

Stockholms Universitet
The Master's Programme in Law & Information Technology

**Auditing Cross-Border E-Commerce
Liability Risk:
Enforcement Analysis**

By
Robert C. Bennett
2000-02-02

Table of Contents		Page
1.	Introduction	1
2	Swedish Enforcement Analysis	6
2.1	The General Rule in Sweden	6
2.2	The Brussels & Lugano Conventions	7
2.3	The Brussels Convention Analyzed	9
2.3.1	Scope	9
2.3.2	Article 27 Grounds for Non-Recognition	10
2.3.3	Jurisdiction as a Ground for Non-Recognition	11
2.3.4	E-Commerce in the Brussels System	13
2.4	Non-Treaty States	15
2.5	Forum Selection Clauses	15
2.6	Swedish Enforcement Analysis Conclusions	16
3.	U.S. Enforcement Analysis	17
3.1	The General Rule in the U.S.	18
3.2	General Procedural Points Pertaining to an Enforcement Action in the U.S.	19
3.3	Uniform Act & Restatement	20
3.4	Recognition Defenses	21
3.4.1	Due Process	22
3.4.2	Personal Jurisdiction	23
3.4.3	Subject Matter Jurisdiction	24
3.4.4	Fraud	25
3.4.5	Notice	25
3.4.6	Public Policy	26
3.4.7	Forum Non Conveniens	27
3.4.8	Prior Agreement	27
3.5	Forum Selection Clauses	28
3.6	U.S. Enforcement Analysis Conclusions	30
4	Conclusion	30
 Appendices		
Appendix A		
Appendix B		

Auditing Cross-Border E-Commerce Liability Risk: Enforcement Analysis

1 Introduction

The Internet is a global network of inter-connected computers and their human operators. The interactions between humans and their machines on the Internet are said to take place in "Cyberspace".¹ Cyberspace is not burdened with many of the limitations imposed on physical space, such as national boundaries. However, Cyberspace activity is subject to the laws of nations.²

Electronic commerce ("e-commerce") is the conduct of business electronically via data transmission over the Internet.³ This definition intentionally excludes commercial activities that take place on other types of networks, such as Intranets and Extranets. Commercial activities that take place on Intranets and Extranets are excluded from this discussion because access to these types of networks is in practice strictly controlled, and thus they avoid most types of cross-border liability risk.

At issue here is the e-commerce that takes place on the Internet. There are three commonly recognized forms of Internet e-commerce: (1) Content provider (a business which hosts its own Web site, or which creates or distributes media content for other Web sites); (2) service provider (a business which provides its own proprietary online service to subscribers, or which provides Internet access services, support, software, or consulting); and (3) businesses that are not truly content providers or service providers, but which utilize the Internet for e-commerce or advertising.⁴ Businesses can engage in several forms of e-commerce at the same time, and new forms of e-commerce are constantly being developed.

Liability risks vary from one form of e-commerce to another, such that all forms of e-commerce will not encounter the same range of liability risks.⁵ For example, a pure content provider will experience liability risks arising from laws that regulate the content of its Web site (e.g., intellectual property, defamation, morality, and marketing laws).⁶ In contrast, a "dot.com

¹ WILLIAM GIBSON, *NEUROMANCER* 4 (1984).

² See David R. Johnson and David Post, *Law and Borders - The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367, 1368 (1996).

³ Nancy Nackaerts, *EU's Liikanen Plans E-Commerce Self-Regulation Guidelines*, *DOW JONES INTERNATIONAL NEWS*, Nov. 30, 1999.

⁴ Daniel J. Langin, *The Economics of the Internet: Insurance and Risk Management, Advertising and Other Business Models, Valuation and Tax Issues*, 482 *PLI/PAT* 447, 449 (1997).

⁵ Langin, *supra* note 4, at 449.

⁶ See, e.g., *Church of Scientology v. Dataweb et al* (Case 96/1048, Dist. Ct. of the Hague, Holland, June 9, 1999) (Dataweb and other Internet Service Providers ("ISPs") held liable for copyright infringement because they hosted web sites containing infringing materials); *Godfrey v. Demon Internet*, London High Court, U.K. (3/26/99) (ISP held liable for defamation because it hosted a customer's defamatory statement); *Lefebure v. Lacambre*, Tribunal de Grande Instance de Paris, Ref. 55181/98, No. 1/JP (6/9/98) (French ISP held liable for privacy violations because it hosted material that violated a French citizen's privacy); *Citron v. Zündel* (Human Rights Commission of Canada, 1997) (Canadian Web site operator sued for content that denies that the holocaust occurred); *SEC v. Frye* [no published opinion] (S.D.N.Y. 1995) (Web site operator found guilty of securities fraud for using the Web site to post invitations to investor in Costa Rican enterprises, where material facts about the investment were misrepresented on

retailer” will experience content liability risk together with liability risks related to the sale of goods (sales, tax, and consumer protection laws).⁷

While e-commerce presents a fabulous commercial opportunity – the opportunity to exploit a global market in Cyberspace, conducting e-commerce may expose a business to the risk of being sued in geographically distant foreign jurisdictions. This is a risk that a company doing business in physical space would normally not encounter unless it ”purposefully” contacted a distant foreign jurisdiction.⁸ However, due to the manner in which the Internet functions, it is likely that an act taken in Cyberspace will affect persons in foreign countries. Moreover, a business conducting e-commerce (hereinafter “Vendor”) could be conducting international commerce without intending, or even realizing, that it is doing so. As a result, a Vendor runs a risk of violating the laws of several foreign countries without realizing or intending to do so. This legal liability risk can be referred to as the ”cross-border e-commerce liability risk.”⁹

Cross-border e-commerce liability risk arises because the Internet has no physical boundaries, but laws do.¹⁰ Moreover, the laws of most nations have not yet caught up with the developments in Cyberspace. As a result, many jurisdictions are overreacting and creating new laws that endanger e-commerce. “There is a hysteria sweeping across the world, creating a legal backlash of vague standards and non-proportional responses to the regulation of Internet related service delivery.”¹¹ As a result, unless a Vendor can limit the jurisdictions that its e-commerce comes into contact with, its potential cross-border e-commerce liability risk could be enormous.

Unfortunately, it is technically difficult to limit contact with distant jurisdictions due to the manner in which the Internet functions.¹² Moreover, an unsuccessful attempt to confine e-commerce activity to safe jurisdictions is legally risky.¹³ In the recent case of *New York v. World Interactive Gaming Corp.*, the State of New York brought suit in New York to enjoin an

the Web site). Abstracts of these cases can be found at *The Perkins Coie Internet Case Digest* (visited 1/25/2000) <<http://www.perkinscoie.com/resource/ecommm/netcase/index.htm>>.

⁷ See, e.g., *State of Utah v. Amoroso*, 1999 Utah App. LEXIS 213 (Ct. App. Ut. 1999) (Utah may criminally prosecute Illinois corporation for selling liquor to Utah residents over the Internet in violation of Utah law); *Ford Motor Co. v. Texas* (Ford operated a Web site that offered to sell used cars, which ran afoul of Texas laws prohibiting auto manufacturers from entering the retail car business). Abstracts of these cases can be found at *The Perkins Coie Internet Case Digest* (visited 1/25/2000) <<http://www.perkinscoie.com/resource/ecommm/netcase/index.htm>>. See also Allan Hall, *U.S. Mail Order Business Fights Germany's Decision Banning Return Policy*, KRTBN KNIGHT-RIDDER TRIBUNE BUSINESS NEWS: EVENING STANDARD (London), Sep. 30, 1999 (U.S. retailer Land's End's lifetime unconditional guarantee on its products held to violate German competition law).

⁸ See Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J. L. & TECH. 3, 8 (1997).

⁹ Of course, for large multinational corporations, the risk of global jurisdiction already exists because their business spans the globe. The businesses that can least afford e-commerce liability risk are the small to medium sized start-up e-commerce businesses. See Brandon Mitchener, *Border Crossings: The Internet makes it so much easier to go global; And so much easier to violate local laws*, THE ASIAN WALL STREET JOURNAL Nov. 22, 1999.

¹⁰ Cath Everett, *U.K.: Internet Pedophile Case Exposes Gaps in the Law*, REUTER TEXTLINE COMPUTING, Jan. 4, 1996 (quoting Clive Gringas, a lawyer with the London law firm of Nabarro Nathanson, L.P.).

¹¹ Patrick G. Crago, *Fundamental Rights on the Infobahn: Regulating the Delivery of Internet Related Services within the European Union*, 20 HASTINGS INT'L & COMP. L. REV. 467, 501 (1997).

¹² See Burk, *supra* note 8, at 8 (“screening or blocking of Internet resources by country is nearly impossible”).

Internet casino from operating in Cyberspace in violation of New York gaming law.¹⁴ The Internet casino operator was the defendant's wholly owned subsidiary, and was physically located in Antigua.¹⁵ The Internet casino attempted to restrict customer access by requiring potential customers to submit their mailing addresses.¹⁶ The purpose of the screening was to deny site access to persons physically located in jurisdictions where gambling is illegal.¹⁷ However, the New York Attorney General bypassed the screening routine by submitting a Nevada address, thereby gaining access to the site. Despite the Attorney General's reprehensible subterfuge, the New York court held that the defendant's screening device was insufficient to avoid New York jurisdiction and gaming laws, and issued the injunction.¹⁸

Although the relief awarded in *NY v. WIGC* was injunctive, the case clearly demonstrates the potential for pecuniary liability arising from the cross-border conduct of e-commerce. In a worst-case scenario, pecuniary liability may arise in a distant foreign jurisdiction operating under unknown laws, despite efforts to avoid contact with such jurisdictions. The plaintiff could obtain a money judgment in the distant foreign jurisdiction where it is too costly or uncertain for the defendant to defend. If the money judgment were large enough, or the plaintiff angry enough, he would then seek to enforce the money judgment where the defendant's assets are located. This scenario can prove very costly to a Vendor conducting e-commerce internationally (whether he knows it or not) due to the relative ease of obtaining a default money judgment in most jurisdictions. Consequently, this paper will focus on foreign money judgments when analyzing cross-border e-commerce liability risk.

Of course, Vendors who are able to limit the jurisdictions that they contact will not incur cross-border e-commerce liability risk. The initial analysis of several knowable factors may identify whether the Vendor will be able to pre-determine the jurisdiction(s) its e-commerce comes into contact with. These knowable factors include: (1) the location of the Vendor's assets, the Vendor's business entity type, the Vendor's domicile, whether the Vendor will act through agent(s), and if so, the nature of the Vendor's relationship with the agent(s) and the domicile of the agent(s); (2) the subject matter and form of the Vendor's e-commerce, and the Vendor's probable customer type; and (3) the technical means whereby the Vendor will conduct e-commerce (see Appendices A and B below for more detail).

¹³ The type of e-commerce conducted will determine the possibility of screening customers by physical location. For example, if the e-commerce is retailing consumer goods on the Internet (e.g., lawn ornaments), the goods must be sent to the customer's physical location. This will require the customer to submit a physical address to the retailer, thereby allowing the retailer to screen out customers residing in undesirable geographical locations. However, if the e-commerce takes place solely in Cyberspace (e.g., Internet gaming), the screening of customers based on their physical location may be impossible, and indeed costly if screening efforts fail.

¹⁴ *State of New York v. World Interactive Gaming Corp.*, No. 404428/98 (Sup. Ct. N.Y. 1999), available on the Internet at *People v. World Wide Gaming Corp.* (visited January 31, 2000) <<http://www.oag.state.ny.us/internet/litigation/wigc.html>> [hereinafter "NY v. WIGC"].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

Not all Vendors will incur cross-border e-commerce liability risk. For example, a Swedish based "dot.com" retailer of tangible goods that refuses to serve customers located outside of Sweden may not incur cross-border e-commerce liability risk. Presumably, such a Vendor would be able to identify unsuitable customers if it requires its customers to give their physical addresses when submitting shipping information. The submission of an unsuitable physical address by the customer would then halt the transaction. This routine would probably enable the Vendor to pre-determine the jurisdiction(s) its e-commerce comes into contact with, thereby negating the risk of incurring cross-border liability.

On the other hand, if the Vendor cannot avoid contacting foreign jurisdictions, or wants to exploit the global market for its goods and/or services, then the Vendor will incur cross-border e-commerce liability risk. At this point, the Vendor has the option of either ignoring the risk, or taking the risk seriously. Whether the Vendor should ignore the risk depends on the Vendor's operation. For example, if the Vendor is an under-capitalized small hobby operation, then it will probably not place much value on its presence in Cyberspace, and the Vendor should probably ignore the risk. On the other hand, if the Vendor is well capitalized and hopes to exploit an innovative and potentially lucrative e-commerce model, it will probably place a significant value on its presence in Cyberspace. This type of Vendor cannot afford to ignore its cross-border liability risk. In this case, the next step is to conduct some sort of risk audit. But where to start?

The Vendor's cross-border e-commerce liability risk could be determined by examining the laws of each foreign jurisdiction that the Vendor's e-commerce may come into contact with. The goal of this process would presumably be to ascertain the proscribed conduct in each such jurisdiction. However, this process will be prohibitively expensive and time consuming due to the vast multitude of potentially applicable foreign laws. Moreover, because it is not always possible to determine the potential plaintiff's physical location, it may not be possible to know which foreign jurisdiction's laws to examine.¹⁹

A better strategy for analyzing the legal issues pursuant to cross-border e-commerce liability risk is to first focus on procedural rather than substantive law. Procedural law provides the rules related to jurisdiction, choice of law, and judgment recognition and enforcement in cross-border disputes. A cross-border procedural law analysis involves three distinct legal questions: (1) Does the court have the legal authority to hear a case involving a party outside its physical boundaries?; (2) what rule of law will apply?; and (3) will the judgment be enforced in the home court of the remote party?²⁰ "Of these three legal questions, the third, enforcement in a party or a vendor's home jurisdiction, is the most important: Can the aggrieved party get redress?"²¹

Because foreign judgment recognition and enforcement is the most important procedural law question relating to liability arising from cross-border disputes, this issue should be addressed

¹⁹ See Burk, *supra* note 8, at 8.

²⁰ Memorandum of the Internet Law and Policy Forum ["ILPF"] to the European Commission, Nov. 4 1999, available on the Internet at IPLF Statement for the Public Hearing of the European Commission (visited Jan. 31, 2000) <<http://www.ilpf.org/ec/ec-hearings-stmt.html>>.

²¹ *Id.*

before any other procedural or substantive law question. This is so because the analysis of the money judgment recognition and enforcement law of the jurisdiction(s) in which the Vendor's assets are located (hereinafter referred to as "Enforcement Analysis") may obviate the need to analyze the laws of the foreign jurisdictions in which the Vendor's assets are not located, and from which the Vendor's assets cannot be reached. In any case, an Enforcement Analysis will identify the foreign jurisdictions from which the Vendor's assets can be reached, thereby focusing the lawyer's research on the procedural and substantive laws of such jurisdictions.

For some lawyers, it may be counter-intuitive to begin the analysis of a legal problem by examining procedural law.²² However, because cross-border e-commerce liability will likely involve cross-border money judgment enforcement, the most practical approach in determining a Vendor's cross-border e-commerce liability risk is to conduct an Enforcement Analysis for the jurisdiction(s) in which the Vendor's assets are located.²³

Enforcement Analysis is based on a simple truism: A money judgment that cannot be enforced is worthless.²⁴ In the cross-border dispute context, the judgment creditor must go abroad to enforce his money judgment against the Vendor's assets.²⁵ In many cases, the foreign judgment enforcement law of the jurisdiction(s) in which the Vendor's assets are located will prevent the recognition and enforcement of a foreign money judgment. Consequently, the procedural and substantive law of a foreign nation whose judgments cannot be enforced against the Vendor's assets where they are located pose no threats, and thus need not be analyzed.

The benefits of conducting an Enforcement Analysis are many. The jurisdiction(s) in which the Vendor's assets are located will usually provide the law applicable to an Enforcement Analysis. Therefore, the sources of controlling law should be somewhat familiar and easily accessible. Moreover, the law of foreign judgment enforcement encompasses the principles pertaining to personal jurisdiction, service of process, notice, choice of law, and venue.²⁶ Consequently, the conduct of an Enforcement Analysis will acquaint the lawyer with potential recognition and enforcement defense issues related to these principles. In addition, the lawyer will begin to examine whether such defenses are better asserted in the initial action or in the subsequent judgment recognition and enforcement action. Finally, foreign judgment recognition and enforcement legal principles inform the drafting of effective forum selection clauses, which

²² To illustrate this point, legal education in Sweden places very little emphasis on procedural law because procedural problems such as personal jurisdiction rarely arise in practice in Sweden. As a result, Swedish lawyers may tend to examine substantive law before procedural law. In contrast, legal education in America places great emphasis on procedural law because due to the sheer number of jurisdictions in America, procedural problems such as personal jurisdiction must often be overcome before the substantive merits of the case can be dealt with. Consequently, American lawyers are much more likely to examine the procedural aspects of a legal problem before delving into its substantive merits.

²³ Donald C. Dowling, Jr., *Forum Shopping and Other Reflections on Litigation Involving U.S. and European Business*, 7 PACE INT'L L. REV. 465, 479 (1995).

²⁴ See *id.* at 471 ("U.S. parties and their lawyers too often expend substantial time and resources, - and sometimes even win multimillion dollar verdicts - but end up recovering nothing, because the defendant's foreign assets prove unreachable").

²⁵ Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 13 (1996).

²⁶ *Id.* at 1.

in many jurisdictions may preclude the recognition and enforcement of foreign judgments rendered in violation thereof.

It must be stressed that conducting an Enforcement Analysis will not obviate the need to examine the procedural and substantive law of the jurisdiction(s) in which the Vendor's assets are located, and the procedural laws of the jurisdictions from which the Vendor's assets can be reached. In addition, if the Vendor is contemplating e-commerce conduct that may be criminal, an Enforcement Analysis will be of no assistance because it does not encompass the principles of foreign criminal jurisdiction.²⁷

This paper will proceed to conduct a sample Enforcement Analysis for Vendors with assets located in Sweden and/or the United States. The purpose of the following sample Enforcement Analyses is to outline the legal issues pertaining to foreign judgment recognition and enforcement as they apply to cross-border e-commerce. Consequently, the sample Enforcement Analyses are not meant to be comprehensive. Rather, their purpose is mainly to walk the reader through this common sense method for auditing a Vendor's cross-border e-commerce liability risk, and to get the lawyer thinking about ways to structure a Vendor's e-commerce activity in order to reduce his cross-border e-commerce liability risk.

2 Swedish Enforcement Analysis

It is important to stress at outset that Swedish law must be analyzed by any Vendor that has assets located in Sweden. This is so because Sweden will generally exercise personal jurisdiction over a non-EU domiciled defendant that has assets located in Sweden, regardless of the defendant's alleged conduct.²⁸

In addition, because Sweden is a member of the European Union ("EU"), it must abide by EU legislation, and also incorporate EU Directives into its own legislation. Therefore, it is critical to analyze EU legislation pertaining to e-commerce and EU procedural law in order to ascertain the applicable e-commerce regulatory framework.

2.1 The General Rule in Sweden

As a general rule, foreign money judgments will not be recognized and enforced in Sweden unless their recognition is required under some special legislation.²⁹ However, there are

²⁷ For an example of a situation involving criminal jurisdiction and the Internet, see *Porn Case Sets Net Jurisdiction Precedent*, COMPUTERGRAM INTERNATIONAL, Jul. 2, 1999.

²⁸ See Chapter 10, § 3 of the Code of Judicial Procedure (Rättegångsbalken) (Swe.); see also Peter F. Schlosser, *Lectures on Civil Law Litigation Systems and American Cooperation with Those Systems*, 45 U. Kan. L. Rev. 9, 23 (1996) ("In Sweden, a hotel guest forgot his umbrella in the room he had rented. This was found to be a sufficient ground to assume jurisdiction over him. Since that time, such [jurisdiction] provisions have been called umbrella provisions").

²⁹ CLEAS LUNDBLAD, ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 209 (Charles Platto & William G. Horton eds., 2nd ed. 1993).

several special legislative exceptions to this general rule.³⁰ These special legislative exceptions are based primarily on the international conventions concluded between Sweden and foreign countries.³¹ Consequently, this Swedish Enforcement Analysis will focus primarily on these international conventions.

For the purposes of this Swedish Enforcement Analysis, a "foreign money judgment" or "foreign judgment" is defined as any final, valid foreign civil law judgment of a court of a foreign country ordering a judgment debtor to pay a sum of money to a judgment creditor.³² Arbitration awards, preliminary injunctions, and permanent injunctions do not fall within the scope of this definition, and will not be discussed herein. Judgments outside the scope of the Brussels Conventions do not fall within this definition as well.

2.2 The Brussels and Lugano Conventions

Sweden is a contracting state to both the Brussels and Lugano Conventions (hereinafter collectively referred to as "Conventions"). The Conventions serve as the primary legislative exceptions to the general rule stated above.³³ The other contracting states to the Conventions include Sweden's most important trading partners.³⁴ The contracting states to the Brussels Convention are the EU member states, and the Brussels Convention has been updated with each accession of new member states to the EU.³⁵ The contracting states to the Lugano Convention include member states from both the European Free Trade Association ("EFTA") and the EU.

The provisions of the Brussels Convention³⁶ parallel those of the Lugano Convention.³⁷ The purpose of the later-enacted Lugano Convention was to extend the provisions of the Brussels Convention to the EFTA member states.³⁸ The effect of the Brussels and Lugano Conventions has been to create a unified system in Western Europe with regard to the recognition and enforcement of judgments.³⁹ This system has been aptly named the "Brussels System", which term is useful in describing the interaction between the Brussels and Lugano Conventions.⁴⁰

³⁰ MIKAEL BERGLUND, ENFORCEMENT OF FOREIGN JUDGMENTS, SWEDEN 3 (Louis Garb & Julian Lew eds., 1994 & Supp. 1998).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Ronald A. Brand, *Enforcement of Judgments in the United States and Europe*, 13 I.L. & COM. 193, 194 n. 8 (1994).

³⁶ The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J. (L 299) 32, reprinted in 29 I.L.M. 1417 (consolidated and updated text) [hereinafter "Brussels Convention"].

³⁷ The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (L 319) 9, reprinted in I.L.M. 620 [hereinafter "Lugano Convention"].

³⁸ Lugano Convention, *supra* note 37, at preamble.

³⁹ Igor I. Kavass, *The Lugano and San Sebastian Conventions*, 18 INT'L J. LEGAL INFO. 230 (1990); John Fitzpatrick, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 CONN. J. INT'L L. 695, 698 (1993).

⁴⁰ Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus For United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57, 69 (1993).

When analyzing the recognition and enforceability of money judgments between Sweden and the other contracting states under the Brussels System, the provisions of the Brussels Convention can generally be relied upon because the provisions of the Lugano and Brussels Conventions are virtually identical.⁴¹ The major difference between the Conventions is that the Brussels Convention's Interpretation Protocol charges the European Court of Justice ("ECJ") with jurisdiction to construe it, whereas the Lugano Convention is to be construed by the courts of its contracting states.⁴²

However, in the second Declaration to the Lugano Convention, the EU member state signatories stated that the ECJ should consider the rulings construing the Lugano Convention when interpreting the Brussels Convention.⁴³ The EFTA member state signatories stated that their national courts should grant similar respect for the ECJ's rulings in construing the Brussels Convention.⁴⁴ Therefore, the identical provisions of both Conventions may in practice be interpreted with some uniformity.⁴⁵

The Brussels Convention is presently operative between Sweden and the other member states of the EU. The Lugano Convention is presently operative between Sweden and the following countries: Austria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Switzerland and the United Kingdom.⁴⁶ The Lugano Convention's provisions apply to matters of jurisdiction in cross border disputes between persons domiciled in contracting states when the defendant is domiciled in a Lugano Convention contracting state that is not a member of the EU.⁴⁷

Sweden is also a signatory to several treaties with its Nordic neighbors. The Nordic Judgment Convention of 1932 (amended in 1977) between Sweden, Denmark, Finland, Iceland, and Norway, and the Swedish-Swiss Judgment Convention of 1936, are still valid with regard to the legal areas not covered by the Lugano and Brussels Conventions.⁴⁸ The Nordic Bankruptcy Convention of 1933 between Sweden, Denmark, Finland, Iceland, and Norway, applies to bankruptcy proceedings and provides that a bankruptcy in any of the Nordic countries is valid in the other Nordic countries.⁴⁹ The Convention between Sweden and Austria on the recognition and enforcement of judgments in civil matters has been superceded by the Brussels Convention, to which both are contracting states.⁵⁰ Because the provisions of the Brussels and Lugano

⁴¹ *Id.* at 68-70.

⁴² Juan Carlos Martinez, *Recognizing and Enforcing Foreign Nation Judgments: The United States and Europe Compared and Contrasted – A Call for Revised Legislation in Florida*, 4 J. TRANSNAT'L L. & POL'Y 49, 78 (1995).

⁴³ Lugano Convention, *supra* note 37, at annex (Declaration by the Representatives of the Governments of the States Signatories to the Lugano Convention which are Members of the European Communities ["EFTA Declaration"]).

⁴⁴ *Id.*

⁴⁵ However, note that Sweden, Austria and Liechtenstein did not sign the EFTA Declaration. *Id.*

⁴⁶ BERGLUND, *supra* note 30, at 10.

⁴⁷ Paul R. Beaumont, *European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, in *Current Developments: European Community Law*, 39 INT'L & COMP. L. Q. 700, 702 (Karl Newmann ed., 1990).

⁴⁸ BERGLUND, *supra* note 30, at 10.

⁴⁹ *Id.*

⁵⁰ Brussels Convention, *supra* note 36, at art. 55.

Conventions generally supercede the provisions of the Nordic and Austrian Conventions, the Nordic and Austrian Conventions will not be discussed further.

2.3 The Brussels Convention Analyzed

The general scheme of the Brussels Convention is to provide uniform and directly applicable jurisdiction rules that form part of the law of each of the contracting states. The rules govern where proceedings must be brought and how judgments can be enforced. Generally speaking, the Brussels Convention ensures that the judgments of one contracting state will be recognized and enforceable in all other contracting states. All judgments rendered by the courts of contracting states that fall within the scope of the Brussels Convention will automatically be recognized and enforceable in all other contracting states, without reconsideration of the judgment's merits in the enforcement forum.⁵¹ Under Article 25 of the Brussels Convention, a recognizable judgment includes a final money judgment given by a court of any of the contracting states.⁵² Article 26 provides that all final judgments given in a contracting state shall be recognized in the other contracting states without any special recognition procedure being required.⁵³

The Brussels Convention applies automatically when the judgment concerned is within the scope of the Convention, and the courts of the claim forum and enforcement forum must apply the Convention's rules whether or not raised by the parties.⁵⁴ However, the automatic application of the provisions of the Brussels Convention is limited to judgments falling within the scope of the Convention.

2.3.1 Scope

The scope of the Brussels Convention is confined to civil and commercial matters, which are essentially matters classified as private matters under the civil law of the contracting states.⁵⁵ Therefore, public law matters are excluded from the scope of the Convention.⁵⁶

Article 1 of the Brussels Convention specifically excludes the following public law matters from the scope of the Convention: Administrative law, customs, revenue, wills, divorce, bankruptcy, social security and arbitration.⁵⁷ In addition, the Brussels Convention does not apply to administrative hearings, but rather only court proceedings and hearings.⁵⁸

⁵¹ Russell, *supra* note 40, at 76.

⁵² Brussels Convention, *supra* note 36, at art. 25.

⁵³ *Id.* at art. 26.

⁵⁴ *Id.* The "claim forum" is the forum where the plaintiff's claim is originally brought. The "enforcement forum" is the forum where the judgment creditor seeks to enforce his judgment against the judgment debtor's assets. The Brussels System will not apply unless the enforcement forum is within a contracting state's jurisdiction.

⁵⁵ Russell, *supra* note 40, at 70.

⁵⁶ *Id.* at 71.

⁵⁷ Brussels Convention, *supra* note 36, at art. 1.

⁵⁸ Russell, *supra* note 40, at 71.

The national laws of the contracting states are not uniform in their classification of civil and commercial matters.⁵⁹ Pursuant to the Brussels Convention Interpretation Protocols, the decisions of the ECJ control the determination of whether a matter is a civil and commercial matter.⁶⁰ In *Eurocontrol*, the ECJ stated that in determining whether a matter is civil or commercial, it would first take into account the scope and objectives of the Brussels Convention, and then consider the general principles stemming from the corpus of national legal systems of the contracting states. Therefore, ECJ case law and Swedish law must be examined when determining whether a specific dispute falls within the scope of the Brussels Convention.

Finally, the scope of the Brussels Convention is limited to matters with an international element, i.e., matters in which the litigants are domiciled in two different countries.⁶¹ Thus, the Brussels Convention does not apply in a dispute between two parties domiciled in the same state where the dispute is brought in that state.⁶²

This rule has two exceptions. The first is that the jurisdiction of the situs of real property has exclusive jurisdiction over matters involving rights to such real property, regardless of where the litigants are domiciled.⁶³ For example, litigation concerning rights in real property located in Germany must take place in Germany, notwithstanding that litigation concerning the real property was commenced in France by parties domiciled in France. The second exception arises where an interrelated action is pending in the courts of another contracting state. In such a case, the court in which the action was brought first has exclusive jurisdiction over the action unless the jurisdiction of the first court is questioned in the second court.⁶⁴

If the Vendor's e-commerce activities are likely to generate judgments that will come within the scope of the Brussels Convention, then it is advisable to examine the grounds for foreign judgment non-recognition under the Brussels Convention. Grounds for non-recognition must be raised by the judgment debtor in the enforcement forum pursuant to an appeal of the enforcement forum's recognition of the claim forum's judgment.⁶⁵ However, the Brussels Convention's grounds for non-recognition offer little hope to the judgment debtor because they are severely limited.

2.3.2 Article 27 Grounds for Non-Recognition

Article 27 of the Brussels Convention provides five grounds for the non-recognition of the judgments of a contracting state.⁶⁶ These grounds are: (1) The claim forum's judgment violates the enforcement forum's public policy; (2) the claim forum rendered a default judgment against the defendant, and there was insufficient service of the documents instituting the action on the

⁵⁹ *Id.* at 70.

⁶⁰ Case 29/76, *LTU Lufttransportunternehmen GmbH and Co. v. Eurocontrol*, [1976] E.C.R. 1541.

⁶¹ Russell, *supra* note 40, at 71-72.

⁶² *Id.* at 72.

⁶³ *Id.*; see also Brussels Convention, *supra* note 36, at art. 16.

⁶⁴ Russell, *supra* note 49, at 72; see also Brussels Convention, *supra* note 36, at arts. 21-23.

⁶⁵ Brussels Convention, *supra* note 36, at art. 36.

⁶⁶ *Id.* at art. 27; see also Martinez, *supra* note 42, at 75.

defendant; (3) a judgment of the enforcement forum between the same parties is irreconcilable with the claim forum's judgment; (4) the judgment of the claim forum on a preliminary matter concerning the status or capacity of natural persons, right in property arising from a matrimonial relationship, or wills or succession, conflicts with the private international law of the enforcement forum, unless the enforcement forum would have reached the same result; and (5) the claim forum's judgment is irreconcilable with an earlier judgment of a court of a non-contracting state, provided that the judgment of the non-contracting state is enforceable.⁶⁷

While public policy may seem a promising ground for non-recognition at first glance, the Committee of Experts to the Brussels Convention stated that this ground should only be applied by the enforcement forum in extraordinary cases.⁶⁸ Therefore, it is probably not a good strategy to take a default judgment in the claim forum and defend against the resulting judgment in the enforcement forum based on the public policy ground.

The second ground, insufficient service, prevents the recognition of a default judgment in the enforcement forum where the defendant was not adequately and timely served with the documents instituting the action in the claim forum.⁶⁹ The enforcement forum determines whether service was adequate and timely according to the law of the claim forum, and the issue is not precluded by the claim forum's determination.⁷⁰ Therefore, insufficient service is probably the best non-recognition ground for the defendant. This statement is borne out by the fact that insufficient service is the non-recognition ground that has been used the most often by defendants to prevent judgment recognition and enforcement under the Brussels Convention.⁷¹

The final three grounds for non-recognition arise where there is a prior judgment between the same parties or in the same matter that is irreconcilable or conflicts with the judgment sought to be enforced. The analysis of these grounds bears little utility in the context of an Enforcement Analysis because since a prior judgment must exist between the same parties or in the same matter, they probably would have already engaged in some litigation. Therefore, the judgment debtor would probably be well beyond the stage of assessing cross-border e-commerce liability risk with respect to the judgment creditor's jurisdiction.

2.3.3 Jurisdiction as a Ground for Judgment Non-Recognition

Jurisdiction is probably the poorest ground for judgment non-recognition under the Brussels Convention. This is so because the issue of jurisdiction is generally precluded from re-litigation in the enforcement forum.⁷² The courts of the contracting states to the Brussels

⁶⁷ Brussels Convention, *supra* note 36, at art. 27; *see also* Martinez, *supra* note 42, at 75-76.

⁶⁸ Martinez, *supra* note 42, at 76 (citing Report by P. Jenard on the Convention of 27 Sept. 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1979 O.J. (C 59) 1, 3).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Commission Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, at Explanatory Memorandum, COM (99) 348 final, at § 4.5 (discussing art. 41 of the Proposed Council Regulation).

⁷² Brussels Convention, *supra* note 36, at art. 28 ¶ 2-3.

Convention generally may not question the jurisdiction of the court rendering the judgment.⁷³ While Article 27 provides that judgments against the public policy of the enforcement forum need not be enforced, Article 28 provides that the public policy exception cannot be applied to matters of jurisdiction in the enforcement forum.⁷⁴

Thus, the issue of the claim forum's jurisdiction should be litigated in the claim forum.⁷⁵ If the issue of the claim forum's jurisdiction is not raised in the claim forum, then it cannot be reopened in the enforcement forum.⁷⁶ In addition, if the defendant asserted and lost a challenge to the claim forum's jurisdiction in the claim forum, or failed to appear in the claim forum, the defendant cannot challenge the claim forum's jurisdiction in the enforcement forum.⁷⁷

In exception to the foregoing, Article 3 of the Brussels Convention lists several exorbitant bases of jurisdiction found in the national laws of the contracting states.⁷⁸ Persons domiciled in a contracting state may not be sued in the courts of the other contracting states where jurisdiction is derived from one of the Article 3 exorbitant bases of jurisdiction.⁷⁹ If the jurisdiction of the claim forum is based on one of the Article 3 exorbitant bases, the judgment obtained in the claim forum may not be enforced under the Brussels Convention against a person domiciled in a contracting state.⁸⁰ This is so regardless of whether the issue of litigation was raised in the claim forum.

It must be noted that the Brussels Convention enforcement rules relating to jurisdiction apply only in cases where the defendant is domiciled in a contracting state.⁸¹ In cases where the defendant is not domiciled in a contracting state, the claim forum can apply its own jurisdictional rules instead of those of the Brussels Convention, including the exorbitant jurisdictional bases listed in Article 3.⁸² This raises the possibility that a judgment can be obtained in a contracting state claim forum against a defendant domiciled in a non-contracting state under the claim forum's exorbitant jurisdictional rules, then enforced against the defendant's assets located in a contracting state enforcement forum.⁸³ In such a case, the enforcement forum cannot question the claim forum's jurisdiction, even though it relies on an exorbitant basis.⁸⁴

For a Vendor domiciled in Sweden or any other contracting state, this scenario is no threat. However, for a Vendor domiciled in a non-contracting state, but with assets in Sweden or any other contracting state, this scenario is cause for concern.

Therefore, when analyzing a Vendor's cross-border e-commerce liability risk, it is critical

⁷³ *Id.*

⁷⁴ *Id.*; see also Martinez, *supra* note 42, at 76.

⁷⁵ Martinez, *supra* note 42, at 71.

⁷⁶ *Id.*

⁷⁷ *Id.* at 71-72.

⁷⁸ Brussels Convention, *supra* note 36, at art. 3; see also Brand, *supra* note 35, at 202.

⁷⁹ Brussels Convention, *supra* note 36, at art. 3; see also Brand, *supra* note 35, at 203.

⁸⁰ Brand, *supra* note 35, at 203.

⁸¹ Brussels Convention, *supra* note 36, at art. 3; see also Brand, *supra* note 35, at 203.

⁸² Brussels Convention, *supra* note 36, at art. 2 ¶ 2; see also Brand, *supra* note 35, at 203.

⁸³ Brussels Convention, *supra* note 36, at art. 2 ¶ 2; see also Martinez, *supra* note 42, at 71-72.

⁸⁴ Martinez, *supra* note 42, at 71-72.

to determine the Vendor's domicile. Under the Brussels Convention, national law determines the domicile of both legal and natural persons.⁸⁵ Most European countries base the domicile of a legal person (e.g., a corporation) on its seat, usually determined by the place of the corporation's central control or management, and not the place of incorporation.⁸⁶ As a result, "companies or corporations founded in or controlled from the United States may ... have difficulty meeting the domicile requirement."⁸⁷ If the claim forum finds that a person is not domiciled in a contracting state, then that person could be subjected to the claim forum's exorbitant jurisdiction without the opportunity to appeal the claim forum's adverse ruling on domicile in the enforcement forum.

Additionally, where the Vendor transacts e-commerce with consumers, it is critical to determine whether the Vendor has a branch, agency or other establishment located within a Brussels Convention contracting state. Article 13 of the Brussels Convention defines a "consumer" as a person who concludes a contract "for a purpose which can be regarded as being outside his trade or profession."⁸⁸ The ECJ has interpreted this language to mean that "only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically."⁸⁹

Under Articles 13 and 14 of the Brussels Convention, a business with a branch, agency or other establishment within a contracting state from which it transacts business with the a consumer, is deemed to be domiciled in the contracting state in which the branch, agency or other establishment is situated.⁹⁰ As a result, instead of being subject to national jurisdiction rules by virtue of Articles 2 and 4 of the Brussels Convention, such a business can be sued by the consumer in his state of domicile, under Article 14, ¶ 1.⁹¹

2.3.4 E-Commerce in the Brussels System

Although a discussion of jurisdiction based on Cyberspace conduct does not come within the general scope of this paper, a few short comments on the topic are in order here due to the fact that judgments are readily recognized and enforced within the Brussels System. Therefore, the next step in determining the feasibility of conducting e-commerce within the Brussels System is determined by examining the procedural rules of jurisdiction under the Brussels Convention as they pertain to e-commerce.

The Brussels Convention's "State of Origin" principle provides that businesses domiciled in contracting states are subject to the regulatory regime of the country in which they are

⁸⁵ Russell, *supra* note 40, at 73.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Brussels Convention, *supra* note 36, at art. 13 ¶ 1.

⁸⁹ Case 269/95, *Benincasa (F.) v. Dentalkit S.R.L.*, [1997] E.C.R. I-3767, at ¶ 17.

⁹⁰ Brussels Convention., *supra* note 36, at arts. 13-14.

⁹¹ Case 318/93, *Brenner & Noller v. Dean Witter Reynolds, Inc.*, [1995] E.C.R. (EC) 278.

domiciled.⁹² Therefore, jurisdiction over cross-border disputes arising out of e-commerce between non-consumers lies in the defendant's domicile state. In contrast, cross-border contract disputes with consumers may fall within the provisions of Articles 13 to 15 of the Brussels Convention, which override the provisions of Articles 2 to 6, and place jurisdiction over cross-border disputes in the consumer's state of domicile.⁹³ Therefore, it is necessary to determine whether consumers will constitute the Vendor's intended customer base.

The Brussels Convention provision applicable to most forms of e-commerce is probably Article 13(3)(a)-(b), which applies to contracts concluded with consumers for the supply of goods or services.⁹⁴ Under this provision, jurisdiction over a cross-border dispute arising out of a contract for the supply of goods or services concluded with a consumer lies in the consumer's state of domicile, provided that the contract was "preceded by a specific invitation addressed to him or by advertising, and the consumer took [in the state of his domicile] the steps necessary for the conclusion of the contract."⁹⁵

Most commentators agree that interactive Web sites do not constitute "a specific invitation" or "advertising" under Article 13(3)(a) of Brussels Convention unless they specifically target the consumers of a specific jurisdiction.⁹⁶ For example, an interactive Web site written in English and advertising goods for the global market would probably not be seen as purposefully directed toward German consumers, even though it is accessible to German consumers in Germany.⁹⁷ However, a German language interactive Web site probably would be seen as being purposefully directed toward German consumers.⁹⁸ Therefore, a cross-border dispute arising out of a consumer goods or services supply contract concluded with a German consumer over an English language interactive Web site would probably not implicate Articles 13-15 of the Brussels Convention, and jurisdiction over said dispute would lie in the courts of the seller's domicile under Article 2 or Article 4.⁹⁹

However, caution should be exercised where the use of conventional advertising and marketing media is contemplated in addition to the conduct of e-commerce with consumers. The ECJ has stated that under Article 13(3)(a), conventional advertising "includes all forms of

⁹² Brussels Convention, *supra* note 36, at art. 2; *see also* John Fitzpatrick, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 CONN. J. INT'L L. 695, 703 (1993); *see also* Anthony Hilton, *Business Day: Unity Vital In Battle Against Brussels' Bad Ideas*, LONDON EVENING STANDARD, Dec. 11, 1999.

⁹³ Brussels Convention, *supra* note 36, at arts. 13-15.

⁹⁴ *Id.* at art. 13.

⁹⁵ *Id.* at art. 13(3)(a)-(b).

⁹⁶ *See, e.g.*, Lionel Stanbrook, *Memorandum of the Advertising Information Group on the Proposals to Adopt the Brussels Convention and the Draft II Rome Convention as EU Regulations Pursuant to Article 65 of the Amsterdam Treaty*, Nov. 4, 1999, at 5; *see also* Mitchener, *supra* note 9.

⁹⁷ *See* Mitchener, *supra* note 9.

⁹⁸ *Id.* (American "dot.com" retailer Land's End's German language Web site was directed towards German consumers, but not its English language Web site).

⁹⁹ *But see* JOACHIM BENNO, THE "ANONYMISATION" OF THE TRANSACTION AND ITS IMPACT ON LEGAL PROBLEMS: A THEORY AS TO WHY THE USE OF ICT ENGENDERS LEGAL PROBLEMS 12-14 (The I.T. Law Observatory Report No. 6/98, 1998) (reasoning that the Brussels Convention's consumer jurisdiction provisions should apply when the seller or service provider knew or should have known that his customer was a "consumer").

advertising in the State where the consumer is domiciled, or a special offer addressed to him.”¹⁰⁰ In *Intership Yachting Sneek*, a display on a booth during a pleasure boat fair in the consumer’s state of domicile was held to come within the scope of Article 13(3)(a).¹⁰¹

As a second condition to the application of Article 14’s consumer jurisdiction provisions, Article 13(3)(b) requires that the consumer take the steps necessary to conclude the contract in his state of domicile.¹⁰² The ECJ stated that this could occur where the consumer executes any written document or takes any action indicating his intention to follow up on the special offer or advertising.¹⁰³ Although an e-commerce contract with a consumer may be executed on-line, thereby casting doubt on the precise physical location of the conclusion of the contract, the consumer can always argue that he concluded the on-line contract intending to follow up on the conventional advertising. Therefore, it may be possible for a Vendor that utilizes conventional advertising media to be drawn within the consumer jurisdiction provisions of Articles 13-15 of the Brussels Convention in a dispute with a consumer.

2.4 Non-Treaty States

As discussed above, the general rule in Sweden is that foreign judgments will not be recognized in Sweden unless there is a special legislative exception requiring their recognition. The primary legislative exceptions were discussed above. Therefore, the judgments of the courts of states that have not concluded treaties with Sweden will generally not be recognized in Sweden. Such states may be referred to as “non-treaty states.”

The United States is a non-treaty state.¹⁰⁴ As a result, a money judgment rendered in an American court will not be recognized and enforced in Sweden. For a Swedish Vendor, this fact nullifies the cross-border e-commerce liability risk *vis-a-vis* American customers. This is so because if American customers want to sue a Swedish Vendor, they will have to come to Sweden to do it. Moreover, Swedish law will control.¹⁰⁵ The inconvenience and expense of foreign litigation, together with the uncertainty of outcome due to the different substantive and procedural laws in Sweden, should form a barrier substantial enough to dissuade all but the most intrepid American litigants. Therefore, there is no need to examine American law when conducting a cross-border e-commerce liability risk analysis for a Swedish Vendor with no assets in America. Of course, this same analysis holds true for all other non-treaty states.

The previous analysis is limited only by the *Vakis Rule*.¹⁰⁶ In *Vakis*, the Swedish Supreme Court ruled that where the parties to a contract agreed that a foreign court would have exclusive jurisdiction over a dispute arising out of the contract, the resulting foreign judgment

¹⁰⁰ Case 99/96, *Mietz v. Intership Yachting Sneek BV*, [1995] E.C.R. 278.

¹⁰¹ *Id.* at ¶ 70.

¹⁰² Brussels Convention, *supra* note 36, at art. 13(3)(b).

¹⁰³ Case 99/96, *Mietz v. Intership Yachting Sneek BV*, [1995] E.C.R. 278, at ¶ 71.

¹⁰⁴ Perritt, Jr., *supra* note 25, at 59.

¹⁰⁵ BERGLUND, *supra* note 30, at 3.

¹⁰⁶ LUNDBLAD, *supra* note 29, at 209.

may be recognized by a Swedish court without substantive review.¹⁰⁷ Therefore, a Swedish Vendor wishing to avoid foreign jurisdiction should avoid concluding contracts containing exclusive jurisdiction provisions in favor of a foreign jurisdiction.

2.5 Forum Selection Clauses

Swedish courts will generally honor forum selection clauses, subject to some legislative exceptions.¹⁰⁸ However, it must be stressed that contesting an EU member state claim forum's jurisdiction pursuant to a forum selection clause must be done in the claim forum under the Brussels Convention. Fortunately, ECJ case law will apply to the issue.¹⁰⁹ The same analysis applies in the Lugano Convention context.

The major drawback to the use of forum selection clauses in e-commerce arises under the Brussels Convention's consumer protection provisions. Under the provisions of Article 17, "the rules of jurisdiction in matters of ... consumer contracts are expressly withdrawn from the intention of the parties."¹¹⁰ "In such matters, the choice of forum cannot come into operation."¹¹¹ Thus, in situations where Articles 13 to 15 apply, a forum selection clause as against a consumer is rendered void under the provisions of Article 17. Otherwise, an exclusive forum selection clause that meets the formal requirements of Article 17 (i.e., in writing), is controlled by ECJ case law, and will probably be enforced in Sweden.¹¹²

2.6 Swedish Enforcement Analysis Conclusions

Sweden will not recognize and enforce foreign money judgments unless a treaty concluded between Sweden and a foreign state requires Sweden to do so. Therefore, there is generally no need to examine the law of non-treaty states when determining the cross-border e-commerce liability risk of a business with assets located in Sweden. However, Swedish law must be examined because Swedish courts will not relinquish jurisdiction over assets located in Sweden.

The primary treaties requiring Sweden to recognize and enforce foreign judgments are the Brussels and Lugano Conventions. Under these two conventions, the judgments of contracting states must be recognized and enforced by Swedish courts, subject to limited exceptions. Asserting the grounds for non-recognition in the enforcement forum is generally not a viable strategy under the Brussels and Lugano Conventions. Therefore, a Swedish Vendor conducting e-commerce with customers domiciled in a contracting state to either Convention should next examine whether its e-commerce activities will expose it to the jurisdiction and laws of those states. In addition, a business must exercise care in determining its domicile and the domicile of its agents when conducting business with consumers through such agents.

¹⁰⁷ *Id.*

¹⁰⁸ Fitzpatrick, *supra* note 92, at 737.

¹⁰⁹ *Id.* at 731.

¹¹⁰ Case 99/96, *Mietz v. Intership Yachting Sneek BV*, [1995] E.C.R. 278, at ¶ 31.

¹¹¹ *Id.*

¹¹² Fitzpatrick, *supra* note 92, at 727-37.

The jurisdictional rules of Articles 2 to 6 of the Brussels Convention reduce cross-border e-commerce liability risk vis-a-vis persons domiciled in the EU. This is so because jurisdiction over cross-border disputes lies in the defendant's state of domicile, provided that the special jurisdictional rules relating to consumers are carefully observed. As a result, cross-border litigation will require the plaintiff to come to the defendant's jurisdiction, thereby reducing the defendant's risk of having to litigate in distant forums. The same holds true under the Lugano Convention.

Forum selection clauses are viable alternatives in limiting cross-border e-commerce liability risk. Thus, the use of forum selection clauses is a good idea, even with respect to transactions concluded with persons domiciled in non-treaty states. Even though the judgments of non-treaty states will generally not be recognized and enforced in Sweden, the use of redundant safeguards to limit cross-border e-commerce liability risk is not a questionable strategy. However, care should be taken when dealing with EU consumers, because forum selection clauses are void as against them under Article 17 of the Brussels Convention.

3 U.S. Enforcement Analysis

It is necessary to stress at the outset that U.S. federal and state procedural and substantive law must be analyzed when determining the cross-border e-commerce liability risk of a Vendor with assets located in the U.S. This is so because the judicial proceedings of any U.S. state, including judgments, are entitled to recognition in all of the other states pursuant to the Full Faith and Credit Clause of the U.S. Constitution.¹¹³ Unfortunately, analyzing U.S. law is not an easy task due to the multitude of jurisdictions within the U.S., i.e., 50 states, several territories and possessions, and the federal legal system. This problem is seriously compounded by the fact that U.S. courts will generally recognize the judgments of foreign countries. While it may be difficult to examine the laws of every U.S. jurisdiction relating to e-commerce, it is simply impossible to examine the laws of every foreign country.

This sample U.S. Enforcement Analysis will address the problem of pecuniary liability arising from money judgments rendered by the courts of foreign countries. Consequently, the terms "foreign money judgment" or "foreign judgment" as used herein exclude a judgment of a court of any U.S. State, territory, or possession, including federal courts. Non-money judgments, such as judgments determining the status of persons or property, judgments for injunctive and preliminary injunctive relief, and judgments determining tax liability or liability for matrimonial or child support, are also not within the scope of "foreign judgment" as discussed herein. Judgments rendered by foreign administrative tribunals and arbitration awards are excluded as well. Therefore, as used herein, the term "foreign money judgment" or "foreign judgment" is a judgment: (1) that has resulted from litigation; (2) that has been rendered by a foreign court of record; (3) that awards a party a sum of money; (4) that is valid and final; and (5) that would be not be denied effect in a U.S. court due to differences in the parties, causes of action, or issues.

¹¹³ U.S. CONST. art. IV, § 1; *see also* Martinez, *supra* note 42, at 52.

In addition, it must be noted that the U.S. Enforcement Analysis is concerned with the scenario of an action being brought by a foreign judgment creditor to gain recognition and enforcement of a foreign judgment in the U.S. against the Vendor's assets (hereinafter "Enforcement Action"). The use of a foreign judgment for the purposes of establishing a prior determination of fact or law will only be discussed as such use relates to an Enforcement Action.

3.1 The General Rule in the U.S.

The U.S. is the most receptive country to foreign money judgments.¹¹⁴ In contrast, foreign countries are generally not willing to conclude a treaty with the U.S. regarding the reciprocal recognition and enforcement of judgments.¹¹⁵ This is so because U.S. jury verdicts are seen abroad as outrageous.¹¹⁶ Nevertheless, as a general rule, U.S. courts will recognize and enforce foreign judgments, subject to the defenses to foreign judgment recognition and enforcement discussed below. However, in contrast to the Brussels Convention, the defenses to foreign judgment recognition in the U.S. are numerous and have teeth.

There is no "U.S. law" pertaining to the recognition and enforcement of foreign judgments, as a lawyer from another country might imagine. Under the U.S. Supreme Court's decision in *Erie Railroad Co. v. Tompkins*, state law controls the recognition and enforcement of foreign judgments, both in state courts and in federal courts applying state law, in the absence of some basis for federal jurisdiction, such as admiralty.¹¹⁷ Therefore, the U.S. has more than 51 separate yet similar regimes of law pertaining to the recognition and enforcement of foreign judgments.¹¹⁸ The general rules of these regimes are similar enough such that a discussion of their most significant features is possible here.¹¹⁹ However, it must be stressed that the U.S. lawyer should carefully examine the recognition and enforcement rules of the U.S. jurisdiction(s) in which his Vendor's assets are located.

There are two general sources of state law pertaining to the recognition and enforcement of foreign judgments: The Uniform Foreign Money-Judgments Recognition Act and state common law.¹²⁰ State common law is summarized by the Restatement (Third) of Foreign Relations Law (hereinafter "Restatement").¹²¹ The Uniform Foreign Money-Judgments Recognition Act (hereinafter "Uniform Act") is a statute that has been adopted by 25 U.S. states, the District of Columbia, and the U.S. Virgin Islands.¹²²

¹¹⁴ Martinez, *supra* note 42, at 65.

¹¹⁵ Perritt, Jr., *supra* note 25, at 60 ("There is no truly international civil judgment enforcement convention to which the United States is a party").

¹¹⁶ Schlosser, *supra* note 28, at 47.

¹¹⁷ 159 U.S. 113 (1895); *see also* Brand, *supra* note 35, at 196; *see also* Johnston v. Compagnie Generale Transatlantique, 152 N.E. 121 (N.Y. Ct. App. 1926).

¹¹⁸ Delvin J. Losing, *Comity in the Free Trade Zone*, 74 N.D. L. REV. 737, 741 (1998).

¹¹⁹ Brand, *supra* note 35, at 196.

¹²⁰ UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1962); *see also* Martinez, *supra* note 42, at 52.

¹²¹ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 481 (1998) [hereinafter "RESTATEMENT"].

¹²² Losing, *supra* note 117, at 741.

The benefit of analyzing the Uniform Act and the Restatement is primarily found in their defenses to the recognition of foreign judgments (hereinafter "Recognition Defenses"). Recognition Defenses may enable the lawyer to structure his Vendor's e-commerce transactions in order to prevent foreign judgment enforcement, or at least plan the litigation of cross-border disputes such that the resulting foreign judgment cannot be enforced against the Vendor's assets located in the U.S. Therefore, this U.S. Enforcement Analysis will primarily focus on Recognition Defenses.

The U.S. Enforcement Analysis will proceed with a short discussion of a few general procedural points pertaining to Enforcement Actions in the U.S. It will then discuss the main features of the Uniform Act and the Restatement, focusing on their Recognition Defenses, followed by a short discussion of forum selection clauses.

3.2 General Procedural Points Pertaining to an Enforcement Action in the U.S.

The enforcement of foreign judgment in the U.S. must be initiated by an Enforcement Action, which is essentially a garden-variety civil action.¹²³ The judgment creditor must commence the Enforcement Action by serving the judgment debtor with process and by filing the action in the enforcement forum, pursuant to the court rules of the enforcement forum.¹²⁴ The judgment creditor must also establish the basis of the enforcement forum's jurisdiction over the judgment debtor and his property.¹²⁵ Jurisdiction over the judgment debtor can usually be established in any jurisdiction in which the judgment debtor's property can be found.¹²⁶ This basis of personal jurisdiction does not require the judgment creditor to establish a connection between the underlying action and the judgment debtor's property or between the judgment debtor and the enforcement forum.¹²⁷

Venue rules provide which county court in a state should hear a particular case.¹²⁸ In an Enforcement Action, venue will probably lie in the county court of the situs of the judgment debtor's property.¹²⁹ However, venue rules will vary from state to state, and may also vary depending on the type of asset that the judgment creditor seeks to attach. For example, the situs of the judgment debtor's bank account may be the debtor's residence in one state, and the bank's corporate residence in another. Therefore, the enforcement forum's statutes, court rules, and common law pertaining to venue must be examined, with particular attention paid to the type of asset involved.

¹²³ RESTATEMENT § 481 com. g.

¹²⁴ For an example of typical superior court civil rules pertaining to the commencement of a civil action, *see* WASH. SUP. CT. C.R. 3-6 (West 1999).

¹²⁵ RESTATEMENT § 481 com. g.

¹²⁶ RESTATEMENT § 481 com. h.

¹²⁷ *Id.*

¹²⁸ *See* Voicelink Data Services, Inc. v. Datapulse, Inc., 86 Wash. App. 613, 622, 937 P.2d 11 (1997).

¹²⁹ *See, e.g.*, WASH. REV. CODE ANN. § 4.12.010 (West 1999).

A foreign judgment will not be enforced unless it is entitled to recognition in the enforcement forum.¹³⁰ Consequently, the judgment debtor can raise any of the recognition defenses in an Enforcement Action. The judgment debtor may also raise any of the defenses to judgment enforcement pursuant to the law of the enforcement forum.¹³¹ An example of a judgment enforcement defense in the state of Washington is the statute of limitations, which runs on a foreign judgment 10 years from the date that the judgment was entered.¹³²

In planning the defense of a cross-border dispute, care must be taken that the doctrines of collateral estoppel and res judicata do not render the defense of the subsequent enforcement action untenable. Generally speaking, under these doctrines, a judgment debtor that has litigated a claim, issue, or fact in the claim forum may be prevented from re-litigating that same claim, issue, or fact in the enforcement forum.¹³³ For example, the issue of the claim forum's jurisdiction over a party will be waived where a party appears in the claim forum, except where such appearance is made solely to contest the claim forum's jurisdiction.¹³⁴ Unfortunately, it is sometimes uncertain whether a U.S. court will apply the claim forum's rules or its own with respect to collateral estoppel and res judicata.¹³⁵

U.S. courts generally give the same effect to default judgments as to judgments rendered in proceedings in which the affected parties participated.¹³⁶ However, in contrast to the Brussels System, a default judgment does not preclude a U.S. enforcement forum from examining the foreign claim forum's jurisdictional bases.¹³⁷

3.3 Uniform Act & Restatement

As stated above, state law generally applies to the recognition and enforcement of foreign judgments, regardless of whether the enforcement forum is a federal or state court. The two general sources of relevant state law are the Uniform Act and state common law, which is collected and summarized by the Restatement. The Uniform Act is a statute, and thus has generally replaced and superceded the common law of the states that have adopted it.

The National Conference on Uniform State Laws promulgated the Uniform Act in 1962.¹³⁸ The following states have adopted the Uniform Act: Alaska, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, and Washington.¹³⁹ The District of Columbia and the Virgin

¹³⁰ RESTATEMENT § 481 com. b.

¹³¹ RESTATEMENT § 481 com. i.

¹³² See WASH. REV. CODE ANN. §§ 4.16.020 and 6.17.020(1) (West 1999).

¹³³ RESTATEMENT § 481 com. i.

¹³⁴ *Id.*

¹³⁵ See 13 A.L.R. FED. 208, § 6[b] (1972 and 1999 Supp.).

¹³⁶ RESTATEMENT § 481 com. i.

¹³⁷ *Id.*

¹³⁸ UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1962) [hereinafter "UNIFORM ACT"].

¹³⁹ UNIFORM ACT § 4 cmt.

Islands (a U.S. territory) have also adopted the Uniform Act.¹⁴⁰ The remaining U.S. states apply their own common law.

The Uniform Act is not uniform in reality, because some of the states have modified their versions of it.¹⁴¹ An example of this non-uniformity is the requirement of reciprocity to the recognition of foreign judgments. Reciprocity generally requires the judgment creditor to establish in the U.S. enforcement forum that the claim forum would enforce a comparable judgment rendered by the enforcement forum.¹⁴² One of the perceived benefits of the Uniform Act is that it did away with the reciprocity requirement laid down by the U.S. Supreme Court in *Hilton v. Guyot*.¹⁴³ However, reciprocity is either mandatory or discretionary under the Florida, Georgia, Massachusetts, Idaho, Ohio, and Texas versions of the Uniform Act, while it is not under the remaining states' versions. The common law of the states that have not adopted the Uniform Act varies as well, such that some states require reciprocity, although most do not.¹⁴⁴

The following section of the U.S. Enforcement Analysis will focus on the recognition defenses set forth in the Uniform Act and the Restatement.¹⁴⁵ It must be stressed that the availability of these defenses will depend on the state law of the enforcement forum. The discussion of each state's law is not feasible here because there is just too much of it. Therefore, the specific recognition and enforcement laws of the jurisdiction(s) in which the Vendor's assets are located must be further analyzed in determining the Vendor's cross-border e-commerce liability risk.

3.4 Recognition Defenses

The Uniform Act and the Restatement provide the following ten recognition defenses: (1) Finality and conclusiveness; (2) due process; (3) personal jurisdiction; (4) subject matter jurisdiction; (5) fraud; (6) notice; (7) public policy; (8) inconsistent judgments; (9) forum non conveniens; and (10) prior agreement.¹⁴⁶ The inconsistent judgments defense will not be discussed below because it generally offers no assistance in determining a Vendor's prospective cross-border e-commerce liability risk. The finality and conclusiveness defense will also not be discussed because the definition of "foreign judgment" herein assumes that the foreign judgment is final and conclusive. However, the prior agreement defense provides the best means of negating cross-border e-commerce liability risk, and will be discussed in more detail than the rest of the defenses.

¹⁴⁰ *Id.*

¹⁴¹ Loring, *supra* note 117, at 743.

¹⁴² *Id.* at 740.

¹⁴³ 159 U.S. 113 (1895); *see also* Loring, *supra* note 117, at 742.

¹⁴⁴ Martinez, *supra* note 42, at 65.

¹⁴⁵ The term "defense" as used herein is not intended to imply that the burden of proof is always on the judgment debtor to establish that the judgment is not entitled to recognition. In fact, the burden of proof varies from state to state. *Compare* Ackermann v. Levine, 788 F.2d 830, 842 n. 12 (2d Cir.1986) (judgment creditor has burden of proof), *with* Fiske, Emery & Assocs. v. Ajello, 577 A.2d 1139, 1141-43, 41 Conn. Sup. 376, 378-381 (Conn. 1989) (judgment debtor has burden of proof).

¹⁴⁶ Loring, *supra* note 117, at 742-744.

Recognition defenses are classified by the Uniform Act and the Restatement according to whether they are mandatory or discretionary. U.S. courts cannot recognize a foreign judgment where the judgment debtor establishes a mandatory recognition defense.¹⁴⁷ Conversely, it is within the court's discretion to grant or deny recognition and enforcement to a foreign judgment where the judgment debtor establishes a discretionary recognition defense.¹⁴⁸ The following discussion of each recognition defense will specify whether a recognition defense is mandatory or discretionary under the Uniform Act and the Restatement.

3.4.1 Due Process

Due process is a mandatory recognition defense under both the Uniform Act and the Restatement. Due process is the broadest recognition defense, and often overlaps into the personal jurisdiction, notice, and public policy recognition defenses.¹⁴⁹

Section §4(a)(1) the Uniform Act provides that:

A foreign judgment is not conclusive if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.¹⁵⁰

Section 482(1)(a) of the Restatement follows the language of the Uniform Act to the letter.

Due process in the U.S. can be defined as "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private rights."¹⁵¹ The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee that U.S. federal and state courts, as well as administrative tribunals, will conduct their legal proceedings in accordance with the principles of due process.¹⁵²

The guarantee of due process is extended to the proceedings of foreign courts when a party to such proceedings attempts to gain their recognition in the U.S., i.e., by seeking enforcement of the foreign judgment.¹⁵³ Therefore, in order to grant the recognition of a foreign judgment, a U.S. court must be satisfied that the procedures of the foreign claim forum rendering the judgment were, or would be, "basically fair."¹⁵⁴

¹⁴⁷ RESTATEMENT § 482 cmt. a.

¹⁴⁸ RESTATEMENT § 482 cmt. a.

¹⁴⁹ Losing, *supra* note 117, at 754.

¹⁵⁰ UNIFORM ACT § 4(a)(1).

¹⁵¹ BLACK'S LAW DICTIONARY 500 (6th ed. 1990) (defining "due process of law").

¹⁵² U.S. CONST. amend. V (guaranteeing that "no person shall ... be deprived life liberty or property, without due process of law"); U.S. Const. amend. XIV, § 1 (guaranteeing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property without due process of law").

¹⁵³ Losing, *supra* note 117, at 746.

¹⁵⁴ *Id.*

However, the foreign claim forum's procedures will not be put on trial; differences between the foreign claim forum's procedures and U.S. procedures are not enough to deny the recognition of the foreign judgment in the U.S.¹⁵⁵ Rather, "the issue is only the basic fairness of the foreign procedures."¹⁵⁶

It is generally accepted that U.S. courts are unwilling to declare a foreign court system unfair under U.S. due process principles.¹⁵⁷ However, there are some cases in which this has happened. One example is *Bank Melli Iran v. Pahlavi*, in which the Ninth Circuit court of appeals held that the judgment debtor had introduced sufficient evidence to show that Iranian court procedures would not meet U.S. due process standards with respect to her.¹⁵⁸ The court found that Pahlavi, the judgment debtor and daughter of the late Shah of Iran, "could not expect fair treatment from the courts of Iran, could not personally appear before those courts, could not obtain proper legal representation in Iran, and could not even obtain local witnesses on her behalf."¹⁵⁹ Although this case has unusual facts, it shows that unusual facts are probably a necessary prerequisite to prevailing on the due process recognition defense.¹⁶⁰

3.4.2 Personal Jurisdiction

Personal Jurisdiction is a mandatory recognition defense under both the Uniform Act and Restatement¹⁶¹, and is the most likely recognition defense to succeed.¹⁶² Personal jurisdiction is the "power which a court has over the defendant's person and which is required before a court can enter a personal or in personam judgment."¹⁶³ Where the claim forum did not have personal jurisdiction over the judgment debtor, the claim forum's judgment cannot be enforced.¹⁶⁴

Section 5 of the Uniform Act provides six bases for the claim forum's exercise of personal jurisdiction that must be recognized by the enforcement forum.¹⁶⁵ Section 421(2)(a)-(k) of the Restatement provides eleven such grounds.¹⁶⁶ In addition, § 5(b) of the Uniform Act provides that the enforcement forum can apply its own bases of jurisdiction to the analysis of whether the claim forum's exercise of personal jurisdiction was proper.¹⁶⁷

The personal jurisdiction recognition defense is waived where the judgment debtor made

¹⁵⁵ *Id.*

¹⁵⁶ *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 688 (7th Cir. 1987).

¹⁵⁷ *See, e.g., Cochran Consulting v. Uwatec USA*, 102 F.3d 1224, 1229 (Fed. Cir. 1996); *Phillips USA Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 359 (10th Cir. 1996); *see also Martinez, supra* note 42, at 57.

¹⁵⁸ 58 F.3d 1406, 1413 (9th Cir. 1995).

¹⁵⁹ *Id.*

¹⁶⁰ A due process recognition defense that overlaps with the personal jurisdiction and public policy recognition defenses is more likely to prevail. *See, e.g., Siedler v Jacobson*, 383 N.Y.S.2d 833 (N.Y. 1976).

¹⁶¹ *See* UNIFORM ACT § 4(a)(2); RESTATEMENT § 482(1)(b).

¹⁶² RESTATEMENT § 482 cmt. c.

¹⁶³ BLACK'S LAW DICTIONARY, *supra* note 151, at 854 (defining "Jurisdiction in personam").

¹⁶⁴ *See, e.g., Koster v. Automark Industries, Inc.*, 640 F.2d 77 (7th Cir. 1981); *Siedler v Jacobson* 383 N.Y.S.2d 833.

¹⁶⁵ UNIFORM ACT § 5.

¹⁶⁶ RESTATEMENT § 421(2)(a)-(k).

¹⁶⁷ UNIFORM ACT § 5(b).

a voluntary appearance in the claim forum (except to contest jurisdiction), where he litigated the claim on the merits in claim forum, or where he waived the issue in the claim forum.¹⁶⁸ However, where the defendant appeared in the claim forum to contest jurisdiction, or had the opportunity to contest jurisdiction and did not, it is uncertain whether the claim forum's determination of the issue will be considered *res judicata* in the U.S. enforcement forum.¹⁶⁹

Therefore, the defendant should decide at the outset of litigation whether he will rely on recognition defenses and take a default judgment in the claim forum, or whether he will litigate the issue of jurisdiction in the claim forum. However, this is not an easy decision. If the defendant takes the latter road, he risks having to litigate jurisdiction under the law of the claim forum, as well as having the issue precluded from re-litigation in the enforcement forum. On the other hand, if the defendant takes a default judgment in the claim forum, all issues pertaining to the substantive merits of case are precluded from re-litigation in enforcement forum.¹⁷⁰

An examination of the Uniform Act and Restatement jurisdictional bases, together with the jurisdictional bases of the jurisdiction(s) in which the Vendor's assets are located, may permit the Vendor to prospectively structure its Cyberspace activities such that it can utilize the personal jurisdiction recognition defense in an enforcement action. In addition, due to the fact that sister-state and federal judgments are readily recognized in all U.S. courts, a U.S. jurisdictional analysis should be conducted in addition to a U.S. Enforcement Analysis.¹⁷¹

3.4.3 Subject Matter Jurisdiction

Subject matter jurisdiction is a mandatory recognition defense under the Uniform Act, but is discretionary under the Restatement.¹⁷² Subject matter jurisdiction is defined as the "power of a particular court to hear the type of case that is then before it."¹⁷³ As a recognition defense, subject matter jurisdiction is rarely successful.¹⁷⁴ This is so because a foreign court is generally presumed to have legitimate subject matter jurisdiction, and a technical jurisdictional mistake by a foreign court in its allocation of work will generally not be sufficient grounds for non-recognition.¹⁷⁵

¹⁶⁸ See Martinez, *supra* note 42, at 58-59.

¹⁶⁹ RESTATEMENT § 482 cmt. c (citing *Somportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d (3rd Cir. 1971); *Sprague and Rhodes Commodity Corp. v. Instituto Mexicano del Cafe*, 566 F.2d 861 (2nd Cir. 1977)).

¹⁷⁰ See, e.g., *Fairchild, Arabatzis and Smith, Inc. v. Prometco (Produce & Metals) Co., Ltd.*, 470 F. Supp. 610 (S.D.N.Y. 1979).

¹⁷¹ This is a developing topic, and much has recently been written on it. See, e.g., Dale M. Candeli, *Personal Jurisdiction and the Internet*, 564 PLI/PAT 79 (1999); John F. Delaney and Robert Murphy, *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, 570 PLI/PAT 169 (1998); Burk, *supra* note 8.

¹⁷² Losing, *supra* note 117, at 749.

¹⁷³ BLACK'S LAW DICTIONARY, *supra* note 151, at 854 (defining "jurisdiction of the subject matter").

¹⁷⁴ Brand, *supra* note 35, at 273.

¹⁷⁵ Alan J. Sorkowitz, *Enforcing Under the Uniform Foreign Money-Judgments Recognition Act*, 37 NO. 5 PRAC. LAW. 57 (1991) ("a lack of competence in the foreign court that was unnoticed by both parties and the court itself may, in some cases, be irrelevant to the merits and insufficient to warrant non-recognition, especially when it resulted from some technicality of the foreign country's laws relating to the division of work among various courts").

3.4.4 Fraud

Fraud is a discretionary recognition defense under both the Uniform Act and the Restatement.¹⁷⁶ With regard to this recognition defense, "extrinsic fraud" is distinguished from "intrinsic fraud." Extrinsic fraud is a "fraudulent action by the prevailing party that deprived the losing party of adequate opportunity to present its case to the court."¹⁷⁷ Intrinsic fraud is the use by a litigant of perjured testimony or falsified documents.¹⁷⁸ An example of extrinsic fraud is the bribery of a judge or jury.¹⁷⁹ Extrinsic fraud must be established in order to prevail on this recognition defense under both the Uniform Act and the Restatement.¹⁸⁰

"The distinction between extrinsic and intrinsic fraud for the purposes of recognition of foreign judgments is based on the view that a challenge on grounds of intrinsic fraud should be addressed to the rendering court."¹⁸¹ "The fraud must relate to matters other than issues that could have been litigated and must be a fraud on the court."¹⁸² Fraud is thus a difficult recognition defense to establish in a U.S. enforcement forum because extrinsic fraud is difficult to discover and prove, and because U.S. courts will not examine the issue of intrinsic fraud.¹⁸³

3.4.5 Notice

Lack of notice is a discretionary recognition defense under both the Uniform Act and the Restatement.¹⁸⁴ In practice, the grounds for this defense arise solely in default judgments because if the defendant appeared, then notice was probably adequate.¹⁸⁵

A U.S. enforcement forum may construe the notice requirement to mean that the notice procedures employed were in compliance with the foreign country's rules.¹⁸⁶ On the other hand, in some U.S. enforcement forums, notice may require only that the defendant had actual notice of the proceeding.¹⁸⁷ In any case, the notice procedures actually employed must satisfy constitutional due process principles.¹⁸⁸

The law on notice requirements differs drastically between U.S. jurisdictions. For example, in *Tahan v. Hodgson*, the D.C. federal circuit court of appeals found that notice papers written in the Hebrew language, which the defendant did not understand, but which were properly

¹⁷⁶ UNIFORM ACT § 4(b)(2); RESTATEMENT § 482(2)(c).

¹⁷⁷ RESTATEMENT § 482 cmt. e.

¹⁷⁸ *Id.*

¹⁷⁹ BLACK'S LAW DICTIONARY, *supra* note 151, at 661 (defining "fraud on court").

¹⁸⁰ *Losing*, *supra* note 117, at 750-51.

¹⁸¹ RESTATEMENT § 482 cmt. e.

¹⁸² *Overmyer v. Eliot Realty*, 371 N.Y.S.2d 246, 258 (1975).

¹⁸³ *Martinez*, *supra* note 42, at 62.

¹⁸⁴ UNIFORM ACT § 4(b)(1); RESTATEMENT § 482(2)(b).

¹⁸⁵ *Losing*, *supra* note 117, at 752.

¹⁸⁶ *Brand*, *supra* note 35, at 274 (citing *Tahan v. Hodgson*, 662 F.2d 862 (D.C. Cir. 1981)).

¹⁸⁷ *Id.*

¹⁸⁸ *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).

served on the defendant, met notice requirements.¹⁸⁹ In contrast, in *Julen v Larson*, a California court held that notice papers written in the German language, which the defendant did not understand, but which were properly served on the defendant, did not meet the notice requirements of the California Uniform Act.¹⁹⁰ In addition, the *Julen* court's dicta reasoned that in order to be informative, notice papers should be in the language of the jurisdiction in which they are served, include the location of the pending action, the amount involved, the date the defendant is required to respond, and the possible consequences of his failure to respond.¹⁹¹ These contrasting cases serve to reemphasize that it is critical to examine the law of the jurisdiction(s) in which the Vendor's assets are located when conducting a U.S. Enforcement Analysis.

3.4.6 Public Policy

Public policy is a discretionary recognition defense under both the Uniform Act and Restatement.¹⁹² While this recognition defense overlaps with the due process, notice, and personal jurisdiction recognition defenses, it is rarely successful on its own merits.¹⁹³

A judgment is contrary to the public policy of the enforcement forum where it is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought."¹⁹⁴ The public policy recognition defense is generally limited to situations where the original claim is repugnant to fundamental notions of what is decent and just in the recognition forum.¹⁹⁵ In *McCord v. Jet Spray Int'l Corp.*, the court held that in order to offend Massachusetts's public policy, a foreign judgment must tend to clearly undermine the "public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property."¹⁹⁶ A mere difference between the causes of action or remedies recognized in the claim forum and enforcement forum is not enough to sustain the public policy defense.¹⁹⁷

As is always the case, care must be exercised by the lawyer who contemplates taking a default judgment in the claim forum. This is so because some U.S. courts have held that the public policy recognition defense may not be raised in the enforcement forum if the judgment debtor defaulted in the claim forum.¹⁹⁸ Conversely, other courts have held that a default judgment in the claim forum does not preclude the public policy recognition defense in the enforcement

¹⁸⁹ 662 F.2d 862, 865 (D.C. Cir. 1981).

¹⁹⁰ 25 Cal. App. 3d 325, 330 (Cal. App. 1972).

¹⁹¹ *Id.* at 328.

¹⁹² UNIFORM ACT § 4(b)(3); RESTATEMENT § 482(2)(d).

¹⁹³ Jonathan H. Pittman, *The Public Policy Exception to the Recognition of Foreign Judgments*, 22 VAND. J. TRANSNAT'L L. 969, 970 (1989).

¹⁹⁴ *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981).

¹⁹⁵ *Losing*, *supra* note 117, at 753-54.

¹⁹⁶ 874 F. Supp. 436, 439 (D. Mass. 1994).

¹⁹⁷ RESTATEMENT § 482 cmt. f.

¹⁹⁸ Pittman, *supra* note 193, at 985 (citing *Tahan v. Hodgson*, 662 F.2d at 867).

forum.¹⁹⁹ Once again, it must be stressed that the only way to avoid the issue preclusion trap is to examine the law of the jurisdiction(s) in which the Vendor's assets are located.

3.4.7 Forum non conveniens

Forum non conveniens is a discretionary recognition defense that is found in the Uniform Act, but not the Restatement.²⁰⁰ Forum non conveniens refers to the discretionary power of a court to decline jurisdiction when the convenience of parties and the ends of justice would be better served if the action were brought and tried in another forum.²⁰¹ This recognition defense is limited under the Uniform Act to cases where the claim forum's jurisdiction was based solely on personal service, and the claim forum was a seriously inconvenient forum for the trial.²⁰² The judgment debtor will prevail on this defense only if he can convince the enforcement forum that the original action should have been dismissed by the claim forum under the enforcement forum's forum non conveniens rules.²⁰³

3.4.8 Prior Agreement

The prior agreement recognition defense is discretionary under both the Uniform Act and the Restatement.²⁰⁴ The grounds for this defense arise where the parties have entered into a contract containing an exclusive forum selection clause, and the judgment creditor subsequently obtains a default judgment against the other party in a claim forum other than the one agreed to by the parties.²⁰⁵ Caution must be exercised here, because the defense will be waived where the defendant voluntarily appeared in a claim forum other than the agreed claim forum.²⁰⁶ In addition, where the defendant litigated the issue of jurisdiction under the forum selection clause in the claim forum, and lost, the enforcement forum may bar the issue from re-litigation under the doctrine of res judicata.²⁰⁷

The best tactic in utilizing this defense may be to take a default judgment in the claim forum. This tactic avoids the uncertainty of foreign law, and the problem of res judicata. For example, Italy, Spain, and Portugal do not favor forum selection clauses in derogation of their jurisdiction.²⁰⁸ Thus, if a U.S. defendant were to litigate the issue of jurisdiction in an Italian claim forum, he runs the risk of losing on the issue under Italian law, and being barred from re-litigating the issue in a U.S. enforcement forum under the doctrine of res judicata. On the other hand, if the U.S. judgment debtor raises the issue of jurisdiction as a recognition defense to a

¹⁹⁹ *Id.* (citing *Ackerman v. Levine*, 788 F.2d 830, 842 (2nd Cir. 1986)).

²⁰⁰ UNIFORM ACT § 4(b)(6).

²⁰¹ BLACK'S LAW DICTIONARY, *supra* note 151, at 655 (defining "Forum non conveniens")

²⁰² *Losing*, *supra* note 117, at 757.

²⁰³ *Id.*

²⁰⁴ UNIFORM ACT § 4(b)(5); RESTATEMENT § 482(2)(f).

²⁰⁵ *Losing*, *supra* note 117, at 756.

²⁰⁶ RESTATEMENT § 482 cmt. h (citing *Biggelaar v. Wagner*, 978 F. Supp. 848 (N.D. Ind. 1997)).

²⁰⁷ RESTATEMENT § 481 reporter's n. 3 (citing *Dart v. Balaam*, 953 S.W.2d 478 (Tex. App. 1997)).

²⁰⁸ *Fitzpatrick*, *supra* note 92, at 737.

foreign default judgment in an enforcement action, the issue is preserved, and will be controlled by the law of the enforcement forum.²⁰⁹

Because U.S. public policy generally favors the freedom to contract and forum selection clauses, this recognition defense offers the best prospects for prospectively planning e-commerce transactions that will avoid foreign courts.²¹⁰ Therefore, the following section will discuss forum selection clauses in greater detail.

3.5 Forum Selection Clauses

Whenever practicable, Vendors should conclude their e-commerce transactions with a contract containing a forum selection clause in favor of the jurisdiction(s) of the Vendor's choosing. This is particularly true for Vendors with assets located in the U.S. because U.S. courts so readily recognize foreign money judgments. A properly drafted forum selection clause will enable a Vendor to avoid cross-border e-commerce liability risk with respect to those jurisdictions that are not exclusively specified in the forum selection clause. This is so because the Vendor can suffer a default judgment in the foreign claim forum, and then block its recognition in the U.S. enforcement forum pursuant to the personal jurisdiction and prior agreement recognition defenses discussed above.

Since the U.S. Supreme Court's decision in *The Bremen v. Zapata Offshore Co.*, federal courts recognize a prima facie presumption in favor of exclusive jurisdiction agreements.²¹¹ A party attempting to disregard a forum selection clause bears a heavy burden to demonstrate that the clause should not be enforced.²¹² The Bremen Court established a reasonableness test to determine the enforceability of a forum clause: The presumption of validity can be overcome by establishing: (1) fraud, (2) overreaching, (3) the lack of neutrality of the chosen forum, (4) strong public policy considerations of the forum where suit is brought that require disregard for the parties' contractual choice, (5) statutory restrictions on jurisdiction agreements, (6) or serious inconvenience.²¹³

Although *The Bremen* dealt with a maritime contract, the Bremen Court's strong presumption in favor of forum selection clauses was extended to garden variety contracts in *Sherk v. Alberto-Culver Co.*²¹⁴ The federal court presumption in favor of foreign selection clauses has grown stronger with time, such that "courts in recent years have rarely taken jurisdiction over cases in which a different forum was chosen by the parties, except in situations where the chosen forum had undergone a major revolution or comparable political change, casting doubt on the continuing existence of the forum intended and on the opportunity of a party

²⁰⁹ Of course, including a choice of law provision in the contract in favor of the law of the enforcement forum is the best way to insure that such law will be applied.

²¹⁰ RESTATEMENT § 482 cmt. h.

²¹¹ 407 U.S. 1 (1972).

²¹² *Id.* at 15.

²¹³ *Id.* at 15-19.

²¹⁴ 417 U.S. 506 (1974).

to secure a fair hearing.²¹⁵ Given the federal courts' strong presumption in favor of forum selection clauses, a business engaging in e-commerce should consider the desirability of selecting a federal forum.²¹⁶

Forum selection clauses that select state forums can be risky. This is so because unlike federal law, state law is not uniform concerning the validity of forum selection clauses, and four states will not recognize them. These states are (1) Alabama;²¹⁷ (2) Georgia;²¹⁸ (3) Iowa;²¹⁹; and (4) Texas.²²⁰ The law of many other states is unclear.²²¹ While it has been stated that most U.S. states generally follow The Bremen, it is critical to analyze the law of the selected forum to ensure that it will honor forum selection clauses.²²²

Up to this point, the discussion of forum selection clauses has focused on forum location. However, the lawyer structuring a Vendor's e-commerce transactions should also consider the aspects of choice of law and forum type.²²³ The opportunity to specify the law applicable to disputes arising out of the contract, and to choose arbitration, should not be overlooked. However, when making such determinations, the Vendor's lawyer should examine whether the forum selected will uphold the choice of law and forum type provisions.

Caution must be exercised in drafting a forum selection clause. A forum selection clause that does not specify that the selected forums are the "exclusive" forums for all disputes arising out of the contract will not preclude a dispute from being brought in a different forum.²²⁴ In addition, it is still uncertain in many U.S. jurisdictions whether a contract executed on-line is enforceable.²²⁵ A forum selection clause in an electronic contract that selects a jurisdiction that will not enforce electronic contracts is useless. In other words, a forum selection clause is only as strong as the law of the jurisdictions it selects. Therefore, the lawyer must examine the law of the jurisdictions selected in the forum selection clause concerning the issues discussed above.

²¹⁵ RESTATEMENT § 421 reporter's n. 6 (citing *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985)).

²¹⁶ This is not to imply that it is completely settled that federal courts will apply federal law to the issue of forum selection clause validity. See Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 69 (1992).

²¹⁷ See *Redwing Carriers, Inc. v. Foster*, 382 So.2d 554 (Ala.1980); *Keelean v. Central Bank of the South*, 544 So.2d 153 (Ala.1989).

²¹⁸ See *Cartridge Rental Network v. Video Entertainment, Inc.*, 209 S.E.2d 132 (Ga.App.1974).

²¹⁹ See *Davenport Mach. & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432 (Iowa 1982).

²²⁰ See *Dowling v. NADW Mktg., Inc.*, 578 S.W.2d 475 (Tex. Civ. App. 1979), *rev'd on other grounds*, 631 S.W.2d 726 (Tex. 1982).

²²¹ Solimine, *supra* note 216, at 63 n. 85.

²²² RESTATEMENT § 482 reporter's n. 5.

²²³ Dowling, Jr., *supra* note 23, at 465.

²²⁴ Carolyn B. Lamm, *Assertion of Jurisdiction Over Non-US Defendants*, 785 PLI/COMM 85, 127-28 (1999).

²²⁵ John F. Delaney and Robert Murphy, *The Law of the Internet: A Summary of US Internet Caselaw and Legal Developments*, 570 PLI/PAT 169, 379 (1998).

3.6 U.S. Enforcement Analysis Conclusion

U.S. courts will generally recognize and enforce foreign judgments, subject to the recognition and enforcement defenses discussed above. However, when conducting a U.S. Enforcement Analysis, the lawyer must carefully analyze the law of the U.S. jurisdiction(s) in which his Vendor's assets are located, because the applicable law varies widely from state to state. Recognition defenses vary widely in their success rates, but compared to the grounds for non-recognition offered by the Brussels Convention, they offer at least some hope to the U.S. Vendor. The recognition defenses of personal jurisdiction and prior agreement offer the best angles for prospectively structuring the U.S. Vendor's e-commerce transactions in order to block the potential enforcement of foreign judgments, thereby limiting the Vendors cross-border e-commerce liability risk.

While forum selection clauses offer the best strategy for reducing the risk of being torpedoed by a foreign judgment, their validity varies with the chosen forum. A forum selection clause that chooses a forum that will not enforce it is worthless. Therefore, it is imperative to examine the law of the chosen forums to determine whether they will uphold forum selection clauses concluded in an on-line contract. Those Vendors that have assets in a forum that will not uphold forum selection clauses, or on-line contracts, should not rely on a forum selection clause as its sole strategy for limiting cross-border e-commerce liability risk.

4 Conclusion

The purpose of this paper has been to describe a common-sense method whereby a lawyer can begin to audit the cross-border liability risks that a Vendor may encounter when conducting e-commerce, i.e., the Enforcement Analysis. In addition, this paper has hopefully given the reader some ideas on how to structure his Vendor's e-commerce transactions in a manner that reduces the Vendor's cross-border e-commerce liability risk, e.g., by adding forum selection clauses to contracts concluded on-line with foreign customers. In addition, the sample Enforcement Analyses have introduced the Swedish and American lawyer to the foreign jurisdictions whose judgments pose a threat to his Vendor's assets, and the legal issues relating to foreign judgment recognition and enforcement. Finally, Appendices A and B contain checklists that are designed to be helpful in conducting an Enforcement Analysis in Sweden and the U.S., respectively.

An interesting and potentially invaluable side effect of conducting an Enforcement Analysis is that jurisdictions can be identified that will not enforce foreign judgments of any type (hereinafter "offshore jurisdictions"). Locating assets in a suitable offshore jurisdiction provides the first step in a non-technical strategy of negating cross-border e-commerce liability. The next step would be to examine the corporate and tax law of a suitable offshore jurisdiction to determine whether it will legally support the Vendor's e-commerce activities. Of course, ownership of the Vendor's offshore entity is a tricky issue that requires expert handling (the inept handling of this issue proved harmful to World Interactive Gaming Corp. in the case of NY v. WIGC). Finally, the technological infrastructure and human resources of the offshore jurisdiction should be examined to determine whether they will support the Vendor's e-commerce activities.

An offshore jurisdiction that can do all of these things will negate the cross-border e-commerce liability risk for all Vendors located there. Moreover, such Vendors will be able to take advantage of the favorable tax environment of their offshore jurisdiction, thereby avoiding the Byzantine maze of international transactional taxation as it has been or will be applied to global e-commerce transactions. If national governments and international governmental organizations (e.g., the EU) attempt to regulate global e-commerce out of existence, or do so out of sheer incompetence, then this author believes that offshore e-commerce will be the wave of the future. Therefore, Vendors should keep the potential of offshore e-commerce in mind should their cross-border e-commerce liability risk become unmanageable.

APPENDIX A

SUGGESTED CHECKLIST FOR SAMPLE SWEDISH ENFORCEMENT ANALYSIS

- 1. Determine the Vendor's business entity type, the location of the Vendor's assets, and the Vendor's domicile. Determine whether the Vendor intends to act through agent(s). If the Vendor intends to act through agent(s), determine the identity and domicile of such agent(s), and the nature of the principal-agent relationship.**

Note: Asset location is the vital determination in an Enforcement Analysis. A foreign judgment creditor must enforce his foreign judgment against the judgment debtor's assets. If the judgment creditor cannot reach the judgment debtor's assets, his judgment is worthless, and the game is up.

You can assume that in order for the Vendor to lose assets to a judgment creditor, the judgment creditor will have to enforce his judgment against the Vendor's assets where they are located. This is so because an enforcement authority will not act without a valid enforcement order, and these orders can only be obtained from courts with jurisdiction to issue them. Almost invariably, such courts and enforcement authorities will be physically located somewhere near your Vendor's assets.

On a related tangent, note that agents pose special jurisdiction problems. For example, under the Brussels Convention, a member state's courts can obtain jurisdiction over a foreign principal based on the location of his agent within such member state's jurisdiction. *See* p. 13. Knowing whether or not the Vendor has agents, who they are, and where they are located is critical in determining the Vendor's exposure to foreign jurisdictions. In addition, the Vendor's domicile is a critical legal determination for companies with agencies, offices, branches, and/or subsidiaries located in a foreign country. *See* pp. 12-13.

- 2. Determine the subject matter and form(s) of e-commerce that the Vendor plans to conduct, and identify the Vendor's customers.**

Note: As briefly discussed above, e-commerce can consist of many different forms. *See* p. 1. The form of e-commerce conducted will determine the types of liabilities that can result therefrom. *Id.* International cases provide examples of the liabilities that have arisen in the past from the conduct of e-commerce, and will give the lawyer an idea of the types of liability issues that the Vendor will experience. *Id.* at n. 6-7.

Identifying the Vendor's customers is critical in determining whether the Vendor will face legal issues relating to consumers. Such legal issues include consumer protection regulation and jurisdiction (forum selection). *See* pp. 13-16. Consumers are highly protected animals in Europe, and poaching can get very expensive.

3. Determine the technical means that the Vendor will utilize in conducting e-commerce.

Note: E-commerce conducted exclusively on-line is most troublesome. This is so because of the technical difficulties arising in ascertaining the potential plaintiff's identity and physical location. *See* pp. 2-3. In addition, some jurisdictions may not recognize electronic contracts at all, or impose contract formation requirements that conflict with those of other jurisdictions. Other legal issues abound, such as the evidentiary value of electronic documents, electronic document encryption requirements, consumer protection regulations, content regulations, and the legal issues related to cross-border litigation arising out of cross-border transactions.

In light of the legal difficulties inherent in pure on-line e-commerce, the better course may be to advise the Vendor to incorporate some physical element (e.g., fax or snail-mail) into transactions with customers. This may provide the Vendor with the ability to ascertain a customer's identity and physical location, which in turn allows the Vendor to avoid transactions with customers residing in undesirable jurisdictions (e.g., jurisdictions with draconian consumer protection regulations, such as Germany).

4. Analyze the laws of the jurisdiction(s) in which the Vendor's assets are located.

Note: At this point, the lawyer will have identified the legal issues arising from the type of e-commerce and technical means utilized in conducting it. For example, if the Vendor with assets located in Sweden intends sell personal data on-line, the lawyer should realize that there are legal issues related to the use of personal data in Sweden. If the Vendor intends to exclusively utilize electronic documents (e.g., on-line contracts), the lawyer should determine whether electronic documents will be recognized in Sweden. It is critical to examine the laws of the jurisdiction(s) in which the Vendor's assets are located for the simple reason that the Vendor's judgment debtor gets to stay at home when collecting against the Vendor's assets.

5a. If the Vendor is able to limit the foreign jurisdiction(s) that he will contact through some technical means, determine the foreign jurisdictions that the Vendor will contact. Conduct an Enforcement Analysis limited to those foreign jurisdictions.

Note: The conduct of an Enforcement Analysis at this stage will identify the foreign jurisdictions whose judgments will not be recognized and enforced in Sweden. Such foreign jurisdiction's laws need not be analyzed, and you have saved your time and your Vendor's money. *See* 5b below for more Enforcement Analysis detail.

If the Vendor's e-commerce will contact Brussels and Lugano Convention jurisdictions, take special care to examine the consumer jurisdiction provisions in the Brussels and Lugano Conventions. *See* pp. 13-16.

If the Vendor's e-commerce will contact EU jurisdictions, examine the Amended Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, COM (1999) 427 final, (hereinafter "E-Commerce Directive"). When enacted by the EU, and thereafter incorporated into the laws of the EU member states, the E-Commerce Directive will provide the general legal framework of e-commerce regulation for all EU member states.

5b. If the Vendor is unable to limit the jurisdictions that he will contact through technical means, conduct an Enforcement Analysis.

Note: In this situation, assume that the Vendor will be sued in every foreign jurisdiction in the world, with such litigation resulting in a money judgment against the Vendor. Next assume that every judgment creditor will seek to enforce the money judgment against your Vendor's assets in Sweden. Remember that relief from this nightmare is provided by the general rule that the judgments of non-treaty states will not be recognized and enforced in Sweden. *See* pp. 5-6, 15-16. '

5b(1) Identify the foreign jurisdictions with which Sweden has concluded a treaty concerning the reciprocal recognition and enforcement of judgments.

Note: These foreign jurisdictions and the treaties are identified above. *See* pp. 7-8.

5b(2) Analyze the enforcement mechanism and jurisdictional provisions in the treaties.

Note: This paper has briefly touched on such provisions in the Brussels Convention above. *See* pp. 8-17. The Lugano Convention should also be analyzed for such provisions. In addition, examine the Nordic Conventions briefly mentioned above. *See* pp. 7-8.

5b(3) Examine whether the Vendor's e-commerce conduct can be structured such that the recognition and enforcement of foreign judgments can be blocked, or foreign jurisdiction can be avoided.

Note: As discussed above, the Brussels Convention does not provide promising grounds for defending against the recognition and enforcement of member state judgments in the courts of other member states. *See* pp. 8-13. In addition, the Brussels Convention's consumer provisions will void forum selection clauses as against consumers. *See* pp. 15-16. If the Vendor's customer base will consist of non-consumers, always utilize a forum selection clause in contracts in favor of the forum most favorable for your Vendor. A well-drafted forum selection clause is the best weapon against cross-border e-commerce liability risk.

Don't assume that a Swedish forum will be the most favorable forum for your Vendor. It's worth taking a look at the laws of other jurisdictions to determine whether they will be more favorable to your Vendor. Of course, the courts of such jurisdictions must be capable of exercising jurisdiction over the case.

6. Analyze jurisdiction issues for the foreign jurisdictions from which your Vendor's assets can be reached.

Note: Although this step is not part of an Enforcement Analysis, it is offered to suggest the next best step in determining the Vendor's e-commerce liability risk. Once it is determined that the money judgments of a foreign jurisdiction's courts will be enforced in the jurisdiction(s) in which the Vendor's assets are located, the next best step is to determine whether such foreign courts will assume jurisdiction over the Vendor based upon his e-commerce conduct. Jurisdiction is a critical issue because it may potentially provide legal grounds for avoiding the expense of litigating a case on the merits in a foreign jurisdiction. *See pp. 11-13*

APPENDIX B

SUGGESTED CHECKLIST FOR SAMPLE US ENFORCEMENT ANALYSIS

1. **Determine the Vendor's business entity type, the location of the Vendor's assets, and the Vendor's domicile. Determine whether the Vendor intends to act through agent(s). If the Vendor intends to act through agent(s), determine the identity and domicile of such agent(s), and the nature of the principal-agent relationship.**

Note: See note to Appendix A, item 1; the considerations are primarily the same.

2. **Determine the subject matter of the Vendor's e-commerce, and identify the Vendor's customers.**

Note: See note to Appendix A, item 2. The considerations are primarily the same, with the exception that US consumer protection law is generally not as draconian as it is in Europe. See p.p. 1-2 n. 7.

3. **Determine the technical means that the Vendor will utilize in conducting e-commerce.**

Note: See note to Appendix A, item 3; the considerations are primarily the same.

4. **Analyze the laws of the jurisdiction(s) in which the Vendor's assets are located.**

Note: The Full Faith and Credit Clause of the US Constitution secures the free recognition and enforcement of US sister state judgments. See p. 16. Moreover, the laws of every US jurisdiction are potentially applicable entities conducting e-commerce from any US jurisdiction, provided that personal jurisdiction over the entity conducting the e-commerce can be obtained. For more on personal jurisdiction in the US, see item 6 below. See also note to Appendix A, item 4.

- 5a. **If the Vendor is able to limit the foreign jurisdiction(s) that he will contact through some technical means, determine the foreign jurisdictions that the Vendor will contact. Conduct an Enforcement Analysis limited to those foreign jurisdictions.**

Note: The US is very receptive to foreign money judgments. See p. 17. This is a problem unique to the US. As a result, a business conducting e-commerce with assets located in the US should not plan on being able to thumb its nose at foreign customers and say "come and get me." Therefore, the lawyer should consider advising the Vendor not to conduct e-commerce with customers located in jurisdictions with laws unfavorable to the Vendor's e-commerce conduct. The alternative is to advise the Vendor to incorporate in every transaction a forum selection clause in favor of the jurisdiction of his choice. See pp. 27-28. The forum selection clause should select the forum location, forum type, and law most favorable to the Vendor.

5b. If the Vendor is unable to limit the jurisdictions that he will contact through technical means, conduct an Enforcement Analysis.

Note: In this situation, assume that the Vendor will be sued in every foreign jurisdiction in the world, with such litigation resulting in a money judgment against the Vendor. Next assume that every judgment creditor will seek to enforce the money judgment against your Vendor's assets in the US. Consider the recognition defenses discussed on pp. 20-27, and consider how the Vendor's e-commerce conduct can be structured to enhance the possibility of asserting the recognition defenses successfully.

The alternative is to advise the Vendor to incorporate in every transaction a forum selection clause in favor of the jurisdiction of his choice. *See* pp. 27-28. The forum selection clause should select the forum location, forum type, and law most favorable to the Vendor. Of course, this won't work if the Vendor is located in a US jurisdiction that does not enforce forum selection clauses. *See* p. 28.

6. Analyze personal jurisdiction issues for the foreign jurisdictions from which your Vendor's assets can be reached.

Note: Because US courts are so apt to recognize and enforce foreign money judgments (excluding foreign tax judgments), the Vendor's assets located in the US can be reached from just about every foreign jurisdiction. Therefore, the analysis of personal jurisdiction law is vital in determining a Vendor's e-commerce liability risk. This is so because personal jurisdiction is the best recognition defense absent an enforceable forum selection clause in favor of the Vendor. In addition, personal jurisdiction law will determine whether the law of every US jurisdiction is applicable to the Vendor's e-commerce conduct. The *Perkins Coie Internet Case Digest, Jurisdiction/Venue* (visited on Feb. 1, 2000) <<http://www.perkinscoie.com/resource/ecommm/netcase/Cases-15.htm>>, provides an excellent collection of US and international cases dealing with personal jurisdiction and venue. *See also* p. 2 n. 8, p. 23 n. 171.

Literature References

- Beaumont, Paul R., *European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, in *Current Developments: European Community Law*, 39 Int'l & Comp. L. Q. 700 (Karl Newmann ed., 1990).
- Benno, Joachim, *The "Anonymisation" of the Transaction and its Impact on Legal Problems: A Theory as to Why the Use of ICT Engenders Legal Problems*, The I.T. Law Observatory Report No. 6/98, 1998.
- Berglund, Mikael, *Enforcement of Foreign Judgments, Sweden* (Louis Garb & Julian Lew eds., 1994 & Supp. 1998).
- Black's Law Dictionary (6th ed. 1990).
- Brand, Ronald A., *Enforcement of Judgments in the United States and Europe*, 13 J.L. & Com. 193 (1994).
- Burk, Dan L., *Jurisdiction in a World Without Borders*, 1 Va. J. L. & Tech. 3 (1997).
- Candeli, Dale M., *Personal Jurisdiction and the Internet*, 564 PLI/Pat 79 (1999).
- Commission Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, at Explanatory Memorandum, COM (99) 348 final.
- Computergram International, *Porn Case Sets Net Jurisdiction Precedent*, Computergram International, Jul. 2, 1999.
- Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J. (L 299) 32, reprinted in 29 I.L.M. 1417 [Brussels Convention].
- Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (L 319) 9, reprinted in I.L.M. 620 [Lugano Convention].
- Crago, Patrick G., *Fundamental Rights on the Infobahn: Regulating the Delivery of Internet Related Services within the European Union*, 20 Hastings Int'l & Comp. L. Rev. 467 (1997).
- Delaney, John F., and Murphy, Robert, *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, 570 PLI/Pat 169 (1998).
- Dowling, Jr., Donald C., *Forum Shopping and Other Reflections on Litigation Involving U.S. and European Business*, 7 Pace Int'l L. Rev. 465 (1995).

Fitzpatrick, John, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 Conn. J. Int'l L. 695 (1993).

Gibson, William, *Neuromancer* (1984).

Hall, Allan, *U.S. Mail Order Business Fights Germany's Decision Banning Return Policy*, KRTBN Knight-Ridder Tribune Business News: London Evening Standard, Sep. 30, 1999.

Hilton, Anthony, *Business Day: Unity Vital In Battle Against Brussels' Bad Ideas*, London Evening Standard, Dec. 11, 1999.

IPLF Statement for the Public Hearing of the European Commission (visited Jan. 31, 2000) <<http://www.ilpf.org/ec/ec-hearings-stmt.html>>.

Johnson, David R., and Post, David, *Law and Borders- The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996).

Kavass, Igor I., *The Lugano and San Sebastian Conventions*, 18 Int'l J. Legal Info. 230 (1990).

Jenard, P., Report on the Convention of 27 Sept. 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1979 O.J. (C 59) 1.

Lamm, Carolyn B., *Assertion of Jurisdiction Over Non-US Defendants*, 785 PLI/Comm 85 (1999).

Langin, Daniel J., *The Economics of the Internet: Insurance and Risk Management, Advertising and Other Business Models, Valuation and Tax Issues*, 482 PLI/Pat 447 (1997).

Losing, Delvin J., *Comity in the Free Trade Zone*, 74 N.D. L. Rev. 737 (1998).

Lundblad, Cleas, *Enforcement of Foreign Judgments Worldwide* (Charles Platto & William G. Horton eds., 2nd ed. 1993).

Martinez, Juan Carlos, *Recognizing and Enforcing Foreign Nation Judgments: The United States and Europe Compared and Contrasted – A Call for Revised Legislation in Florida*, 4 J. Transnat'l L. & Pol'y 49 (1995).

Mitchener, Brandon, *Border Crossings: The Internet Makes it So Much Easier to Go Global; And So Much Easier to Violate Local Laws*, The Asian Wall Street Journal, Nov. 22, 1999.

Nackaerts, Nancy, *EU's Liikanen Plans E-Commerce Self-Regulation Guidelines*, Dow Jones International News, Nov. 30, 1999.

The Perkins Coie Internet Case Digest (visited 1/25/2000)
<<http://www.perkinscoie.com/resource/ecommm/netcase/index.htm>>.

Perritt, Jr., Henry H., *Jurisdiction in Cyberspace*, 41 Vill. L. Rev. 1 (1996).

Pittman, Jonathan H., *The Public Policy Exception to the Recognition of Foreign Judgments*, 22 Vand. J. Transnat'l L. 969 (1989).

Rättegångsbalken, Chapter 10 § 3.

Restatement (Third) Foreign Relations Law §§ 421, 481-82 (1998 and 1999 Supp.).

Reuters, *U.K.: Internet Pedophile Case Exposes Gaps in the Law*, Reuters Textline Computing, Jan. 4, 1996.

Russell, Kathryn A., *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus For United States Action*, 19 Syracuse J. Int'l L. & Com. 57 (1993).

Schlosser, Peter F., *Lectures on Civil Law Litigation Systems and American Cooperation with Those Systems*, 45 U. Kan. L. Rev. 9 (1996).

Shapiro, Sheldon R., 13 American Law Reports Fed. 208 (1972 and 1999 Supp.).

Solimine, Michael E., *Forum-Selection Clauses and the Privatization of Procedure*, 25 Cornell Int'l L.J. 51 (1992).

Sorkowitz, Alan J., *Enforcing Under the Uniform Foreign Money-Judgments Recognition Act*, 37 No. 5 Prac. Law. 57 (1991).

Stanbrook, Lionel, *Memorandum of the Advertising Information Group on the Proposals to Adopt the Brussels Convention and the Draft II Rome Convention as EU Regulations Pursuant to Article 65 of the Amsterdam Treaty*, Nov. 4, 1999.

Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 261 (1962).

United States Constitution (1779).

Washington Revised Code Annotated §§ 4.12.010, 4.16.020, and 6.17.020(1) (West 1999).

Washington Superior Court Rules 3-6 (West 1999).