Are We "There" Yet? An Analysis of Canadian and European Adjudicatory Jurisdiction Principles in the Context of Electronic Commerce Consumer Protection and Policy Issues

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THE GLOBAL NATURE OF THE INTERNET and the growth of electronic commerce (e-commerce) raise a plethora of legal issues. While, on the one hand, both consumers and businesses can benefit from the novel opportunities of the electronic marketplace, on the other, they are also faced with the unique impediments that the internet presents. The change of the face of the marketplace through the advent and rise of electronic commerce raises the question whether existing legislation is adequate to meet the basic needs of today's online consumers without preventing particularly small and mid-sized businesses from exploring new business prospects.

This article analyses if, and how, Canadian and European legislatures and judges have approached their goal of promoting e-commerce by providing a reliable set of rules that regulates one of the most vital subjects in a business-to-consumer (B2C) e-commerce transaction: adjudicatory jurisdiction, or, which court has the power to hear a conflict that arises out of an unsuccessful e-commerce transaction. Without a sound framework that takes into account the unique aspects of business taking place in a world without borders, consumer confidence in e-commerce is unlikely to grow, and the online marketplace cannot reach its fullest potential. Therefore, both the consumer and the online merchant have to be provided with legal certainty regarding jurisdictional principles governing internet transactions.

LE CARACTÈRE MONDIAL DE L'INTERNET et la croissance du commerce électronique soulèvent maintes questions juridiques. Si les consommateurs et les consommatrices ainsi que les entreprises peuvent bénéficier des nouvelles possibilités qu'offre le cybermarché, l'un et l'autre sont confrontés aux obstacles uniques que présente l'internet. La transformation des marchés avec l'avènement et le développement du commerce électronique provoque une remise en question de l'efficacité des lois existantes à répondre aux besoins fondamentaux de la clientèle actuelle en ligne sans nuire aux entreprises, petites et moyennes, qui cherchent à exploiter de nouvelles avenues commerciales.

L'article fait un survol de la législation et de la jurisprudence canadiennes et européennes en cherchant à déterminer leur efficacité à promouvoir le commerce électronique en fournissant un ensemble de règles fiables pour la réglementation les questions clés liées aux rapports entre l'entreprise et les consommateurs et consommatrices dans le monde du cybercommerce : la compétence juridictionnelle ou le tribunal autorisé à entendre un différend résultant d'une opération cybercommerciale infructueuse. Sans un cadre de référence bien défini, qui tienne compte des particularités du commerce dans un monde sans frontières, il est peu probable que la confiance des consommateurs et consommatrices se développe. En conséquence, le cybermarché ne sera pas exploité à pleine capacité. Il est donc essentiel que les consommateurs et consommatrices ainsi que les cybercommerçants disposent de certitudes juridiques quant aux principes juridictionnels qui régissent les opérations commerciales effectuées par internet.

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> The unique nature of the Internet highlights the likelihood that a single actor might be subject to…regulation by states that the actor never intended to reach and possibly was unaware were being accessed. Typically, states' jurisdictional limits are related to geography; geography, however is a virtually meaningless construct on the Internet.[1]

1. INTRODUCTION

ON 16 SEPTEMBER 2005 THE ONTARIO COURT OF APPEAL and the British Columbia Supreme Court rendered their long-awaited decisions in two internet adjudicatory jurisdiction cases.[2] Both cases concerned allegedly defamatory statements, which were published in American newspapers, and which were also available on the newspapers' websites. The question before the courts was whether both Ontario's and British Columbia's judiciaries could assume adjudicatory jurisdiction over the respective out-of-province defendant.

This issue, however, is not only relevant for internet defamation cases, but it also relates to online commercial publications and transactions conducted on the internet. Generally, the electronic commerce phenomenon has vastly increased over the last years, and therefore has become a matter of considerable concern, given "the Internet's worldwide, multi-jurisdictional reach."[3] The online world avails businesses and consumers of the ease of selling or buying products and services within an unlimited geographic market, but it is this great advantage flowing from e-commerce that also poses major challenges to businesses, consumers, and policy makers.[4] Its borderless and virtual nature distinguishes the

1. *American Libraries Association. v. Pataki*, 969 F. Supp. 160 (SD NY 1997), available at ACLU, <http://www.aclu.org/privacy/speech/15547lgl19970620.html>.
2. *Bangoura v. Washington Post* (2005), 258 D.L.R. (4th) 341 (Ont CA), <http://www.ontariocourts.on.ca/decisions/2005/september/C41379.htm> [*Bangoura*]; *Burke v. NYP Holdings, Inc. (c.o.b. New York Post)*, 2005 BCSC 1287, <http://www.courts.gov.bc.ca/Jdb-txt/SC/05/12/2005BCSC1287.htm> [*Burke*].
3. *Bangoura, ibid.* at para. 48.
4. Roger Tassé & Maxime Faille, "Online Consumer Protection: A Study on Regulatory Jurisdiction in Canada," prepared for the Office of Consumer Affairs, Industry Canada (July 2001), <http://www.ulcc.ca/en/cls/index.cfm?sec=4&sub=4n&print=1> at Introduction [Tassé & Faille, "Online Consumer Protection"].

internet from the more traditional methods of purchasing goods or services and, therefore, defies many of the traditional, border-confined consumer protection rules, which were designed primarily for non-virtual conventional paper-based transactions.

Particularly when transacting in such a borderless world, consumers might be concerned about possibly losing the benefits of the protection they have been used to when purchasing something through the use of traditional media within their jurisdiction, even if they are not entirely sure what those benefits are. Similarly, online businesses might be alarmed by the probability that they might be expected to be familiar with and to comply with "a patchwork of regulatory schemes and varying requirements of all the jurisdictions in which their various clients or potential clients may be located."[5] The discomfort which arises out of this legal uncertainty undermines the confidence in the internet as a new and efficient mode of conducting business for both parties.

In the "physical" (or offline) world, it is a long established and general principle that the "laws of a particular jurisdiction normally only have effect within the boundaries of that jurisdiction."[6] They are limited to the "land mass comprising the particular country, province, state, municipality or other substate entity under the control of such a government."[7] The internet, however, presents fundamental challenges to such a geographical or political analysis. Its boundaries are "purely virtual," and thus it calls into question the applicability of geographically based jurisdiction conceptions to the online world.[8]

Since the federal and provincial public policy trend in Canada has been to encourage the growth of e-commerce,[9] and with cross-border transactions increasing, a legal framework that supports commercial transactions on the internet and that provides consistent principles that "lead to predictable results regardless of the jurisdiction in which a particular buyer or seller resides"[10] has become necessary. The needs and interests of consumers and businesses have to be properly balanced, and one of the key issues in this regard is to establish "a practicable and reasonably predictable set of rules to determine what jurisdiction's laws will apply to consumer contracts and what courts will have the authority to adjudicate and enforce disputes."[11] In 2004 an understanding was reached among federal, provincial, and territorial ministers responsible for consumer affairs to promote consumer protection in electronic commerce, and at the same time greater harmony was called for through the implementation of model legislation.

5. *Ibid.* at Introduction.
6. Chris Reed, *Internet Law: Text and Materials*, 2d ed. (Cambridge: Cambridge University Press, 2004) at p. 217 [Reed, *Internet Law*].
7. George S. Takach, *Computer Law*, 2d ed. (Toronto: Irwin Law 2003) at p. 648 [Takach, *Computer Law*]. See also Marvin Baer *et al.*, *Private International Law in Common Law Canada: Cases, Text and Materials* (Toronto: Emond Montgomery, 2003) at p. 14 [Baer *et al.*, *Private International Law in Common Law Canada*]: "Every nation possesses an exclusive sovereignty and jurisdiction within its own territory."
8. Reed, *Internet Law*, *supra* note 6; see also John Sullivan & Daniel Tsai, "The Developing Law of Internet Jurisdiction," (2003) 61:4 The Advocate 521 [Sullivan & Tsai, "Developing Law of Internet Jurisdiction"].
9. Canada's Electronic Commerce Strategy outlines "initiatives designed to establish Canada as a world leader in the adoption and use of electronic commerce. Working in close collaboration with the private sector, the federal government has concentrated on creating the most favourable environment possible in areas which are critical to the rapid development of e-commerce." See Industry Canada, "The Digital Economy in Canada," <http://e-com.ic.gc.ca/epic/internet/inecic-ceac.nsf/en/home>.
10. Consumer Measures Committee & Uniform Law Conference of Canada, "The Determination of Jurisdiction in Cross-Border Business-to-Consumer Transactions: A Consultation Paper" (2001), <http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca01862e.html> ["Consultation Paper"].
11. Tassé & Faille, "Online Consumer Protection," *supra* note 4.

Thus, this article analyses if, and how, Canadian and European legislatures and judges have approached their goal of promoting e-commerce by providing a reliable set of rules that regulates one of the most vital subjects in a business-to-consumer (B2C) e-commerce transaction: adjudicatory jurisdiction, that is, which court has the power to hear a conflict that arises out of an unsuccessful e-commerce transaction. Without a sound framework that takes into account the unique aspects of business taking place in a world without borders, consumer confidence in e-commerce is unlikely to grow, and the online marketplace cannot reach its fullest potential. Therefore, both the consumer and the online merchant have to be provided with legal certainty regarding jurisdictional principles governing internet transactions.

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2. CANADIAN ADJUDICATORY JURISDICTION PRINCIPLES AND INTERNET TRANSACTIONS

WHEREAS A COURT USUALLY ONLY HAS JURISDICTION within a specific and therefore limited geographic area, such as a province, a country, or a state, in the world of the internet, no such geographic boundaries exist.[12] As a consequence, online businesses that provide international services face the prospect that they might be "hauled into a courtroom in far off jurisdictions."[13] Similarly, a consumer's confidence when purchasing goods or services online is frequently undermined by the concern of possibly not having recourse to his or her local court system in the event of a dispute.[14] The worldwide accessibility of websites thus raises the question whether the traditional theories of jurisdiction adapt to a world "where geography no longer matters."[15]

2.1. General Adjudicatory Jurisdiction Principles[16]

2.1.1. General Principles in Case of a Forum Selection Clause

At the outset, adjudicatory jurisdiction relates to "the power of [a] court to hear and determine a case, and in particular, whether [a] court has legal authority over a defendant's person."[17] Since the sovereign was given the right to control any person physically present in the territory under the theory of territorial sovereignty, English courts at common law were entitled to assume jurisdiction over any person

12. Sullivan & Tsai, "Developing Law of Internet Jurisdiction," *supra* note 8 at p. 521. Barry B. Sookman, *Computer, Internet and Electronic Commerce Law*, looseleaf (Toronto: Carswell, 1989) at pp. 11-13 [Sookman, *Computer, Internet and Electronic Commerce Law*].
13. Michael Geist, *Internet Law in Canada*, 3d ed. (Ontario: Captus Press, 2002) at p. 41 [Geist, *Internet Law in Canada*].
14. Michael Geist, "Is There a There There? Toward Greater Certainty for Internet Jurisdiction," (2001) 16:3 Berkeley Technology Law Journal 1345, <http://www.law.berkeley.edu/journals/btlj/articles/vol16/geist/geist.pdf> [Geist, "Is There a There There?" cited to Berkeley Technology Law Journal], Study commissioned by the Uniform Law Conference of Canada and Industry Canada, <http://www.ulcc.ca/en/cls/internet-jurisdiction.pdf>.
15. Sullivan & Tsai, "Developing Law of Internet Jurisdiction," *supra* note 8 at p. 521. See also Sookman, *Computer, Internet and Electronic Commerce Law*, *supra* note 12.
16. Unfortunately, a complex analysis of the various facets of the law of jurisdiction is beyond the scope of this paper. I therefore only provide an overview of the most general principles without any claim to being exhaustive.
17. Teresa Scassa & Michael Deturbide, *Electronic Commerce and Internet Law in Canada* (Toronto: CCH Canadian, 2004) at p. 451 [Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*].

present in England on whom a writ could be served.[18] Therefore, not too long ago, the common law courts held forum selection clauses "contrary to public policy" and any agreement to "oust" the jurisdiction was found void.[19]

However, as a basic principle today, parties to a contract may specify in their agreement where any arising disputes may be litigated or arbitrated.[20] Forum selection clauses are common in international commercial transactions and are generally encouraged by courts as they "create certainty and security in the transaction, derivatives of order and fairness, which are critical components in private international law."[21] The power to give personal jurisdiction to a court that it would not otherwise have rests on the equitable principle of estoppel and may be given expressly by consent[22] or by conduct.[23]

Commonly, and absent any overriding limits on judicial jurisdiction such as those established by treaties,[24] most Canadian courts give effect to choice of jurisdiction clauses, unless a "strong cause" for not doing so is shown.[25] This test was established in the English decision *The Eleftheria*[26] and "provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage."[27] Therefore, the mere existence of a jurisdictional clause is not determinative of the issue.[28] Amongst other factors, the court takes into account "with what country either party is connected, and how closely," "whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages," or "whether the plaintiffs would be prejudiced by having to sue in the foreign Court."[29]

Today, Canadian courts generally are aware of contextual circumstances and take into account social, moral, or economic matters when determining whether to uphold a forum selection clause.[30] Recent decisions also indicate that the courts now tend to consider the sophistication of the parties or any existing lack of uneven bargaining power between the parties. Moreover, the Supreme

18. Baer *et al.*, *Private International Law in Common Law Canada*, *supra* note 7 at p. 194.
19. *Ibid.* at p. 328.
20. John Swan & Vaughan Black, *Materials on Conflict of Laws*, vol. 2, coursepack (Dalhousie University, February 2005) at p. 398. [Swan & Black, *Materials on Conflict of Laws*].
21. *Z.I. Pompey Industrie v. ECU-Line N.V.* 2003 SCC 27, <http://scc.lexum.umontreal.ca/en/2003/2003scc27/2003scc27.html>, [2003] 1 S.C.R. 450 at para.20 [*Z.I. Pompey* cited to LexUM/S.C.R.].
22. The so-called "consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to jurisdictions of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments." *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, <http://www.ontariocourts.on.ca/decisions/2002/may/muscuttC35934.pdf>, (2002) 213 D.L.R. (4th) 577 (Ont CA) [*Muscutt*] at para. 19 [*Muscutt*].
23. Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws,* 6th ed. (Markham: Butterworths, 2005) at p. 11-7 [Castel & Walker, *Canadian Conflict of Laws*].
24. See, for example, the *Carriage by Air Act,* R.S.C. 1985, c. C-26, <http://laws.justice.gc.ca/en/C-26/176583.html>, sched. 1, art. 28 (1), which implements the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* , 12 October 1929, as amended by the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929*, 28 September 1955, 478 U.N.T.S. 371. Castel & Walker, *Canadian Conflict of Laws, ibid.* at p. 11-15.
25. *Z.I. Pompey, supra* note 21 at para. 20.
26. *The Eleftheria*, [1969] 1 Lloyd's Rep. 237 (PDAD) [*The Eleftheria*].
27. *Z.I. Pompey*, *supra* note 21 at para. 20.
28. "Consultation Paper," *supra* note 10 at p. 5.
29. *The Eleftheria, supra* note 26 at p. 242. For a comprehensive list of factors taken into account by the courts see Shafik Bhalloo, "Jurisdictional Issues in Electronic Commerce Contracts: A Canadian Perspective," (2004) 7:2 Computer Law Review & Technology Journal 225, <http://www.smu.edu/csr/articles/2004/Winter/Bhalloo.pdf> at p. 272 [Bhalloo, "Jurisdictional Issues in Electronic Commerce Contracts"].
30. Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 17 at p. 13.

Court of Canada has pointed out "that the unconscionability approach to exclusion and time limitation clauses should be equally applicable to forum selection."[31]

2.1.2. General Principles Absent a Forum Selection Clause

However, where there is no explicit choice of jurisdiction agreement between the parties, under the common law the assertion of jurisdiction over defendants usually is based on their presence in the territory of the forum at the time of the service or at the time that the originating process is issued, in the case of a defendant who is present then, but subsequently leaves the territory to avoid service.[32] The former concept is generally not controversial in cases where the defendant is ordinarily resident in the territory of the forum at the time of the service or regularly present there.[33] Conversely, when the defendant merely happens to be in the jurisdiction temporarily at the time that the proceeding begins, and no other connections between the action and the forum exists, the assertion of jurisdiction might be questionable. Therefore, Canadian courts have repeatedly held that, although they *could*, they *should* not claim jurisdiction and have, therefore, exercised their discretion to decline it.[34]

The most significant change in this traditional common law approach to asserting jurisdiction, however, can be seen in the development of the service *ex juris* rules.[35] Under the service *ex juris* rules, Canadian courts may assert jurisdiction over defendants in cases where they neither consent to the jurisdiction of the court, nor can be served within the territory of the forum.[36] However, the service *ex juris* rule "must respect the principle of 'order and fairness'."[37] This principle puts limits on the reach of provincial jurisdiction against an out-of-province defendant, and thus, according to the Supreme Court of Canada, requires a "real and substantial connection between the subject matter of the

31. *Z.I. Pompey*, *supra* note 21 at para. 33. See Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *ibid.* at p. 13.
32. Castel & Walker, *Canadian Conflict of Laws*, *supra* note 23 at p. 11-8. The type of jurisdiction which is based on the defendant's presence is also called "assumed jurisdiction." Prior to *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, <http://scc.lexum.umontreal.ca/en/1990/1990rcs3-1077/1990rcs3-1077.html>, 76 D.L.R. (4th) 256 [*Morguard*], "assumed jurisdiction" did not provide a basis for recognition and enforcement of foreign judgments. *Muscutt v. Courcelles*, *supra* note 22 at para. 20.
33. Castel & Walker, *Canadian Conflict of Laws*, *supra* note 23 at p. 11-19.
34. *Ibid.* at p. 11-19.
35. Swan & Black, *Materials on Conflict of Laws*, *supra* note 20 at p. 410. The regulations governing this rule are set out in provincial legislation dealing with the courts' procedure. They slightly vary among the provincial superior courts, the territorial courts, and the Federal Court, but generally can be separated into three types. See Castel & Walker, *Canadian Conflict of Laws*, *ibid.* at p. 11-19. For a comprehensive analysis of the BC Rules of Court, for example, see Bhalloo, "Jurisdictional Issues in Electronic Commerce Contracts," *supra* note 29 at p. 233.
36. Castel & Walker, *Canadian Conflict of Laws*, *ibid.* at p. 11-10.
37. Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 17 at p. 452.

action and the forum."[38]

What constitutes a real and substantial connection? Although various examples for a real and substantial connection are given in several provincial rules, these lists or categories of cases are not exhaustive.[39] Ultimately, it is left to the courts to determine whether the prerequisites are fulfilled. Alas, courts have consistently been "wrestling with giving content to the principles of order and fairness in relation to judicial jurisdiction."[40] On 29 May 2002, however, the Ontario Court of Appeal released five companion decisions considering the jurisdiction question and the substantial connection test, which might give some guidance and clarification for future decisions.

In the leading decision in *Muscutt,* the court developed a broad approach to the real and substantial connection test and established eight relevant factors:

1) the connection between the forum and the plaintiff's claim;
2) the connection between the forum and the defendant;
3) unfairness to the defendant in assuming jurisdiction;
4) unfairness to the plaintiff in not assuming jurisdiction;
5) the involvement of other parties to the suit;
6) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
7) whether the case is interprovincial or international in nature; and
8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.[41]

Notably, the Supreme Court of Canada in *Morguard* insisted that the real and substantial connection test must be a flexible, rather than a rigid test.[42] Therefore, when applying the *Muscutt* principles, one has to keep in mind that, ultimately, the assumption of jurisdiction must be guided by the constitutional requirements

38. *Morguard, supra* note 32. "This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest." *Tolofson v. Jensen,* [1994] 3 S.C.R. 1022, <http://scc.lexum.umontreal.ca/en/1994/1994rcs3-1022/1994rcs3-1022.html> at p. 1049 [*Tolofson*]. Note that the real and substantial connection test does not supplant the traditional bases of jurisdiction (*Teja v. Rai*, 2002 BCCA 16, <http://www.courts.gov.bc.ca/jdb-txt/ca/02/00/2002BCCA0016.htm>, 209 D.L.R. (4th) 148). It also does not apply in situations where the defendant is present in the jurisdiction (*Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431, <http://www.ontariocourts.on.ca/decisions/2003/february/canwestC37464.pdf>, 223 D.L.R. (4th) 627, (Ont CA)). Importantly, the real and substantial connection test only limits judicial jurisdiction under provincial law. Thus, when jurisdiction is asserted by a federal statute, it does not apply. *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92 <http://scc.lexum.umontreal.ca/en/2001/2001scc92/2001scc92.html>, [2001] 3 S.C.R. 978.

39. Castel & Walker, *Canadian Conflict of Laws*, *supra* note 23 at p. 11-12. See for example Uniform Law Conference of Canada, *Court Jurisdiction and Proceedings Transfer Act*, <http://www.ulcc.ca/en/us/1c4.cfm>, s. 10.

40. *Muscutt*, *supra* note 22; *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 60 O.R. (3d) 76 (Ont CA), <http://www.ontariocourts.on.ca/decisions/2002/march/sinclairC36590.pdf>, 213 D.L.R. (4th) 643; *Lemmex v. Sunflight Holidays Inc.* (2002), 60 O.R. (3d) 54 (Ont CA), <http://www.ontariocourts.on.ca/decisions/2002/may/lemmexC37455.pdf>, 213 D.L.R. (4th) 627; *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84 (Ont CA), <http://www.ontariocourts.on.ca/decisions/2002/may/leufkensC36006.pdf >, 213 D.L.R. (4th) 614; *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (Ont CA), <http://www.ontariocourts.on.ca/decisions/2002/may/gajrajC36992.pdf>, 213 D.L.R. (4th) 651. See Swan & Black, *Materials on Conflict of Laws*, *supra* note 20 at p. 479.

41. *Muscutt*, *supra* note 22 at paras. 76–100.

42. *Tolofson, supra* note 38; *Hunt v. T&N plc,* [1993] 4 S.C.R. 289, <http://scc.lexum.umontreal.ca/en/1993/1993rcs4-289/1993rcs4-289.html>; *Muscutt, supra* note 22 at paras. 56, 75; see Baer *et al.*, *Private International Law in Common Law Canada*, *supra* note 7 at p. 49.

of order and fairness.[43] No factor should be exclusively determinative. Rather, "all relevant factors should be considered and weighed together."[44]

Nonetheless, as accommodating as these principles might seem for determining a real and substantial connection, they were created in an offline environment and their application might, therefore, be difficult in an online context. This, however, is where my analysis turns next, and we will see how the Canadian judiciary has so far dealt with the novel challenge of internet jurisdiction.

2.2. Jurisdiction and the Internet

With the rise of transnational activities and the increase of cross-border trade, due to the ease and flexibility of modern communication means such as telephone or fax, a number of exceptions to the strict territorial principles of jurisdiction began to develop.[45] Today, Canadian courts regularly assert jurisdiction outside their territory.[46] Particularly, they are "prepared to assume jurisdiction in a number of situations where domestic actors have an impact on persons outside of Canada, and conversely where foreign actors affect persons within Canada."[47]

However, unlike previous technologies, electronic communications challenge traditional notions because of the increase in volume of information, the ease by which information becomes instantly accessible throughout the world regardless of its point of origin, and the mobility of data in a system where "borders tend to disappear."[48] Thus, in internet cases and, absent a choice of forum agreement between the parties or a person's submission to a court's jurisdiction, the traditional factors for determining whether or not an action has a real and substantial connection to a forum can be "less than satisfactory."[49] What seems to be clear, however, is that jurisdiction cannot be avoided "merely because the defendant did not physically enter the forum state."[50]

Does this mean, then, that worldwide internet access stands for worldwide jurisdiction? Or would it be better to argue that jurisdiction over internet disputes is restricted "such that only the courts of those states where the defendant or its web server are located have jurisdiction"?[51] Under the first extreme, a plaintiff could sue where she or he sees fit, and would only be subject

43. Baer *et al.*, *Private International Law in Common Law Canada*, *ibid.* at p. 49.
44. *Muscutt*, *supra* note 22 at para. 76.
45. Takach, *Computer Law*, *supra* note 7 at p. 648.
46. "Consultation Paper," *supra* note 10 at p. 5.
47. *Ibid.* at p. 5.
48. John D. Gregory, "Solving Legal Issues in Electronic Government: Jurisdiction, Regulation, Governance," (2002) 1:3 Canadian Journal of Law and Technology 1, <http://cjlt.dal.ca/vol1_no3/pdfarticles/gregory.pdf>.
49. "Consultation Paper," *supra* note 10 at p. 6; Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 17 at p. 462; and Sookman, *Computer, Internet and Electronic Commerce Law*, *supra* note 12 at p. 11-19.
50. Geist, *Internet Law in Canada*, *supra* note 13 at p. 46.
51. Sullivan & Tsai, "Developing Law of Internet Jurisdiction," *supra* note 8 at p. 521.

to potential arguments regarding *forum conveniens* claims.[52] The latter approach, on the other hand, could lead to forum shopping by businesses, which would just set up their servers in jurisdictions with lenient consumer protection regimes, for example.[53]

Between these two extremes, however, lies a large middle ground with room for various alternatives, and the courts have applied several different tests to ascertain whether they have jurisdiction over internet disputes.[54] While some courts have simply applied traditional rules to online communications, others have tried "to develop new tests to accommodate the uniqueness of the electronic commerce."[55] The earliest internet jurisdiction cases emerged in the United States and, as we will see, initially, courts in Canada were more than willing to adopt the solutions that US courts had offered.

2.2.1. *Zippo Manufacturing Company* v. *Zippo Dot Com, Inc.*[56] and Beyond

The *Zippo* case can probably be seen as one of "the most influential cases on the issue of jurisdiction and the Internet."[57] It involved an internet domain name dispute over the name "Zippo" and "represents an early attempt to give a comprehensive and considered decision on Internet jurisdiction."[58] To be more precise, the court had to examine whether the assertion of jurisdiction in the case fell within the limits of the "due process" principle set forth in the Fourteenth Amendment of the United States Constitution. This principle constitutes a constitutional restriction on exercising long arm personal jurisdiction and basically stipulates that "jurisdiction over a non-resident defendant of the forum state may be exercised only if the defendant has had substantial or continuous and systematic contacts with the forum state."[59]

Although *Zippo* was not the first case to deal with internet jurisdiction issues,[60] it was with this decision that the courts began to recognize that merely

52. *Ibid.* at p. 521. It is very important not to confuse the distinction between assumed jurisdiction, where the real and substantial connection test applies, and the *forum non conveniens* doctrine. Very often there is more than one forum capable of assuming jurisdiction, and it is necessary to determine where the action should be litigated. "The most appropriate forum is determined through the *forum non conveniens* doctrine, which allows a court to decline to exercise its jurisdiction on the ground that there is another forum more appropriate to entertain the action." *Muscutt, supra* note 22 at para. 40. The *forum non conveniens* doctrine was elaborated in *Amchem Products Inc. v. British Columbia (Workers Compensation Board),* [1993] 1 S.C.R. 897, <http://scc.lexum.umontreal.ca/en/1993/1993rcs1-897/1993rcs1-897.html>, 102 D.L.R. (4th) 96.
53. Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 17 at p. 462.
54. "Consultation Paper," *supra* note 10 at p. 7; Sullivan & Tsai, "Developing Law of Internet Jurisdiction," *supra* note 8 at pp. 521–522.
55. "Consultation Paper," *supra* note 10.
56. 952 F. Supp. 1119 (WD Pa 1997) [*Zippo*].
57. Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 17 at p. 453.
58. Sullivan & Tsai, "Developing Law of Internet Jurisdiction," *supra* note 8 at p. 523.
59. Frederic Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union: *Quid Novi Sub Sole*?" (2002) 10:3 International Journal of Law & Information Technology 344, <http://www.law.kuleuven.be/icri/publications/338Intl%20Journal%20of%20Law%20and%20IT.pdf?where=> [Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union"]. In the US, the court has to follow two steps: it has to start its analysis by considering the "long arm" statute in effect in the state in which the court is located. If assertion of jurisdiction is allowed under the forum state's laws, subsequently it must examine whether exercising jurisdiction falls within the limits of the "due process" principle of the Fourteenth Amendment of the United States Constitution. See Sullivan & Tsai, "Developing Law of Internet Jurisdiction," *supra* note 8 at p. 523.
60. For example, an earlier case would be *Bensusan Restaurant Corp. v. King,* 937 F. Supp. 295 (SD NY 1996), which "distinguished between a Web site that meant to convey information only, and one which sold or targeted its product to a particular jurisdiction." Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada, supra* note 17 at p. 477, n. 9.

transferring analogies from the offline-world to the internet would not be appropriate, as the offline tests would not easily adjust to this new medium.[61] The court in *Zippo* recognized that activity on the internet is as varied as that in a traditional commercial environment. It established a "sliding scale test" that rejects both extreme positions addressed above in favour of a more flexible approach which relates to "the nature and quality of the activity being carried out on the Internet, the defendant's objective in carrying out his activity, and the location of the injury allegedly suffered by the plaintiff."[62]

In considering the constitutional limitations[63] of exercising jurisdiction over non-resident defendants, the court elaborated that

> the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.…At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.…At the opposite end are situations where a defendant has simply posted information on an Internet web site which is accessible to users in foreign jurisdictions. A passive web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction.…The middle ground is occupied by interactive web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the web site.[64]

The court applied the so-called "minimum contacts" test and critically evaluated whether the defendant purposefully established contacts with the forum state and whether it was foreseeable that "the defendant's conduct and connection to the forum state are such that he could reasonably expect to be hauled into court there."[65] The rationale behind this is the logical assumption that, where one purposefully directs business at a jurisdiction and thus avails himself of the benefits of conducting business within a certain jurisdiction, one should be aware of the fact that the courts of that jurisdiction would be able to exercise personal jurisdiction.[66]

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61. Geist, "Is There a There There?" *supra* note 14 at p. 1363.
62. Sullivan & Tsai, "Developing Law of Internet Jurisdiction," *supra* note 8 at p. 523; Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 17 at p. 453.
63. Exercising jurisdiction is limited by the "due process" principle set forth in the Fourteenth Amendment of the United States Constitution.
64. *Zippo*, *supra* note 56 at p. 1124. For a very good explanation of the various categories of internet contacts, see Rhoda J. Yen, "Personal Jurisdiction and the Internet: Applying Old Principles to a 'New' Medium," (2002) 86:3 Florida Bar Journal 41, <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/8f4b401ebe14ccc385256b680059fc1f?OpenDocument> [Yen, "Personal Jurisdiction and the Internet"].
65. *Zippo*, *supra* note 56 at p. 1123, quoting from *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), <http://supreme.justia.com/us/444/286/case.html>.
66. Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 17 at p. 454.

Although this passive-versus-active approach has been cited with approval in numerous cases, it soon became clear that the *Zippo* "sliding scale test" suffers from various shortcomings and would, as website technology and design evolved, lead "inexorably to a finding of jurisdiction in the case of most Web sites, and this would be too far reaching a result."[67] Indeed, the test does not distinguish between actual and potential sales, but rather determines that the mere existence of an active website is enough to assert jurisdiction.

This, however, could often lead to undesirable outcomes and eventually runs contrary to public policy related to the internet and electronic commerce, that is, to encourage the use of the internet for commercial purposes, increase interactivity, and by doing so enhance consumer choice through opening new markets for small- and medium-sized businesses.[68] The test discourages prospective online merchants from creating active websites, since such sites would increase the likelihood of facing lawsuits in foreign jurisdictions. Instead, the test encourages the use of passive websites with limited risks, but these also present a barrier to the electronic commerce policy approach just described.[69]

Recognizing this predicament, US courts subsequently began to articulate different tests in order to find jurisdiction. These tests included vague approaches, such as "something more than interactivity,"[70] and more defined methods, for example, the "targeting test"[71] or "insufficient commercial effects/ purposeful availment."[72] Most of these tests work with the underlying premise that "jurisdiction should only be exercised in those circumstances where the Web site operator expressly aimed its activity at the forum state,"[73] Thus, it has been established that the defendant must:

1) direct electronic activity into the forum state;
2) intend to engage in business or other interactions in the forum state; and
3) engage in activity that created under the forum state's law a potential cause of action with regard to a person in the forum state.[74]

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67. Takach, *Computer Law*, *supra* note 7 at p. 663. For a collection of case law following *Zippo*, see Geist, "Is There a There There?" *supra* note 14 at pp. 1367–1371.
68. Geist, *Internet Law in Canada*, *supra* note 13 at p. 66; Geist, "Is There a There There?" *supra* note 14 at p. 1378.
69. Geist, *Internet Law in Canada*, *ibid.* at p. 66; Geist, "Is There a There There?" *ibid.* at p. 1378. See also Canada's Electronic Commerce Strategy, <http://e-com.ic.gc.ca/epic/internet/inecic-ceac.nsf/en/home>.
70. *Panavision International, L.P. v. Toeppan,* 141 F.3d 1316 (9th Cir 1998), <http://www.ca9.uscourts.gov/coa/newopinions.nsf/04485f8dcbd4e1ea882569520074e698/f05d3f7623c90f5488256e5a007188ef?OpenDocument>.
71. *American Information Corporation v. American Infometrics, Inc.,* 139 F.Supp.2d 696 (D Md 2001).
72. *People Solutions, Inc. v. People Solutions, Inc.,* 2000 WL 1030619 (ND Tex 2000). See also Yen, "Personal Jurisdiction and the Internet," *supra* note 64 at p. 41.
73. Takach, *Computer Law*, *supra* note 7 at p. 664. Several courts either explicitly or implicitly have criticized *Zippo's* emphasis on website interactivity. One court stated that it was reluctant to follow *Zippo* because "it is not clear why a website's level of interactivity should be determinative on the issue of personal jurisdiction. The website's level of interactivity may be one component of a determination whether a defendant has availed itself purposefully of the benefits or privileges of the forum state. For example, a finding that a defendant uses its website to engage in repeated commercial transactions may support the exercise of personal jurisdiction, so long as there is a corresponding finding that the defendant is expressly targeting residents of the forum state and not just making itself accessible to everyone regardless of location." *Hy Cite Corp. v. BadBusinessBureau.Com, LLC,* 297 F. Supp. 2d 1154 (WD Wisc 2004), <http://www.wiwd.uscourts.gov/bcgi-bin/opinions/district_opinions/C/03/03-C-421-C1-8-04.pdf> at p. 1160.
74. *ALS Scan, Inc. v. Digital Serv. Consultations, Inc.*, 293 F. 3d 707 (4th Cir 2002), <http://pacer.ca4.uscourts.gov/opinion.pdf/011812.P.pdf> at p. 714 [*ALS Scan*], adapting the *Zippo* continuum and creating this three-prong test for finding express targeting or aiming. See Cindy Chen, "United States and European Union Approaches to Internet Jurisdiction and their Impact on E-Commerce," (2004) 25:1 University of Pennsylvania Journal of International Economic Law 423 at p. 435 [Chen, "United States and European Union Approaches to Internet Jurisdiction"].

Consequently, jurisdiction was found in a 2002 electronic commerce case, *Carrot Bunch Co. v. Computer Friends, Inc.*,[75] in which an internet user bought products online by browsing interactively and completing an online form, and received an e-mail confirming purchases. Additionally, there was also evidence that the defendant had actually made additional sales through this process to other residents in the forum state. Conversely, in *United Cutlery Corp.*,[76] the court concluded that sales through internet auction sites such as eBay and Yahoo! did not demonstrate purposeful availment. The court observed that,

> although the websites were interactive and designed for the purpose of selling products to participating users, [the defendant] exercised no authority over maintenance of the websites, nor did he exert control over the audience they targeted.[77]

Noting that the defendant's "manifested intent was to sell to the highest bidder, regardless of the state in which the bidder resided,"[78] the court determined that the defendant had not directed activity into Maryland with the "manifested intent of engaging in business or other interactions within the State,"[79] and thus, that he had not purposefully availed itself of the privilege of conducting business in Maryland.[80]

Nonetheless, despite this variety of tests, especially in settings involving doing business in a forum through the use of the internet, various other recent cases show that the courts still draw their conclusions from *Zippo*.[81] What now seems to be clear though is that a websites's level of interactivity is not determinative on the issue of personal jurisdiction and that US courts "do not have jurisdiction over a website merely because it is accessible in the US or in a US state, otherwise all website holders would be subject to their jurisdiction."[82]

2.2.2. Canadian Case Law

When turning to Canadian case law, it is important to keep in mind that the Supreme Court of Canada in *Morguard* established the "real and substantial connection" test to make the service *ex juris* rule conform with the principle of "order and fairness." It thereby put a constitutional limit on a Canadian court's ability to assert jurisdiction over an out-of-province defendant. Despite the fact that the Canadian approach in this aspect differs from the methods employed in the US, Canadian courts were initially more than willing to adopt the *Zippo*

75. 218 F.Supp. 2d 820 (ND Texas 2002), <http://www.txnd.uscourts.gov/pdf/Opinion/301cv1229_25.pdf>.
76. *United Cutlery Corp. v. Nfz, Inc.* (D Md 2003), <http://www.mdd.uscourts.gov/Opinions/Opinions/unitedcutlery1203.pdf>.
77. *Ibid.* at p. 8.
78. *Ibid.* at p. 8.
79. *Ibid.* at p. 8.
80. *Ibid.* at p. 8.
81. For example, *Shamsuddin v. Vitamin Research Prods.*, 346 F. Supp. 2d 804 (D Md 2004), <http://www.mdd.uscourts.gov/Opinions/Opinions/shamsuddin11302004.pdf>; *Best Van Lines, Inc v. Walker,* 2004 U.S. Dist. LEXIS 7830 (SD NY 2004); *LCW Auto. Corp. v. Restivo Enters.* (WD Tex 2004), <http://www.nysd.uscourts.gov/courtweb/pdf/D05TXWC/04-06774.PDF>. See Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 17 at p. 455.
82. Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59 at p. 348.

"sliding scale" test.[83] Unfortunately, they did so not in an electronic commerce dispute, where the *Zippo* test would be "in harmony with the real and substantial connection standards," but in a defamation context.[84] The 1999 British Columbia Court of Appeal case, *Braintech Inc. v. Kostiuk*,[85] was the first Canadian appellate decision to address the internet jurisdiction issue.[86]

Although the case deals with "the relatively narrow matter of enforcement of a foreign judgment arising from defamatory material on an electronic bulletin board," it may also nourish the discussion concerning contractual disputes.[87] By adopting the passive-versus-active *Zippo* test, the B.C. Court of Appeal held that postings on an electronic bulletin board were passive in nature and that, therefore, "the mere posting of libellous material on a Web site was insufficient for a finding of jurisdiction in the absence of proof that someone in the relevant jurisdiction actually accessed the material."[88] The significance of *Braintech*, therefore, lies in the fact that it unequivocally rejects the proposition that worldwide internet access means worldwide jurisdiction over internet disputes.[89] The court recognized that "something more" than mere internet accessibility is required in order to establish a *Morguard* substantial connection with that jurisdiction. Yet, the court did not formulate a precise rule on what would have amounted to doing so.[90]

However, when finding that there was "no allegation or evidence [that] Kostiuk had a commercial purpose that utilized the highway provided by the Internet to enter any particular jurisdiction,"[91] the court employed a "purposeful availment approach to substantial connection to reach the result it did."[92] This method was later referred to as the "concept of targeting," and it was argued that the determination of whether an individual was using the internet to "target" a particular jurisdiction should play a major role in determining whether the courts of the forum should assert jurisdiction, *i.e.*, to ascertain whether there was

83. Sookman, *Computer, Internet and Electronic Commerce Law*, *supra* note 12 at p. 11-27; Geist, "Is There a There There?" *supra* note 14 at p. 1369.
84. Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, note 17 at p. 456.
85. *Braintech, Inc. v. Kostiuk* (1999), 171 D.L.R. (4th) 46 (BC CA), <http://www.canlii.org/bc/cas/bcsc/1998/1998bcsc11999.html> [*Braintech*].
86. Vaughan Black & Michael Deturbide, "*Braintech, Inc. v. Kostiuk*: Adjudicatory Jurisdiction for Internet Torts," (2000) 33:3 Canadian Business Law Journal 427 [Black & Deturbide, "Adjudicatory Jurisdiction for Internet Torts"]. See also *Pro-C Ltd. v. Computer City, Inc.* (2000), 7 C.P.R. (4th) 193 (Ont SCJ) [*Pro-C*].
87. Black & Deturbide, "Adjudicatory Jurisdiction for Internet Torts," *ibid.* at p. 427.
88. Takach, *Computer Law*, *supra* note 7 at p. 663; Geist, "Is There a There There?" *supra* note 14 at p. 1369–1370.
89. Sullivan & Tsai, "Developing Law of Internet Jurisdiction," *supra* note 8 at p. 525.
90. Black & Deturbide, "Adjudicatory Jurisdiction for Internet Torts," *supra* note 86 at p. 437; Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 17 at p. 457.
91. *Braintech*, *supra* note 85 at p. 61.
92. Black & Deturbide, "Adjudicatory Jurisdiction for Internet Torts," *supra* note 86 at p. 442. See also Sookman, *Computer, Internet and Electronic Commerce Law*, *supra* note 12 at p. 11-36.

a real and substantial connection.[93] In particular, in order to ascertain the appropriate criteria for a targeting test, more emphasis should be put on "the core jurisdictional principle—foreseeability," which "in that context depends on three factors—contracts, technology and actual or implied knowledge."[94] While forum selection clauses in contracts provide "important evidence as to the foreseeability of being hauled into the courts of a particular jurisdiction," "newly emerging technologies that identify geographic locations constitute the second factor."[95] Lastly, the factor of actual or implied knowledge incorporates "targeting knowledge gained through the geographic location of tort victims, offline order fulfilment, financial intermediary records and Web traffic," and thus constitutes a "catch-all" factor.[96]

Two other relatively recent Canadian decisions, *Re World Stock Exchange*[97] and *SOCAN*,[98] radically rejected the notion that jurisdiction over internet disputes should generally be restricted to those states where the defendant or its web server are located. *SOCAN* and *WSE* are not adjudicatory jurisdiction cases, but one can nevertheless draw some distant but useful analogies about such jurisdiction by analysing the court's approach to the facts before it. Particularly in *SOCAN,* the court looked at the policy behind the allegedly violated *Copyright Act* and reasoned that:

> No doubt some latitude should be given to the Board to determine, case-by-case, how to apply the real and substantial connection test.…[S]ince the policy of the Act is to protect copyright in the Canadian market, the location of the end user is a particularly important factor in determining whether an Internet communication has a real and substantial connection with Canada.[99]

Although neither decision dealt with an electronic commerce dispute, they show that the courts are willing to take various factors, such as policy rationales, into consideration when applying the *Morguard* real and substantial connection test to internet settings.

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93. The appropriate criteria for the "targeting test" are discussed by Michael Geist, "Internet Jurisdiction: The Shifting Adjudicatory Approach," (2002) 3:1 Isuma: Canadian Journal of Policy Research 1 at p. 87 [Geist, "Shifting Adjudicatory Approach"]. "An element of a 'real and substantial connection' in the context of a normal course of trade can be purposeful activity directed to the development of the market for services or wares in Canada." *Pro-C, supra* note 86; Geist, "Is There a There There?" *supra* note 14 at p. 1380. The concept of "targeting" is not new and was the determining factor in many US decisions, such as *Bancroft & Masters Inc. v. Augusta National Inc.*, 223 F. 3d 1082 (9th Cir 2000), <http://www.ca9.uscourts.gov/ca9/newopinions.nsf/0/2e84e99fe610b5f88825695200757ab0/$FILE/9915099.PDF>, and in *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir 2002), <http://pacer.ca4.uscourts.gov/opinion.pdf/012340.P.pdf>.
94. Geist, "Shifting Adjudicatory Approach," *ibid.* at p. 91.
95. *Ibid* at p. 91.
96. *Ibid* at p. 91.
97. *Re World Stock Exchange* (2000), 9 A.S.C.S. 658 (Alberta Securities Commission), <http://www.albertasecurities.com/Enforcement/Enforcement%20Orders/1876/World_Stock_Exchange_-_Reasons_-_2000-02-15_-__1310963.pdf> [*WSE*].
98. *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45, <http://scc.lexum.umontreal.ca/en/2004/2004scc45/2004scc45.html>, [2004] 2 S.C.R. 427 [*SOCAN*].
99. *SOCAN*, *ibid.* at para. 37.

The same guidelines were established in the Australian High Court decision in *Dow Jones v. Gutnick*,[100] a defamation case, which was most recently approved of in *Bangoura* and *Burke*, the two latest Canadian internet jurisdiction decisions.[101] In *Gutnick*, the court rejected the argument that jurisdiction over internet disputes should lie only with the courts of those states where the defendant's web servers are located. Instead, the court established a test that focuses on where the plaintiff had suffered his harm and gave "much less weight to passive versus active considerations than courts in North America."[102]

Notably, however, in addition to the *Gutnick* principles, both the Ontario Court of Appeal in *Bangoura* and the British Columbia Supreme Court in *Burke* extensively discussed the *Muscutt* test to determine the existence of a real and substantial connection. Unfortunately, they did so without further elaborating on the "ubiquity, universality and utility"[103] of the internet and the possible impact these features might have on the application of the *Muscutt* principles to commercial internet publications. Furthermore, it is important to note that Armstrong JA in *Bangoura* later referred to "alternative approaches to the issue of jurisdiction" which include:

> i) The Targeting Approach: Under this approach, a court would take jurisdiction where the publication is targeted at the particular forum of the court.
>
> ii) The Active/Passive Approach: Under this approach, a foreign defendant who actively sends electronic publications to a particular forum would be subject to the jurisdiction of that forum's courts. A defendant who simply posts to a passive Web site would not be subject to such jurisdiction.
>
> iii) The Country of Origin Approach: Under this approach, jurisdiction is taken where the publication originated. The theory of this approach is that it is in the country of origin where the publisher has the last opportunity to control the content of the publication.
>
> iv) Foreseeability and Totality of Circumstance: This approach is similar to the approach taken by the court in Muscutt and its companion cases.[104]

As discussed above, the first and second approach date back to the earliest internet adjudicatory jurisdiction theories established in *Zippo* and *Braintech*. Thus, it is interesting to see that, according to Armstrong JA, these

100. *Dow Jones & Company Inc v. Gutnick*, 2002 HCA 56 (High Court of Australia), <http://www.austlii.edu.au/au/cases/cth/HCA/2002/56.html>. A very good analysis of the principles elaborated in *Gutnick* is provided by Mary Paterson, "Following the Right Lead: *Gutnick* and the Dance of Internet Jurisdiction," (2003) 3:1 Canadian Journal of Law and Technology 49, <http://cjlt.dal.ca/vol3_no1/pdfarticles/paterson.pdf>. Paterson supports a Canadian adoption of *Gutnick* because of several similarities between the Canadian and the Australian jurisdiction principles, *ibid.* at pp. 53–55.
101. *Bangoura*, *supra* note 2; *Burke*, *supra* note 2.
102. Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 17 at p. 458. For a similar decision in the US see *Northwest Healthcare Alliance Inc. v. Healthgrades.com Inc.*, 50 Fed. App. 339 (9th Cir 2002). Takach, *Computer Law*, *supra* note 7 at p. 667, n. 149. A good overview of the recent case law is also provided in Erik A. Hanshew, "Click Softly and Carry a Big Gavel: Internet Jurisdiction in the Year 2002," (2003) 6:11 Journal of Internet Law 14 [Hanshew, "Click Softly and Carry a Big Gavel"].
103. *Burke*, *supra* note 2 at para. 20.
104. *Ibid.* at para. 48.

approaches "are consistent with the real and substantial connection test and capable of incorporation into the proper application of the *Muscutt* factors."[105] However, it remains to be seen whether "in some future case involving Internet publication, [Canadian courts] will find it useful to consider and apply one or more of the proposed approaches."[106]

All in all, courts have started to take a more subtle and contextual approach in asserting or rejecting jurisdiction in disputes that involve internet communications. Unfortunately, a great amount of uncertainty still remains, since no definite rule exists as to what is necessary to establish a real and substantial connection in an online context. As of this writing, the author is not aware of Canadian case law that specifically deals with an electronic commerce dispute. Thus, it remains to be seen whether a possible application of the *Muscutt* principles or the methods described above might shed some light on the still rather dark area of the assertion of jurisdiction over an out-of-province defendant in an electronic commerce context.

2.3. Canadian Consumer Policy

Until a court has dealt with this issue, neither online businesses nor online consumers can say with confidence that there is no risk of being hauled into a courtroom in a far-off jurisdiction in the event of a dispute arising out of an online transaction. Thus, commentators have called for "Canadian jurisdictional and proper law provisions governing consumer electronic contracts."[107] Generally, consumers "are perceived to be at a strong disadvantage in being forced to defend their case in a foreign forum."[108] Even if the consumer had a better chance of obtaining and enforcing a judgment against a vendor under the laws of the vendor's jurisdiction, commencing an action in the foreign vendor's jurisdiction may not appeal to the consumer who would have to incur travel expenses and the cost of "foreign" legal advice to defend his or her rights.[109]

Therefore, the suggestion has been not to apply the substantial connection test to these settings, but to essentially restore the pre-*Morguard* position. This would require the consumer defendant to have been a resident in the foreign state at the time the litigation was initiated, and would ensure that a Canadian consumer defendant would face "a reasonably level playing field."[110]

In recognition of the consumer's dilemma, a joint working group of the inter-governmental Consumer Measures Committee and the Uniform Law Conference of Canada issued a consultation paper, which proposed that the

105. *Bangoura, supra* note 2 at para. 47.
106. *Ibid.* at para. 49.
107. Jacob S. Ziegel "Enforcement of Foreign Judgments in Canada, Unlevel Playing Field, and *Beals v. Saldhana:* A Consumer Perspective," (2003) 38 Canadian Business Law Journal 294 at 305 [Ziegel, "Enforcement of Foreign Judgments in Canada"]. See also Tassé & Faille, "Online Consumer Protection," *supra* note 4.
108. Ziegel, "Enforcement of Foreign Judgments in Canada," *ibid.* at p. 304.
109. Roger Tassé & Kathleen Lemieux, "Consumer Protection Rights in Canada in the Context of Electronic Commerce," Report to the Office of Consumer Affairs Industry Canada (1998), <http://strategis.ic.gc.ca/pics/ca/full_e.pdf> [Tassé and Lemieux, "Consumer Protection Rights in Canada"].
110. Ziegel, "Enforcement of Foreign Judgments in Canada," *supra* note 107 at p. 304. The views and suggestions which Ziegel advances in his commentary can be found in Tassé and Lemieux, "Consumer Protection Rights in Canada," *ibid.* at p. 295.

"targeting approach" should be employed when determining which court should have jurisdiction in consumer contracts. Essentially, the proposed rules stipulate that:

> 1. In circumstances where
>
> a) the consumer contract resulted from a solicitation of business in the consumer's jurisdiction by or on behalf of the vendor and the consumer took all the necessary steps for the formation of the consumer's contract in the consumer's jurisdiction; or
>
> b) the consumer's order was received by the vendor in the consumer's jurisdiction; or
>
> c) the consumer was induced by the vendor to travel to a foreign jurisdiction for the purpose of forming the contract and the consumer's travel was assisted by the vendor;
>
> the consumer has the option to bring proceedings against the vendor either in the courts of the consumer's jurisdiction or in the courts of the vendor's jurisdiction.[111]

However, "if the vendor clearly demonstrates that it took reasonable steps to avoid concluding contracts with consumers resident in a particular jurisdiction, it is deemed not to have solicited business in that jurisdiction."[112] The vendor itself, on the other hand, may bring proceedings against the consumer only in the courts of the consumer's jurisdiction.[113] Although generally the parties remain free to enter into an agreement concerning the choice of forum, such an agreement is, according to rule four, only valid if it is entered into after the dispute has arisen or if it allows the consumer to bring proceedings in courts other than those provided for in rule one.

These proposed rules clearly attempt to balance the need for certainty while at the same time protecting consumers effectively. Equally, businesses can be sure that the legal risk of operating online is not "disproportionate to a business' connection to the relevant forum's … courts" and that they are "able to choose whether or not to operate under a particular jurisdiction's legal framework."[114]

It is interesting to point out that Ontario's *Consumer Protection Act, 2002*,[115] which applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place,[116] stipulates expressly in section 7(1) that "the substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary." Section 7(2) further provides that

111. "Consultation Paper," *supra* note 10 at s. 13.
112. *Ibid.* at s. 2.
113. *Ibid.* at s. 3.
114. *Ibid.* at s. 11.
115. *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, <http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02c30_e.htm> [*Consumer Protection Act*].
116. *Ibid.* at s. 2.

> any term or acknowledgement in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.[117]

Therefore, as specified in section 100(1), if a consumer has a right to commence an action under the Ontario *Consumer Protection Act, 2002,* he or she may commence the action in the Ontario Superior Court of Justice, even if a choice of forum clause favours a foreign jurisdiction.

Similarly, since under section 2(1) of Alberta's *Fair Trading Act*[118] any waiver or release by a person of the person's rights, benefits, or protections under that Act or the regulations is void, any agreement which would deprive the consumer of his right under section 13(1) to commence an action in the Court of Queen's Bench would be void.

Notably, the consumer in these provinces does receive protection from the non-waivability of her home forum and the fact that in case of a dispute, she at least does not have to incur further travel expenses or costs for foreign legal advice. Therefore, it is interesting that, for example, in Manitoba, Nova Scotia, New Brunswick, and Saskatchewan no such consumer jurisdiction clause exists and also that the *Internet Sales Contract Harmonization Template*[119] avoids the issue of jurisdiction in consumer contracts.

Although in 2004, as discussed above, the federal, provincial, and territorial ministers responsible for consumer affairs reached an understanding that they would promote consumer protection in electronic commerce and called for greater harmony through the implementation of model legislation, the author is not aware of any province or territory that has actually implemented any of the proposals made in the Consultation Paper.[120]

To conclude, notwithstanding some judicial guidance, the lack of harmonized, precise, reliable, and predictable rules to govern the choice-of-forum question seems to push the goal of promoting electronic commerce by enhancing consumer and business confidence into the distant future. Thus, for many individuals who purchase over the internet, "legislated consumer protection measures will be hollow safeguards,"[121] and by clicking the mouse or connecting to the server, consumers still run the risk of entering "a potentially hostile nation."[122]

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117. *Ibid.* at s. 7(2). According to s. 7(3), *after* a dispute arises, the consumer, the supplier, and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law. Section 100 (1) stipulates that if a consumer may commence an action under this Act, the consumer may commence the action in the Superior Court of Justice.
118. *Fair Trading Act*, R.S.A. 2000, c. F-2, <http://www.qp.gov.ab.ca/documents/Acts/F02.cfm?frm_isbn=0779748654>.
119. *Internet Sales Contract Harmonization Template*, <http://www.strategis.ic.gc.ca/pics/ca/sales_template.pdf>. The Template was prepared by the Consumer Measures Committee (CMC) for consumer protection legislation in Canada governing internet sales and service contracts. On 25 May 2001, the *Internet Sales Contract Harmonization Template* was approved and adopted by the federal, provincial, and territorial ministers in charge. The Template does not have the force of law; rather, it is a guide for the provinces and territories for enacting their own internet consumer protection laws.
120. See also Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, *supra* note 17 at pp. 464–465.
121. *Ibid.* at p. 462.
122. Hanshew, "Click Softly and Carry a Big Gavel," *supra* note 102 at p. 14.

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3. EUROPEAN ADJUDICATORY JURISDICTION LEGISLATION

THE TECHNOLOGICAL INNOVATIONS ON THE INTERNET have brought the globalization trend to businesses within the European Union too. Even though the impact of e-commerce in Europe is still limited—compared with the United States, for example—in Europe the use of the internet as a new global marketplace has also increased vastly. The resultant need to adapt to this quick emergence and rise of internet commerce and to provide a uniform approach to jurisdiction over cases involving consumer transactions via the web has not gone unrecognized in the European Union (EU), however. Consequently, with *Council Regulation 44/2001 of December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*,[123] new legislation came into effect from 1 March 2002 to govern this area. I begin my analysis with a short overview of the previous European jurisdiction legislation, as this will provide a better understanding of the current consumer contracts jurisdiction regime and its implications.

3.1. The Brussels Convention

The rules governing jurisdiction over transnational disputes in the EU had, for a long time, been governed by the 1968 *Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters*.[124] This was a private international law instrument ratified by all Member States, which subsequently required the Member States to enact laws in their own countries to give effect to the objectives laid down in the Convention.[125]

The international contracts jurisdiction regime of the *Brussels Convention* was generally inspired by the well-known international law rule *actor sequitur forum rei*, which means "individuals should be sued in the court of the place where they are domiciled."[126] In a "typical commercial transaction, the plaintiff would sue in the 'place of performance of the obligation in question'," or "where the transaction is or should have been completed."[127]

However, since consumers have traditionally been seen as the economically weaker and legally less experienced party, consumer contracts

123. EC, *Council Regulation 44/2001 of December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, [2001] O.J.L. 12/1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:HTML> [*Brussels Regulation*].

124. EC, *Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters*, [1998] O.J.C 27/1 (consolidated version), <http://europa.eu.int/scadplus/leg/en/lvb/l33054.htm> [*Brussels Convention*].

125. Ksenija Vasiljeva, "1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online," (2004) 10:1 European Law Journal 123 at p. 124 [Vasiljeva, "Jurisdiction in Consumer Contracts Concluded Online"]; Chen, "United States and European Union Approaches to Internet Jurisdiction," *supra* note 74 at p. 437.

126. *Brussels Regulation*, *supra* note 123, art. 2; Vasiljeva, "Jurisdiction in Consumer Contracts Concluded Online," *ibid.* A very good discussion of the *actor sequitur forum rei* principle is provided by Arthur Taylor von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems* (The Hague: Martinus Nijhoff Publishers, 2002) at p. 179 ff.

127. *Brussels Regulation*, *supra* note 123; see *Brussels Convention*, *supra* note 124, art. 5(1); Chen, "United States and European Union Approaches to Internet Jurisdiction," *supra* note 74 at p. 437.

were governed by significantly different rules of jurisdiction.[128] If a contract qualified as a consumer contract under Article 13 of the *Brussels Convention*, under Article 14 the consumer was given a choice of jurisdiction between either his home domicile or that of the supplier. The supplier, on the other hand, was only permitted to bring suit in the consumer's domicile; so the idea behind these rules was clearly to protect the consumer from becoming involved in any cross-border litigation.[129]

Interesting, though, were the requirements upon which an agreement would qualify as a consumer contract. First, the European Court of Justice held that the concept of "consumer" within the meaning of Article 13 of the *Brussels Convention* covered "only a private final consumer, not engaged in trade or professional activities. ... Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provision."[130]

Second, Article 13 of the *Brussels Convention* stipulated expressly that any contract between a consumer and a business for goods or services, the purpose of which was outside of a consumer's normal trade or profession, only qualified as a consumer contract if it was:

> 1) for the sale of goods on instalment credit terms; or
>
> 2) a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
>
> 3) any other contract for the supply of goods or a contract for the supply of services, and
>
> a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and
>
> b) the consumer took in that State the steps necessary for the conclusion of the contract.[131]

Thus, as a result of the "specific invitation" requirement, unless the consumer was targeted directly in his home Member State by certain acts of the supplier aimed specifically at the country in which the consumer is domiciled, the consumer did not have the choice to sue in his or her home country. He or she had to abide by the *actor sequitur forum rei* rule. The supplier must have shown his express will to inform consumers of other Member States about its goods or services. Typical examples for a specific invitation or advertising addressed to the consumer included advertising in the press, radio, or television, or in catalogues.[132]

128. Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59.
129. *Brussels Regulation*, *supra* note 123, art. 14; Vasiljeva, "Jurisdiction in Consumer Contracts Concluded Online," *supra* note 125 at p. 125.
130. *Benincasa v. Dentalkit Srl*, C-269/95, [1997] E.C.R. I-3767, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995J0269:EN:HTML> at paras. 16–17.
131. *Brussels Regulation*, *supra* note 123, art. 13 (emphasis added).
132. Vasiljeva, "Jurisdiction in Consumer Contracts Concluded Online," *supra* note 125 at p. 126.

The second condition that had to be satisfied for a contract to fall within the scope of a consumer contract under Article 13—the requirement that the consumer took all the steps necessary to conclude the contract in his or her home domicile—effectively prevented a consumer from claiming the protection of Articles 13 and 14 in cases where the supplier did not intend to trade its goods or services in the state of the consumer's domicile.[133] Therefore, where it was purely the consumer's initiative to conclude the contract with a supplier in a different Member State, he or she was not allowed to rely on Article 14 of the Convention.

Thus, the conditions set forth in Article 13 of the Convention clearly aimed at protecting the "passive" consumer against the "aggressive" supplier who approaches the consumer in his Member State, whereas the "active" consumer who comes into contact with the supplier on his or her own initiative was excluded from the special protection regime of the *Brussels Convention*. Consequently, following the underlying rationale of this provision, an "active" consumer was thought to "reasonably have expected to have to bring the other party to a foreign court,"[134] that is, that he or she had to sue the supplier in its home forum.

Unfortunately, since neither the Convention nor its preparatory documents defined the terms "specific invitation" or "advertisement," legal doctrine soon became divided into three groups "as to whether or not, and if so, to what extent, the distinction between 'active' and 'passive' consumers can or has to be applied [to] consumer contracts entered into via the Internet."[135] A first group of authors called for maximum consumer protection and was of the opinion that a consumer is always passive and that therefore actively holding a commercial website always complies with the "specific invitation" or "advertisement" condition. Conversely, the second group always considered the consumer as the active party, since in their opinion it is always the consumer who surfs to a website and thus purposefully enters the market of a particular state. Lastly, the third group called for a case-by-case examination and was of the opinion that the special protection regime should never be denied or granted *a priori*. Rather, the degree of activity or passivity of both the consumer and the website holder should be evaluated in each case and taken into consideration "according to the degree of interactivity of the website."[136] This middle ground group of authors is clearly in line with the aforementioned *Zippo* "sliding scale" test and the "purposeful availment" approach developed in the US courts.

Due to these discrepancies, it quickly became obvious that while the *Brussels Convention* clearly dealt with jurisdiction, it had not anticipated the internet and the unique difficulties e-commerce would cause.[137] The rigid statutory regime of the EU turned out to be "ill equipped to deal with jurisdictional questions stemming from Internet transactions."[138]

133. *Ibid.* at p. 126. See also Morten Foss & Lee A. Bygrave, "International Consumer Purchases Through the Internet: Jurisdictional Issues Pursuant to European Law," (2000) 8:2 International Journal of Law and Information Technology 99, <http://folk.uio.no/lee/oldpage/articles/Consumer_purchases_jurisdiction.pdf> [Foss & Bygrave, "International Consumer Purchases Through the Internet"].
134. Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59 at p. 351.
135. *Ibid.* at p. 351.
136. *Ibid.* at p. 353.
137. Chen, "United States and European Union Approaches to Internet Jurisdiction," *supra* note 74 at p. 438.
138. Michael Cordera, "E-Consumer Protection: A Comparative Analysis of EU and US Consumer Protection on the Internet," (2001) 27:2 Rutgers Computer and Technology Law Journal 231 at p. 232 [Cordera, "E-Consumer Protection"].

3.2. The Brussels Regulation

On 22 December 2000, the EU approved *Council Regulation 44/2001 of December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*[139] that replaced the *Brussels Convention* with effect from 1 March 2002. The *Brussels Regulation* is a revision of the 1968 *Brussels Convention*, and was promulgated in order to "maintain[] and develop[] [the] area of freedom, security and justice,"[140] and to formulate

> [p]rovisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation....[141]

It is interesting to note that the new jurisdiction rules were issued in the form of an EU Regulation, rather than a Convention or a Directive. A Convention is generally negotiated between the states, whereas "a Directive would have needed to be implemented individually by each Member State and could have resulted in varying national provisions."[142]

As an EU Regulation, by contrast, the *Brussels Regulation* has a general scope, is obligatory in all its elements, and directly applicable in all Member States of the European Union. Any local laws contrary to the regulation are overruled, as EU Law has supremacy over the laws of the Member States. New legislation enacted by Member States must be consistent with the requirements of EU regulations. For these reasons, regulations constitute the most powerful or influential EU legislative acts.[143]

The need for enactment of binding uniform legislation in each Member State, however, must be seen in light of the development of new electronic communication methods for transacting business. The fact that e-commerce in the EU "lagged behind the Unites States" was clearly attributed to "lack of consumer confidence in the security of Internet transactions."[144] Therefore, when drafting the *Brussels Regulation*, the European legislature took into account the fast development of electronic commerce, and closely considered the applicability of the provisions to the new business opportunities created by the internet.[145] In other words, "the criteria given in Article 13(3) of the Convention had been

139. *Brussels Regulation*, *supra* note 123.
140. *Ibid.*, recital (1) of the Preamble.
141. *Ibid.*, recital (2) of the Preamble.
142. Marco Berliri, "Jurisdiction and the Internet, and European Regulation 44 of 2001" in Dennis Campbell, ed., *E-Commerce: Law and Jurisdiction—The Comparative Law Yearbook of International Business*, Special Issue, 2002 (The Hague: Kluwer Law International, 2003) 1–12 at p. 6. [Berliri, "Jurisdiction and the Internet"].
143. LawbourLawTalk.com, *Dictionary*, <http://encyclopedia.laborlawtalk.com/Regulation>.
144. Chen, "United States and European Union Approaches to Internet Jurisdiction," *supra* note 74 at p. 438, referring to a quote by Leonello Gabrici, a commission spokesman, stating that "lack of consumer confidence is the main thing holding up the development in e-commerce."
145. Joakim Oren, "International Jurisdiction Over Consumer Contracts in e-Europe," (2003) 52:3 International and Comparative Law Quarterly 665 [Oren, "International Jurisdiction Over Consumer Contracts in e-Europe"].

reframed to take account of developments in marketing techniques."[146]

Despite this new awareness, there has been "a desire to secure continuity between the Brussels Convention, with its case law, and the Brussels Regulations."[147] Thus, large parts of the *Brussels Regulation* resemble both the structure and the provisions of the *Brussels Convention*, and the basic principle set out in Article 2 of the Regulation still stipulates that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. However, the provisions dealing with consumer contract jurisdiction are now to be found in Section 4, Articles 15 to 17 of the Regulation, and require a detailed analysis.

3.2.1. The New Consumer Contract Jurisdiction Regime

Section 4 of the *Brussels Regulation* is structured as follows: Article 15 sets the scope to which Section 4 is applicable, Article 16 defines the substantive rules on jurisdiction over consumer contracts, and Article 17 provides the circumstances under which the parties can depart from the statutory provisions by an express choice of forum agreement.

Probably the most important and significant change with regard to consumers is the broadened scope of the modified provision dealing with commercial activities in Article 15 of the Regulation. This new approach, as we will see in due course, "extends the circumstances in which consumers are able to sue in their home jurisdiction, with important consequences for online contracts and the development of e-commerce."[148]

While Article 16(1) of the Regulation, just like the old Article 14 of the Convention, still stipulates that

> a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled,

the scope of Article 15(1)(c) has been wholly redefined. Under the new provision, jurisdiction over a consumer contract:

> shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:
>
> a) it is a contract for the sale of goods on instalment credit terms; or
>
> b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

146. Commission of the European Communities, *Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM(1999) 348 final, 99/0154 (CNS), <http://eur-lex.europa.eu/LexUriServ/site/en/com/1999/com1999_0348en01.pdf> at p. 16 [*Proposal for a Council Regulation (EC) on jurisdiction*]. See also Vasiljeva, "Jurisdiction in Consumer Contracts Concluded Online," *supra* note 125 at p. 130.
147. *Brussels Regulation*, *supra* note 123, recitals (5) and (19) of the Preamble; Vasiljeva, "Jurisdiction in Consumer Contracts Concluded Online," *supra* note 125 at p. 128.
148. Vasiljeva, "Jurisdiction in Consumer Contracts Concluded Online," *supra* note 125 at p. 128.

> c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile, or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.[149]

Although generally Article 15 of the Regulation maintains the Convention's special consumer protection regime but introduces some modifications as regards its field of application, it is subsection (c) which warrants special scrutiny in the consumer contract jurisdiction context. This is the focus of the following analysis.

To begin with, the altered wording now concentrates on a supplier's commercial activities, rather than on the consumer. Therefore, it has effectively put an end to the extensive discussion in legal doctrine and legal practice, as set out above, as to whether, and how, a consumer purchasing goods or services online could be qualified as "active" or "passive," and, consequently, whether the consumer can rely on the special protection regime. More exactly, "one now only has to take account of the question of whether or not the other party directs his activities to…the state in which the consumer is domiciled."[150]

Unfortunately, however, the Regulation does not define which specific activity qualifies as "directing" it to the consumer's Member State. However, since this concept was subject to much attention in the preparatory works of the draft proposal, one can attempt to draw from these documents some guidance on how to interpret the new provision. There, the European Commission expressly clarified that

> The concept of activities pursued or directed towards a Member State is designed to make clear that point (3) [now (c)] applies to consumer contracts concluded via an interactive website accessible in the State of the consumer's domicile. The fact that a consumer simply ha[s] knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction.[151]

Consequently, since the Commission required that a website must have an interactive nature, the mere passive distribution of commercial information via a website cannot be considered to fall into the scope of the provision. On the contrary, a consumer must "at least have the possibility to enter into an agreement online."[152]

Thus, the fact that the website must merely be accessible in the EU Member State in which the consumer is domiciled obviates the need to evaluate the degree of a website's deliberate targeting of the state. Besides examining

149. *Brussels Regulation*, *supra* note 123, art. 15.
150. Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59. Interestingly, the Regulation "does not prescribe that the other party has to direct his website to the consumer as a person but to the state in which the consumer is domiciled," at endnote 57.
151. *Proposal for a Council Regulation (EC) on jurisdiction*, *supra* note 146 at p. 16 (emphasis added). See also Oren, "International Jurisdiction Over Consumer Contracts in e-Europe," *supra* note 145 at p. 679; also Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59 at endnote 58.
152. Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59 at p. 357.

the degree of interactivity of the website, no other factors, such as language used on the website, have to be considered.[153] Recital 13 of the Commission's initial Draft Regulation specifically emphasized that

> electronic commerce in goods or services by a means accessible in another Member State constitutes an activity directed to that State. Where that other State is the State of the consumer's domicile, the consumer must be able to enjoy the protection available to him when he enters into a consumer contract by electronic means from his domicile.[154]

Altogether, as a result of the new regime of the *Brussels Regulation*, one would assume that the mere accessibility of a website from any Member State will trigger the adjudicatory jurisdiction of that State. The implication of this condition would be that, since any website is almost always accessible in all EU Member States, any website holder who is domiciled in an EU Member State could be sued in any EU Member State, "irrespective of whether or not he wished to do business in the Member State concerned."[155]

Recognizing this predicament, the European Council and the European Commission issued a joint statement, explaining that

> the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means.[156]

Furthermore, they stressed that

> for Article 15.1(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities.[157]

Despite these attempts to clarify this somewhat confusing situation, however, online businesses are still left with an unanswered question as to whether their websites would trigger Article 15(1)(c) of the Regulation. The tendency seems to be that, as soon as a contract has been concluded by a consumer through an interactive website, Article 15 (1)(c) is prompted, and he or she can rely on the protection regime stipulated in Article 16 of the Regulation.

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153. *Ibid.* at p. 358.
154. *Proposal for a Council Regulation (EC) on jurisdiction*, *supra* note 146 at p. 29 (emphasis added). See also Oren, "International Jurisdiction Over Consumer Contracts in e-Europe," *supra* note 145 at p. 681.
155. Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59 at p. 358; see also Vasiljeva, "Jurisdiction in Consumer Contracts Concluded Online," *supra* note 125 at p. 130; and Oren, "International Jurisdiction Over Consumer Contracts in e-Europe," *supra* note 145 at p. 680.
156. "Justice, Home Affairs and Civil Protection," press release for the 2314th Council Meeting (30 November 2000–1 December 2000), Annex, <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/13865.en0.html#_Toc501511819>.
157. *Ibid.*

It is interesting to note that the European Parliament considered the implication that under the new Article 15 of the *Brussels Regulation* virtually every online business can be hauled into a foreign court room due only to the fact that the website is interactive in nature and accessible in that Member State as "far too excessive,"[158] as one commentator described the European Parliament's reaction. Therefore, it proposed an amendment to the Commission according to which the mere accessibility of the website would not be sufficient anymore for the purpose of asserting jurisdiction. By contrast, the website's degree of deliberately targeting the state in which the consumer is domiciled would have to be taken into account, as well.

The European Parliament thus recommended amending Article 15 by adding the following paragraph:

> The expression "directing such activities" shall be taken to mean that the trader must have purposefully directed his activity in a substantial way to that other Member State or to several countries including that Member State. In determining whether a trader has directed his activities in such a way, the courts shall have regard to all circumstances of the case, including any attempts by the trader to ring-fence his trading operation against transactions with consumers domiciled in particular Member States.[159]

However, the Commission rejected the proposal, as it appeared to run "counter to the philosophy of the provision."[160] It believed that the mere fact that a website is interactive in nature and is accessible in the Member State in which the consumer is domiciled is sufficient for asserting jurisdiction over electronic contracts. Moreover, it found that "the very existence of such a contract would seem to be a clear indication that the supplier of goods or services has directed its activities towards the state where the consumer is domiciled."[161] Therefore, the Commission stated that the definition suggested by the Parliament

> is based on the essentially American concept of business activity as a general connecting factor determining jurisdiction, whereas the concept is quite foreign to the approach taken by the Brussels Regulation.[162]

To clarify, while the American concept, as we have seen, takes into account the level of business activity, *i.e.* purposeful availment and minimum contacts, the general ground set forth in the *Brussels Regulation* ultimately

158. Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59 at p. 358. See the *Proposal for a Council Regulation (EC) on jurisdiction*, *supra* note 146.
159. European Parliament, *Proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM(1999) 348 - C5-0169/1999 - 1999/0154(CNS), <http://www.europarl.europa.eu/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=000921&LANGUE=EN&TPV=PROV&SDOCTA=12&TXTLST=1&Type_Doc=FIRST&POS=1>.
160. *Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty)*, COM/2000/0689 final - CNS 99/0154, <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=500PC0689&lg=en> at para. 2.2.2 [*Amended Proposal for a Council Regulation on Jurisdiction*].
161. *Ibid.* at para. 2.2.2.
162. *Ibid.* at para 2.2.2. For a good analysis of the discussion between the Commission and the Parliament, see Berliri, "Jurisdiction and the Internet," *supra* note 142 at pp. 9–11.

focuses on the domicile of both the consumer and the trader. Furthermore, the motivation and policy behind the European and the American concept seem to be somewhat different. While the *Brussels Regulation* has obviously been composed in order to protect consumers as the traditionally assumed weaker party to a contract, the *Zippo* sliding-scale test is used "in order to decide whether personal jurisdiction based on Internet activity comports with the US Constitution's 14th Amendment."[163] This disparity in method was clearly unacceptable for the Commission and eventually the *Brussels Regulation* came into effect virtually unchanged.

Unfortunately, the Commission's argument that the very existence of a consumer contracts is an indication that the trader has directed its activities towards the state where the consumer is domiciled seems to be somewhat contradictory to the actual wording of Article 15. And indeed, as it has been pointed out by various authors, it is true that the Commission's statement leads to a circular reasoning: "if 'directing to' is a necessary condition for the existence of a consumer contract…then the existence of a consumer contract cannot be itself an indication that the 'directing to' condition is fulfilled."[164]

Thus, one now probably has to await an opportunity for the European Court of Justice (ECJ) to take up that discussion and give some further interpretative guidelines and, in particular, to clarify whether this confusing phrasing of the condition was truly intended. What must be taken into account, however, is the aforementioned context of continuity between the *Brussels Convention* and the *Brussels Regulation*, which must be ensured.[165] As it was the express desire to continue to adhere to the legislation interpretation guidelines provided by the ECJ, the comments of the ECJ on consumer protection in the Convention must be kept in mind. In *Shearson Lehmann Hutton Inc. v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen GmbH*, the ECJ specifically held that

> the special [legal system] established by the [Brussels] Convention is inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, and the consumer must not therefore be discouraged from suing by being compelled to bring [an] action before the courts in the Contracting State in which the other party to the contract is domiciled.[166]

Moreover, since the ECJ traditionally applies a teleological method when interpreting EU legislation, it usually considers the motivation and policy

163. Oren, "International Jurisdiction Over Consumer Contracts in e-Europe," *supra* note 145 at p. 684.
164. Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59.
165. *Brussels Regulation*, *supra* note 123, recitals (5) and (19) of the Preamble.
166. *Shearson Lehmann Hutton Inc. v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen GmbH*, Case C-89/91, [1993] ECR I-0139, <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61991J0089> at para 18. See Vasiljeva, "Jurisdiction in Consumer Contracts Concluded Online," *supra* note 125 at pp. 135–136.

behind specific provisions.[167] Therefore, one has to closely analyse the draft proposals and preparatory documents of the *Brussels Convention* and the *Brussels Regulation*, which, as already discussed above, generally seem to favour consumer protection over businesses. The Commission, in its first draft proposal, explicitly clarified that "the material scope of the provisions governing consumer contracts has been extended so as to offer consumers better protection, notably in the context of electronic commerce."[168] It has also been noted that in e-commerce, it is often the case that the supplier requires prepayment from the consumer in order to carry out the transaction, and that it is usually the supplier who unilaterally dictates the terms of the contract without giving the consumer the opportunity to renegotiate these terms.[169] Therefore, particularly when it comes to e-commerce, the professional party is presumed to be in the stronger position.

Lastly, another important change in the new *Brussels Regulation* can also be seen in the omission of the old *Brussels Convention* condition that the consumer must have taken steps necessary for the conclusion of the contract in the state in which he or she is domiciled. This produces the effect that the special protection regime applies when the steps necessary for the conclusion of the contract have been taken anywhere in the world, as long as the website is accessible in the consumer's Member State domicile.[170]

According to the Commission, this new scope of the provision overcomes the flaw in the Convention that a consumer could not rely on the special protection regime if the other party had urged the consumer to leave the state in which he is domiciled for the purpose of entering into the contract.[171] Furthermore, since the Commission specifically explained that "the removal of the [old] condition…shall also be seen in the contexts of contracts concluded via an interactive website," and that

> for such contracts the place where the consumer takes these steps may be difficult or impossible to determine, and they may in any event be irrelevant to creating a link between the contract and the consumer's State,[172]

the latter amendment was, obviously to a large extent, motivated by electronic commerce.

To conclude, the new *Brussels Regulation* consumer jurisdiction approach can be summarized thus: every EU consumer who buys goods or services through

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167. "A teleological interpretation of the law means that the interpretation is based on specific knowledge, or on assumed knowledge, regarding the purpose of the law." Quoted from Oren, "International Jurisdiction Over Consumer Contracts in e-Europe," *supra* note 145 at note 15.
168. Oren, "International Jurisdiction Over Consumer Contracts in e-Europe," *ibid.* at p. 669.
169. See Committee on Legal Affairs in the Internal Market (Diana Wallis, Rapporteur), *Report on the proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters,* A5-0253/2000, <http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//NONSGML+REPORT+A5-2000-0253+0+DOC+PDF+V0//EN&L=EN&LEVEL=0&NAV=S&LSTDOC=Y>.
170. Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59; Oren, "International Jurisdiction Over Consumer Contracts in e-Europe," *supra* note 145 at p. 673. For a very good discussion of the consumer protection regime under the old Convention, see Foss & Bygrave, "International Consumer Purchases Through the Internet," *supra* note 133.
171. Oren, "International Jurisdiction Over Consumer Contracts in e-Europe," *supra* note 145 at p. 673–674. See also Foss & Bygrave, "International Consumer Purchases Through the Internet," *ibid.*
172. Oren, "International Jurisdiction Over Consumer Contracts in e-Europe," *ibid.* at p. 674, citing *Proposal for a Council Regulation (EC) on jurisdiction*, *supra* note 146 at p. 16.

a website accessible in his Member State, irrespective of whether he or she is physically present in his or her home domicile, falls within the scope of the protective regime and has the privilege of litigating in his or her home domicile.[173]

The drafters of the *Brussels Regulation* clearly chose to make the so-called "country-of-destination" principle the rule, rather than the exception for consumer contracts jurisdiction. In doing so, they substantially derogated from the traditional international law *actor sequitur forum rei* rule in order to enhance consumer confidence in the online marketplace.

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4. COMPARATIVE ANALYSIS

ALTHOUGH CANADA AND THE EUROPEAN UNION pursue the same policies, that is, to boost electronic commerce through enhancing consumer confidence in the electronic marketplace, the legislative models regarding internet jurisdiction employed to realize this aspiration are significantly different.

As we have seen, today it is generally acknowledged that in Canada contracting parties can agree to an express choice of jurisdiction clause. This clause is usually given effect by the courts unless a strong cause for not doing so is shown.[174] In a consumer context, however, provincial consumer protection laws in Ontario and Alberta, for example, stipulate that, despite an express choice of forum agreement, the consumer cannot be deprived of his or her right to commence an action in his or her home jurisdiction. Unfortunately, in Nova Scotia, New Brunswick, Manitoba, and Saskatchewan, for example, no specific consumer jurisdiction clauses exist, and the *Internet Sales Contract Harmonization Template* also avoids the issue of consumer internet jurisdiction.

Absent an express forum selection clause, the limits on extraterritorial jurisdiction in Canada have to be considered case-by-case through the use of guidelines which have been developed through a series of cases in the offline world, emerging in the 1990 Supreme Court of Canada decision in *Morguard*.[175] The Court established the "real and substantial connection" test, which requires a "real and substantial connection" between the subject matter of the action and the forum and thus prevents a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In 2002, this test was further developed by the Ontario Court of Appeal in *Muscutt*, where the court established a broad approach to the "real and substantial connection" test, by means of eight relevant factors.[176] Nevertheless, the court emphasized that the assumption of jurisdiction must eventually be guided by the constitutional requirements of order and fairness.

Turning to an internet context, however, the Canadian courts have struggled to give content to the *Morguard* test. Although they have started to take a more subtle and contextual approach in asserting or rejecting jurisdiction in disputes that involve internet communications, all that seems clear so far is

173. Chen, "United States and European Union Approaches to Internet Jurisdiction," *supra* note 74 at p. 440.
174. *Z.I. Pompey*, *supra* note 21.
175. *Morguard*, *supra* note 32.
176. *Muscutt*, *supra* note 22.

that "something more" than mere internet accessibility is required to satisfy *Morguard.* Initially drawing from US case law like *Zippo,* in due course more novel concepts such as "purposeful availment" or "targeting" have also been considered by the Canadian judiciary. But absent Canadian case law dealing specifically with an electronic commerce dispute, there still remains great uncertainty as to what is necessary to establish a real and substantial connection in an internet transaction.

Therefore, it is interesting to see that Armstrong JA in *Bangoura* considered the most commonly used approaches such as "targeting," "active-versus-passive, "country of origin," and "foreseeability and totality of circumstances" as "consistent with the real and substantial connection test and capable of incorporation into the proper application of the *Muscutt* factors."[177] As already said before, it now remains to be seen whether "in some future case involving internet publication, [Canadian courts] will find it useful to consider and apply one or more of the proposed approaches."[178]

In Europe, on the other hand, the rigid statutory regime of the 1968 *Brussels Convention* was considered to be ill-equipped to deal with jurisdictional questions stemming from internet transactions. The distinction between the "active consumer" and the "passive consumer" especially had led to much debate as to whether this distinction was applicable to consumer contracts entered into via the internet. Therefore, in an attempt to boost consumer confidence in electronic commerce, the 1968 *Brussels Convention* was replaced by the new *Brussels Regulation* which came into effect in March 2002. Notably, the new legislation was passed in the form of a Regulation, which, as explained above, is directly applicable in all the EU Member States.

In summary, the new general rule as regards international e-consumer contracts jurisdiction in the EU is that

> a consumer, irrespective of his nationality, who is domiciled in a EU Member State and who uses, anywhere in the world, an interactive website which is (also) accessible in the Member State in which the consumer is domiciled and the holder of which is domiciled in a Member State, can bring proceedings against the website holder in the Member State in which he [the consumer] is himself domiciled.[179]

Thus, enterprises that are domiciled in an EU Member State can be sued in any EU Member State where their website is accessible, and if a consumer contract was entered into as a result of the consumer visiting this website, irrespective of whether or not the merchants focused their online business on that Member State.

This method for determining the appropriate jurisdiction is significantly different from the US targeting approach discussed above, where the seller must not only direct electronic activity into the forum state, but also must intend to engage in business or other interactions in the forum state, and lastly, must

177. *Bangoura, supra* note 2 at para. 47.
178. *Ibid.* at para. 49.
179. As interpreted by the European Commission, see Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59.

engage in activity that creates under the forum state's law a potential cause of action with regard to a person in the forum state. Only if the online business fulfils this three-prong test can it be said that the business effectively targets the consumer's forum state and thus has to reasonably foresee the possibility of being sued in that forum. Also, the aforementioned Canadian foreseeability criteria require much more than mere accessibility of the website in the consumer's home forum and the conclusion of a consumer contract for the finding of whether a specific jurisdiction has been targeted and thus whether the seller should have reasonably expected the possibility of being hauled into a courtroom in a far-off jurisdiction.

Nonetheless, even though the results are similar—generally, EU and Canadian courts favour the consumers' forum—the differences between the Canadian and the European systems are obvious. The *Brussels Regulation* sets forth a rigid standard that clearly favours the consumer: if it is a consumer contract that has been entered into via an interactive website, the consumer can choose the forum where he or she wants to bring an action. Importantly, Article 17 of the *Brussels Regulation* specifically deems forum selection clauses in consumer contracts ineffective, unless they are entered into after the dispute arose and they favour the consumer. In Canada, by contrast, in determining the *ex juris* assertion of jurisdiction, the courts employ the flexible "real and substantial connection" test, where they are required to make a case-by-case factual inquiry as to whether the connection between the subject matter of the action and the forum is sufficient to satisfy the test. However distinct these approaches might seem, they both present significant weaknesses when viewed in light of the underlying policy of simultaneously enhancing consumer confidence and promoting electronic commerce.

A fundamental weakness of the Canadian approach is its clear lack of predictability when it comes to transferring traditional conflict of laws principles to the online environment. The courts have struggled to give content to the *Morguard* test even in an offline context and are now faced with the even more complex question of determining a "real and substantial connection" in internet transactions. Absent any Canadian case law dealing with a B2C e-commerce dispute, online businesses must attempt to foresee whether or not the level of interactivity of their websites is high enough to be considered to be targeting the consumer's jurisdiction, for example. Online consumers, on the other hand, still cannot say with confidence—at least in those provinces without contrary consumer protection rules, such as Manitoba, Nova Scotia, New Brunswick, and Saskatchewan—that their mouse-click will not deprive them of the possibility of commencing an action in their home forum. In this regard, due to the still relative infancy of e-commerce, the risk of being hauled into a foreign courtroom in a far-off jurisdiction is not easy to foresee for either contracting party at this point in the Canadian regime.

In a similar way, the bright-line rules of the regulatory approach taken by the European legislature show significant shortcomings.[180] First, although the

180. Chen, "United States and European Union Approaches to Internet Jurisdiction," *supra* note 74 at p. 443.

statutes of the *Brussels Regulation* were clearly drafted in light of the internet, many expressions lack definitiveness and therefore remain difficult to interpret in an online context. For example, as discussed above, the concept of "directing activities" was subject to much debate, but unfortunately the European Commission rejected Parliament's approach to amend and clarify the statute. It thereby rejected the suggestion put forth by Parliament as "based on the American concept," a "concept quite foreign to the approach taken by the Brussels Regulation."[181] As a result, the Regulation came into force virtually unchanged, and thus the new country-of-destination approach still remains ambiguous in its interpretation as applied to the internet.

Second, whereas consumer organisations evidently declared that it seemed fair that the professional party took the burden of suing in a foreign state, it is very well arguable that the underlying concept of the *Brussels Regulation* "that a contract entered into via an interactive website qualifies as having been 'directed' towards the consumer is flawed."[182] Thus, it was claimed that the drafters of the *Brussels Regulation* "misinterpreted the nature of e-consumer transactions and subsequently, wrote an overly broad regulation… when they adopted the country-of-destination approach."[183]

The major argument in this regard is that not all consumer contracts entered into interactively are directed at those consumers completing such contracts, since "consumers could click through various links to reach a foreign web site and complete a contract, … but it could not be said that the foreign web site owner directed any of his activities to those consumers."[184] Additionally, one can claim that a consumer does very well know that a website owner is not necessarily domiciled in the same EU Member State as the consumer, and that therefore the consumer could reasonably expect being subject to a foreign jurisdiction.[185] In other words, a consumer is more likely to be aware that she is availing herself of goods or services provided by a foreign website than is the website owner likely to be aware that the consumer resides in a foreign member state.

As a result of the strict *Brussels Regulation* regime, businesses may be obliged to organise their websites in such a way as to make it clear to consumers that they do not wish to enter into any transactions if the consumers are domiciled in a specific Member State, or to install costly technologies to avoid contracting with certain Member States.[186] For example, so-called ring-fence attempts could be used to indicate that the seller only intends to do business with customers domiciled within the stated Member States. Consequently, consumers who are domiciled outside this geographic area cannot reasonably

181. *Amended Proposal for a Council Regulation on Jurisdiction*, *supra* note 160.
182. Chen, "United States and European Union Approaches to Internet Jurisdiction," *supra* note 74 at p. 444; see Cordera, "E-Consumer Protection," *supra* note 138 at pp. 249–250.
183. Chen, "United States and European Union Approaches to Internet Jurisdiction," *ibid.*; see Cordera, "E-Consumer Protection," *ibid.* at p. 249.
184. Chen, "United States and European Union Approaches to Internet Jurisdiction," *ibid.*; see Cordera, "E-Consumer Protection," *ibid.*
185. Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59; see also Chen, "United States and European Union Approaches to Internet Jurisdiction," *supra* note 74 at pp. 444–445.
186. Vasiljeva, "Jurisdiction in Consumer Contracts Concluded Online," *supra* note 125 at p. 132; Debusseré, "International Jurisdiction over E-Commerce Contracts in the European Union," *supra* note 59.

expect to be protected by the special regime of the *Brussels Regulation*.[187] Even though this seems to be a discrimination between consumers according to their place of residence, which is "inconsistent with the principles of common market and free movement of goods and services" within the EU, companies should have the right to decide which market they want to target.[188]

Third, since the EU approach is likely to subject sellers to higher litigation costs, online businesses might be tempted to pass on these costs to the consumer by simply raising their prices.[189] Additionally, small and mid-sized enterprises that lack the resources to establish highly technological websites that identify geographic locations to avoid the pitfalls just described may even decide to simply shut down their web presence completely to avoid the risk of being subject to a foreign jurisdiction.[190] While larger enterprises that operate on an EU- or even world-wide basis can more easily afford legal expertise to litigate complicated international matters, small and mid-sized businesses are more likely faced with the fact that a costly lawsuit in a foreign jurisdiction may cause them to go out of business.[191] Thus, "ironically, a measure meant to promote consumer confidence in internet transactions…actually reduces consumer choices."[192]

These shortcomings of the *Brussels Regulation* effectively hamper the development of electronic commerce, since the country-of-destination approach is overly broad and an unfair burden, particularly to small and mid-sized online businesses. The question as to whether the adoption of the *Brussels Regulation* has brought more legal certainty to the online marketplace by providing confidence for businesses and consumers alike cannot be answered in the affirmative.

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5. CONCLUSION

THE INCREASED BLURRING OF NATIONAL AND INTERNATIONAL contexts due to the global nature of the internet amplifies the importance of a reliable set of rules governing adjudicatory jurisdiction issues. It is therefore interesting to note that in Canada, until recently, the rules of conflict of laws have "not generally been perceived or seized upon as an area in which concerns for consumer protection should be pursued, at least not explicitly."[193] In Europe, on the other hand, "the rules of private international law, insofar as they operate to determine where a given piece of litigation must proceed…" have been recognized "as a site in which concerns for consumer protection and related instrumental policy goals may legitimately be pursued."[194]

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187. Oren, "International Jurisdiction Over Consumer Contracts in e-Europe," *supra* note 145 at p. 691.
188. Vasiljeva, "Jurisdiction in Consumer Contracts Concluded Online," *supra* note 125 at p. 132. For further reading see Foss & Bygrave, "International Consumer Purchases Through the Internet," *supra* note 133 at p. 121.
189. Chen, "United States and European Union Approaches to Internet Jurisdiction," *supra* note 74 at p. 445.
190. See Oren, "International Jurisdiction Over Consumer Contracts in e-Europe," *supra* note 145 at p. 691; Vasiljeva, "Jurisdiction in Consumer Contracts Concluded Online," *supra* note 125 at p. 142.
191. Chen, "United States and European Union Approaches to Internet Jurisdiction," *supra* note 74 at pp. 446–447.
192. *Ibid.*
193. Vaughan Black, "Consumer Protection in the Contract of Laws: Canada, the United States, and Europe" in Iain Ramsay, *Consumer Law in the Global Economy— National and International Dimensions* (Aldershot: Ashgate Dartmouth, 1997) at p. 195.
194. *Ibid.* at pp. 197, 208.

As we have seen, however, in an e-commerce context, neither the current Canadian nor the current European approach to determining the assertion of judicial jurisdiction seem satisfactory and capable of accomplishing their e-consumer policy goals. Whereas the legislative situation in Canada calls for more predictable and reliable rules, the European regime, on the other hand, seems to be highly overregulated and thus impedes the development of the online marketplace.

The best option is a middle course that takes better account of both competing positions and demands. The proposals made by the Canadian joint working group in their 2002 Consultation Paper seem to lead in the right direction, although some weaknesses can be observed. Under this approach, only if the consumer contract results from a solicitation of business in the consumer's jurisdiction—that is, if the business actively targets the consumer's jurisdiction, and the consumer took all the steps necessary for the formation of the contract in his or her jurisdiction— must the seller face the possibility of being sued in the consumer's jurisdiction. Conversely, if the seller takes reasonable steps to avoid concluding contracts with consumers in particular jurisdictions, he will not have to fear the prospects of litigating in a foreign jurisdiction. Thus, the Consultation Paper generally focuses neither solely on the consumer's actions, nor on the seller's online business (inter)activity. Rather, it attempts to balance the needs and interests of online consumers and online businesses by establishing a more practicable and more predictable set of rules to determine the jurisdiction question.

However, since the proposed rules remarkably resemble the approach taken by the superseded *Brussels Convention* (compare the "specific invitation" or "advertising" requirement with the "solicitation of business" part of the Consultation Paper, and the mutual prerequisite that the contract was concluded in the consumer's home forum), some clarifications as to what qualifies as a "solicitation of business in the consumer's jurisdiction" in an internet context seem necessary.

In this regard, the foreseeability criteria described above in combination with the three-prong targeting test established in the US case *ALS Scan*[195] could serve as a practical guideline. Where it is obvious that the online merchant directs electronic activity into the consumer's forum state, intends to engage in business or other interactions in the forum state, and engages in activity that creates under the forum state's law a potential cause of action with regard to a person in the forum state, it might be rather difficult to argue that she could not have reasonably foreseen the possibility of being sued in that particular jurisdiction. Just as well, if the seller does not intend to aim her website at a particular forum, for example by engaging in "jurisdictional avoidance"[196] through ring-fencing, or by entering into a choice of forum agreement with the consumer after the dispute has arisen, she cannot be expected to still reasonably foresee being hauled into a courtroom in a far-off jurisdiction.

Furthermore, it might be useful to consider the necessity of the clause that the consumer has to take "all the steps necessary for the formation of the

195. *ALS Scan*, *supra* note 74.
196. Geist, "Shifting Adjudicatory Approach," *supra* note 93 at p. 91.

consumer's contract in the consumer's jurisdiction." If the online business clearly targets the consumer's jurisdiction, it should not make a difference whether the consumer enters into the contract while he is physically present in his home forum, or whether he is on vacation in a foreign country, as long as the consumer is normally domiciled in the targeted forum. While it is definitely sensible to protect a consumer who has been induced by vendors to travel to a foreign jurisdiction only for the purpose of forming the contract and the consumer's travel was assisted by the vendor, it is questionable if, in the age of laptops and mobile phones which can be used to browse the web, it is still realistic to require the consumer's physical presence in his home jurisdiction.

All things considered, one could summarize a "middle course" approach thus: in circumstances where the consumer contract resulted from a solicitation of business in the consumer's jurisdiction by or on behalf of the vendor, or the consumer's order was received by the vendor in the consumer's jurisdiction, the consumer should have the option to bring proceedings against the vendor either in the courts of the consumer's jurisdiction or in the courts of the vendor's jurisdiction. However, if the vendor clearly demonstrates that she took reasonable steps to avoid concluding contracts with consumers resident within a particular jurisdiction, for example by using ring-fence mechanisms, she is deemed not have solicited business in that jurisdiction. The vendor, on the other hand, should be restricted to the consumer's jurisdiction if she wants to commence an action against the consumer.

Under these rules, consumers could expect to be protected effectively, while businesses could be sure that the legal risk of operating online is not disproportionate to their connection to the relevant forum. To conclude, such an approach might present a reasonable compromise between the flexibility of the Canadian, and the stringency of the European, e-commerce consumer protection methodologies in the context of the assertion of adjudicatory jurisdiction.