation of such clauses for consumer lease contracts.¹⁵

2.2.4 Consumer Contracts

A number of provisions provide a higher level of protection for consumer contracts compared with commercial contracts. These provisions have mainly been added over the last few years. To name a few examples - there are limits on choice-of-law provisions, special requirements for limitations of warranties, consumers are not liable for consequential damages, and limitations on damages for personal injury are not permitted.¹⁶ Most

⁹ Emmie West, *Construction Contracting: Building Better Law with the Uniform Commercial Code*, 52 Case W. Res. L. Rev. 1067, 1075 n. 46 (2002) referring to UCC § 1-102 cmt. 1 (2001).

¹⁰ UCC § 2-204 (2003).

¹¹ *Id.* § 2-206.

¹² *Id.* § 2-204 (3).

¹³ Restatement (Second) of Contracts § 69(1)(a).

¹⁴ *Id.* at 2-207. For a background including drafting history, its application, and deliberations see James J. White, *Contracting Under Amended 2-207*, 2004 Wis. L. Rev. 723 (2004).

¹⁵ UCC § 2A-106 (2).

¹⁶ § 1-301 (e), § 2-316, § 2-710 (3), § 2-719 (3).

importantly, other legislation regulating consumer sales are not impaired or repealed by UCC.¹⁷

2.3 E-commerce Regulation

There are two additional relevant statues and one stalled statutory initiative. The two statues are relatively new and have not yet left a footprint in case law so the practical impact of these statues is not assessed. The stalled initiative is not only relevant as background information of an attempt to modify the UCC but it is possibly relevant in some situations and it has been mentioned in a few court opinions.

2.3.1 Uniform Computer Information Transactions Act

The Uniform Computer Information Transactions Act (UCITA) was an attempt to create a standardized law for software licensing and other transactions in digital information modeled after the UCC. A number of areas were excluded including financial services, music and movies, and most employment contracts.¹⁸

UCITA was first approached as an amendment to the UCC known as Article 2B but finally presented as a separate entity in 1999.¹⁹ There was strong opposition to UCITA including unison opposition from twenty-four state Attorneys General. The Act was criticized for not affording enough consumer protection and bias in favor of the software industry.²⁰

In an attempt to address the concerns were thirty-eight amendments to the UCITA adopted in 2002 but only Virginia and Maryland have enacted UCITA.²¹ A number of states have enacted defensive legislation to protect its citizens from being subjected to UCITA based on contractual provisions.²² These laws are generally referred to as “bomb-shelter” provisions and void choice of law or forum selection clauses in contracts if it results in the application of UCITA.

¹⁷ § 2-102 and further enhanced by § 2-108 (1)(b).

¹⁸ UCITA § 103 (d).

¹⁹ Maureen A. O'Rourke, *An Essay on the Challenges of Drafting a Uniform Law of Software Contracting*, 10 Lewis & Clark L. Rev. 925, 929-930 (2006).

²⁰ See e.g. Jean Braucher, *The Failed Promise of the UCITA Mass-market Concept and its Lessons For Policing of Standard Form Contracts*, 7 J. Small & Emerging Bus. L. 393, 394, 423 (2003); Matthew D. Stein, *Rethinking UCITA: Lessons From the Open Source Movement*, 58 Me. L. Rev. 157, 176-177 (2006). See listing of opponents in Courtney Lytle Perry, *My Kingdom for a Horse: Reining in Runaway Legislation from Software To Spam*, 11 Tex. Wesleyan L. Rev. 523, 548 (2005).

²¹ Maryland Code Ann., Commercial Law §§ 22–100 to 22–816; Virginia Code Ann. §§ 59.1–501.1 to 59.1–509.2.

²² Including Iowa Code § 554D.104), North Carolina (N.C. Gen. Stat. § 66-329), West Virginia (W. Va. Code § 55-8-15), and more states consider such legislation.

UCITA substantially modified contract formation by embracing the concept of the layered contract. A layered contract allows provisions to be included at a later time and allow a party to reserve the right to modify these provisions at a later date.²³ The other party could decline the additional terms and cancel the contract for a refund. The contract formation contradicts common law and is in stark contrast to the gap filling provisions of the UCC.²⁴

Forum selections clauses are allowed indiscriminately but may be limited on grounds of unconscionability and by public policy provisions.²⁵

The lacking support from major organizations and continuous opposition is likely to prevent any further advancement of UCITA and a major revision and institutional commitment is needed to bring it back to the table.²⁶

2.3.2 Uniform Electronic Transactions Act

The Uniform Electronic Transactions Act (UETA) provides legal recognition of electronic agreements for commercial transactions and government.²⁷ The Act is limited in scope but is a complete and effective regulation of electronic contracts. The Statute was proposed by NCCUSL in 1999 and has been adopted by 48 jurisdictions and the four outstanding States²⁸ have laws addressing these issues.

UETA is complementary to other legislation by applying to electronic records and signatures in situations not covered by UCC, certain state law²⁹, or UCITA.³⁰ The fundamental objective with UETA regarding electronic transactions is to extend existing laws to contracts concluded electronically. This serves as an effective way to ensure electronic contracting is incorporated into existing contract law and other relevant regulations. The Act also provides defensive protection by ensuring consistency in the area of commercial transactions. The protection against deviations from existing law in this emerging field is important and a prudent measure.

UETA only applies when the parties agree to conduct an electronic transaction but the agreement does not have to be explicit but may be

²³ § 202(a)-(b).

²⁴ See UCC § 2-204 (2003)

²⁵ UCITA §§ 110, 111, 106.

²⁶ Sandy T. Wu, *Uniform Computer Information Transactions Act: Failed to Appease its Opponents in Light of the Newly Adopted Amendments*, 33 Sw. U. L. Rev. 307, 325-326 (2004).

²⁷ UETA § 3.

²⁸ The four states not adopting UETA are Georgia, Illinois, New York, and Washington.

²⁹ State law specifically excepted from UETA and state laws regarding establishing wills, codicils, and testamentary trusts.

³⁰ UETA § 3

“determined from the context and surrounding circumstances, including the parties' conduct”.³¹

2.3.3 Electronic Signatures in Global and National Commerce Act

The Electronic Signatures in Global and National Commerce Act (ESIGN)³² is a law with a similar objective as UETA but it is federal law. ESIGN prescribe the same legal validity to electronic signatures as handwritten signatures and this is achieved by outlawing refusal to legally accept a signature, contract or record only because it is in electronic form.

A number of areas are excluded from the scope of ESIGN including many situations of family law, parts of UCC, legal procedure, product recalls, etc.³³

ESIGN address consumer information by establishing certain requirements as to how traditional information to consumers can be provided in electronic form.³⁴ These provisions provide both a certain level of protection for consumers and facilitate e-commerce conversion of activities with legally binding information requirements.

One important feature of ESIGN is the attempt to encourage states to address the issues pertinent to e-commerce. There are consequently room for state law preemption under certain conditions and instructions to the states on specific areas to address.³⁵

2.4 International Regulation

Under the Supremacy Clause of the US Constitution are treaties upheld as federal law preempting state law.³⁶ The Constitution itself overrides treaties but acts by congress are on an equal level as treaties. It is settled law that courts should not, if possible, interpret US law to violate international law. This is a consequence of the duty of judges to avoid render the United States in violation if international law.³⁷

Two treaties, with impact on international sales and arbitration, are reviewed below but only in a selective fashion to illustrate the direct and indirect impact of international treaties.

³¹ *Id.* § 5(b).

³² 15 U.S.C. § 7001.

³³ *Id.* § 7003.

³⁴ *Id.* § 7701 (c).

³⁵ *Id.* §§ 7002, 7003.

³⁶ US Constitution Article VI, § 2.

³⁷ William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 *Hastings L.J.* 251, 253 (2006).

2.4.1 Convention on Contracts for the International Sale of Goods

The UNCITRAL Convention on Contracts for the International Sale of Goods (CISG)³⁸ supersedes US law by default, unless the CISG is excluded in the contract.³⁹ The Convention is applicable to sales of goods between merchants from countries ratified the convention.

CISG does not regulate jurisdiction or choice of law but forum selections are upheld under CISG and considered a material term, requiring affirmative assent.⁴⁰ There are substantial differences between the UCC and CISG. It has been suggested these differences has not been adequately addressed.⁴¹

The differences between UCC and CISG are not explored further in this work, nor are the terms or application of the convention.

2.4.2 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention) is the most important element in international arbitration.⁴² Over 130 countries have ratified the New York Convention ensuring worldwide applicability.

The New York Convention does not only address enforcement of awards but also enforcement of arbitration agreements. The application of the treaty has not reached a high level of harmonization as other successful treaties due to the inheritably discrete nature of arbitration and the primary focus on enforcement.⁴³

³⁸ 52 Fed. Reg. 6264 (1987).

³⁹ CISG Article 6.

⁴⁰ *Chateau des Charmes Wines, Ltd. v. Sabate USA, Inc.*, 328 F.3d 528, 531 (9th Cir. 2003).

⁴¹ See e.g. Fred H. Miller, *International Legal Developments and Uniform State Laws: A Radical Proposal?*, 60 Consumer Fin. L.Q. Rep. 402, 407 (2006); William S. Dodge, *Teaching the CISG in Contracts*, 50 J. Legal Educ. 72, 72 (2000);

⁴² For an overview of the legal framework see e.g. Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 Am. J. Comp. L. 233, 234-236 (2006).

⁴³ Leonardo D. Graffi, *Securing Harmonized Effects of Arbitration Agreements Under the New York Convention*, 28 Hous. J. Int'l L. 663, 757-758 (2006).

3 Jurisdiction

3.1 Introduction

There is not much difference between internal US jurisdiction and how jurisdiction is exercised over foreign nationals and the differences are miniscule in an international perspective. There are, in particular, some differences regarding recognition and enforcement of judgments. A judgment issued by a US court is entitled to recognition and enforcement in all US jurisdictions courtesy of the Full Faith and Credit Clause.⁴⁴ There is a framework in place for recognition of foreign judgments with minor variations between states, but it is incomplete.⁴⁵

The Foreign Sovereign Immunities Act⁴⁶ is not relevant in the present context because commercial activities are excluded.⁴⁷

The US jurisdictional doctrine has evolved from a common law system into *sui generis* powered by precedence. A high level of flexibility has been achieved by framing the question in a constitutional context and not by detail legislation. Understanding the pivotal court opinions on jurisdiction is imperative to grasp this legal area.

3.2 Court Jurisdiction Fundamentals

The first step by a court related to jurisdiction is to establish its own jurisdiction and this is referred to as subject matter jurisdiction. This is primarily a determination by the court to establish if it is empowered and competent to adjudicate and its mandate is derived from the Constitution.

The court proceeds, after establish subject matter jurisdiction, to determine if it has jurisdiction over the parties or over the object of the suit. The latter jurisdiction is referred to as personal jurisdiction or jurisdiction *in personam* and the former as jurisdiction *in rem*⁴⁸. There is also mixed jurisdiction called *quasi-in-rem* whereas a judgment is directed towards a person but is limited to the value of property in the court's jurisdiction. Only personal jurisdiction is dealt with further.

⁴⁴ U.S. Constitution, Article IV, Section 1.

⁴⁵ See Section 2 and 3 of Uniform Enforcement of Foreign Judgments Act (UEFJA); See e.g. Violeta I. Balan, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. Marshall L.Rev. 229 (Fall 2003).

⁴⁶ 28 U.S.C. § 1330.

⁴⁷ 28 U.S.C. § 1605 (a)(2).

⁴⁸ The Supreme Court clarified in *Shaffer* that jurisdiction in rem is not jurisdiction over the object itself but instead over the persons' interests in the object.

The courts establish jurisdiction before proceeding to consider the merits of the case and previously relatively common hypothetical jurisdiction is no longer admissible.⁴⁹

3.3 Personal Jurisdiction

In personam jurisdiction still rested on the presence of the defendant in the jurisdiction, after the reform of the Fourteenth Amendment of 1868 and the landmark case *Pennoyer v. Neff*, in order to be served process.⁵⁰ The subsequent expansion of jurisdictional reach remained predicated on consent. Implied consent was introduced as a consequence of increased mobility⁵¹ and growing commerce⁵².

The Supreme Court departed from a focus on presence and consent in *International Shoe Co. v. Washington*⁵³ of 1945 and introduced a model based on contacts with the jurisdiction. The court articulated the “minimum contacts” rule based on due process rights of a foreign defendant.⁵⁴ The material dispute of the *International Shoe* case was about payments to a state unemployment fund which was disputed by an out of state company conducting some business activities in the state.

The court reasoned that a party acting within the jurisdiction “enjoys the benefits and protection of the laws” and it may correspondingly give rise to obligations.⁵⁵ The contacts were supposed to be the source of the plaintiff’s claim and required to be continuous and systematic.⁵⁶ Alternatively, the court held, jurisdiction could be based on one or many acts by the defendant’s in-state agent.⁵⁷

The court also opened the door for another kind of jurisdiction based on contacts related to the plaintiff’s claim. This became known as *general jurisdiction* as supposed to *specific jurisdiction* discussed above. The contacts qualifying for general jurisdiction were prescribed as “substantial”.⁵⁸ Furthermore, the court held that the exercise of jurisdiction should not violate “traditional notions of fair play and substantial justice”.⁵⁹

⁴⁹ *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-102 (1998).

⁵⁰ 95 U.S. 714 (1877).

⁵¹ For example implied consent by out of state driver by using the roads in the jurisdiction see *Hess v. Pawlowski*, 274 U.S. 352 (1927).

⁵² Doing business in a state was considered implied consent, see e.g. *Chipman, Ltd. v. Thomas B. Jeffrey Co.*, 251 U.S. 473 (1920).

⁵³ 326 U.S. 310, 316 (1945).

⁵⁴ *Id.* at 316.

⁵⁵ *Id.* at 319.

⁵⁶ *Id.* at 317.

⁵⁷ *Id.* at 318.

⁵⁸ *Id.* at 318.

⁵⁹ *Id.* at 316.

The *International Shoe* court created the foundation of modern jurisdictional doctrine and the jurisdictional theory of special and general jurisdiction were developed in subsequent cases.

3.3.1 Specific Jurisdiction

The effects test was developed in *Calder v. Jones*⁶⁰, a case regarding tortious claims for publication of an article. None of the defendants had any direct connection with the state. The court upheld jurisdiction on the rationale that the defendants had intentionally aimed their action at the jurisdiction.⁶¹

The plaintiffs in *World-Wide Volkswagen v. Woodson*⁶² experienced a car accident while passing through a state and sued, among others, the out of state car dealer where they had bought their vehicle. The crux of the case was foreseeability and the court held that the defendant had not purposefully availed itself of benefits or privileges by conducting activities in the jurisdiction.⁶³ The court refused to grant jurisdiction and concluded that a finding to the contrary would subject every merchant to jurisdiction wherever a sold item would travel.⁶⁴

The Supreme Court upheld jurisdiction in *Burger King Corp. v. Rudzewicz*⁶⁵ for a contract claim between the corporation and an out of state franchisee defendant. The court presented a two-part test and the material parts of the test was picked up from *International Shoe*.⁶⁶ The first part focused on purposeful availment by the defendant and the second part on substantial justice. The court elaborated on the second part of the test and held that a variety of factors may be considered such as the burden on the defendant, social policies of a state, the interstate judicial system, the plaintiff's interests, etc.⁶⁷ The court also asserted that aspects favoring upholding jurisdiction may lessen the required contacts. The court contended that a defendant whom had purposefully directed activities at the forum state has to demonstrate a high level unreasonableness in order to defeat jurisdiction.⁶⁸

*Asahi Metal Industry Co. v. Superior Court of California*⁶⁹ was a product liability case related to a motorcycle accident. A Taiwanese firm had manufactured a part of the motorcycle and the Japanese company Asahi had provided one of the components. Approximately twenty percent of the

⁶⁰ 465 U.S. 783 (1984).

⁶¹ *Id.* at 789.

⁶² 444 U.S. 286 (1980).

⁶³ *Id.* at 297.

⁶⁴ *Id.* at 295.

⁶⁵ 471 U.S. 462 (1985).

⁶⁶ *Id.* at 476.

⁶⁷ *Id.* at 477.

⁶⁸ *Id.*

⁶⁹ 480 U.S. 102 (1987).

Taiwanese firm's sales were to the jurisdiction. The share of Japanese sales to the Taiwanese was minuscule of its overall operation.⁷⁰ The court declined jurisdiction and held that placing a product in the stream of commerce is not an act purposefully directed at the jurisdiction.⁷¹ Additional conduct could, however, qualify for jurisdiction including to specifically design the product for the local market, advertising, support channels, or marketing through a distributor.⁷²

3.3.2 General Jurisdiction

General jurisdiction was created in the *International Shoe* case but the Supreme Court was, at the time, satisfied to only putting it forth as a vague concept.⁷³

*Perkins v. Benguet Consolidated Mining Co.*⁷⁴ was a shareholder suit and jurisdiction was upheld over the Philippine defendant. The case provides an example of when general jurisdiction was upheld but the test did not evolve the concept a whole lot further. This is, to date, the only case whereas the Supreme Court has upheld general jurisdiction. The company was considered to have carried out a "continuous and systematic" part of its business in the jurisdiction but the activities were limited in scope.⁷⁵ The president of the company had, in effect, located the headquarters of the company in the jurisdiction.⁷⁶ It is unclear if any other jurisdiction would have been able to claim jurisdiction.⁷⁷

General jurisdiction was declined in the wrongful death suit in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.⁷⁸ The court rebuked that purchases or activities such as training related to those purchases formed jurisdiction.⁷⁹ The court cited and developed the *Perkins* opinion by adding "general business contacts" to the reference "continuous and systematic" contacts as enunciated in *Perkins*⁸⁰ - the purchases in *Helicopteros* did not measure up to this level of contacts.

⁷⁰ *Id.* at 106. The sales accounted for 1.24% in 1981 and 0.44% in 1982.

⁷¹ *Id.* at 112.

⁷² *Id.*

⁷³ For a full background of the distinction between general and specific jurisdiction (and other aspects of personal jurisdiction) see e.g. Flavio Rose, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 Cal. L. Rev. 1545, 1550 (1994).

⁷⁴ 342 U.S. 437 (1952).

⁷⁵ *Id.* at 438.

⁷⁶ *Id.* at 447-448.

⁷⁷ Alfred Hill, *Choice of Law and Jurisdiction in The Supreme Court*, 81 Colum. L. Rev. 960, 980 (1981).

⁷⁸ 466 U.S. 408 (1984).

⁷⁹ *Id.* at 417.

⁸⁰ *Id.* at 416.

In *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*⁸¹ was suit filed in a jurisdiction with no apparent connection to the case. The court concluded there was sufficient contacts to qualify for general jurisdiction but it would be unreasonable because the lack of a connection to the jurisdiction.⁸² The *Met Life* opinion verifies that the reasonableness test applies to general jurisdiction as well as specific jurisdiction.

3.4 Traditional Concepts

There was uncertainty after *International Shoe* if the new theory based on contacts was exclusive and abolished other forms of personal jurisdiction based on traditional common law jurisdictional principles. The Supreme Court suggested exclusivity for the contact theory in *Shaffer v. Heitner*⁸³ but the issue was finally clarified in *Burnham v. Superior Court of California*⁸⁴ by reaffirming the validity of alternative basis of jurisdiction and upholding transient jurisdiction. It was, however, suggested that even the traditional forms of jurisdictions should undergo a minimum contacts analysis but the requirements were not addressed.⁸⁵

Besides jurisdiction based on presence, such as transient jurisdiction, may jurisdiction be established based on domicile and consent. The concept of domicile was introduced in *Milliken v. Meyer*⁸⁶ and provides the location of a permanent home a possible forum to sue the defendant disregarding current whereabouts.

The delivery of summons is an old common law basis of jurisdiction and could theoretically still be used but this ought be avoided especially considering implications of the Internet. Service of process is generally allowed by personal delivery, regular mail, and telefax, and the court can also direct other manner of service.

Service of process by email were upheld in *Rio Properties, Inc. v. Rio Int'l Interlink*⁸⁷ and by an English court⁸⁸ but conclusions thereof are premature. Delivery of summons may in some exceptional situations be conducted, or aided, by electronic means but jurisdiction based on reaching a person per email would create a backdoor to precipitate jurisdiction.

⁸¹ 84 F.3d 560 (2d Cir. 1996).

⁸² *Id.* at 575.

⁸³ 433 U.S. 186 (1977).

⁸⁴ 495 U.S. 604, 619 (1990).

⁸⁵ The was expressed by Justice Brennan in a concurring opinion, *id.* at 630-632.

⁸⁶ 311 U.S. 457 (1940).

⁸⁷ 284 F.3d 1007 (9th Cir. 2002).

⁸⁸ The English case is reported in "Service with a Smiley, The Effect of Electronic Mail on Service of Process" Temple International & Comparative Law Journal Vol. 11, No. 2, Fall 1997.

3.5 Consent – Forum Selection Clauses

The most common form of jurisdiction based on consent is by a forum selection clause in a contract. Forum selection clauses are generally recognized under US law but widespread use is a relatively new phenomena. Traditionally was the disposition of jurisdiction in this manner refused by courts and viewed as an intrusion by the parties into the courts domain.⁸⁹ This changed with the case *Bremen v. Zapata Off-Shore Co*⁹⁰ when a forum selection clause in a commercial contract was upheld. The case had a substantial international character - the plaintiff was a US corporation, the defendant a German corporation, and the forum selection clause designated a UK jurisdiction where litigation was pursued in parallel.

The *Bremen* court enumerated reasons why a forum selection clause should not be enforced - unreasonable, unjust, based on overreaching, fraud, due to overweening bargaining power, contradicting strong public policy, etc.⁹¹

The Supreme Court later upheld a forum selection clause in a consumer contract in *Carnival Cruise Lines, Inc. v. Shute*⁹². The term in question was incorporated into the contract by a standard form agreement attached to the tickets also referred to as a contract of adhesion. From a contract point of view is this very close to the shrinkwrap agreement. A basic reasonableness test was maintained.

Forum selection clauses are generally endorsed by state law but there are deviations. The exceptions are usually very specific such as the invalidity presumption in the New Jersey Franchises Practices Act (NJFPA).⁹³

Another, relatively common, situation when jurisdiction is determined by consent is by a contractual arbitration clause. The application of due process requirements for foreign arbitration awards is an area of considerable controversy. It is likely constitutional due process requires personal jurisdiction in order to execute an arbitration award against a foreign person but the exact standards are not clear.⁹⁴ Many issues leading up to the due process matter has been cleared by legislation in recent past.⁹⁵

⁸⁹ William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 Hastings Bus. L.J. 1, 15 (2006).

⁹⁰ 407 U.S. 1 (1972).

⁹¹ *Id.* at 10, 12, 15, 17.

⁹² 499 U.S. 585 (1991)

⁹³ See *Kubis v. Perszyk Assocs. v. Sun Microsystems, Inc.*, 146 N.J. 176, 192-93 (1996).

⁹⁴ William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 Hastings L.J. 251, 268-282 (2006).

⁹⁵ Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 Am. J. Comp. L. 233, 236, 240-241 (2006).

The historic reluctance to forum clauses prior to these cases appears to have been overcome with a mix of reasoning based on freedom of contract and economics but a reasonableness test is maintained.⁹⁶

3.6 Constitutional Considerations

As noted above, the constitutional aspect has been a crucial component for developing the modern jurisdictional doctrine. A framework has been built by the courts around the rights protected by the Constitution and the Supreme Court has refrained from far-reaching and intrusive verdicts that could undermine the current dynamics. The Supreme Court appears fully comfortable with this flexibility and proceeds to serve as a catalyst for the development in the area.

The Fourteenth Amendment is not applicable in federal courts but the Fifth Amendment protects due process rights of individuals before federal courts.⁹⁷

The State of Georgia has since 1991 legislation authorizing asserting jurisdiction for computer related crimes solely based on communication to or going through the State.⁹⁸ Such an extensive exercise of jurisdiction could be challenged as an attempt to regulate interstate commerce in violation of the commerce clause.⁹⁹

A more ambitious approach, along the same lines, is to challenge any regulation by the states in the area of Internet activity as an impediment to interstate commerce and it has proven successful a few cases.¹⁰⁰

3.7 Long Arm

State jurisdiction is primarily based on its territory but it may reach out and assert jurisdiction over a “foreign citizen” beyond the borders of the state. The rules empowering such jurisdiction are referred to as “long arm” statutes.

⁹⁶ For a historical background see e.g. 407 U.S. 1, 9 note 10 (1972)

⁹⁷ *Heft v. AAI Corp.*, 355 F. Supp.2d 757, 762(?) (M.D. Pa. 2005)

⁹⁸ Computer Systems Protection Act, Official Code of Georgia Annotated § 16-9-94(4).

⁹⁹ Article I, Section 8, Clause 3 of the U.S. Constitution. See for example *Granholm v. Heald*, 544 U.S. 460 (2005); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

¹⁰⁰ See e.g. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); N.Y. statute regarding disseminating obscene material to minors held unconstitutional as a violation of the commerce clause and the District Court concluded that “the unique nature of cyberspace necessitates uniform national treatment and bars the states from enacting inconsistent regulatory schemes”, *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 183-184 (S.D.N.Y. 1997).

The long arm statutes are state law and vary from state to state but they are formed under same constitutional requirements. The statutes varies by nature of being state law and some states such as California explicitly grant jurisdiction to the fullest extent of constitutional law¹⁰¹ while others such as New York is more restrictive¹⁰².

Whether the defendant is business or an individual is generally considered a relevant fact when determining if it is reasonable to require a party to litigate in a jurisdiction.¹⁰³

3.8 Federal Jurisdiction

Federal courts subject matter jurisdiction over federal law including matters relevant to the Constitution is found in the same.¹⁰⁴ Federal courts are also authorized to adjudicate cases even without a federal question if the opposing parties are from different jurisdictions - this is referred to as diversity jurisdiction.¹⁰⁵ Supplemental jurisdiction is the third type of federal jurisdiction and is, as supposed to the two other, at the discretion of the court. Supplemental jurisdiction allows federal courts to hear state court issues related to a claim already before the court. This is a common law device allowing one court to resolve all issues between litigants.

Federal jurisdiction is not insulated from state law as demonstrated in *Hoagland v. Sandberg, Phoenix & von Gontard, P.C.*¹⁰⁶ where the federal court held that state law define what qualify as a corporation under the federal diversity jurisdiction. The finding in *Hoagland* is not without controversy and may be perceived to undermine federal jurisdiction and the very purpose of diversity jurisdiction.¹⁰⁷

Federal courts rest on the state law where it sits to assert jurisdiction over foreign defendants.¹⁰⁸ Consequently will a federal court in diversity jurisdiction apply the long arm statute of the state where located.¹⁰⁹

¹⁰¹ California Civil Procedure Code § 410.10.

¹⁰² N.Y. Civil Practice Law Rules sections 301 and 302.

¹⁰³ *Gary Scott International, Inc. v. Baroudi*, 981 F. Supp. 714 (D. Mass. 1997).

¹⁰⁴ U.S. Constitution, Article III

¹⁰⁵ There is a minimum amount in controversy of \$75,000 and some cases are excluded from this type of jurisdiction, most notably a number of family law cases. There must be a matter of complete diversity if there are many parties to the case.

¹⁰⁶ 385 F.3d 737 (7th Cir. 2004).

¹⁰⁷ See e.g. 118 Harv. L. Rev. 1347, 1350 (2005)

¹⁰⁸ Fed. R. Civ. P. 4 (k)(1)(A); See e.g. *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 622 (4th Cir.1997).

¹⁰⁹ Fed. R. Civ. P. 4 (e): See e.g. *Arrowsmith v. UPI*, 320 F.2d 219 (2d Cir. 1963).

3.9 International Regulation

The Hague Conference on Private International Law produced the Convention on Choice of Court Agreements in June 2005. The Convention is a reduced version of the proposal from 1992 but ratification would be a significant development.

The Convention is limited to commercial contracts with a forum selection clause and a large number of specific issues are excluded - including many forms of damages, anti-trust, and intellectual property issues.¹¹⁰

Some of the challenges during the negotiations were less grounded in legal concerns and more related to national interests.¹¹¹ Jurisdiction is at core of the treaty because enforcement entails to accept the jurisdiction of the court issuing the judgment to be enforced.

3.10 Summary

Specific jurisdiction is based on the defendant's direct contacts with the jurisdiction related to the controversy while general jurisdiction rests on a habitual connection. One way to summarize the rules for specific jurisdiction is by the *Data Disc* three-prong test:¹¹²

1. Purposeful availment - consider if the contact was of required nature.
2. Relatedness - validate the suit arose from the contacts of the previous step.
3. Reasonableness - consider whether jurisdiction is fair and reasonable.

¹¹⁰ The Convention on Choice of Court Agreements, Article 2.

¹¹¹ Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing Reciprocity Requirement into US International Recognition and Enforcement Law*, 35 Geo. J. Int'l L. 239, 259-261 (2004).

¹¹² *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1287 (Cal. 1977); The test is frequently referenced by scholars *see e.g.* Moritz Keller, *Lessons for the Hague: Internet Jurisdiction in Contract and Tort Cases in the European Community and the United States*, 23 John Marshall J. of Comp. & Info. Law 1, 23 (2004); Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 Harv. L. Rev. 1821, 1822 (2003); Susan Nauss Exon, *A New Shoe Is Needed To Walk Through Cyberspace Jurisdiction*, 11 Alb. L.J. Sci. & Tech. 1, 6 (2000); The test is also commonly referenced by courts *see e.g.* *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991); Pavlovich v. Superior Court, No. S100809, 58 P.3d 2, 6 (Cal. 2002); *Breckenridge Pharmaceutical, Inc. v. Metabolite Laboratories, Inc.*, 444 F.3d 1356, 1363 (Fla. 2006).

The fundamental basis general jurisdiction is state sovereignty.¹¹³ The reasonable test should be applied for this form of jurisdiction as well. A direct relationship between the contracts and the controversy is not required but much more substantial contracts are needed.

The burden of proof is moving between the parties for both kinds of jurisdictions, starting at the plaintiff but moving to the defendant at the reasonableness step.

¹¹³ Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate about "Class Action Fairness"*, 58 SMU L. Rev. 1313, 1347 (2005).

4 Case Law

4.1 Introduction

The case law for jurisdictional issues involving the Internet is moderate in volume and span about ten years. There are substantially more cases on contractual issues and this body of cases goes back almost twenty years.

4.2 Jurisdiction on the Internet

It was ascertained early that contacts over the Internet could establish minimum contacts in cases such as *Inset Systems, Inc. v. Instruction Set, Inc.*¹¹⁴ and *Compuserve, Inc. v. Patterson*¹¹⁵. The first fundamental question the courts tackled was if access to a website alone was sufficient to establish jurisdiction. This is still an issue under consideration in some specific situations such as defamation and certain intellectual property rights matters but jurisdictional doctrine for commercial situations has moved beyond that. It has repeatedly been confirmed that a website alone does not confer personal jurisdiction in this context.¹¹⁶

4.2.1 The Zippo Sliding Scale Test

The trademark dispute in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*¹¹⁷ brought forth a specific test for determining jurisdiction for websites. The test is referred to as the “sliding scale” and is commonly referred to for determining jurisdiction based on the level of interactivity of a website. The test was embraced by courts immediately and served as an easy method to help determine jurisdiction over websites.

The defendant was an out-of-state corporation operating an Internet news service with some subscribers in the jurisdiction. The plaintiff is an established manufacturer of a product under the name used by the defendant in the domain and sued for using the trademark. Violations of both federal and state law were claimed and the court upheld jurisdiction.

Careful study of the opinion raise suspicion it has been misinterpreted by oversimplification and placing too much weight on a certain aspect. The comment about interactivity does not seem be held as the principal and

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

¹¹⁵ 89 F.3d 1257 (6th Cir. 1996).

¹¹⁶ See e.g. *Mink v. AAAA Development LLC*, 190 F.3d 333, 336-37 (5th Cir.1999), *IMO Industries, Inc. v. SEIM s.r.l.*, No. 3:05-CV-420-MU, 2006 WL 3780422 at * 3 (W.D.N.C. 2006); *Maynard v. Philadelphia Cervical Collar Co.*, No. 00-1555, 2001 WL 929708 (Fed. Cir. 2001)

¹¹⁷ 952 F. Supp. 1119 (W.D. Penn. 1997).

determinative factor by the court as subsequent interpretations suggest. For instance, the *Zippo* court states “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.”¹¹⁸ The court continues to emphasize the required connection to the jurisdiction: “If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.”¹¹⁹

The court’s statement about interactivity of the website is regarding the cases that are hard to determine and reads “the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”¹²⁰ Neither the reading nor the cited case law appears to support a conclusion that the interactivity of a website alone would suffice to grant jurisdiction.¹²¹ There is ambiguity in these statements and it is not apparent if the qualities refers to the website in general or as it applies to the interaction between the parties.

Misinterpreted or not, the *Zippo* sliding scale test has been fiercely criticized by commentators and the critique appears unison to the point that it is hard to find any endorsements by experts in the field.¹²²

The perception of a test dependent upon the interactivity of a website is easy to denounce as fundamentally flawed and any relevance it may have carried when it was conceived has diminished over time with increasingly interactive websites. The basic shortcoming with such a sliding scale test is the limitation to appraise the potential for contacts and not actual contacts. It could be compared with telephone – a phone can surely be interactive, used to negotiate, and conclude contracts but the mere possession of a handset does not usually subject the owner to jurisdiction.

4.2.2 Sliding Scale Test & Something More

Shortly after the *Zippo* case appeared the trademark case *Cybersell, Inc. v. Cybersell, Inc.*¹²³ The court held that using a website for advertising and solicit business is not enough to assert jurisdiction but there had to be

¹¹⁸ *Id.* at 1124.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ In the cited case was jurisdiction upheld in a tort case and the court was far from certain about this application, see *Maritz, Inc. v. Cybergold, Inc.*, 947 F.Supp. 1328, 1332-1334 (E.D. Mo. 1996).

¹²² See e.g. Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L. J. 1345, 1378-1381 (2001); C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 Ind. L.J. 601, 613-614, 622 (2006); [insert additional references from notes].

¹²³ 130 F.3d 414 (9th Cir. 1997).

“something more” by directing activity at the jurisdiction in a “substantial way”.¹²⁴

The “something more” finding of *Cybersell* has generally been heeded whenever the sliding scales test is used. This was the case in the copyright controversy *ALS Scan, Inc. v. Digital Service Consultants, Inc.*¹²⁵ about photographs published on a website. The court voiced that the website would have to be directed at the jurisdiction and demonstrate intent to engage in business in the forum.¹²⁶ The court expressed concerns about too extensive jurisdiction and the need to conserve the “defense of personal jurisdiction”.¹²⁷ A new rule, based on the *Zippo* model, was formulated requiring “(1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts”.¹²⁸

The plaintiff in *Toys “R” Us, Inc. v. Step Two*¹²⁹ brought suit against a Spanish company including violation of trademark and unfair competition. The website of the defendant was interactive but it was abundantly clear it targeted the Spanish market and it was impossible to complete a contact form with a US address, the website was in Spanish, and prices listed in European currency.¹³⁰

4.2.3 General Jurisdiction

General jurisdiction has been considered less often than specific jurisdiction for Internet contacts because there is a higher requirement for contacts to qualify. This does not mean that general jurisdiction is excluded and it has been upheld in the products liability case *Mieczkowski v. Masco Corp.*¹³¹ and an interactive website formed one part of the contacts qualifications.¹³²

In *Gator.com Corp. v. L.L. Bean, Inc.*¹³³ was general jurisdiction upheld and the sliding scale test was a part of the reasoning. Ultimately was jurisdiction exercised based on a mix of contacts but the court indicated that Internet contact alone may be enough to even qualify for general jurisdiction requirements.¹³⁴

¹²⁴ *Id.* at 418.

¹²⁵ 293 F.3d 707 (4th Cir. 2002).

¹²⁶ *Id.* at 714.

¹²⁷ *Id.* at 712.

¹²⁸ *Id.* at 714.

¹²⁹ 318 F.3d 446 (3d Cir. 2003).

¹³⁰ *Id.* at 454-455.

¹³¹ 997 F.Supp. 782 (E.D.Tex.1998).

¹³² *Id.* at 788.

¹³³ 341 F.3d 1072, 1079 (9th Cir. 2003).

¹³⁴ *Id.* at 1078,

4.2.4 Sliding Scale Test Astray

Michigan jurisdiction was upheld over a foreign defendant offering blood screening for newborn in the trademark infringement case *Neogen Corp. v. Neo Gen Screening, Inc.*¹³⁵ About ninety percent of the plaintiff's total business in 1999, consisting of 215,000 tests, were done under contracts with hospitals and government agencies of which none was located in Michigan.¹³⁶ The remaining business serviced individual professionals of which fourteen contracts from Michigan in 1999.¹³⁷ The *Zippo* sliding scale test was applied and the court concluded that setting up a login accounts is part of the contract and it is an interactive feature indicating the defendant "has intentionally reached out to Michigan customers".¹³⁸ The court avoided the question if the connections through the website was enough to sustain personal jurisdiction but concluded there were other contacts. It is somewhat unclear what these contacts were besides receiving the samples per postal delivery and mail test results. The weak nexus between the contacts and the suit did not appear to trouble the court.

4.2.5 Rejections of the Sliding Scale Test

There are a few cases outright rejecting the *Zippo* sliding scale test, such as the antitrust case *GTE New Media Services, Inc. v. BellSouth Corp.*¹³⁹ The court held that use of websites are unilateral acts on the part of individuals rather than purposeful activity in the jurisdiction by the website owners. The court resorted to a traditional minimum contacts analysis.

The strongest rebuttal of the sliding scale test is probably found in *Hy Cite Corp. v. badbusinessbureau.com L.L.C.*¹⁴⁰ questioning if the test conforms to opinions of the Supreme Court.¹⁴¹ The court in *Millennium Enterprises, Inc. v. Millennium Music, LP*¹⁴² refrained from using the sliding scale and noted parts of it needs "further refinement".¹⁴³

4.2.6 Effects Test

In the trademark suit *American Information Corporation v. American Infometrics, Inc.*¹⁴⁴ was the sliding scale test rejected in favor for an effect test. This indicates that the *Calder* effects test is not completely ruled out in

¹³⁵ 282 F.3d 883, 890 (6th Cir. 2002).

¹³⁶ *Id.* at 886.

¹³⁷ *Id.* at 887.

¹³⁸ *Id.* at 890-1.

¹³⁹ 199 F.3d 1343, 339 U.S. App. D.C. 332 (D.C. Cir. 2000).

¹⁴⁰ 297 F.Supp.2d 1154 (W.D. Wis. 2004).

¹⁴¹ *Id.* at 1160.

¹⁴² 33 F.Supp.2d 907 (D. Or. 1999).

¹⁴³ *Id.* at 921.

¹⁴⁴ 139 F.Supp.2d 696 (D. Md. 2001). Affirmed in *Sunbeam Products, Inc. v. 148977 Canada, Inc.*, No. C-02-85666, 2004 WL 3135768 at *10 (Md. Cir. Ct. 2004).

the commercial context but is clearly more often used in defamation and intellectual property cases.¹⁴⁵

4.3 Shrinkwrap Cases

4.3.1 Early Developments

The early development of shrinkwrap case law consists of three cases and covers the late 1980s and early 1990s. The three cases exhibit adherence to traditional principles of contract law and a reluctance to consider terms not negotiated in a traditional fashion.

A shrinkwrap warranty disclaimer and liability limitation were deemed unenforceable in *Step-Saver Data Systems, Inc. v. Wyse Technology*.¹⁴⁶ The court considered the shrinkwrap terms to be an attempt to unilaterally introduce material alterations after contract formation.

A law of the State of Louisiana validated shrinkwrap license agreements but the federal court in *Vault v. Quaid Software, Ltd.*¹⁴⁷ found the agreement not enforceable due to federal copyright policy and held it unenforceable as a contract of adhesion.

A set of shrinkwrap clauses, including warranty disclaimer and limitation of liability, were upheld in *Arizona Retail Systems, Inc. v. Software Linc, Inc.*¹⁴⁸ against a reseller but not for subsequent sales of the software by the reseller to consumers. The principal difference between these two groups was that the reseller had taken part of the agreement before purchasing the product but did not furnish the consumer with the contract prior to the transactions.

4.3.2 A New Interpretation

The case *ProCD v. Zeidenberg*¹⁴⁹ marked a change in how courts viewed shrinkwrap contracts. The plaintiff sold a software product for the consumer market powered by a database of telephone numbers. The defendant purchased the product, extracted the data, and offered access to the information for sale on a website. The shrinkwrap agreement was not available to the defendant prior to the purchase but it was delivered with the software. The court ruled that the shrinkwrap terms were enforceable.

¹⁴⁵ See e.g. *Revell v. Lidov*, 317 F.3d 467, 472 (5th Cir. 2002); *Panavision International, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998); *Nissan Motor Co. v. Nissan Computer Corp.*, 89 F. Supp. 2d 1154 (C.D. Cal. 2000); *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000).

¹⁴⁶ 939 F.2d 91 (3d Cir. 1991).

¹⁴⁷ 655 F. Supp. 750 (E.D. La. 1987), affirmed 847 F.2d 255 (5th Cir. 1988).

¹⁴⁸ 831 F. Supp. 759 (D. Ariz. 1993).

¹⁴⁹ 86 F.3d 1447 (7th Cir. 1996).

The court noted that it is not uncommon with situations where payment is done before all terms are delivered such as with insurance sales and tickets for air travel, concerts, and cruises.¹⁵⁰ The critical part of the *ProCD* opinion rested on an examination and reinterpretation of the contractual elements.

The court argued that the UCC allows the parties to structure the sale in whatever fashion they please and it contended the contract was not actually formed at the time when the software was exchanged for payment. The court claimed that the contract was formed after the user had taken part of the terms and chose not to return the software for a refund within thirty days.¹⁵¹ The *ProCD* opinion also included some policy reasoning.

The impact of *ProCD* was significant and it was immediately cited in subsequent cases involving enforcement of shrinkwrap terms.¹⁵²

ProCD has been criticized for an incorrect application of UCC by using the sale of goods provisions and for incorrectly assuming § 2-207 only applies to situations with more than one form.¹⁵³

The court considered in *Meridian Project Systems, Inc. v. Hardin Const. Co., LLC*¹⁵⁴, among other things, if a EULA was enforceable as a shrinkwrap agreement between two companies. The shrinkwrap was held enforceable citing *ProCD*.¹⁵⁵ The court acknowledged and endorsed the policy considerations for the software industry discussed in *ProCD*.

4.3.3 Notice of Terms

The *ProCD* opinion was not only reaffirmed in *Hill v. Gateway 2000, Inc.*¹⁵⁶ but it was expanded to apply to goods and consumer transactions. The case was about the enforceability of an arbitration clause in a shrinkwrap agreement distributed with computer products ordered per telephone. The court rested on its own previous opinion in *ProCD* and cited the Supreme Court decision in *Carnival*.

It is not clear if the defendant provided notice of the additional terms when the plaintiff placed the order. The plaintiffs argued that the arbitration clause

¹⁵⁰ *Id.* at 1451; The Supreme Court decision in *Carnival* was noted.

¹⁵¹ *Id.* at 1452-53.

¹⁵² See e.g., *Westendorf v. Gateway 2000, Inc.*, No. 16913, 2000 WL 307369, at *1 (Del. Ch. 2000) – arbitration clause; *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 570 (N.Y. App. Div. 1998) – warranty disclaimer; *Levy v. Gateway 2000, Inc.*, 33 U.C.C. Rep. Serv. 2d (CBC) 1060, 1062, 1997 WL 823611 (N.Y. Sup. Ct. 1997) – warranty disclaimer.

¹⁵³ See e.g. James J. White, *Contracting Under Amended 2-207*, 2004 Wis. L. Rev. 723, 741 (2004).

¹⁵⁴ 426 F.Supp.2d 1101, 2006 Copr.L.Dec. P 29,166, 80 U.S.P.Q.2d 1141 (E.D. Cal. 2006).

¹⁵⁵ *Id.* at 1107.

¹⁵⁶ 105 F.3d 1147 (7th Cir. 1997).

was not adequately and properly identified in the contract but the court refuted this aspect as of any significance. The court furthermore pursued an unclear line of reasoning suggesting that the plaintiffs conceded the shrinkwrap terms by claiming the warranty.¹⁵⁷

In *Schafer v. AT&T Wireless Services, Inc*¹⁵⁸ had the plaintiff ordered cell phone service over the telephone and subsequently challenged the validity of an arbitration clause. The arbitration clause was printed in a “Welcome Guide” that was supposed to be delivered with the phone. The plaintiff claimed she never received the document but the court considered she had notice of it because it was listed on the box delivered to her.¹⁵⁹

No notice of the additional terms were provided by the defendant when the order was placed and the court seems to have been determined to assign significance to the listing of the welcome guide on a box. Subsequent cases appear to lower the requirements on the notice to the buyer about the additional future terms compared with what was mandated in the *ProCD* opinion.¹⁶⁰

4.3.4 Time of Contract

A more rigid contractual analysis was conducted in *Klocek v. Gateway, Inc.*¹⁶¹ regarding enforcement of an arbitration clause for the sale of computer equipment to a consumer. The court noted the seller had not informed the buyer the sale was conditional on agreement to the additional terms. Sending the terms to the buyer was not deemed adequate notice and the court placed the burden on the seller to communicate any additional conditions to conclude the transaction.¹⁶² The arbitration clause was not enforced.

4.3.5 Divergent Views

Enforceability of a limitation of liability clause was considered in *M.A. Mortenson Co. v. Timerline Software Corp.*¹⁶³ The plaintiff had used the defendant’s software to generate construction bids and a bug in the software caused incorrect bids. A purchase contract had been negotiated at the sale of the software and the product was distributed with a shrinkwrap license including the exclusionary clause.

¹⁵⁷ *Id.* at 1149.

¹⁵⁸ No. Civ. 04-4149-JLF, 2005 WL 850459 (S.D. Ill. 2005).

¹⁵⁹ *Id.* at 3-5.

¹⁶⁰ See e.g. *O’Quin v. Verizon Wireless*, 256 F. Supp. 2d 512 (M.D. La. 2003); *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071 (C.D. Cal. 2002); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000).

¹⁶¹ 104 F.Supp.2d 1332 (D.Kan. 2000).

¹⁶² *Id.* at 1341.

¹⁶³ 140 Wash.2d 568, 998 P.2d 305 (Wash. 2000).

The court upheld the limitation of liability citing *ProCD, Hill*, and *Brower*.¹⁶⁴ These three opinions were noted to “represents the overwhelming majority view on this issue”.¹⁶⁵ The court did not explicitly pinpoint exactly how and when the shrinkwrap became part of the contract but observed the standing relationship between the parties and the fact the purchase in question was an upgrade. The court noted that the shrinkwrap terms were referenced repeatedly and a number of times when starting the computer program.¹⁶⁶ The court also considered the conscionability of the clause but it was found not unconscionable.¹⁶⁷

The recent case *Wachter Management Co. v. Dexter & Chaney, Inc.*¹⁶⁸ has striking similarities with *Mortenson* but the court did not enforce the forum selection in the shrinkwrap terms. The court disagreed with the *Mortenson* decision and placed the formation of the contract to when the plaintiff accepted the offer from the defendant. The shrinkwrap terms were considered additional terms the plaintiff never expressly agreed to.

In *Defontes v. Dell Computers Corp.*¹⁶⁹ was an arbitration clause challenged with an attack on the principal validity of shrinkwrap agreements. The court confirmed that shrinkwrap agreements are valid contracts citing *ProCD, Hill* and *O’Quin*. The contract in question was not upheld because the absence of information to the customer of how to proceed if unwilling to comply with the terms.¹⁷⁰ This deficiency effectively undermined the ratification mechanism of the shrinkwrap agreement.

4.3.6 Time of Notice

The same arbitration agreement for the sale of computers was considered in the two cases *Rogers v. Dell Computer Corp.*¹⁷¹ and *Stenzel v. Dell, Inc.*¹⁷² The latter case involved two plaintiffs whom ordered the merchandise in a slightly different fashion. The court noted the plaintiffs in *Stenzel* were given multiple opportunities to review the terms both as shrinkwrap and browsewrap. The arbitration clause was upheld.¹⁷³

The court focused in *Rogers* on the timing of the notice of the shrinkwrap terms. Unfortunately, the court was not provided with adequate information about the ordering process so it was unable to determine whether the clause

¹⁶⁴ *Id.* at 582-585.

¹⁶⁵ *Id.* at 583 n. 10.

¹⁶⁶ *Id.* at 584.

¹⁶⁷ *Id.* at 585-589.

¹⁶⁸ 144 P.3d 747 (Kan. 2006).

¹⁶⁹ No. C.A. PC 03-2636, 2004 WL 253560 (R.I. Super. 2004).

¹⁷⁰ The court considered a reasonable person model provided in *Specht* at 516, *id.* at 7.

¹⁷¹ 127 P.3d 560 (Okla. 2005).

¹⁷² 870 A. 2d 133 (Me. 2005).

¹⁷³ *Stenzel*, 870 A. 2d at 138.

was binding - it proceeded to analyze the timing issue but without a conclusive opinion to if it was binding.¹⁷⁴

4.3.7 Unconscionable Terms

An arbitration clause in a consumer contract was held substantially unconscionable in *Brower v. Gateway 2000, Inc.*¹⁷⁵ due to the harsh terms of the arbitration procedure. The arbitration required an advance fee of \$4,000, which was more than the value of the computer equipment subject to the controversy. Arbitration as a matter of process was still upheld due to the absence of procedural unconscionableness and the case was returned to the lower court to appoint an arbitrator.¹⁷⁶

4.3.8 Terms of Use

A clause in a shrinkwrap agreement prohibiting reverse-engineering was upheld in *Bowers v. Baystate Technologies, Inc.*¹⁷⁷ Unfortunately, the case did not provide much substance on the provisions limiting use of the product because the defense focused on different issues and did not submit such a challenge. The court ruled for the plaintiff with references to freedom of contract and recalled the *ProCD* opinion.¹⁷⁸

4.4 Browsewrap Cases

A claimed breach of contract was brought in *Pollstar v. Gigamon Ltd.*¹⁷⁹ after the defendants had published content retrieved from the plaintiff's website contrary to terms of use posted by the plaintiff. The court noted that the terms were not displayed in a prominent fashion but it was still not persuaded to declare them invalid and did not grant the defendant's motion to dismiss.¹⁸⁰

Enforcement of plaintiff's browsewrap forum selection clause was denied in *America Online, Inc. v. Alameda County Superior Court*¹⁸¹. The Californian court refused to enforce the clause appointing Virginia as the forum due to concerns consumers would not be able to bring a class action suit in Virginia like in California. The court held that the state's consumer

¹⁷⁴ The court cited U.C.C § 2-207 in *Rogers*, 127 P.3d at 566 [verify the page!]; The finding was consistent with the refusal to enforce an arbitration clause in *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D.Kan. 2000).

¹⁷⁵ 246 A.D.2d 246, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998).

¹⁷⁶ The same conclusion was reached in *Filias v. Gateway 2000, Inc.*, No. 97 C 2523, 1998 U.S. Dist. LEXIS 20358 (E.D. Mich. 1998).

¹⁷⁷ *Bowers v. Baystate Technologies, Inc.*, 320 F.3d 1317 (Mass. 2003).

¹⁷⁸ *Id.* at 1323-1324, 1324-1325.

¹⁷⁹ 170 F.Supp.2d 974 (E.D. Cal. 2000).

¹⁸⁰ *Id.* at 981-982.

¹⁸¹ 90 Cal. App. 4th 1 (Cal. Ct. App. 2001).

protection laws would be circumvented and this issue of public interest outweighed the contractual issue at play.

4.4.1 Notice of Terms

Internet users and website operators brought a class action suit in *Specht v. Netscape Communications Corp.*¹⁸² regarding a plug-in software. The software was provided for free and marketed to facilitate browsing the Internet. The program collected information on Internet use and transmitted this information to the defendant. The defendant posted the browsewrap terms at a link placed below the icon to execute a download of the software. The court held that a “reasonably prudent Internet user” would not have learned about the terms prior to responding to the defendant’s invitation to download the software.¹⁸³ The court concluded the procedure did not provide reasonable notice of the terms and the act of downloading the software did not manifest assent to the terms and the plaintiff was not bound by the arbitration clause.¹⁸⁴

In addition to the shrinkwrap element of the *Defontes* case, as presented above, was enforceability of browsewrap terms considered. The browsewrap terms were not upheld on grounds of insufficient notice and the court described the notice to be “inconspicuously located at the bottom of the webpage”.¹⁸⁵

4.4.2 Repeat Visits

Restrictions on the use of web content was considered in *Register.com, Inc. v. Verio, Inc.*¹⁸⁶ Defendant visited the plaintiff’s website daily and queried what is known as the WHOIS database and used the resulting information to solicit business. The database contained information about the domain name registrations processed by the plaintiff including customer contact information. Domain name registrars are required to publish this information by the registrar accreditation agreement.

The plaintiff’s website was designed to provide the terms on the pages together with the domain name registration information. The defendant claimed the notice was not legally enforceable and did not constitute a contract.¹⁸⁷

The court held that the repeated use of the site created adequate and legally binding notice of the terms. The circumstances were analogizing to a farm

¹⁸² 306 F.3d 17 (N.Y. 2002).

¹⁸³ *Id.* at 20.

¹⁸⁴ *Id.*

¹⁸⁵ *Defontes* at 6.

¹⁸⁶ 356 F.3d 393 (2d Cir. 2004).

¹⁸⁷ *Id.* at 401.

stand. The court reasoned that a visitor to a farm stand may be excused for taking a bite out of an apple one time before noticing a sign indicating the price but will be expected to pay for apples on subsequent visits.¹⁸⁸ The defendant would, consequently, not be held by the terms for single or even sporadic visits.

The reasoning in *Register.com* was upheld in *Cairo, Inc. v. Crossmedia Services, Inc.*¹⁸⁹ where a forum selection clause was at play. The plaintiff used automated information collection from the defendant's website. The collected information, including "deep-links", was displayed on the plaintiff's website. The defendant sent plaintiff a cease and desist letter. Plaintiff filed suit seeking a declaratory judgment it did not violate any intellectual property right or breach of contract. The forum selection clause was ambiguous but upheld and the motion to dismiss was granted.¹⁹⁰

Register.com is established as a landmark case and it is often cited in relation to Internet contracts.¹⁹¹ The influence of *Register.com* and *Cairo* goes beyond the scope of Internet cases – for example, was a recent ruling on a forum selection notice for a public works bid upheld based on the two cases.¹⁹²

4.4.3 Lack of Contract

In the recent case *Waters v. Earthlink, Inc.*¹⁹³ was the defendant sued for breach of contract and damages related to Internet service. The plaintiff had purchased Internet service from a company, which had been sold and then resold. At the time of the first sale was the original company's "user agreement" replaced on the ISP's website.¹⁹⁴ The new terms, posted after the second transfer of ownership of the company, included a warranty disclaimer and stated that services were provided in an "as is" condition.¹⁹⁵ The plaintiff was not notified of the new terms but was given notice of changes to the service and instructed to migrate the website to a new server. The plaintiff claimed to have been unable to access the content to move the webpages and consequently suffered damages due to the service interruption.¹⁹⁶

¹⁸⁸ *Id.*

¹⁸⁹ No. C 04-04825 JW, 2005 WL 756610 (N.D. Cal. 2005).

¹⁹⁰ *Id.* at 5, 6.

¹⁹¹ See e.g. *Treiber & Straub, Inc. v. U.P.S., Inc.*, 2007 WL 45851 at 5 (Wis. 2007); *F.T.C. v. Cleverlink Trading Ltd.*, 2006 WL 3106448 at 6 (N.D.Ill. 2006); *Benicorp Ins. Co. v. National Medical Health Card Systems, Inc.*, 447 F.Supp.2d 329 at 337 (S.D.N.Y. 2006)

¹⁹² *Fru-Con Const. Corp. v. County of Arlington*, No. 1:06CV1, 2006 WL 273583 at 2 (E.D. Va. 2006).

¹⁹³ 2006 WL 1843583 (Mass. Super. 2006).

¹⁹⁴ *Id.* at 1.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 2.

Massachusetts' law does not require the existing contracts to be transferred when a company is acquired and the original contract is simply dissolved. The consequential situation left the plaintiff without a contract besides, possibly, the terms posted with the "as is" notice. It is clear that the court is bothered by the plaintiff's breach of contract claim without producing, or effectively, arguing the presence of a contract and ruled against him.

The defendant appears to have informed the plaintiff properly of the changes of service with adequate notice and instructions. The plaintiff should have contacted the defendant to resolve the problem to transfer the files. The case illustrates that deficiencies in contract terms is to the detriment to the party attempting to enforce a perceived obligation.

4.5 Clickwrap Cases

The clickwrap contract was developed out of the traditional shrinkwrap contract and it was at the start a mix of traditional shrinkwrap presentation of the terms combined with a clickwrap component. Consequently are the first instances of clickwrap elements found in shrinkwrap cases such as *ProCD* and *Mortenson*. As a matter of classification herein are agreements considered clickwrap contracts when is the principal means to conclude the contract is an indication of assent on a computer screen – normally manifested by "a click".

*Caspi v. The Microsoft Network, LLC*¹⁹⁷ is commonly hailed as the first major clickwrap case and involved a forum selection clause in a class action suit. The clause was upheld citing the *Carnival* opinion. The plaintiffs invoked consumer protection concerns and suggested the forum clause was a result of the defendant's overweening bargaining power. The court rejected these arguments and noted that the plaintiffs have not demonstrated deficiencies in the consumer protection in the forum appointed by the clause.¹⁹⁸ The plaintiffs were unable to demonstrate any compelling facts regarding unfair exploitation of the defendant's bargaining power beyond the size of the defendant.¹⁹⁹

In *Groff v. America Online, Inc.*²⁰⁰ was the plaintiff sued for violation of a consumer protection statute. The defendant moved to dismiss the case by invoking a forum selection clause. The court upheld the forum selection with reference to the *Zapata* case and examined the reasonableness by analyzing nine factors.²⁰¹

¹⁹⁷ 323 N.J.Super. 118, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).

¹⁹⁸ *Id.* at 531-532.

¹⁹⁹ *Id.* at 530-531.

²⁰⁰ 1998 WL 307001 (R.I. Super. 1998).

²⁰¹ The nine factors were used in *D'Antuono v. CCH Computax Systems, Inc.*, 570 F.Supp. 708 (R.I. Super. 1983), *id.* at 3.

A clickwrap arbitration clause was upheld in *Lieschke v. Realnetworks, Inc.*²⁰² for a consumer contract but the consequence of opinion is curtailed by the feeble and impotent challenge by the plaintiffs.²⁰³ The case may primarily demonstrate that the burden of proof unequivocally rests with the plaintiff.

A forum selection clause was upheld between two companies in *I-A Equipment Co., Inc. v. ICode, Inc.*²⁰⁴ The court cited *ProCD* and *Hill* together with considering whether it would be “unfair or unreasonable” to adjudicate the case in the jurisdiction of the clause.²⁰⁵

The plaintiff in *Motise v. America Online, Inc.*²⁰⁶ was a family member using an AOL sign-on and claimed not to be bound by AOL’s terms, including a forum selection clause because he never agreed to the terms. The user had not been given notice of the terms and could not be held directly by them but the court found him to be a sub-licensee and received a derivate notice as such.²⁰⁷ The finding rests on general agency law and the forum clause was upheld.

The plaintiff in *Eslworldwide.com, Inc. v. Interland, Inc.*²⁰⁸ challenged a forum selection clause arguing it was a misunderstanding because he had intended to reactivate an old account and not set up a new account. The court concluded the plaintiff had not overcome the presumption of the validity of the contract.²⁰⁹

4.5.1 Unconscionable Terms

No determination was made on the enforceability of a clickwrap arbitration clause in *Comb v. Paypal, Inc.*²¹⁰ because the court proceeded to consider if the forum clause was substantively unconscionable under the assumption it would be enforceable and it was found to be procedurally unconscionable under California law. The court made references to the relatively low skill level of the consumer and the fact that the average transaction was \$55.²¹¹ The user agreement was a lengthy article of twenty-five printed pages.²¹²

The plaintiff in *Novak v. Overture Services, Inc.*²¹³ objected to a forum selection clause on the grounds that it was unreasonable due to its

²⁰² No. 99 C 7274, 99 C 7380, 2000 WL 198424 (N.D. Ill. 2000).

²⁰³ *Id.* at *2-3.

²⁰⁴ No. 0057CV467, 2000 WL 33281687 (Mass. Dist. 2000).

²⁰⁵ *Id.* at 3.

²⁰⁶ 346 F.Supp.2d 563 (S.D.N.Y. 2004).

²⁰⁷ *Id.* at 566.

²⁰⁸ No. 06 CV 2503(LBS), 2006 WL 1716881 (S.D.N.Y. 2006).

²⁰⁹ *Id.* at 2.

²¹⁰ 218 F. Supp. 2d 1165 (N.D. Calif. 2002).

²¹¹ *Id.* at 1172-73.

²¹² *Id.* at 1169.

²¹³ 309 F.Supp.2d 446 (E.D.N.Y. 2004).

inaccessibility. The text was available in a textbox next to the “I agree” button. The court upheld the clause holding it was not overly long, written in normal font, and the plaintiff had unlimited time to read the terms.²¹⁴

4.5.2 Public Policy

In *Scarcella v. America Online, Inc.*²¹⁵ was a forum clause challenged by a consumer plaintiff. The New York court upheld the clause but refused to enforce it on grounds of public policy. The court found enforcement unreasonable due to the cost and inconvenience of litigating in Virginia, a \$2,000 limit as supposed to the New York \$5,000 limit, and the option for the defendant to transfer the case out of Virginia Small Claims Court under Virginia law.²¹⁶ The court concluded enforcement would frustrate the legislative goals of New York.²¹⁷

The proceedings in the small claims court are of great interest from a principal and practical point of view.²¹⁸ The plaintiff challenged the sign-up process and contended the large number of screens as unreasonable. The court concluded the sign-up process entailed 91 screens but held the information on those screens must be considered the equivalent of a contract on paper.²¹⁹ Refusal to do so would “threaten the viability of the internet as a medium of commerce”.²²⁰

4.5.3 Challenging Browsewrap

The principal validity of browsewrap contracts have been challenged in the two cases *Mortgage Plus, Inc. v. DocMagic, Inc.*²²¹ and *Recursion Software, Inc. v. Interactive Intelligence, Inc.*²²² In the latter case was it attacked under state law but browsewrap contracts were recognized as an enforceable legal instrument in both cases and the terms were upheld.

4.6 Summary

The Supreme Court has yet not issued any opinions in the realm of in Internet jurisdiction or Internet contracts. It is apparent after considering the case law that clickwrap contracts are far easier to enforce than browsewrap.

²¹⁴ *Id.* at 451.

²¹⁵ 11 Misc.3d 19, 811 N.Y.S.2d 858 (N.Y. Sup. App. Term 2005).

²¹⁶ *Id.* at 858.

²¹⁷ *Id.* at 858-9.

²¹⁸ 798 N.Y.S.2d 348, 2004 WL 2093429 (N.Y. City Civ. Ct. 2004).

²¹⁹ *Id.*, 2004 WL 2093429, at 1.

²²⁰ *Id.* at 2.

²²¹ 2004 WL 2331918 (D.Kan. 2004).

²²² 425 F.Supp.2d 756 (N.D.Tex. 2006).

4.6.1 Jurisdiction

The *Zippo* sliding scale test is the most commonly used component in determining jurisdiction in Internet cases and courts frequently cite the opinion. The focus of the test is on the interactive qualities of websites but it has usually, since *Cybersell*, been combined with additional components evaluating the factual contacts. Nevertheless, the sliding scale test in some cases seduced courts to reach dubious conclusions such as in *Neogen* and in general jurisdiction cases. Some courts have questioned the legitimacy of the test such as in *Hy Cite*. It should be noted that, notwithstanding the negative effects, the sliding scale test could be part of a proper analysis such as in *Toys “R” Us*. The test is, however, surely not a necessity for a good analysis and can be disregarded completely without detriment such as in *GTE*.

An effects test inspired by *Calder* is not completely out of the question but rarely applied in the commercial context.

4.6.2 Shrinkwrap

The courts' interpretation of early shrinkwrap contracts was marked by a strict adherence to a traditional interpretation of contract law and shrinkwrap terms were rarely enforced. There was a radical change with the landmark case *ProCD*, which opened the floodgates for enforcement. The most significant change with *ProCD* was a re-examination of the formation of a contract. Shrinkwrap terms were made considered an integral part of the contract by postponing the time of contract formation and not an alteration to an existing contract and subject to consent.

This line of reasoning comes across as an artificial construct and unnecessary experimentation with principles of contract law. The parties are certainly afforded the freedom to negotiate and conclude the contracts in whatever fashion they please but this interpretation is contrary to common sense and, most probably, contrary to the parties' own perception of when the contract is formed.

The court claimed in *ProCD* that the procedure with delayed terms is a common occurrence. This argument is misleading because the most prominent use of this is in areas subjected to relative comprehensive regulation protecting the rights of consumers.²²³ Many of those services are more of a subscription providing an ongoing benefit and not the finality as most shrinkwrap contracts entail.

The *ProCD* interpretation was quickly affirmed and expanded to apply in consumer transactions with *Hill*. The nature of the clauses of shrinkwrap

²²³ Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 Wayne L. Rev. 1805, 1823-1824 (2000).

contracts appears to change and this may be a consequence of a wide spread acceptance of its use – for instance, jurisdictional provisions becomes more common.

The notification requirement of shrinkwrap terms was over time weakened compared with standard set forth in *ProCD*. This process culminated with *Schafer* where the court was not concerned whether the terms had been provided or not and terms were distributed with other printed materials and liberally labeled without affecting the enforceability.

It is clear from looking at the relevant case law, the courts tend to focus on procedure and not touch the material terms of shrinkwrap agreements. The unconscionable arbitration terms in *Brower* was an exception. The courts have held the number of times shrinkwrap terms are provided to the buyer is a relevant factor.

There is indication of a moderation of the *ProCD* opinion over the last few years and the failure of UCITA may have contributed to a somewhat more careful approach but it is premature to conclude if this is a definitive change in direction.

4.6.3 Browsewrap

The browsewrap contract is a problematic of the contract because the structural weakness the acceptance and in notification of terms. Ambiguous terminology and questionable titling on the terms is a further complicating factor.

It is easy to have sympathy for the outcome and reasoning in the *Register.com* opinion but its still questionable as a contract.

The courts appear to apply a different standard to merchants and consumers and setting a higher requirement on notification for consumers - browsewrap contracts are rarely upheld against consumers.

The *Specht* court refers to a reasonable user and attaches importance to the specific location of the link to the full terms just like in *Desfontes*.

The lower standard for merchants is understandable but a too low standard for companies may lead to complications. Commentators have observed it may create a very difficult situation for businesses if its employees are considered to enter into contracts on the employer's behalf by visiting websites.²²⁴

Another aspect worthy of consider with browsewrap contracts is that most cases with merchants involves the use of information found on publicly

²²⁴ See e.g. Mark A. Lemley, Terms of Use, 91 Minn. L. Rev. 459, 461-463 (2006).

accessible websites and one may question if it is prudent to allow restrictions of the use of public information beyond existing intellectual property regulation. It seems more practical, aligned with the nature of the Internet, and economical to require the website owners to restrict access to information not intended to be in the public domain. Access control is nowadays commonplace and the technical solutions trivial and readily available.

It may, at the end of the day, not be good use of resources for the legal system to police use of publicly available information beyond current intellectual property law.

4.6.4 Clickwrap

Clickwrap contracts are upheld at a higher rate than browsewrap contracts and it is relieved of the challenges of re-examining time of formation and other aspects of traditional contract law principles.

Consumer contracts are common and often upheld. The courts have demonstrated a reluctance to consider the material terms of the contracts but consumer protection interests have been successfully defended by exercise of jurisdiction, or refusal to do so, in cases such as *Scarcella* and *Comb*.

One issue the courts have not elaborated very much on yet is on standards for notice and presentation of terms. It is understandable the courts are reluctant to get too engaged in the presentation of the terms due to concerns of undermining the validity of electronic contracts. The problem with strictly maintaining this approach is to institutionalize a lack of incentive for the party drafting the contract to present it in a clear and understandable fashion.

Forum selection clauses are generally upheld as long they have been incorporated into the contract appropriately as in the early *Groff* and the recent *Elsworldwide*.

5 Discourse

5.1 Introduction

The issues related to jurisdiction and Internet contracting are both subject to ongoing discourse in the legal community. The matter of jurisdiction is a continuous debate in the legal community along with the development in the courts and the issues of Internet contracts has over the past years created an active debate in the legal community.

A survey of these two debates is presented below but this is, by no means, a full inventory of the discussion on these two areas but merely a sample.

5.2 Jurisdiction

5.2.1 Introduction

The categorization and borderlines between specific areas and tests are, at times, arbitrary and some creative discretion has been utilized to sort and group these ideas.

5.2.2 Cyberjurisdiction

There was a lot of debate in the mid 1990s about the prospect to create a separate legal system for the Internet.²²⁵ The opposing group, called unexceptionalists, denounced this view and held that the Internet is only a set of cables. The group did not even concede the term “cyberspace” much less any specific regulation thereof.

It is abundantly clear that there will be no separate “cyberlaw” any time soon. The Internet has, however, demonstrated a good ability to self-regulate smaller communities, both commercial and non-commercial. Some Internet communities facilitate feedback from fellow users as a mechanism to encourage good behavior in some Internet services. The prospects for an all-encompassing cyberlaw is not realistic but some online arbitration system and other alternative conflict resolution mechanisms may emerge for specific controversies.

²²⁵ Probably best exemplified by John Perry Barlow’s bombastic “A Declaration of the Independence of Cyberspace” at <http://homes.eff.org/~barlow/Declaration-Final.html>

There is new wind in the sails of the research on the legal concepts and implications at the intersection of the Internet and the physical world. This research is not utopian in nature but pragmatic and astute.²²⁶

5.2.3 Modified Effects Test

Leitstein has suggested modifications to the *Zippo* sliding scale test through adjusting the “passive” classification to a “non-commercial” group.²²⁷

Leitstein use this as an argument for an entryway to a modified effects test applied to commercial situations. One tangible risk with focusing on effect rather than intent is potential unpredictability and exorbitant jurisdiction.

The approach may in effect develop a jurisdictional theory placing the burden to limit jurisdiction on the website owner. A centerpiece of this theory would depend on the website owner’s ability to control whom transaction are concluded with. This would in turn create an incentive for website owners to properly address the jurisdictional issue through contractual means and/or selection of customers.

If consumer protection continues to be addressed primarily on the state level will this also encourage the merchants to understand these provisions and limit exposure as the merchant sees fit.

This solution would place a great burden on operators of websites and it is likely to have a negative effect on e-commerce by compartmentalize markets both in the US and internationally. As with any theory potentially rendering extensive jurisdiction may this theory not substantially mitigate the problem of Internet jurisdiction on the international level but only defer the challenge to an issue of enforcement.

5.2.4 Modifications to Minimum Contacts

One suggested modification to the current specific jurisdiction test is to modify the required relationship between the contacts, of the first prong, and the controversy, usually referred to as the second prong. Instead of the general “but-for” causal requirement would a more immediate relationship be required. This can be achieved by limiting how far back the causal chain is permissible. The approach is borrowed from legal causation in tort law and referred to as proximate cause.²²⁸

²²⁶ See e.g. Julie E. Cohen, *Cyberspace as/and Space*, 107 Colum. L. Rev. 210 (2007)

²²⁷ Todd Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 La. L. Rev. 565, 584 (1999).

²²⁸ Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 Idaho L. Rev. 583, 589-591 (2001); Note: *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 Harv. L. Rev. 1821, 1838-1844 (2003).

Two other commentators suggest a three-level hierarchy as a process to determine jurisdiction. The first level is limited to passive access of information and would not require the website owner to submit to foreign jurisdiction. The second level consists of transactions and would create a presumption for jurisdiction but leave an option for the website owner to rebut. A challenge to the jurisdiction would require the merchant to show lack of intent and no reasonable expectation that purchases would take place from the jurisdiction. At the third level is jurisdiction assumed for transactions with large commercial entities.²²⁹ This scheme would certainly provide a defined process but it would probably result in more expansive jurisdiction and place a considerable burden on the website operator.

5.2.5 Stream-of-Commerce-Plus

The “stream-of-commerce-plus” theory is an analogy of Justice O’Connor’s reasoning in the *Asahi* opinion.²³⁰ The original theory is both elegant and brilliant but it is difficult to use it in the Internet context in a meaningful way because a website is immediately available through the Internet. Furthermore, there are no other actions needed for a website to become available, such as marketing plans, trading partners, middle men, etc. Consequently is the “stream-of-commerce” part reduced to a binary state and all weight falls on the “plus” part of the test which would, essentially, be a question of a targeting or purposeful availment test.

5.2.6 Targeting

A targeting approach provides a modernized way to deal with the subjective intent in the minimum contacts heritage. The approach was envisioned by Geist to include three criteria: 1) contractual agreement; 2) use of technology; and 3) actual or implied knowledge.²³¹ The contract criterion is simply an issue of whether a forum selection clause is part of the contract or not. Technology can be used to extract information about the contracting parties and it can also be leveraged to query and cross reference with other data repositories. The actual and implied knowledge enables consideration of information such as delivery address, credit card billing address. It may additionally be useful in the tort context. The use of technology and integration with other with information in databases is controversial and raise privacy concerns. This test may not be fully developed yet but stand out as one of the more constructive directions for an Internet specific test.

²²⁹ Joseph S. Burns & Richard A. Bales, Personal Jurisdiction on the Web, 53 Me. L. Rev. 29, 48-50 (2001).

²³⁰ See e.g. David L. Stott, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web Site*, 15 J. Marshall J. Computer & Info. L. 819, 838-844 (1997).

²³¹ Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L. J. 1345, 1380, 1392-1404 (2001).

5.2.7 New Test Based on Existing Doctrine

Spencer suggests a reformulation of the current jurisdictional doctrine in order to facilitate application in the Internet context. The following three-prong test is suggested combined with discarding the sliding scale test:

*“(1) purposefully directs activity into the state via virtual networks; (2) that activity gives rise to, in a person within the State, a potential cause of action cognizable in the State's courts; and (3) the assertion of jurisdiction is constitutionally reasonable.”*²³²

Burden shifting is incorporated in the test and requires the parties to actively participate. Spencer claim legitimacy of this approach by pointing out that lower courts should not alter traditional principles as formulated by the Supreme Court.²³³

The approach assumes the existing doctrine is sufficient to deal with Internet jurisdiction. The claim of legitimacy based on existing principles is somewhat illusory because the principles are potentially contradictory unless more closely defined and consolidated. Applying principles developed in by higher courts through precedence is generally left to the lower courts and this is generally an important step to advance the body of law.

This test, along with numerous other new tests, does actually very little to consolidate existing principles and formulate a clear and useful test. Involving the parties through burden shifting may be economically sound but it will ultimately weaken precedence by limiting the creative latitude of the courts and that is probably not particularly desirable in this area.

5.2.8 Reformed Jurisdictional Doctrine

Floyd and Baradaran-Robison propose a new jurisdictional regime with a unified test for personal jurisdiction.²³⁴ The critique is directed against the current state of affairs with different tests depending on contexts while the same fundamental interests are at play.²³⁵

The commentators want to remedy the inconsistency of a subjective requirement for purposeful availment and an objective requirement for the effects test. Consistency is achieved by modifying the purposeful availment requirement to an objective requirement defined as “awareness to a

²³² A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. Ill. L. Rev. 71, 109 (2006).

²³³ *Id.* at 111-112.

²³⁴ C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 Ind. L.J. 60181 Ind. L.J. 601, 605-625 (2006).

²³⁵ *Id.* at 628.

substantial degree of certainty”.²³⁶ Integration of the two concepts is not inconceivable and has already occurred in a few cases when targeting aspects has been considered in purposeful availment situations. Such a measure would be good for doctrinal cohesiveness but the practical impact of the change may not be noticeably.

The suggested reform would create a platform to tackle Internet jurisdiction and other difficult situations and a unified test would, in particular, ensure a coherent development of the exercise of jurisdiction but this solution does not come with a silver bullet for Internet jurisdiction.

Another, more radical, reform proposal is a “category-specific jurisdiction” as proposed by Arthur Taylor von Mehren.²³⁷ This approach favors a statute driven regulation prevalent in civil law legal systems. This would, of course, require an act of Congress. This approach would provide a predictable system but the measure is fundamentally alien to the US legal tradition it would create a number of challenges.

The proposed material regulation consists of a set of rules granting state jurisdiction over foreign websites in commercial disputes but not over foreign non-commercial websites. This rule is not necessarily needed to be implemented through statute but could be provided by a firm precedence, for instance by an opinion by the Supreme Court.

The intrinsic challenge with this alien approach becomes obvious when due process rights are considered.²³⁸ The approach is not impossible and the US has plenty of detail regulations by statutes but it is questionable if such a contemptuous issue should be regulated in this way considering long-term repercussions for the legal system including how to integrate this new body of law with other areas of law and how to create a mechanism to update the regulation and ensure continuous evolution.

5.2.9 European Style International Jurisdiction

The European jurisdictional regime²³⁹ has been a great success by integrating jurisdiction in the EU and Keller²⁴⁰ propose to adopt a European style of US regulation for international jurisdiction. The thought is to create a separate set of rules for international jurisdiction - this will both create a cohesive system for the exercise of international US jurisdiction and pave

²³⁶ *Id.* at 630.

²³⁷ See Note: A “Category-Specific” Legislative Approach to the Internet Personal Jurisdiction Problem in U.S. Law, 117 Harv. L. Rev. 1617 (2004).

²³⁸ *Id.* at 1636-1638.

²³⁹ The European system is based on the Brussels Convention of 1968 and the Lugano Convention of 1988. The Brussels Convention was superseded by the Brussels Regulation in 2000 (Regulation 44/2001 (EC)).

²⁴⁰ Mortiz Keller, *Lessons for the Hague: Internet Jurisdiction in Contract and Tort Cases in the European Community and the United States*, 23 John Marshall J. Of Comp. & Info. Law 1 (2004).

the way for a strong international integration driven by a European-American understanding.

The differences in the political-legal systems are, however, so profound that the prospect of a wholesale harmonization of jurisdictional rules remains implausible and unlikely without fundamental changes to the systems.²⁴¹ The intra European jurisdictional regime was created within the political and legal framework of these mainly civil law systems with a tradition of a strong reliance on the legislator.

The challenge in of adopting a European style international jurisdictional regime would go beyond applying a different set of rules to a set class of cases but it would deprive the remaining domestic jurisdictional law of important case law for the continuing development of the doctrine.

Fragmenting jurisdictional doctrine would create a number of challenges in the legal system. Furthermore, it is difficult to motivate why the US system should unilaterally reform its rules for cases with an international component. It is noteworthy that foreign parties are not discriminated against in the current system - it has even been suggested that the liberal enforcement of foreign judgments, due to US courts use of comity and not reciprocity, is to the detriment of US bargaining power in international negotiations.²⁴²

Continuing work on international integration will be useful and the negotiated, but not signed, Convention on Choice of Court Agreement is a modest but important step. Future negotiations will probably continue in a piecemeal fashion and address specific situation where there is some common ground and prospects to reach a compromise.

5.3 Internet Contracts

5.3.1 Introduction

The main challenge with Internet contracts is to implement the traditional contract process on the Internet. The lack of the means to conclude a contract by a written signature is a challenge – after all, signing at the dotted line is well established for concluding a contract and no comparable electronic equivalent has emerged yet. Another challenge is the buyers' frequent ignorance of contract terms and the omission to take part of the terms may even be rational at times.

²⁴¹ See e.g. one description of the differences of courts and legislators in Tapio Puurunen, *The Judicial Jurisdiction of States over International Business-to-Consumer Electronic Commerce from the Perspective of Legal Certainty*, 8 U.C. Davis J. Int'l L. & Pol'y 133, 243 (2002).

²⁴² Adler & Zarychta (2006) at 7.

These and other shortcomings create deficiencies in the current Internet contracting undermining the contract process. This challenge is unfortunate and may restrain all forms of e-commerce. Four selected approaches to this challenge are discussed below.

5.3.2 Virtual Representation

The doctrine of virtual representation has emerged in the legal debate as a prominent modern theory. The theory is somewhat abstract but it contends that others of the same class may represent a party to a contract. Consent is consequently constructed by trusting other individuals in the same situation to take part of the terms and, if needed, seek legal remedies – assent by representation.²⁴³

The theory is in fact quite old and was originally developed in the 18th century to excuse the disenfranchisement in the UK.²⁴⁴ The theory was developed, and is still used, for probate cases regarding representation of minors, unborn, or unknown.²⁴⁵ It has also been used in civil procedure to bind persons not a party to a suit to its judgments.

One danger with the virtual representation argument is that it can easily be used to justify denial of valid claims, such to oppose suffrage and deny voting rights from the propertyless.²⁴⁶

Another approach to negotiations of contract terms, for both commercial and consumer relations, is to rest on the mass-market concept and ignore any real negotiations but the customer's selection among competing offers and terms is the only means of negotiations.²⁴⁷ It would presume weak, if any, policing of terms and it may be considered something of market anarchy.

²⁴³ See e.g. Clayton P. Gillette, Rolling Contracts as an Agency Problem, 2004 Wis. L. Rev. 679, 684.

²⁴⁴ Ashira Pelman Ostrow, *Dual Resident Voting: Traditional Disenfranchisement and Prospects For Change*, 102 Colum. L. Rev. 1954, 1961 (2002)

²⁴⁵ The traditional concept is still used, see e.g. Valerie J. Vollmar, *The Oregon Uniform Trust Code and Comments*, 42 Willamette L. Rev. 187, 198, 210-211, 230-231 (2006); Lynn Foster, *The Arkansas Trust Code: Good Law for Arkansas*, 27 U. Ark. Little Rock L. Rev. 191, 210-211 (2005); David F. Powell, *The New Florida Trust Code, Part 1*, 80-Aug Fla. B. J. 24, 28 (2006).

²⁴⁶ See e.g. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto Era*, 94 Cal. L. Rev. 1323, 1357-1358 (2006).

²⁴⁷ Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Policing of Standard Form Contracts*, 7 J. Small & Emerging Bus. Law 393, 417-19 (2003).

5.3.3 Improvements to Disclose of Terms

There have been a few proposals on how to improve contracting with delayed or disjointed disclosure of contract terms such as the case with shrinkwrap and browsewrap contracts. The “template notice” proposal by Friedman requires the seller to provide information about the most important contract terms during the sales process and where to find the full terms.²⁴⁸ The proposal aims at providing adequate notice of the terms along with good presentation of these. The proposal also includes a reasonable expectations requirement to the deferred terms.²⁴⁹

The proposal would improve contracting with delayed disclosure of terms by addressing the weaknesses in notice and predictability but the main virtue of the proposal is to improve the contracting process.

It may, however, be even more useful to implement the proposal through a general requirements test and let the courts take care of implementation.

5.3.4 Reasonably Communicated Test

The “reasonably communicated” test is a proposed two-pronged test to address notification of a forum selection clause in consumer clickwrap and browsewrap contracts.²⁵⁰ The requirement of adequate notice is held as a threshold question before a court considers enforcement.

The test was developed by courts considering forum selection clauses for cruising passenger tickets and has been used in some other situations.²⁵¹ Reasoning from a variety of sources including the Supreme Court cases *Bremen* and *Carnival* supports the test.²⁵² It does not alter or limit the individual’s duty to read the terms.

In its original version, the first prong addresses the physical characteristics of the ticket and how the terms are presented. The second prong considers the customer’s ability to become meaningfully informed about the terms such as how familiar the person is with the ticket, time and inducement to study the terms, and if there are measures outside of the ticket drawing attention to the terms.²⁵³

Only in a few cases have the notice of the terms been considered for browsewrap and clickwrap forum selection cases but this test can clearly be

²⁴⁸ Stephen E. Friedman, *Improving the Rolling Contract*, 56 Am. U. L. Rev. 1, 2, 12-15 (2006),

²⁴⁹ *Id.* at 43-45

²⁵⁰ Kaustuv M. Das, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the ‘Reasonably Communicated’ Test*, 77 Wash. L. Rev. 481.

²⁵¹ *Id.* at 492-496.

²⁵² *Id.* at 486-489.

²⁵³ *Id.* at 493-494,

adapted to the Internet contracting. The test would balance the use of forum selection clauses and requires the website operator to make a credible effort to inform the user.

5.3.5 Terms of Use & Battle of Electronic Forms

Lemley has identified the emerging threat of enforcement of certain browsewrap contracts, in particular “Terms of Use” posted on websites.²⁵⁴ He notes that the courts have been reluctant to enforce browsewrap contracts against individuals but willing to do so against corporations.²⁵⁵ Continuing enforcement of these contracts may put companies in a difficult situation. Employees may, on behalf of the company, enter in to a large number of contracts every day and it is likely there are overlapping and conflicting provisions.

The problem can be traced back to the *ProCD* opinion and the erosion of assent. The problem is further compounded by the courts tendency to apply a property/trespass interpretation of browsewrap agreements. The browsewrap contract is compared with a trespass sign but such a sign is not a contract but only a notice - the trespass sign is not effective as a contract but only because law protect private land.²⁵⁶ The simple solution to this problem is for courts to refrain from enforcing browsewrap contracts.

Even if browsewrap contracts would not be enforced is there the prospect of a looming battle of electronic forms by use of clickwrap contracts. Lemley suggest solve this challenge with the same model as how the “battle of the forms” problem with standard forms is tackled in UCC.²⁵⁷ The solution was to allow proposed terms between merchants to become part of the contract unless it was a material alteration. It would be preferred if this was formally incorporated in the UCC in a revision.

²⁵⁴ Mark A. Lemley, *Terms of Use*, 91 Minn. L. Rev. 459 (2006).

²⁵⁵ *Id.* at 472, 476.

²⁵⁶ *Id.* at 468-472.

²⁵⁷ UCC § 2-207.

6 Fundamental Legal Issues

6.1 Introduction

Some legal issues of a more profound quality and a few selected and urgent issues with a focus on contract law and economics is discussed below, These are all fundamental questions with an impact on Internet contracting or other legal issues.

6.2 Demarcation

It is apparent, even with the limited history of the Internet, it is desirable to limit the scope of Internet issues subject to litigation. The problem is not an overly litigation happy cadre of consumers but the courts consider in some cases issues they should not be concerned with.

The courts should specifically stay clear of legal action, beyond existing law, regarding publicly available information. It would be desirable if the courts would even refuse to enforce contractual terms regulating common access and use of information available to the public. The appropriate means to control publication of information is clearly by existing intellectual property law.

Website owners can limit and control access to information easily by technical means and the question about use of links in *Ticketmaster* and *Cairo* is, for example, should simply not be subject to legal wrangling but should be addressed by the website owner on a technical level.

It is imperative to limit the involvement of the legal system both the sake of the continuing development of the Internet and on account of economics. There is a danger if the legal system offers an alternative to carefully and skillfully built websites. Too eager involvement by the courts may also develop into an expensive venture and to tie up precious resources of the legal system addressing issues that are better addressed by other means.

6.3 Contract Law

Transplanting contract law to the Internet is an issue of great significance and it will be a tragedy if contracting on the Internet is part of and a seamless instance of contract law. Contract law is one of the most important legal institutions in the modern society and a requirement for a functioning market economy - the principles of contract law ought to be held sacred and its principles revered and defended.

Maintaining contract law as a unified legal regime is of utmost importance and discrepancies would be detrimental to the Internet environment and the cohesiveness of the entire legal system. The legislators have taken action to address this issue by statutes mandating the application of contract law in Internet contracts, such as UETA and ESIGN, and the courts have repeatedly upheld browsewrap and clickwrap contracts.

The eagerness to ensure a proper and expeditious implementation of contract law on the Internet may have led to some unbalances due to excessive weight on certain aspects of the contracting process - a correction is desirable. It is for instance understandable that the duty to read contract terms has to be upheld. A failure to require that would, in effect, make adherence to contracts optional and defeat the purpose of the contract as a legal instrument but that postulate does not mean that it is impossible, undesirable, or not prudent to require a certain standard on how the terms are communicated.

6.3.1 Principles of Contract Law

Driven by a willingness to embrace the use of the contracts on the Internet has the contract requirements in some browsewrap cases been lowered to such a low level that the principles of contract law is jeopardized. The contract has been trivialized by upholding browsewrap contracts with miniscule requirements on adequate notice of terms and no requirement of consent to the terms. The consequence is that hidden unilateral declarations have been given the status of a contract.

The courts may have been seduced by a combination of extending an already questionable interpretation of contract law in the form of shrinkwrap contracts together with an improper and incorrect property law analogy.

There is good reason, in general, to be skeptical to contracts without an exchange of goods or services for compensation or some other mutual benefit. There is no mutual benefit to many browsewrap contracts and the only benefit to enter into the contract is, most often, access to publicly available information.

It appears to be common for courts to accept clickwrap consent *prima facie* based on an *e contrario* reasoning on how the standard websites works and that is unfortunate. The reasoning goes like this: the buyer agreed to the terms by clicking on an "I agree" button and it is ascertained because the website would not allow the user to proceed without agreeing. But because there are glitches in software and websites are most often changing over time is it desirable to require the website owners to produce specific evidence of each contract. This will further create an incentive for the website owners to design good systems that collect the appropriate information.

The artificial modification of the time of contract in shrinkwrap contracts is troubling foolery with the principles of contract law. The reinterpretation of the contracting process conducted in *ProCD* contradicts contract law and common understanding of the concept.

6.3.2 Participation of Contracting Parties

Contracting is a cooperative process and there ought to be more incentives for an active process for Internet contracts. For instance, the terms should to be presented in a meaningful way. The “reasonably communicated” test is an example of a standard developed by the courts and provides the means to evaluate the presentation of terms.

The volume of the text, labeling of terms, and other parts of the presentation are important factors of a proposed contract and it is not reasonable with terms presented over a large number of web pages such over ninety screens as reported in the *Scarcella* case. Allowing such practices is an invitation to deceitful practices and the *Specht* opinion addressed some of these issues in a sensible for consumer browsewrap contracts.

The objective should be an immediate presentation of the terms. A minimum requirement should be to require the user to scroll through the full text of the contract terms before proceeding with the transaction and the user should be required to indicate assent by checking a checkbox, or comparable means, for any material terms such as a jurisdiction selection clauses.

Such requirements measures could be construed as hostile to the market and the freedom of contract but it may on the other hand be viewed as a measure to ensure a properly working market and instill confidence in the market.

These kinds of requirements would encourage website owners to create effective user interfaces by other means than to produce verbose terms. This development would also counteract the current tragic culture of commonly ignoring the terms presented before enter into contract.

6.3.3 The Signature

The personal signature has played an important role in contracting. The act of writing the signature “on the dotted line” is a very fortunate part of the process by defining the exact time of agreement to the contract and serves as a definitive written record.

There is currently nothing equivalent to the signature for Internet contracts. Modern crypto technology offers plenty of options but any solution relying a specific technology creates a problematic reliance. It is unlikely a digital pen will be implemented on keyboards and users are generally not

comfortable to write a signature with the mouse. Maybe the online equivalent of the signature will be a thumbprint made possible by widespread use of finger print readers in the future.

6.3.4 Predictability

The contracting process on the Internet would be enhanced by higher predictability of how and where terms are presented. It is, for instance, completely predictable to find details on limitations on use of software in the deferred shrinkwrap terms but the product usage type is commonly identified on the box or in the title of the product for Internet sales - student, home, pro, or commercial.

Only terms of lower importance should be placed in a less accessible location such as shrinkwrap terms, this information includes information to the customer on how to interact with the company, support details and limitations, and time limits. Materials terms should on the other hand not be included in the less accessible terms.

The “template notice” proposal address this aspect and could, in a modified form, be a constructive improvement. One pragmatic approach to promote diligent contracting practices is to void all contracts with clauses presented in deceitful manner. This was not the case in *Desfontes* and it hard to see any reason why another merchant should not try to slip a similar clause into a contract.

6.4 Integrity of the Legal Disciplines

There are instances of creative use of the law by applying regulation on situations outside the intended scope of the regulation, such as the use of artificial contracts instead of seeking remedy from intellectual property law. Another case is the application of trespass logic by considering the website a piece of property.

The analogy is a useful tool in legal method but the integrity of specific law is important to observe. The possible blurring of carefully crafted definitions of legal constructs may cause disintegration beyond the realm of Internet contracts and jurisdiction.

A related problem is the attempts to merge different aspects of law applicable to the Internet and one example of this is the attempt to replace copyright law with the software licensing in UCITA.²⁵⁸

²⁵⁸ Courtney Lytle Perry (2005) p. 549-550.

The Internet is a new and emerging area and it is bound to be challenging to apply the law but that is a poor excuse for stretching the application and meaning of legal disciplines.

6.5 Attempts to Solve Legal Issues with Technology

There are occasionally attempts to promote specific technology solutions to solve jurisdictional issues on the Internet, for instance by utilizing geographic location technologies.²⁵⁹ This would surely simplify matters but such an endeavor is based on a false premise and it is a decisive mistake to make any legal construct dependent upon a specific technology.

There have been great advances with geographic location technology over the last few years and proponents for using it in the legal context points to the higher level of accuracy and argues that this technology does not have to be waterproof to be useful from a legal point of view.²⁶⁰ The real problem is not lack of perfection but the risk of radical changes related to the technology.

The fundamental problem with this approach is resistance to accept the Internet as a borderless user space. Any solution contradicting the nature of the environment where it operates is unfortunate and may prove problematic in the future. Secondly, this particular technology can be circumvented and the techniques undermining it are not used very commonly currently but there is no guarantee it will not gain widespread acceptance tomorrow.²⁶¹ There are also already corporate deployments with such measures for completely legitimate reasons.²⁶² Use of geographic location may in fact create an incentive to evade it and speed up its demise as a useful measure.

If this kind of technology would be used actively in a legal context is it difficult to imagine there would not eventually be a punishment for merchants not using it, for instance by considering lack to deploy geographic location technology as a decision to agree to any and all jurisdictions. This would clearly create a heavy burden on the merchant.²⁶³

Any legal solution based on a particular technology can be rendered useless on short notice. Technology has evolved substantially over the years and

²⁵⁹ The technology is also referred to as geo-location and GeoIP and the technology attempts to identify the physical location of a person accessing a website.

²⁶⁰ Dan Jerker B. Svantesson, *Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet*, 23 John Marshall J. of Comp. & Info. Law 101, 111-114 (2004).

²⁶¹ E.g. by use of a proxy server or tunneling.

²⁶² E.g. point-to-point VPN connections in combination with proxy servers.

²⁶³ Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. Penn. L. Rev. 1951, 1962 (2005).

will presumably continue to evolve and lawyers may not, ultimately, be the best professional group to predict technological development.²⁶⁴

²⁶⁴ Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207, 207.

7 Conclusion

7.1 Introduction

The US is a good environment to explore an emerging legal area such as jurisdiction on the Internet. The courts' relatively high latitude to innovate in undefined legal issue is advantageous and internal cases have emerged and provide a decent body of opinions.

The most effective manner to handle Internet jurisdiction is by a forum selection clause in a clickwrap contract. The only issue of some uncertainty in this situation is the notice of the terms. Beyond this conclusion the situation is uncertain, both regarding the jurisdictional and contractual components.

Consumer protection is mainly addressed on the state level and sometimes enforced beyond the boundaries of the state by the power of assuming or denying jurisdiction.

The occasional tendency for overreach using certain regulation is problematic and should be avoided by either a more clearly and narrowly defined application, or by a more stringent application of the law by the courts.

The legal system should not under any circumstances intervene in matters better left addressed by technical design and implementation. Invasive exercise of court power risks stifling innovation and squandering resources by holding up the legal system.

Technology will surely continue to develop and some aspects may be useful in the legal context but a legal vehicle should not be built upon specific technologies. Technology is continuously changing and if replaced, such legal solutions will become equally obsolete. The law should be based on principles and reasoning. These may change over time but not at the pace of Moore's Law.²⁶⁵

7.2 Jurisdictional Doctrine

Jurisdictional doctrine has evolved by Supreme Court opinions over a long period of time and increased mobility has served as a great catalyst in the

²⁶⁵ Moore's Law holds that the number of transistors on a chip doubles every 24 months. This prediction is obviously not sustainable indefinitely, but has proven surprisingly durable since its enunciation in 1965. The observation is attributed to Intel's co-founder Gordon E. Moore.

development - there is no reason to believe the development will not continue.

There is uncertainty regarding how to apply current jurisdictional doctrine in cases on the Internet. The sliding scale test of the *Zippo* opinion has an obstructing effect on further development of the doctrine and a detrimental effect on the reasoning of the courts - the test should be abandoned.

Modifications to the specific jurisdiction doctrine should be considered in order to adapt it to the Internet environment. The requirement of only a causal relationship between the contacts and the controversy should be elevated to proximate cause. This measure would limit the exercise of jurisdiction slightly and exclude cases on the fringe. A reformed minimum contacts test could be useful for Internet situation by embracing a combination of the targeting approach and widening of the courts' inquiry, similar to the examination conducted in the *Asahi* case. A broader inquiry may include business and marketing measures as well as implied and actual knowledge.

The use of technical measures to limit the jurisdictional exposure by a party tendering contracts on the Internet should be considered a legitimate means taken into account when contesting jurisdictions as a legitimate means to limit jurisdiction, but it should not develop into a requirement to escape purposeful availment.

The minimum contacts requirement has traditionally focused on intent but there are good reasons to introduce an objective effect based consideration. It is clearly a principal question and the decision will determine which party will carry the burden of proof and thus lose in case of uncertainty and suffer for unintended consequences. It is advisable to maintain intent as the primary focus but introduce an objective element such as a "reasonable user" test in parallel to the intent inquiry. Another option is to purposefully maintain uncertainty and make a determination on an individual basis, basically splitting the burden and guard against abuse from either party.

7.3 International Jurisdiction Considerations

Cases with an international element have played an instrumental role in the development of US jurisdictional doctrine by accentuating the jurisdictional issues.

Integrating international situations into the doctrine has been valuable and virtually eliminated the risk of national bias and discrimination against parties from other countries but it has also created a barrier against developing a different set of rules for international situations as part of negotiating an international jurisdictional regime. The successful integration of international aspects into the doctrine together with enforcement based on

comity may actually have placed the United States at a disadvantage in international negotiations.

Extensive international harmonization is unlikely, but the negotiations will probably continue to focus on narrow and well-defined aspects of jurisdiction.

International commitments should be carefully coordinated with the UCC to avoid disjointed situations like between UCC and CISG.

7.4 Contracts

The implementation of contract law on the Internet needs an adjustment and should be balanced by a strict adherence and respect for traditional principles of contract law.

The two influential cases *ProCD* and *Register.com* stand out as unfortunate with long-term consequences. The two verdicts corrected unfair practices and produced a fair outcome, but did so on incorrect legal grounds. The court makes an impressive argument in the *Register.com* opinion, but it still created an unfortunate precedence. The effects of the *ProCD* opinion appear to have been moderated lately and will hopefully be followed by more focus on the notification aspect of the shrinkwrap terms.

The courts have exercised a healthy skepticism towards browsewrap contracts with consumers, but enforcement towards commercial entities is generally accommodated. These artificial contracts are in fact unilateral declarations, and should not be upheld as contracts.

Clickwrap contracts are usually upheld, including forum clauses. Improvements can be made on the standard for the presentation of contract terms and labeling. The buyer should continue to have an uncompromised duty to read the terms, but the contracting process should not invite ignoring taking part of the terms.

The courts appear fairly lax about the notice requirement and this is unfortunate. Manifest assent should be required for material terms and such a standard would automatically limit the scope and usefulness of browsewrap contracts and greatly improve online contract negotiation.

The legislators have done a good job of adapting to some specific issues of contract law for the digital playing field by initiatives such as UETA and E-SIGN.

Continuing development of UCC should be prioritized so it will maintain its position and relevance notwithstanding the UCITA fiasco. It is possible, but unlikely, that Congress would place the Internet under exclusive federal jurisdiction.

Bibliography

- Jean Braucher, *Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms, Especially for Software*, 2004 Wis. L. Rev. 753 (2004).
- Jean Braucher, *The Failed Promise of the UCITA Mass-market Concept and its Lessons For Policing of Standard Form Contracts*, 7 J. Small & Emerging Bus. L. 393 (2003).
- William S. Dodge, *Teaching the CISG in Contracts*, 50 J. Legal Educ. 72 (2000).
- Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 Am. J. Comp. L. 233 (2006).
- C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 Ind. L.J. 601 (2006).
- Lynn Foster, *The Arkansas Trust Code: Good Law for Arkansas*, 27 U. Ark. Little Rock L. Rev. 191 (2005)
- Stephen E. Friedman, *Improving the Rolling Contract*, 56 Am. U. L. Rev 1 (2006).
- Alfred Hill, *Choice of Law and Jurisdiction in The Supreme Court*, 81 Colum. L. Rev. 960 (1981).
- Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 Wis. L. Rev. 679 (2004)
- Moritz Keller, *Lessons for The Hague: Internet Jurisdiction in Contract and Tort Cases in The European Community and the United States*, 23 John Marshall J. of Comp. & Info. Law 1 (2004)
- Mark A. Lemley, *Terms of Use*, 91 Minn. L. Rev. 459 (2006).
- Fred H. Miller, *International Legal Developments and Uniform State Laws: A Radical Proposal?*, 60 Consumer Fin. L.Q. Rep. 402 (2006).
- Kathryn I. Murtagh, *UCC Section 2-719: Limited Remedied and Consequential Damage Exclusions*, 74 Cornell L. Rev. 359 (1989).
- William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 Hastings L.J. 251 (2006).
- Ashira Pelman Ostrow, *Dual Resident Voting: Traditional Disenfranchisement and Prospects For Change*, 102 Colum. L. Rev. 1954 (2002).
- David F. Powell, *The New Florida Trust Code, Part 1*, 80-Aug Fla. B. J. 24, (2006).
- Recent Cases: Diversity Jurisdiction - Definition of Corporation Under 28 U.S.C. § 1332(c) - Seventh Circuit Holds That the Term "Corporation" Is Entirely State-Defined - Hoagland v. Sandberg, Phoenix & von Gontard, P.C.*, 385 F.3d 737 (7th Cir. 2004), 118 Harv. L. Rev. 1347 (2005).
- Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto Era*, 94 Cal. L. Rev. 1323 (2006).

- Dan Jerker B. Svantesson, *Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet*, 23 *John Marshall J. of Comp. & Info. Law* 101 (2004).
- Valerie J. Vollmar, *The Oregon Uniform Trust Code and Comments*, 42 *Willamette L. Rev.* 187 (2006).
- James J. White, *Contracting Under Amended 2-207*, 2004 *Wis. L. Rev.* 723 (2004).
- William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 *Hastings Bus. L.J.* 1 (2006).

Table of Cases

- ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 142 F. Supp. 2d 703 (2003).
- American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 797 P.2d 477 (1990)
- Arizona Retail Systems, Inc. v. Software Linc, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993).
- Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000).
- Bowers v. Baystate Technologies, Inc.*, 320 F.3d 1317 (Mass. 2003)
- Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998).
- Caspi v. Microsoft Network, L.L.C.* 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).
- Compuserve, Inc. v. Patterson*, 937 F. Supp. 161, 163 (D. Conn. 1996).
- GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343, 339 U.S. App. D.C. 332 (D.C. Cir. 2000).
- Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).
- Inset Systems, Inc. v. Instruction Set, Inc.*, 89 F.3d 1257 (6th Cir. 1996).
- Nissan Motor Co. v. Nissan Computer Corp.*, 89 F. Supp. 2d 1154 (C.D. Cal. 2000).
- Panavision International, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998).
- ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).
- Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991).
- Vault v. Quaid Software, Ltd.*, 655 F. Supp. 750 (E.D. La. 1987).
- Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Penn. 1997).
- Willendson v Forsoket*, 29 Fed Cas 1283 (DC Pa 1801) (No 17,682).