

**A STUDY ON PERSONAL JURISDICTION REGARDING
INTERNATIONAL E-COMMERCE IN THE EUROPEAN
UNION AND THE UNITED KINGDOM***
- WITH A COMPARATIVE STUDY WITH E-COMMERCE
JURISDICTION IN THE UNITED STATES -

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I . INTRODUCTION

The E-commerce has become the norm in B2C transactions worldwide.¹ Because of the convenience and high speed that are associated with Internet transactions, many consumers prefer online shopping instead of direct purchases in the department stores or markets. It seems to be inevitable that the rate of Internet consumer transactions will continue to increase as the consumers are no longer restricted to the local markets and retailers and will be able to shop online, looking for the best deal of goods from around the world.

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1. B2C (business-to-consumer), also known as online retailing or online shopping, involves the sale of goods or services to individual customers for their own use. B2B (business-to-business) describes trade between different businesses or entities. It can be completed by performance against payment or performance against performance. Faye F. Wang, *Internet Jurisdiction and Choice of Law*, 3 (Cambridge University Press, 2010).

And consumers located worldwide are attracted to and likely to purchase more goods and services of the Korean companies as the superiority of the Korean products and services have been widely recognized worldwide. Especially, the consumers in European Union (hereinafter “EU”) have been the major purchasers of the Korean products.²

However, one of the legal issues related to the Internet transactions can arise when the consumers in EU sue the Korean corporations and business entities. The European consumers would prefer to sue the Korean defendants in the forum courts located in Europe whereas the Korean defendants would not want to be subject to personal jurisdiction in European courts.³ Then, the issue is whether or not the forum courts in Europe can exercise personal jurisdiction over the foreign defendants such as Korean corporations. The characteristics of E-commerce bring about a new challenge to the issue of initiating a lawsuit that a regular commerce does not. With regular commerce, it is easy to define the location of parties and subject matters and thus to identify territorial boundaries. However, territorial boundaries will be unascertainable in E-commerce.⁴ For example, when digital goods are delivered online—downloaded—without physical delivery, the place of delivery is not technically physical. In other words, it becomes very difficult to identify the place of delivery online than offline.⁵ The forum court in EU will decide the existence of personal jurisdiction over a foreign defendant according to the EU laws and rules. So it is important for the Korean corporations to understand the EU rules and regulations on the Internet personal jurisdiction so that they can anticipate whether or not their business activities can be subject to lawsuits in EU and plan their corporate activities

2. As of 2018, the EU is the third largest—after China and the US—trading partner of Korea: the third largest in terms of the Korean export and the second largest in Korean import. 경제통상관계주 벨기에 유럽연합 대한민국 대사관-외교부, 한-EU 교역 현황, available at http://overseas.mofa.go.kr/be-ko/wpge/m_7588/contents.do (Last visited Jan. 10, 2020).

3. Personal jurisdiction is about the question whether a forum court has the authority to make a judgment that is binding to the defendant. A plaintiff can make a decision as to which court the case is filed initially. However, a court without a proper personal jurisdiction (unless the defendant consents to personal jurisdiction of the forum court) cannot render a judgment that can bind the defendant. Richard D. Freer and Wendy Collins Perdue, *Civil Procedure Cases, Materials, and Questions*, Fifth Ed. 21 (LexisNexis, 2008).

4. The infrastructure of the Internet makes it difficult to establish geographic location of Internet users. For example, the location may be where the server is maintained or where the recipient views the website. Cindy Chen, *United States and European Union Approaches to Internet Jurisdiction and Their Impact on E-Commerce*, 25 U. Pa. J. Int'l Econ. L. 423, 432 (2004); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 741-45 (E.D. Mich. 1999).

5. Wang, *supra* note 1, at 7.

accordingly.⁶

The focus of this paper is to study the rules, standards, and legal principles that the EU and UK courts will apply in deciding the existence of personal jurisdiction over Internet transactions.⁷ Also, this paper will analyze the Internet personal jurisdiction of the US and compare it with that of the EU. Because the US and the EU have been leading the landscape of the world trade and economy, the laws and regulations including personal jurisdiction of one region will have significant influence and ramification to the other. More importantly, by studying and analyzing the current case laws and trends in the US, we will be able to find the relevant counterpoint which can provide solutions to the existing problems with the current EU rules and regulations. Also, this paper discusses the issue of harmonizing the E-commerce personal jurisdiction between the EU and the US as a way to enhance the legal certainty of personal jurisdiction to contracts concluded through the Internet. Lastly, this paper is to propose ways to reduce or minimize the risk that Korean corporations are being subject to personal jurisdiction in the EU by providing them with the guidelines as to how to anticipate and avoid the possible lawsuits in the EU due to the application of personal jurisdiction there.

II. E-Commerce Personal Jurisdiction in the EU and the UK

1. *Brussels Regulation*

Compared to the common law system of the US which is based on the judge-made case laws, the EU's legal system is based on the continental laws and thus deals with personal jurisdiction under the statutory and regulatory basis. The EU initially codified the rules on personal jurisdiction and recognition and execution of the foreign judgments through the Brussels Convention. The EU Member States were required to implement the Brussels Convention by enacting their own statutes according to the objectives of the Convention.⁸

6. The fact that a foreign corporation is subject to personal jurisdiction in a forum court has another important ramification because a foreign company can be subject to the substantive as well as procedural laws of the forum court. It means that a foreign corporation can be placed at a disadvantageous position procedurally during litigation process and that the application of substantive law of forum court can lead to the unfavorable outcome against the foreign corporation.

7. It is worth examining the personal jurisdiction of the UK which is the only country based on the common law system unlike other EU countries with civil law basis. Also, the UK has recently finalized with the EU the Brexit withdrawal which will make the UK the only country not bound by the EU laws and rules.

However, the Brussels Convention is meant to provide a rule on the personal jurisdiction regarding regular commerce rather than specifically dealing with the Internet commerce. As the Brussels Convention does not reflect the development of the Internet and modernization of the E-commerce,⁹ the Council of the European Union enacted the Brussels Regulation which is designed to compensate for the deficiencies of the Brussels Convention and to provide the legal principles and rules on the E-commerce.¹⁰ Unlike the Brussels Convention which needed to be codified by each Member State into its domestic laws individually, the Brussels Regulation has the direct effects on the Member States.¹¹ Through the Brussels Regulation, the EU attempts to approach the subject of E-commerce with more uniformity and legal certainty.¹² Another important aspect of the EU, through the Brussels Convention and Brussels Regulation, is the strong protectionism of consumers who are considered as the 'weaker party' in business and legal transactions.

First of all, the Brussels Regulation Art. 23(2) defines electronic contracts by stating that "any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing." To wit, the scope of the Brussels Regulation includes a contract concluded by a click-wrap agreement or a contract stored in a computer as a secured word document (i.e., a read-only document or document with entry password).¹³

2. Personal Jurisdiction on Domiciled Defendants in the EU

In the EU, defendants can be sued at their domiciles. That is, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that state.¹⁴ Then, the next question is how

8. Chen, *supra* note 4, at 437; Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1998 Official Journal of the European Union (C 27) 1.

9. *Id.* at 438 ("Brussels Convention did not anticipate the internet and the unique difficulties E-commerce would cause courts in determining where a case should be heard.").

10. Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1.

11. Under the Brussels Regulation Art. 76, it is directly binding on member states unlike Brussels Convention which each country must adopt its own version in its statutory code. Chen, *supra* note 4, at 437, 439.

12. The Brussels Regulation aims to harmonize the rules of conflict of jurisdiction in civil and commercial matters by encouraging judicial cooperation between member states and facilitating cross-border litigation. Wang, *supra* note 1, at 10, 36.

13. *Id.* at 37.

14. Brussels Regulation Art. 2.

to determine a domicile of a natural person or a legal entity. The court in a member state shall apply the law of that state in order to determine whether a natural person is domiciled in a particular member state. (Brussels Regulation Art. 59(1)) If a natural person does not have a place of business, the person's habitual residence should be deemed to be a factor to determine his domicile. (UN Convention on Electronic Contracts Art. 6(3)) The determination of domicile for a legal entity is more complicated. Brussels Regulation Art. 60(1) provides that a company or legal entity is domiciled at the place where it has (1) its statutory seat, (2) its central administration, or (3) its principal place of business.¹⁵ And the statutory seat, central administration, or principal place of business can be determined according to certain connecting factors such as the registration of the defendant's business, licenses, electronic payments, and places of delivery of goods or services.¹⁶ In the US, the domicile (citizenship) of a legal entity such as a corporation is deemed to be a state of the incorporation and a principal place of business.¹⁷ So, the concept of domicile in the EU is wider than that of domicile in the US which gives the plaintiff in the EU more options in filing a lawsuit against a defendant in the EU.

3. B2B Contracts

1) Place of Performance

Regarding B2B contracts, a defendant may be sued in a member state in which the defendant is not domiciled. To wit, a defendant can be sued either at its domicile or at a forum which is not its domicile. Brussels Regulation Art. 5(1) states that "a person domiciled in a Member State may be sued in another Member State (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question (b) ... the place [of performance] is: in the sale of goods, the place in a Member State where the goods were

15. UN Convention on Electronic Contracts. Art. 6(2): "If a party does not indicate his place of business and has more than one place of business, then the place of business is that which has the closest relationship to the relevant contract."

16. King v. Crown Energy Trading AG [2003] ILPr 489 ("Although Art. 60 envisages a possibility that a company's central administration and its principal place of business may be located at different places, it will often be the case that they overlap, especially in relation to small organizations.").

17. 28 U.S.C. Sec. 1332(c)(1): "[A] corporation shall be deemed to be a citizen of every State ... by which it has been incorporated and of the State ... where it has its principal place of business..."

delivered or should have been delivered; in the provision of services, the place in a Member State where the services were provided or should have been provided.”

Thus, the defendant can be sued not only at its domicile Member State but also at the place of performance of contractual obligation. The Brussels Regulation appears to give the plaintiff more options in initiating a lawsuit since the personal jurisdiction over the defendant is expanded to include the place of performance. Therefore, it means that defendants should anticipate that they can be sued not only at their domicile state but also at the state of performance under the contract.

Then, it is necessary to have some guidelines in determining the place of performance because it is rather difficult to locate the place of delivery of goods or provision of services in E-commerce transaction.

(1) Place of Dispatch/Uploading

The first possibility for locating the place of performance is the place of dispatching or uploading of information. To wit, it is the place where the information was dispatched or uploaded on the web server.¹⁸ The UN Convention on Electronic Contracts Art. 10(3) provides that “an electronic communication is deemed to be dispatched at the place where the originator has its place of business.” Accordingly, the place of business of the seller is likely to be considered as the place of performance where it can be sued in B2B transactions. This will give an advantage to the seller because the forum is at its own business location.

(2) Place of Receipt/Downloading

The second possibility for locating the place of performance is the place of receipt or downloading the information. To wit, it is the place where the information was received by the recipient—the place where the information was downloaded onto the recipient’s computer.¹⁹

The problem with the second approach, however, is that the recipient can order and download his digitalized products while he is away at a place unconnected with his domicile or place of business because buyers can order goods through computers linked to the Internet through a network supporting mobile access.²⁰ In other

18. Wang, *supra* note 1, at 53.

19. J.J. Fawcett, J.M. Harris and M. Bridge, *International Sale of Goods in the Conflict of Laws* 1304 (Oxford University Press, 2005).

words, if the buyer is legally allowed to sue the seller at the place of downloading, the buyer may intentionally go to that place for the purpose of choosing a favorable court. Since using the place of downloading as the place of performance can encourage a forum shopping, other means of determining the place of performance is preferable.

(3) The Place where seller or recipient has a closest connecting factor

Another possibility for locating the place of performance is the place where the seller or the recipient has a closest connecting factor such as the place of business for either the seller or the recipient, principal place of business, central administration, statutory seats, or habitual residence.²¹

(4) Specification of Place of Performance

The parties can agree to specify a particular place as the place of performance. The European Court of Justice held that if the place of performance of a contractual obligation has been specified by the parties in the contractual clause, the court for that place has jurisdiction concerning the disputes relating to that obligation under the Brussels Regulation Art. 5(1).^{22 23} The designation of place of performance is to be recognized unless parties designate a place that has no connection with the reality of the contract.²⁴

4. B2C Contracts

The EU widely expanded the scope of the Internet personal jurisdiction with respect to consumer contracts,²⁵ because a consumer

20. Tapio Puurunen, "The Judicial Jurisdiction of States over International Business-to-Consumer Electronic Commerce from the Perspective of Legal Certainty," 8 U.C. Davis J. Int'l L. & Pol'y 133, 164 (2002); Wang, *supra* note 1, at 56.

21. *Id.* at 53. The list for the possible place of performance appears to be similar to the list of domicile.

22. Zelger v. Salinitri (Case 56/79), [1980] ECR 89.

23. Color Drack GmbH v. Lexx International Vertriebs GmbH (Case C-386/05), [2007] I. L. Pr. 35, p. 472. If there are more than two places of delivery, the parties may agree to specify which of the various places of delivery is to be chosen as the place of performance.

24. Puurunen, *supra* note 20, at 161; MSG v. Gravieres Rhénares (Case C-106/95), [1997] E.C.R. 911, 944, para. 32.

25. The "consumer" is defined as a person for a purpose which can be regarded as being outside his trade or profession. (Brussels Regulation Art. 15) The consumers are considered as the weaker parties to contracts who are less experienced in business and legal matters, and thus need more economic and legal protections. *Bertrandt v. Ott*, 1978 E.C.R. 1431, 1446, Case 150/77, para.

in B2C contracts in the EU can sue a defendant not only at the defendant's domicile but also at the consumer's domicile.^{26 27}

Initially, the EU seemed to have a very wide view on the personal jurisdiction on consumer E-commerce. For instance, the EU Council had a strong support for the expansive application of the Internet personal jurisdiction in consumer contract by proposing that a consumer—a domiciliary in the EU Member State—should be able to sue a website operator in the consumer's domicile as long as he uses—anywhere in the world—an interactive website which is accessible in the Member State in which he is domiciled.²⁸

However, the EU, through the Brussels Regulation, modified its expansive view of personal jurisdiction by providing a new standard on E-commerce jurisdiction. The Brussels Regulation Art. 15(1)(c) provides that personal jurisdiction over a defendant will be proper if the contract has been concluded with the defendant 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 Member States including that Member State.²⁹ So more than a mere accessibility and interactive nature of a website are required and the Internet activities must be categorized as the “pursuing or directing” online activities for asserting E-commerce personal jurisdiction over a defendant in the EU.³⁰

The first question to be answered is whether or not the concept

21; Shearson Lehman Hutton v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH, 1993 E.C.R. I-139, 187, Case C-89/91, para. 18.

26. Brussels Reg. Art. 16: (1) “A consumer may bring proceedings against the other party 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, (2) Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.” Unlike the US, the consumers in the EU can be sued only at their domiciles which exhibits a strong preference to the protection of consumers.

27. The Brussels Regulation expands the definition of domicile of the defendant. Art. 15(2): “where a consumer enters into contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.”

28. Brian Boone, “Bullseye!” Why a “Targeting” Approach to Personal Jurisdiction in the E-Commerce Context Makes Sense Internationally,” 20 Emory Int'l L. Rev. 241, 277 (2006); Frederic Debussere, “International Jurisdiction over E-Commerce Contracts in the European Union: Quid Nove Sub Sole?” 10 Int'l J. L. & Info. Tech. 344, 348-49 (2002)(“[I]f the website has an interactive nature, its mere accessibility in the EU Member State in which the consumer is domiciled is sufficient for asserting jurisdiction over the E-Contract.”).

29. Brussels Regulation Art. 15(1)(c).

30. Merely allowing its website to be accessed in other member states is not sufficient to assume that the website is directing its activities toward those member states. Chen, *supra* note 4, at 445.

of “pursuing or directing” activities require any physical presence in a member state. It is argued that while the concept of “pursuing” activities in Member State of the consumer’s domicile may require some physical presence in that State, the concept of “directing” activities does not.³¹ However, it is more reasonable to argue that either “pursuing” or “directing” activities does not require any physical presence as electronic contracts can be performed without physical presence.³²

The next question is to determine how the EU defines the concept of “pursuing or directing” activities to the Member States.³³ ³⁴ While the EU does not, intentionally or unintentionally, distinguish between the concept of “directing” and that of “pursuing,” it deems “directing” activity to be continuous business activities connecting to Member State with financial benefits³⁵ rather than single, random, or isolated transaction. For example, if a seller employs particular business strategies or resources to pursue certain EU markets in order to sell particular goods and products, such financially benefit-seeking activities can be regarded as “directing” activities.³⁶ However, it is known that simply maintaining a domain name, electronic mail, or IT system that can be accessed in the EU markets does not translate into having direct financial effects in the Member States. Also, allowing to use Euro currency or using EU Member State languages does not have direct financial effects by itself.³⁷ One example of “directing”

31. P. Cachia, “Consumer Contracts in European Private International Law: The Sphere of Operation of the Consumer Contract Rules in the Brussels I and Rome I Regulations,” 34 *European Law Review* 476, 483 (2009).

32. Wang, *supra* note 1, at 61-62.

33. The Commission has explained that the extended concept of “pursuing or directing activities” is designed to include consumer contracts concluded via interactive websites accessible in the State of the consumer’s domicile. Proposal for a council regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Com 1999/348, 99/0154), on 14 July 1999, available at euro-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0348:FIN:EN:PDF (Last visited Jan. 20, 2020).

34. A disagreement exists within the EU organizations as to the scope of “pursuing or directing” activities as the European Parliament supports the narrower scope while the European Commission supports the wider scope. Although the European Parliament proposed that directing was established where the online trading site was an active site if a seller had purposefully directed its activity in a substantial way to a Member State where the consumer was domiciled, the European Commission has opined that even unsolicited emails sent to individual customers or specific consumer groups can be considered to be active sales. Commission Notice, Guidelines on Vertical Restraints, para. 51, 2000 O.J. (C291) 1, 12; Puurunen, *supra* note 20, at 158, 253.

35. Wang, *supra* note 1, at 62.

36. *Id.*

37. Joint Statement of the Commission and the Council on Arts 15 and 73 of the Regulation, available at ec.europa.eu/civiljustice/hompage/homepage_ec_en_declaration.pdf (Last visited Feb. 20, 2020)

activity in a specific member state can be advertising and specific invitation for purchase orders.³⁸

More specifically, the “directing or pursuing” activities can be subject to E-commerce jurisdiction if online sellers or websites direct their activities toward consumers, provide an online shopping platform, or offer goods or services to consumers in the Member State of the consumer’s domicile, or a number of Member States including that Member State.³⁹ So it appears that the “directing or pursuing” Internet activities in the EU can be defined as very broad and expansive which can subject many foreign defendants to the EU jurisdiction who made online contracts with consumers through interactive websites accessible to consumer’s domicile. And such expansive application of E-commerce jurisdiction demonstrates the EU’s strong commitment for the consumer protection in B2C transactions.⁴⁰

5. *United Kingdom*

Under the Brexit agreement (AKA “Brexit”), the UK finally withdrew from the EU as of January 31, 2020. The EU and the UK have recently begun the transition (implementation) period which is due to end on December 31, 2020 during which they will negotiate and attempt to make a deal regarding new free trade agreements, tariffs, and other important issues between them.⁴¹

Since the UK will not be bound by the EU laws and rules after its official withdrawal from the EU, it is necessary to anticipate the UK’s stance on the legal matters including E-commerce and personal jurisdiction. It seems that the UK will continue to take an aggressive position in terms of exercising its Internet personal jurisdiction in B2C transactions. First of all, the UK has taken a strong position of protecting its consumers and adopted the EU directives on consumer protection. For example, the UK adopted the Consumer Protection

38. Rudolf Gabriel, Judgment of the Court (Sixth Chamber) of 11 July 2002, C-96/00, p. 44, available at euro-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0096:EN:HTML. (Last visited Jan. 20, 2020) (“Concept of advertising and specific invitation covers all forms of advertising whether disseminated by press, radio, TV, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that state as well as commercial offers made to consumer in person, in particular by an agent or door-to-door salesman.”).

39. Wang, *supra* note 1, at 60.

40. Je-woo Ahn and Eun-sup Li, “A Comparative Study on US and EU Legislation regarding Jurisdiction in International Electronic Commerce” *The Journal of Internet Electronic Commerce Research*, Vol. 7, No. 3, 451-472 (2007).

41. Peter Barnes, “Brexit: What Happens Now?” BBC News (Feb. 5, 2020) available at <https://www.bbc.com/news/uk-politics-46393399> (Last visited Feb. 8, 2020).

Co-operation Regulation in 2006 which provides the EU's national consumer protection authorities with greater powers to protect consumers against cross-border breaches of consumer protection laws. Secondly, the UK government, since the Brexit referendum in 2016, has continued to recognize that new EU regulations are enforceable as law in the UK and has implemented EU directives—including E-commerce matters—by means of its national legislation.⁴² It is noteworthy that the UK has recently advised online businesses and service providers that it will seek to prioritize “continuity and stability” with respect to E-commerce and will align the UK with the approach in the EU's E-commerce Directives.⁴³

It is still uncertain whether the EU and the UK will make a deal—if any—regarding E-commerce transactions and jurisdiction. In case that there is no deal made, it remains to be seen whether the UK will continue along the same line with the EU in terms of E-commerce and jurisdiction or take a new approach by establishing its own case laws. However, it appears to be more likely that the UK will continue the aggressive stance in exercising E-commerce personal jurisdiction because of its strong consumer protection policy and of its intent to pursue continuity in following the EU's approach in E-commerce.

III. E-Commerce Personal Jurisdiction in the US

1. *Background and History*

The rules and standards for personal jurisdiction in the EU are more predictable and less uncertain because the laws of the EU are statutory-based which are set up through the codification and regulation-making. On the other hand, the US rules and standards because of its common law and case law systems are lacking uniformity and legal certainty compared to the relatively clearer guidelines provided under the EU rules.^{44 45}

42. Robert Bond, United Kingdom e-Commerce, Getting the Deal Through, (Aug. 2019), available at <https://gettingthedealthrough.com/area/11/jurisdiction/22/e-commerce-2020-united-kingdom/> (Last visited Feb. 8, 2020). The UK's implementation of EU rules includes the E-commerce area. For example, after the EU issued the General Data Protection Regulation (GDPR) in 2018, the UK actively issued GDPR guidance and enforced the powers granted to data protection authorities under the GDPR.

43. *Id.*

44. In the US, the principle of the Internet jurisdiction in consumer contracts (B2C) are identical to those of B2B contracts. Wang, *supra* note 1, at 73.

45. It is noteworthy that the Internet jurisdiction in the EU has developed on the basis of

Similar to the EU approach in E-commerce personal jurisdiction, the US position is that a mere posting of a website in Internet itself is not sufficient to subject a defendant to personal jurisdiction in the forum state because simply making a website accessible online without more substantial activities is not equivalent to an activity directed to any particular locale.⁴⁶

The US, in order to exercise personal jurisdiction, first examines whether there is a “minimum contact” between the defendant and the forum state and at the same time considers the “reasonableness” factors.⁴⁷ The important difference from the EU approach is that the US courts impose a high standard for meeting the “minimum contact” standard and consider the “reasonableness” factors that the Brussels Convention and Brussels Regulation do not recognize.⁴⁸

2. *Zippo Sliding Scale Approach*

The first definitive standard that the US used was the sliding scale or continuum approach under the Zippo case.⁴⁹ Under this approach, websites are categorized into three types: active, passive, or interactive websites. If a defendant enters into contracts with residents of a foreign jurisdiction that involve the repeated transmission of computer files over the Internet, it is considered as active websites, making it subject to Internet personal jurisdiction of the forum court.⁵⁰ If a

EU statutes and regulations which are relatively slow and rigid in development. On the other hand, the Internet jurisdiction and jurisprudence in the US have been established over many case laws which are more dynamic in development than the EU.

46. Michael Traynor and Laura Pirri, “Personal Jurisdiction and the Internet: Emerging Trends and Future Directions,” 712 PLI/Pat 93, 106 (2002).

47. In order to subject a defendant to a personal jurisdiction, he must have certain minimum contacts with the forum such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). The minimum contact test can be satisfied if a defendant purposefully avails itself of the privilege of conducting activities within the forum State. *Hanson v. Denckla*, 357 U.S. 235 (1958) and *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987); The reasonableness factors are (i) plaintiff’s interest in obtaining convenient and effective relief; (ii) the burden on the defendant in defending in the forum; (iii) the forum State’s interest in adjudicating the dispute; (iv) the interstate judicial system’s interest in obtaining the most efficient resolution. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

48. Puurunen, *supra* note 20, at 247.

49. *Zippo Mfg Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1119-21 (W.D. Pa 1997): The manufacturer of “Zippo” tobacco lighters, a Pennsylvania corporation, sued Zippo Dot Com, a California news service, which used domain names “Zippo.com,” “Zippo.net,” and “Zipponews.com.” The Pennsylvania court found the personal jurisdiction proper because the defendant advertised its news service to the Internet public through Internet service providers that had bases of operation in Pennsylvania and it sought out these Pennsylvania ISPs in its advertising efforts.

50. *CompuServe Inc. v. Patterson*, 89 F. 3d. 1267 (6th Circuit 1996).

particular website merely provides information to a person visiting that website and may be accessed by Internet browsers but do not allow interaction between the host and visitor, it is considered as passive website, not being subject to Internet personal jurisdiction.

In the middle of the sliding scale – somewhere between active and passive websites – lie interactive websites in which a user can exchange information with the host computers. There the jurisdiction should be determined by the “level of interactivity and commercial nature of the exchange of information that occurs on the website.”⁵¹ If the activities occurring on a defendant’s website lean more toward the passive side of the scale, personal jurisdiction will not be applied. If, however, the activity slides toward the active side of the scale, personal jurisdiction will be likely to be upheld.⁵²

However, the Zippo sliding scale approach comes with a major problem in its own because the concept of interactivity can be defined in various ways. If a specific website is neither active nor passive but rather interactive, inconsistent finding can be reached due to the ambiguous and amorphous definition of interactivity.⁵³ More importantly, the “one-size-fits-all” Zippo approach has come under attack or was not followed by recent cases because in today’s digital age a web site may be highly active yet not affect the forum state in a sufficiently meaningful way to warrant personal jurisdiction.⁵⁴ Because of the development and expansion of the Internet, nearly all the commercial sites can be defined as being interactive to some extent which makes the application of sliding scale to be difficult. Also, the Zippo test could discourage the adoption of interactive websites⁵⁵ for fear of being subject to personal jurisdiction, hampering online business activities.

3. *Effects Test*

The second approach that the US courts took was the effects test. In *Calder v. Jones*, a California resident brought a suit in California Superior Court against Florida residents who allegedly wrote libellous matter about the plaintiff in a national publication. The California

51. Zippo Mfg Co., *supra* note 49, at 1124.

52. *Id.*

53. Boone, *supra* note 28, at 259.

54. *Kindig It Design, Inc. v. Creative Controls, Inc.* 2016 WL 247574 (D. Utah 2016); *ClaimSolution, Inc. v. Claim Solutions, LLC*, 2017 WL 2831330 (D. Kan. 2017).

55. Michael Geist, “Is There a There There? Toward Greater Certainty for Internet Jurisdiction,” 16 *Berkeley Tech. L.J.* 1345, 1348 (2001).

Court found the exercise of jurisdiction to be proper by stating that “the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California.”⁵⁶

Yahoo! Inc. v. LICRA is a case with international implication that relied on the effects test.⁵⁷ A French organization which opposes racism and anti-Semitism obtained the French court order mandating that Yahoo take all necessary measures to block any access via Yahoo.com to the Nazi artifact auction service or any messages and text relating to Nazi.⁵⁸ Yahoo filed suit in California asking for a declaration of unenforceability of the foreign judgment. The Ninth Circuit Court of Appeals held that, although the case should be dismissed for not being ripe for adjudication, the district court did have personal jurisdiction. The court found the grounds for exercising personal jurisdiction over the foreign defendant to be as follows: sending the cease-and-desist letter to Yahoo! headquarters, obtaining the French judgments against Yahoo! and serving process on Yahoo! in California. The court opined that these contacts were intended to have effects in California.⁵⁹

So the focus of the effects test is placed upon the conducts of a defendant in the forum state. However, websites can have some kind of “affect” on all the places in which it can be accessed online.⁶⁰ Also it may be easier to determine the place of effect on individuals; however, it may not be easy to determine the place where a large multi-forum corporation is affected or harmed.⁶¹

56. *Calder v. Jones*, 465 U.S. 783, 789 (1984); Boone, *supra* note 28, at 260 (“Courts focus on the actual effects the website has in the forum state rather than trying to examine the characteristics of the website or web presence to determine the level of contact the site has with the forum state.”).

57. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme (LICRA)*, 433 F.3d 1199 (9th Cir. en banc 2006).

58. *Ass’n Union des Etudiants Juifs de France v. Yahoo!, Inc.*, T.G.I. Paris, Nov. 20, 2000, ord. ref., J.C.P. 2000, Actu., 2219, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf>. (Last visited Feb. 20, 2020)

59. *Yahoo! Inc. v. LICRA*, 433 F.3d at 1207-11; Anderson Bailey, “Purposefully Directed: Foreign Judgments and the Calder Effects Test for Specific Jurisdiction,” 62 N.Y.U. Ann. Surv. Am. L. 671, 685 (2007).

60. Denis T. Rice and Julia Gladstone, “An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace,” 58 Bus. Law 601, 629 (2003).

61. *Id.*

4. Targeting Approach

Due to the problems regarding the sliding scale test and effects test, the US courts adopted a new approach called the targeting approach. The difference between the targeting approach and the other two tests – especially the effects test – is that the targeting approach examines the defendant's intention on the targeted market.⁶² The defendant's intention can be verified, for example, by looking at whether the defendant purposefully or deliberately directed his activity in a substantial way to the forum state.⁶³ In *Cybersell, Inc. v. Cybersell, Inc.*, an Arizona corporation sued a Florida corporation in Arizona alleging that the defendant infringed the plaintiff's trademark. The court found that the posting of minimally interactive website by the Florida defendant, without any other contact, was insufficient to exercise jurisdiction. Further, the court held that websites that simply advertise or solicit sales could not support an assertion of personal jurisdiction in Internet context without “something more” to indicate that the defendant purposefully and intentionally directed his activity towards the forum.⁶⁴ The targeting or deliberate action requirement of *Cybersell* should apply regardless of whether the defendant's website is highly interactive or passive,⁶⁵ which distinguishes it from the sliding scale test.

The Ninth Circuit Court of Appeals in *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.* held that the targeting test is satisfied “when a defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom a defendant knows to be a domicile or resident of the forum state.”⁶⁶ Also, this test is known to be a better and fairer

62. Boone, *supra* note 28, at 265; *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F. 3d 707, 714 (2002); Carole Aciman and Diane Vo-Verde, “Refining the Zippo Test: New Trends on Personal Jurisdiction for Internet Activities,” 19 *Computer & Internet Law* 16, 19 (2002).

63. The targeting approach adopted the plurality opinion of Justice O'Connor in *Asahi* case which examines whether the defendant's action purposefully directed toward the forum and which requires, for the exercise of personal jurisdiction, something more than mere awareness of a product or service being placed in the stream of commerce. *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. at 111; Boone, *supra* note 28, at 252.

64. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F. 3d 414, 420 (9th Circuit 1997). This rationale is based on the test employed by the *Asahi* case in which the forum court reviews whether a defendant purposefully availed itself of the benefits and privileges of conducting business in the forum state.

65. M. Traynor, *supra* note 46, at 119.

66. *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F. 3d 1082, 1087-88 (9th Circuit 2000): A California computer services corporation, which owned Internet domain name “masters.com,” sued Georgia golf club which held “Masters” trademark, seeking declaration that the plaintiff's use of Internet domain name did not infringe the defendant's trademark. The court found the jurisdiction proper because the defendant had targeted California by sending a letter to

approach for determining whether a defendant reasonably anticipated being haled into a foreign forum court to defend his activities there.⁶⁷ When a defendant has engaged in a wrongful or harmful conduct targeting a specific market, the defendant reasonably anticipated or could have anticipated that it could be haled into a foreign state to defend its activities.⁶⁸

Compared to the EU, it is more difficult to subject foreign defendants in the E-commerce personal jurisdiction in the US because, first of all, consumers cannot sue the defendants at the consumer's domicile unless the targeting test is satisfied and the targeting test seems to impose more strict and rigid standards—before exercising personal jurisdiction—than the counterpart approach of the EU. On the other hand, it is easier for the consumers in the EU to sue the defendants at the consumer's domicile because the EU does not impose the same kinds of rigid standards as the US. The “pursuing or directing” approach of the EU is not as rigorous as the “targeting” test of the US because the EU test does not closely examine the intention and purpose of the defendant's online activities. Whereas the EU's approach seems to take a very broad view on the defendant's outward appearances and its activities, the US courts closely examine the defendant's online activities to see if they are deliberate and intentional. For example, the US courts examine whether a defendant deliberately attempted to make minimum contacts with the forum state by purposefully availing itself of the benefit and privileges of conducting business in the forum state. Even if the outcome of the tests of both regions may come out the same, the more rigorous examination under the US case laws places higher hurdles for the plaintiff to cross before the court grants E-commerce personal jurisdiction.

the plaintiff's business in California demanding that the plaintiff cease from using the “masters.com” website.

67. Geist, *supra* note 55.

68. The test of whether a defendant purposefully availed itself of the benefits and privileges of conducting business in the forum state can be tied to the inquiry as to whether the defendant can anticipate being haled into forum court because if the defendant purposefully availed itself of the forum state, it did or could have reasonably anticipated or foreseen being haled into the forum court when and if the defendant's activity caused some bad effects or harms to the forum state.

IV. Harmonization on E-Commerce Personal Jurisdiction between the EU and US

There will be more advantages and profits to be gained if the EU and the US—the two regions with the biggest markets for international trade and businesses—attempt to harmonize their respective laws in E-commerce jurisdiction.⁶⁹ First of all, jurisdictional uniformity in international transactions will promote more E-commerce business transactions between the two regions. The different approaches taken by the two regions will create a lot of confusion and misunderstanding between the trading partners in B2B transactions as well as between merchants and consumers in B2C transactions. On the other hand, the trading partners as well as the corporation and consumers will benefit from the legal certainty and transparency in jurisdictional and choice of law matters. This in turn can encourage more transactions in B2B as well as in B2C contracts. If there is a high level of uncertainty for being subject to jurisdiction in foreign forum, small and mid-sized companies may choose to shut down their websites.⁷⁰ However, with more certainty and transparency as to the possibility of being subject to personal jurisdiction in foreign country, small and mid-sized companies are likely to continue operating their websites in foreign jurisdictions.

Between the two different approaches taken by the EU and the US, it seems to be preferable to adopt the targeting approach of the US in terms of E-commerce personal jurisdiction for several reasons. First of all, the definition of domicile is very broad in the EU so that, although a defendant can be sued at its domicile, the possible places for being sued are more various than the US.⁷¹ Secondly and more importantly, the Brussels Regulation of the EU provides the specific provision which allows the consumer plaintiff to sue the defendant at the consumer's domicile. Although the EU Internet jurisdiction requires more than a mere accessibility of the interactive website to the consumer in a Member State, the test of “pursuing or directing” activities to the Member State seems to be so broad in its application

69. Along with the need to harmonize the personal jurisdiction rules, there is a necessity for the harmonization of choice-of-law between the two regions to facilitate more cross-border transactions. The choice-of-law rules for the EU are the Rome Convention of 1980 and the Rome I Regulation of 2008. The counterpart rules for the US are the Uniform Commercial Code and the Second Restatement. Wang, *supra* note 1, at 100, 123.

70. Chen, *supra* note 4, at 446.

71. For example, the domicile or citizenship of the corporation in the US is the place of incorporation and the principal place of business whereas that of the corporation in the EU includes the statutory seat, central administration, and principal place of business.

that a lot of website activities—although they may not be intentional and deliberate—can be subject to the Internet jurisdiction of the EU. Also, in the EU, the concept of “pursuing or directing” activities does not require any physical presence in a specific Member State. Thus, the Internet activities of a company even without any physical presence in the EU can be subject to the EU jurisdiction. Such a wide application of the EU Internet personal jurisdiction can hamper the E-commerce transactions in the EU market. Thirdly, the targeting approach taken by the US takes a closer and fairer look at the activities of the defendant in the forum state. That is, the targeting approach attempts to discover the intention and purpose of the defendant by closely examining the activities that the defendant has engaged in the forum state. Whether or not the defendant purposefully directed its activities in a substantial and meaningful way needs to be answered before the US court exercises a personal jurisdiction over the defendant.⁷²

V. Exclusive Jurisdiction (Forum Selection Clause)

The parties may insert a contractual language designating a specific forum court—exclusive jurisdiction—for resolving a contractual dispute. If the parties include a choice of jurisdiction clause in the terms and conditions on the website, it can eliminate confusion and question as to which court has jurisdiction when a dispute arises later on. The Convention (2005) on Choice of Court Agreements (AKA “Choice of Court Convention”) Art. 5 provides the basic rule that the court chosen by the parties in an exclusive choice of court agreement shall have jurisdiction.⁷³ The Choice of Court Convention Art. 6 states that “a court other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies” unless the chosen court has decided not to hear the case, or the agreement is null and void or against the public policy under the law of that state, which is determined under the law of the

72. The Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters was an attempt to harmonize international jurisdictional law. Although it was ratified by only a handful number of countries not including the EU and the US, it did support the adoption of the targeting approach of the US. Hague Conference Permanent Bureau, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, Interim Text 7, available at http://www.cptech.org/ecom/jurisdiction/Interim_text.rtf (Last visited Jan. 20, 2020).

73. The EU, Denmark, Mexico, Singapore, and the UK are parties to the convention. China, North Macedonia, Ukraine, and the US signed the convention, but did not ratify.

state of the chosen court.⁷⁴

The question then is whether the chosen forum court in the EU should recognize such forum selection clause to be binding. The EU recognizes the party autonomy in choosing a forum court at the time of contract making for resolving any legal dispute exclusively. The Brussels Regulation sets out the requirements of the application of exclusive jurisdiction agreements. Art. 23(1) of the Brussels Regulation states that “[i]f the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction which shall be exclusive unless the parties have agreed otherwise.”⁷⁵ However, if none of the contracting parties is domiciled in a Member State, the chosen court has a discretion to determine the existence and exercise of its jurisdiction pursuant to its own laws.⁷⁶

Before enforcing the choice of jurisdiction clause, the EU requires that there is a consensus between the parties for entering into such agreement which was made automatically online. However, there is a difficulty in proving consensus between the seller and the consumer when the consumer clicks the “I agree” button on the website by mistake or without carefully reading the essential terms and conditions. The EC Directive on Electronic Commerce Art. 10(1)(b) attempted to reduce such problem by requiring that the agreement be filed by the service providers and that “[c]ontract terms and conditions provided to the recipient must be available in a way that allows him to store and reproduce them.” However, the Directive fails to provide any remedy for a violation of the above requirement to provide the stipulated information.⁷⁷

But the more important issue regarding the exclusive jurisdiction is that the Brussels Regulation imposes a limitation in the application of

74. The contracting parties in both B2B and B2C contracts might face the same issue in that the exclusive choice of court clause could have been automatically inserted in the click-wrap or shrink-wrap agreements. Wang, *supra* note 1, at 24, 27.

75. The formality requirements of electronic exclusive jurisdiction agreements depend on the customs or formal practices of the international trade parties. The terms in click-wrap agreement are treated similarly to those on the back of the traditional bill of lading. *Id.* at 44.

76. Brussels Reg. Art. 23(3) provides that “[w]here such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.”; *Sinochem v. Mobil* [2000] 1 Lloyd’s Rep 670.

77. For example, if the buyer clicked the “I agree” button on choice of court provision incorporated or referred to in an interactive click-wrap agreement, such term must be available to read and download or reproduce. Wang, *supra* note 1, at 42.

exclusive jurisdiction in terms of consumer contracts. While the Brussels Regulation Art. 17 allows for forum selection clauses, it does not allow the forum selection clause in a B2C contract to be enforced unless such agreement is entered into after the dispute arises.⁷⁸ In other words, consumers are allowed to sue in their domicile home court unless the forum selection clause was entered after the dispute arises. The reason for such limitation is to provide the consumers with the protection from the corporate traders who tend to unilaterally include the boilerplate languages buried in the long contracts, the unfair terms of which are often non-negotiated and undisclosed to the consumers. The unfairness lies in the fact that the seller includes the exclusive territorial jurisdiction in its own principal place of business without proper negotiation with and disclosure to the consumers who are often lacking bargaining power with no real choice.⁷⁹

VI. Business Strategies for the Korean Corporations

1. *Internet Activities*

It will be better in terms of the corporate interest for the Korean corporations to minimize or avoid being subject to the personal jurisdiction and the litigation in the EU courts. If a Korean corporation is sued in a foreign jurisdiction, it will be burdensome in terms of not only litigation and discovery costs in foreign courts but also defending in foreign countries where the Korean company and its Korean lawyers are lacking the knowledge and information about the local court and its laws and procedures which will necessitate the hiring of a local lawyer.⁸⁰ But it will be difficult in finding the “right” attorneys in foreign country and in communicating with them effectively throughout the litigation. Also, the Korean company will be

78. Brussels Regulation Art. 17; Unlike the US, the EU does not enforce the arbitration agreements in consumer contracts which were made before the dispute arises. Donna M. Bates, “A Consumer’s Dream or Pandora’s Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?” 27 *Fordham Int’l L.J.* 823, 842 (2004).

79. Børge Dahl, *Consumer Protection and the Provisions on Jurisdiction in the 1968-EEC Judgments Convention*, 46 *Nordisk Tidsskrift for International Ret* 104, 108-11 (1977); *Océano Grupo Editorial SA v. Roció Murciano Quintero*, 2000 E.C.R. I-4941, Cases C-240-243/98, para. 24; Report of the American Bar Association, “Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet,” 55 *Bus. Law.* 1801, 1860 (2000).

80. For example, the Korean company must follow the foreign civil procedures regarding document submissions and their translations which can be expensive. Vivienne Kendall, *EC Consumer Law* 5-33, 158 (1994).

put into disadvantages because it needs to follow the substantive laws and procedures of the forum court in the foreign country.

One of the possible actions that a Korean company can take to avoid the foreign litigation in E-commerce is that in the website, it can specify that it will be engaged in Internet transactions only in a specific country or countries as listed. For example, a Korean company can include a provision in the contract that goods or services are only intended for sale in certain countries. This is an attempt to avoid being subject to personal jurisdiction in a country not listed in the website or in a country that the company wishes to avoid litigation. However, the method of limiting jurisdiction may not be ideal for the corporate interest because it can reduce the sales volume and revenues for the corporation.

The more realistic approach is that the Korean corporation attempts to anticipate whether and how the EU courts will exercise the Internet personal jurisdiction when a lawsuit is brought there. This approach is more realistic because the Korean companies cannot entirely avoid the application of the EU regulations and lawsuit simply by contractually attempting to limit the scope of jurisdiction in the EU. If the Korean companies understand the relevant Internet personal jurisdiction rules and anticipate their application, they can prepare how to avoid or minimize the Internet personal jurisdiction in the EU.

As discussed above, it seems that it is easier to be subject to personal jurisdiction in the EU than in the US concerning the E-commerce B2C transactions. So it is advised that the Korean corporations take more conservative approach if they do not wish to be subject to lawsuits regarding B2C transactions in the EU. For example, the Korean corporations should avoid or at least minimize any business activities that can be considered as “pursuing or directing” activities to the EU Member States while being mindful that the scope of “pursuing or directing” activities is broad and casts a wider net to the corporate defendants in comparison to the targeting test used in the US. For example, the Korean companies can be subject to E-commerce personal jurisdiction if they are engaged in continuous business activities, extend specific invitation for purchase orders, or offer goods through specific advertising directed to the consumers in the EU. Also, because the EU can exercise E-commerce jurisdiction over a defendant which has no physical presence in the EU, the Korean companies can be subject to a lawsuit even if they do not open up a branch office in the EU. To wit, it is not easy to

be free from the imposition of the EU personal jurisdiction in E-commerce B2C because the concept of “pursuing or directing” activities can be interpreted to be broad and even obscure.

2. *Forum Selection Clause and Arbitration Clause*

The Korean company can attempt to limit the exercise of personal jurisdiction in foreign forum by including the forum selection clause in the contract agreed with the consumer so that a litigation can occur exclusively in the forum designated in the clause^{81 82} The advantage from using the forum selection clause is the legal predictability for the contractual parties by agreeing to the personal jurisdiction at the time of contract making. To wit, the parties in E-commerce transactions can avoid the risk of being sued in several different jurisdictions because they can anticipate a particular jurisdiction in which they can be sued and need to defend themselves. However, such forum selection clause is currently against the EU’s traditional policy of consumer protection and also against the consumer right in terms of party autonomy as the EU has approached the forum selection clauses negatively. It has been the conventional position of the EU that the consumers need to be protected from the forum selection clauses or arbitration clauses that the merchants have unilaterally prepared in their favor. Especially, using the forum selection clause or arbitration clause may not be effective in B2C contracts because the EU courts may not recognize the forum selection clause or arbitration clause in consumer contracts unless such agreement is entered into after the dispute arises.⁸³ Accordingly, using the forum selection clauses or arbitration clauses is not such a viable option for the Korean companies with respect to B2C E-commerce.

81. It can specify arbitration instead of litigation as an alternative dispute resolution method: International trade parties usually choose arbitration due to the predictability of recognition and enforcement of arbitral awards under the New York Convention. Wang, *supra* note 1, at 30.

82. As another alternative dispute resolution method beside ADR, Online Dispute Resolution (ODR) may provide a very viable channel for solving international B2C E-commerce disputes because it can offer both businesses and consumers the means to resolve their online related disputes rapidly and inexpensively. Mary Shannon Martin, “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, 158 (2002).

83. Bates, *supra* note 78, at 838-844.

VII. Conclusion

The EU is known for its commitment of consumer protection which is evidenced in its expansive application and exercise of Internet personal jurisdiction in B2C transactions. For example, the “pursuing or directing” test that the EU applies before exercising its Internet jurisdiction is very wide in its application that foreign corporations are easier to be subject to the jurisdiction and lawsuit in the EU. In this paper, I proposed that the EU adopts the “targeting” test that the US courts have used in Internet personal jurisdiction. The “targeting” test seems to be a better and fairer approach than the “pursuing or directing” test because it examines the real intent and purposes behind the online business activities of the defendant corporations, looking beyond their outward activities. Also, let alone the advantages from harmonizing the personal jurisdiction between the EU and the US such as the facilitation of more Internet commerce, the legal certainty in Internet jurisdiction can bring about more transparency in B2B as well as B2C transactions and cooperation between the two important Internet markets.

The Korean corporations, however, need to be mindful of the current jurisdictional jurisprudence of the EU. As employing a conservative business strategy of avoiding or limiting the EU consumer markets is not ideal for the corporate interests, it is more important to understand and anticipate the EU Internet jurisdiction and plan the business activities in the EU accordingly. The forum selection clause choosing specific courts for litigation or choosing arbitration is advisable for avoiding a lawsuit in an unfavorable jurisdiction. However, the EU imposes a heavy limitation on the forum selection clause because it has a strong policy against forum selection clause concerning consumer contracts. Thus, it is more realistic to make efforts to reduce the lawsuits in a specific jurisdiction that the Korean companies wish to avoid by minimizing any online business activities that can be considered as “pursuing or directing” in the EU.

REFERENCES

[국내문헌]

- 경제통상관계주 벨기에 유럽연합 대한민국 대사관-외교부, 한-EU 교역 현황, http://overseas.mofa.go.kr/be-ko/wpge/m_7588/contents.do
- 노태약, “사이버불법행위의 재판관할과 준거법,” 국제사법연구, 제8호, 한국국제사법학회, 2003
- 석광현, “국제적인 전자거래와 분쟁해결-국제재판관할을 중심으로,” 인터넷 법률, 창간호, 법무부, 2000
- 안제우, 이은섭, “국제전자상거래에서의 재판관할에 관한 미국과 유럽연합 법제의 비교법적 검토,” 인터넷전자상거래 연구 제7권 제3호, 2007
- 우광명, “전자상거래의 국제재판관할 관련 판례변화에 관한 연구,” 통상정보연구 제13권 3호, 2011

[외국문헌]

1. 저서

- Faye F. Wang, *Internet Jurisdiction and Choice of Law*, 3 (Cambridge University Press, 2010)
- J.J. Fawcett, J.M. Harris and M. Bridge, *International Sale of Goods in the Conflict of Laws* 1304 (Oxford University Press, 2005)
- Richard D. Freer and Wendy Collins Perdue, *Civil Procedure Cases, Materials, and Questions*, Fifth Ed. 21 (LexisNexis, 2008)

2. 논문

- Anderson Bailey, “Purposefully Directed: Foreign Judgments and the Calder Effects Test for Specific Jurisdiction,” 62 N.Y.U. Ann. Surv. Am. L. 671, 685 (2007)
- Bórgé Dahl, “Consumer Protection and the Provisions on Jurisdiction in the 1968-EEC Judgments Convention,” 46 Nordisk Tidsskrift for International Ret 104, 108-11 (1977)
- Brian Boone, “Bullseye!” Why a “Targeting” Approach to Personal Jurisdiction in the E-Commerce Context Makes Sense Internationally,” 20 Emory Int’l L. Rev. 241, 277 (2006)

- Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1998 Official Journal of the European Union (C 27) 1
- Carole Aciman and Diane Vo-Verde, "Refining the Zippo Test: New Trends on Personal Jurisdiction for Internet Activities," 19 *Computer & Internet Law* 16, 19 (2002)
- Cindy Chen, "United States and European Union Approaches to Internet Jurisdiction and Their Impact on E-Commerce," 25 *U. Pa. J. Int'l Econ. L.* 423, 432 (2004)
- Commission Notice, Guidelines on Vertical Restraints, para. 51, 2000 Official Journal of the European Union (C291) 1, 12
- Denis T. Rice and Julia Gladstone, "An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace," 58 *Bus. Law* 601, 629 (2003)
- Donna M. Bates, "A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?" 27 *Fordham Int'l L.J.* 823, 842 (2004)
- Frederic Debussere, "International Jurisdiction over E-Commerce Contracts in the European Union: Quid Nove Sub Sole?" 10 *Int'l J. L. & Info. Tech.* 344, 348-49 (2002)
- Mary Shannon Martin, "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, 158 (2002)
- Michael Geist, "Is There a There There? Toward Greater Certainty for Internet Jurisdiction," 16 *Berkeley Tech. L.J.* 1345, 1348 (2001)
- Michael Traynor and Laura Pirri, "Personal Jurisdiction and the Internet: Emerging Trends and Future Directions," 712 *PLI/Pat* 93, 106 (2002)
- P. Cachia, "Consumer Contracts in European Private International Law: The Sphere of Operation of the Consumer Contract Rules in the Brussels I and Rome I Regulations," 34 *European Law Review* 476, 483 (2009)
- Report of the American Bar Association, "Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet," 55 *Bus. Law.* 1801, 1860 (2000)
- Tapio Puurunen, "The Judicial Jurisdiction of States over International Business-to-Consumer Electronic Commerce from the Perspective of Legal Certainty," 8 *U.C. Davis J. Int'l L. & Pol'y* 133, 164 (2002)

Vivienne Kendall, EC Consumer Law 5-33, 158 (1994)

3. 판례

- ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F. 3d 707, 714 (2002)
- Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 111 (1987)
- Ass'n Union des Etudiants Juifs de France v. Yahoo!, Inc., T.G.I. Paris, Nov. 20, 2000, ord. ref., J.C.P. 2000, Actu., 2219, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf>
- Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Circuit 2000)
- Bertrandt v. Ott, 1978 E.C.R. 1431, 1446, Case 150/77, para. 21
- Calder v. Jones, 465 U.S. 783, 789 (1984)
- ClaimSolution, Inc. v. Claim Solutions, LLC, 2017 WL 2831330 (D. Kan. 2017)
- Color Drack GmbH v. Lexx International Vertriebs GmbH (Case C-386/05), [2007] I. L. Pr. 35, p. 472
- CompuServe Inc. v. Patterson, 89 F. 3d. 1267 (6th Circuit 1996)
- Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1
- Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 420 (9th Circuit 1997)
- Cyberspace Communications, Inc. v. Engler, 55 F. Supp. 2d 737, 741-45 (E.D. Mich. 1999)
- Kindig It Design, Inc. v. Creative Controls, Inc. 2016 WL 247574 (D. Utah 2016)
- King v. Crown Energy Trading AG [2003] ILPr 489
- MSG v. Gravieres Rhénanes, Case C-106/95, 1997 E.C.R. 911, 944, para. 32
- Océano Grupo Editorial SA v. Roció Murciano Quintero, 2000 E.C.R. I-4941, Cases C-240-243/98, para. 24
- Shearson Lehman Hutton v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH, 1993 E.C.R. I-139, 187, Case C-89/91, para. 18
- Sinochem v. Mobil [2000] 1 Lloyd's Rep 670
- Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme (LICRA), 433 F.3d 1199, 1207-11 (9th Cir. en banc 2006)
- Zelger v. Salinitri, Case 56/79 [1980] ECR 89
- Zippo Mfg Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119, 1124

4. 기타

28 U.S.C. Sec. 1332(c)(1)

Brussels Regulation Art. 2, 15, 16, 17, 23, 76

Hague Conference Permanent Bureau, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, Interim Text 7, *available at* http://www.cptech.org/ecom/jurisdiction/Interim_text.rtf

Peter Barnes, "Brexit: What Happens Now?" BBC News (Feb. 5, 2020) <https://www.bbc.com/news/uk-politics-46393399>

Proposal for a council regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Com 1999/348, 99/0154), on 14 July 1999, *available at* euro-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0348:FIN:EN:PDF

Robert Bond, United Kingdom e-Commerce, Getting the Deal Through, (Aug. 2019), <https://gettingthedealthrough.com/area/11/jurisdiction/22/e-commerce-2020-united-kingdom/>

Rudolf Gabriel, Judgment of the Court (Sixth Chamber) of 11 July 2002, C-96/00, p. 44, *available at* euro-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0096:EN:HTML

The Consumer & Competition Policy Directorate in the United Kingdom; Cross Border Consumer Contractual Disputes within the European Union: Which Country Has Jurisdiction? --Frequently Asked Questions. U.K. Dep't of Trade and Industry Website, *available at* http://www.consumer.gov.uk/ccp/topics1/guide/jurisdiction_faq.htm

UN Convention on Electronic Contracts. Art. 6(2)

[Abstract]

A Study on Personal Jurisdiction Regarding International E-Commerce in the European Union and the United Kingdom*
- With A Comparative Study with E-Commerce Jurisdiction in the United States -

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The E-commerce has become the norm in B2C transactions worldwide as many consumers prefer online shopping instead of direct purchases through local stores or retailers. However, a legal issues related to the Internet transactions can arise when the consumers in EU sue the Korean business entities in the EU courts—the issue being whether or not the forum courts in Europe can exercise the personal jurisdiction over the foreign defendants. It is important for the Korean corporations to understand the EU rules on the Internet personal jurisdiction such as the Brussels Regulation so that they can anticipate whether or not their business activities can be subject to lawsuits in EU and plan their corporate activities accordingly.

First, defendants who are domiciled in an EU member state can be sued in the courts of their domiciles. In B2B transactions, the defendant can be sued not only at its domicile Member State but also at the place of performance of contractual obligation. The EU widely expanded the scope of the Internet personal jurisdiction with respect to consumer contracts because a consumer in B2C contracts can sue a defendant not only at the defendant's domicile but also at the consumer's domicile. The Brussels Regulation provides that personal jurisdiction over a defendant will be proper if the contract has been concluded with the defendant 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.

With the conclusion of the Brexit, it remains to be seen whether the UK will continue along the same line with the EU in terms of E-commerce and jurisdiction or take a new approach by establishing its own case laws. However, it appears that the UK will continue the strong stance in exercising E-commerce personal jurisdiction because of its aggressive consumer protection policy and of its intent to

pursue continuity in following the EU's approach in E-commerce.

The US courts, in order to exercise personal jurisdiction, first examines whether the defendant had a "minimum contact" with the forum state and at the same time considers the "reasonableness" factors. And the US currently is employing the "targeting" approach regarding E-commerce personal jurisdiction in which the courts review whether the defendant purposefully or deliberately directed his online activity in a substantial way to the forum state.

The "target" approach seems to be a better and fairer approach than the "pursuing or directing" test because first it closely examines the real intent and purposes behind the online business activities of the defendant corporations, and secondly the EU test of "pursuing or directing" activities seems to be so broad in its application that a lot of website activities—although they may not be intentional and deliberate—can be subject to the Internet jurisdiction of the EU which can hamper the E-commerce transactions in the EU market.

Even though the EU recognizes forum selection clauses, it does not allow the forum selection clause in a B2C contract to be enforced unless such agreement is entered into after the dispute arises.

The Korean businesses need to be mindful that the concept of "pursuing or directing" activities toward the EU Member States can be interpreted to be broad, making it difficult to be free from the imposition of personal jurisdiction in B2C transactions. Thus, it is more realistic to make efforts to reduce the lawsuits in a specific jurisdiction that the Korean companies wish to avoid by minimizing any online business activities that can be considered as "pursuing or directing" in the EU.

Keywords: E-Commerce, Personal Jurisdiction, B2C, Domicile, Forum Selection Clause

[국문요약]

유럽연합과 영국에서 국제전자상거래의 대인관할권에 대한 연구 - 미국의 전자상거래 대인관할권 법리와 비교법적 검토 -

공 영 호

전 세계적으로 기업과 소비자간 전자상거래가 더욱 일상화되었고 활성화되고 있다. 많은 소비자들은 직접 장터나 소매상에 가서 물건을 구입하기 보다는 전자상거래를 선호하고 있다. 하지만 전자상거래에 관한 법적 쟁점은 유럽의 소비자가 한국 기업이나 상인을 상대로 유럽에 소재하는 법정지에서 소송을 제기했을 때 발생하는데, 유럽 법정지 법원이 외국 기업에 대한 대인관할권을 행사할 수 있는가라는 문제이다. 한국 기업으로서는 유럽의 전자상거래에 관한 대인관할권을 이해하여서 어떠한 상업적 활동으로 인해 유럽에서 소송 제기당할 수 있는가를 예측하고 이에 상응하는 대비를 하는 것이 중요하다.

먼저 피고인이 유럽에 법적 거주지를 가지고 있으면 그 곳 법정지에서 소송 당할 수 있다. 기업간 전자상거래에서는 피고인은 법적 거주지만 아니라 계약 이행 장소에서 소송 당할 수 있다. 유럽연합은 기업과 소비자간 전자상거래에서 법원의 대인관할권의 범위를 확장하였는데, 소비자가 피고를 상대로 피고의 법적 거주지뿐만 아니라 소비자의 법적 거주지에서도 소송을 제기할 수 있도록 규정하고 있다. 브뤼셀 규정에서는 소비자의 법적 거주지가 속한 유럽연합 회원국을 상대로 상업적이거나 전문적인 활동을 추구하거나 지향한 피고인과 소비자가 계약을 체결하였으면 그 피고인에 대한 대인관할권이 합당하다고 명시한다.

브렉시트가 완결된 시점에서 영국이 전자상거래와 재판관할권에 대하여 유럽연합과 같은 입장을 유지할지 아니면 새로운 접근 방식을 택할지는 시

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간을 두고 봐야할 것이다. 하지만 영국의 소비자 보호 정책과 전자상거래에 대한 유럽연합의 접근 방식을 고수하고자하는 의도로 봤을 때 전자상거래에 대한 대인관할권의 행사에 적극적인 자세를 취할 것으로 보인다.

미국 법원은 대인관할권을 행사하기 위해서 피고인이 법정지와 최소한의 접촉이 있었는지를 검토함과 동시에 대인관할권 행사의 합당성에 대한 요인들을 고려한다. 현재 미국 법원은 피고인이 법정지를 상대로 어떠한 의도적이고 고의적인 인터넷 활동을 하였는가를 검토하는 타깃팅 테스트를 사용하고 있다. 이러한 미국의 타깃팅 테스트가 유럽연합의 테스트보다 더 공정하고 바람직한 방법이다. 타깃팅 테스트는 피고 기업의 전자상거래 활동의 실질적 의도와 목적을 상세히 검토하는 반면, 유럽연합의 테스트는 적용 범위가 광범위하여 실질적 의도와 고의성이 결여된 인터넷상의 활동들도 유럽연합의 대인관할권에 종속될 수 있으며, 결과적으로 유럽연합의 전자상거래를 위축시킬 수 있다.

유럽은 기본적으로 전속적 관할조항을 인정하고 있지만 기업과 개인간 전자상거래 계약에서 분쟁이 발생하기 전에 합의한 전속적 관할조항은 인정하지 않는다.

한국 기업으로서는 유럽연합의 기업과 개인간 전자상거래 대인관할권에 사용되는 테스트가 매우 광범위하게 해석 될 수 있기 때문에 유럽연합의 대인관할권이 적용되기 쉽다는 것을 인식할 필요가 있으며, 유럽연합에서 소송을 피하고자 하는 지역에서는 상업적 인터넷 활동을 추구하거나 지향하는 것으로 간주될 수 있는 활동을 최소화하도록 노력하는 것이 현실적이다.

주제어: 전자상거래, 대인관할권, 기업과 소비자간 거래, 법적 거주지, 전속적 관할조항

