

# **The Hague Runs into B2B: Why Restructuring the Hague Convention of Foreign Judgments in Civil and Commercial Matters to Deal with B2B Contracts is Long Overdue**

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## **I. INTRODUCTION**

In October of 1999, The Hague Conference on Private International Law issued a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Hague Convention).<sup>1</sup> There were sixty-four member States to the Hague Conference on Private International Law in January 2004.<sup>2</sup> In order to maintain effective international business to business (B2B)<sup>3</sup> contracts, the Hague Convention must revise some of its original

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1. Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999 *available at* <http://www.hcch.net/e/conventions/draft36e.html> (last visited Jan. 31, 2004), reprinted in A.L.I., International Jurisdiction and Judgments Project: Report (Apr. 14, 2000) [hereinafter Hague Convention].

2. See Hague Conference on Private International Law, Member States as of Oct. 31, 2002, *at* <http://www.hcch.net/e/members/members.html> (last visited Jan 31, 2004). The member states of the Hague Conference are: Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, The former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Jordan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Monaco, Morocco, Netherlands, New Zealand, Norway, Panama, Peru, Poland, Portugal, Romania, Russian Federation, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, and Yugoslavia. *Id.*

3. ROGER LEROY MILLER & FRANK B. CROSS, THE LEGAL AND E-COMMERCE ENVIRONMENT TODAY: BUSINESS IN ITS ETHICAL, REGULATORY, AND INTERNATIONAL SETTING, 398 (West 2002) (discussing business to business contracts). The growth of B2B contracts has been exponential, and the future of the B2B market seems to have no end. *Id.* See *infra* text accompanying note 22 (outlining how the Hague Convention deals with B2B contracts).

language.<sup>4</sup>

Part I of the note analyzes electronic commerce, specifically B2B contracts. Next, Part II briefly describes the foundation and history of the Hague Convention, as well as two specific articles. In Part III, alternative approaches to jurisdiction and enforcement of judgments are outlined; including an overview of the informal working group's proposals to accomplish the goal of the Special Commission.<sup>5</sup> The Special Commission is concerned with whether the Hague Convention meet the needs of e-commerce.<sup>6</sup> Finally in Part IV, proposals are tested by adopting certain aspects of the alternative approaches in Part III, better aligning the Hague Convention with current B2B law.

## II. ELECTRONIC COMMERCE

By the year 2007, the number of Internet users is projected to be approximately 1.46 billion.<sup>7</sup> Congress has defined e-commerce as "any transaction conducted over the Internet or through Internet access, comprising the sale, lease, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access."<sup>8</sup> These transactions are creating a great deal of revenue, with some estimating Internet commerce growth to be 1.3 trillion by the end of 2003.<sup>9</sup> The above numbers evidence the growing trend toward the online marketplace

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4. James Love, *At the end of The Hague Conference, the Internet and the public domain are at risk*, ON LINE opinion, July 15, 2001, at <http://www.onlineopinion.com.au/2001/Jul01/Love.html> (last visited Feb. 26, 2003) (analyzing how the treaty was drafted not drafted with electronic commerce in mind, and the strangling effect it will have). *But see* Mary Shannon Martin, Note, *Keep it Online: The Hague Convention and The Need for Online Alternative Dispute Resolution in International Business to Consumer E-Commerce*, 20 B.U. INT'L L.J. 125, 134 (2002) (suggesting the B2B contracts should be subject to the default rules of the Hague because the parties are operating at arm's length).

5. See Report on the First Meeting of the Informal Working Group on the Judgments Project, Oct. 22-25, 2002 at <http://www.hcch.net/e/workprog/jdgm.html> (last visited Jan. 31, 2004); Report on the Second Meeting of the Informal Working Group on the Judgments Project, Jan. 6-9, 2003 at <http://www.hcch.net/e/workprog/jdgm.html> (last visited Jan. 31, 2004).

6. See Hague Convention, *supra* note 1, at n. 1.

7. Computer Industry Almanac, Inc., *Internet Users Will Top 1 Billion in 2005: Wireless Internet Users Will Reach 48% in 2005*, March 21, 2002 at <http://www.c-i-a.com/pr032102.htm> (last visited Mar. 7, 2003). See generally MICHAEL L. RUSTAD & CYRUS DAFTARY, *E-BUSINESS LEGAL HANDBOOK*, § 8.01 (Aspen Law & Business (2003) (describing the prevalence of the global marketplace).

8. Internet Tax Freedom Act 47 U.S.C. § 151 (1998).

9. Advisory Commission on Electronic Commerce: Report to Congress, April 2000, at [http://www.ecommercecommission.org/acec\\_report.pdf](http://www.ecommercecommission.org/acec_report.pdf) (last visited Mar. 7, 2003) (citing a Forrester Research project released in 1998).

using B2B contracts, but if the Hague Convention is not updated, these trends might decrease.<sup>10</sup>

This note specifically deals with B2B contracts.<sup>11</sup> Many non-negotiated, mass-market contracts are enforceable as B2B contracts, under the current Hague Convention.<sup>12</sup> In addition, click-wrap agreements are also enforceable.<sup>13</sup> Businesses are able to choose which jurisdiction their contracts will be enforced by using clip-wrap agreements.<sup>14</sup> In a recent survey of international businesses, the majority of the businesses specified certain courts to obtain exclusive jurisdiction over their businesses.<sup>15</sup>

There are some courts which do not enforce click-wrap agreements.<sup>16</sup> Being relatively young, these types of “contracts” will surely change the way many conduct business over the next several years. Recently, a broad based electronic commerce organization has urged Mr. Jeffrey Kovar, Assistant Legal Advisor for Private International Law, United States Department of State, to revamp the current language of the Hague Convention because click-wrap agreements have an adverse impact on current electronic commerce.<sup>17</sup>

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10. See James Love, *What you should know about The Hague Conference on Private International Law's Proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Consumer Project on Technology, June 2, 2001, at <http://www.cptech.org/ecom/jurisdiction/whatyoushouldknow.html> (last visited Feb. 26, 2003) (speculating that the Hague Convention in its present state drastically hinders B2B contracts). Drastic substantive law differences between countries might create an atmosphere for forum-shopping. *Id.* at 2. But see Kristin Hudson, Comment, *The Draft Hague Convention on Jurisdiction and Enforcement of Judgments and the Internet-A New Jurisdictional Framework*, 36 J. MARSHALL L. REV. 223, 248 (2002) (advocating the present draft convention provides a jurisdictional framework which is uniform and predictable); see generally Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty* 85 CORNELL L. REV. 89 (1999).

11. See Miller & Cross, *supra* note 3 and accompanying text.

12. Love, *supra* note 10, at 2 (outlining contracts which would be enforced under the present draft convention). Purchasing an airline ticket for a business trip over the Internet is one type of contract. *Id.*

13. See Miller & Cross, *supra* note 3, at G-3 (defining click-wrap agreements). These are the “I Agree” tabs online customers click on, completing their online transactions. *Id.*

14. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (noting that forum selection clauses can be subject to scrutiny for fundamental fairness).

15. See generally Survey Regarding Business Practices on Jurisdictional Issues, International Chamber of Commerce, Mar. 2003 (charting results of an international business survey, whereby most business chose one, but less than a few specific jurisdictions).

16. *Williams v. America Online, Inc.* 2001 WL 135825 (Mass. Super. 2001) (Massachusetts court refusing to enforce a forum selection clause, which gave exclusive jurisdiction to the courts of Virginia).

17. affect: Americans for Fair Electronic Commerce Transactions, Feb. 5, 2003, at <http://www.cptech.org/ecom/jurisdiction/affecthague.pdf> (last visited Feb. 26,

Cases of this sort will be distinguished under the Hague Convention because the treaty honors forum selection clauses. If adopted by Congress, courts of the United States, and the several States would be required to enforce the Hague Convention.<sup>18</sup> Perhaps the threat of a constitutional crisis may permit some courts to disregard an adopted Hague Convention.<sup>19</sup>

There is another type of business contract conducted over the Internet, used mainly for personal transactions, called business to consumer (B2C) contract.<sup>20</sup> The most recognizable B2C contracts are transacted through ebay. Contracts which fall under this category are potentially within the Hague Convention, but there has been considerable dispute over the language of Article 7-dealing with B2C contracts.<sup>21</sup> The online marketplace is now a global forum for businesses and persons to conduct business. In the interest of modernizing the law, the Hague Convention is proposing to adopt a uniform set of rules dealing with business, but that does not necessarily mean e-commerce or B2B.

### III. HAGUE CONVENTION AND ENFORCEMENT OF B2B CONTRACTS

The Hague Convention is not the first multilateral convention dealing with recognition and enforcement of judgments, and most likely, it will not be the last. The Convention was not specifically drafted to deal with Internet or B2B contracts, but typical "business" jurisdiction and judgments.<sup>22</sup> Specifically, the Hague Convention

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2003).

18. U.S. CONST. art. VI; *see also* Love, *supra* note 10, at 3 (commenting on Art. 4 of the Hague Convention, and how it would require enforcement of click-on agreements).

19. *See generally* Ronald A. Brand, *Due Process as a Limitation on Jurisdiction IN U.S. Courts and a Limitation on the United States at the Hague Conference on Private International Law* (Feb. 1998) (unpublished paper, on file with the United States Department of State), at [http://www.state.gov/www/global/legal\\_affairs/brand.html](http://www.state.gov/www/global/legal_affairs/brand.html) (last visited Mar. 4, 2003) (discussing potential conflicts with the Hague Convention and Due Process).

20. *See* Miller & Cross, *supra* note 3, at 398 (discussing certain types of B2C contracts).

21. Hague Convention, *supra* note 1. Article 7: Contracts Concluded by Consumers; this section of the Hague convention has continually been updated, modified, and criticized. For a good discussion on B2C contracts and Article 7 *see* Martin, *supra* note 4, at 135-41 (proposing to implement Alternative Dispute Resolution (ADR) into the online consumer marketplace). This particular author believes there is a need for change in the way B2C contracts are enforced. *Id.* at 150-58 (explaining the need for an alternative solution to B2C contracts, and that it might be ADR).

22. *See* Hague Convention, *supra* note 1 and accompanying text (noting that the

prohibits its application in a number of areas of law.<sup>23</sup> Primarily based on the Brussels and Lugano Conventions,<sup>24</sup> the Hague Convention seeks to establish international jurisdiction and recognition of foreign judgments.<sup>25</sup> The United States would like an international model for jurisdiction of B2B contracts because traditional approaches have proved rudimentary at best.<sup>26</sup>

At its essence, the Hague Convention, if adopted by its member States, would allow a person to obtain a judgment in a member country, and enforce the judgment in another member country.<sup>27</sup> The Hague Convention does provide member countries with an escape clause, so long as the foreign judgment is “manifestly incompatible with public policy.”<sup>28</sup> This clause may be applicable in the United States to deal with issues such as censorship.<sup>29</sup>

To enforce B2B contracts under the Hague Convention, the courts of member States must first have jurisdiction to settle the dispute,

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Hague Convention is neutral towards the internet and B2B).

23. Hague Convention, *supra* note 1, art. 1, para. 2 (listing areas of law the Hague Convention does not apply).

24. See Brussels Convention: Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, available at <http://europa.eu.int/cj/common/recdoc/convention/en/c-textes/brux-idx.htm> [hereinafter Brussels Convention]. See also Lugano Convention: Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, available at <http://europa.eu.int/cj/common/recdoc/convention/en/c-textes/lug-idx.htm> [hereinafter Lugano Convention].

25. See Hague Convention, *supra* note 1. The Hague Convention operates on an international level. See *supra* note 2 (listing the international member countries participating in the Hague Convention). But see Brussels Convention, *supra* note 24 (listing the European member countries).

26. See Assad Siddiqi, Article, *Welcome to the City of Bytes? An Assessment of the Traditional Methods Employed in the International Application of Jurisdiction Over Internet Activities—Including a Critique of Suggested Approaches*, 14 N.Y. INT’L L. REV. 43, 64-65 n.118 (2001) (explaining factors affecting United States’ Internet jurisdictional problems); see also Peter D. Trooboff, *The Hague Conference*, NAT. L. J., July, 23, 2001, at 1 (suggesting that the Hague Convention has the opportunity to provide clearer jurisdiction rules, home and abroad).

27. See Richard Stallman, *Harm from the Hague*, GNU Project, June 2001, at <http://www.gnu.org/philosophy/hague.html> (last visited Feb. 15, 2003) (stating the general premise of the Hague Convention).

28. See Hague Convention, *supra* note 1, art. 28, para. 1 (outlining grounds for refusing to recognize a judgment).

29. See Stallman, *supra* note 27, at 2 (discussing the First Amendment protections that would still exist for Americans under the present Hague Convention). See also Kerry Shaw, *Technology Briefing Internet: French Court Rejects Suit Against Yahoo*, N.Y. TIMES, Feb. 12, 2003, at C9 (discussing how the French Court threw out the Yahoo! case). Yahoo! was sued in France, under a law which prohibits the sale of Nazi paraphernalia, the second lawsuit by a French human rights organization. *Id.*

conferred by Article 4: choice of court.<sup>30</sup> Furthermore, the party must establish the B2B contract under Article 6: contracts, which does not specifically use the acronym B2B.<sup>31</sup> The definition of contracts under the present Hague Convention would include B2B contracts because the language of Article 6 does not exclude B2B contracts.<sup>32</sup> Enforcement of B2B contracts under Article 4 would be mandatory because the language used in Article 4 does not incorporate earlier proposed language prohibiting abusive or unfair contracts.<sup>33</sup>

There will be significant effects to B2B contracts if the present Hague Convention is not altered to address the increasing e-commerce market. Perhaps the most detrimental characteristic of the Hague Convention is its permissive attitude towards forum shopping.<sup>34</sup> Businesses would be able to find jurisdictions with favorable laws, enforceable in all member countries.<sup>35</sup> Forum

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30. Hague Convention, *supra* note 1, art. 4 provides:

(1) If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts have themselves declined jurisdiction.

(2) An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into or confirmed:

(a) in writing;

(b) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

(c) in accordance with a usage which is regularly observed by the parties;

(d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.

(3) Agreements conferring jurisdiction and similar clauses in trust instruments shall be without effect if they conflict with the provisions of Article 7, 8 or 12.

31. Hague Convention, *supra* note 1, art. 6 provides:

A plaintiff may bring an action in contract in the courts of a State in which:

(a) in matters relating to the supply of goods, the goods were supplied in whole or in part;

(b) in matters relating to the provision of services, the services were provided in whole or in part;

(c) in matters relating both to supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.

32. *Id.*

33. See Love, *supra* note 10, at 3 (discussing the significance of article 4: choice of court clause). See also Laura Weinstein, *Beware the Global Net Police*, Wired News, Dec. 23, 2002, available at <http://www.wired.com/news/print/0,1294,56916,00.html> (noting the Hague Convention would require countries to enforce judgments, even if the law was legal in their own country).

34. *Id.*

35. *Id.*

selection clauses are generally acceptable within the United States, subject to the general restrictions and requirements of contract law.<sup>36</sup> Most citizens of this country would probably not believe that courts of the United States may be asked to enforce laws from other countries, which are not congruent and proportional to the laws of their country or State. Forum shopping does not affect every business, but it places an undue burden on those businesses that do not have the capabilities to defend themselves internationally.<sup>37</sup>

The doctrine of *forum non conveniens* exists in some United States jurisdictions. This allows jurisdictions to not hear cases that could be heard in other forums; or if it is inconvenient for the forum court to exercise jurisdiction.<sup>38</sup> There are problems in relying on this doctrine because it is not recognized in all states.<sup>39</sup> Furthermore, the present draft Hague Convention does not adopt *forum non conveniens*, so that alone would forbid courts from exercising the common law doctrine.<sup>40</sup>

The draft treaty is not meant for a global economy that supports e-commerce, and some argue that the treaty is an attempt by the Europeans to put their mark on an area of law they have no control over.<sup>41</sup> Some possibilities the Internet and e-commerce community might take would be to block users from countries whose laws are not satisfactory, or even force e-commerce companies to discontinue business altogether in certain areas of the world.<sup>42</sup> This fear is in addition to the imminent threat of free speech and First Amendment issues surrounding the Hague Convention.<sup>43</sup> By curtailing business and business related activities to specific regions of the world, whole countries would be cut off from being able to make their own

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36. *Breman v. Zapata Offshore Shoe Co.*, 407 U.S. 1 (1972).

37. See Love, *supra* note 10, at 3 (arguing that small businesses will be some of the businesses hit by the Hague Convention).

38. Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 AM. BUS. L. J. 531, 560 (commenting on how courts use this doctrine to decline jurisdiction).

39. *Id.*

40. See Hague Convention, *supra* note 1 (there is no mention of the doctrine *forum non conveniens* in the Hague Convention).

41. See Love, *supra* note 4, at 3 (commenting on the Hague Convention and its potentially disastrous effects). James Love, who is considered to be one of the foremost authorities on the Hague Convention, and its potential affect on the Internet community believes the Europeans' slow walk to the Internet marketplace is one reason they are trying to base the Hague Convention on the older Brussels Convention. *Id.*

42. See Clayton, *supra* note 10, at 225 n. 16 (2002) (suggesting e-commerce business might decide to forgo business if the right principles are not adhered to).

43. *Id.* at 224. See *supra* note 29 and accompanying text (discussing the French court decision in the Yahoo! sale of Nazi paraphernalia).

conscious choices of what to read, buy, and sell.

#### IV. ALTERNATIVE APPROACHES TO JURISDICTION AND ENFORCEMENT OF JUDGMENTS

This section discusses some alternative approaches to jurisdiction and enforcement of judgments. First, it discusses federal due process analysis, specifically concentrating on cyberspace jurisdiction. Next are Restatement sections, and model laws, which overall set specific jurisdictional parameters for parties trying to exercise jurisdiction. Finally, the European Union (EU) approach is analyzed, concentrating on the Brussels Convention, and a specific regulation issued to deal with e-commerce. These respective approaches to jurisdiction and enforcement of judgments vary, but could assist the Special Commission in drafting specific language to deal with B2B contracts.<sup>44</sup>

##### A. Due Process in Cyberspace

A party seeking to establish specific jurisdiction over a non-resident defendant in the United States must conform to *International Shoe v. Washington* and its progeny.<sup>45</sup> Jurisdiction exercised over a non-resident defendant is valid if the defendant has “minimum contacts” with the forum and exercising jurisdiction over the defendant does not violate “traditional notions of fair play and substantial justice.”<sup>46</sup> A three-prong test now governs Internet jurisdiction; articulated by *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* and its progeny.<sup>47</sup> *Zippo* involved an Internet domain name dispute. The Plaintiff was a Pennsylvania tobacco lighter manufacturer and the Defendant was a California based Internet news service with approximately three thousand subscribers in Pennsylvania.<sup>48</sup> The court granted jurisdiction because of the

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44. See discussion *infra* Part VI (incorporating the alternative approaches to jurisdiction and enforcement of judgments and the present state of B2B contracts).

45. *International Shoe v. Washington*, 326 U.S. 310 (1945).

46. *Id.*

47. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

48. *Id.* The *Zippo* case outlined a sliding-scale approach to internet jurisdiction. *Id.* A court employing the *Zippo* test looks at the “nature and quality of commercial activity” of the conducts. *Id.* at 1124. As applied, the level of Internet activity is judged from being active to passive, with a large gray area in between. *Id.* Jurisdiction would be exercised over an active website, which purposefully availed itself to a particular forum. *Zippo Mfg. Co.*, 952 F. Supp. at 1124 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, establishing the “purposeful availment” prong of the “minimum contacts” analysis).



defendant's contacts and business within the forum state.<sup>49</sup> After *Zippo*, Internet jurisdiction was viewed as something unique because courts recognized the distinctive realm of the online community.<sup>50</sup>

Two specific deviations exist from the *Zippo* test, which were born from its sliding-scale approach. First is the targeting approach, which requires "something more" than Internet activity to satisfy the forum minimum contacts requirement.<sup>51</sup> As applied, the "something more" is intentional "targeting" of Internet activity to a particular forum.<sup>52</sup> In *American Information Corporation v. American Infometrics, Inc.*<sup>53</sup> the court applied the targeting approach. The court declined to find jurisdiction in Maryland over a California based website, which did not solicit business in Maryland.<sup>54</sup> The Ninth Circuit has required "express aiming," meaning a defendant must target a specific plaintiff whom they know to be a resident of that forum state.<sup>55</sup>

In addition to courts altering the *Zippo* test, there have been scholarly attempts to refine *Zippo* using a targeting based test. Most notably, Professor Michael Geist from the University of Ottawa presents a three-factor analysis.<sup>56</sup> Under the test, courts should first consider whether the parties reasonably assented to specific jurisdiction, based upon prior conduct; second, whether the parties avoided or targeted specific jurisdictions using specific technologies available; and third, whether the parties had or should have had

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49. *Zippo Mfg. Co.*, 952 F. Supp. at 1124.

50. See, e.g., *Cybersell, Inc. v. Cybersell, Inc.* 130 F.3d 414 (9th Cir. 1997), *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 2002) (using the *Zippo* test to overturn the district courts exercise of personal jurisdiction over a website that did not "purposefully avail" itself to the forum state), *Citigroup Inc. v. City Holding Company, et al.* 97 F. Supp. 2d 549 (S.D.N.Y. 2000) (finding direct online communication between parties to be enough intentional activity directed at the forum to satisfy *Zippo*).

51. See *Cybersell*, 130 F.3d at 418

52. *Id.*

53. 139 F. Supp. 2d 696 (D. Md. 2001).

54. *Id.* at 699-70 (citing *Cybersell*, where an indication of interest feature within a website does not automatically subject a party to jurisdiction) (citations omitted); see also *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537 (E.D. Pa. 1999) (using the sliding-scale and targeting approach, and finding that an interactive web site with no directed activity at the forum, nor online sales could be subject to jurisdiction); but see *Euromarket Designs Inc. v. Carte & Barrel Ltd.*, 96 F. Supp. 2d 824 (N.D. Ill 2000) (holding jurisdiction over an Irish retailer in a trademark dispute because of the high level of interactivity from the website).

55. See *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082 (9th Cir. 2000) (holding a higher burden than the *Zippo* test requires).

56. Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 661 PLI/Pat 561 (2001) (proposing a three factor test to replace *Zippo*).

knowledge about the geographic location of the online activity.<sup>57</sup>

The second alternative to the Zippo test, is based on the “effects” a website has on a particular jurisdiction, not considering the specifics of the technology.<sup>58</sup> Jurisdiction is proper under the “effects” test if a party intentionally commits a tortious act aimed at a forum state, where they know harm will be suffered.<sup>59</sup> A notable example of the effects test is discussed in *Blumenthal v. Drudge*,<sup>60</sup> where a White House employee had a libel suit brought based on email sent, which had its effects in the District of Columbia.<sup>61</sup>

In sum, although the targeting and effects test seem similar in form, there are notable differences between the two. The targeting approach is often specifically used to reach parties who aim to do business with a particular forum.<sup>62</sup> This is contrary to the effects test, where a defendant commits tortious acts in one forum, and either knows or should know where those actions are going to have effects.<sup>63</sup> In addition, the effects test distinguishes itself by not using technology to establish jurisdiction.<sup>64</sup>

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57. Geist, *supra* note 56, at 602-03. See also Michael Geist, *E-borders loom, for Better or Worse* (June 28, 2001), at <http://news.globetechnology.com/servlet/GAMArticleHTMLTemplate?tf=globetechnology/TGAM/NewsFullStory.html&cf=globetechnology/tech-config-neutral&slug=TWGEISY&date=20010628> (noting that without borders the Internet is inflexible to the current traditional standard). The professor also points to geographic technologies, which might improve on-line advertising, limiting the forums sites would be directed to. *Id.* But see Gregory J. Wrenn, *Cyberspace is Real, National Borders are Fiction: The Protection of Expressive Rights Online Through Recognition of National Borders in Cyberspace*, 38 STAN. J. INT'L L. 97, 98 (arguing the Internet has borders though its physical components; like memory, and networks). This particular author believes grave dangers loom if the legal community views the Internet as “borderless.” *Id.* at 98.

58. See *Calder v. Jones*, 465 U.S. 783 (1984) (outlining the effects-based test).

59. See *id.* at 783 (reasoning jurisdiction to be proper because the libel directed at California had its effects of their conduct, which occurred in Florida); see also *Pavlovich v. Superior Court*, 109 Cal. Rptr. 2d 909 (Cal. App. 2001) (holding proper jurisdiction over a party who knew or should have known the entertainment industry capital was California).

60. 992 F. Supp. 44 (D. D.C. 2000).

61. *Id.* at 57 (holding that the party knew the “devastating” effects of the emails sent would be felt within the District of Columbia).

62. See *supra* notes 54 - 56 and accompanying text (outlining specific applications of the targeting prong proposed to replace or amend the *Zippo* test).

63. See *supra* notes 58 - 61 and accompanying text (discussing the “effects” test, and how Internet activity conducted in one forum effects another).

64. Cf. *Calder*, 465 U.S. at 783 (not discussing technology’s impact on effects of tortious actions). But see *Blumenthal*, 992 F. Supp. 44 (applying the effects based test to Internet activity).

*B. Restatement's and the ALI Approach*

There are two model laws this note analyzes, the Restatement (Third) of Foreign Relations law, and the American Law Institute (ALI) model law. The ALI proposes a jurisdiction model at foreign judgments, citing the Hague Convention as its motivation.<sup>65</sup> Together, these two model laws could be helpful to the drafters of the Hague Convention. In general, model laws may be an extremely useful source of information when modifying or amending laws, because knowledgeable scholars draft model laws.<sup>66</sup>

The Restatement (Third) of the Foreign Relations Law, Section 421 outlines jurisdiction and judgments.<sup>67</sup> Jurisdiction over a party must be reasonable.<sup>68</sup> Reasonableness is defined by Section 421 as a party being present in the state, domiciled in the state, a resident of the state, or a national of the state.<sup>69</sup> In addition, past and present contacts can subject parties to jurisdiction within the state.<sup>70</sup> Appearance or someone appearing on behalf of a party can waive jurisdiction, with the caveat that the appearance is not to contest jurisdiction.<sup>71</sup> The power foreign nations possess over citizens of other nations based on B2B contracts will unlikely be changed by this particular Restatement section.<sup>72</sup>

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65. Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635 (2002) (outlining a proposal for foreign judgments, whether or not the Hague Convention continues to exist in the international community). The proposal would also craft a federal statute to recognize and enforce foreign judgments, assuming the Hague Convention does not fail, but continuing its project if it does. *Id.* at 635-36.

66. See *infra* notes 117 - 121 (discussing how model laws might help reform B2B contracts).

67. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1987).

68. *Id.*

69. *Id.*

70. *Id.* The following subsections are included in the Restatement:  
(g) the person, whether natural or juridical, has consented to the exercise of jurisdiction;  
(h) the person, whether natural or juridical, regularly carries on business in the state;  
(i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity;  
(j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial direct, and foreseeable effect within the state, but only in respect of such activity; or  
(k) the thing that is subject of adjudication is owned, possessed, or used in the state, but only in respect of a claim reasonably connected with that thing.  
*Id.*

71. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1987).

72. See Siddiqi, *supra* note 26, at 80-81 and accompanying text (indicating that contracts based on Internet activity will most likely not be adjudged by the

A closely related section to 421 is Section 403 of the Restatement (Third) of Foreign Relations Law, which primarily deals with the reasonableness of jurisdiction.<sup>73</sup> As outlined above, certain jurisdictions are “effects” based, where the activity is outside the jurisdiction, but has effects inside.<sup>74</sup> The Restatement (Second) of Conflict of Laws, Section 37 allows a cause of action arising from effects outside the state, unless the exercise of jurisdiction would be unreasonable.<sup>75</sup>

The ALI approach is primarily concerned with the reciprocity of judgments because state law presently dictates reciprocity, and absent a federal statute, there is no agreement to judgment reciprocity to international judgments.<sup>76</sup> If a federal statute were in place than the Hague Convention, if signed, would require states to recognize foreign judgments.<sup>77</sup> The ALI approach is not finalized, but some of the areas it is considering are the following: jurisdiction in federal court, state court or both; defining “habitual residence”; *res judicata* and preclusion; *lis pendens*; and procedural rules for enforcement.<sup>78</sup> The ALI approach will not be a new restatement, but something more specific to deal with the Hague Convention and foreign judgments,

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Restatement).

73. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1987) (outlining limitations on the jurisdiction to prescribe). This particular section deals primarily with reasonableness, an age-old legal maxim in the United States, employed by some around the world. *See Id.* at cmt. A. In determining reasonableness, a party is to look at a list of factors, consisting primarily of links, connections, the character, and the overall consistence with the international system. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987) (listing the factors the Restatement requires parties to follow when determining jurisdiction).

74. *See Blumenthal*, 992 F. Supp. 57 (discussing how actions outside one jurisdiction have effects in another).

75. RESTATEMENT (SECOND) OF CONTRACTS LAWS § 37 (1971) (laying out the effects test for contracts). The drafters of this particular section expressed no opinion when jurisdiction would run afoul to the First and Fourteenth Amendments of the Constitution. *Id.*; *see also* Restatement (Third) of Foreign Relations of Law § 403 (1987) (stating “[i]nternational law permits nations to regulate extraterritorial activity with local effects”).

76. *See* Silberman & Lowenfeld, *supra* note 65, at 636-37 (describing what the main purpose of the ALI project is going to be). *But see* U.S. CONST. art. IV § 1 (the Full Faith and Credit Clause requires states to recognize judicial proceedings of other states).

77. *See* Silberman & Lowenfeld, *supra* note 65, at 637. Adoption of the Hague Convention is vital for the United States because many of its judgments are not recognized outside of the United States. *Id.* The ALI does not decide if foreign judgments will be enforced in state or federal court, but it is an important consideration because of the hope for uniformity. *Id.* at 645.

78. *See* Silberman & Lowenfeld, *supra* note 65, at 646-47 (discussing what the ALI is going to consider when drafting a foreign statute).

with a final proposal to Congress of a federal statute on point.<sup>79</sup>

*C. The EU Approach*

The countries who belong to the European Union (EU) have adopted a different approach than the United States.<sup>80</sup> For more than twenty years the Brussels Convention has governed rules of jurisdiction for disputes between member countries.<sup>81</sup> The Brussels Convention is more analogous to the purposeful availment prong of United States due process jurisdiction.<sup>82</sup> In its original form, the Brussels Convention is not suitable to deal with Internet and electronic commerce.<sup>83</sup> The party that initiates the suit is the most significant party when analyzing the Brussels Convention.<sup>84</sup> Judgment in one member country must be enforced by other member countries, with a few exceptions; violating public policy, and default judgments not carrying proper service are two exclusions.<sup>85</sup>

The Internet and e-commerce industry have encouraged the Brussels Convention to update its language. It has done so by issuing the Council Brussels Regulation (Brussels Regulation), which took effect in 2002.<sup>86</sup> As applied to B2B contracts, the Brussels Regulation places emphasis on the place of contract performance, the so-called “transactional nexus” for the contract.<sup>87</sup> Some have argued

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79. See generally Silberman & Lowenfeld, *supra* note 65.

80. For a list of EU member states see [http://europa.eu.int/abc/governments/index\\_en.htm#members](http://europa.eu.int/abc/governments/index_en.htm#members).

81. Brussels Convention, *supra* note 24 (outlining convention rules for cross-border disputes between member countries).

82. See Siddiqi, *supra* note 26, at 81 (distinguishing the Brussels Convention’s jurisdictional rules from the Lugano Convention, aligning them with United States due process).

83. See Siddiqi, *supra* note 26, at 82 (since the Brussels Convention prohibits tag jurisdiction, it would difficult to enforce electronic commerce jurisdiction). This is especially true for consumer based contracts. *Id.* at 83. But see Lugano Convention, *supra* note 24, at art. I (outlining that the Convention applies to civil and commercial matters, with certain exceptions), Siddiqi, *supra* note 26, at 82-83 (speculating the Lugano Convention does have sufficient language to deal with Internet commerce).

84. See THE FUTURE OF REMEDIES IN EUROPE 172 (Claire Kilpatrick, Tonia Novitz, & Paul Skidmore eds., 2000) (commenting that a party who initiates a suit can choose the forum with the best remedy).

85. *Id.* (discussing the policy, equating it with the doctrine of equivalence effects, which promotes the free movement of judgments between Contracting States).

86. Council Brussels Regulation [hereinafter Brussels Regulation] (EC) (Dec. 22, 2000), O.J. (L 012) pp. 0001-0023 (bringing the Brussels Regulation into the electronic age of commerce).

87. *Id.* at art. (5)(1). Under the Brussels Convention the same transactional nexus applies. Brussels Convention *supra* note 24, art. 5(1). But see Brussels

that the broad language of the Brussels Regulation will place an undue burden on small and medium sized businesses because of the prohibitive cost of defending suits in any member country.<sup>88</sup>

#### V. SPECIAL REPORT OF THE INFORMAL WORKING GROUP

A special informal working group is updating the language of the Hague Convention to better suit B2B contracts, specifically dealing with cross-border B2B transactions.<sup>89</sup> The First Secretary, Andrea Schultz has been preparing the reports of the informal working groups, which held its first meeting in October 22-25, 2002.<sup>90</sup> The first meeting almost exclusively focused on choice of court clauses in B2B cases, which is Article 4 of the Hague Convention.<sup>91</sup> In addition, a proposed definition of B2B contracts was discussed,

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Regulation, *supra* note 86, art. 15 (1)(c) (noting the different language used to deal with consumer contracts). This particular section is important for consumer contracts because it looks at the domicile of the parties in determining jurisdiction, as opposed to the transactional nexus used for B2B contracts. *Id.* at art. 16(2). The Brussels Regulation will significantly effect forum selection clauses, making them effectively void in B2C contracts. See Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 AM. BUS. L. J. 531, 555-57 (2002). If a website does not indicate a specific country they would be said to target all countries, subjecting them to jurisdiction in all countries. See NUA, *EU Countries Pass Joint Ecommerce Law* (Dec. 4, 2000), at [http://www.nua.ie/surveys/?f=VS&art\\_id=905356214](http://www.nua.ie/surveys/?f=VS&art_id=905356214). The European Commission has issued language describing specific sections. See European Commission, "Explanatory Memorandum to the Proposal for a Council Regulation on Jurisdiction," COM (1998) 348 of 14 July 1999, at [http://europa.eu.int/eur-lex/en/com/pdf/2000/en\\_500PC0689.pdf](http://europa.eu.int/eur-lex/en/com/pdf/2000/en_500PC0689.pdf). According to the Brussels Regulation, a person may sue if the party "[p]ursues commercial activities in the Member State of the Consumer's domicile. . . by any means," defining by any means as language drafted for Internet based transactions. *Id.* (emphasis supplied).

88. See NUA, *supra* note 87 (arguing that it will also deter future venture investment in European web businesses).

89. CPTech Page on the Hague Conference on Private International Law's Proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, William New, *E-Commerce: Experts Narrow Focus of Hague E-Commerce Treaty* (Nov. 11, 2002), at <http://lists.essential.org/pipermail/hague-jur-commercial-law/2002-November/000696.html> (discussing the Oct. 22-25 meeting of the special working group).

90. Report on the First Meeting of the Informal Working Group on the Judgments Project [hereinafter Preliminary Doc. 20], Oct. 22-25, 2002 at <http://www.hcch.net/e/workprog/jdgm.html>.

91. *Id.* at 4 (discussing the goals of the Special Commission, specifically, to deliver a unified proposal to members of the Hague Convention). Some commentators have suggested that focusing on choice of forum is a good idea because it avoids troublesome areas that have slowed the negotiations. See New, *supra* note 89 and accompanying text (noting that ISP providers are at issue with choice of forum clauses because they could be hauled into any court because of the presence of content). The First Secretary has stated that by focusing on two party contracts, the third party ISP providers would be left out. *Id.* at 2.

which essentially made every transaction that was not a B2C, a B2B contract, minus certain charitable and government contracts.<sup>92</sup>

Before debating the substance of choice of court clauses, the technological developments within the past six years were reviewed because the present Article 6: contracts, was not clear on electronic and other forms of contracts.<sup>93</sup> The working group's suggestion is to stamp valid agreements "in writing or by any other means of communication which renders information accessible [as a data message] so as to be usable for subsequent reference."<sup>94</sup> By expanding the language of the phrase "data message" the special working group proposes to incorporate more B2B contracts.<sup>95</sup> As related to Article 4: choice of court, the group proposed allowing parties to choose which court would govern disputes, absent contractual choice of law provisions.<sup>96</sup> Undecided in the first meeting was whether two parties within the same jurisdiction could try a case in a foreign jurisdiction; most important here are issues of public policy and manifest injustice clauses.<sup>97</sup>

The second meeting was held January 6-9, 2003, and First Secretary Andrea Schultz prepared the report.<sup>98</sup> Two main substantive issues were covered under the second meeting, first was the definition of "exclusivity" in choice of court clauses; second was non-exclusive choice of court clauses and whether an international

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92. See Preliminary Doc. 20, *supra* note 90 at 10, defining B2B contracts as the following:

This Article shall not apply to choice of forum agreements with regard to consumer contracts or individual contracts of employment. A consumer contract is an agreement between a natural person acting primarily for personal, family or household purposes (the consumer) and another party acting for the purposes of its trade or profession, or between two consumers.

93. See Preliminary Doc. 20, *supra* note 90, at 5 (suggesting that the commission check with the UNCITRAL Model Law on Electronic Commerce for further clarifications). The past draft convention incorporated definitions from this particular model law. *Id.*

94. *Id.* at 17 (outlining proposals for Article 4: Choice of Court), *see also*, Hague Convention, art. 4, *supra* note 30 (for a description of the present Art. 4: Choice of Court).

95. See Preliminary Doc. 20, *supra* note 90, at 17 (summarizing what a data message is supposed to be).

96. See Preliminary Doc. 20, *supra* note 90, at 7 (noting how specific the language proposed is, the first meeting essentially gives forum selection clauses carte blanche)

97. See Preliminary Doc. 20, *supra* note 90, at 13 (responding to a question from this meeting, and will most likely be presented in all following meetings).

98. Report on the Second Meeting of the Informal Working Group on the Judgments Project [hereinafter Preliminary Doc. 21], January 6-9, 2003 at <http://www.hcch.net/e/workprog/jdgm.html>.

element would be required.<sup>99</sup> Relating to “exclusivity,” the commission deferred to its first meeting notes, but did emphasize further discussion on whether certain choice of court clauses were prevalent in B2B contracts.<sup>100</sup> If so, the commission would seemingly revisit the idea.<sup>101</sup> The language discussing an international element is not clear because the commission will refine this section in later meetings.<sup>102</sup>

Another topic discussed at the second meeting directly related to B2B contracts was the click-wrap agreement, and the need for a general escape clause for non-negotiated contract clauses.<sup>103</sup> These types of agreements are abundant on the Internet, and pose potential problems for states and countries who might sign on to the Hague Convention.<sup>104</sup> These are popular in the area of electronic commerce, and potentially harmful to businesses and consumers.<sup>105</sup> In addition, there were two proposals to deal with the issue of invalidating certain choice of court clauses.<sup>106</sup> First, was to allow the national court seized to determine the substantive validity of choice of court, and second, the law of the chosen court would operate on the substantive validity, and not the seized court.<sup>107</sup>

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99. *Id.* at 4 (outlining the key elements of the second meeting). Further issues discussed during the second meeting are not covered in this note, such as whether intellectual property should be included in the Hague Convention. *Id.*

100. *See id.* at 6 (discussing B2B cases, and the three general choice of court clauses). The three choice of court clauses are:

(1) clauses choosing one court (or the courts of one State) only (i.e. pure exclusivity)  
(2) clauses allowing several courts identified in the agreement while excluding all others (i.e. multiple exclusivity), and  
(3) non-exclusive choices of courts indicating an agreed court without preventing parties from sizing a different one.

*Id.* at 6.

101. *See* Preliminary Doc. 21, *supra* note 98, at 6 and accompanying text (concluding that there was no general consensus on this particular issue).

102. *See* Preliminary Doc. 21, *supra* note 98, at 7-8 and accompanying text (discussing the international element, whether it is required, and how it should be read). The second meeting did discuss the possibility of limiting the scope of the convention with certain language because of specific joint venture requirements in some foreign countries. *Id.* at 7.

103. *See* Preliminary Doc. 21, *supra* note 98, at 9 (outlining which types of agreements would need a general escape clause, and why).

104. *See supra* notes 13 - 15 (discussing click-wrap agreements).

105. *See* Preliminary Doc. 21, *supra* note 98, at 9 (holding that legal systems hold these types of clauses invalid because of their injustice, unreasonableness, or public policy).

106. *See generally* Preliminary Doc. 21, *supra* note 98.

107. *See* Preliminary Doc. 21, *supra* note 98, at 10 (noting the advantages of this would be no line drawing, and an elimination of the escape clause), *but see id.* at 11 (wanting the convention to clarify parties' right to choose a law applicable to the



## VI. REFINING B2B UNDER THE HAGUE CONVENTION

The Hague Convention has the ability to offer greater predictability in foreign suits, and clarify when and where judgments are recognized and enforced.<sup>108</sup> Specifically relating to B2B contracts, the Hague Convention itself recognizes the necessity of changing the language to better deal with emerging global technology markets.<sup>109</sup> The B2B community needs a system that is adaptable to new and innovative technologies, and the present Hague Convention does not incorporate language relating to specific technologies.<sup>110</sup> Click wrap agreements, omnipresent in online transactions, showcase an example of the current limitations of the Hague Convention, as applied to the Internet and e-commerce.<sup>111</sup> If the Hague Convention can update its language to better conform with B2B contracts, many businesses and member states will not be as hesitant about adopting the Hague Convention.<sup>112</sup>

Under the United States due process analysis, there exist some

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substantive validity of choice of court clauses) (footnotes omitted).

108. See Trooboff, *supra* note 26, at 1 (outlining how the Hague Convention will facilitate the administration of judgments). The United States does not normally impose reciprocity with foreign judgments, so being a member of the Hague Convention gives the United States an opportunity to do so, with the hope that foreign governments do the same. *Id.* Cf. Stallman, *supra* note 27, and accompanying text (if adopted the Hague Convention will give parties more of a utopian model to recognize and enforce judgments).

109. See *supra* notes 90, 98 and accompanying text (outlining the First and Second meeting of the working group). The meetings were initiated because the present Hague Convention was not specific enough with B2B definitions, and articles affecting B2B contracts. See Preliminary Doc. 20, *supra* note 90 (listing some of the objectives of the informal working group).

110. See Hague Convention, *supra* note 1 and accompanying text (recognizing that the language of the draft convention does not yield itself to an emerging global market, dominated by changing technologies).

111. See Miller & Cross, *supra* note 3, at 398 (defining click-wrap agreements), see also Love, *supra* note 10 and accompanying text (arguing that the draft convention will enforce transactions unthinkable to the average person), but see *Williams v. America Online, Inc.* 2001 WL 135825 (Mass. Super. 2001) (not enforcing a click-wrap agreement because it was against public policy).

112. Cf. Stallman, *supra* note 27 at 4-6 and accompanying text (comparing portions of the Hague Convention). If parties would agree on certain elements of the draft, such as definitions of business to business transactions, and choice of law clauses, delegates would be more willing to push for full adoption. *Id.* See also Carole Aciman & Diane Vo-Verde, *Refining the Zippo Test: New Trends on Personal Jurisdiction for Internet Activities*, 19 No. 1 Computer & Internet Law 16, 21 (2002) (stating that the present state of Article 7 is met with much resistance on the United States side relating to B2C contracts). The resistance is present because businesses could potentially defend and any forum a consumer lives, if a website advertised in that forum. *Id.* Changing Article 7 to a more targeted approach would potentially relieve this problem. See *id.*

notable examples of how B2B contracts can subject a party to jurisdiction.<sup>113</sup> The Hague Convention could define jurisdictional issues clearer in the B2B setting by using the targeting approach, which requires a party to target a particular forum in order to be subject to jurisdiction in that forum.<sup>114</sup> Adopting the targeting approach could relieve the Hague Convention from altering choice of court agreements, which are present in most non-negotiated mass market contracts falling under B2B contracts.<sup>115</sup> The effect will be businesses not choosing particular forums to hear their cases, and returning to the United States courts for enforcement purposes only.<sup>116</sup>

The Hague Convention drafters should consider the model law of the Restatement and recent ALI approach.<sup>117</sup> The Restatement may not provide a great standard for B2B contracts because foreign nations will not have any sort of long-arm statutory power in the United States over other states.<sup>118</sup> Internet jurisdiction cases have been rare on the international level, so this theory is mainly speculative.<sup>119</sup> The Restatement, however, has the potential to influence the drafters because at its essence it deals with what is reasonable to do in a particular situation.<sup>120</sup> Additionally, the ALI approach will present a statute to Congress recognizing uniformity in enforcement of foreign judgments.<sup>121</sup> The drafters of the Hague Convention, in reviewing the ALI approach, might find it helpful in reformulating language for the convention and B2B contracts.

Unlike the Brussels Convention, which is limited to the members of the European Union, the Hague Convention would apply to all

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113. See *supra* notes 47-50, 51, 58-59 (discussing *Zippo*, the targeting approach, and the effects based test for internet jurisdiction).

114. See *supra* notes 51-57 (outlining the targeting approach). Here, the key element is whether a party intentionally targeted a specific forum. See *Cybersell, Inc. v. Cybersell, Inc.* 130 F.3d 414 (9th Cir. 1997). The intentional aiming aspect is part of "something more" that is required under the targeting approach. *Id.*

115. See Love, *supra* note 10 (discussing the affect on non-negotiated mass market contracts).

116. Cf. Love, *supra* note 10 (commenting on click-wrap agreements and the problems them have). There has been considerable effort to curtail choice of court agreements, but large United States e-commerce firms have lobbied effectively to keep choice of court clauses present. *Id.*

117. See *supra* notes 67-79 and accompanying text (outlining the different restatement positions and ALI approach to judgments and contracts).

118. See Siddiqi, *supra* note 26, at 81 (commenting on the Restatement and its potentially useless affect internationally on judgments).

119. Siddiqi, *supra* note 26 at 81.

120. See *supra* notes 73-75 and accompanying text (describing the overall character of the Restatement, with certain factors that are necessary to determine jurisdiction).

121. See *supra* notes 76-79 and accompanying text (describing the ALI approach and the federal statute, which might be presented to Congress).

member states.<sup>122</sup> The Brussels Convention gives parties who initiate the suit, choice of forum, and its applicable remedies.<sup>123</sup> This provision of the Brussels Convention is arguably pro Plaintiff, so e-commerce firms will surely create resistance.<sup>124</sup> The Hague Convention drafters face B2B and e-commerce language revisions, something the Brussels Convention already accomplished through the Council Brussels Regulation.<sup>125</sup> Probably the most significant impact the Brussels Regulation can have on the Hague Convention is its emphasis on a “transactional nexus” between parties in B2B contracts.<sup>126</sup> This provision is similar to the targeting approach under the United States due process analysis.<sup>127</sup> Drafters of the Hague Convention can be assisted from the Brussels Convention. Areas that overlap with United States due process jurisdiction would seemingly satisfy both sides of the Trans-Atlantic relationship.

The working group, which has been meeting over the past six months, has begun to develop new language to better assist B2B contracts and the many problems they face; such factors include how B2B contracts affect choice of court clauses.<sup>128</sup> The working group’s tailored definitions of B2B contracts continue to fail to leave parties with a clear understanding of what a B2B actually is.<sup>129</sup> One of the

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122. See Silberman & Lowenfeld, *supra* note 65, at 638 (pointing out the Hague Convention will have broad sweeping authority over member states with few defenses). This particular article points to the fact that the Hague Convention will expand clauses like the Full Faith and Credit Clause of the United States Constitution. *Id.* at 639, *see also* U.S. CONST. art. IV, § 1. *But see* Weinstein *supra* note 33 (arguing how the Hague Convention is going to suppress individual nations’ sovereignty).

123. See *supra* note 84 and accompanying text (pointing to some of the idiosyncrasies of the Brussels Convention), *see also* Brand *supra* note 19, at 16-23 (discussing particular sections of the Brussels Convention that might be an affront to United States rules on jurisdiction). A specific example exists if the jurisdiction rules of Article 2 of the Brussels Convention is compared with World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), whereby jurisdiction would be proper under the Brussels Convention and not under the United States Constitution.

124. *Cf.* Love, *supra* note 10, at 4 (suggesting a major coup for e-commerce firms was that the EU had succumbed to gutting most consumer protection).

125. See *supra* notes 86-87 and accompanying text (articulating language to deal with B2B and e-commerce).

126. See *supra* note 87 and accompanying text (noting the difference between B2B and B2C contracts, whereby B2B requires a transactional nexus). This can be seen as an important step toward refining the overall approach of B2B contract jurisdiction and judgments. *See id.*

127. See *supra* notes 50-57 (defining the targeting approach).

128. See *supra* notes 90-107 and accompanying text (outlining specific suggestions the informal working group has already made, and plans to work on).

129. See *supra* notes 94, 95 and accompanying text (using “data message” does not conform to other B2B definitions by scholars or other Conventions). *But see supra* notes 3, 9 (defining B2B in different contexts, with more emphasis on

most important steps the working group has undertaken is choice of forum clauses relating to B2B contracts.<sup>130</sup> Choice of forum clauses are a potential hindrance to the spread of global technology and business, evidenced by a recent survey, indicating that many companies forgo entering into international contracts because they could be subject to jurisdiction in a number of courts.<sup>131</sup>

Deciding which court would hear the substantive validity of choice of court clauses is of particular importance to click-wrap agreements because certain courts will honor them, while others might not.<sup>132</sup> The Hague Convention might look to the ALI approach because a federal statute does require reciprocity, and the Hague Convention would benefit from uniformity, if there were a federal statute on point.<sup>133</sup> International businesses will benefit from legal uniformity, ultimately helping them to spread more growth into the global technology economy.<sup>134</sup>

## VII. CONCLUSION

The emerging global marketplace already has a significant influence on business around the world. In order to promote the growth of international business, the Hague Convention seeks to establish a set of guidelines, providing the international community predictability in recognizing and enforcing foreign judgments. The problem is, the Hague Convention is not up to date with language addressing the global marketplace, specifically business engaged in B2B contracts. A reasonable proposal is to first define B2B contracts more specifically. Next, review alternatives to jurisdiction already in place around the globe, such as United States due process analysis

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specific online functions); *supra* note 87 (outlining how the Brussels Convention defines B2B contracts with an emphasis on the transactional nexus; *cf. supra* Part III. A (analogizing that although United States Due Process does not define B2B; B2B contracts are something more than “data messages”).

130. *See supra* Part IV. (noting the emphasis the working group has placed on refining choice of court clauses). In order to effectively maintain a strong international element the drafters might need to require some sort of targeting approach, as suggested by the United States Due Process jurisprudence. *See supra* Part III. A.

131. *See supra* note 15 and accompanying text (discussing the recent survey and the results of the international business community).

132. *See supra* notes 14, 16 and accompanying text (suggesting that courts generally uphold forum selection clauses, but if wrapped in a click-wrap agreement it is not guaranteed).

133. *See supra* Part III. B (outlining the ALI approach to a homogeneous law on recognition and enforcement of foreign judgments).

134. *Cf. Clayton, supra* note 10 at 224-25 (discussing the potential impact on businesses if the Hague Convention does not refine its present language).

and the European Union's analysis. By using these alternatives in the Hague Convention, countries will not be shocked by new language or methods of dealing with jurisdiction. While one member states' jurisdictional rules will not dominate the Hague Convention, having a piece in the entire puzzle will go a long way in appeasing those countries who decide to adopt the Hague Convention.