

**INTERNET COMMERCE: DOING BUSINESS IN A NETWORKED WORLD**

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**Chapter Sixteen**  
**Jurisdiction and Related Matters**

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**K. Forum-Selection Clauses**

Parties to commercial transactions often seek to establish contractually which court shall have jurisdiction to decide disputes arising from their relationship. While “[f]orum-selection clauses have historically not been favored by American courts,” the modern view “is that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-10 (1972). This rule applies, under federal law, both where the clause was the result of negotiation between two business entities, and where it is contained in a form contract that a business presents to an individual on a take-it-or-leave-it basis. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

Companies that offer goods and services online have an especially strong incentive to define contractually the forum for resolution of disputes, since they may be engaging in transactions with purchasers located in a multiplicity of jurisdictions, and defending lawsuits in scattered locations is very expensive. Furthermore, since courts typically (though not always) apply the law of the forum in which they sit, suit in foreign jurisdictions subjects sellers to various substantive laws, increasing their costs of complying with applicable law.

Providers of Internet access or other online services frequently include a forum-selection clause in the “Terms of Service” to which subscribers must indicate their assent as part of the process of gaining access to the service. The clause is often one element of a lengthy recitation of conditions that the subscriber may view by scrolling through an on-screen box. The subscriber is typically asked to indicate assent to the Terms of Service by clicking an on-screen button that says “I Agree.” Other online sellers may present the forum selection clause in other ways, such as through a hyperlink called “Terms and Conditions” or “Legal Notice,” or by text in greater or lesser proximity to the terms of the offer.

Should courts enforce online forum-selection clauses? Most courts that have ruled on the issue have enforced the clauses. Thus, in *Groff v. America Online, Inc.*, 1998 WL 307001 (R.I. Super. May 27, 1998), the plaintiff, an individual in Rhode Island who subscribed to America

Online, sued the company in Rhode Island state court, alleging violations of state consumer protection legislation. The process of becoming a member of AOL includes a step in which the applicant must assent to AOL's Terms of Service by clicking an "I Agree" button. The Terms of Service "contains a forum selection clause which expressly provides that Virginia law and Virginia courts are the appropriate law and forum for the litigation between members and AOL." Citing *M/S Bremen v. Zapata*, the court looked to whether enforcement of the clause would be "unreasonable." It did so by application of a nine-factor test, including such criteria as the place of execution of the contract, public policy of the forum state, location of the parties and witnesses, relative bargaining power of the parties, and "the conduct of the parties." The court concluded that enforcement of the clause would not be unreasonable, and so dismissed the case.

In *Kilgallen v. Network Solutions, Inc.*, 99 F. Supp.2d 125 (D. Mass. 2000), the court enforced a forum-selection clause on less supportive facts. Defendant Network Solutions, Inc., at the time the monopoly registrar of domain names ending with in the .com top-level domain, sent plaintiff a notice via e-mail stating that he would soon receive an invoice to pay his annual registration fee. The lengthy notice included a section titled "Domain Name Registration Agreement," paragraph P of which contained a forum-selection clause. A month later, plaintiff received an invoice via e-mail, which stated: "In making payment for the invoice below, Registrant agrees to the terms and conditions of the current Domain Registration Agreement." Plaintiff paid the invoice, but through a series of clerical errors NSI misapplied the payment, and subsequently cancelled the domain name for nonpayment, whereupon another person registered it. Plaintiff sued for breach of contract, and NSI sought to enforce the forum-selection clause. The court enforced the clause, finding that plaintiff had failed to demonstrate that it was reasonable.

But in *America Online, Inc. v. Superior Court of Alameda County*, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699 (Cal. App. 1 Dist. 2001), the court declined to enforce the contractual forum-selection clause. Plaintiff Mendoza sought to represent a class of former AOL subscribers, who alleged that AOL continued to debit their credit cards for monthly subscription fees even after they cancelled their subscriptions. The complaint alleged several causes of action, including violation of the California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 et seq., a consumer protection statute that prohibits unfair and deceptive trade practices. AOL filed a motion to stay or dismiss, based on the forum-selection clause contained in its Terms of Service. The clause stated: "You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of AOL resides in the courts of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any such dispute including any claim involving AOL or its affiliates, subsidiaries, employees, contractors, officers, directors, telecommunications providers and content providers . . . ." The TOS also contained a choice-of-law provision: "The laws of the Commonwealth of Virginia, excluding its conflicts-of-law rules, govern this Agreement and your membership." The trial court denied AOL's motion, and AOL filed a petition for a writ of mandamus.

The appeals court affirmed. It agreed with the trial court that although "[n]ormally, the burden of proof is on the party challenging the enforcement of a contractual forum selection clause," in this case the burden should shift to AOL, in view of the CLRA's non-waiver

provision, which states: “Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.” Cal. Civ. Code § 1751. The court found: “Where the effect of transfer to a different forum has the potential of stripping California consumers of their legal rights deemed by the Legislature to be non-waivable, the burden must be placed on the party asserting the contractual forum selection clause to prove that the CLRA’s anti-waiver provisions are not violated.” The court continued:

AOL correctly posits that California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable. \* \* \* This favorable treatment is attributed to our law’s devotion to the concept of one’s free right to contract, and flows from the important practical effect such contractual rights have on commerce generally. This division has characterized forum selection clauses as “play[ing] an important role in both national and international commerce.” \* \* \* We \* \* \* view such clauses as likely to become even more ubiquitous as this state and nation become acculturated to electronic commerce. See [*Carnival Cruise Lines*]. Moreover, there are strong economic arguments in support of these agreements, favoring both merchants and consumers, including reduction in the costs of goods and services and the stimulation of e-commerce.

But this encomium is not boundless. Our law favors forum selection agreements only so long as they are procured freely and voluntarily, with the place chosen having some logical nexus to one of the parties or the dispute, and so long as California consumers will not find their substantial legal rights significantly impaired by their enforcement. Therefore, to be enforceable, the selected jurisdiction must be “suitable,” “available,” and able to “accomplish substantial justice.” (*The Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 17 \* \* \*) The trial court determined that the circumstances of contract formation did not reflect Mendoza exercised free will, and that the effect of enforcing the forum selection clause here would violate California public policy by eviscerating important legal rights afforded to this state’s consumers. Our task, then, is to review the record to determine if there was a rational basis for the court’s findings and the choice it made not to enforce the forum selection clause in AOL’s TOS agreement. \* \* \* California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state’s public policy. \* \* \*

The court reviewed *Hall v. Superior Court*, 150 Cal.App.3d 411, 197 Cal.Rptr. 757 (1983), which declined to enforce a forum-selection clause naming Nevada as the forum, on the ground that to do so would conflict with the anti-waiver provision of California’s Corporate Securities Law of 1968. The court continued:

The CLRA parallels the Corporate Securities Law of 1968, at issue in *Hall*, insofar as the CLRA is a legislative embodiment of a desire to protect California consumers and furthers a strong public policy of this state. \* \* \* Certainly, the CLRA provides remedial protections *at least* as important as those under the Corporate Securities Law of 1968. Therefore, by parity of reasoning, enforcement of AOL’s forum selection clause, which is also accompanied by a choice of law provision favoring Virginia, would necessitate a waiver of the statutory remedies of the CLRA, in violation of that law’s anti-waiver provision \* \* \* and California public policy. For this reason alone, we affirm the trial court’s ruling.

The court went on to compare the CLRA with its Virginia counterpart, finding that “Virginia’s law provides significantly less consumer protection to its citizens than California law provides for our own.” In particular, the Virginia statute does not permit class actions. The court said: “[W]e cannot accept AOL’s assertion that the elimination of class actions for consumer remedies if the forum selection clause is enforced is a matter of insubstantial moment. The unavailability of class action relief in this context is sufficient in and by itself to preclude enforcement of the TOS forum selection clause.” The court went on to note that

neither punitive damages, nor enhanced remedies for disabled and senior citizens are recoverable under Virginia’s law. More nuanced differences are the reduced recovery under the VCPA for “unintentional” acts, a shorter period of limitations, and Virginia’s use of a Lodestar formula alone to calculate attorney fees recovery. \* \* \* Quite apart from the remedial limitations under Virginia law relating to injunctive and class action relief, the cumulative importance of even these less significant differences is substantial. Enforcement of a forum selection clause, which would impair these aggregate rights, would itself violate important California public policy. For this additional reason the trial court was correct in denying AOL’s motion to stay or to dismiss.<sup>17</sup>

<sup>17</sup> Because we affirm on other grounds, we need not decide whether the trial court correctly concluded that the TOS was an unconscionable, adhesion contract \* \* \* or Mendoza’s alternative contention that the forum selection clause is unenforceable because it was induced by fraud.

## Notes

1. *Place of execution.* One of the reasonableness factors that the court applied in *Groff* was the place where the contract was executed. The court admitted to some perplexity on this point. “It is not clear,” the court observed, “in this electronic age, where the last place the contract was executed [sic]. Was it when plaintiff clicked the ‘I agree’ button . . . in Rhode Island or where the message was received, at defendant’s mainframe in Virginia?” The court concluded: “The place where the transaction has been or are [sic] to be performed appears to take place where defendant’s mainframe is located.” Does the location of the execution of the contract seem like a meaningful issue in this context? Should the location of AOL’s mainframe computer be determinative?

2. *Actual knowledge required?* Should it matter whether the plaintiff actually read the forum selection clause before clicking “I Agree”? The plaintiff in *Groff* claimed in his affidavit: “I never saw, read, negotiated for or knowingly agreed to be bound by the choice of law . . . .” The court was unmoved, reciting the “general rule that a party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents.” Is clicking on an “I Agree” button displayed on a computer monitor the equivalent of signing a document, for purposes of indicating that the signing party recognizes the significance of his act? Should the prominence of the forum selection clause in the sign-up process be a significant factor? The sign-up process that the plaintiff in *Groff* underwent involved numerous screens full of text, taking up 94 pages in hard-copy format.

3. *Non-waivable provisions.* The holding in *AOL v. Superior Court* turned on the California legislature's decision to make consumer rights under the CLRA non-waivable. Why would a legislature choose to interfere with consumers' freedom of contract in this way? How can AOL (or any other online seller) respond to such legislation? Contracts in consumer transactions are typically non-negotiable, because the low value of the transaction cannot justify the costs of negotiation. Is the reverse true here: is AOL stuck with charging California subscribers the same price as subscribers in states that are willing to enforce its forum-selection clause?

4. *Contract of adhesion.* In *Spera v. America Online, Inc.*, Index No. 06716/97 (N.Y. Sup. Ct., Westchester Cnty. Jan. 27, 1998), the court enforced a forum selection clause against a defendant who claimed that AOL had engaged in misleading business practices. Applying New York law, the court rejected plaintiff's arguments that the forum selection clause was "a contract of adhesion" and that enforcing the clause would be against public policy.

5. *Choice-of-law clauses.* A forum-selection clause is sometimes accompanied by a choice-of-law clause, as was the case in *AOL v. Superior Court*. Courts generally enforce contractual choice-of-law provisions, but complex issues can sometimes arise. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187.

#### **Note: Forum-selection clauses under European Union law**

The European approach to personal jurisdiction in cross-border disputes is rather different from the U.S. approach. The rules determining which country's courts have jurisdiction over a defendant are set out in a regulation issued by the Council of the European Union, known as the Brussels Regulation.<sup>1</sup> The Regulation, which became effective on March 1, 2002, is an update of a 1968 treaty among European countries, known as the Brussels Convention.<sup>2</sup>

The Regulation establishes the general rule that "[p]ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." Art. 2. But there are a number of derogations from that general rule, allowing a person to be sued in the courts of a country other than the one where he is domiciled. For example, if the action relates to a contract, suit may be brought "in the courts for the place of performance of the obligation in question." Art. 5(1)(a). If the action relates to tort, suit may be brought "in the courts for the place where the harmful event occurred or may occur." Art. 5(3).

There are also special rules for certain consumer contracts. A consumer contract is one that is "concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession." Art. 15(1). Certain types of consumer contracts are *per se* covered by the special rules: these are contracts for the sale of goods on installment credit, and

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<sup>1</sup> Council Regulation (EC) no 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Dec. 22, 2000, 2001 O.J. (L 12) 1.

<sup>2</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1990 O.J. (C 189) 1 (consolidated).

contracts for a loan made to finance the sale of goods. Art. 15(1)(a), (b). Other types of contracts are covered if

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

Art. 15(1)(c).

Two important special rules apply to actions relating to a covered consumer contract. First, the consumer may sue the seller either in the seller's country *or* "in the courts for the place where the consumer is domiciled." Art. 16(1). (But the seller still may sue the consumer only in the consumer's country.) Second, contractual forum-selection clauses are usually unenforceable. A forum-selection agreement is enforceable only if it is "entered into after the dispute has arisen," if it gives the *consumer* a choice of additional courts in which to bring the action, or if it confers jurisdiction on the courts of a country in which both the seller and consumer were "domiciled or habitually resident" at the time the contract was concluded. Art. 17. In other words, a forum-selection clause that deprives a consumer of the right to file suit in the courts of his own country is enforceable *only* if it is entered after the dispute has arisen. This prevents the use of take-it-or-leave-it contracts that deprive consumers of the home-court advantage — a technique that is quite commonly employed by sellers in the United States.

Is the Regulation's disapproval of forum-selection clauses an unwarranted interference with freedom of contract?

The general definition of consumer contracts in Art. 15(1)(c) was quite controversial. The corresponding provision of the Brussels Convention defined a consumer contract as one as to which "in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising," and "the consumer took in that State the steps necessary for the conclusion of the contract." Brussels Convention, Art. 13(3). One impetus for revision of the Convention was the uncertain application of Art. 13 to consumer contracts concluded online. As the European Commission explained in its proposal for the Regulation:

The criteria given in Article 13(3) of the Brussels Convention have been reframed to take account of developments in marketing techniques. \* \* \* The concept of activities pursued in or directed towards a Member State is designed to make clear that [Art. 15(3) of the Regulation] applies to consumer contracts concluded via an interactive website accessible in the State of the consumer's domicile. The fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction. \* \* \* The removal of the condition in [Art. 13(3)(b) of the Convention] that the consumer must have taken necessary steps for the conclusion of the contract in his home State shall also be seen in the context of contracts concluded via an interactive website. For such contracts the place where the consumer takes these steps may be difficult or impossible to determine, and they may in any event be irrelevant to creating a link between the contract

and the consumer's State. The philosophy of new Article 15 is that the contractor creates the necessary link when directing his activities towards the consumer's state.

Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(1999) 348 final, at 16 (Jul. 14, 1999).

Does the revised wording of the Regulation make it clear under what circumstances a seller's maintenance of a website will subject the seller to the consumer-contract exception, allowing the consumer to sue the seller in the consumer's home country? When is a website "direct[ed] to" a particular country? If it is accessible in that country? If it is written in the national language of the country? If prices are quoted in the currency of that country? Is it clear that this formulation brings more contracts within the consumer-contract exception than the Convention did?

#### **L. Statutes Providing Jurisdiction over Online Activities**

In 1999, the Virginia legislature added a provision to the state long-arm statute that is aimed at extending jurisdiction to cover certain uses of computers. The provision states: "Using a computer or computer network located in the Commonwealth shall constitute an act in the Commonwealth." This statement of what shall be deemed "an act in the Commonwealth" becomes operative when combined with other provisions of the long-arm statute, such as those granting jurisdiction over a claim arising from a person's "[t]ransacting any business in this Commonwealth," "[c]ontracting to supply services or things in this Commonwealth," or "[c]ausing tortious injury by an act or omission in this Commonwealth." VA. CODE § 8.01-328.1(A)(1) - (3). A person is deemed to "use" a computer if he "[a]ttempts to cause or causes \* \* \* [1] a computer or computer network to perform or to stop performing computer operations; [2] the withholding or denial of the use of a computer [or] computer network \* \* \* ; or [3] another person to put false information into a computer." VA. CODE § 18.2-152.2. A "computer network" is defined as "as set of related, remotely connected devices and any communications facilities including more than one computer with the capability to transmit data among them through the communications facilities." *Id.*

Does this provision succeed in overcoming the perplexities that result when attempting to ascertain the location of events that are accomplished through online communications? If a person in State A transacts business with a person in State B by sending an e-mail message that is routed through a server located in Virginia, is this "use" of the server that gives rise to jurisdiction over the person in State A? What if the person in State A defames a person in State B by posting a message in a newsgroup that is hosted on a server located in Virginia? Some of the computers that constitute America Online are located in Virginia. Under this statute, does jurisdiction arise in Virginia every time two AOL members, located anywhere in the world, transact business using their AOL accounts?

#### **Note: Venue**

The venue provisions generally applicable to cases brought in federal court allow a suit to be brought in "a judicial district in which a substantial part of the events or omissions giving rise

to the claim occurred.” 28 U.S.C. § 1391(a)(2), (b)(2). What special issues are presented when applying this provision to online activity?

1. In trademark infringement cases, venue may be proper where confusion of purchasers occurs. *Cottman v. Transmission Systems, Inc. v. Martino*, 36 F.3d 291, 295 (3d Cir. 1994). If the infringement occurs on a Web page, confusion of purchasers may occur wherever the website is accessed. Several courts have held that use of an infringing mark on a website may help to establish venue in districts where the site is accessible. See *Telephone Audio Productions, Inc. v. Smith*, 1998 WL 159932 (N.D. Tex. Mar. 26, 1998); *Gary Scott Int’l, Inc. v. Baroudi*, 981 F. Supp. 714 (D. Mass. 1997). Should it be relevant whether the site is actually accessed by potential purchasers in the district? Should it matter whether the site is “passive” or “interactive”?

2. The venue provision applicable to actions under the Securities and Exchange Act allows venue in any jurisdiction where the defendant “transacts any business.” 15 U.S.C. § 78aa. In *Shapiro v. Santa Fe Gaming Corp.*, 1998 WL 102677 (N.D. Ill. Feb. 27, 1998), the court held that defendant’s operation of a passive website and a toll-free number does not constitute transacting business within the district. The court relied on cases holding that these contacts are insufficient to support jurisdiction. Should the term “transacts business” be interpreted the same way when it is a basis for venue as when it is a basis for jurisdiction?

**Note: Subject matter jurisdiction**

A court has subject matter jurisdiction over a case if the substance of a case brings it within the court’s adjudicatory authority. The involvement of online communications in the activities giving rise to a lawsuit rarely creates new issues with respect to subject matter jurisdiction.

One situation in which online communications may raise novel issues is where subject matter jurisdiction depends upon the existence of interstate commerce. The most general constitutional basis for exercise of federal legislative authority is the Commerce Clause, which authorizes Congress “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Art. I, Sec. 8. Many federal statutes apply in terms only to interstate activities — e.g., 15 U.S.C. § 1263 (prohibiting “[t]he introduction or delivery for introduction into interstate commerce of any misbranded hazardous substance or banned hazardous substance”); 16 U.S.C. § 824 (regulating “the transmission of electric energy in interstate commerce”). Federal statutes that do not contain an explicit commerce limitation, but draw their authority from the Commerce Clause, likewise may be applied consistently with the Constitution only if the case arises from interstate commerce.

Several federal statutes regulate certain types of *communications* that occur in interstate commerce. For example, the Wire Fraud statute makes it illegal to “transmit[] \* \* \* by means of wire \* \* \* communication in interstate or foreign commerce” any communication for the purpose of executing any scheme to obtain money by fraud. 18 U.S.C. § 1343. Similarly, the federal threats statute makes it illegal to “transmit[] in interstate or foreign commerce any

communication containing any threat to kidnap any person or any threat to injure the person of another.” 18 U.S.C. § 875(c). Normally these statutes are applicable in situations where a person in one state engages in a communication with a person in another state, thereby satisfying the “interstate commerce” requirement. But what if the two people who are communicating are located in a single state, and they communicate via an online medium that routes the communication through another state? Is the communication in “interstate commerce”?

The court gave an affirmative answer to this question in *U.S. v. Kammersell*, 7 F. Supp.2d 1196 (D. Utah 1998), which involved a defendant who was charged with making a threat in violation of 18 U.S.C. § 875(c). Defendant had sent a threatening communication from his location in Utah to the target, also located in Utah. The communication, an America Online “insta-message,” was routed through AOL’s server in Virginia. The court found that this communication was in interstate commerce, on a plain reading of the statute. “‘Transmits \* \* \* in interstate commerce’ is not ambiguous. \* \* \* Its plain meaning encompasses the conduct in this case. \* \* \* The fact that the recipient of the threat was located in the same state is of no consequence.” 7 F. Supp.2d 1199-1200, 1202.

Do you agree with the court that the term “interstate commerce” unambiguously includes a communication between two people located in the same state, if it is routed through another state? Could the term be fairly read as encompassing only communications between people located in different states?

In concluding that the location of the two communicators is irrelevant, the court relied on (a) *U.S. v. Whiffen*, 121 F.3d 18 (1st Cir. 1997), finding that a call from a New Hampshire location to another New Hampshire phone number, which was automatically transferred so that the caller was speaking with a person located in Florida, was in interstate commerce; (b) *U.S. v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997), which found it indisputable that e-mail transmissions between a person located in Ontario and a person located in Michigan are in interstate or foreign commerce; (c) and *U.S. v. Kelner*, 534 F.2d 1020 (2d Cir. 1976), which found the interstate commerce requirement satisfied by a threat transmitted via a television broadcast that was received outside the state where the broadcaster was located, though the target of the threat was located in the same state as the broadcaster. Do these three cases support the court’s conclusion?

If AOL happened to have a server located in Utah, through which the message was routed, the court would presumably have concluded that the communication was not in interstate commerce. Is it sensible for subject matter jurisdiction to turn on such a fortuity?

How would the court’s reasoning apply in a situation where a person accesses a website whose owner is located in the same state, but the server hosting the website is located in another state? What if the Web server and both communicators are located in a single state, but some of the packets constituting the communication are routed through a server located in another state? What if a person sends a threat via Federal Express to a recipient located in the same state, but the airplane carrying the letter touches down in Memphis, where Federal Express has its hub? See Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 419 (1998) (noting that at one time “most Federal Express packages, regardless of origin or destination, were routed through Memphis, Tennessee”).

## **Note: Enforcement of judgments**

Enforcing a judgment obtained in a case involving online communications is, as a general matter, no different from enforcing a judgment obtained in any other case. But there are differences between enforcing a judgment against a defendant with assets located within the United States, and enforcing a judgment against a defendant whose assets are located outside the United States. Since cases featuring online communications may well involve parties located in different countries, the inherent difficulties of enforcing foreign judgments are of special salience in the online context.

A judgment issued by a state or federal court within the United States generally must be given the same effect in any other jurisdiction as it would receive in the forum jurisdiction. This is due to the U.S. Constitution's Full Faith and Credit Clause, Art. IV, § 1, as implemented by 28 U.S.C. § 1738, and federal common law. Thus, a party who obtains a judgment from a state or federal court in the United States may seek to execute it against assets of the judgment debtor that are located anywhere in the United States.

When a party seeks to enforce a U.S. judgment against assets located outside the United States, matters are not so simple. Each country prescribes its own rules as to the circumstances under which it will enforce a judgment issued by a court located in another country. Historically, courts in other countries have been reluctant to enforce judgments issued by U.S. courts. This hostility towards U.S. judgments has been due, in part, to the propensity of U.S. courts to award damages (especially punitive damages) that seem excessive by the standards of courts in other countries, and by their willingness to assert personal jurisdiction on grounds that are considered exorbitant in other judicial systems.

Canadian courts have in recent years become more liberal in enforcing judgments issued by courts outside the jurisdiction where enforcement is sought — that is, by courts located in another Canadian province, as well as those located outside Canada. In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (Can.), the Supreme Court of Canada established the principle that provincial courts must recognize judgments of other provincial courts as long as there was a “real and substantial connection” between the rendering court and the action. *McMickle v. Van Straaten*, [1992] 93 D.L.R. (4th) 74 (B.C.S.C.), which enforced a default judgment rendered by a California court, extended this principle to encompass judgments from foreign courts. See Terry W. Milne & Terry I. Wuester, *Recognition of American Judgments in Canada: Recent Canadian Law Moves Toward a “Full Faith and Credit” Standard*, 74 MICH. B.J. 42 (1995).

But a Canadian court may still refuse to enforce a U.S. judgment in circumstances where another U.S. court would be required to honor the judgment. In *Braintech, Inc. v. Kostiuk*, 1999 BCCA 0169 (British Columbia Court of Appeal 1999), a British Columbia court refused to enforce a default judgment that a U.S. District Court in Texas had issued in a case based on alleged defamation posted on an Internet bulletin board. The plaintiff, a Nevada corporation with headquarters in British Columbia and a facility in Texas, obtained the judgment against defendant, an individual residing in British Columbia. The British Columbia court applied the

rule established in *Morguard v. De Savoye, supra*, according to which the critical inquiry was whether there was a “real and substantial connection” between the Texas court and the action. The court held that there was an insufficient connection. Applying the *Zippo* test, the court determined that the bulletin board on which the allegedly defamatory message was posted was “passive.” Referring to the *Zippo* criteria of “level of interactivity” and “commercial nature” of the communication, the court found: “In these circumstances the complainant must offer better proof that the defendant has entered Texas than the mere possibility that someone in that jurisdiction might have reached out to cyberspace to bring the defamatory material to a screen in Texas. There is no allegation or evidence [defendant] had a commercial purpose that utilized the highway provided by Internet to enter any particular jurisdiction.” The court concluded: “Such a contact does not constitute a real and substantial presence. On the American authorities this is an insufficient basis for the exercise of an in personam jurisdiction over a non-resident.”

## Notes

1. As the court explained, the issue presented under Canadian law was whether there was a “real and substantial connection” between the Texas court and the lawsuit. Why did the court apply the *Zippo* test? Does use of the *Zippo* test imply that the Canadian requirement is met whenever the forum court had jurisdiction according to its own law?

2. The court also characterized the issue as whether “defendant has entered Texas.” Is this equivalent to the “real and substantial connection” criterion, or to the due process jurisdictional criterion?

3. Having concluded that a posting on a BBS was “passive” under the *Zippo* analysis, why did the court go on to consider the *Zippo* criteria of “level of interactivity” and “commercial nature” of the communication? Was the court correct in finding that “[o]n the American authorities” the Texas court did not have jurisdiction over the defendant?

U.S. courts have customarily been liberal in recognizing and enforcing foreign judgments. Enforcement of foreign judgments in U.S. courts is governed by state law. Some 28 states and the District of Columbia have adopted the Uniform Foreign Money-Judgments Recognition Act, which generally requires state courts to give full faith and credit to foreign judgments. Other states enforce foreign judgments under their own statutory schemes, or on common-law comity principles. [is this true?]

The Uniform Act specifies circumstances under which a court may not recognize a foreign judgment (absence of due process in the rendering court, lack of personal or subject matter jurisdiction) and other circumstances under which enforcement of a foreign judgment is discretionary (lack of notice to the defendant, fraud, inconsistency with public policy of the state, etc.). Uniform Foreign Money-Judgments Recognition Act § 4 (1962).

The public policy exception is one that holders of judgments from foreign courts may find particularly troublesome. Courts have invoked this provision to deny recognition to money judgments based on defamation, on the ground that the rendering court did not implement the intricacies of the First Amendment rules applying to defamation claims in this country. *See*

*Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995) (foreign court placed burden of proving truth of statement on defendant, and did not apply “actual malice” criterion), *aff’d*, 159 F.3d 636 (D.C. Cir. 1998) (Table).