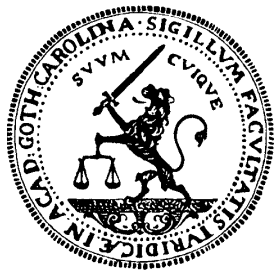

Faculty of Law
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Jurisdiction and Applicable Law on the Internet

Master thesis

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Contents

Summary

The Internet has revolutionised the global market place. Internet shopping is now accessible to an increasing numbers of people. In theory, this new form of media offers convenience, speed and choice to the consumer, but the question is whether it works in practice?

Business-to-consumer cross-border transactions, whether carried out electronically or otherwise, are subject to the existing framework on jurisdiction and applicable law. Jurisdiction, applicable law and recognition and enforcement of judgements are seen as matters of Private International Law. Private International Law is not a universal set of rules, but a part of each countries national legislation. Physical presence within a State is the traditional ground for jurisdiction and applicable law. The technology and nature of the Internet makes it close to impossible to recognise the location of a user. Therefore, consideration should be given to whether the existent framework for applicable law and jurisdiction should be modified, or applied differently, to ensure effective and transparent consumer protection in the context of the continued growth of electronic commerce.

The main body for establishing jurisdiction in Europe is the Brussels Convention on Jurisdiction, Recognition and Enforcement of Civil and Commercial Matters and for establishing applicable law the Rome Convention on Law Applicable to Contractual Obligations. The Commission has presented a proposal to amend the Brussels Convention and one of the reasons is the consideration of the new form of commerce. One of the most important changes, in the proposal, concerns the consumer legislation. The new criterion for applying the consumer protective legislation is proposed to be that the consumers counterpart has *directed his activities* towards the consumers country of residence. However, as can be seen from *e.g.*, U.S. case law, the criterion of *directed activities* is not easy to apply. The Commission does not clarify the difference between a passive

and an interactive Web site, and it is uncertain whether you can draw any clear principles from either the proposal or U.S. case law concerning *directed activities.*

The consumer protection was also one of the aims behind the Distance Selling Directive. The Directive contains some important rules for consumers such as the minimum clause establishing that Member States may have a higher level of consumer protection as long as they are compatible with the Directive, and the binding rule stating that a consumer may not lose the protection of the Directive by virtue of a choice of law clause stating that a non-member state's law is applicable to the contract. The impact of the Directive might be questionable since some of the most common items that consumers shop over the Internet are excluded from the application of the Directive.

Worth consideration is also whether consumers are really in need of protective legislation when using the Internet. Is it reasonable to expect merchants to be familiar with the laws of every jurisdiction where a consumer may reside? Is it possible to establish certain principles that apply in certain situations or is there a possibility that the technique itself may solve any of the problems that it has created?

The questions are many and the answers are few and meanwhile the Internet and electronic commerce is evolving in an enormous speed. A global dialogue is important to create a functional and predictable framework.

Preface

I would like to take the opportunity to thank Niklas Henriksson at Telia s.p.r.l. in Brussels who has given me a lot of ideas and support in writing this thesis. I would also like to give my gratitude to Ian Ross and Maria Welandson at Ross & Co Solicitors for letting me use their office and computers in the finishing stage and Lisa Almgren at Grundberg Mocatta for her help with, non the least, the language. Finally I would like to thank my supervisor, Patrik Lindskoug for accepting to be my supervisor even though I chose to write during the summer and helped me with the problems occurring when you are writing abroad.

London, October 2000

1 Introduction

1.1 Purpose

This thesis deals with issues of Private International Law, mainly questions concerning jurisdiction and applicable law, in cross-border contractual transactions arising in transaction promoted through the Internet. The primary aim is to evaluate if consumers are particularly sensitive when using electronic commerce.

The purpose of this thesis is to analyse whether consumers are in need of a protection by legislation when it comes to jurisdiction and applicable law in business-to-consumer transactions on the Internet. I also intend to analyse if the existing rules and principles of Private International Law are competent to deal with transactions over the Internet or whether there is a need for new regulation. In doing this I will examine the existing legislation and principles that are mainly used to establish jurisdiction and applicable law even in a more general sense. I will also give a brief description of the Internet and how it works to explain why this feature creates problems when it comes to jurisdiction and applicable law.

1.2 Limitations

Apart from the questions concerning jurisdiction and the applicable law where I have focused mainly at jurisdiction, the field of Private International Law deals with questions concerning the recognition and enforcement of foreign judgement. However, as these matters do not provide any specific problems in relations to purchases through the Internet, they are not dealt with in this thesis.

Another problem is that the scope of "consumer protection" is so broad, that I have chosen to limit this thesis to jurisdiction and applicable law. I will therefore not discuss other aspects of consumer protection, such as how to market on Web sites etc. I have used the term "consumer transaction" for business-to-consumer transactions, and will not discuss the pure "consumer-to-consumer" transactions.

It is not possible, within the frames of this thesis, to investigate every country's approach to jurisdiction and applicable law on the Internet. I have therefore limited my work to cover mainly the European Union and in certain aspects the United States. The reason for this is that the two main regulations that will be mentioned in this thesis are the Brussels Convention[1] and the Rome Convention[2]. They are the two instruments for establishing jurisdiction and applicable law in Europe[3] and works as guidance for a lot of other countries around the world. United States on the other hand have a lot of practice when it comes establishing jurisdiction in disputes which have arisen on the Internet. The main reason for using the U.S. cases in comparison is because of the criterion *directed activities*, which is used in the United States and now proposed to be a ground for jurisdiction even in Europe.

Finally, "Jurisdiction and applicable law on the Internet", is a very broad title and the problems that can arise in this area are many and divers. I have, as is an authors right, focused on a couple of them which I found particularly interesting. In doing so there is nothing that says that others would not have made a different choice.

[1] The Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, Sept. 30, 1968, 1978 O.J. (L 304) (Hereinafter referred to as the Brussels Convention).
[2] The Rome Convention on the Law Applicable to Contractual Obligations, 19 June 1980, O.J. (L 266). (Hereinafter referred to as the Rome Convention).
[3] The Brussels Convention, *e.g.*, was implemented in Sweden 1990.

1.3 Method

Since I have chosen to base this thesis on a comparison between existing rules and principles of Private International Law in Europe and in the United States, I will use both a descriptive and analytic method.

Private International Law comprises rules and principles some of which are codified and some which are developed through practise. I will therefore concentrate on both existing legislation and a number of cases, mainly from the U.S.

Although I have concentrated my work on rules specifically dealing with consumer transactions, more general rules and principles may sometimes apply to consumer transactions and will therefore also be discussed.

1.4 Research and Material

The Internet is evolving in an enormous speed and there is no saying in what possibilities there will be in a near future. There is a lot of research going on around the world trying to establish whether the existing legislation covers the new technology. The analysis, thus, because of the speed of the development, is quickly outdated. Among the various articles about the Internet and the suggestions that are made to solve the judicial problems some are diverse and sometimes very radical. It is therefore of great importance to read it with a critical mind and pay attention to the fact that there is no truth or fact about how these problems should be solved, at least not today.

The materials that I have used in this thesis are both regulations, such as mainly the Brussels and Lugano Conventions, the Rome Convention, the

proposed amendment to the Brussels Convention[4] and the Distance Selling Directive[5]. I have also taken guidance in a lot of cases, mainly from the U.S. and a lot of articles found on the Internet.

When it comes to consumer protection there is so much work going on around the world on amending existent legislation and codes of practise, and on establishing new guidelines governing electronic commerce that is would not be feasible to list all the initiatives here[6].

[4] To be found at; <http://www.europa.eu.int/geninfo/query>.
[5] The Distance Selling Directive 97/7 EC, OJ L 117, 7.5.1997.
[6] *See, e.g.*, The World Trade Organisation (WTO) has established a work programme on electronic commerce and published a study which identifies a range of issues that need to be tackled. The Organisation for Electronic Co-operation and Development (OECD) Committee on Consumer Policy has drafted guidelines with detailed input from consumer representatives. The Transatlantic Consumer Dialogue (TACD) formulated recommendations on electronic commerce at a conference on 23-24 April 1999 in Brussels. These recommendations cover the establishment of minimum standards for consumer protection, urge the development of an International Convention of Privacy Protection, special protection for children, minimum standards for disclosure of information by suppliers, intellectual property rights, and call for discussion of a proposal to create a permanent global institution for consumer protection. The European Union's Distance Selling Directive, which is still in the process of being transposed into national legislation across the EU, is also highly relevant.

2 Private International Law, the Consumer Concept and The Background and Nature of the Internet

2.1 Introduction

Today the technology provides the industry to reach consumers in a way that has never been done before. A result of this expanding new technology is that there is no legislation to cover the new area. If the rules of Private International Law cannot handle these situations in a desirable way, there is a clear risk of heavily undermining consumer legislation, which, in some countries is well developed. This chapter therefore aims at presenting "Private International Law", defining the word "consumer" and briefly presenting the background and technology behind the Internet since familiarity with the technology composing the Internet is essential to understanding some of the unique jurisdictional issues that the Internet creates.

2.2 Private International Law

Whenever a court is confronted with a case that contains a foreign element[7], there are two questions that needs to be determined before the court can solve the conflict. A common problem arises, *e.g.*, when the parties do not reside in the same country. The court must then determine whether it has jurisdiction to adjudicate upon the case. If the court does not have this competence the case shall be dismissed and the plaintiff is obliged to go to another court that has jurisdiction. On the other hand, if the court has jurisdiction, it must, secondly, determine what rules is shall apply to solve the conflict.[8] The final issue is to solve the question of recognition and enforcement of judgement[9].

[7] By "foreign element" is meant simply a contact with some system of law other than that of the court.
[8] Bogdan, Michael; *"Svensk Internationell Privat- och Processrätt"*, Stockholm 1999, pp 19-22. (Hereinafter referred to as Bogdan).
[9] Which as stated above will not be further discussed in this thesis.

The rules and principles a court will use to determine these questions constitute the field of law usually referred to as either Private International Law or the Conflict of Laws. Whilst the term "Conflict of Laws" is basically used by American writers, the term "Private International Law" is commonly used on the continent of Europe and the Scandinavian countries. Variations, of course, do exist and in England *e.g.*, both terms are used. Sometimes a distinction is made between Procedural Private International Law, concerning the competence of the court, and Private International Law, concerning the applicable law[10].

It is important to notice that, although the name may imply the opposite, the rules of Private International Law are not a universal set of rules, put out in an autonomous legal system with international application. On the contrary, the rules of Private International Law constitute a part of each State's national legal system[11]. Thus, in establishing its competence and the law to apply, the court will always use its "own law"[12]. Decisions on jurisdiction and which substantial law to apply, *lex causae*, on the case are not sufficient. There are questions, mainly of procedural nature that are always considered under the law of the deciding court, *lex fori*[13]. There are also laws of the state of the court that are considered so important that the court is bound to apply them in any case, even if a foreign law chosen by a choice of law rules governs the dispute, so called mandatory laws.[14] In the context of contractual disputes the foreign element, which generate the application to Private International Law, usually appears because a contract was made or to

[10] Benno, Joachim; *"Consumer Purchases through Telecommunications in Europe"*, Oslo 1993, pp 21-22.(Hereinafter referred to as Benno).
[11] Bogdan, p 19.
[12] To be noted is that in some cases a court, when establishing applicable law, use the "*doctrine of renvoi*". Basically the doctrine implies that if the court of a country finds the law of another country is shall also apply the private international law rules of that country, which in its turn may point out yet another legal system as applicable. Nevertheless, even if a court does apply the principle of *renvoi*, the competence to do so must derive from the national rules of private international law of the country to which the court adheres. *See*, for instance, Bogdan pp 53-55.
[13] Bogdan, pp 40-41.
[14] Bogdan, pp 70-73.

be performed in a foreign country, or because property was situated there, or because one of the parties is domiciled (or has his habitual residence) in a country other than that of the court. There may even be situations where both parties are domiciled in the same country as the court, but the fact that the contract was made in a foreign country necessitates the application of Private International Law. The reason is that, although the question of jurisdiction in this case may be reasonable clear, the court cannot be sure which law to apply to the contract. Is it the law of the country where the parties are domiciled or the local law where the contract was made; was the place of contracting just coincidental or did the parties choose it intentionally for the foreign law to be applicable? Even if the parties have made an express choice of the proper law to govern the contract, prorogation, the court must determine under which law the validity of such clause should be examined. It should, however, be kept in mind that the rules and principles of Private International Law are formal in character and do not in themselves provide a solution to the conflict in question. It rather point out whether the court has jurisdiction, and if it has, the set of rules with which the conflict is supposed to be solved. Further there are cases when the court are not willing to accept the result of *lex causae* and refers to *ordre public*.[15]

It is easy to see that using the Internet as a market place might cause a problem here. When using an electronic media, with the character of Internet it is basically impossible to establish the physical presence of a user. If you close a deal on a Web site, where do you, *e.g.*, say that the place of performance is? The server, or where the service provider is located?

To be noted is that in most countries Private International Law has not been regulated to a large extent. Efforts to harmonise rules of Private International Law have been made in the European Union through the

[15] This means that it would be against national public policy, social or ethical values to apply certain regulations of a foreign law.

Brussels and Lugano Conventions concerning jurisdiction and through the Rome Convention concerning applicable law. There are also non-regulated areas which have been filled up by analogy and unwritten principles.

2.3 The Consumer Concept

The term "consumer" is by origin an economic concept and covers private individuals as well as professionals in purchasing activities,[16] although in the judicial context the term has generally been given a more narrow definition. Here the consumer is commonly defined as a *private person who acquires goods mainly for his own use*[17] and not for resale or use in business. This restriction in definition compared to the economic concept is due to the aim of consumer legislation. This aim is basically to protect certain weaker parties in contractual relationships. Accordingly, in most European legislation a consumer contract is a contract where one of the parties is acting for a purpose which can be regarded as being outside his trade or profession, whilst the counter-party is acting within his trade or profession.

The development of consumer legislation in the 1960th and 1970th should, among other things, be seen as a result of increased purchasing power of consumers in combination with market expansion for goods and services. *E.g.*, extensive advertising which exploits various methods of governing the preferences of consumers. The difficulties of consumers in getting an overall view of the goods and services and the risk of hazardous products. The widespread use by sellers of unilaterally framed contract conditions which consumers are in reality unable to influence, and further more, the real

[16] Bernitz, Ulf: *"Consumer protection: aims, methods, and trends in Swedish consumer law"* in *Scandinavian Studies in Law* (1976), pp 13-36, p 21.(Hereinafter referred to as Bernitz).
[17] Bernitz pp 21-22.

difficulties that face consumers in asserting their rights in connection with complaints.[18]

The use of the Internet has further expanded the market for goods and services which in some ways may be seen as strengthening the consumer position. The risk of sale pressure decreases when the consumer has a broad choice. On the other hand may important contract terms be hidden several clicks beneath an offer which can give devastating results by an unfortunate click with the mouse.

Of great importance in the European perspective are the efforts taken within the EC on the protection of the consumer interests. [19]

2.4 The Background and Nature of the Internet

2.4.1 The Background

The term Internet[20] is used to describe a world-wide group of connected networks that allow the public to access information and services. The Internet began in 1969 as a network of four computers located in the U.S. The U.S. Department of Defence funded the initial work through an entity known as the Advanced Research Projects Agency or ARPA. The ARPA Network, or the ARPANET, was designed to be a decentralised system with the ability to re-route communications in the event of an attack on an individual section of the network.

In the 1980s, the National Science Foundation, the scientific and technical agency of the federal government, expanded ARPANET to connect to

[18] Benno, pp 14-15.
[19] *See e.g.*, the Distance selling Directive, which will be discussed further ín chapter 3.
[20] Draft Report: "*Transnational Issues in Cyberspace; A Project on the Law Relating to Jurisdiction"*.

computers around the world. The Internet, which included e-mail, exhibited slow but steady until 1994, when the World Wide Web (the Web) was introduced. The uses of the Web, once limited to military and educational endeavours, expanded to business and residential use of stands as the future of commerce by introducing, among other things, a more user-friendly "click and drag" approach to the navigator of the Internet.

2.4.2 The Nature of the Internet

Because concepts of jurisdiction are principally based on notions of physical presence within a jurisdiction, it is important to make sure that the nature of the Internet is not forgotten when dealing with personal jurisdiction issues. Among the facts that describes the nature of the Internet and thereby describe the difficulties in using traditional concepts of geographically based jurisdiction are these;

The Internet is local computer systems hooked to national and international high-capacity systems, a "network of networks".[21] Each link in this "network" is connected together by a variety of connections; microwave transmission, fiber optic cable, twisted-pair copper wire or other communications media. The computers then communicate by employing machine-language conventions known as IP, or Internet Protocol.[22] You could say that it is these protocols that define the network, those machines that talk to each other using Internet protocol *are* the Internet.[23] The Internet operates by taking data, breaking it up into separate parts called packets, and sending the packets along available routes to a destination computer.[24]

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[21] Burk, Dan; *"Jurisdiction in a World Without Borders"*, 1 Va. J.L. & Tech. 3 (Spring 1997) <http://vjolt.student.virginia.edu/graphics/voll/voll_art3.html> (Visited April 11, 2000), pp 9-10. p 2. (Hereinafter referred to as Burk).

[22] Internet Assigned Number Authority (IANA), together with The Internet Corporation for Assigned Names and Numbers (ICANN) are responsible for the IP numbers and addresses. For more information, *see e.g.*, <http://www.icann.org> and <http://www.iana.org/index2.html>.

[23] Burk, p. 2.

[24] Global Internet Project; *"How the Internet works"*(<http://www.gip.org/gip7.htm>) (Visited July 12, 2000).

These packets can and do travel very different routes on their way to destination. There is therefore no control of the packet routing and "no central authority to govern Internet usage, no one to ask permission to join network and no one to complain to when things go wrong"[25].

One of the reasons that make the rules for online commerce likely to be different then those for business interactions in real space steams from the Internet's telepresence features. So insensitive is the network to geography that it is frequently impossible to determine the physical location of a resource or user. Such information is unimportant to the network's function or the purposes of its creators. In real space a business can usually locate the person or entity with whom it is interacting which rends to facilitate identification of partners and validation of transaction. This process is far more difficult in cyberspace, when the parties to the transaction may be adjoining rooms of half the world away, and the network offers no way to tell the difference.

Although Internet has "addresses", these locate the machine on the network and not the real space. It is therefore nearly impossible to block or screen Internet resources. Some Internet addresses include geographic designators such as, *e.g.*, "se" located in Sweden. In those cases an Internet host may instruct his machine to refuse access requests originating from a "se" domain if he wishes to deny access to Swedish users.[26]

Of importance is also that the Internet often uses "caching"[27], the process of copying information to servers so that future trips to a Web site will be less time consuming. In order to better manage packet traffic, Internet servers are often designed to store partial or complete duplicates of materials from frequently accessed sites. This process is essential to the speed of the

[25] Burk, p 3.
[26] The problem is that most Internet addresses do not contain a geographic clues, the so called national top domain names contra the generic top domain names, and all the same all Internet addresses are portable because they are not physically addresses.

operation of the Web. The Internet user will never know the difference between the cached materials and the original. The materials displayed on the user's machine will appear to come from the original source, whether they are actually transmitted from there or from a cache.[28] This makes it impossible for the user to know whether he is accessing materials at a particular site or if he is accessing copies of those materials located on a different machine in another part of the world. The result is that it is not only impossible to know the location of the user, it is also equally impossible to be certain of the Internet resource that you might use.

The Internet is rapidly evolving. Initially, and still most predominantly, the Internet is a passive system, one in which no communications takes place unless it is initiated by a user. But, services are now being developed in which Internet service providers can "push" data to users, similar to services that deliver "junk" mail. Thus, although the traditional jurisdictional question about "purposeful availment"[29] may still exist relating to defendant's "passive" Web site, there are fewer questions relating to purposeful availment in a push system.

Important to think about is also that the technology sometimes may "solve its own problems". For example, some software programs can be programmed so that they identify the country, laws, standards, whatever the consumer may want so that he is given a choice whether or not he wants to proceed while shopping on the Internet.

Worth taking into consideration is also that the Internet has many positive aspects, such as global reach, low barriers to entry and more choice for the consumer.

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[27] Burk, p. 5.
[28] Litigation In Cyberspace: *Jurisdiction And Choice of Law A United States Perspective*, pp 7-8. (<http://www.abanet.org/buslaw/cyber/initiatives/usjuris.html>)(Visited July 6, 2000).
[29] Purposeful availment is further discussed under American Law in chapter 3.

2.5 Conclusion

Jurisdiction, applicable law and recognition and enforcement of judgements are all a part of Private International Law. Private International Law is not a universal set of rules but a part of each State's national legal system. The traditional ground for jurisdiction and applicable law is physical presence within a State, which with regard to the nature and technology of the Internet, is if not impossible to determine, very much more difficult. The consumers often gain protective legislation, this to protect the weaker party in a contractual relationship. For this purpose the consumer is defined *as "a private person who acquires goods mainly for his own use*".

When trying to use the rules of Private International Law on the Internet it is important to take into consideration, not only the problems with the old presumption of physical presence, but also that the consumer might have gained using the new technology. In terms of choice and availability for the consumer he has now got a stronger position and further it is possible to create programs where he gets aware of certain information about the trader before he concludes the transaction. At the same time one should be aware of the fact that important contract terms may be well hidden on a Web site.

This was just a brief conclusion of chapter two. For a conclusion of the thesis as a whole, see page 1. The problems that arise in consumer disputes over the Internet and how principles of Private International Law can be used on the Internet will further be discussed in the conclusions after chapter three and four. For more general and personal reflections see chapter 5.3.

3 Jurisdiction

3.1 Introduction

In every case with which a court is confronted, the first thing it must determine is whether it has jurisdiction to adjudicate. This competence of the court - the power and its limitations - derives from the internal procedural rules of the State where the court is situated. In this sense the competence may also be described as emanating from the State's power - as a sovereign - to govern over persons and property within the confines of its territory. Accordingly, an uncertainty concerning the competence of the court arises in situations where the defendant is resident outside this territory. Clearly, because of the nature of the Internet, this is a problem when establishing jurisdiction in this area.

In Europe a little case law concerning jurisdiction on the Internet has so far been established and the main body for establishing jurisdiction in Europe is therefore the Brussels Convention. In United States on the other hand, a lot of cases concerning jurisdiction in cyberspace have arisen with different solutions. This chapter aims at both describing the general principles of jurisdiction according to the Brussels Convention. The principles used in the United States will also be discussed, mainly from some of the case law that has been established. Of interest is also the Distance Selling Directive and the proposed amendment to the Brussels Convention, which therefore also will be discussed.

3.2 The Brussels Convention

The main non-national body for establishing jurisdiction in Europe is the Brussels Convention between the Member States of the EC. Although it does not form a part of EC law its development must be seen in the light of Article 220 of the Treaty of Rome (1957) establishing the European Economic Community. Article 220 prescribes, among other things, that the

Member States shall strive to simplify the formalities concerning mutual recognition and enforcement of judgements of the various courts of the Member States.[30]

3.2.1 Background and Scope of the Convention

This concern, already stated in 1957, lead to the working out of the Brussels Convention on Jurisdiction and Enforcement of Judgement in Civil and Commercial Matters (1968)[31]. However, as the title underlines, the Convention goes further than what prescribed in Article 220 of the Treaty of Rome. It does not deal just with the recognition of foreign judgements, but also sets out rules governing the competence of the court to adjudicate[32]. In this sense the Convention is sometimes referred to as a double convention, regulating both the competence of a court to hear and decide an action brought before it and the competence of a court to recognise and enforce a foreign judgement.

The original version of the Brussels Convention has been modified on certain points by the Conventions of 1978, 1982 and 1989[33]. Especially noteworthy in the context is the introduction of the consumer concept through the Convention 1978[34].

The Brussels Convention has proven to be a successful tool for its purposes and has therefore attracted other States that are not parties to the Convention, especially States for which the EC constitutes an important trading partner, such as the EFTA countries. Accordingly, as the economic ties between EC and EFTA grew closer during the 1980s, the strive to widen

[30] Pålsson, Lennart; *"Bryssel- och Luganokonventionerna"*, Stockholm 1995, p 17. (Hereinafter referred to as Pålsson).
[31] The Brussels Convention entered into force 1973.
[32] Pålsson, p 23-24.
[33] The Commission has put forward a proposal for amending the Brussels Convention which will be discussed further in chapter 3.2.4.
[34] The consumer concept was stated in the ECJ case*; Bertrand v. Ott*, 1978 ECR 1431 premiss 21.

the scope of the Brussels Convention to the EFTA countries, was a natural development which culminated in the working out of the Lugano Convention in 1988. [35]

The structure of the Brussels and Lugano Conventions are identical[36] and, except, for the final provisions, the numbering of the Articles in each Convention is parallel. Most of the rules are, furthermore, the same. The existing differences primarily relate to contracts of employment and exclusive jurisdiction concerning immovable property and tenancy proceedings, which falls outside the scope for this thesis. Thus, for the purposes of the following presentation reference will be made only to the Brussels Convention.

The scope of the Convention is not to be read out alone from Article 1, but must be seen in conjunction with the Preamble and Article 57. The Preamble state that the Convention is only concerned with the international jurisdiction of the Contracting States. Thus, they will not apply in disputes of purely domestic character. Furthermore, according to Article 57, the Convention will not affect the application of certain other Conventions on the same matter with which the Contracting States have entered into in the past, or will enter into in the future.

It follows from Article 1 that the Conventions shall apply to "civil and commercial matters" it follows from the express exclusion of matters, that the Convention is aimed at situations subject to private law as opposed to public law. However, according to the *LTU v. Eurocontrol* case[37], the key criterion is the nature of the "legal relationships between the parties to the action of the subject-matter of the action". Thus, the involvement of a public authority shall not, in and of itself, render the Convention inapplicable, but

[35] Pålsson, pp 19-21.
[36] While the Brussels Convention concerns jurisdiction matters within the EC, the Lugano regulates the relation between the EC and the EFTA countries.

rather situations where the dispute derives from the party's exercise of powers as a public authority.

Article 1, furthermore, excludes most matters concerning family law, bankruptcy, social security and arbitration. However, the intention is that these matters should only be excluded where they are the principle objects of the proceedings.

3.2.2 Bases for Jurisdiction

Title II of the Convention deals with the jurisdictional competence of the courts of the Contracting States.

The provisions laid down under Title II only apply in situations where the defendant is domiciled in a Contracting State. Accordingly, only in these cases is a Contracting State obliged to apply the rules of the Brussels Convention.[38] Thus, in situations where the defendant is not domiciled in a Contracting State, each Contracting State is free to apply its own jurisdictional rules,[39] including jurisdictional bases regarded as exorbitant, which otherwise are banned by the provisions laid down in Article 3. However, Article 4 states a derogation from the general rule in that the rules governing exclusive jurisdiction in Article 16 shall apply irrespectively of whether the defendant is domiciled in a Contracting State or not.

The general rule of the Conventions is that a defendant shall be sued in the Contracting State where he is domiciled[40]. The domicile criterion shall be determined according to Articles 52[41]-53[42].

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[37] Judgement of October 14, 1976, in Case 29/76, *LTU v. Eurocontrol*, (1976), ECR 1976; concerning the Brussels Convention.
[38] Article 3.
[39] Article 4.
[40] Article 2(1).
[41] According to Article 52(1), in order to determine whether a party is domiciled in the Contracting State whose court are seized for the matter, the court shall apply its internal law. However, if the court decides that the party is not domiciled in the forum State

Section 2 provides for special jurisdiction in some specific situations contained in Articles 5-6 (a). The bases set out in theses Articles may be applied alternatively with the general rule of the defendant's domicile. The plaintiff may, thus, choose either to sue the defendant in the Contracting State where he is domiciled *or* in a court pointed out by the alternative bases in Article 5-6 (a). For example, the plaintiff, in matters relating to a contract, may sue the defendant in courts for the place of performance, of the obligation in question.[43] Another example is where the dispute arise out of the operations of a branch, agency or other establishment, in which case the plaintiff may sue in the courts of the place in which the branch, agency or other establishment is situated.[44]

Section 3 and 4 provide for special jurisdiction in matters relating to insurance[45] and certain consumer contracts.[46] As the aim of these rules is to protect usually weaker parties, they do not serve as alternative bases for the benefit of the plaintiff, but rather as mandatory[47] rules that take precedence when applicable.

Among other things, the Articles governing insurance and certain consumer contracts hold that the action against a policy-holder, insured or beneficiary, and a consumer, must be brought in the State of that person's domicile. Furthermore, the Articles set down stringent restrictions on agreements on jurisdiction. In case of a conflict, the rules governing insurance contracts take precedence over rules governing consumer contracts.

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according to its law, then, in order to determine whether the party is domiciled in another Contracting State, the court must apply the law of the other Contracting State in question.

[42] Article 53(1) provides that in the context of companies, other legal persons and associations of natural or legal persons, their "seat" shall be treated as their domicile. In order to determine the seat, the court shall apply its rules of private international law.

[43] Article 5(1).

[44] Article 5(5).

[45] Article 7-12 (a).

[46] Article 13-15.

[47] A mandatory rule is defined as one that cannot be derogated from by contract.

For practical reasons Section 5 provides for exclusive jurisdiction in certain situations. The defendant shall in these cases be sued in the courts of a Contracting State to which the specific subject-matter of the conflict is regarded to have a specific close connection. The exclusive jurisdictional bases are mandatory and, thus, when applicable, take precedence over all the other bases provided for in the Convention.

Prorogation is also possible, which means that the parties can sometimes agree upon jurisdiction.[48] This is provided for in Section 6, which also sets out requirements for such an agreement to be valid.[49] Expressly prohibited are agreements that are contrary to the rules set out in Articles 12, 15 and 16, concerning insurance contracts, consumer contracts and exclusive jurisdiction. Article 18, finally, deals with the defendant's submission to the forum by appearing before the courts.

3.2.3 Consumer Contracts

Consumer contracts benefits special rules in the Brussels Convention. The consumer may, if certain conditions are fulfilled, bring proceedings towards his counterpart either where he is domiciled[50] or in the state where the consumer himself is domiciled.[51] The special requirement that has to be met for the consumer to be able to make this choice is stated in Article 13[52].

According to the first paragraph of Article 13 the contract must not only be classified as a consumer contract, but also be one of the three types listed in points 1-3. The first two types of contracts concern contracts for the sale of goods on instalments credit terms, point 1, and contracts for loans repayable by instalments, or for any other form of credit, made to finance the sale of

[48] Article 17(1).
[49] Article 17(3).
[50] According to the main rule in Article 2(1).
[51] The consumer himself may only be sued in the country where he is domiciled.
[52] These conditions respond to the conditions in the Rome Convention, *see*, chapter 4.

goods, point 2. These types of contracts are unlikely to occur in the context of the Internet and will therefore not be discussed further in this thesis[53].

However, the opposite goes for point 3, which does not refer to a specific type of contract, but rather to specific elements of the transaction. The second paragraph of Article 13 widens the scope of the general rule in Article 4[54]. It makes the rules governing consumer contracts applicable, not only to situations where the defendant *is* domiciled in a Contracting State, but also certain situations where the defendant is *not* domiciled, but had a certain branch, agency or establishment in a Contracting State. The condition is that the dispute arises out of the operations of this branch, agency or establishment. If it does, the defendant is deemed to be domiciled in that State. This rule should be compared with Article 5(5), which, in cases where the defendant *is* domiciled in a Contracting State, gives the consumer the alternative to sue in another Contracting State under the same conditions.

The intention of Article 13(1) point 3 is to cover contracts that have a sufficiently strong connection with the State where the consumer is domiciled. Most situations in the concept of purchases through the Internet, will be dependent on whether the contract satisfies the conditions under point 3 or not.

Point 3 puts up two conditions of which both must be satisfied for the rules to apply. First, (a) the conclusion of the contract must have been preceded by, in the State of the consumer's domicile, either a *specific invitation* addressed to him, or by *advertising*. Secondly, (b) the consumer must have taken the *steps necessary for the conclusion of the contract in the State of his domicile*. Both theses conditions raise problems to be considered in

[53] Even if they occur, none of them will cause any particular problems in relation to purchases through the Internet. This is because they refer to specific types of contracts which can be identified irrespective of how the transaction was supported and took place.
[54] According to Article 13(1), the rules of Section 4 shall apply without prejudice to the provisions in Articles 4 and 5(5).

relation to purchases through the Internet. Another problem is that in using the consumer protective rules you are assuming that the counterpart *knows* or *should have known* that he was dealing with a consumer. This does not cause any problems in an off-line environment, but when using the Internet problems arise.

The central element of this condition is the requirement that the specific invitation or advertising , must take place *in* the State of the consumers domicile. Thus, it is crucial for the application of point 3 to determine where these acts actually takes place in the context of electronic commerce on the Internet. These problems will be further discussed in chapter 5.2.

If the contract fulfils the conditions laid down in Article 13, the protective rules of Articles 14 and 15 will apply. Article 14 makes a distinction between situations where the consumer acts as plaintiff, and situations where the consumer acts as defendant. In situations where the consumer acts as a plaintiff he may choose to bring proceedings either in the courts of the State where his counterpart is domiciled or in the court of the Contracting State in which he himself is domiciled.[55] In situations where the consumer is acting as a defendant he may only be sued in the courts of the Contracting State in which he is domiciled.[56]

These provisions shall, however, not affect the right to bring a counter-claim in the court in which, in accordance with Articles 13-15, the original claim is pending.[57]

The rules in Article 14 may be departed from only by an agreement (prorogation of jurisdiction).[58] However, Article 15 lays down stringent conditions for such an agreement to be valid.

[55] Article 14(1). It should be kept in mind that parties which are not domiciled in a Contracting State may, nevertheless, be deemed to be domiciled in a Contracting State under the conditions laid down in Article 13(2).
[56] Article 14(2).

If the contract can not be classified as a consumer contract covered by the provisions in Section 4, or is not to be governed by the provisions in Articles 7-12 (matters relating to insurance) or Article 16 (exclusive jurisdiction), it shall be governed by the more general rules in Section1-2. If the Brussels Convention, or any other convention on the subject, is to be found not applicable, the transaction is to be governed by the national jurisdictional rules of the State where the proceedings are brought.

3.2.4 The Proposal for Amending the Brussels Convention

The Commission presented a proposal for amending the Brussels Convention in the beginning of 1998. Another proposal was presented in the summer of 1999 and the purpose of the proposals is to replace the Brussels Convention and update is with, among other things, considerations in the new forms of commerce. [59]

3.2.5 Consumer Contracts

The most radical of the proposed changes concerns consumer contracts and is to be found in Article 15 in the proposal. The Commission proposes that consumers should have a larger area for application of the consumer protective law, that the consumer should be able to sue his counterpart in the country of his own habitual residence. The existing requirement that the consumer must have taken "*necessary steps for concluding the contract in his own country*" is proposed to be removed. The criterion for applying the consumer protective rules, according to the Commissions proposal, is that the consumers counterpart has *directed his activities* towards the consumers county. The reason for this, according to the Commission, is to make clear that Article 15 applies to consumer contracts concluded via an interactive

[57] Article 14(3).
[58] Article 15.

Web site accessible in the state of the consumers residence. If the consumer only had knowledge of a service or possibility to by services or goods from a passive Web site, the regulation is not applicable, however. [60] These problems will be further discussed in chapter 5.2.

Further, the existing Article 14 is proposed to be amended with a statement that the consumer may only in the *place*, instead of the country, where he is domiciled. This is motivated by the Commission by the concern that the consumer should be able to sue his counterpart as close to his home as possible.

3.2.6 Other Proposed Changes

Another change is that the Brussels Convention is proposed to turn into a Regulation instead of a Convention. This change of legal structure means that it would become a part of Community law instead of being intergovernmental. This is motivated with that it will be easier to achieve the free movement of judgements in civil and commercial matters, if it do not depend on national legislation, but is put down in a mandatory Community legislation.[61]

Concerning legal persons the proposal contains a an autonomous definition stating that a company or other legal persons or associations of natural or legal persons is domiciled at the place where it has its statutory seat or central administration or principle place of business. [62]

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[59] Work has also been initiated to amend the Rome Convention, but since the proposal only regard the choice of law applicable to tort it will not be further discussed in this thesis.
[60] The Commission Explanatory Memorandum to its *Proposal for a Council Regulation on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters*, Article 2(1). To be found at (< http://www.europa.eu.int/geninfo/query>) (Visited 10 June, 2000).
[61] Preamble, Rec 6.
[62] According to Article 57. The reference to national courts, however, is still kept regarding validity of legal persons etc.

An autonomous definition of place of performance is also suggested in the proposal.[63] It states simply that the place of performance shall be that place where the goods, according to the contract were or should have been delivered. Concerning service, where the service were or should have been provided.

Finally, the existing Article 17 is proposed to declare that any communications by electronic means shall be equivalent to writing.

3.3 The Distance Selling Directive

The Distance Selling Directive[64] seeks to harmonise the legislation of the Member States of the EC. It was published 1997 and has to be implemented by the Member States within tree years.[65] The purpose with the Directive was the protection of consumers in Europe, taking into consideration the special risks that comes with trading on the Internet.

The Directive applies to most contracts concluded between consumers and vendors by means of "distance communications", which cover selling *e.g.* by fax telephone or Internet commerce.[66] To be noted, though, is that there are some important exemptions in Article 3. *E.g.* goods intended for everyday consumption such as food and beverages etc are not covered by the Directive.[67]

Consumers are ensured to get certain information by Article 4 and one of the most important principles for consumers is stated in Article 6, which provide the consumer with seven days right of withdraw from the contract. This right is without penalties and without having to give a reason.

[63] Article 5(1)b.
[64] Directive 97/7 EC, OJ L 117, 7.5.1997.
[65] The Distance Selling Directive was *e.g.* implemented in the Swedish legislation 1 June 2000.
[66] Article 2.

Of importance is also that the consumer cannot lose the protection of this Directive by virtue of choice of the law of a non-member state as applicable law to the contract if the latter has close connection with the territory of a Member State. This rule is of binding nature and Member States shall take the measures needed to make sure that it is followed.[68]

Another important rule in the Directive is the "minimum clause" which give the Member States a right to have a higher level of consumer protection than the Directive as long as they are compatible with Treaty.[69]

3.4 American Law

3.4.1 The Principles of Personal Jurisdiction

In the United States jurisdiction is regulated through the *Doctrine of Personal Jurisdiction*.[70] This is then divided into *general* and *specific* jurisdiction.

Initially, personal jurisdiction principally required the physical presence of a defendant within the boundaries of the jurisdiction. As economy became more and more dependant on interstate contacts, substitute tests were developed to permit the exercise of jurisdiction in light of the virtual presence of a defendant within a state. General jurisdiction involves an attempt to assert jurisdiction over a non-resident defendant when the defendant's contacts are unrelated to the dispute. An assertion of general jurisdiction over the individual is proper only if the defendant's contact with the forum is systematic and continuous enough that the defendant might anticipate defending any type of claim there. General jurisdiction will not

[67] Article 3(2).
[68] Article 12(2).
[69] Article 14.

be discussed further in this thesis since it is based on other factors, without relevance to Internet.

Specific jurisdiction is where the defendant has not had continuous and systematic contacts with the state sufficient to subject him to general jurisdiction. Through the so called, "long arm" statue, most states permit jurisdiction to be exercised to the full extent if it is according to "due process"[71].

The defendant must have such "minimum contact" with the forum that the assertion of jurisdiction by it does not offend "traditional notions of fair play and substantial justice".[72] Whether the contracts are sufficient to satisfy the constitutional standard depends upon the "quality and nature" of the defendant's acts in the forum "in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure".[73] To determine whether the defendant has minimum contact with the forum a three-part test is to be applied. (1) The non-resident defendant must *purposefully direct* his activities or act in a way that *purposefully avails* himself of the privilege if doing business in the forum and thereby invoking the benefits and protection of its laws. (2) The claim must be one which arises out of or relates to the defendant's forum-related activities. And finally (3), the exercise of jurisdiction must comport with fair play and substantial justice, *i.e*., be "reasonable"[74].[75]

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[70] Draft Report pp. 27-29.
[71] "Due process" requires only that in order to subject a defendant to judgement *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it, such as the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Due Process was established in *International Shoe Co. v. Washington*, 362 U.S. 310, 316 (1945). The concept is now established in the American Constitution in the Fourteenth Amendment. *International Shoe* also introduced the principle of "minimum contact".
[72] *Id*. At 316.
[73] *Id*. At 319.
[74] *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).
[75] Litigation in Cyberspace*: Jurisdiction And Choice of Law A United States Perspective*, p 4. (http://www.abanet.org/buslaw/cyber/initiatives/usjuris.html) (Visited June 6, 2000).

Cases arising in the context of electronic commerce for the most part do not fit within this paradigm. Defendants whose forum "presence" is manifested by a Web site accessible in the forum are the featured players in the new jurisdictional disputes. Still, prior case law has dealt with variations of the same problem and provides at least analogies to guide the emerging jurisprudence.

3.4.2 Examples of Internet Cases

In *CompuServe*[76], the Court held that a Texas shareware author who sold his shareware through CompuServe's registrations system was subject to jurisdiction in Ohio. CompuServe filed an action for declamatory judgement declaring that it had not infringed the defendant's trademarks. The defendant had never been to Ohio. He had, however, sold his software to 12 Ohio residents for less than $650. By doing so and by virtue of entering into the CompuServe registration agreement, which specified the use of Ohio law, the Sixth Circuit found that the defendant had purposefully availed himself of the privilege of doing business in Ohio. The Court stated:

> He subscribed to CompuServe, and then he entered into the Shareware Registration Agreement when he loaded his software onto the CompuServe system for other use and, perhaps, purchase. Once Patterson had done those two things, he was on notice that he made contracts, to be governed by Ohio law, with an Ohio-based company. Then, he repeatedly sent his computer software, via electronic links, to the CompuServe system. Moreover, he initiated the events that led to the filing of this suit by making demands of CompuServe via electronic and regular mail messages.
>
> The real question is whether these connections with Ohio are "substantial" enough that Patterson should reasonably have anticipated being haled into an Ohio court.
>
> The Court answered the question affirmative, even while acknowledging that while merely entering into a contract with Ohio and that his injection of his software product into the stream of commerce without more would probably have been insufficient grounds for jurisdiction.

[76] *CompuServe, Inc. v. Patterson*, 89 F3d. 1257 (6th Cir.1996).

In *Inset Systems, Inc. v. Instruction Set*[77] the court held that;

> Advertising via the Internet was solicitation of a sufficiently repetitive nature to satisfy the long-arm statue. As a result, the court held that advertising on the Internet, by itself, satisfied the "purposeful availment" test:
>
> In the present case, the defendant has directed its advertising activities via the Internet and its tollfree number toward, not only the state of Connecticut, but to all states. The Internet as well as toll free numbers are designed to communicate with people and their business in every state. Advertisements on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. The defendant has therefore, purposefully availed himself of the privilege of doing business in Connecticut.

Mauritz, Inc. v. CyberGold, Inc[78], the California operator of a Web site using the domain name "cybergold.com" was sued by a Missouri company for trademark infringement. The defendant's Web site provided information about the company and solicited Internet users who wanted to be on its mailing list to provide names and particular areas of interest. The defendant would then provide a personal electronic mailbox and forward advertisements to the user that corresponded with the selected interests. The court held;

> Because the Internet is an entirely new means of information exchange, analogies to cases involving the use of mail and telephone are less satisfactory in determining whether defendant has "purposefully availed" himself to this forum. Unlike the use of mail, the Internet, with its electronic mail, is a tremendously more efficient, quicker and vast means of reaching global audience. By simply setting up, and posting information at, a Web site in the form of an advertisement or solicitation, one has done everything necessary to reach the global Internet audience.

When concluding that it had jurisdiction over the non-resident, the court stated:

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[77] *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).
[78] *Mauritz, Inc. v. CyberGold, Inc*, 947 F Supp. 1328 (E.D. Mo. 1996).

> CyberGold's posting information about its new, up-coming service through a Web site seeks to develop a mailing list of Internet users, as such users are essential to the success of its service. Clearly, CyberGold has obtained the Web site for the purpose of, and in anticipation that, Internet users, searching the Internet for Web sites, will access CyberGold's Web site and eventually sign up on their mailing list. Although CyberGold characterises its activity as merely maintaining a "passive Web site", its intent is to reach all Internet users, regardless of geographic location. The defendants characterisation of its activities as passive is not completely accurate. By analogy, if a Missouri resident would mail a letter to CyberGold regarding its service, CyberGold would have the option as to whether to mail information to the Missouri resident and would have to take some active measures to respond to the mail. With CyberGold's Web site, CyberGold automatically and indiscriminately responds to each and every Internet user who access its Web site. Through this Web site, CyberGold has consciously decided to transmit advertising information to all Internet users, knowing that such information will be transmitted globally. Thus, CyberGold's contacts are of such quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favour the exercise of personal jurisdiction over the defendant.

In *Zippo Mfg. Co. v. Zippo Dot Com, Inc*.[79], the court held that it could exercise jurisdiction and a trademark infringement action based on the defendant's domain name. The defendant's Web site, which was used for an Internet news service, had the domain names "zippodot.com", "zippo-net", and "zippo-news.com". The defendant had 140,000 paying subscribers world-wide. About two percent of those subscribers lived in Pennsylvania. In addition, the defendant had entered into agreements with seven Internet access providers in Pennsylvania.

The court stated that it was "not being asked to determine whether a Web site alone constitute the purposeful availment of doing business in Pennsylvania". However, because it had 3, 000 subscribers in Pennsylvania, the court suggested that the Zippo defendant was doing business in Pennsylvania. The court suggested that a sliding scale be adopted for

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

purposes of determining whether or not jurisdiction was appropriate, and introducing the lexicon of an "interactive" Web site to jurisdictional jurisprudence.

> This sliding scale is consistent with well-developed personal jurisdictional principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.[80] At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.[81] The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and the commercial nature of the exchange of information that occurs on the Web site.[82]

The case *Panavision Intern., L.P. v. Toeppen*[83], involved a case against a "cyber squatter" who registered domain name names that were registered trademarks for other companies and then sought to sell the domain names to the trademark owner. In this case, the mark involved was "PANAVISION" owned by a California corporation. The defendant was an Illinois resident. The court initially noted that the "purposeful availment" test differs, depending on the nature of the claim. For example, it stated that in cases arising from contract disputes, merely contracting with a resident of the forum state was usually insufficient to confer specific jurisdiction. However, in the tort setting, specific jurisdiction could be predicated on: (1) intentional actions; (2) expressly aimed at the forum state; (3) causing harm, the brunt of which is likely to be suffered in the forum state. The court held;

> Toeppen allegedly registered Panavision's trademarks as domain names with the knowledge that the names belonged to Panavision and with the intent to interfere

[80] *Eg., CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).
[81] *Eg., Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).
[82] *Eg., Maritz, Inc. v. CyberGold, Inc*., 947 F. Supp. 1328 (E.D. M.o. 1996).
[83] *Panavision Intern., L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal.1996).

> with Panavision's business. Toeppen expressly aimed his conduct at California. Finally, Toeppen has harmed Panavision, the brunt of which Panavision has borne in California, which Toeppen knew would likely happen because Panavision's principal place of business and the heart of the theatrical motion picture and television camera and photographic equipment business are in California. Toeppen's actions are anything but "random, fortuitous, or attenuated."…He has not engaged in "untargeted negligence" but has "expressly aimed" his tortious activities at California…Jurisdiction is proper because Toeppen's out of state conduct was intended to, and did, result in harmful effects in California. Panavision should not now be forced to go to Illinois to litigate its claims.

In *Minnesota v. Granite Gate Resorts, Inc.*[84], the attorney general of Minnesota brought a consumer protection action against the owner and operator of a Nevada gambling establishment. The defendant had established "WagerNet" on the World Wide Web. The WagerNet site indicated that to use the betting service, one would have to establish an account and that WagerNet could submit any disputes regarding the account to the courts in the user's home state or the courts in the country of Belize. After filing the action, the defendant moved to dismiss based on lack of personal jurisdiction. Discovery indicated that 248 separate computers from within Minnesota had accessed the Web site within a two-week period. The court held that the defendants were subject to the jurisdiction of Minnesota courts:

> Here the defendants crossed Minnesota borders through the Internet advertisement and solicited business for their gaming venture. If out attorney general cannot hail them into court, then the citizens of Minnesota will not have an adequate Consumer Protection remedy.
>
> In order to reasonable anticipate being hailed into court under the Doctrine of Minimum Contacts, there must be some acts by which the defendant purposefully avails itself of the privileges of conducting activities within the forum state, thus involving the benefits and protection of its laws… In this case, the acts of WagerNet consisted of placing its ad on the Internet 24 hours, 7 days a week, 365 days a year.

[84] *Minnesota v. Granite Gate Resorts, Inc.*, 1996 W.L.767432 (D. Minn. 1996).

The case *Digital Equipment Copr. V. Alta Vista Technology, Inc.*[85], contains an interesting discussion of cyberspace jurisdiction. The court acknowledged that the absence of physical boundaries changed traditional jurisdictional thinking dramatically:

> The Internet has no territorial boundaries. As far as Internet is concerned, not only is there perhaps "no there there," the "there" is everywhere where there is Internet access. When business is transacted over a computer network via a Web site accessed by a computer in Massachusetts, it takes place as much in Massachusetts, literally or figuratively, as it does anywhere.

The court further noted that "to impose traditional territorial concepts on commercial uses of the Internet has dramatic implications, opening the Web user up to inconsistent regulations throughout fifty states, indeed, throughout the globe. It also raises the possibility of dramatically chilling "the use of the Internet".

In Digital, however, the court did not find that the ultimate disposition would bring a non-resident defendant into court solely by virtue of operation of a Web site, nor did it believe its decision would have a chilling effect on the Internet. The case involved a trademark dispute on a search engine and a terminated license to use the mark. Of importance to the court was the fact that while there was no venue clause, the license agreement did call for the application of Massachusetts law. While the license may not have been enough by itself to permit the exercise of jurisdiction, the use of the contact to engage in business with others in Massachusetts and the resulting confusion in Massachusetts was sufficient.

The international aspect was considered in *Playboy Enterprises, Inc., v. Chuckleberry Pub., Inc.*[86]. Here the court held that a United States

[85] *Digital Equipment Copr. V. Alta Vista Technology, Inc.*, 1997 WL 136437 (D. Mass. 1997).
[86] *Playboy Enterprises, Inc., v. Chuckleberry Pub., Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996).

injunction entered 15 years earlier prohibiting the sale or distribution of a magazine within the United States that was using the mark "Playmen" also covered sale and distribution by way of the Internet. The injunction that Playboy had obtained against the publication enjoined distribution in the United States and several other countries but not in Italy. Thus, the defendant could publish Playmen in Italy, the court held that;

> The defendant has actively solicited United States customers to its Internet site, and in doing so has distributed its products within the United States. When a potential subscriber faxes the required form the defendant, he receives back via e-mail a password and a user name. By this process, the defendant distributes its product within the United States.

The court held that the defendants could continue to maintain the World Wide Web site, but prohibited the defendants from accepting any subscriptions from customers in the United States. There was no discussion relating to personal jurisdiction because the United States court retained jurisdiction over the defendant for the purpose of enforcing the injunction. The court held that the defendant's distribution of images through its intentional contact with the United States, as well as by its invitation to users to download the pictorial images stored on its server in Italy, amounted to distribution in the United States.

In *Bensusan Restaurant Corp., v. King*[87], the court came to the conclusion that there was no personal jurisdiction. The plaintiff owner of the famous Blue Note Jazz Club in New York's Greenwich Village owned the federal registered mark "Blue Note". The defendant King operated a small club in Columbia, Missouri, also called "Blue Note". The trademark infringement action arose from King's creation of a Web site, located on a server in Missouri, that contained a logo similar to that of the plaintiff. The site contained information about the Missouri club, a schedule of events and information on ordering tickets by telephone. Although the site was accessible world-wide, tickets could be ordered only by telephone and

[87] *Bensusan Restaurant Corp., v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).

picked up in person at the Blue Note bow office in Missouri. In addition, the first page of the defendants Web site originally contained a disclaimer: "The Blue Note's Cyberspot should not be confused with one of the world's finest jazzclubs, Blue Note, located in the heart of New York's Greenwich Village. If you should find yourself in the big apple, give them a visit." The site also contained a link to a web site promoting the plaintiff's Blue Note. After objection by the plaintiff, the defendant removed the second and third sentence of the disclaimer and the link.

The court found that there was neither intentional targeting nor a substantial impact on the plaintiff. In addition to the specific disclaimer, 99 percent of the defendants patronage was by local residents of Columbia, Missouri, and the remaining percent were out -of-state customers who had some prior connection with the area.

Jurisdictional issues arising from consumer protection disputes are most likely to arise in the "transactional" area- marketing, advertising and online transaction- where bargaining power disparities originate from contractual relations. Consumer protection laws of individual states in the United States, modelled of the Federal Trade Commission Act[88], have been interpreted to apply on the Internet. For example, in *People v. Lipsitz*[89], an in-state seller of magazine subscriptions over the Internet, violated consumer protection laws of New York, by falsifying statements in emails and by failing to deliver promised magazines and refunds. He was subject to personal jurisdiction in New York due to contacts and business solicitations in the state. The court concluded that, "traditional standards have proved to be sufficient to resolve all civil Internet jurisdictional issues to date".

3.4.3 Developed Principles

[88] 15 U.S.C. §5.
[89] *People v. Lipsitz*, 663 N.Y.S. 2d 468 (Sup. Ct. N.Y. Co., 1997).

When reading these cases its clear that the concept of *directed activities* is not easy to apply on the Internet. The cases are a bit inconsistent and it is important in every case to evaluate the circumstances of each case before drawing a conclusion. There are, though, some principles that can be seen in the discusses cases, such as *e.g.*, a passive Web site that only make information available does not fulfil the minimum contact requirement. Personal jurisdiction on that ground is therefore not possible. If you instead have an interactive Web site, where the parties can exchange information you have to examine the level of activity to determine whether there are ground for specific jurisdiction. The criterion of purposeful availment is the tricky question here. The only clear case of personal jurisdiction seems to be where the defendant clearly does business over the Internet by entering contract with the counterpart. If the business that is being conducted is not enough the circumstances must be evaluated under the specific jurisdiction test.

3.5 Conclusion

The main body to establishing jurisdiction in Europe is the Brussels Convention. The general rule according to the Convention is that a defendant shall be sued in the country where he is domiciled. Alternative principles for jurisdiction are also provided by the Convention. Concerning consumer contracts the Convention requires certain conditions to be fulfilled for the protective legislation to be applicable. The contract must have been proceeded by a *specific invitation* directed to the consumer in his country of residence, or by *previous advertising*. Further, the consumer must have taken *all the necessary steps to conclude the contract in that country*. The consumer benefits the advantage to sue his counterpart where he is domiciled if these conditions are fulfilled.

Problems arises when using these rules on contracts concluded over the Internet. How do you decide the place of performance? Is the consumer's

domicile, the country where the service provider is seated or maybe where the server is seated? To think about is also that the relevant obligation has to be determined, which can be difficult since a contract normally consists of several obligations.

Some people have stressed that a Web site might be seen as a branch or other establishment, which in that case could be a ground for jurisdiction.[90] This is reasonable if the Web site is registered under a national top domain, since it is then a cause of a choice to expose oneself to a country. If it, on the other hand, is a generic top domain it is not so easy to apply. Information is moved around to different servers in space, often of practical reasons and because of the character of the Internet. To think about is also that the material you use does not have to come from the original source, but can just as well be a cache.

The rule in the Brussels Convention that are deemed to cause most problems is Article 5.3. In matters relating to tort both the court in the State where the harm was done, and the State where it had it's effect have jurisdiction. One can just imagine trying to establish were an damaging activity has been committed on the Internet, and even more difficult, where it may have it's effect (probably everywhere).[91] These problems are all very interesting, but nonetheless outside of the frames of this thesis.

Theses requirements are more difficult to apply in the new media that the Internet creates. This was also one of the considerations in the Commissions proposal for amending the Brussels Convention. Concerning consumer contracts the proposal suggests to remove the criterion that the consumer must have taken *"all necessary steps for concluding the contract in his country of residence"*. When using the Internet, *e.g.*, answering an offer

[90] Bogdan, Michael; *"Kan en Internetsida utgöra ett driftställe vid bedömningen av svensk domsrätt och tillämplig lag?"* in SvJT 1998: 10 pp 825-836.
[91] These problems are all very interesting, but nonetheless outside of the frames of this thesis.

received in one's country of residence, abroad, this criterion would lead to that you are deprived the protective legislation in your country. This seems to be a bit to restrictive in the world of Information Technology. The proposed removal of the criterion must be seen as a good attempt to adjust the existing rules of Private International Law to cover the new media and the removal in fact do widen the scope for the protective consumer legislation. The Commission instead proposes that the criteria for using the protective consumer legislation should be that the counterpart has *directed his activities* towards the consumers home country. This is to make clear that the consumer rules is applicable when a consumer concludes a contract via an interactive Web site but not if it is a passive Web site.

As to the other proposed changes of the Brussels Convention *e.g.*, the suggestions to have an autonomous definition of both *place of performance* and the *seat* of a legal person, it is an attempt to harmonise the national legislation of the Member States of the EC. This is always welcome, not only because it makes the application of the rules easier, but also because it is one of the goals of the European Union and increase legal certainty.

The Distance Selling Directive contains certain important rules for consumers, such as the minimum clause, the seven days right to withdraw and the binding rule stating that a consumer cannot lose the protection of the Directive by making an agreement that a non-member state's law is applicable to the contract. Important to notice, though, is the exemption that goods intended for everyday consumption, such as food and beverages are excluded from the Directive. This means that the most common consumer contracts over the Internet are excluded, and makes you wonder what impact the Directive will have, if any, in consumer contracts. At the same time it is quite evident why food and beverages are excluded from the right to withdraw.

In doing a comparison between the principles used in the Unites States and Europe it is quite easy to see that the physical presence of a defendant within a states boundaries is the most general, common and certainly the oldest ground for jurisdiction used in the U.S as well as in Europe. Meanwhile Europe continues to have domicile as the general rule, the States have developed the system of "minimum contacts" to be able to assert jurisdiction over a non-resident defendant. Even though the Brussels Convention states additional grounds for jurisdiction such as *e.g.* place of performance, and the seat of a branch, agency or other establishment, the principles for establishing jurisdiction according "minimum contacts" seems more favourable to use when trading on the Internet. The three-part test that is applied is to determine minimum contacts is more reasonable in the world of Information Technology. That the non-resident defendant must *purposefully direct* his activities or act in a way that *purposefully avails* himself of the privilege if doing business in the forum and thereby invoking the benefits and protection of its laws, does clearly respond to what one might want to establish by using the criterion directed activities as a ground for jurisdiction.

The grounds of jurisdiction in the United States changed when they realised that as economy became more and more dependant on interstate contacts, they needed a substitute ground to permit the exercise of jurisdiction in light of the virtual presence of a defendant within a state. By the proposed change to the Brussels Convention one might see that the European Union is heading the same way, which might be a cause of the rapidly evolving Internet.

It is further possible to see from the U.S case law that the criterion of directed activities is not easy to apply and the judgements are inconsistent. The principle that a passive Web site is not enough for personal jurisdiction while an interactive Web site it can be, depending on that level of activities, is the same as the Commission put forward in its proposal for application of

Article 15, but neither in the proposal nor in the U.S case law they make a clear difference.

4 Applicable law

4.1 Introduction

After a court has found itself competent to rule upon a case, the next step is to ascertain the set of rules to apply to the conflict. In doing this the court uses its own rules of Private International Law. The rules of applicable law, or the Choice of Law doctrine and jurisdiction sometimes interact and this chapter therefore aims at briefly describing the different rules that helps the court to decide which law is applicable on a case.

It is generally accepted in Europe that the principle of the parties' freedom of contract also comprises the freedom to determine law applicable to the contract.[92] On the other hand, there are discussion about whether this freedom should be absolute or restricted in some way.

In the case where there is no choice of law on behalf of the parties, different methods have developed to ascertain the applicable law. A distinction between two major approaches can be made. Whilst the first holst rigid and inflexible tests as the way to determine applicable law, the other method considers all elements in the transaction to localise the law with which the contract has its closest connection.

Moreover, situations exist when a court will not apply the rules of a foreign law even though this law has been found applicable. This might be due to illogical results, such as in the case of denial of the doctrine of renvoi or because the application of the foreign rule of the State of the court.

[92] Article 3 of the Rome Convention.

4.2 The Rome Convention

4.2.1 Background and Scope

Work on the Convention was initiated already in 1967 and should be seen, especially together with the Brussels Convention, as a part of the ongoing efforts within the EC to unify the rules of Private International Law. The Convention was signed in 1980 and came into force in 1991.

According to Article 1, the Convention shall apply to contractual obligations in any situations involving a choice between the laws of different countries. Article 2 goes on to state that any law specified by the Convention shall be applied whether or not it is the law of a Contracting State. Neither is there any requirement on the nationality or domicile of the parties to the contract. The Convention does not, however, apply to all contractual obligations. Exempted from its application are certain specific matters listed in Article 1(2), for example: matters relating to status and legal capacity of natural persons, wills, certain rights deriving from matrimonial and family relationships, negotiable instruments, arbitration and forum agreements, company law, agency, trusts etc.

4.2.2 General Principles

The general view in Europe is that the parties are free to agree upon the law applicable to the contract. However, some have stressed that this freedom should be limited in certain ways. One opinion stresses that in order to prevent the parties to escaping mandatory rules, they should only be entitled to choose a law with which the contract has a natural connection. Another opinion holds that the freedom to choose the applicable law should be strictly limited in situations where one of the parties is objectively

considered as the weaker party, such as in the context of consumer and employment contracts.

According to Article 3(1) the general principle is that the parties are free to agree upon the applicable law to the contract. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. The parties may choose any law and there is no requirement that the contract must have a close connection with the legal system of the law chosen. However, the Convention stipulates that if all other elements, apart from the choice of law, are connected with one country only, the parties' choice of applicable law shall no prejudice the application of rules of the law of that country. This is also referred to as mandatory rules.[93] The party autonomy is also restricted in the context of certain consumer contracts[94] and individual employment contracts[95].

If the choice of law is not expressly stated or it does not clearly follow from the contract that the parties have made a real choice, a court may not infer a choice upon the parties. In such a case the situation is to be governed by the supplementary rules in Article 4. This rule in itself does not constitute any problems when used on the Internet.

4.2.3 Closest Connection

Article 4 provides for the situation where the parties have not agreed upon the law applicable. In that case the law to govern the contract shall be the law with which the contract has its closest connection.[96] There is, however, a presumption that this is the country where the party who is to effect the performance which is *characteristic* of the contract, has, at the time for conclusion of the contract, his habitual residence, or, in the case of a

[93] Article 3(3).
[94] Article 5.
[95] Article 6.
[96] Article 4(1).

company, its central administration.[97] The characteristic performance of the contract is usually *not* the performance that takes place in form of money.

The closest connection method can cause problems when trading on the Internet, since difficulties finding the characteristic performance, is more complicated. Especially since a Web site is often just an intermediary for other companies offering different sorts of services or goods. If the characteristic performance can not be determined one has to use the general closest connection test, which certainly is even more bound to the physical world. As shown before the Internet is totally unbound with where its users are located at the moment. Further there is more places that can be relevant for the case, such as location of the operator, where the parties are domiciled, the location of the companies' office etc.

4.2.4 Consumer Contracts

Special rules are provided for certain consumer[98] contracts and individual employment contracts.[99] These rules are aimed at protecting weaker parties in contractual relations. The rules governing consumer contracts apply in the specific situations listed in Article 5(2). Where there is no choice of law, the applicable law is the law of the country where the consumer has its habitual residence.[100] If the contract contains a choice of law clause, it may not deprive the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he had his habitual residence.[101]

The special rules concerning consumer contracts apply under certain circumstances. The contract conclusion must have been preceded by a

[97] Article 4(2).
[98] Though it is not specifically mentioned, the special rule shall apply only when the counterpart of the consumer acts within his trade or profession. *See e.g.*, Giuliano, M and Lagarde, P*: Report on the Convention on the law applicable to contractual obligations*, OJ 1980 C 282, 1, Art 5(2). (Hereinafter referred to as Giuliano-Lagarde).
[99] Article 5-6.
[100] Article 5(3).
[101] Article 5(2).

specific invitation to the consumer, or by *previous advertising* in the country where he is domiciled and finally the consumer must have taken the *necessary steps* for concluding the contract in that country[102]. These problems will be further discussed in chapter 5.2.

4.2.5 Mandatory rules and Public Policy

As already mentioned, even if the parties to a contract, have made a choice of law applicable to the contract, the mandatory rules of another country may be applied. This is the case, according to Article 3(3) if all the elements relevant to the situation, apart from the choice of law, are connected with that country. Application of different mandatory rules, irrespective of the law otherwise applicable according to the Convention, is further specified in Article 7. This is the case, according to Article 7(2), with the mandatory rules of he forum - a common principle prior to the Convention.

A more controversial rule is adopted in Article 7(1). The Article states that effect may be given also to the mandatory rules of the law of another country, other than the law of a country otherwise pointed out by the rules of the Convention, with which the situation has a close connection. This is if and in so far as these rules, according to the law of the latter country, must be applied whatever the law applicable to the contract. This rule has been questioned and subject to criticism and Article 22 also provides a possibility for the Contracting States to make a reservation against its application. This, together with the fact that the rule laid down in Article 7(1) is not in itself mandatory, make it doubtful that the court will put any greater effort into examining other foreign laws than the law it has found applicable - makes it truly doubtful that this rule will be applied unless one of the parties make use of its possibilities and provides evidence of the foreign law in question.

Article 16 of the Convention provides for the situation where the application of a foreign rule would violate the public policy of the forum. The

[102] These requirements are the same as in the Brussels Convention.

requirement is that the application of the foreign rule is manifestly incompatible with the public policy of the forum.

4.3 Conclusion

The main principle according to the Rome Convention is that contracting parties are free to determine what law to apply to a contract. The closest connection method is used when no choice of law has been made. Concerning consumer contracts it is stated that consumers cannot be deprived of the consumer legislation of his country, as long as certain conditions are fulfilled. These conditions correspond to the conditions for consumer protection according to the Brussels Convention. If the conditions are fulfilled the consumer are entitled to sue his counterpart in his own country. The Internet causes certain problems when applying these conditions which is further discussed in chapter 5.2.

5 Problems arisen in Electronic Commerce Concerning Consumer Contracts and General Reflections

5.1 Introduction

After having discussed the more general rules and principles of determining jurisdiction and applicable law, this chapter aims at pointing out some of the difficulties when using these in electronic commerce with special regard taken to consumer contracts. Instead of parting jurisdiction and applicable law they will here be discussed together since they often interact. Concerning the consumer contracts the problems arisen when using the rules in the Brussels Convention and the Rome Convention are identical. I will also present some general and personal reflections about whether consumers are in need of protective legislation concerning jurisdiction and applicable law when trading on the Internet.

5.2 Consumer Contracts

One of the criteria to use the consumer regulation is that these are to be applied only when the counterpart *knows or has reason to believe* that he is dealing with a consumer. This criterion is difficult to use on the Internet. Depending on the products the service provider will generally know whether he is dealing with a consumer, however, there are situations where it is not so easy to foresee. Probably the best thing to do for a consumer not to be deprived the consumer protective rules is to make sure that his counterpart knows that he is dealing with a consumer. The trader on the other hand should be careful to get information about who he is dealing with. [103]

Another problem is *"previous advertising"* which is supposed to be have done in the country where the consumer resides. The "previous advertising"

[103] For further discussion *see, e.g.*, Benno pp 81-84 or Giuliano-Lagarde 5(2).

means that the seller must have taken steps to market his goods and services in the country of the consumer. This could be through advertising in radio, newspaper, mail orders etc.[104] Since it is not the location of where the advertisement was initiated that is important, but where it was perceived, it causes a problem when trading on the Internet. This makes the location of the server important since it holds the Web page, where a lot of these kind of advertisement can be found. Even though the trader often knows that a consumer in another country can easily access his Web page, it is not so easy for the consumer to understand that requesting a Web page from another country can make his lose that consumer protective rules of his own legislation.

Concerning the requirement of a *"special invitation"* a problem arises when a consumer has an address under a generic top domain[105]. The seller of the product can then argue that he could not possibly know the resident of a consumer. On the other hand one may say that at trader doing business via *e.g*., yahoo mail should take into consideration that the counterpart could be from a another country. [106] Further if the trader if it concerns a national top domain the case is clear and he can never argue that he did not know who he sent it to. A specific invitation sent to an electronic mailbox should be comparable with normal mail.

The final requirement is that the consumer shall have taken "*the necessary steps"* for concluding the contract is his country. Problems then arise when the consumer takes the necessary steps to conclude the contract his country of residence. Say *e.g*. that the consumer is on vacation using his mobile or Internet cafes to reply to an offer that he receives at home. But, as discussed above this requirement might get removed according to the proposed

[104] Giuliano-Lagarde, Art 5(4).
[105] In the case that the consumer has a national top domain an invitation via e-mail does not cause a problem. An e-mail invitation is not to be different from normal mail in those circumstances.
[106] Lindskoug, Patrik; *"Internationellt privat- och processrättsliga regler vid konsumenthandel på Internet"*, p 16.

amendment of the Brussels Convention and be replaced by the criterion of *directed activities*.

This proposed change is in my opinion in favour for the consumer. The criterion of that "necessary steps" must have been taken to conclude the contract may in many cases get the result that the consumer is deprived of the consumer protective rules of the Convention, and the removal certainly widens the scope of the consumer protective legislation.

Directed activities on the other hand, may be difficult to apply, but are nonetheless more fair. If it can be shown that a trader has directed his activities towards a consumers country of residence the protective rules are applicable. This might get as an effect that more traders on the Internet use disclaimer to be sure that they are not seen as have directed their activities a country they do not want to deal with. It is important to see that also this criterion arises questions. It is stated that in Article 15 that is going to cover an interactive Web site, but it does not say anything about whether or not the interactive Web site in it self must directed towards a consumers country. A passive Web site clearly, according to the proposal, falls outside the scope of the protective consumer legislation but isn't it possible for a passive Web site to have directed activities toward certain countries?

5.2 General Reflections

It is clear that traditional aspects over consumer protection are difficult to apply to the Internet. The primary reason is that most countries throughout the world has regimes to protect their consumers based on the old presumption that consumers will shop close to where they live and will not give up their sovereignty in applying these laws. The question it not only, though, how to apply rules and principles on the Internet. It is also whether consumers really are in need of protection when trading over the Internet.

The characteristics of the Internet, for example, lower barriers to entry, global reach etc, may reduce risks of unfairness in consumer contracts with vendors. The Internet increases the availability of consumer choice and has the potential to limit the sales pressures and that can create unfairness. All Internet users can find alternative sources of goods and services-indeed, the global nature of the medium could reduce risk that users are limited to a single source or a single form contract for a given good or service.

In some ways, however, the Internet may create a risk for consumers. For example, important contract terms can be buried multiple clicks beneath an offer. Further, it may be difficult to understand the implication of even clearly disclosed contract terms. Consumers might be held to contractual terms as a result of an accidental click of the mouse.

Important is also that technology can solve many of the problems that it causes. *E.g.*, artificial Bots - resident software programs - can be programmed by consumers to identify the country, laws, protections, standards and remedial options that the consumer seeks while shopping on the Internet. The consumer can thus be given an answer to whether he should proceed with a particular transaction. To extent that nations adopt uniform global protocol standards, such a system of electronic disclosures and decision-making can allow consumers to entry only into the contractual arrangements they want to in cyberspace.

An approach to addressing jurisdictional issues with regard to Internet transactions, offered by *e.g.*, consumer groups is that jurisdiction resides with the physical location of the consumer for all transactions. Finding the jurisdiction of the consumer to apply to a transaction could prove unworkable for e-businesses, requiring them to be familiar with and comply with the laws of every jurisdiction in which consumers who transact business with them may reside.

Moreover, even *if* it were possible to comply with all of the different laws, the cost of the compliance, especially for small companies, creates a barrier to entry. However, it is important to recognise when measuring the cost of compliance that the Internet creates inexpensive access to a world-wide customer base that is otherwise unimaginable.

A result of this could also be that traders instead limit offer their products over the Internet only to consumers in limited jurisdictions. Many companies are currently placing such restrictions on their transactions. This would limit the number of international transactions

Alternatively, some businesses are suggesting that the jurisdiction of the merchant should govern the transactions with consumers. This is the approach currently being set forth by the Global Business Dialogue on Electronic Commerce, the American Advertising Federation (the AAF) and the International Chamber of Commerce.[107] Under this approach, the jurisdiction of the merchant and its corresponding consumer protection laws should apply to all transactions. This approach is unlikely to garner support of consumer advocates or governments outside the United States. Additionally, the jurisdiction of the merchant approach would encourage "shopping" by merchants to locate in jurisdiction with legal frameworks favourable to their businesses.

Another possible basis for establishing jurisdiction in the area of consumer protection is that of "targeting". Under this concept, local authorities could assert jurisdiction over online consumer transaction involving merchants from another jurisdiction when the merchant has intentionally targeted the overall offer to consumers found in those jurisdictions. Some factors that could serve as indications of targeting are advertisements, sale of products and services, shipment, language, and monetary currency of the web site.

[107] The American Advertising Federation suggests this approach in its comments to the Federal Trade Commission on the Consumer Protection submitted for workshop in July 1999.

The targeting concept also is mentioned in OECD's Guidelines on Consumer Protection adopted in December 1999, which states that: "businesses should take into account the global nature of electronic commerce and, whether possible, should consider the various regulatory characteristics of the market they have targeted"[108]. This approach may prove difficult because of the difficulties in determining the characteristics that are associated with "targeting", unless nation states are willing to agree on acceptable standards for successful targeting in cyberspace. In addition, to the extent that "targeting" becomes an accepted means of establishing jurisdiction. Further the concept of targeting and the principle proposed to serve as indication of targeting, does seems, at least to the author, like the ones one want to use when looking at the criterion directed activities. In trying to establish workable principles for targeting one may therefore get a step closer to solving the problems arisen on the Internet.

Another potential solution, and the one most favourable to me, is not to apply either the law of the consumer or of the merchant, and instead to apply common principles of consumer protection law that would govern all transactions over the Internet regardless of the location of the consumer or the merchant. Such an approach would harmonise differing laws and establish a uniform law of consumer protection for Internet transactions. Harmonisation could occur through formal governmental mechanisms, *i.e.* treaties or bilateral agreements, or through less formal self-regulatory initiatives[109].

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[108] Recommendations of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce (December, 9, 1999). (Visited July 24, 2000) (< http://www.oecd.org/dsti/sti/it/consumer/prod/guidelines.htm>), at 4-5.

[109] One development towards harmonisation is seen in the OECD development of consumer protection guidelines for consumer protection on the Internet. These guidelines represent a first step toward finding harmonised law in the area of consumer protection. While these guidelines do not set out detailed standards for consumer protection, they do provide general guidance to member countries for the substantive consumer protections that they should provide their citizens. Included are these guidelines on advertisement and marketing practises, business disclosures, payment, dispute resolution and redress. As with other guidelines adopted by the OECD, countries will consider these guidelines as they develop and implement online consumer protection standards.

The Draft Hague Convention on Jurisdictional and Foreign Judgements in Civil and Commercial Matters[110] presents one possible forum for addressing jurisdictional issues. The drafting of this convention began prior to the proliferation of the Internet. The momentum for concluding the Convention appears to have slowed as representatives are considering its implications for e-commerce. Until recently, the Convention had and approach similar to that found in the Brussels Convention in which the law of the habitual residence of the consumer would apply. It is unclear what the outcome of the convention will be. The convention does not address substantive areas of consumer protection.

Codes that set forth the standards for transactions are being developed throughout the world. Various U.S. companies are actively discussing consumer protection and jurisdiction issues that arise in the electronic commerce context, in the hope of developing a code of conduct for online transactions between merchants and consumers.[111]

Further, a global dialogue between regulators, consumers and businesses is underway to create a coherent, functional and predictable framework for consumer protection.[112]

[110] Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Cival and Commercial Matters. Adopted by the Special Commission on 30 October, 1999. To be found at; (<http://www.hcch.net/e/conventions/draft36e.html>) (Visited June 6, 2000).
[111] BBBOnline is in the late stages of developing a code of conduct for businesses dealing with consumers, and on June 6, 2000, the Electronic Commerce and Consumer Protection Group proposed guidelines to protect consumers online. *See;* (<http://www.ecommercegroup.org/>). (Visited June 15, 2000).
[112] *See, e.g.*, the recent European Commission proposal for the establishment of an alternative dispute "cleainghouse" mechanism to deal with disputes arising from online purchases. Bureau for National Affairs, August 8, 2000. To be found at: (http://www.bna.com).

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