Jurisdiction Based on 'Business Activities' in the Hague Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters

Peter Gottwald*

I. Introduction

Recently, German newspapers reported that the surviving dependants of the victims of the accident of the German ICE train which occurred close to Eschede (Lower Saxony) on 3 June 1998 intend to file a claim for damages against the Deutsche Bahn in Germany, amounting to DEM 550,000 for each casualty, and at the same time by class action in New York.[1] Similar plans have come to light in Austria following the catastrophe involving the glacier train in Kaprun on 11 November 2000. Co-operating with US lawyers, local lawyers requested authorization to bring actions in the United States in order to attempt to secure American levels of damages.[2]

In Eschede, no American citizen was killed or wounded, in Kaprun at least eight US citizens are said to have been among the victims. With the exception of these eight victims, both accidents do not appear to bear any relation to the United States. The lawyers, however, claim that the US federal courts and, in particular, the courts of the state of New York have jurisdiction, since both train companies also do business and sell train tickets in New York. According to the lawyers, this fact proves sufficient for establishing 'general jurisdiction' against both companies. For this reason, these lawyers claim that both companies can be sued in New York for any claim.

If this were, in fact, to be the case, it would justify the opinion of Europeans that this jurisdiction is completely unreasonable and exorbitant. In the improved Hague Draft Convention of 30 October 1999, Article 18(2)(e) excludes jurisdiction on the

---

* Professor of Law at Regensburg University.

1 'Eschede-Hinterbliebene bereiten Klage in den USA vor' *Süddeutsche Zeitung*, 1.3.2001, nr. 50, 13.

2 W. Posch, 'Ambulance Chasing im Dienste US-amerikanischer Rechtshegemonie' (2001) ZfRV 14, 15.

European Journal of Law Reform, Vol. 4, No. 1

basis solely of commercial or other activities of the defendant in the Forum state, except where the dispute is directly related to such proceedings. Incentives to sue in the US would clearly be reduced by this rule.[3]

As far as can be ascertained from US legal scholars, it would appear that the majority accept that 'doing continuous and systematic business' cannot be upheld in an international Convention as a general jurisdiction for companies.[4] Others, however, state that, at least for American lawyers and politicians, the lack of a fundamental traditional jurisdiction could, in the long run, become the 'deal-breaker at the Hague'.[5] There have, nevertheless, been voices in Germany expressing the view that a general jurisdiction on the basis of permanent and planned business activities could be justifiable, similar to the jurisdiction based on property. This view also maintains that such a jurisdiction would not differ much from the (unquestioned) jurisdiction on the basis of the existence of a branch.[6]

II. The Prohibition of General Jurisdiction Based on Business Activities

In order to judge the effects of general jurisdiction on the basis of continuous and systematic contacts with the forum state, it is necessary first to examine the relevant American case-law and legal literature. When doing so it is important to bear in mind that, according to American legal thinking, continuous and systematic business contacts have the same implications in practice for legal persons as does presence in the state for individuals.[7]

1. Constitutional Limits of Jurisdiction

With reference to the 1945 *International Shoe* decision of the US Supreme Court,[8]

---

[3] F. Juenger, 'Eine Haager Konvention über die Urteilsanerkennung?', in H. Schack (ed.), *Gedächtnisschrift für Lüderitz* (Munich 2000) 329, 335 and 338.

[4] A.T. v Mehren, 'Must Plaintiffs Seek out Defendants?' (1997–98) 8 King's College Law Journal 23, 42; Clermont, 'Jurisdictional Salvation and the Hague Treaty' (1999) 85 Cornell Law Review 89, 95; Weintraub, 'Negotiating the long-arm provisions of the judgments convention' (1998) 61 Albany Law Review 1269, 1278; Zekoll, 'The role and status of American law in the Hague Judgments Convention Project' (1998) 61 Albany Law Review 1283, 1294 f.

[5] L. Silberman & A. Lowenfeld, 'A Different Challenge for the ALI' (2000) 75 Indiana Law Journal 635, 642; Mehler and Ruopp 'Das Haager Abkommen über die Anerkennung ausländischer Entscheidungen in Zivil- und Handelssachen' (1999) DAJV-NL 86, 88.

[6] Grothe, '"Exorbitante" Gerichtszuständigkeiten im Rechtsverkehr zwischen Deutschland und den USA' (1994) 58 RabelsZ 686, 696 f.

[7] *United Rope Distributors Inc v. Kimberly Lines* 770 FSupp 128, 132 (SDNY 1991).

[8] 326 US 309 (1945).

American courts distinguish between general jurisdiction and specific jurisdiction.[9] In either case, a two-stage test applies: (1) Do the necessary minimum contacts of the defendant with the forum state exist and (2) is it in accordance with due process to exercise jurisdiction in the particular case?[10] Whilst developed with regard to interstate cases, this test nevertheless also applies to international cases.[11]

When an American court considers whether general jurisdiction exists in a given case, it also investigates whether the business activities of the defendant in the forum state were continuous and systematic enough to require the defendant to have considered the possibility of being sued in the courts of that state in any litigation which may have arisen.[12] At the same time, it is emphasized that clear limits cannot be deduced from either of the two relevant decisions of the US Supreme Court.[13]

In *Perkins v. Benguet Consolidated Mining Co*[14] a shareholder sued a mining company seated in the Philippines in a state court in Ohio for a declaration that the company had illegally failed to pay the dividend owed to him. The US Supreme Court affirmed the general jurisdiction of the state of Ohio due to the fact that during the Second World War the president had governed the company from his residence in Ohio. This meant that the central office location for supervisory activities was located in Ohio. It may also be the case that the Supreme Court affirmed jurisdiction as a result of the fact that no other forum was available, so-called 'jurisdiction by necessity'. In any case, American lawyers draw from this decision the conclusion that general jurisdiction against a commercial company also exists in the state where its main real business activities take place.

The US Supreme Court objected to general jurisdiction, however, in the *Helicopteros Nacionales de Colombia v. Hall* case.[15] In this case, the surviving dependants of four Americans killed in an helicopter crash which occurred in Peru sued the owner of the helicopter, a Columbian company, in Texas. The connection with Texas and the United States resulted from the fact that the victims of the accident were employees of a joint venture company from Peru that had its seat in Texas. This company had agreed with the defendant concerning transport by helicopter to working sites in Peru. The US Supreme Court held that the buying of helicopters and the training of the pilots in Texas for the flights to South America was not a sufficient basis for general jurisdiction.

---

[9] This distinction was deepened by v. Mehren and Trautman, 'Jurisdiction to Adjudicate: A Suggested Analysis' (1966) 79 Harvard Law Review 1121.

[10] Brand 'Due Process, Jurisdiction and a Hague Judgments Convention' (1998/99) 60 University of Pittsburgh Law Review 661, 669–671.

[11] *Weber v. Jolly-Hotels* 977 FSupp 327, 330–333 (DNJ 1997); Born, *International Civil Litigation in the US Courts*, (3rd ed 1996) 95 ff.; M. Lejeune '"Personal Jurisdiction" über ausländische Firmen nach amerikanischem Zivilprozessrecht' (1998) RIW 8, 12.

[12] *Weber v. Jolly-Hotels* 977 FSupp 327, 331 (DNJ 1997).

[13] Scoles and Hay, *Conflict of Laws* (3rd ed. 2000) § 6.9 (348).

[14] 342 US 437 (1952).

[15] 466 US 408 (1984); Lejeune, '"Personal jurisdiction" über ausländische Firmen nach amerikanischem Zivilprozessrecht' (1998) RIW 8, 10.

If the cases already discussed were to constitute a comprehensive overview of the case-law on general jurisdiction on the basis of business activities, the exclusion within Article (18)(2)(e) of the Hague Draft for these cases would not be necessary. At the same time, no negative effect would be brought about by the existence of this exclusion, since paragraphs (c) and (d) of Article 3(2) of the Draft explicitly provide general jurisdiction for legal persons in the State of their central administration or principle place of business.[16]

2. Specific Criteria for the Determination of General Jurisdiction

The two-stage test of general jurisdiction necessitates complex weighing up. In fact, many lower courts consider this to be so difficult that it is not possible to provide general criteria for a definition or to paint a clear picture based on the decided cases.[17] Any decision concerning minimum contacts is considered to be dependent on the particular case and requires a fact-intensive inquiry.[18] The following aspects should be considered in weighing up the facts:[19]

(1) mere solicitation in the forum state is, in general, not sufficient, but extensive solicitation in connection with other aspects may be sufficient;
(2) sales to the forum state have not, generally, been considered to be sufficient;[20]
(3) purchases within the forum state do not establish jurisdiction;
(4) the conclusion of other contracts is, in general, not enough, whereas the conclusion of exclusionary distribution contracts has, in many cases, been considered sufficient;
(5) property in the forum state in general is not enough. It has been decided, however, that this would be different when a bank account was used for carrying out the most important business;
(6) maintaining a branch, even a small office, would establish general jurisdiction. Official approval for doing business in the forum state together with the appointment of an agent authorized to accept service is considered to establish general jurisdiction.[21] The holding of a share of a partnership that has its seat in the forum state does not mean that the partners themselves

---

[16] C. Kessedjian 'Vers une Convention à vocation mondiale en materière de compétence juridictionelle internationale et d'effects des jugements étrangers' (1997) Rev. dr. unif. 675, 682 (no. 21).

[17] *Aquascutum of London Inc v. SS American Champion* 426 F 2d 205 (2nd Cir 1970); Scoles and Hay *Conflict of Laws* (3rd ed. 2000) § 6.9 (348).

[18] *Metropolitan Life Ins Co v. Robertson-Ceco Corp*, 84 F 3d 560, 570 (2nd Cir 1996).

[19] Born *International Civil Litigation in United States Courts* (3rd ed 1996) 112 f.

[20] Scoles and Hay 351 (footnote 20).

[21] *Sondergard v. Miles Inc* 985 F 2d 1389, 1391–1397 (9th Cir 1993); Minn Stat § 303.13(1)(1): 'A foreign corporation shall be subject to service of process ... by service upon its registered agent.'

> can be sued in the forum state with regard to an industrial accident suffered by an employee of the company.[22]

The relevant jurisprudence should now be considered in order to examine the way in which US courts have applied these criteria.

In *United Rope Distributors, Inc*,[23] United Rope Distributors, which was incorporated in Delaware and had its main branch in Minnesota, sued for damages because of the loss of a shipload against the undercharterer of the sunken ship, Kim-Sail Ltd, which was incorporated on the Caymen Islands and had its main branch in New York. In return, Kim Sail sued for compensation against the owner of the ship, Seatriumph Marine Corp, a Liberian company the main branch of which was situated in Greece. The third-party complaint was admissible only if Seatriumph, as a foreign company, was doing business in New York. But, Seatriumph's business in New York was indirect: it used a personal closely-connected investment company which had a bank account into which the major part of the charter of the ship was paid, and from which the majority of the expenses from the sunken ship were taken. The United States District Court (SDNY) held that the activities of a third party established jurisdiction according to § 301 New York CPLR if they were important enough as to otherwise require execution by a separate body. Accordingly, the administration of important parts of the income flowing from the charter business was considered to be sufficient.[24] The idea that a company can be sued at the location of its company bank account is not very convincing, especially in light of the ease of online banking and of the guarantee of low costs of transactions in today's commercial world. This is especially the case in relation to locations such as England, due to the fact that in relation to third-party proceedings or part 20 claims, the general rules concerning actions, and therefore also those concerning jurisdiction, apply. From a German point-of-view, there is scarcely any reason to object, since the third-party notice ('*Streitverkündung*') which fulfils a comparable function does not at all require that the person served with a third-party notice ('*Streitverkündungsempfänger*') should be sued individually in the court of the main process.

More questionable is the case of *Frummer v. Hilton Hotels International Inc.* which has been the subject of repeated discussion in legal literature. The facts of this case are as follows: in 1967 the New York Court of Appeals held that the London Hilton Hotels (UK) Ltd was subject to general jurisdiction in New York. Therefore, it was deemed that jurisdiction also applied to an accident which took place in a bathtub of the London Hilton Hotel. The justification for this was that Hilton (UK) took part in the Hilton Reservation Service which had its seat in New York and which made binding room reservations. Hilton (UK) was, therefore, considered to be 'present' in

---

[22] *Ytuarte v. Gruner & Jahr Printing and Pub Co* 935 F 2d 971, 972 f. (8th Cir 1991).

[23] United Rope Distributors, Inc. v. Kimberly Line and Kim-Sail Ltd., Kimberly Line and Kim-Sail Ltd. v. Seatriumph Marine Corp. 770 FSupp 128 (SDNY 1991).

[24] 770 FSupp 128, 132–134.

New York as a result of the reservation service. Since Hilton (UK) gained considerable income from this service it was also subject to general jurisdiction in New York, even though the claimant had not reserved his London hotel room using the New York service. Somebody who, in general, gained an advantage from the reservation activities in New York was not considered to be entitled to complain about disadvantageous consequences therefrom.[25] A more precise elaboration of the extent of the advantages that Hilton (UK) gained from the reservation service does not exist.

In the cases of *United Rope*, *Seatriumph* and *Hilton Hotels*, all of the companies in question were connected with each other. Even though the majority of the court in *Hilton* explicitly answered in the negative the question as to whether their judgment had the effect of piercing the corporate veil to the parent company, Breitel J emphasized in his dissenting opinion that, in reality, the decision was based on the assumption that the apparent independence enjoyed by the individual Hilton branch was negated by its interconnection within the group of companies.[26] Today, nearly all large hotels offer fixed contingents of rooms to tourist companies. Moreover, clients are able to book accommodation with binding effect at local travel agencies. As such, the consequence of the decision in *Frummer* is that a hotel company could be sued for any claim in all the target areas whence its clients are drawn.[27] The newly amended US Federal Rules on Civil Procedure (FRCP) 4(k)(2) extends further the general jurisdiction of the federal courts. According to this provision, the question as to whether sufficient minimum contacts exist is no longer merely dependent on the relation to the specific federal state, but rather, it is also dependent on connection of the defendant to the United States of America as a whole.[28] It must to be said, though, that in the meantime the standards seem to have been set higher. In *Weber v. Jolly-Hotels* the District Court of New Jersey denied general, as well as specific, jurisdiction of the Italian Jolly-Hotel Group in New Jersey because the traveller came from New Jersey, because promotion of the hotel chain could be accessed via the internet in New Jersey, and because the trip was booked at a travel company that has its seat in Massachusetts.[29]

3. *Due Process Control*

The second stage of the personal jurisdiction test consists of an examination as to whether the exercise of jurisdiction would be reasonable, that is, guarantees of

---

[25] *Frummer v. Hilton Hotels International Inc* 227 NE 2d 851, 854 (1967).
[26] *Frummer v. Hilton Hotels International Inc* 227 NE 2d 751, 855, Breitel J. dissenting.
[27] This was already pointed out by Breitel J. in his dissenting vote in *Frummer v. Hilton* 227 NE 2d 851, 856.
[28] Born, *International Civil Litigation* 196.
[29] *Weber v. Jolly-Hotels* 1997) 977 FSupp 327, 332–334 (DNJ 1997) (the case of *Frummer* is not discussed).

substantial justice.[30] At this point, the diagnosis of *in personam* jurisdiction is largely inseparable from *forum non conveniens* considerations.[31] Since minimum contacts have been deemed only to establish general jurisdiction when continuous and systematic, these contacts should exist over a period of five to six years.[32] Thus, the Second Circuit Court of Appeals held that the sale in Vermont of exterior steel façades, worth four million US dollars over six years, together with the appointment locally of an authorized dealer, an authorized building contractor and the advertizing of architects proved sufficient in establishing minimum contacts.[33] The Court of Appeal then stated, however, that it was not reasonable for a New York-based company to attempt to sue in Vermont a Delaware corporation, which had its principal seat in Pennsylvania, for damage to the façade of a building situated in Miami, Florida.[34]

Thus, if applied to the two cases mentioned in the opening paragraph of this paper, this reasoning would lead to the conclusion that, if genuine clients could be shown to exist who bought tickets in New York for the Deutsche Bahn or the Kaprun Glacier Train, both companies would be open to being sued in New York, provided the advantages which the companies gained from these New York transactions were not so small as to be of no commercial importance.[35]

Notwithstanding this conclusion, however, the New York court would still possess discretionary power to prohibit the claims on the basis of *forum non conveniens*.[36] Americans make much of this possibility. They claim that a vast jurisdiction, combined with this discretion to prohibit claims, provides a greater guarantee of individual justice than the strict rules concerning jurisdiction which exist in Europe.[37] However, this assertion ignores the fact that a defendant is obliged to bear considerable legal expenses,[38] even in the case of dismissal of the action, and therefore has a significant interest in preventing such actions at an earlier stage.

---

[30] *Metropolitan Life Ins Co v. Robertson-Ceco Corp* 84 F 3d 560, 567–568, 573 (2nd Cir 1996).

[31] Dissenting opinion of Walker C.J. in *Metropolitan Life Ins Co* 84 F 3d 560, 576.

[32] *Metropolitan Life Ins Co v. Robertson-Ceco*, 84 F 3d 560, 569.

[33] 84 F 3rd 560, 573. On the other hand, the fact that 183 copies of the weekly edition of an Israeli newspaper were usually sold in Massachusetts was not considered to be sufficient for establishing the general jurisdiction of Massachusetts, at least jurisdiction was not considered to be 'reasonable', *Chaiken v. VVPub Corp* 119 F 3d 1018, 1028.

[34] 84 F 3rd 560, 573–575, 576 (the practical reason for the claim was that in Vermont the action did not fall under the statute of limitation).

[35] In *Shute v. Carnival Cruise Lines* 897 F 2d 377, 381 (9th Cir 1990) the court held that the sale of holidays to residents of the forum state amounting to 1.29% of the total turnover was insufficient.

[36] Posch 'Ambulance Chasing im Dienske US-Amerikanischer Rechtshegemonie', (2001) ZfRV 14, 16 f.

[37] Blum, *Forum non conveniens* (1979 Zürich) 9 ff.; Born *International Civil Litigation* 315.

[38] James, Hazard and Leubsdorf *Civil Procedure* (4th ed. 1992) §1.22 Attorney fees: The American Rule.

4. Consequences for the Hague Convention

It remains exceptional for a foreign company to be subject to general jurisdiction in the United States as a result of its business activities. Nonetheless, that this ground of jurisdiction is placed on the so-called 'black list' is reasonable, since its mere existence can be used as a means of exercising procedural pressure and since it proves to be expensive and difficult to refute. Therefore, the exclusion in Article 18(2)(e) of the Hague draft is absolutely necessary.

This conclusion is also valid with regard to modern business transactions in cyberspace, although courts do not seem to have resorted to general jurisdiction in these cases. One can support as correct the decision which held that, whilst a website is accessible throughout a country, this could not mean that a company was subject to general jurisdiction in states other than the one in which the company had its seat. If this were not the case, a company may be subject to general jurisdiction everywhere and this was considered to be unconstitutional.[39] As a result of this, the abolition of general jurisdiction on the basis of doing business is less important than the prevention of the possibility to threaten somebody with this jurisdiction.

More relevant is the limitation of jurisdiction on the basis of having a branch to cases arising out of its operation. According to American legal thinking general jurisdiction on the basis of maintaining a branch does exist.

III. Specific or Limited jurisdiction

Within the draft of the Hague Convention, only general jurisdiction based on commercial activities is excluded, specific jurisdiction is not subject to this exclusion (Article 18(2)(e)). Consequently, the way in which American courts deal with specific jurisdiction based on commercial activities is of decisive importance. Four fundamental grounds establishing specific jurisdiction based on commercial activities are known: presence, consent, waiver, and transacting business. Jurisdiction based on choice of forum agreements or on unconditional appearance are not, in general, problematic. The jurisdiction of individuals based on incidental presence, so-called 'tag jurisdiction', is excluded by Article 18(2)(f) and (i) of the Hague Draft. Provided that no jurisdiction by consent exists, therefore, only jurisdiction based on transacting business remains.

---

[39] *Atlantech Distribution v. Credit General Insurance* 30 FSupp.2d 634, 536 f. (DMd. 1998) (an admission for doing business that so far had not been used connected with the appointment of a representative in the state of the forum did not lead to another decision); Rau, '"Minimum contacts" und "personal jurisdiction" im Cyberspace' (2000) RIW 761, 766 f.

This type of jurisdiction is not accepted within the obligatory so-called 'white list' of the Hague draft convention.

1. Consequences for the Hague Convention

Insofar as there are no special rules, the draft of the Hague Convention does not exclude the application of the national law on jurisdiction (Article 17). Thus, courts in the United States of America are not forced, for example, to make use of 'white list' grounds of jurisdiction such as place of performance, tort or of having a branch, all of which prevail in Europe and are recognized in the Hague Draft, but rather they may continue to base their decisions on transacting business. A judgment based on a ground of jurisdiction found within the so-called 'grey list' is not to be recognized in the other contracting states on the basis of Article 23 et seq. of the Convention (Article 24), but rather on the basis of national law. According to the Convention, however, the judgment should be recognized if, in fact, the court of origin (also) had jurisdiction under the Convention itself. The court of enforcement has the responsibility of examining whether the court of origin possessed jurisdiction. In undertaking this examination, the court is bound by the finding of fact, but not by the legal conclusions drawn (Article 27(1) and (2)). Thus, the enforcing court should apply Articles 6, 9 or 10 of the Convention (questions of the place of performance, of jurisdiction on the basis of having a branch, or of tort) to the findings of the US court concerning (1) minimum contacts including the 'purposeful availment' test; and (2) the reasonableness of the exercise of jurisdiction. Thus, the Hague Draft does not increase, or at least does not increase significantly, the ease with which the examination of the recognizability of judgments of US courts can be carried out, since the recognizing court is bound by the findings of the facts of the US court. Genuine double conventions usually render the examination of the existence of jurisdiction in relation to recognition unnecessary or, at least, incredibly straightforward. In light of the above, this is not true of the Hague Draft Convention.[40] It may well be possible that, when transacting business forms the basis for specific jurisdiction, the differences between Unites States and European law are, in reality, very small indeed.[41] At the same time, it is true that the correspondence or divergence must be examined on a case-by-case basis.

2. Requirements with Regard to Transacting Business in the State

The existence of minimum contacts may also be reviewed with reference to the following historical point: that the mere cross-border sale of goods is not sufficient.[42]

---

[40] Critical *Schlosser*, 'A New Hague Convention and the United States' University of Kansas Law Review 45 (1996), 39.

[41] Schlosser (1996) 45 University of Kansas Law Review 39, 42.

[42] 'Placing a product into the stream of commerce "without more" '; cf. *Brown v. Geha Werke GmbH*, 69 FSupp2d 770, 776 (DSC 1999) (Production of a paper shredder in Germany; sale to US import company; no sufficient minimum contact with the USA).

Moreover, intention to serve the market of the forum State should also exist. This latter requirement may be fulfilled by:

(1) the adaptation of the product to the specific market;
(2) the distribution of advertizing and instructive material by the company itself in the forum State;
(3) the instruction of buyers by staff within the forum State;
(4) the establishment of a distribution system in the forum State;
(5) the allocation of distribution licences; and
(6) the selling of a considerable quantity of goods.[43]

In relation to the question of the reasonableness of the exercise of the jurisdiction, the following aspects should be considered:[44]

(1) the burden for the defendant of litigation in the forum State;
(2) the interests of the forum in relation to the case;
(3) the interest of the plaintiff in having easy and effective legal protection;
(4) the interest of the judiciary in settling the dispute as effectively as possible; and
(5) the interests of the public and of public policy.

Whilst this may sound complicated in theory, rarely have these conditions proved problematic in practice. Moreover, in practice, these criteria have usually been applied in a reasonable way.

For example, one's ability to book a room in a hotel of a foreign (Italian) hotel company through a travel company located in a sister State, would not establish specific jurisdiction.[45] (No jurisdiction would exist at the place of residence of the holiday-maker in relation to the place of performance of the contract, nor would tortious jurisdiction exist in a US-state in the case of an accident in Italy.)

Afram Export Corp v. Metallurgiki Halyps SA concerned a Wisconsin company which had sold to a Greek company scrap metal to be used for steel production. The contract was concluded via telex from Milwaukee where a representative of the buyer was supposed to examine the quality of the scrap metal and to accept the goods. Since the price of scrap metal had decreased since the time of the contract, the buyer refused to accept the goods. Afram sued for the loss it had suffered. The court held that, whereas the mere sale of scrap metal in Wisconsin could not establish jurisdiction there, the acceptance in the state of the seller would. Moreover, it was argued that, since the buyer maintained an office in New York, it would be easier for the buyer to defend an action in the United States than it would be for the seller to take the case to court in Greece.[46]

---

[43] Born, *International Civil Litigation* 140 f.
[44] *Gary Scott International Inc v. Baroudi* 981 FSupp 714, 717 (D Mass 1997).
[45] *Weber v. Jolly-Hotels* 977 FSupp 327 (DNJ 1997).
[46] *Afram Export Corp v. Metallurgiki Halyps SA* 772 F2d 1358 (7th Cir 1985).

Under the Hague Draft the same result could easily be achieved. According to Article 6(a), in the case of the sale of goods, one can sue in the State to which the goods were delivered, whether in part or as a whole. This solution is consistent with the new Article 5(1)(b) of the Brussels I Regulation, which has the same effect but is more precise: in the sale of goods one can sue at the place to which the goods were, or should have been, delivered.

Even product liability claims are dealt with in the USA on the basis of transacting business. In the case of *Oswald v. Scripto*, the Japanese cigarette lighter manufacturer Tokai-Seiki, which had its seat in Yokohama, had managed to sell, through its exclusive importer Scripto Inc, between three and four million cigarette lighters annually within the United States. A drugstore owner in Texas had bought these lighters from a Texan wholesaler. When his wife proceeded to use one of the lighters, her nightwear caught fire. She then sued not only Scripto, but also Tokai-Seiki in relation to her physical injury. Rules governing personal jurisdiction required that Tokai-Seiki did business in the state and that the lawsuit was a consequence of this business activity.[47] The Federal Court of Appeal was of the opinion that a company selling between three and four million cigarette lighters within the United States annually should be aware of the possibility that some of them would be sold in Texas, and accordingly held that Tokai-Seiki was subject to jurisdiction there.[48] In contrast, however, the District Court of South Carolina rejected a claim for damages against the German company Geha-Werke for lack of jurisdiction. In this case, the daughter of a marine officer was injured whilst playing, in her father's office, with a paper shredder manufactured by Geha and imported by a general purchaser. The Court held that the sale of goods via a general importer would not establish jurisdiction.[49]

In spite of this contradiction, the decision in *Oswald* can still be regarded as correct. According to Article 10(1)(b) of the Hague Draft, jurisdiction does exist for tort in the state where the injury arose, unless the defendant could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that state. Were one to answer in the affirmative the question concerning the foreseeability of injury in the case of the large scale distribution of pocket lighters, the judgment against Tokai-Seiki would be capable of being recognized under the Hague Draft. However, under German law (§§ 32, 328 ZPO) and the Brussels I Regulation (Article 5 (3)), no reservations are provided against this result. This is due to the fact that under both German law and the Regulation, the person responsible for the damages is unconditionally subject to jurisdiction at the place of the accident and foreseeability of this location is of no importance. The manufacturer of a product cannot avoid product liability in tort by sale to a general importer. Although the Hague Draft Convention limits the jurisdiction for tort at the location

---

[47] *Oswald v. Scripto Inc* 616 F2d 191, 195 (1980).
[48] Ibid. at 198, 200.
[49] *Brown v. Geha-Werke GmbH* 69 FSupp 2d 770 (DSC 1999).

of its occurrence according to the equivalent criteria of the US Supreme Court in the case of *World-Wide Volkswagen v. Woodson*,[50] this limitation proves to be of no major importance, due to the fact that, in relation to the usual sale of commercial goods, almost everything can be claimed as being foreseeable.

The American courts have also had to deal with international infringements of personal rights. In the *Chaiken v. VVPub Corp* case[51] a New York weekly newspaper correspondent had dealt, in two articles, with the activities of Jewish settlers and terrorists in the West Bank. He wrote about an afternoon spent with a married couple, whom he named, who had emigrated from Massachusetts to Israel. A summary of this article was then published in an Israeli daily newspaper. The couple sued the correspondents of both newspapers and the newspapers themselves in Massachusetts for damages for defamation. It was shown that four copies daily and 183 copies on Sundays of the Israeli newspaper published in the Hebrew language were delivered to subscribers in Massachusetts. Eighty-one percent of the copies of the New York weekly newspaper were sold in New York, whilst only two percent were sold in Massachusetts. The Court of First Instance affirmed jurisdiction for tort against all defendants. In contrast, however, the Court of Appeal was of the opinion that, since the correspondent of the Israeli publication had written his article in New York and then sent it to Israel for publication, this correspondent had not committed a tort in Massachusetts. The Court further refused to recognize the necessary minimal contacts required for general jurisdiction and the exercise of jurisdiction itself by the Israeli newspaper, stating that this was unreasonable. One can contend that the examination of specific jurisdiction would certainly have led to the same result.

Thus, from this decision one can learn that the court will decline jurisdiction in general in relation to widely spread torts at the location of injury if the effect of this tort in the forum State is only minimal.

3. *Jurisdiction on the Basis of the Existence of a Branch or of Regular Business Activities*

While no difficulties have been encountered in relation to the examination of specific jurisdiction in relation to tort, it is now necessary to investigate whether the same can be said of the potential jurisdiction on the basis of having a branch according to Article 9 of the Hague Draft. This examination shall commence with a case dealing with an accident which occurred during an organized bus tour.

Mrs Carter from Virginia had booked, in an agency of the American Automobile Association in her hometown in Virginia, a bus trip throughout Europe conducted by Trafalgar Tours Ltd of London. This reservation was made via Trafalgar Tours USA Inc, the seat of which was located in New York. In Leoben, Austria, the bus driver was negligently responsible for an accident in which Mrs Carter was seriously

---

[50] *World-Wide Volkswagen Corp v. Woodson* 444 US 286 (1980).
[51] *Chaiken v. VVPub Corp* 119 F 3d 1018 (2nd Cir 1997).

injured. She proceeded to sue the London company for damages in Virginia. The Court treated the London and New York companies as though they were one.

Had the accident occurred during air travel, Article 28 (1) of the Warsaw Convention of 1929 would have ensured that Mrs Carter would have been entitled to sue, not only at the seat or at the place of the main branch of the airline, but also before the courts of the place of the business of the branch at which the contract was concluded. American and German courts consider the seat of the (independent) IATA travel agency at which the flight was booked to be sufficient,[52] although the French courts do not agree in this respect. Article 28 of the Warsaw Convention comprises all kind of claims for damages independent of whether they are based on contract or tort.

The solution provided by Article 33(2) of the new Montreal Convention of 1999 is even more straightforward. Under this convention, in the case of death or injury of a passenger, an action for damages can be brought before the courts of the state within which the passenger was primarily resident at the time of the accident, provided that the company administers flights in this State and that it does business there either through its own branch or through the branch of an associated airline.

Unfortunately, however, no such rules exist in the case of bus tours. Thus, the issue of a possible connection between the action and the business activities in Virginia of the defendant, or one of its agents, was of decisive importance. The United States District Court held that an important connection with Virginia did exist due to the fact that the trip was booked in Virginia.[53] This outcome was not affected by the fact that the defendant had never previously concluded travel contracts with citizens of Virginia.[54] The jurisdiction was also considered to be compatible with the requirements of due process since the defendant had intentionally recruited clients in Virginia. Moreover, it was deemed that, in such cases, the state of Virginia had a strong interest in availing its citizens of the remedies provided by its courts.[55]

When one examines the possibility of this decision being recognized under Articles 25(1) and 26 of the Hague Draft, the following becomes clear:

(1) jurisdiction as to the place of performance (Article 6(b)) would not be available in Virginia since the bus trip was not to be executed there;
(2) jurisdiction in relation to tort (Article 10) would exist only in Austria, the place of the occurrence of the accident;
(3) there would be no possibility of jurisdiction within Virginia on the basis of

---

[52] L. Goldhirsch, *The Warsaw Convention Annotated* (2nd ed. The Hague 2000) 183–185; Th. Wenzler 'Article 28(1) Warschauer Abkommen in der Rechtsprechung US-amerikanischer Gerichte' (1990) TransportR 414–418. The USA is a contract state.

[53] With reference to the case of *McGee* 355 US 220 (1957) (action of an insured against the insurance company at the place of his residence).

[54] *Carter v. Trafalgar Tours Ltd* 704 FSupp 673, 676 (WDVa 1989).

[55] 704 FSupp 673, 677.

the existence of a branch (Article 9) since the defendant company had no such branch in Virginia. The subsidiary company also had its only seat in New York. In contrast, however, were the words 'where the defendant has carried on regular commercial activity by other means' to be added, this would bring about the existence of jurisdiction. This formula corresponds directly with the case of *Carter v. Trafalgar Tours*;

(4) as a consumer, Mrs Carter could also rely upon the special jurisdiction available to consumers, under Article 7, in the state in which she was habitually resident. The travel contract was founded on professional activities of the defendant in Virginia, in particular public advertizing, and Mrs Carter had concluded the contract in Virginia. One possible shortcoming of Article 7(1), however, is that it fails to spell out whether jurisdiction is granted in relation to tortious, as well as contractual, claims. Drawing a comparison with Article 15(1) of the Brussels I Regulation, however, one could assume that the jurisdiction is limited to contractual claims. If this is so, whether the more limited or the broader version of Article 9 is accepted becomes an issue of decisive importance.

The author would advocate the granting of procedural consumer protection not only to international travel by air, but also such travel by bus or by ship. In this respect, however, Article 33(2) of the 1999 Montreal Convention illustrates the fact that if consideration is only concerned with (perhaps hardly tangible) business activity in the forum State, and not with the existence of a concrete branch, this could produce the danger of increasing excessively the scope of the provision.

Outside the scope of consumer protection, as far as international commercial trade and services are concerned, extending jurisdiction based on maintaining a branch generally to all disputes arising directly out of any kind of regular commercial activity by other means would clearly be too far reaching. In practice, were Article 9 to be formulated in this way it would reverse, to a large extent, the exclusion of general jurisdiction based on commercial activities in Article 18 (2)(e). In order to be entitled to bring an action in the United States, a commercial buyer of any goods would be required only to order those goods from a catalogue, available in the United States, from a company with its seat in any other country. United States courts could, of course, reject jurisdiction in such a case on the grounds of infringement of due process or as a result of *forum non conveniens*. Nevertheless, one should not accept overly broad jurisdiction, combined with a duty of recognition, if the correctness of this jurisdiction is guaranteed only by a reasonable exercise of discretion. Even though American lawyers maintain that jurisdiction in the forum of business activities is essential,[56] such a vague ground of jurisdiction for the plaintiff as part of the so-called 'white list' should not be accepted. Moreover, the example

[56] J. Kovar 'A letter to the Hague Conference on Private International Law' (2000) DAJV-NL 44, 45.

provided by the 1999 Montreal Convention illustrates that it is possible for the United States – in the interest of its own internationally active airline companies – to grow accustomed to the idea of concrete jurisdiction.

4. Specific Jurisdiction as a Consequence of Activities in Cyberspace

Peculiar consequences do not flow from business activities carried out in cyberspace – whether business advertisements, business actually executed in cyberspace or disputes arising from such business relations. Increasingly frequently during the last few years, however, American courts have been saddled with the burden of deciding the location of the jurisdiction of a company which, as a result of cyberspace advertizing, infringes trademarks or domain names of third parties,[57] or violates the prohibition of unfair competition.

If a contractual relationship exists between the parties, the case is relatively simple. In the case of *Compuserve Inc v. Patterson*, the Federal Court of Appeal held that, in relation to a dispute regarding the possible infringement of copyright or unfair competition, a person distributing software via a provider with its seat in Ohio would be subject to jurisdiction in Ohio.[58]

Whilst under European law the result reached would have been the same, it would have been possible for this result to have been achieved more easily: Ohio was obviously the place of performance for the distribution contract and, moreover, the infringement of the rights in dispute also occurred there. The parties may take legal action for a negative declaratory judgment at both the place of performance and the place of the occurrence of the tort.

If no contractual relationship between the parties exists, American courts apply the theory of minimum contacts and distinguish between three different groups of examples:[59]

(1) the enterprise is active in cyberspace through a *passive website*, available in other states, containing advertisements for goods or services as well as information in relation to sources of supply. This provision of information is not deemed to be sufficient to establish jurisdiction in the state of the recipient;[60]

---

[57] V. Sanchez 'Taking a Byte out of Minimum Contacts: A reasonable exercise of personal jurisdiction in Cyberspace Trademark Disputes' (1999) 46 *UCLA Law Review* 1671–1717.

[58] *Compuserve Inc v. Patterson* 89 F 3d 1257, 1263–1268 (6th Cir 1996).

[59] *Zippo Manufactoring Co v. Zippo DotComm Inc* 952 FSupp 1119 (WDPa 1997); Sanchez 'Taking a Byte out of Minimum Contacts' (1999) 46 UCLA Law Review 1671, 1686 f., 1704 ff.

[60] *Zippo Co v. Zippo DotComm Inc* 952 FSupp 1119, 1124 (WDPa 1997); *Cybersell Inc v. Cybersell Inc* 130 F 3d 414 (9th Cir 1997); *Brown v. Geha Werke GmbH* 69 FSupp 2d 770, 777 (DSC 1999); T.Bettinger 'Der lange Arm amerikanischer Gerichte: Personal jurisdiction im Cyberspace' (1998) GRUR International 660, 662 f.; M. Rau '"Minimum contacts" und "personal jurisdiction" im Cyberspace' (2000) RIW 761, 766.

(2) a company contracting with a client in another state through an *interactive website*, however, will generally be deemed to have transacted business in the state of the client. The firm is considered to be subject to jurisdiction in this state for disputes arising out of this relationship.[61] Contradicting this general rule, however, in some cases the courts have required an additional connection with the forum state, such as considerable sales in the state of the client;[62]

(3) the position concerning a *passive website with additional connections*,[63] which lies between these two previous positions. Thus, it was contended that a company which makes available a free telephone number can be considered to be soliciting business and purposefully to be availing itself of the advantages of the forum state.[64] Notwithstanding the fact that most courts seem to disagree with this line of reasoning,[65] they have, in general, ruled in favour of the outcome that it would provide. For example, the following facts were deemed sufficient to establish the jurisdiction of the courts of Massachusetts in an action concerning trademark infringement:[66] a Californian passive website existed on which there was an offer, accessible from Massachusetts, for cigar humidors. The company intended to sell this product to a chain of retail shops in Massachusetts and had, in fact, managed to sell twelve boxes thereof to a retailer in Massachusetts. Similarly, it was held that the distribution of male nude photographs via online subscription from Florida to 17,000 subscribers did establish jurisdiction in favour of the Californian courts, since 2,100 of the subscribers were resident in California and, moreover, the distribution infringed the copyrights of the Californian plaintiff.[67]

From a European viewpoint, the conclusions reached in these cases would not provide many grounds for objection. This can be traced to the fact that, under Article 10(1)(b) of the Hague Draft and Article 5(3) of the Brussels I Regulation, jurisdiction would have been available at the place of injury in both cases. Moreover, that the injury might take place in such a location was not, in either case, unforeseeable. Whilst the incorporation of passive websites into the black list of

---

[61] *Stomp Inc v. Neato LLC* 61 FSupp 2d 1074, 1078 (CDCal 1999) (quality not quantity of conduct!).

[62] *Compuserve Inc v. Patterson* 89 F 3d 1257 (6th Cir 1996); *Millenium Enterprises v. Millenium Music* 33 FSupp 2d 907 (DOr 1999); Rau (2000) RIW 761, 766, 769.

[63] Rau (2000) RIW 761, 767.

[64] *Inset Systems v. Instruction Set* 937 FSupp 161 (DConn 1996).

[65] *Rannoch Inc v. Rannoch Corp* 52 FSupp 2d 681 (EDVa 1999); Rau, "minimum contacts" and "personal jurisdiction" in Cyberspace (2000) RIW 761, 767.

[66] *Gary Scott International Inc. v. Baroudi* 981 FSupp 714, 716 f. (DMass 1997).

[67] *Colt Studio Inc v. Badpuppy Enterprise* 75 FSupp 2d 1104 (CDCal 1999). On the other hand, the court denied jurisdiction concerning the personal liability of the persons acting for the defendant (1111).

Article 18(2) Hague Draft would not prove contentious,[68] the significance of such an action would be slight.

5. *Jurisdiction on the Basis of the Existence of a Branch or of Subsidiary Companies*

In international business the existence, in a State other than that of the main undertaking, of dependent branches of that main undertaking proves to be the exception rather than the rule. In contrast, however, it is much more common for subsidiary companies to be founded in foreign countries. Whilst the shares of these subsidiary companies do not always belong to the parent company, in practice this is often the case. The issue of whether or not jurisdiction of the parent company is established as a result of the existence of jurisdiction of a subsidiary company has long been the subject of international procedural law.[69] Neither the Brussels Convention of 1968, the Brussels I Regulation, nor the Hague Draft Convention address this issue, even though it would be very helpful, for practical reasons, were they to do so. As a result of this, jurisdiction in relation to the parent-subsidiary relationship of a company is governed under national law or, at best, through extensive interpretation of the Brussels Convention[70] or the Brussels I Regulation.

American courts are of the opinion that contacts of a subsidiary company with the forum would not automatically mean that the parent company was also subject to general jurisdiction there. However a piercing is admissible when the following circumstances occur:[71]

(1) the subsidiary took part in the business of the parent company;
(2) the subsidiary was a mere alter ego or representative of the parent company; or
(3) the companies are not directed separately and, as such, would appear to ordinary clients to be inseparable.

---

[68] 'Electronic Commerce and International Jurisdiction' in Hague Conference on Private International Law, Enforcement of Judgments, Prel Doc No. 12, 9 (August 2000).

[69] M. Otto, *Der prozessuale Durchgriff* (Munich 1993); Toepke 'Jurisdiction over foreign (non-US) Corporations in the United States on Parent-Subsidiary Relationships', in M. Lutter (ed.) *Festschrift für Stiefel* (1987), 785.

[70] The Report of the Special Commission (P. Nygh and F. Pocar) concerning the draft dated October 1999 (Preliminary document 11) treats subsidiary companies as branches if they are under the direct control of the parent company and if they participate in its business.

[71] *Weber v. Jolly-Hotels* 977 FSupp 327, 334 (DNJ 1997); Welp *Internationale Zuständigkeit über auswärtige Gesellschaften mit Inlandstöchtern im US-amerikanischen Zivilprozess* (Berlin 1982) 95 ff; H. Müller *Die Gerichtspflichtigkeit wegen 'doing business'* (Cologne 1992) 37 ff.; Born *International Civil Litigation* 151 ff.

Similar principles are also deemed to exist in relation to Article 5(5) of the Brussels Convention and the equivalent article of the Brussels I Regulation.[72] Whilst this consistency should ensure that particular problems are avoided, a slight discrepancy does arise as a result of the fact that American courts are far more willing than their European counterparts to consider such conditions as being in existence and, thereby, to pierce the corporate veil.

IV. Conclusions

1. Article 18(2) of the Hague Draft Convention contains a so-called 'black list' of grounds of jurisdiction, excluded as a result of 'insufficient relation' to the forum. This list includes general jurisdiction on the basis of business activities, as well as jurisdiction on the basis of transient presence in the forum state. In both cases, this exclusion of jurisdiction is justified. This exclusion is important insofar as it brings about a limitation of the jurisdiction in relation to the existence of a branch. Beyond this, the restriction is seldom relevant.
2. The Hague Draft Convention does not acknowledge specific jurisdiction based on transacting business as a ground of jurisdiction. Rather, it is included within the so-called 'grey list' of Article 17. In determining whether an American judgment is capable of recognition in another Contracting State, Article 25(1) dictates that the grounds of jurisdiction upon which the American court based its decision must conform with one of the grounds acknowledged by the Hague Draft Convention. The Contracting State is only under an obligation to recognize the foreign judgment when this condition is fulfilled. The case by case examination of jurisdiction in relation to recognition which is necessary under the so-called 'mirror principle' found in § 328(1)(1) German Code of Civil Procedure is not generally altered by the Hague Draft Convention. The Convention neither intensifies nor simplifies this examination.
3. The current wording of Article 9 of the Hague Draft correctly limits the jurisdiction in relation to the existence of a branch to branches themselves and disputes relating to such branches. This provision should not be extended to other activities within the forum State, since to do so would be to render the article vague and uncertain.

   Were the draft to be passed in its present form, reasonable limitation of exorbitant grounds of jurisdiction relating to the United States of America would result. In contrast, however, since all existing uncertainties would remain unsolved, the Convention would represent neither a step forward nor a step backward in relation to the vast majority of disputes falling under the 'grey list'.

---

[72] Otto *Der prozessuale Durchgriff* (1993) 141 ff; Gottwald *MünchKomm ZPO* (2nd ed. 2001) Article 5 EuGVÜ Note 55.

4. Americans have criticized the current draft. They maintain that it is too similar to the Brussels Convention – an unsuitable model for a global agreement. This unsuitability stems from the fact that, at present, no worldwide common market is in place and no court is empowered to provide a uniform interpretation of the Convention. Moreover, the Draft, like the Brussels Convention before it, is considered to contain too many compulsory and complicated rules concerning the purposes of a global agreement.[73]

In international trade the alternative to litigation is arbitration. In 1958, the community of States agreed to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has 130 member States from all legal traditions and economic regions of the world. Whilst no court exists which is empowered to provide a uniform interpretation of this document, the Convention is considered to be a success. This is in spite of the fact that it is in need of modernization. This success is a result of the fact that it sets out, in a predictable and consistent manner, the requirements for recognition and enforcement of arbitral awards. The Convention contains basic due process requirements for arbitration, whilst at the same time attempting to guarantee effortless incorporation of arbitral awards. In fact, it has been so successful that even States which originally failed to favour arbitration are now convinced of its benefits.

Fundamental to the success of a possible global convention concerning the recognition and enforcement of judgments is the inclusion therein of rules leading to predictability and clarity. Whilst the world is not about to become a common legal and commercial market, cross-border trade, both inside and outside of regional trading zones, is continually on the increase. Were this not the case, the Hague Convention as a global instrument would be redundant. A convention which grants significant discretion to the courts of the contracting states in relation to the recognition and enforcement of foreign judgments fails to provide legal certainty and, therefore, is no real improvement on the current situation, at least in so far as the large industrialized nations are concerned, the relations between which are marked by relatively generous recognition within national law of foreign judgments. The fundamental disagreement which exists in relation to jurisdiction on the basis of transacting business, and its reasonableness as a ground of jurisdiction, illustrates that, at least for the time being, the chances of an ideal solution being reached are extremely slim.

---

[73] A.T. von Mehren, 'The Hague Jurisdiction and Enforcement Convention Project Faces an Inpase' (2000) IPRax 465, 467; A.T. von Mehren and R. Michaels, 'Pragmatismus und Realismus für die Haager Verhandlungen zu einem weltweiten Gerichtsstands- und Vollstreckungsübereinkommen' (2000) DAJV-NL 124, 128.