

An Analysis of Jurisdiction Rules for
Electronic Consumer Contracts :
United Kingdom, United States and Global
Perspectives

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ABSTRACT

The purpose of this thesis is to examine European and United States jurisdiction rules for consumer contracts where the consumer and the seller who contract with each other over the Internet via the World Wide Web are in different jurisdictions. The thesis will demonstrate that despite recent adaptation in both jurisdictions, existing rules are not conducive to consumer contracts entered into by means of electronic commerce (hereafter ‘electronic consumer contracts’). This thesis will argue that both United Kingdom and United States jurisdiction rules for such contracts should be further amended and harmonised to enable consumers to sue in their own jurisdiction when foreign businesses intended to target them via active or interactive web sites. The aim of international private law is premised on a “desire to do justice” to the parties involved in a cross-border dispute. Chapter One will demonstrate that this aim is particularly significant with regard to the role of international private law vis-à-vis the legal regulation of cross-border electronic consumer contract disputes. When a consumer contract is entered into between parties across borders by electronic means and a dispute arises between those parties, the effective application of a certain and predictable jurisdiction rule to determine which jurisdiction will hear the dispute is crucial. Subsequent chapters of this thesis will demonstrate that given the continued inconsistencies in existing jurisdiction rules in the United Kingdom and the United States, further adaptation and harmonisation of jurisdiction rules for electronic consumer contracts is now both necessary and desirable.

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CONTENTS

Copyright Declaration	ii
Abstract	iii
Acknowledgements	iv-v
Chapter One International Private Law, the Onset of Electronic Commerce and the Significance of Jurisdiction Rules for Electronic Consumer Contracts	 7
Chapter Two Jurisdiction Rules for Electronic Consumer Contracts in the Brussels 1 Regulation	 71
Chapter Three Developments in Rules of Personal Jurisdiction for Electronic Consumer Contracts in the United States	 169
Chapter Four The Continuing Significance of Jurisdiction Rules for Electronic Consumer Contracts	 273
Appendix (i) European Commission Statement on Article 15 of the Brussels 1 Regulation (ii) - (iv) Hague Conference's Draft Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters Articles 4 and 7, 1999 Draft Convention Article 7, 2001 Draft Convention	 299
Bibliography	307
Table of Cases	434
Table of Statutes, Conventions and Instruments	445

Chapter One

International Private Law, the Onset of Electronic Commerce and the Significance of Jurisdiction Rules for Electronic Consumer Contracts

1. INTRODUCTION

“Lawmakers truly concerned with enabling electronic commerce for the benefit of their citizens should be able to agree on an international minimum level of consumer protection that will alleviate the legal costs and risks plaguing online business worldwide.”¹

The purpose of this thesis is to examine European and United States jurisdiction rules for consumer contracts where the consumer and the seller who contract with each other over the Internet via the World Wide Web are in different jurisdictions. The thesis will demonstrate that despite recent adaptation, such rules are not conducive to consumer contracts entered into by means of electronic commerce (hereafter ‘electronic consumer contracts’). This thesis will argue that jurisdiction rules for such contracts should be further amended and harmonised to enable the consumer to sue in his own jurisdiction when a foreign business has targeted the consumer via an active or interactive web site. The aim of international private law is premised on a “desire to do justice”² to the parties involved in a cross-border dispute. The present chapter will

¹ Christopher T. Poggi, “Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation,” 2000 41 Va J Int’l L 224 at p.276. See also OECD, “Ministerial Declaration on Consumer Protection in the Context of Electronic Commerce,” Ottawa 7-9 October 1998, DSTI/CP(98)12/FINAL, “Consumer Protection in the Electronic Marketplace,” DSTI/CP98(13)/FINAL, 22 December 1998, and “Ministerial Declaration on Consumer Protection in the Context of Electronic Commerce,” Ottawa 7-9 October 1998, DSTI/CP(98)12/FINAL. Copyright OECD (and on file with author).

² A. E. Anton, *Private International Law*, 2nd ed, W. Green, Edinburgh, 1990 at p.1.

demonstrate that this aim is particularly significant with regard to the role of international private law vis-à-vis the legal regulation of cross-border electronic consumer contract disputes. When a consumer contract is entered into between parties across borders by electronic means and a dispute arises between those parties, the effective application of a certain and predictable jurisdiction rule to determine which jurisdiction will hear the dispute is crucial. This chapter will consider the following issues. Firstly, the importance of “conflicts justice” in jurisdiction rules for electronic consumer contracts will be explored. Secondly, the chapter will examine both the conceptual issues and practical concerns consumers and businesses located in different jurisdictions face when contracting electronically with each other. Thirdly, regard will be given to the operation of connecting factors in determining the jurisdiction of an electronic consumer contract. Fourthly, the benefit of harmonising international private law rules for electronic consumer contracts will be outlined. Subsequent chapters of this thesis will demonstrate that given the continued inconsistencies in existing jurisdiction rules in the United Kingdom and the United States, further adaptation and harmonisation of jurisdiction rules for electronic consumer contracts is now both necessary and desirable.

2. CONFLICTS JUSTICE IN JURISDICTION RULES FOR ELECTRONIC CONSUMER CONTRACTS

2.1 The Aim and Scope of International Private Law

“In a democracy, the law may be deemed to reflect the values and beliefs of the society that lives by it. This explains some of the differences between national laws...(O)ther differences can be traced to the geographical, demographic, economic or social conditions prevailing in each state.”³

International private law provides rules of jurisdiction, choice of law and recognition and enforcement of foreign judgments for cases where the existence of a foreign element is present in the facts of the dispute.⁴ The importance of choice of law rules to the regulation of cross-border disputes is undoubted.

According to Jaffey

“... the aim of the choice of law rule must be to select the appropriate governing law on criteria of justice and convenience for the parties.”⁵

The purpose of Article 5 of the Rome Convention on the Law Applicable to Contractual Obligations is to ensure certainty and predictability by applying the mandatory rules of the consumer’s habitual residence. The reason for this approach, as Jaffey confirms, is that the consumer has the “convenience in consulting [his] law,” rather than being entitled to rely on *whatever law* is more favourable to him (whether his domestic law or a foreign law).⁶ Whilst the present author acknowledges that the existing requirements of Article 5 must be

³ Th M. De Boer, “The Relation between Uniform Substantive Law and Private International Law,” in A.S Hartkamp, M.W. Hesselink, E.H. Hondius, C.E. Du Perron, J.B.M. Vranken, (eds), *Towards a European Civil Code*, Martinus Nijhoff Publishers / Kluwer Academic Publishers Group, 1994 at p.21.

⁴ Anton, note 2 supra; P.M. North and J.J. Fawcett, *Cheshire and North’s Private International Law*, 13th ed, Butterworths, London, 1999 at p.5.

⁵ A.E. Jaffey, *Topics in Choice of Law*, The British Institute of International and Comparative Law, London, 1996 at p.51 and 49. At p.540, words in brackets added.

⁶ Jaffey, *ibid* at p.540, words in brackets added.

adapted for consumer contracts conducted by electronic means,⁷ the particular focus of this thesis is the adaptation of jurisdiction rules for such contracts. Jurisdiction rules are a “manifestation of state sovereignty.”⁸ One of the purposes of jurisdiction rules is to determine whether the state or its courts can adjudicate over cases with a foreign element.⁹ Once the jurisdiction of a cross-border dispute has been determined, the *lex fori*’s choice of law rules will be applied. The effective operation of “judicial”¹⁰ or “juridical”¹¹ jurisdiction rules relies upon locating the parties or their activities in a particular jurisdiction.¹² Indeed, Byassee’s comments on the significance of physical presence in determining jurisdiction are particularly indicative.

“(T)he fundamental jurisdictional premise of the common law is physical presence, either actual or constructive within the jurisdiction attempting to assert authority over an individual. The body of the individual action may be located in the jurisdiction, the individual may perform an action that has physical effects within the jurisdiction or the individual boundaries of the jurisdiction itself are defined in physical geographical terms.”¹³

International private law rules are premised on connecting factors which are used to determine whether parties are physically present or their activities are

⁷ Lorna E. Gillies, “Electronic Contracts and Consumer Welfare: Modernisation of the Rome Convention on Contractual Obligations,” Proceedings of the ERA Trier Conference “E-commerce: Challenges for Private and Tax Law,” London, 13th May, 2004. The paper is on file with the author of this thesis.

⁸ D. W. Bowett, “Jurisdiction: Changing Patterns of Authority over Activities and Resources,” in R. St. J. MacDonald, and D. M. Johnston, *The Structure and Process of International Law*, Martinus Nijhoff Publishers, Dordrecht, 1986 at p.555 and R. St. J. MacDonald and D. M. Johnston, “International Legal Theory: New Frontiers of the Discipline,” in R. St. J. MacDonald and D. M. Johnston, *ibid* at p.1.

⁹ Michael Akehurst, “Jurisdiction in International Law,” (1972-73) 46 BYBIL 145 at 145.

¹⁰ Akehurst, *ibid*.

¹¹ Gillies, note 7 *supra*.

¹² Anton, note 2 *supra* at p.6; North and Fawcett, note 4 *supra*.

¹³ William S. Byassee, “Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community,” 1995 30 Wake Forrest L Rev, 197.

associated with certain jurisdictions in a material way. Domicile is an important connecting factor used to determine whether parties are physically located in a jurisdiction. For example, a party is domiciled in England if he can demonstrate both residence and an intention to remain in England.¹⁴ The place where the parties' commercial activities occur also connects the parties to a particular jurisdiction. Once the parties know where each other is geographically located, or where their activities have taken place, they will be able to determine which jurisdiction will hear their dispute. Connecting factors are a means of ensuring that the closest,¹⁵ and thereby the most appropriate, jurisdiction of a dispute can be foreseen¹⁶ or determined with a degree of certainty and predictability.¹⁷ Once the parties know or have anticipated what jurisdiction will hear any dispute between them, they will then be able to determine whether the *lex fori* will apply its own laws, the law that the parties have agreed in their contract or another law to govern the dispute. If international private law rules are to provide justice for the parties, determining the jurisdiction with the closest geographical connection or interest to a dispute with a foreign element is therefore crucially significant.¹⁸ Since international private law rules seek to

¹⁴ North and Fawcett, note 4 supra at p.137 *et seq.*

¹⁵ A.P.M.J. Vonken, "Balancing Processes in International Family Law, On the determination and weighing of interests in the conflicts of laws and the 'openness' of the choice of law system," in Th M. De Boer, *Forty Years On: The Evolution of Post War Private International Law in Europe, Symposium in Celebration of the 40th Anniversary of the Centre of Foreign Law and Private International Law*, University of Amsterdam, on 27 October 1989, Kluwer, Deventer, 1990 at p.171 and 173.

¹⁶ Peter Hay, Ole Lando, and Ronald D. Rotunda, "Conflict of Laws as a Technique for Legal Integration," in Mauro Capelletti, Monica Seccombe and Joseph Weiler (eds), *Integration Through Law*, Volume 1, Book 2, Walter de Gruyter, New York, 1986 at p.192.

¹⁷ Vonken, in De Boer (ed), note 15 supra at p.176.

¹⁸ Vonken in De Boer (ed), note 15 supra at p.174 and 180.

ensure justice to the parties in a cross border dispute, an important consideration is the meaning of justice in the context of this thesis.

2.2 The Pursuit of Conflicts Justice in International Private Law Rules

The two aspects of justice that must be considered in the context of this thesis are conflicts justice and material justice of consumer protection law. The Oxford Dictionary defines justice as, *inter alia*, “the administration of law in a fair and reasonable way.”¹⁹ The Collins Dictionary defines justice, *inter alia*, as “the moral principle that determines the fairness of actions.” It also defines justice more specifically as “the administration of law according to prescribed and accepted principles.”²⁰ In international private law cases the pursuit of conflicts justice is sought as the parties are from different jurisdictions with different expectations of their legal rights and remedies. International private law rules seek to provide certainty and predictability of result²¹ to facilitate “conflicts justice.”²² In particular, the aim of jurisdiction rules is two-fold. The first aim is to provide the parties with legal certainty by providing rules that direct their dispute to the most appropriate jurisdiction²³ whether a choice of forum has been agreed or not. Vonken describes this as the “*parties’ conflicts interests.*”²⁴ Each party may reasonably expect the dispute to be heard in the

¹⁹ *Compact Oxford Dictionary, Thesaurus and Wordpower Guide*, Oxford University Press, Oxford, 2002.

²⁰ *Collins Dictionary and Thesaurus*, Harper Collins, Glasgow, 1991.

²¹ Vonken, in De Boer (ed), note 15 supra at p.176.

²² Vonken *ibid* and Hay, Lando and Rotunda, in Capelletti *et al* (eds) note 16 supra at p.190 citing Kegel.

²³ Symeon C. Symeonides (ed), *Private International Law at the End of the 20th Century: Progress or Regress?*, Kluwer Law International, London, 2000 at p.44-45.

²⁴ Vonken, in De Boer (ed), note 15 supra at p.178.

jurisdiction where they are located, where their activities take place or the jurisdiction specified in the contract.²⁵ Furthermore each party may reasonably expect the substantive laws of those jurisdictions to apply.²⁶ The existence of choice of forum and law clauses in contracts are *prima facie* evidence that the parties have agreed what jurisdiction will hear any dispute and what law will apply to their contractual obligations. Nevertheless, international private law rules must provide clear rules to determine which jurisdiction will apply to the parties' dispute. Jurisdiction rules must also stipulate whether or not the parties can agree a choice of forum clause and what effect that choice has on the resolution of their dispute. Jurisdiction rules must determine whether a purported choice of forum clause, for example in a standard form or a click-wrap agreement²⁷ on a web site, enables one or either parties to override a particular jurisdiction rule.

The purpose of international private law rules is not therefore to determine the final outcome of a dispute between the parties. There is the potential for more than one jurisdiction and law to apply in a cross-border dispute. The second aim of international private law rules is therefore to facilitate predictability of result.²⁸ The content and scope of jurisdiction rules must be clear for jurisdiction to be established. By determining the place where a consumer can

²⁵ Vonken, in De Boer (ed), note 15 supra at p.178.

²⁶ Vonken, in De Boer (ed), note 15 supra at p.178.

²⁷ Click-wrap agreements are considered later in this Chapter.

²⁸ Vonken, in De Boer (ed), note 15 supra at p.176.

sue a business, both parties can foresee what procedural rules and substantive law will apply to their cross-border dispute.²⁹ As Jaffey affirms,

“... a party in an international dispute cannot complain of injustice if the justice given to him or her is that of his or her own country. The difficulty, of course, is that the parties will often belong to different countries, whose standards of justice differ.”³⁰

In addition the use of connecting factors, the “litigational convenience of [...] the parties [and their] witnesses”³¹ and the legal regulation of cross-border activities are significant “wider considerations”³² in establishing jurisdiction in the consumer’s domicile. In the context of this thesis, there are legal, practical and financial benefits to the consumer when a dispute is heard in his jurisdiction. As Vonken confirms

“(T)he parties cannot be expected to have a detailed knowledge of substantive law provisions. Rather it must be assumed that they have a general perception of the essential principles of justice embodied in ‘their’ law.”³³

A consumer is more likely to know the procedural or substantive consumer protection rules of his jurisdiction and will want to take advantage of the protection provided by those rules. Jurisdiction rules therefore provide the “means [for] observance of [consumer’s] rights.”³⁴ Establishing jurisdiction is therefore a crucial “first” step in determining where the dispute will be heard

²⁹ North and Fawcett, note 4 supra at p.5 and 32.

³⁰ Jaffey, note 5 supra at p.18.

³¹ James Fawcett, “The Interrelationships of Jurisdiction and Choice of Law in Private International Law,” (1991) 44 Current Legal Problems 39 at p.52.

³² Fawcett, *ibid.*

³³ Vonken, in De Boer (ed), note 15 supra at p.178.

³⁴ Thomas Janssens, “The Shearson judgment of the European Court of Justice: Problems raised by the “Europeanisation” and “Communitisation” of the Term “Consumer” in the Brussels Jurisdiction and Judgments Convention,” 1995 4 ERPL 605 at p.606. Words in brackets added for syntax.

and what law will be applied to that dispute. Whilst choice of law rules are important in resolving the parties' dispute, analysis of choice of law rules vis-à-vis electronic consumer contracts is out with the scope of this thesis. As Fawcett explains, whilst questions of choice of law often arise when jurisdiction is being determined,³⁵ the function of jurisdiction and choice of law rules is different³⁶ and therefore requires separate treatment.³⁷ As stated earlier, it is the purpose of jurisdiction rules to establish the most appropriate jurisdiction by means of connecting factors. This thesis will focus on how jurisdiction rules for consumer contracts must be adapted to ensure that the consumer's dispute can be heard in his jurisdiction when the parties contract by electronic means. As Halfmeier indicates, a jurisdiction rule requiring the consumer to sue a business in the business' jurisdiction would be costly to the consumer and have a prohibitive effect on consumer-led litigation.³⁸ Nevertheless, the notion of predictability is perhaps more important to a business in two respects. Firstly, a business should have regard to the legal implications of contracting with foreign consumers when planning, marketing and undertaking its cross-border activities towards consumers in foreign jurisdictions. In particular, the business ought to be able to foresee which jurisdiction could hear the dispute. Secondly, a business will want to know the legal and commercial effect of a rule that confers jurisdiction in the consumer's domicile. As Hay *et al* confirm,

³⁵ Fawcett, note 31 supra at p.50-51.

³⁶ Fawcett, *ibid* at p.40.

³⁷ Fawcett, *ibid*.

³⁸ Axel Halfmeier "Waving Goodbye to Conflicts of Laws? Recent Developments in European Union Consumer Law," in Charles E.F. Rickett, and Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge University Press, 2003 at p.386.

“(I)n international trade, predictability can be achieved only if the courts of all countries strive to establish conflicts-of-law rules which ensure uniform results.”³⁹

By ensuring that jurisdiction rules apply in a certain and predictable fashion, conflicts justice contributes significantly towards the just resolution of a cross-border dispute.

As stated earlier, jurisdiction rules seek to achieve conflicts justice by using connecting factors to establish that the parties are associated with a particular jurisdiction in a material way. The parties’ physical presence or activities in a particular jurisdiction are used as ‘connecting factors’ for this purpose.⁴⁰ One way in which jurisdiction rules facilitate conflicts justice is by application of the *actor sequitur forum rei* principle (hereafter the ‘*actor sequitur* principle’). The effect of this principle is that the defender/defendant is sued in the jurisdiction wherever he is domiciled.⁴¹ The *actor sequitur* principle ensures that if a party domiciled in one jurisdiction takes legal proceedings against a defender/defendant domiciled in another jurisdiction, it is appropriate that a dispute should be heard in the jurisdiction where the defender/defendant is situated. Otherwise, the defender/defendant may be prejudiced by not having

³⁹ Hay, Lando and Rotunda, in Capelletti *et al* (eds), note 16 supra at p.167.

⁴⁰ Hay, Lando and Rotunda, in Capelletti *et al* (eds), note 16 supra at p.192.

⁴¹ “Report by Mr. P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, 3 June 1971,” 1979 OJ C59/1 (hereafter “the Jenard Report”), p.13, 18 *et seq.* Ian F. Fletcher, *Conflict of Laws and European Community Law*, North Holland Publishing Company, Amsterdam, 1982. Michael Chissick and Alistair Kelman, *Electronic Commerce Law and Practice*, Sweet and Maxwell, 3rd ed, 2002 at p.116.

reasonable notice of the dispute and it may be more difficult for him⁴² to obtain legal representation and defend himself in another jurisdiction. For example, the interests of the defendant are enshrined in both rules of jurisdiction for civil and commercial matters in the EU Brussels 1 Regulation⁴³ and the US constitutional requirement for “minimum contacts” in asserting personal jurisdiction. As Zaphiriou confirms “(T)he dominant [US] constitutional concern as to the exercise of jurisdiction is fairness to the defendant.”⁴⁴ It matters not that the manner in which the defendant’s interests are considered in terms of “constitutional [...] or jurisprudential objectives.”⁴⁵ In both examples, the *actor sequitur* principle demonstrates a general approach in ensuring that “conflicts justice” is achieved when both parties to a dispute with a foreign element are domiciled in different jurisdictions.

However, in certain situations it is necessary that jurisdiction rules for particular disputes facilitate conflicts justice and depart from the *actor sequitur* principle. An example of the departure from the *actor sequitur* principle in the context of this thesis is jurisdiction rules which aim to protect a certain class or group of persons, such as consumers. For example section 3(1) of both the United Kingdom’s Unfair Terms in Consumer Contract Regulations 1999

⁴² For the purposes of brevity, references to the masculine throughout the thesis also imply reference the feminine gender.

⁴³ In the Brussels Convention and Brussels 1 Regulation respectively. Chissick and Kelman, note 41 supra at p.117, 118 *et seq.*

⁴⁴ George A. Zaphiriou, “Basis of the Conflict of Laws: Fairness and Effectiveness,” 1988 10 Geo Mason UL Rev 301 at p.303, 304 and 310. Word in square brackets added.

⁴⁵ Zaphiriou, *ibid* at p.305.

(incorporating the EU Directive on Unfair Terms in Consumer Contracts)⁴⁶ and the Consumer Protection (Distance Selling) Regulations 2000 (incorporating the EU Directive on the protection of consumers in relation to distance contracts)⁴⁷ define a consumer as a “natural person ... acting for purposes which are outside his trade, business or profession.”⁴⁸ Chissick and Kelman define a consumer as a party to a contract who is a “non-specialist.”⁴⁹ Stuyck confirms that

“(A) central issue in consumer law literature is the notion of the consumer [...] for many subjects of consumer law it doesn’t matter whether a broad or restrictive concept is chosen.”⁵⁰

However, it is important that the “concept of “consumer””⁵¹ is defined when establishing juridical protection for consumers vis-à-vis jurisdiction rules for cross-border consumer contracts. The consumer must know whether he will be provided with juridical protection from the courts of his domicile and the foreign business must be able to predict with certainty when the consumer can rely on such protection. As Stuyck continues,

“(T)he definition of consumer however does matter when rules govern contractual matters in order to protect the weaker “consuming” party against the supposedly more powerful (professional) “supplying” party.”⁵²

Therefore for the purposes of this thesis, a consumer contract is a contract

⁴⁶ 1993 OJ L95/29.

⁴⁷ 1997 OJ L144/16.

⁴⁸ Unfair Terms in Consumer Contracts Regulations 1999 SI/2083 incorporating the Unfair Terms in Consumer Contracts Directive 93/13/EC, 1993 OJ L95/29 and the Consumer Protection (Distance Selling) Regulations 2000 SI/2334 incorporating the Distance Selling Directive 97/7/EC 1997 OJ L144.

⁴⁹ Chissick and Kelman, note 41 *supra* at p.32.

⁵⁰ Jules Stuyck, “European Consumer Law After The Treaty of Amsterdam: Consumer Policy In Or Beyond The Internal Market?” (2000) 37 CMLR 367 at p.376.

⁵¹ Stuyck, *ibid.*

⁵² Stuyck, *ibid.*

between a legal person (the business) who sells goods or services in the course of a business, and a natural person (the consumer) who purchases those goods or services out with their trade or profession for their own private use or consumption. This thesis regards consumers as “natural persons, acting out with their trade or profession” in accordance with Article 5 of the Rome Convention on Contractual Obligations,⁵³ the United Kingdom Unfair Terms in Consumer Contract Regulations 1999,⁵⁴ the Organisation for Economic Cooperation and Development’s (OECD) Guidelines on Consumer Protection in Electronic Commerce 1999, Article 2(e) of the Directive on the Legal Aspects of Electronic Commerce,⁵⁵ and Article 15 of the Brussels 1 Regulation. If a consumer in one jurisdiction enters into a consumer contract with a foreign seller and a dispute arises between the parties, the question that must be determined is whether the consumer can sue the seller in his own jurisdiction. In order to provide certainty and predictability for consumers who enter into consumer contracts, subject to certain conditions,⁵⁶ the consumer can raise proceedings in his own jurisdiction. Firstly, it is necessary to establish that the parties are a consumer and a seller selling in the course of a business. Secondly, it is necessary to establish the jurisdictions in which those parties are domiciled or have a place of business respectively. Thirdly, and most importantly for the focus of this thesis, it is necessary to determine whether the business intended to

⁵³ Council Convention on the Law Applicable to Contractual Obligations,” Rome, 19th June 1980, (80/934/EEC), 1980 OJ L266 (hereafter referred to as the “Rome Convention”).

⁵⁴ Implementing Directive 93/13 EEC, 1993 OJ L95/29. Note 48 supra.

⁵⁵ OJ 2000 L178 (hereafter the ‘Electronic Commerce Directive’).

⁵⁶ Considered in Chapter Two and Three infra.

contract with consumers from particular jurisdictions as a result of their online marketing or commercial activities. The ability of consumers to contract with businesses via web sites has challenged the effective operation of jurisdiction rules for consumer contracts. Whilst the aim of international private law rules is to ensure that conflicts justice is achieved, the pursuit of material justice should also be facilitated. In the context of this thesis, the relationship between international private laws and substantive consumer protection laws must therefore be explored.

2.3 The Relationship Between Conflicts Justice and Material Justice of Consumer Protection Law

International private law rules are not concerned with implementing substantive consumer protection policies as such.⁵⁷ Instead, as the previous section indicated, the purpose of international private law is to provide rules that will determine the particular jurisdiction or law of a cross-border dispute in a fair and just manner. Jurisdiction rules seek to compliment “material justice” in substantive consumer protection laws. Symeonides has described material justice as “the same type and quality of justice as is pursued in fully domesticated situations.”⁵⁸ The starting point for substantive consumer

⁵⁷ Vaughan Black, “Consumer Protection in the Conflict of Laws: Canada, the United States and Europe,” in Iain Ramsay (ed), *Consumer Law in the Global Economy, National and International Dimensions*, Dartmouth, Aldershot, 1997 at p.195 and 199.

⁵⁸ Symeonides, note 23 supra at p.45.

protection law is to provide material justice to consumers in recognition of the inequality of bargaining power between the parties.⁵⁹ As a natural person, the consumer's bargaining position in a consumer contract is weaker in comparison to the economic position and negotiating power of a business.⁶⁰ The consumer is not expected to have the same specialist knowledge of the goods or services offered by the business and the legal, financial and operational implications of contracting in particular jurisdictions. The pursuit of material justice for consumers in substantive consumer protection law is illustrated during various stages of the consumer contract. At the contract formation stage, the consumer is protected by varied substantive consumer protection laws that may, *inter alia*, limit the seller's ability to impose unfair terms in contracts with consumers. For example in the United Kingdom, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 limit the business' ability to impose unfair contractual terms. The consumer often has recourse to specific legislative protection when purchasing or financing the purchase of goods or services from a business. For example in the EU, consumer protection is premised on, *inter alia*, *ius poenitentiae*.⁶¹ In the event of a contractual dispute between the consumer and the business, the consumer's jurisdiction

⁵⁹ Geraint Howells and Stephen Wetherill, *Consumer Protection and Law*, Ashgate, Aldershot, 2005 at p.6 and 8 ; European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, "Consumer Policy Strategy 2002-2006," COM 2002 (208) FINAL, 7 May 2002, p. 7-9, at

http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2002/com2002_0208en01.pdf.

⁶⁰ *Ibid.*

⁶¹ The other two aspects to EU consumer protection have been identified as 'information disclosure and juridical protection': Simone Van Der Hof, "European Conflict Rules Concerning International Online Consumer Contracts," 2003 12(2) *Information and Telecommunications*

provides the consumer with ‘access to justice’ in three main respects.⁶² Firstly, the consumer can seek additional remedies when there has been a breach of the contract of sale by the seller. For example under the Sale of Goods Act 1979, as amended by the Unfair Terms in Consumer Contracts Regulations 1999, the consumer can now⁶³ request the additional remedies from the seller. Secondly, simplified procedural or evidential rules may be available to the consumer for him to initiate court proceedings such as Small Claims Rules. Thirdly and most significantly for this thesis, international private law rules are (to an extent) influenced by and compliment substantive consumer protection laws⁶⁴ as they enable the consumer to bring proceedings against a business in his own jurisdiction. To illustrate the point, Mendes has described Articles 13-15 of the Brussels 1 Regulation as “an example of the vulnerable consumer being protected against those with actual or imaginary stronger bargaining power.”⁶⁵ A business has actual bargaining power since it can assess foreign markets in advance and determine in advance the conditions upon which it will contract with foreign consumers. The role of international private law in providing “juridical protection”⁶⁶ for consumers has been aptly described by Reimann as a

Law, 165 ; Giusella Finocchiaro, “European Law and Consumer Protection in the Information Age,” 2003 12(2) Information and Communication Technology Law, 111 ; Gillies, note 7 supra.

⁶² Gillies, note 7 supra.

⁶³ The additional remedies inserted into the 1979 Act for consumer cases came into force on 31st March 2003.

⁶⁴ Jaffey, note 5 supra.

⁶⁵ Errol P. Mendes, in “The Troublesome Workings of the Judgments Convention of the European Economic Community,” 1980 13 Vand J Transnat’l L at p.96.

⁶⁶ Van Der Hoff, note 61 supra and Gillies, note 7 supra.

“ [...] protective attitude [which] reflects the belief, more common in Europe than the United States, in the duty of the State to balance social or economic inequalities between its citizens or to make access to justice easier for those in particular need of it.”⁶⁷

Whilst a protectionist policy towards consumers is not as generally evident in the United States as it is amongst European Union member states, jurisdiction rules for consumer contracts in the US remain well-established, “entirely reasonable and in step with the emergence of consumer protection laws in Western Europe and in other industrialised nations.”⁶⁸ Specific jurisdiction rules for electronic consumer contracts are therefore crucial if the consumer is to continue to be afforded juridical protection against a foreign seller.⁶⁹ When the parties to a consumer contract are situated in different jurisdictions, each party may understandably prefer the courts of their own or another jurisdiction to hear any potential dispute between them. The parties are more likely to know and understand how the rules of jurisdiction apply in their own domicile compared to foreign jurisdictions. The consumer is in a contractually weaker position than the seller no matter whether the consumer contracts with a business by electronic means or not. However, the nature of the online contract renders the consumer’s already weaker contractual position more acute. The OECD recently reported that consumers continue to experience increased choice and

⁶⁷ Mathias Reimann “American Private Law and European Legal Unification – Can the United States be a Model?” (1996) 3 MJ 217 at p.82. Words in square brackets removed and modified respectively.

⁶⁸ Mendes, note 65 supra at p.96.

⁶⁹ Black, in Ramsay (ed), note 57 supra at p.195.

risk as a result of electronic commerce activity via the World Wide Web.⁷⁰ The present author has previously observed that consumers regard “data protection and security concerns, fraud, breach of privacy, jurisdiction and [applicable] law”⁷¹ as risks that they have perceived or experienced when contracting electronically over the World Wide Web (WWW). Black has argued that a consumer who contracts with a business online would be “psychologically vulnerable and exposed”⁷² if he had to raise proceedings in the foreign business’ jurisdiction. The increase of online activities over the WWW between consumers and businesses has necessitated a reconsideration of jurisdiction rules for consumer contracts. Puurunen has argued that a consumer would have “poor means of obtaining effective judicial relief”⁷³ if there was uncertainty about where he could sue a foreign business and by implication what laws would apply to his online activities. The consumer can obtain legal advice and representation to raise proceedings in his own jurisdiction far quicker and cheaper than if he had to do so in a foreign business’ jurisdiction.⁷⁴

⁷⁰ OECD, “Consumers in the Online Marketplace: The OECD Guidelines Three Years Later,” Report by the Committee on Consumer Policy on the Guidelines for Consumer Protection in the Context of Electronic Commerce,” DSTI/CP(2002)4/FINAL, 3 February 2003, available at <http://www.oecd.org>. Hereafter referred to as the ‘OECD 2003 Report.’ Copyright OECD. Lorna E. Gillies, “The Continuing Significance of Top-Down Legal Regulation of Risk in Business-to-Consumer Electronic Commerce,” in Iain Ramsay (ed), *Consumer Choice and Risk*, Kluwer/Sakkoulas, 2005 (*forthcoming* and on file with the author).

⁷¹ Gillies, *ibid.* Word in brackets added.

⁷² Black, in Ramsay (ed), note 57 *supra* at p.208.

⁷³ Tapio Puurunen, “The Legislative Jurisdiction of States Over Transactions in International Electronic Commerce,” 2000 XVIII John Marshall Journal of Computer and Information Law, 689 at p.696.

⁷⁴ Black, in Ramsay (ed), note 57 *supra* at p.207-8.

Peterson has remarked that “the goal of uniformity (or predictability) is inherent” in conflicts justice.⁷⁵ In recent years countries such as the United Kingdom and the United States have adapted their existing jurisdiction rules for consumer contracts to apply to consumer contracts conducted electronically. The following chapters of this thesis will demonstrate the similarities in how those jurisdiction rules have been adapted. However, it will also be demonstrated that the continued application of those jurisdiction rules will create diverging results. For example, the jurisdiction rule for consumer contracts amongst (the majority of) EU member states only permits the consumer to raise proceedings in his own jurisdiction if the defendant business is situated in or directs its commercial activities towards consumers in an EU Member State.⁷⁶ The courts in the United States can assert jurisdiction over a defendant who does business in a consumer’s jurisdiction. However, the US courts have regard to and usually enforce the jurisdiction agreement in a consumer contract when determining which jurisdiction should hear the parties’ dispute.⁷⁷ In order to ensure that the aims of certainty and predictability for conflicts justice are achieved,⁷⁸ this thesis will argue that the existing United Kingdom and United States jurisdiction rules for electronic consumer contracts must be amended further. In addition it will also be argued that regardless of a purported choice of forum, jurisdiction rules for electronic consumer contracts

⁷⁵ Courtland H. Peterson, “American Private International Law at the End of the 20th Century: Progress or Regress?” in Symeonides, note 23 supra at p.427.

⁷⁶ See Chapter Two infra.

⁷⁷ See Chapter Three infra on jurisdiction rules for consumer contracts in the United States.

⁷⁸ Symeonides, note 23 supra.

must provide a harmonised rule which enables the consumer to raise proceedings against the business in his own jurisdiction no matter where the parties are domiciled.

2.4 Synopsis of the Internet and Electronic Commerce

The Internet is a network of computers that enables users to communicate with each other⁷⁹ regardless of where those computers, or those that use them, are situated. The Internet was originally set up as a means of communication between defence experts in different countries through a system known as “ARAPNET.”⁸⁰ The reason for creating the link between these computers was that in the event of ordinary terrestrial telephone lines failing, the Internet still enabled different computers to communicate with each other.⁸¹ It did this by allowing the messages to be divided up electronically into pieces, also known as “packets.” These packets would be sent via different telephone lines at different times and to different computers in order to reach their end destination. It would be feasible to say that no two packets go the same way or “route.” The transfer of messages in this way was known as “packet switching”⁸² and still occurs

⁷⁹ Chissick and Kelman, note 41 supra at xxxix.

⁸⁰ See generally The Internet Society, “All About the Internet,” <http://www.isoc.org/internet/history/> and “A Brief History of the Internet,” <http://www.isoc.org/internet/history/brief.shtml>. Mahoney, “United States” in Dennis Campbell (ed), *Law of International Online Business*, Sweet and Maxwell, London, 1998, Chapter 17 at p.617 ; Tammy S. Trout-McIntyre, “Personal Jurisdiction and the Internet: Does the Shoe Fit?” 1997 Hamline L Rev 21, 223 at p.249 ; Ryan Yagura, “Does Cyberspace Expand the Boundaries of Personal Jurisdiction?” (1998) 38 IDEA 301 at p.302.

⁸¹ The Internet Society, *ibid*.

⁸² A. Michael Froomkin, “The Internet as a Source of Regulatory Arbitrage,” in Brian Kahin and Charles Nesson (eds), *Borders in Cyberspace Information Policy and the Global Information Infrastructure*, The Mit Press, Cambridge, Massachusetts, 1997 at p.129; Herbert Kronke, “Applicable Law in Torts and Contracts in Cyberspace,” in Katharina Boele-

today on the Internet. By 1984, the academic community also began to use a version of ARAPNET known as NSFNet⁸³ and in the last decade the Internet has opened out to businesses and consumers via the WWW.⁸⁴

The increasing use of the Internet led to the creation of other global computer networks of which the most well known and ‘commercial’ is the WWW. The WWW enables those with access to a computer with a suitable Internet browser,⁸⁵ telephone connection, modem and an account with an Internet Service Provider (or ‘ISP’) to view web pages of potentially millions of organisations around the globe, ranging from multi-national enterprises, through to small to medium sized businesses (or SME’s), academic institutions and governments. The ability of a consumer to communicate or contract with a seller online is dependant upon the level of activity of the seller’s web site. The activities of web sites have been frequently⁸⁶ distinguished as ‘active’, ‘passive’ or ‘interactive.’⁸⁷ A web site that enables a consumer to conclude a contract by going through a series of steps or pages on that web site, such as Amazon or

Woelki and Catherine Kessedjian (eds), *Internet Which Court Decides? Which Law Applies?*, Kluwer Law International, The Hague, 1998 at p.66.

⁸³ Yagura, note 80 supra at p.302, who refers to Matthew R. Burnstein, “Conflicts on the Net: Choice of Law in Transnational Cyberspace,” 1996 Vand J Transnat’l L 29, 75.

⁸⁴ Yagura, note 80 supra at p.303; Trout-McIntyre, note 80 supra at p.225-226.

⁸⁵ Now predominantly Microsoft Internet Explorer.

⁸⁶ Chapter Three infra, on the extent to which an active, passive or interactive web site plus additional activity establishes personal jurisdiction in the United States. The EU and the Hague have each endorsed the application of the “Sliding Scale” of web site activity. Avril Haines, “The Impact of the Internet on the Judgments Project: Thoughts for the Future,” Hague Conference on Private International Law, Preliminary Document No. 17, <http://www.hcch.net>.

⁸⁷ Preliminary Draft Report for a Council Regulation (EC) (COM (1999) 348 final – C5-0619/1999 – 99/0154 (CNS)) by the Committee on Legal Affairs and the Internal Market <http://cyberia.ie/~twinkle/draftep.doc> at “Explanatory Statement.” See Chapter Two and Three infra and Frederic Debussere, “International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?” 2002 10 IJLIT 344 at p.357.

Easyjet, is an example of an ‘active’ web site.⁸⁸ Conversely when a web site is nothing more than information source to potential consumers,⁸⁹ it is a ‘passive’ web site. Furthermore, ‘interactive’⁹⁰ web sites are web sites that provide a combination of information and communication with potential consumers such as information request options⁹¹ or sign up facilities to receive information on goods or services by e-mail.⁹² An interactive web site combines information and is a means whereby parties can communicate with each other to a greater or lesser extent.⁹³ The level of web site activity is a crucial connecting factor in determining whether businesses intended to use their web sites to sell goods and advertise⁹⁴ to consumers in foreign jurisdictions.⁹⁵ The WWW is a communication tool,⁹⁶ enabling information to be viewed, shared, requested and retrieved between computer networks. The WWW also enables parties to enter into contracts with each other for goods and services⁹⁷ which is a key aspect to electronic commerce. Electronic commerce enables parties to use digital language on computers to communicate, negotiate and contract with each

⁸⁸ <http://www.amazon.co.uk> and <http://www.easyjet.co.uk>

⁸⁹ For example <http://www.woodrows.co.uk>.

⁹⁰ Debussere, note 87 supra.

⁹¹ For example <http://www.ghost.co.uk> (this site also has an email order facility).

⁹² For example <http://www.cashmerecompany.co.uk>.

⁹³ Ibid.

⁹⁴ See the European Commission’s comments on the interpretation of ‘active’ and ‘passive’ sales (derived from the application of Article 4(b) of the Block Exemption Regulation) in its ‘Guidelines for Vertical Restraints’ (on EC Competition Rules), 2000 C291/1 ; considered in Chapter Two infra.

⁹⁵ Lorna E. Gillies, “Rules of Jurisdiction for Electronic Consumer Contracts – Scottish Perspectives,” 2001 2 SLPQ 124 at p.132.

⁹⁶ Yagura, note 80 supra.

⁹⁷ Chissick and Kelman, note 41 supra at p.68 *et seq.*

other.⁹⁸ Whilst a number of attempts have been made to define electronic commerce, no single definition has been universally applied.⁹⁹ As a starting point, it is helpful to consider Sookman's general definition of electronic commerce. Sookman has defined electronic commerce as

“any kind of transaction that is made using digital technology, including transactions over open networks such as the Internet, closed networks such as electronic data interchange (EDI) and debit and credit cards.”¹⁰⁰

This definition is too wide for the purposes of this thesis but is similar to that provided by Chissick and Kelman. In their established text on the subject, those authors defined electronic commerce as “a broad term describing business activities with associated technical data that are conducted electronically.”¹⁰¹ However, the definitions of electronic commerce tend to be distinguishable in two key respects. Firstly, electronic commerce is often defined by reference to the accessibility of computer networks as communications media. In the past, electronic commerce activity took place over “closed”¹⁰² or restricted access computer networks.¹⁰³ Electronic Data Interchange (‘EDI’) is an example of a restricted form of electronic commerce used exclusively by businesses as an automated order and payment system.¹⁰⁴ Such private computer networks are not used by businesses in their contracts with consumers. In the last ten years, electronic commerce has taken place between businesses and consumers over

⁹⁸ John Rothchild, “Protecting the Digital Consumer: The Limits of Cyberspace Utopianism,” 1999 Ind LJ 74, 893 at p.900 ; Barry B. Sookman, “Electronic Commerce, Internet and the Law – A Survey of the Legal Issues,” [1999] CTLR 52.

⁹⁹ Sookman, note 98 supra at p.52.

¹⁰⁰ Sookman, note 98 supra at p.52.

¹⁰¹ Chissick and Kelman, note 41 supra, at p.xxxviii.

¹⁰² Sookman, note 98 supra.

¹⁰³ Sookman, note 98 supra.

¹⁰⁴ Chissick and Kelman, note 41 supra at p.67.

open, unrestricted computer networks.¹⁰⁵ The Organisation for Economic Commerce and Development (OECD), World Trade Organisation (WTO) and World Intellectual Property Organisation (WIPO) have each sought to define electronic commerce in the context of their various work programmes and activities on the legal regulation of electronic commerce. The OECD refers to electronic commerce as a “global network.”¹⁰⁶ The WTO has defined electronic commerce as

“ ... the production, distribution, marketing, sale, or delivery of goods and service by electronic means.”¹⁰⁷

WIPO has defined the Internet (representing the network of computers that enable electronic commercial activity to take place) as “allow(ing) communications and transactions to take place over an “open network.”¹⁰⁸

Catchpole has similarly defined electronic commerce as

“ ... a term that has become synonymous with commercial transactions involving both organisations and individuals, based upon the processing and transmission of digitised data [...] transmitted over open networks such as the Internet.”¹⁰⁹

The definition of electronic commerce used for the purposes of this thesis is the combination of the terms derived from the OECD and WIPO given to

¹⁰⁵ WIPO, Primer on Electronic Commerce and Intellectual Property Issues, <http://ecommerce.wipo.int/primer/primer.html#8>.

¹⁰⁶ OECD, note 1 supra.

¹⁰⁷ WTO, “Work Programme on Electronic Commerce,” Adopted by the General Council, 25th September 1998, available at http://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm. This definition is preferred and used by J. Barrett Willingham, “Electronic Commerce and the Free Trade Area of the Americas,” NAFTA: Law and Business Review of the Americas, Summer 2000, 483 at p.484 (obtained via Westlaw 07/06/01).

¹⁰⁸ WIPO, Primer on Electronic Commerce and Intellectual Property Issues, <http://ecommerce.wipo.int/primer/primer.html#8>.

¹⁰⁹ James Catchpole, “The Regulation of Electronic Commerce: A Comparative Analysis of the Issues Surrounding the principles of Establishment,” 2001 9 Int J Law and Info Tech 1,1 at p.2.

“commercial transactions conducted over a digitised [open] global network.”¹¹⁰

The most prominent open network on the Internet is the WWW. Consumers must be able to access the WWW as an open computer network to be able to view websites and enter into contracts with foreign businesses online via those websites.

Secondly, the types of markets businesses pursue via electronic commerce can be used to distinguish the different definitions of electronic commerce. Two predominant business models have emerged from electronic commerce activity via the WWW.¹¹¹ In a “business-to-business” or “B2B” model, businesses use electronic commerce to contract directly with other businesses only. As stated earlier, a contract conducted by Electronic Data Interchange (EDI) is an example of a contract between businesses requiring no intermediary or agent. Before the advent of the Internet and the WWW, these contracts were the only contracts to be entered via the use of computer networks. However over the last ten years businesses have adopted electronic commerce as a business model and communication tool to attract foreign consumers. The contracts that result from such activities are termed “business-to-consumer” or “B2C” contracts. The parties use open computer networks via the WWW to contract directly with each other, without the need for the business to have an agent, branch or

¹¹⁰ OECD, note 1 supra.

¹¹¹ There are other types of business activities conducted by electronic means which are completely out with the scope of this thesis. These include, for example contracts between businesses and governments (B2G) and peer-to-peer contracts (P2P) such as those conducted between private individuals via an online auction web site such as Ebay (<http://www.ebay.co.uk>).

representative in the consumer's jurisdiction. This thesis is only concerned with jurisdiction rules for electronic consumer contracts that are entered into via web sites on the WWW.

Electronic commerce enables businesses and consumers to enter into contracts with each other for the purchase of goods and services via computer networks whether or not the parties are situated in the same jurisdiction or not.¹¹² The use of the Internet (and the WWW) has raised important issues for the legal regulation of electronic commerce activity. In terms of protecting the consumer who enters into online transactions, Rothchild¹¹³ has suggested that electronic commerce presents a “challenge” to consumer protection policy. Rothchild maintains that electronic commerce facilitates the “disintermediation” of consumer protection law.¹¹⁴ Rather than the consumer contracting via a supplier in the same jurisdiction, as a result of its “inherent international nature,”¹¹⁵ disintermediation enables the consumer to contract directly with the seller in another jurisdiction. The disintermediation of consumer contracts provides benefits and challenges to businesses and consumers alike. Reed has recently reiterated that the key commercial and financial benefits of electronic commerce to businesses are “(G)lobal equivalence ... (T)he digital transmission

¹¹² Willingham, note 107 supra and Sookman, note 98 supra.

¹¹³ Rothchild was a member of the OECD Working Party on the Guidelines for Consumer Protection in E-Commerce.

¹¹⁴ Rothchild, note 98 at p.896 *et seq.*

¹¹⁵ Rothchild, *ibid* at p.897.

of information ... [and] ... (A)utomated decision making.”¹¹⁶ The most significant benefit to businesses that use electronic commerce via the WWW is the ability to seek out and target new consumer markets. As Reed recently affirmed, businesses using electronic commerce as a commercial medium can operate on a “globally equivale[nt]”¹¹⁷ scale with other businesses. Businesses of any size can therefore compete with other businesses for sales to consumers in the same (ie domestic) or foreign jurisdictions. The corresponding result of global equivalence for consumers is the increased choice of goods and services available to them on a “take it or leave it” basis “at the click of a mouse.”¹¹⁸ A web site which is accessible in the consumer’s jurisdiction may determine whether the seller’s goods or services are available to the consumer in his jurisdiction or not. If not, both parties would have to use other means of communicating with each other, for example by telephone or in writing. As a last resort, the consumer could travel to the seller’s jurisdictions to contract with the seller. These examples demonstrate how the ability to access “digital information”¹¹⁹ on the seller’s web site on the WWW is an efficient way for the consumer to contract with a foreign seller. Furthermore, as mentioned earlier, in addition to accessing (new) foreign markets, an additional advantage for the business contracting online is that the consumer makes payment when entering into the online click-wrap agreement. However as stated earlier, the consumers may either perceive or experience an increased risk when contracting with a

¹¹⁶ Chris Reed, *Internet Law, Text and Materials*, 2nd ed, Cambridge University Press, 2004 at p.5. Word in brackets added.

¹¹⁷ Reed, *ibid* at p.5. Word in brackets modified for syntax.

¹¹⁸ Puurunen, note 73 *supra* at p.692.

foreign seller over the WWW than if they had contracted that seller by visiting the seller's shop.¹²⁰ Conversely, the foreign seller may not be satisfied that the other party is a 'consumer'. Whilst "automated decision making"¹²¹ on the WWW has diminished the need for a local supplier or middleman in the consumer's jurisdiction, there has been a corresponding increase in the risks to the parties who contract online. The remaining chapters of this thesis will illustrate how jurisdiction rules for consumer contracts have been extended to include contracts conducted over the Internet with foreign sellers. However it will be demonstrated that those rules have not been sufficiently modified to ensure that the consumers contracting online can sue the business in their own jurisdiction.

2.5 The Application of International Private Law Connecting Factors to Electronic Consumer Contracts

As stated earlier, international private law rules use geography or location of the parties or the place where their commercial activities take place as traditional connecting factors to determine the jurisdiction of a cross-border dispute. The traditional connecting factors of location of the parties and the business' activities are important to a consumer contract. For example, Zain reiterates Rothchild's "disintermediation" point that in a "traditional sale,"¹²² the consumer must visit the seller's premises in order to contract with that seller. In

¹¹⁹ Reed, note 116 supra at p.5.

¹²⁰ Rothchild, note 98 supra at p.896.

¹²¹ Reed, note 116 supra at p.5.

that situation, the consumer is re-assured by factors such as the physical presence of the seller, the ability to inspect the goods and assess their suitability in advance of contracting with the seller and paying for the goods.¹²³

Alternatively, the consumer may contract with a seller who is located in another jurisdiction if that seller issued advertisements in the jurisdictions where that consumer is domiciled.

However, the use of the Internet challenges how parties to an electronic consumer contract can be adequately identified so that they, and their activities, may be sufficiently connected with a particular jurisdiction. If the parties' presence or their activities are connected with a particular jurisdiction, then it can be foreseen both by the consumer and seller where their dispute is likely to be heard. Regardless of the method of communication used, the ability of the parties to foresee where each other is geographically located and where business activities are directed are "decisive"¹²⁴ factors in determining which jurisdiction will hear their dispute. When the seller in one jurisdiction uses traditional media such as a catalogue, mail, newspaper, radio or television to seek business from potential consumers in other jurisdictions, the seller is likely to know with certainty in which countries customers receiving the catalogues or viewing the advertisement are located. For example, when a South African wine producer

¹²² Saami Zain, "Regulation of E-Commerce: Is It Fair To Consumers?" 2000 31 UWLA Law Review 163 p.167.

¹²³ Zain, *ibid* at p.167.

¹²⁴ Richard Fentiman, "English Private International Law at the End of the 20th Century: Progress or Regress?" in Symeonides (eds), note 23 *supra* at p.190 ; Rothchild. note 98 *supra* at p.915 referring to the Brussels Convention.

sells wine via mail order catalogues to addresses in England or puts an advertisement in an English newspaper to attract custom and consumers in England contract with the seller for goods contained in the catalogue or newspaper advertisement, the seller knows where those consumers are located. The consumer is also likely to be aware of the seller's location when following the instructions in the catalogue or advertisement for ordering goods. If the seller does not want to contract with consumers in particular jurisdictions for financial, legal or operational reasons, then it will not send catalogues or advertise to potential consumers in those jurisdictions. As an additional precaution, the seller can still refuse to contract with the consumer by filtering orders sent by consumers from particular jurisdictions. However when the seller uses other forms of globally accessible, or as Fentiman describes "dematerialized,"¹²⁵ media such as electronic commerce to attract custom, it is difficult for either party to know or foresee where the other is physically located. As Rice confirmed, foreseeability is a "fundamental jurisdictional issue" raised by the Internet.¹²⁶ Geist also premised his targeting test on the need for foreseeability.¹²⁷ The consumer must rely on information on the foreign business' web site if he wishes to contract with that foreign seller online. The online information of a foreign business can be confirmed or checked with

¹²⁵ Fentiman, in Symeonides (ed), *ibid* at p.190.

¹²⁶ Denis T. Rice, "Jurisdiction in Cyberspace: Which Law and Forum Apply to Securities Transactions on the Internet?" *University of Pennsylvania Journal of International Economic Law*, Fall 2001, Volume 21, Number 3, 585.

¹²⁷ Michael Geist, "Is There a There? Towards Greater Certainty for Internet Jurisdiction," 2001 *16 Berkeley Tech Law Journal* 1345 available at <http://www.law.berkeley.edu/journals/btlj/articles/vol16/geist/geist.pdf>.

information offline,¹²⁸ for example by newspaper advertisements or the business' address if it has a branch in the consumer's jurisdiction. The business contracting online with a consumer must rely on the delivery address and payment details provided by the consumer in the online contract.¹²⁹ This information is crucial as it determines whether the business is dealing with a consumer, if the contract is a consumer contract and what jurisdiction rule will be applied as a result. If the location of either party is uncertain or cannot be foreseen then it becomes more difficult to determine which jurisdiction will hear a dispute between the parties. There are three main options for businesses. Firstly businesses can try to either limit, or as Geist¹³⁰ and Svantesson¹³¹ each suggest "de-target," the accessibility of their web sites in particular jurisdictions. Whilst it is feasible, as Øren suggests, for businesses to "ring-fence"¹³² the availability of their web sites, unscrupulous consumers could try to access the web site via Internet Service Providers (ISPs) in other jurisdictions. Furthermore, in order to provide greater certainty for consumers and predictability for businesses, the jurisdiction test should be premised on a *positive act on behalf of the seller to engage in business activity in a particular jurisdiction*. For example in determining the jurisdiction of a contract, Article 5

¹²⁸ Offline activities are those activities not conducted via web sites, for example traditional advertising in newspapers, television or invitations by post.

¹²⁹ Geist, note 127 supra. Geist's article refers to payment details providing either an indication or confirmation of the consumer's location.

¹³⁰ Geist, *ibid*.

¹³¹ Dan Svantesson, "Jurisdiction Issue in Cyberspace What Should Article 7 – Consumer Contracts, of the Proposed Hague Convention, Aim to Accomplish in Relation to E-Commerce?" 2001 5 CLSR 318 at p.323. Svantesson defines the term as "dis-targeting."

¹³² Joakim S.T. Øren, "International Jurisdiction Over Consumer Contracts in e-Europe," 2003 52 ICLQ 665, at p.682.

of the Brussels 1 Regulation focuses on the place of performance of the obligation in question. Also, as Chapter Two will consider (in the context of jurisdiction), Article 5 of the Rome Convention on Contractual Obligations requires, that the seller

“ ... *must have done certain acts* such as advertising in the press, or on radio or television, or in the cinema or by catalogues *aimed specifically at that country* ...”¹³³

Furthermore despite Øren’s preference for ring-fencing, the European Commission rejected it as the criteria for determining how a business directs its commercial activities.¹³⁴ Finally, as Chapter Three will consider, general or specific personal jurisdiction are established by the United States’ courts either when a business is deemed to have “continuous and systematic contacts with the forum”¹³⁵ or when the business has purposefully availed itself by doing business in the jurisdiction¹³⁶ respectively. Given the global, dematerialised nature of the WWW, any adaptation of current jurisdiction rules for electronic consumer contracts must continue to focus on the requirement that the business positively intended to target particular jurisdictions rather than a test on which jurisdictions the business wished to avoid. Secondly, businesses can, and should be encouraged, to specify on their web sites which jurisdictions their online commercial activities are directed towards. Thirdly, businesses can limit the

¹³³ “Council Report on the Convention on the law applicable to contractual obligations, by Professors Mario Giuliano and Paul Lagarde,” 1980 OJ C282 (hereafter the “Giuliano and Lagarde Report”) at p.24. Words italicised for emphasis.

¹³⁴ Øren, note 132 supra at p.682.

¹³⁵ *Bancroft & Masters Inc., v Augusta National Inc.*, No.99-15099 223 F.3d 1082.

¹³⁶ *Helicopteros Nacionales de Colombia, S.A v Hall* 466 US 408, 414-416, 104 S.Ct 1868, 1872-73, 80 L.Ed.2d 404 (1984).

activities of their web sites by using a ‘passive’ web site. As Campbell has affirmed “(I)f electronic commerce is to realise its full potential, the parties doing business must know what rules will be applied to their activities.”¹³⁷ The remaining chapters of this thesis will demonstrate that recent changes to the jurisdiction rules for consumer contracts in the United Kingdom and the United States will continue to provide inconsistent results. For those reasons, international private law rules must now provide a clear and consistent jurisdiction rule when a consumer has contracted with a seller by electronic means over the WWW. This thesis will argue that in order to achieve that objective, jurisdiction rules for electronic consumer contracts must ensure certainty and predictability of result by enabling the consumer to raise proceedings in his own jurisdiction when the business has targeted him intentionally via an active or interactive web site.

It is acknowledged that the problem of establishing where parties are located or where their activities take place for the purposes of determining jurisdiction is not a new one.¹³⁸ As stated earlier, fixed¹³⁹ connecting factors of residence and activity have been used to facilitate conflicts justice in cross-border cases. However, the application of connecting factors may not always lead to certain and predictable results. On more than one occasion, the challenge of applying

¹³⁷ Dennis Campbell (ed), note 80 supra at p.24.

¹³⁸ Alan Reed, “Jurisdiction and Choice of Law in a borderless electronic environment,” in Yaman Akdeniz, Clive Walker and David Wall (eds), *The Internet, Law and Society*, Pearson Education, Harlow, 2000 at p.79.

¹³⁹ Vonken in De Boer (ed), note 15 supra at p.176.

pre-Internet rules to activities on the WWW has been equated to “(O)ld wine in new bottles.”¹⁴⁰ The Internet is simply another means of communication. That said, when the parties use the WWW to contract with each other it may be difficult to determine where either the consumer is domiciled or the place where the seller is situated or conducts its business. In the context of this thesis it is helpful to consider Mayer’s comment that,

“(I)nternet regulation does not start from a clean slate. Most legal problems related to Cyberspace already existed in the real world long before....”¹⁴¹

The emergence of electronic commerce as a new, global form of business activity questions the application of the existing international private law connecting factors of geography or location of the parties and their activities. As a result these connecting factors have, as Puurunen has indicated, been “applied, modified, or abandoned to measure up to societal goals.”¹⁴² Willingham has identified time and distance¹⁴³ as two of the most significant barriers to “traditional” international trade. It is submitted that the use of the Internet as a commercial communication method has “redefined the significance” of the time and distance between businesses and consumers who contract with each other.¹⁴⁴ When a consumer enters into a contract with a business via a web site, it is accepted that the contract is entered into

¹⁴⁰ Alan Reed, in Akdeniz *et al* (eds), note 138 supra at p.80 and Chris Reed, note 116 supra at p.173.

¹⁴¹ Franz C. Mayer, “Europe and the Internet: The Old World and the New Medium,” (2000) 11 EJIL 149 at p.151.

¹⁴² Puurunen, note 73 supra.

¹⁴³ Willingham, note 107 supra at p.488.

¹⁴⁴ Puurunen, note 73 supra at p.692; Peter Stone, “Internet Consumer Contracts and European Private International Law,” 2000 9(1) Information and Communications Technology Law 5 and Reed, note 116 supra at p.173.

instantaneously in the same way as if the parties had used a fax machine.¹⁴⁵ Electronic commerce via the WWW is a means or medium of communication¹⁴⁶ used by parties to contract with each other.¹⁴⁷ Docherty and Fletcher confirm that the Internet has “revolution[ised]” commercial communications.¹⁴⁸ Consensus on that observation is found in Catchpole’s assertion that the Internet is “one of the most important commercial mediums to emerge in the latter years of the 20th century.”¹⁴⁹ Indeed, in his article on European jurisdiction rules for internet contracts, Stone acknowledges that electronic commerce is a communication method¹⁵⁰ that requires a harmonised approach to establishing jurisdiction in the consumers’ domicile at international¹⁵¹ level. Despite the parties being at a distance to one another, electronic commerce enables contracts between businesses and consumers to be concluded as fast as face-to-face¹⁵² communication. It is the global, networked infrastructure of the WWW that

¹⁴⁵ Andrew D. Murray, “Entering Into Contracts Electronically: The Real WWW,” in Lillian Edwards, and Charlotte Waelde (eds), *Law and the Internet A Framework for Electronic Commerce*, 2nd ed, Hart Publishing, Oxford, 2000 at p.25.

¹⁴⁶ Stuart Dutson, “The Internet, the conflict of Laws, international litigation and intellectual property: the implications of the international scope of the Internet on intellectual property infringements,” 1997 JBL 495 at p.496 and Stone, note 144 supra.

¹⁴⁷ Yagura, note 80 supra at p.302. See also Shinichiro Hayakawa, “Private Law in the Era of the Internet,” in Jurgen Basedow and Toshiyuki Kono (eds), *Legal Aspects of Globalization Conflict of Laws, Internet, Capital Markets and Insolvency in a Global Economy*, Kluwer Law International, The Hague, 2000. at p.30-31 ; Murray in Edwards and Waelde (eds), note 145 supra at p.18. Dutson, note 146 supra and Heather Rowe, “Electronic Commerce and Consumers,” 1998 IBL 165 at p.170. In Focus, “Defining E-Commerce,” 2000 I-Ways, First Quarter, 32 at p.45 where reference is made to the paradigm that whilst a separate set of rules or cyber-laws are not necessary for consumer protection, a modification of the existing rules are necessary to “accommodate electronic commerce.”

¹⁴⁸ Michael Docherty and Roland Fletcher, “Responding to the legal problems of electronic commerce,” (2000) 5 Communications Law 2.

¹⁴⁹ Catchpole, note 109 supra at p.1.

¹⁵⁰ Peter Stone, “The Treatment of Electronic Contracts and Torts in Private International Law under European Community Legislation,” (2002) 11 2 Info and Comm Tech Law 121 at 122.

¹⁵¹ Stone, *ibid* at p.125.

¹⁵² Murray, in Edwards and Waelde (eds), note 145 supra and Reed, note 116 supra at p.173.

Willingham and Chris Reed attribute to its popularity¹⁵³ and efficiency as an effective cross-border business tool.¹⁵⁴ However, the geographical distance between the parties is legally significant when a consumer contracts with a seller via a web site. Given that commercial activity between businesses and consumers has become increasingly “globali[sed] ... and demateriali[sed]”¹⁵⁵ by electronic commerce, it has become correspondingly challenging to determine where the consumer or business is located and to which jurisdictions a foreign business directs its commercial or marketing activities. As stated earlier, the seller’s physical location or place of commercial activities are connecting factors or “signposts” that the consumer can rely on when contracting ‘offline’ (ie when the WWW is not used). However these connecting factors must be re-considered when the consumer contracts with a business online via web site on the WWW. For these reasons it is imperative that consumer contract jurisdiction rules are applied with certainty if the consumer has contracted electronically with a business. In his paper on “The Progress or Regress of English Private International Law,” Fentiman concludes, *inter alia*, that

“...traditional assumptions of private international law may become inappropriate. In particular, the notions that acts and their consequences may be territorially located for the purposes of choice of law and jurisdiction, which lies at the heart of the subject, may become irrelevant. At the very least it becomes necessary, if the notion of territorial connection is to be retained, first to identify the characteristic and (in conflicts terms) most significant events which occur in novel transactions or processes, and secondly to locate those events in a particular jurisdiction. Is transmission or reception the key moment in a

¹⁵³ OECD, note 70 supra.

¹⁵⁴ Willingham, note 107 supra at p.483; Reed, note 116 supra.

¹⁵⁵ Fentiman, in Symeonides (ed), note 124 supra. Words modified for syntax.

satellite broadcast? What is (or what are) the decisive features of the use of the internet?”¹⁵⁶

The advent of cross-border communications via electronic commerce has enabled an increasing number of cross-border consumer contracts to take place.¹⁵⁷ The increasing number of cross-border consumer contracts has rendered the concern over establishing which jurisdiction should hear the dispute more acute.¹⁵⁸ When a business uses electronic commerce to contract with a consumer, it has the potential to attract consumers on a global scale. As stated earlier, the decisive features of the Internet are the ability to identify the parties, their geographical location and the place where their activities are directed towards or take place. The Internet facilitates anonymity¹⁵⁹ of the parties, coined in Steiner’s cartoon punch-line “(O)n the internet, nobody knows you’re a dog.”¹⁶⁰ For example, the seller’s anonymity may be enhanced when its web site contains a top-level domain ending such as “.com,” or multiple web site domain endings that appear to be directed towards consumers in those jurisdictions. The consumer’s anonymity may also be facilitated by the ISP used. For example, the consumer may register and use an email address with more than one ISP in more than one country. The consumer can also use an entirely separate identity in their email address for example

¹⁵⁶ Fentiman, *ibid* at p.190.

¹⁵⁷ See next section of Chapter *infra*.

¹⁵⁸ Lorna E. Gillies, “A Review of the New Jurisdiction Rules for Electronic Consumer Contracts within the European Union,” *Commentary*, 2001 (1) *The Journal of Information, Law and Technology (JILT)* <http://elj.warwick.ac.uk/jilt/01-1/gillies.html>, 28 February 2001.

¹⁵⁹ Reed, note 116 *supra* at p.35.

¹⁶⁰ Peter Steiner, “On the Internet, nobody knows you’re a dog,” *The New Yorker*, 5th July 1993, available at <http://www.cartoonbank.com> and Reed, *ibid* at p.140. This well-known cartoon depicts a dog sitting at a workstation, talking to another dog.

“pseudonym@AOL.com” or “nickname@yahoo.com.” In addition, either party could use cryptography to encrypt their email correspondence and preserve their anonymity.¹⁶¹ The combined lack of physical contact between the parties and the technology used sustains the anonymity of parties to an electronic consumer contracts. The anonymity of the parties to an electronic consumer contract is, according to Zain, an “ambiguity” that legislators must protect consumers against.¹⁶² However the opportunity for anonymity has implications for both parties. As Puurunen rightly asserts, the business may not know for certain whether a consumer is located in a particular country or not.¹⁶³ Businesses may not wish to contract with consumers in particular jurisdictions for economic or legal reasons. For example, the business may only want to target specific markets and ship goods to certain countries or there may be a prohibition on selling certain goods, such as alcohol or pornographic material, to consumers in certain countries. Furthermore, the cost of having to defend claims made by, or litigate against, consumers in a foreign jurisdiction is a legitimate disincentive for businesses that have invested in technology or are contemplating whether to do so.¹⁶⁴ As stated earlier, both parties to an electronic consumer contract are reliant on each other, or third parties,¹⁶⁵ to provide information on their identity and location. The business may use technical measures (on its web site) or contractual devices (in an online click-wrap agreement) to encourage and restrict

¹⁶¹ Froomkin in Kahin and Neeson (eds), note 82 supra at p.133 *et seq.*

¹⁶² Zain, note 122 supra at p.166-168.

¹⁶³ Puurunen, note 73 supra at p.690.

¹⁶⁴ Sookman, note 98 supra at p.54.

¹⁶⁵ Geist, note 127 supra.

consumers from particular jurisdictions from being able to contract with the business via its web site. An example of a technical measure would be when the seller's web site requires the consumer to select his country from a "drop-down list"¹⁶⁶ of countries on a web site to be able to access the web site, join a mail list¹⁶⁷ or proceed to order goods. Alternatively, as Johnson and Post suggest, the business could use different country domain name endings,¹⁶⁸ for example ".uk" (United Kingdom) or ".de" (Germany), to direct consumers to use the web sites with the domain name ending of their own country. However, whilst the domain name of a web site may indicate where the seller is located or seeks custom to an extent, if a business uses a '.com' domain ending, the ambiguity of the seller's location continues. A contractual measure may require the consumer to confirm his address during the contract formation stage. Furthermore, a business may impose a choice of forum clause in a contract in order to protect itself or limit its liability from claims by a consumer. Equally, in comparison to the earlier example of the catalogue or advertisement from the South African wine seller, the consumer who contracts with the business online may not know with certainty where that business is located. A consumer does not have the same ability to impose a technical measure on a web site or stipulate a choice of forum clause in a contract. For a consumer contract to proceed online via a web

¹⁶⁶ For example, see <http://www.gucci.com>. By clicking on the country the person browsing the web site may be taken to the relevant 'country' page of that web site where country-specific information can be viewed.

¹⁶⁷ For example, at the time of writing, the web site of a Spanish jewellery company (<http://www.tous.es>) omits the United Kingdom and the United States from its drop-down list of countries to be able to sign up for online information and news.

¹⁶⁸ David R. Johnson and David G. Post, "The Rise of Law on the Global Network," in Kahin and Nesson (eds), note 82 supra and affirmed by Puurunen, note 73 supra at p.690.

site, the consumer is usually required to confirm acceptance of the contractual terms. By clicking on an “I accept” or “I agree” icon on a web page the consumer is deemed to accept the contractual terms that, together with details of the consumer’s order and confirmation of payment, creates the click-wrap or “online”¹⁶⁹ agreement between the parties.¹⁷⁰ The click-wrap agreement has been regarded as an “adaptation”¹⁷¹ or an up to date version of a shrink-wrap agreement.¹⁷² The click-wrap agreement therefore imposes standard terms and conditions that the consumer must accept for the online contract to be concluded, or find another seller. The click-wrap agreement will invariably include or refer to a choice of forum clause. The seller may also use one or more language or currency payment options on its web site. The method of payment may provide some indication of where the consumer is located, for example if a currency conversion is required from the consumer’s currency to the currency required to pay for the contract goods. Whilst these options may be used to either facilitate or restrict consumers in certain jurisdictions from contracting with the seller online, they are not sufficiently consistent factors to determine the jurisdiction of a cross-border dispute. As the next Chapter will demonstrate, the European Union rejected language and currency as suitable connecting factors to determine where a business directs its activities.¹⁷³

¹⁶⁹ Adam Gatt, “Electronic Commerce – Click Wrap Agreements, The Enforceability of Click-Wrap Agreements,” (2002) 18 6 CLSR 404.

¹⁷⁰ Gatt, *ibid* at p.405.

¹⁷¹ Gatt, *ibid*.

¹⁷² Matthew Burnstein, “A Global Network in a Compartmentalised Legal Environment,” in Boele-Woelki and Kessedjian (eds), note 83 *supra* at p.31.

¹⁷³ Chapter Two *infra*.

Despite Burnstein's suggestion that "place matters less on the Internet,"¹⁷⁴ it is submitted that the traditional connecting factors of location and activity must still operate to determine which jurisdiction will hear the parties' dispute. To ensure that their sovereignty is asserted over a cross-border dispute, states must ensure that parties are domiciled or their commercial activities take place within or are connected in a sufficient manner to the territorial boundaries of that state. The connection between the parties and their location or where their activities take place ensures that the state can assert jurisdiction over a dispute and, as Sookman affirms,¹⁷⁵ apply its own laws. To enable a state to assert its sovereignty over an electronic consumer contract dispute, substantive consumer protection rules must be complimented by a consistent, harmonised jurisdiction rule in favour of the consumer's jurisdiction. Since electronic commerce is a method of dematerialised cross-border communication, the general consensus is that electronic consumer contracts ought to be regulated in the same manner as consumer contracts conducted offline.¹⁷⁶ Indeed, the ability to effectively regulate electronic consumer contracts illustrates a wider need for appropriate legal regulation of commercial activities conducted online. The certainty and predictability of the legal regulation of electronic commerce will be a significant influence on the continued use and popularity of electronic commerce as a

¹⁷⁴ Burnstein, in Boele-Woelki and Kessedjian (eds), note 172 supra at p.24.

¹⁷⁵ Sookman, note 98 supra at p.54.

¹⁷⁶ OECD, note 1 supra. Froomkin, in Kahin and Nesson (eds), note 82 supra ; Catchpole, note 109 supra at p.1. Although it would appear that, by referring to the perceived, separate nature of the physical and online worlds, Catchpole tends to endorse the view that they are indeed separate and are therefore different; Dennis Campbell (ed), note 80 supra, at p.24; Docherty and Fletcher, note 148 supra; Chapters Two and Three.

commercial communication medium.¹⁷⁷ As Docherty and Fletcher have remarked “...commercial interests [cannot be trusted] to protect the interests of consumers.”¹⁷⁸ The need for sovereign states to regulate electronic commercial activities and the disputes arising from them is a key argument against businesses or third parties operating Alternative Dispute Resolution (ADR) schemes, such as online arbitration or mediation, for resolving cross-border consumer contract disputes. Whilst a number of ADR schemes have operated, for example TrustUK and BBBOnline in the USA, these schemes should still remain complimentary to providing consumers with sufficient juridical protection via jurisdiction rules.¹⁷⁹ Jurisdiction rules for consumer contracts have been adapted in response to the adaptation of substantive consumer protection rules. Nevertheless, the following Chapters will demonstrate that the particularists’ approach that has been used to adapt existing¹⁸⁰ jurisdiction rules for electronic consumer contracts in the United Kingdom and the United States is not conducive to enable the consumer to sue the business in his own jurisdiction, thereby ensuring justice is achieved in such circumstances.

¹⁷⁷ Catchpole, note 109 supra at p.1.

¹⁷⁸ Docherty and Fletcher, note 148 supra at p.3. Words in brackets added.

¹⁷⁹ The Statement on Article 15 and 73, see Appendix (i) ; Trans Atlantic Consumer Dialogue, “Resolution on the Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters,” Ecom-22-01, May 2001, available at <http://www/tacd.org> (obtained 20/06/01).

¹⁸⁰ Mendes, note 65 supra at p.96 and Rothchild, note 98 supra on the matter of disintermediation” of consumer protection policy.

3. THE LEGAL REGULATION OF ELECTRONIC COMMERCE: JURISDICTION RULES FOR ELECTRONIC CONSUMER CONTRACTS

In the last decade,¹⁸¹ a global market of goods and services has become increasingly evident as businesses and consumers contract with each other electronically.¹⁸² In 2000, the American Bar Association reported

“(T)hat electronic commerce is poised to become an essential element of international trade is a truism that hardly needs repeating. However, realization of the full potential of electronic commerce will be impeded by uncertainty as to the law of commerce in cyberspace, unless this certainty can be dispelled. As long as different jurisdictions have different laws, and as long as different courts provide different advantages and disadvantages (other than choice of law) for different parties, a number of procedural questions will be vital to the legal order of commerce in cyberspace.”¹⁸³

The international development of commerce and trade¹⁸⁴ and the resulting increase in disputes¹⁸⁵ arising between businesses and consumers in different jurisdictions have become, as North has affirmed, the “seed-bed for international conflicts...”.¹⁸⁶ In response to the increasing level of commercial activity conducted via the WWW, national governments have introduced new laws or adapted existing substantive laws and policies. For example, the Member States of the European Union have adopted an umbrella Directive on ‘certain legal

¹⁸¹ Myles Neligan, “Ten Years of Selling in Cyberspace,” BBC News, 25th October 2004, available at <http://news.bbc.co.uk/1/hi/business/3945775.stm> (obtained 25/10/04).

¹⁸² OECD, note 1 supra at p.3.

¹⁸³ American Bar Association, Committee on Cyberspace Law, “Prospectus Transnational Issues In Cyberspace: A Project On The Law Relating to Jurisdiction,” <http://www.abanet.org/buslaw/cyber/initiatives/prospect.html> (obtained 14/07/00). OECD, note 70 supra.

¹⁸⁴ Jurgen Basedow, “The Effects of Globalization on Private International Law,” in Jurgen Basedow and Toshiyuki Kono (eds), note 147 supra at p.6.

¹⁸⁵ Dennis Campbell (ed), note 80 supra and Jurgen Basedow and Toshiyuki Kono (eds) note 147 supra.

¹⁸⁶ P.M. North, in Symeonides (ed), note 23 at Preface, vii and Mayer, note 141 supra.

aspects of information society services, in particular electronic commerce, in the Internal Market’ (hereafter the Electronic Commerce Directive).¹⁸⁷ The introduction of the Electronic Commerce Directive has led to further directives which regulate particular aspects of electronic commerce activities such as, *inter alia*, electronic signatures,¹⁸⁸ distance selling¹⁸⁹ and the distance marketing of consumer financial services.¹⁹⁰ The United States has introduced, *inter alia*, the Uniform Electronic Transactions Act (UETA) and the Uniform Computer Information Transactions Act (UCITA) to regulate electronic commerce activity. The courts in the United States have also sought to adapt the rules of personal jurisdiction to apply to the defendant’s commercial activities conducted via electronic commerce in a particular state. Various international organisations such as the Hague Conference on Private International Law,¹⁹¹

¹⁸⁷ “Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market,” (Directive on electronic commerce), 2000 OJ L178, also at http://www.europa.eu.int/eur-lex/en/lif/dat/2000/en_300L0031.html. Hereafter the ‘Electronic Commerce Directive.’

¹⁸⁸ “Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, ” 2000 OJ L013. Hereafter the “Electronic Signatures Directive.”

¹⁸⁹ “Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts’, (Directive on Distance Selling),” 1997 OJ L0007, also at http://europa.eu.int/eur-lex/en/lif/dat/1997/en_397L0007.html. Hereafter the ‘Distance Selling Directive.’

¹⁹⁰ “Directive 2002/65/EC of the European Parliament and of the Council concerning the Distance Marketing of Consumer Financial Services and Amending Council Directives 90/619/EEC,” 97/7/EEC and 98/27/EEC, 23 September 2002 available at <http://register.consilium.eu.int/pdf/en/02/st03/0363-r1en2.pdf>. Hereafter the ‘Distance Marketing of Consumer Financial Services Directive.’

¹⁹¹ Hague Conference on Private International Law, “Round table on electronic commerce and the Internet in conjunction with the University of Geneva,” <http://www.hcch.net/e/workprog/e-comm.html>, and Preliminary Documents No.7 of April 2000 and No.12 of August 2000 on “Electronic Data Interchange, the Internet and Electronic Commerce.”

OECD,¹⁹² WIPO¹⁹³ and UNCITRAL¹⁹⁴ have undertaken projects and written reports and guidelines that have directed a national, and inherently particularist, approach to the legal regulation of contracts conducted by electronic commerce.

Given the expansion in the globalisation of markets and finance combined with national regulations and initiatives to regulate electronic commercial activities, it has become increasingly necessary to refer to rules of international private law.¹⁹⁵ Whilst the level of cross-border consumer activity has increased,¹⁹⁶ the application of international private law rules to consumer contracts has not been entirely consistent. Before the WWW opened new markets to businesses and consumers, the number of cross-border consumer contracts was not significant. Vaughan Black's observation that "international private law only required to be considered in one-off cases when cross-border matters ar[o]se"¹⁹⁷ is a historical indicator of the prevalence of cross-border disputes. However with the advent of electronic commerce, the requirement to determine the jurisdiction of a cross-

¹⁹² Note 1 supra.

¹⁹³ WIPO held conferences in 1999 and 2001 on "Electronic Commerce and Intellectual Property Issues," see <http://ecommerce.wipo.int/primer/primer.html#8> as well as a forum on Private International Law and Intellectual Property Issues in 2001, <http://www.wipo.int/pil-forum/en/index.html> (which includes the following papers; Henry J. Perritt, "Electronic Commerce: Issues In Private International Law And The Role Of Alternative Dispute Resolution," and Rochelle C. Dreyfuss, "Draft Convention On Jurisdiction And Recognition Of Judgments In Intellectual Property Matters.")

¹⁹⁴ UNCITRAL, "Model Law on E-Commerce," 1996 37 EDI Law Review 3, 275 and its Working Group IV on electronic commerce, <http://www.uncitral.org/en-index.htm>.

¹⁹⁵ See J.H.A. Van Loon, "The Increasing Significance of International Co-operation for the Unification of Private International Law," in De Boer (ed), note 15 supra at p.102 and 122.

¹⁹⁶ Puurunen, note 73 supra at p.696.

¹⁹⁷ Black, in Ramsay (ed), note 57 supra at p.210. Lorna E. Gillies, "Adapting International Private Law Rules for Electronic Consumer Contracts," in Rickett and Telfer (eds), note 38 supra. Word in bracket modified for syntax.

border consumer dispute has now become a “demonstrably significant”¹⁹⁸ issue. Indeed, the present author has also observed that “(R)ules and principles of international private law often need to be applied in many more cross-border disputes than before.”¹⁹⁹ The onset of electronic commerce by means of the WWW to advertise, promote and sell goods or services have contributed to the internationalisation or disintermediation of consumer contracts.²⁰⁰ Consumers continue²⁰¹ to have concerns regarding the risk of “fraudulent activity”²⁰² and the privacy and security of their online transactions. Consumers must also be assured that jurisdiction rules will alleviate the legal and financial risks of having to sue a foreign business in a foreign jurisdiction.²⁰³ The risks associated with electronic commerce have necessitated governments to re-think and, as Rothchild affirms, re-assess both substantive consumer protection policy²⁰⁴ and international private law rules.²⁰⁵ Businesses and consumers have

¹⁹⁸ Black, in Ramsay (ed), note 57 supra at p.208.

¹⁹⁹ Gillies, note 197 supra at p.360.

²⁰⁰ Gillies, *ibid*.

²⁰¹ As reported by Chris Gethin and Suzanne Gribble, “Cyber Rules for Consumer Protection Urgently Needed Says International Federation,” Consumers International Press Release, 6 September 1999 at <http://www.consumersinternational.org/news/pressreleases/electronic060999.html> (obtained 28/08/00). See also Lori Enos, “Report: UK Consumers Distrust E-Commerce,” *Ecommercetimes*, 3 August 2000, <http://www.ecommercetimes.com/news/articles2000/000803-1.shtml> (obtained 23/08/00), Lori Enos, “Consumer Watchdog Unveils Net Conduct Code,” *Ecommercetimes*, 25 October 2000 at <http://www.ecommercetimes.com/news/articles2000/0001025-1.shtml> (obtained 26/10/00) and Jon Whiteley, “Understanding the Online Buyer,” *ADMAP* July/Aug 2000 p.14-16. See the recent findings of the OECD in “Consumers in the Online Marketplace: The OECD Guidelines Three Years Later, Report by the Committee on Consumer Policy on the Guidelines for Consumer Protection in the Context of Electronic Commerce,” DSTI/CP(2002)4/FINAL, 3 February 2003.

²⁰² Rothchild, note 98 supra at p.898-899.

²⁰³ Gillies, in Rickett and Telfer (eds), note 197 supra at p.359.

²⁰⁴ Rothchild, note 98 supra at p.899.

²⁰⁵ Rothchild, *ibid* at p.914 and 916.

become more aware of which court should ²⁰⁶ hear any dispute resulting from an electronic consumer contract.²⁰⁷ As consumers have accepted electronic commerce as a legitimate, convenient and efficient method of contracting with a foreign business, the content and implementation of appropriate international private law rules has become globally significant. The recommendations of the OECD Council are particularly indicative of the interaction between the national and international regulation of international commercial activity.

“Business-to-consumer cross-border transactions, whether carried out electronically or otherwise are subject to the existing framework on applicable law and jurisdiction. Electronic commerce poses challenges to this existing framework. Therefore, consideration should be given to whether the existing 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. In considering whether to modify the existing framework, governments should seek to ensure that the framework provides fairness to consumers and business, facilitates electronic commerce, results in consumers having a level of protection not less than afforded in other forums of commerce, and provides consumers with meaningful access to fair and timely dispute resolution and redress without undue cost or burden.”²⁰⁸

In the five years since that recommendation, different jurisdictions have adapted jurisdiction rules for electronic consumer contracts in response to the

²⁰⁶ OECD, note 1, supra at p.7.

²⁰⁷ In their comments on the October 1999 draft of the proposed Judgments Convention, contributors to the Consumer Project on Technology’s page on the Hague Conference’s proposed judgments convention pointed out that the issue was not simply an ‘academic one’ for businesses, available at <http://lists.essential.org/pipermail/hague-jur-commercial-law/>, 2-3rd April 2001.

²⁰⁸ OECD, “Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, 29 ILM 504 (2000). Copyright OECD. See also Puurunen, note 70 supra at p.692. This section was repeated and acknowledged by the Hague Conference on Private International Law in their report “Electronic Data Interchange, Internet and Electronic Commerce,” drawn up by Catherine Kessedjian, available at <http://hcch.net/doc/jdgmpl2.doc> (obtained 17/10/00) at p.9.

disintermediation of consumer protection by electronic commerce.²⁰⁹ The following chapters of this thesis will therefore demonstrate how the European Union and the United States have adapted existing jurisdiction rules for consumer contracts to accommodate electronic commerce. The majority of European Member States,²¹⁰ including the United Kingdom,²¹¹ have already adapted rules of jurisdiction for consumer contracts in the Brussels 1 Regulation.²¹² Mayer has acknowledged that whilst the EU has implemented legislation to address the legal aspects of electronic commerce, it has “failed to shift the crucial issue of regulation of technical control over the Internet onto a truly international arena.”²¹³ Mayer’s comments are particularly indicative in the context of how international private law rules have been adapted. For example, as Chapter Two will demonstrate, rules of jurisdiction for electronic consumer contracts in the Brussels 1 Regulation apply, *inter alia*, only when the consumer is domiciled and the defendant business is situated in an EU Member State. Meanwhile, the courts in the United States²¹⁴ have adapted their existing

²⁰⁹ Docherty and Fletcher, note 148 supra at p.3 where they cite the United States, Australia and New Zealand as examples. See also Reinhard Schu, “The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?” 1997 Int J Law and Tech Vol 5 No 2 192 at p.203.

²¹⁰ Schu, *ibid*.

²¹¹ In the United Kingdom, Out-law.com reported that the “UK Office for National Statistics valued UK on-line trading in 2001 at £18.4 billion for the year (excluding the financial services sector),” and that the “B2C share of on-line sales increased from 33% to 36%...” “UK on-line sales topped £18 billion in 2001,” Out-law.com, 10th October 2002 at http://www.out-law.com/php/page.php3?page_id=ukbusinesssalesto1034249377 referring to the report of the Office of National Statistics “2001 online trading by UK business,” 8 October 2002, <http://www.statistics.gov.uk/pdfdir/ecom1002.pdf>.

²¹² Given the likely replacement of the Rome Convention with a Community Instrument, modified choice of law rules for (electronic) consumer contracts should follow ; Gillies, note 7 supra.

²¹³ Chapter Two *infra*.

²¹⁴ Schu, note 209 supra at p.228-29.

jurisdiction rules for the increasing number²¹⁵ of contracts that are entered into electronically. Chapter Three will demonstrate that despite adaptation by the courts, rules of personal jurisdiction are not consistent in establishing jurisdiction over a foreign business in the consumer's domicile. As this chapter has indicated, electronic commerce activity is not restricted to parties domiciled in EU Member States. Mayer's comment highlights the challenge of regulating electronic commerce activity at global level. As the OECD reported above and as Catchpole confirms,

“e-commerce should be embraced as an integral part of business and, therefore, regulated and controlled to afford consumers, and alike, the legislative protections that are available in the physical world.”²¹⁶

It is submitted that whilst jurisdiction rules for electronic consumer contracts have been adapted by national governments to an extent, the remaining chapters of this thesis will demonstrate that divergences still exist in the content and application of jurisdiction rules for electronic consumer contracts. The next two chapters of this thesis will demonstrate that the United Kingdom (influenced by developments at European level) and the United States have simply adapted their existing national jurisdiction rules to apply to electronic consumer contracts. Those chapters will demonstrate that the adaptation of jurisdiction

²¹⁵According to the OECD, “(E)-commerce retail sales in the second quarter of 2002 accounted for 1.2% of total sales,” and confirmed that the “total value of on-line retail sales” was \$35.9 billion ; OECD, “Measuring the Information Economy,” Chapter IV, Electronic Commerce at p.66, available at <http://www.oecd.org/dataoecd/34/35/2771139.pdf>. Copyright OECD. Two countries with greater “share of Internet users buying over the Internet” are Denmark and Sweden and the report also states that retail sales in Canada doubled in the period 1999-2000 ; *ibid.* See further Industry Canada, Office of Consumer Affairs, Strategis, “Consumer Protection Rights in Canada in the Context of Electronic Commerce,” Quebec Civil Code S.Q. 1991 c64, 31/08/98, <http://strategis.ic.gc.ca/SSG/ca01078e.html> (obtained 13/09/00)).

²¹⁶ Catchpole, note 109 *supra* at p.1.

rules in this manner has not ensured that the consumer can always sue a business in his own jurisdiction. The rules in the United Kingdom and the United States are still not sufficiently consistent in establishing jurisdiction in the consumer's domicile. The key divergences in the existing consumer contract jurisdiction rules are as follows. Firstly, given the global, anonymous nature of electronic commerce, the scope of the consumer jurisdiction rules requires to be clarified. This thesis will submit that the definition of consumers as natural persons acting for their private use should be retained. The definition should not be extended to enable sole traders and small enterprises to benefit from a protective jurisdiction rule intended for a party who is a non-specialist. Secondly, the use of jurisdiction agreements to direct a dispute to a jurisdiction other than the consumer's domicile must be resolved. This thesis will submit that if rules of jurisdiction for electronic consumer contracts are to provide certain and predictable results, they should not be thwarted by a jurisdiction agreement which directs the parties' dispute to the business' jurisdiction. Thirdly, it remains to be clarified exactly what level of web site activity will establish that the business directed (the term used in the United Kingdom rules) or targeted (the approach in the United States rules) its online activities towards the consumer's jurisdiction. This thesis will demonstrate that the directing activities and targeting tests are the same and seek to secure the same result; that is, to establish that the business *intended to contract with a foreign consumer via its active or interactive web site*. If the level of web site activity required for the operation of those tests is appropriately determined, it will be clearer to both

parties that the consumer jurisdiction rule will apply. This thesis will argue that ‘active’ and ‘interactive’ web sites should be regarded as directing commercial activities or targeting consumers for the purposes of jurisdiction. Fourthly, if the directing activities/targeting tests are clarified and satisfied, jurisdiction must be established in the consumer’s domicile no matter where the defendant is domiciled. These current divergences demonstrate how a particularist approach has prioritised national interests in the adaptation of international private law rules.²¹⁷

The effect of these divergences is two-fold. Firstly, the practical effect of these divergences is that the parties continue to be unable to determine with certainty and predictability which jurisdiction will apply to their dispute. Secondly, conflicts justice cannot be achieved if certainty and predictability of result are not assured even after jurisdiction rules have been adapted. However, given the general importance of electronic commerce to world trade²¹⁸ and the specific incidence of electronic consumer contracts, cooperation between countries is now necessary to ensure that both conflicts justice is achieved and confidence in electronic commerce as a commercial medium is maintained. Basedow has described such cooperation as contributing to a “new world order”²¹⁹ in the international regulation of commercial activities. The use of electronic commerce as a communication medium has brought about the

²¹⁷ Hay, Lando and Rotunda, in Capelletti *et al* (eds), note 16 supra at p.167.

²¹⁸ Catchpole, note 109 supra at p.3.

²¹⁹ Basedow, in Basedow and Kono (eds), note 184 supra at p.5.

“internationalisation of consumer issues.”²²⁰ This thesis submits that harmonisation of jurisdiction rules to protect consumers and provide certainty for businesses contracting online²²¹ and, as Goldring suggests, limit forum shopping, is now necessary.²²² The existing rules of jurisdiction for electronic consumer contracts are not consistent to enable the consumer to sue a business in his own jurisdiction.²²³ A globally harmonised consumer contract jurisdiction rule in favour of the consumer’s jurisdiction that requires the business to have intentionally targeted consumers via active or interactive web sites will ensure that conflicts justice is achieved no matter where either party is located.

4. HARMONISATION OF JURISDICTION RULES FOR ELECTRONIC CONSUMER CONTRACTS

As stated earlier, approaches to the legal regulation of electronic commerce activity are individual state regulation, model laws and harmonisation.²²⁴ It has been demonstrated that the purpose of substantive consumer protection law is to

²²⁰ Puurunen, note 73 supra at p.690 and Rothchild, note 98 supra at p.896.

²²¹ John Goldring, “Netting the Cybershark: Consumer Protection, Cyberspace, the Nation-State, and Democracy,” in Kahin and Neeson (eds), note 82 supra at p.324 refers to the consumer as the weaker party ie that consumer protection law rather than general law and/or market forces should regulate.

²²² Goldring in Kahin and Neeson (eds), *ibid* at p.93 and 94.

²²³ Given that international private law is inherently “national law,” Schu, note 209 at p.199, the harmonisation of such laws is worthy of consideration, a point considered by Steven Gallagher, “Contracting in Cyberspace – A Minefield for the Unwary,” 2000 16 CLSR 101 at p.103 where he stresses that such are the “limitations of the existing legal framework ... some have been moved to call for a comprehensive overhaul of the existing legislation and have put forward proposals ranging from the international unification of choice of law rules to the creation of an independent internet jurisdiction in its own right where disputes would be dealt with by a special court or arbitral body.”

²²⁴ Poggi, note 1 supra at p.227-228.

protect consumers. It is submitted that consumers should be provided with juridical protection via international private law regardless of the method used by the parties to contract with each other. To attain that objective, governments have already adapted jurisdiction rules for electronic consumer contracts. As electronic commerce is not restricted to consumers and businesses situated in one jurisdiction, the ways in which other countries have sought to adapt their international private law rules for such contracts must be considered.²²⁵ For that reason, the remaining chapters of this thesis will consider how jurisdiction rules have been developed in the United Kingdom and the United States. The reasons for selecting those jurisdictions are as follows. Firstly, both countries' economies have continued to maintain high levels of participation in electronic commerce.²²⁶ These levels of participation can be attributed to the historical development of the World Wide Web in the United States and, in the case of both countries, the political will to develop and sustain electronic commerce as, *inter alia*, a legitimate commercial activity and educational tool.²²⁷ Secondly, as stated earlier, those countries have actively adapted or introduced substantive laws to regulate electronic commerce in their own jurisdictions in support of regional political objectives. Thirdly, those countries have also adapted existing jurisdiction rules for consumer contracts. The courts of the United States have adapted their existing rules of personal jurisdiction in an attempt to ensnare the

²²⁵ Th M. De Boer, "The Evolution of Postwar Private International Law," in De Boer (ed), note 15 supra at p.10 and Schu, note 209 supra at p.198.

²²⁶ OECD, "Measuring the Information Economy," Chapter IV, Electronic Commerce, <http://www.oecd.org/dataoecd/34/35/2771139.pdf>. Copyright OECD.

²²⁷ Chapters Two and Three infra.

online activities of a foreign defendant. The United Kingdom has implemented an EU Regulation which modified the jurisdiction rule for consumer contracts. Fourthly, the countries are similar in that they comprise separate, internal jurisdictions (Scotland and England, Wales and Northern Ireland in the UK and the fifty states of the United States). However, for electronic commerce to continue to flourish and for the parties to know with certainty or predict the effect of a particular jurisdiction rule when contracting online, jurisdiction rules for electronic consumer contracts must be applied consistently and provide an automatic, harmonised rule in favour of the consumer's jurisdiction.

During the twentieth century there was a theoretical shift in the development of international private law. Since the 1960s in particular,²²⁸ codification and harmonisation of international private law rules have become the predominant methods of developing international private law rules.²²⁹ According to the Oxford Dictionary, the meaning of harmonisation is described as bringing something “into consonance or accord,” and the verb “unify”, a synonym of harmonisation, means “to gather or combine parts or elements into a close mass or a coherent whole.”²³⁰ The starting point to harmonisation of international private law rules can be summed up by reference to Storme's observation that “(A)ny unification project must meet a particular need and at the same time be

²²⁸ De Boer, in De Boer (ed), note 225 supra at p.3.

²²⁹ Vonken, in De Boer (ed), note 15 supra at p.171.

²³⁰ *Compact Oxford Dictionary, Thesaurus and Wordpower Guide*, Oxford University Press, Oxford, 2002.

feasible.”²³¹ As stated earlier, the need for harmonisation of jurisdiction rules for electronic consumer contracts is to ensure that certainty and predictability of result are achieved. Conflicts justice can be achieved when a consistent rule for electronic consumer contracts is provided in favour of the consumer’s jurisdiction. The need to harmonise such jurisdiction rules is realistic given the economic significance of electronic commerce and the need to ensure that predictability of result is assured for the benefit of both parties. If it can be established that the business meant to contract with the consumer in a particular jurisdiction via the WWW, then as Stone affirms,²³² it is fair and just that the business ought to be subject to the jurisdiction of the consumer’s domicile in the same way as if the business had directed its commercial activities via an advertisement in a newspaper or on television in the consumer’s domicile.

During the last century, the theories of universalism²³³ and particularism²³⁴ have developed international private law rules. The purpose of a universalist approach is to ensure that international private law rules provide predictability of result. A universalist approach upholds international private law as “primarily a coordinating task...for uniformity of result and decisional harmony.”²³⁵ The universalist approach, as espoused by the EU in both the

²³¹ Marcel Storme, “Procedural Consequences for a Common Private Law for Europe,” in A.S. Hartkamp *et al* (eds), note 3 *supra* at p.86. Van Loon, in De Boer (ed), note 195 *supra* at p.102 and 122.

²³² Stone, note 150 *supra* at p.125.

²³³ Hay, Lando, and Rotunda in Capelletti *et al* (eds), note 16 at p.168-169.

²³⁴ Hay, Lando and Rotunda, *ibid* at p.172.

²³⁵ Vonken in De Boer (ed), note 15 *supra* at p.172.

Brussels and Rome Conventions,²³⁶ seeks to ensure that foreign judgments are given equal recognition and enforcement which, according to Hay *et al* facilitates the reduction in forum selection. By contrast, the particularist approach is centred on reflecting national interests in international private law rules. Particularism focuses on the development of international private law rules in tandem with the development of substantive laws of the forum state.²³⁷ Hay *et al* suggest that despite the Restatement (Second) (Conflict of Laws), the US approach to international private law rules has traditionally tended to favour particularism.²³⁸ As stated earlier, the regulation of electronic commerce activity via international private law rules raises two important points. Firstly, there is the need to ensure that jurisdiction rules facilitate conflicts justice by ensuring that the parties to an electronic consumer contract can determine or predict with a degree of certainty which jurisdiction will hear a dispute between them. To that end, a business will be able to predict which jurisdiction (and law) will apply to a dispute with a foreign consumer. Secondly, as stated earlier, international private law rules should strive to compliment the objectives of substantive laws in order to reach a “just solution” to a cross border dispute.²³⁹

As Furrer has indicated,

“... all considerations regarding conflict of laws focus on national law and national interests. Even the opening of the national system of

²³⁶ Hay, Lando and Rotunda, in Capelletti, *et al* (eds), note 16 supra at p.167-168.

²³⁷ Vonken in De Boer, note 15 supra at p.172.

²³⁸ Hay, Lando and Rotunda, in Capelletti, *et al* (eds), note 16 supra at p.167-168.

²³⁹ Hay, Lando and Rotunda, in Capelletti, *et al* (eds), *ibid* at p.172. Word in brackets modified for syntax.

conflict of laws towards foreign legal systems is, fundamentally, directed by national interests....”²⁴⁰

Particularism questions the need for international private law to reflect societal influences²⁴¹ and substantive private law.²⁴² This is rightly so; since international private law is national law, it must not circumvent national law and national interests. To that extent, Vonken has suggested that particularism imposes a wider, perhaps regulatory, role in the development of suitable and effective international private law rules.²⁴³ As stated earlier, disputes between consumers and businesses that have contracted electronically with each other will increase in a dematerialised, globally equivalent marketplace. As the previous section of this Chapter indicated, this thesis will demonstrate how jurisdiction rules for electronic consumer contracts have been simply adapted by the United Kingdom and the United States. It is submitted that the recent adaptation of existing jurisdiction rules in those countries is indicative of a particularist response by those governments to secure juridical protection for consumers. When new forms of business activities and methods of communication require to be regulated, it is to be expected that states will adopt an approach that focuses on current national laws and interests. A particularist approach has been reflected by amendments to substantive consumer protection

²⁴⁰ Andreas Furrer, “European Law without Peak and Centre? Observations on the Europeanization Process in Private Law Towards a Supranational Multi-level System,” in Christian Joerges and Oliver Gerstenberg (eds), “Private governance, democratic constitutionalism and supranationalism,” Proceedings of the COST A7 Seminar, Florence, 22 to 24 May at p.181.

²⁴¹ Vonken in De Boer (ed), note 15 supra.

²⁴² Furrer, in Joerges and Gestenberg (eds) note 240 supra; Ingrid Volkmer, “Universalism and Particularism: The Problem of Cultural Sovereignty and Global Information Flow,” in Kahin and Nesson (eds), note 82 supra.

²⁴³ Vonken in De Boer (ed), note 15 supra.

laws and the introduction of rules to regulate electronic commerce activities in the United Kingdom and the United States. National interests and the societal need to regulate new forms of commercial activities have directed such an approach. Whilst jurisdiction rules for electronic consumer contracts have been adapted at national level in recent years, national interests are no longer confined to commercial activities within jurisdictional boundaries. Since the United Kingdom and the United States will continue to apply their own modified jurisdiction rules to electronic consumer contract disputes, the possibility of diverging results will increase.²⁴⁴ At this point, it is submitted that the two theories of particularism and universalism meet. For example as the next Chapter will demonstrate, at EU level there has been a concerted effort to harmonise national or ‘horizontal’ international private law rules of individual Member States with regional or ‘vertical’ “post-war European”²⁴⁵ international private law to meet the objectives of the Internal Market. However Chapter Three of this thesis will demonstrate that the courts in the United States still have regard to the internal United States constitutional requirement of ‘Due Process’ when determining whether jurisdiction can be asserted over a foreign or ‘out of state’ defendant. The remaining chapters of this thesis will demonstrate that the influence of particularism in the adaptation of jurisdiction rules for electronic consumer contracts renders those rules inefficient in the long term. As electronic commerce facilitates global commerce, it is therefore

²⁴⁴ Indeed according to De Boer, *ibid*, “(D)iverging national laws have been attributed as signifying different national interests.”

²⁴⁵ De Boer, in De Boer (ed), note 225 *supra* at p.9.

paramount that jurisdiction rules for electronic consumer contracts provide certainty of application and predictability of result and ensure forum shopping limited. Whilst it is conceded that international private law will continue to reflect particularists' interest in substantive law to an extent,²⁴⁶ it must be noted that

“(P)ivate international law is not itself international; but should certainly be drawn up in an international frame of mind.”²⁴⁷

It is submitted that the continued application of particularism as a theory to develop jurisdiction rules for electronic consumer contracts is now outmoded. According to Akehurst, unless international private law rules are developed by considering similar rules in other countries, then such rules were likely to be unsatisfactory²⁴⁸ and that their development would be “along increasingly divergent lines.”²⁴⁹ It is submitted that these points are crucial to the increasing number of consumer contracts being conducted across borders by electronic means and the rules of jurisdiction currently applicable to such contracts. The following chapters of this thesis will demonstrate not only how jurisdiction rules have been adapted but how uncertainty of application and unpredictability of result are manifested by such rules. Jurisdiction rules for electronic consumer contracts therefore now need to be developed either in tandem or harmoniously with other countries to ensure that conflicts justice and international²⁵⁰

²⁴⁶ Vonken in De Boer (ed), note 15 supra.

²⁴⁷ Akehurst, note 9 supra citing Wolff.

²⁴⁸ Akehurst, note 9 supra and at p. 231 explains that this is why the Hague Conference had an initial lack of success in achieving harmonisation by way of Conventions.

²⁴⁹ Akehurst, note 247 supra.

²⁵⁰ Vonken, in De Boer (ed), note 15 supra at p.178.

“decisional harmony”²⁵¹ are achieved. Furthermore, it is submitted that as a theory for developing jurisdiction rules for electronic consumer contracts, particularism has now been overtaken by the necessity for a universally consistent jurisdiction rule. The divergences that still exist in those jurisdiction rules will continue to hinder the consumers’ ability to sue the seller in his own jurisdiction.

Kotting has previously questioned whether the theoretical development of international private law rules should be initiated “on a national, interregional or international level.”²⁵² As this thesis supports a universalist approach to the harmonisation of jurisdiction rules for electronic consumer contracts, it must therefore be considered at what level such harmonisation has to take place to be truly effective. As Van Loon asserts,²⁵³ there has been an increasing internationalisation of international private law rules that have

“developed not in a vacuum but in a context of growing internationalisation of daily life which presents many challenges to private international law and to the unification of private international law in part.”

Over the last century, harmonisation of international private law has increased as a result of the efforts of regional (supranational) and international organisations. Indeed, as Symeonides aptly describes,

²⁵¹ Meijers, “Gemeenschappelijke toelichting op het Benelux-Verdrag houdende een Eenvormige Wet betreffende het Internationaal Privachrecht,” cited in De Boer (ed), note 225 supra at p.2.

²⁵² Roelof Kotting, “The Vicious Circle of Forum Law,” in De Boer (ed), note 15 supra at p.xv.

²⁵³ Van Loon, in De Boer (ed), note 195 supra at p.102.

“(M)any nations, not least since the establishment of the United Nations, have seen the need to come together on the international plane to provide mechanisms not only for the resolution of disputes between States, but also to resolve some of the issues which arise from [the] globalization of our activities.”²⁵⁴

The international treaty or convention has become the most prevalent instrument used to promote international cooperation between countries.²⁵⁵ The European Community is the most prominent example of regional involvement in the development and implementation of international private law rules for the purposes of the Internal Market.²⁵⁶ The Hague Conference on Private International Law is an international organisation that was set up for the purpose of harmonising international private laws amongst its member countries.²⁵⁷ The Hague Conference has harmonised a range²⁵⁸ of international private law topics by way of international conventions.²⁵⁹ By the end of the last century the Hague Conference aimed to harmonise rules on jurisdiction, recognition and

²⁵⁴ Symeonides (ed), note 23 supra at Preface, vii (word in bracket substituted).

²⁵⁵ Van Loon, in De Boer (ed), note 195 supra.

²⁵⁶ The Brussels Convention and the Brussels I Regulation are the relevant European Community instruments for the purposes of the analysis in this Thesis and are considered in Chapter Two. The proposals for the replacement of the Rome Convention to a Community Instrument, issued in January 2003 and available at http://www.europa.eu.int/eur-lex/com/gpr/2002/com2002_0654en01.pdf (obtained 21/01/03) (hereafter “Green Paper”), analysis of which is out with the scope of this Thesis. The proposals for the replacement of the Rome Convention to a Community Instrument, issued in January 2003 and available at http://www.europa.eu.int/eur-lex/com/gpr/2002/com2002_0654en01.pdf (obtained 21/01/03) (hereafter “Green Paper”), analysis of which is out with the scope of this Thesis.

²⁵⁷ The Hague Conference on Private International Law, <http://www.hcch.net>. Article 1 of “Statute on the Hague Conference on Private International Law,” 15 July 1955, states that “(T)he purpose of the Hague Conference is to work for the progressive unification of the rules of private international law,” available at <http://www.hcch.net/e/conventions/text01e.html>. Van Loon, in De Boer (ed), note 195 supra.

²⁵⁸ Later commercial conventions included the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters in 1965, the Convention on Taking Evidence Abroad in Civil or Commercial Matters in 1970 and the Convention on the Law Applicable to Contracts for the International Sale of Goods in 1986. ; <http://www.hcch.net/e/conventions/bibl00e.html>.

²⁵⁹ Symeonides (ed), note 23 supra.

enforcement in civil and commercial matters in its proposed Jurisdiction and Judgments Convention. The proposed convention has been regarded as one of the most ambitious and fraught projects that the Hague Conference has undertaken in recent years.²⁶⁰ However in the last three years the scope of the convention has been substantially reduced to a convention on ‘choice of court’ rules only. The proposals in the previous (1999 and 2001) draft conventions are important to consider in the context of this thesis for the following reasons. Firstly, the proposed convention would have had, and may yet still have²⁶¹ in its modified form, worldwide effect. Secondly, the present author has questioned²⁶² whether the initial and subsequent draft articles of the convention could apply to electronic consumer contracts. The present author has previously concluded that the proposed convention should retain jurisdiction rules for consumer contracts and that Option B in the draft of Article 7 in the 2001 proposed convention was the most appropriate proposed jurisdiction rule for electronic consumer contracts.²⁶³ Thirdly, the two drafts of the proposed convention continue to represent a unique and significant effort towards harmonisation of, *inter alia*, jurisdiction rules for electronic consumer contracts. Fourthly it should be noted that, by its own admission, the Hague Conference’s efforts may yet form the basis of a separate project for an international

²⁶⁰ Chapter Four *infra*.

²⁶¹ By virtue of the substantially reduced draft convention on choice of court agreements – <http://www.hcch.net>.

²⁶² Lorna E. Gillies, “The Impact of the Hague Conference’s Proposed Judgments Convention for Electronic Commerce and Intellectual Property Disputes,” 2002 16 3 *Int Rev L Comps and Tech* 233.

²⁶³ Gillies, *ibid* at p.243.

convention on either electronic commerce or electronic consumer contract jurisdiction.²⁶⁴ For those reasons the draft consumer contract jurisdiction rules in the Hague Conference's proposed convention will be considered in the final chapter of this thesis. Even if such a Convention does not take place, then it is still feasible and necessary for existing jurisdiction rules for consumer contracts to be amended to prevent continued inconsistent results.

5. SUMMARY

The remaining chapters of this thesis will now examine the existing rules of jurisdiction for consumer contracts in the United Kingdom (with reference to European Union policy and developments) and the United States. The thesis will demonstrate that, despite recent adaptation, rules of jurisdiction for consumer contracts do not ensure certainty and predictability of result and thereby conflicts justice. This thesis will conclude, with reference to the Hague Conference's Judgments Convention project, that existing rules should be further amended and harmonised to provide an automatic rule in favour of the consumer's jurisdiction. Given the commercial significance of electronic commerce, governmental and non-governmental organisations, businesses, consumers and their representatives have a vested interest in how international private law rules apply. Where appropriate, the views, suggestions and recommendations of these organisations will also be considered in the final chapter. This thesis argues that international private law rules must facilitate

²⁶⁴ Haines, note 86 supra.

“global access to [*conflicts*] justice”²⁶⁵ by enabling a consumer who has entered into an electronic consumer contract after being targeted by the business’ active or interactive web site to sue a business in his own jurisdiction. Such a global, harmonised approach ²⁶⁶ of jurisdiction rules for electronic consumer contracts will be required for legal certainty and predictability to be achieved in the on-line environment.

²⁶⁵ Gillies, in Rickett and Telfer (eds), note 197 supra at p.361. Word in brackets added.

²⁶⁶ As with other areas of international private law; Hans Van Loon, “Globalisation and The Hague Conference on Private International Law,” *International Law Forum du droit international* 2:230, 2000 ; Poggi, note 1 supra at p.277.

Chapter Two

Jurisdiction Rules for Electronic Consumer Contracts in the Brussels 1 Regulation

1. INTRODUCTION

This Chapter will examine and assess jurisdiction rules for electronic consumer contracts in the Brussels 1 Regulation,¹ the EU Instrument that replaced the Brussels Convention.² This Chapter will demonstrate that the consumer contract jurisdiction rules in the Brussels 1 Regulation and Schedules 4 and 8 to the United Kingdom's Civil Jurisdiction and Judgments Act 1982 (hereafter 'the 1982 Act') have not been sufficiently adapted to establish jurisdiction of an electronic consumer contract in the consumer's domicile. The rules in the Brussels 1 Regulation remain restrictive in three ways. First, the rules only apply to consumers domiciled in an EU Member State and businesses that are domiciled or have a branch in and direct their activities to, an EU Member State. Second, the rules only apply to certain consumer contracts. Third, the rules of jurisdiction are subject to particular conditions which are not conducive to electronic consumer contracts. Schedules 4 and 8 to the 1982 Act and Paragraph 6.20(5) CPR must also be adapted to ensure that the consumer can establish jurisdiction in his domicile regardless of where the defendant is

¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 OJ L12/1 (hereafter the Brussels 1 Regulation) ; Lorna E. Gillies, "A Review of the New Jurisdiction Rules for Electronic Consumer Contracts within the European Union," Commentary, 2001 (1) The Journal of Information, Law and Technology (JILT) <http://elj.warwick.ac.uk/jilt/01-1/gillies.html>, 28 February 2001.

² With the exception of Denmark, the implications of which are considered later in this Chapter.

domiciled. It will be demonstrated that further adaptation and harmonisation of these rules is required to ensure that the consumer's jurisdiction can be established with certainty and predictability. The rules must be adapted in the following ways. Firstly, the consumer jurisdiction rules should continue to apply only to private (ie natural), final consumers purchasing for their own private use or consumption. Secondly, the term 'directing such activities' in Article 15(1)(c) must be clarified to ensure it is consistently applied when businesses undertake commercial activities via their active or interactive web sites. It is submitted that consumers must therefore be specifically targeted by businesses via such web sites. If businesses intentionally direct their online activities towards consumers in this manner, any dispute must be heard in the consumer's jurisdiction. Thirdly, a jurisdiction clause in a click-wrap agreement on a business' web site must not restrict or prevent the consumer's dispute from being heard in his jurisdiction.

2. SYNOPSIS OF INTERNATIONAL PRIVATE LAW RULES FOR CONSUMER CONTRACTS IN EUROPE

Whilst consumer protection policy has developed in the EU since the 1970's,³ the Treaties of Maastricht and Amsterdam sought to further strengthen⁴ the development of such policies to increase the level of protection afforded to

³ Article 5(2) of the Treaty of Rome required the consumer to be protected ; Prof Dr jur M. Lehmann, "Electronic Commerce and Consumer Protection in Europe," 2000 Vol 17 Comp High Tech Law Journal 101 ; Jules Stuyck, "European Consumer Law After The Treaty of Amsterdam: Consumer Policy In Or Beyond The Internal Market?" (2000) 37 CMLR 367at p.377 *et seq.*

⁴ Article 3, EC Treaty; Stuyck, note 3 *supra* at p.377.

consumers in the EU Member States. The Single European Act inserted Article 100a into the Treaty, which affirmed the extent of the European Commission's policy on consumer protection as follows

“
...
3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.”

The Maastricht Treaty sought to ensure that consumers received, in accordance with Article 129a(1) (re-numbered Article 153 by the Treaty of Amsterdam), a “high level of consumer protection” in specific action either taken to pursue completion of the internal market or to “...protect the health, safety and economic interests of consumers.”⁵ The Treaty of Amsterdam also imposed a duty on the European Community to ensure that consumers' rights are taken into account in the development and adoption of relevant measures. Article 153 also ensured that the Community achieved a high level of consumer protection when “defining other Community policies and activities” and “...in the context of completion of the internal market.” For example, Article 153 enabled Member States to continue to implement their own consumer protection rules, even if those rules were more stringent than the provisions contained in European Community instruments.⁶ However, in any event, national rules had to be compatible with the Treaty.⁷ The European Community has continued to

⁵ Article 129a(1) EC ; Stuyck, *ibid.*

⁶ Member States were also under an obligation to notify the Commission of such rules.

⁷ Article 153 TEU.

develop its consumer protection policies post-Treaty of Amsterdam.⁸ The Tampere Council sought to increase mutual cooperation between the civil laws of the EU Member States as follows,

“The main objective of co-operation in civil law is to establish better collaboration between Member States in order to encourage free movement of citizens. The European Council of Tampere (15 and 16 October 1999) established a map for the effective implementation, among others, of the civil co-operation provisions introduced by the Amsterdam Treaty. The three priorities in this field are better access to justice, mutual recognition of judicial decisions, and increased convergence in the field of procedural law.

The Commission will pursue the targets set for the effective **implementation of the civil cooperation provisions introduced by the Amsterdam Treaty and developed by the conclusions of the European Council of Tampere.** The Commission will continue to update, at regular intervals, a “Scoreboard”, to monitor the progress in the adoption and implementation of the range of measures needed to meet these targets.

The Commission will take into account the consumer’s interest **when Community rules on international private law are established.**⁹

⁸ Note 9 infra. Another example of the coordination of consumer redress mechanisms is the development of an “out-of-court” settlement procedure. See European Parliament, Legislative Observatory, “Out-of-court settlement of consumer disputes (recommendation 98/257/EC, Tampere european council conclusions), INI/2000/2209, http://wwwdb.europarl.eu.int/oeil/oeil_viewdnl.ProcedureView?lang=2&procid=4458 and European Parliament, Legislative Observatory, “Consumer Disputes: creation of a european extra-judicial network,” INS/2000/0405, http://wwwdb.europarl.eu.int/oeil/oeil_viewdnl.ProcedureView?lang=2&procid=4037

In the context of electronic commerce and the Information Society, see the study by PriceWaterhouse Coopers for the European Commission at European Commission, Health and Consumer Protection, Study on Consumer Law and Information Society, “Final Report Study on Consumer Law and the Information Society,” 17 August 2001, http://europa.eu.int/comm/dgs/health_consumer/library/surveys/sur20_study_en.pdf at http://europa.eu.int/comm/dgs/health_consumer/library/surveys/sur20_en.html

⁹ European Commission, “Communication From the Commission to the European Parliament, The Council, The Economic and Social Committee and The Committee of the Regions, Consumer Policy Strategy 2002-2006,” Brussels COM (2002) 208, http://www.europa.eu.int/consumers/policy/intro/consumer_policy_strategy_en.pdf and http://europa.eu.int/comm/consumers/policy/intro/intro_en.html at para. 3.2.3.3.

The European Community has developed a policy of ensuring that as consumers, the citizens of Europe all have the same level of consumer protection afforded to them.¹⁰ Van Der Hoff has defined the three “pinnacles”¹¹ of EU consumer protection as “information disclosure, *ius poenitentiae* and juridical protection.”¹² The basis of juridical protection for consumers is to provide the consumer with access to the jurisdiction and consumer protection rules of the consumer’s domicile. Today, substantive consumer protection rules apply to a wide range of matters including, *inter alia*, product liability, consumer credit, rules governing contracts concluded at a distance (‘distance selling’)¹³ including the distance marketing of consumer financial services.¹⁴ Juridical protection for consumers is provided by jurisdiction and choice of law rules for consumer contracts.¹⁵ Such measures reflect objectives that have evolved for consumer protection through amendments of the Treaty.¹⁶

¹⁰ Tampere Council Recommendations, *ibid*.

¹¹ Simone Van Der Hoff, “European Conflict Rules Concerning International Online Consumer Contracts,” 2003 12(2) Information and Telecommunications Law, 165.

¹² Van Der Hoff, *ibid*.

¹³ Hector L. MacQueen and Rafi Azim-Khan, “The Argos free TV debacle: two legal opinions,” 1999 1 Electronic Business Law 9, 9.

¹⁴ Proposed Directive 2002/65/EC of the European Parliament and of the Council concerning the Distance Marketing of Consumer Financial Services and Amending Council Directives 90/619/EEC, 97/7/EEC and 98/27/EEC, 23 September 2002 available at <http://register.consilium.eu.int/pdf/en/02/st03/0363-r1en2.pdf> (known as the ‘Distance Marketing of Consumer Financial Services Directive.’)

¹⁵ The responsibility for judicial rules for civil and commercial matters rests with the European Commission’s Justice and Home Affairs (JHA) Directorate, http://www.europa.eu.int/comm/dgs/justice_home/index_en.htm. EUROPA, European Commission, Justice and Home Affairs, “Communication from the Commission to the Council and the European Parliament, Biannual Update of an Area of “Freedom, Security and Justice in the European Union,” (Second Half of 2001) COM (2001) 628, 31 October 2001, http://www.europa.eu.int/comm/dgs/justice_home/pdf/scoreboard_30oct01_en.pdf at http://www.europa.eu.int/comm/dgs/justice_home/index_en.htm.

¹⁶ Unless otherwise stated, reference to the Treaty in this Chapter and this Thesis is the Treaty of Amsterdam as amended by the Treaty of Nice where appropriate.

3. JURISDICTION RULES FOR ELECTRONIC CONSUMER CONTRACTS IN THE BRUSSELS 1 REGULATION

According to the Commissioner for Justice and Home Affairs, the initial revision process to replace the Brussels Convention with a Community Regulation¹⁷ was to allow for,

“...improv(ing) access to justice within the EU. This will strengthen the rights of the citizen as a consumer as well as in other roles. It will also contribute to a more stable legal framework for industry, in particular small and medium sized companies, and thereby give a positive impetus to the further development of the internal market.”¹⁸

The EU Commission recognised the need to ensure consumers receive adequate juridical protection when contracting with foreign sellers. The Commissioner for the Single Market, Mario Monti, reiterated the essence of the proposals which was to facilitate closer cooperation¹⁹ between Member States in furtherance of Treaty objectives.

“(T)his Communication is to be seen as a first step towards a new Single Market policy in the field of procedural law.”²⁰

Since the proposals to replace the Brussels Convention with the Brussels 1 Regulation commenced, the European Union recognised the need to provide

¹⁷ The Brussels Convention, as amended, shall still apply between Denmark and the other Member States; Brussels Regulation, note 1 supra at Recital 22. In terms of choice of law rules, a Green Paper has been issued on proposals to replace the Rome Convention with a Community Instrument: see EU Commission, “Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization,” COM(2002) 654 final, 14th January 2003 available at http://www.europa.eu.int/eur-lex/com/gpr/2002/com2002_0654en01.pdf (obtained 21/01/03).

¹⁸ “Procedural law: The Commission advocates more efficiency in obtaining and enforcing judgments in the European Union,” in “Update on the Single Market,” at <http://www.europa.eu.int/comm/dg15/en/update/general/1038.html>.

¹⁹ Helmut Kortenber, “Closer Cooperation in the Treaty of Amsterdam,” (1998) 35 CMLR 833 at p.845.

²⁰ Note 18 supra.

certain and predictable jurisdiction rules for electronic commerce. On 14 July 1999, the European Commission adopted a draft Regulation on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters to “replace and update the 1968 Brussels Convention with a view to take into account of new forms of commerce which did not exist in 1968.”²¹ The EU Commission therefore acknowledged the need to regulate electronic commerce including consumer contracts entered into via the WWW. Indeed as Beaumont confirmed, the articles given priority in the revision process included the exclusive rules of jurisdiction for consumer contracts in Articles 13-15.²² The basis for adopting the Brussels 1 Regulation was further explained by Beaumont as follows,

“The sound operation of the internal market creates a need to have clear rules on jurisdiction and speed up the recognition and enforcement of judgments in civil and commercial matters. To this end, rapid procedures and legal certainty are of the essence at a time when the increasing frequency of exchanges between persons and economic operators in different Member States leads to a growth in litigation.”²³

After much debate on the provisions of, *inter alia*, Articles 15-17, the European Union approved the Brussels 1 Regulation on 30th November 2000.²⁴ On 1st

²¹ “Commission adopts draft Regulation on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters,” Document IP/99/510 dated 14/07/1999 at <http://europa.eu.int/rapid/start/cgi/guest...ion.gettxt=gt&doc=IP/99/510|0|RAPID&lg=EN>.

²² Paul R., Beaumont, “A United Kingdom Perspectives on the Proposed Hague Judgments Convention,” 1998 Brook Int’l L Vol XXIV: 1 75 at p.91.

²³ Beaumont, *bid*. Interestingly, the primary negotiations for the revision of the Brussels Convention appeared to proceed on the basis that the provisions would remain in the form of a Convention, not a Community Instrument.

²⁴ Keith Regan, “EU OK's E-Commerce Dispute Law,” 1 December 2000 <http://www.EcommerceTimes.com/perl/story/5635.html> (obtained 01/12/00). Brussels 1 Regulation 2001 OJ L12/1, note 1 *supra*.

March 2002²⁵ it replaced the Brussels Convention with modified rules²⁶ of jurisdiction for, *inter alia*, electronic consumer contracts.

3.1 Judicial Cooperation in Civil and Commercial Matters and Juridical Protection for Consumers in the Brussels 1 Regulation

The Brussels 1 Regulation aims to provide for the free movement of judgments in civil and commercial matters in terms of the European Union's '*acquis communautaire*'.²⁷ The *acquis* extends to facilitating cooperation in civil and commercial matters throughout the European Union. The application of jurisdiction rules for consumer contracts in the Brussels 1 Regulation is restricted for the following reasons. Firstly, the legal basis of the Brussels 1 Regulation restricts the application of those rules since they only apply when the defendant is situated or has a branch or agency in an EU Member State. In cases involving a defendant situated in a non-Member State, Article 15 confirms that the national laws of the Member State (by virtue of Article 4) must be applied. As far as the United Kingdom is concerned, rules of jurisdiction for consumer contracts contained in Schedules 4 and 8 to the Civil Jurisdiction and Judgments

²⁵ 'Competence Judiciaire, Reconnaissance et Execution des Decisions Civiles et Commerciales - Version Provisoire Communication a la Presse 2314ème session du Conseil - Justice, Affaires Interieures et Protection Civile', Version Provisoire - Brussels, 30 November / 1 December 2000, at <http://ue.eu.int/newsroom/main.cfm?LANG=2>. Article 76, 2001 OJ L12/1 supra at p.16, first confirmed by the European Council in Competence Judiciaire, Reconnaissance et Execution des Decisions Civiles et Commerciales - Version Provisoire, 30 November / 1 December 2000, <http://ue.eu.int/newsroom/main.cfm?LANG=2>.

²⁶ http://europa.eu.int/eur-lex/en/oj/2001/l_01220010116en.html.

²⁷ Preamble of the Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty), Recital 5 at http://europa.eu.int/eurlex/en/com/dat/2000/en_500PC0689.html. See also Antje Wiener, "The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance," (1998) 4 ELJ 3, 294 at p.299 where the author describes the essence of the Community Acquis as "...represent(ing) the continually changing institutional terms which result from the constructive process of 'integration through law'."

Act 1982 and Paragraph 6.20(5) CPR must be amended to apply consistently to contracts conducted over the WWW. Secondly, the legal basis for adopting the Brussels 1 Regulation has implications for Member States amending or adopting future jurisdiction rules for defendants not domiciled in an EU Member State. It will be shown that the lack of a harmonised approach is not conducive for a certain and predictable jurisdiction rule in favour of the consumer's domicile. Thirdly, in matters relating to Denmark, a lack of coherence prevails with the continued application of Articles 13-15 of the Brussels Convention. Fourthly, it will be demonstrated that the specific provisions in Articles 15-17 of the Brussels 1 Regulation must be amended to clarify and ensure that the consumer can establish jurisdiction in his own domicile with greater consistency.

The revision of the Brussels Convention was based on Article 61(c) and Article 65, and implemented in terms of Article 67, of the EC Treaty. As both Basedow and Remien have confirmed Article 65, as opposed to Article 95,²⁸ was the correct basis for implementing the Brussels 1 Regulation²⁹ since the free movement of persons must include measures for judicial cooperation in civil and commercial matters. Whilst Article 95 deals with the free movement of services on the one hand, on the other hand Article 65 specifically refers to the promoting the compatibility of conflicts of law and jurisdiction. It is submitted

²⁸ Jona Israëli, "Conflicts of Law and the EC after Amsterdam A Change for the Worse?" (2000) 7 MJ 81.

²⁹ Jürgen Basedow, "The Communitarisation of The Conflict of Laws Under The Treaty of Amsterdam," (2000) 37 CMLR 687 at p.698-699. Oliver Remien, "European Private International Law, The European Community and its Emerging Area of Freedom, Security and Justice," (2001) 38 CMLR 53 at 74-75.

that this is correct approach since consumers must be provided with effective juridical protection via personal jurisdiction rules when contracting with foreign businesses. Indeed, the remarks made by the EU Commissioner Mario Monti indicated the extent to which EU competence was to be strengthened in relation to the four freedoms.

“(T)he free movement of judgments is an important corollary to the basic freedoms of the EU treaty. The rules in this field can still be improved and reflection has to be extended also to other areas of procedural law. Once in force, the Amsterdam Treaty offers the EU new possibilities and instruments to deal with the issue.”³⁰

The revision of the Brussels Convention was regarded as assisting the mutual recognition of civil and commercial matters, being the “cornerstone of judicial cooperation.”³¹ As Beaumont³² reported, the measures provided in Article 65 EC ‘for the field of judicial cooperation in civil matters having cross-border implications...insofar as necessary for the proper functioning of the internal market’ included,

“(a) improving and simplifying:

-...

- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extra judicial cases;

(b) promoting the compatibility of the rules applicable in the member States concerning the conflict of laws and jurisdiction;

...”³³

³⁰ Monti, in “Procedural law: The Commission advocates more efficiency in obtaining and enforcing judgments in the European Union,” in “Update on the Single Market,” note 18 supra.

³¹ Bulletin EU 10/99, “VI. Mutual recognition of judicial decisions” at <http://www.europa.eu.int/abc/doc/off/bull/en/9910/i1010.htm>

³² Paul R. Beaumont, “European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,” (1999) 48 ICLQ 223 at p. 225.

³³ 1997 OJ C340/203. Charles T. Kotuby Jr., “External Competence of the European Community in the Hague Conference on Private International Law : Community Harmonization and Worldwide Unification,” 2001 NILR 1 at p.17-18 suggests that the “mere existence” of this legislation is “...representative of the exercise of competence provided for in the Treaty.”

The starting point for action under Article 65 is, as Basedow confirms, for the benefit of “intra Community relations.”³⁴ Remien supports Basedow assertion that Article 65 only provides a basis for Community competence in international private law in matters between the EU Member States.³⁵ Therefore the amendment of jurisdiction rules in the Brussels Convention was only for the benefit of the Internal Market. Furthermore, as Kotuby has observed, the effect of Community competence

“... operates as a ‘blocking effect’, precluding Member States action only insofar as that action may ‘affect Community rules’ or ‘alter their scope’.”³⁶

Whilst Community competence enables the EU to implement international private law rules such as the Brussels 1 Regulation amongst Member States, protective jurisdiction rules still must be provided for consumers when they contract with businesses situated in non-Member States. However Basedow, Kotuby and Remien have all suggested that the internal competence (*in foro interior*) provided by Article 65 implies that the European Union has external competence (*in foro exterior*)³⁷ to legislate in matters involving non-Member States.³⁸ Given the restrictive application of Articles 15-17 of the Brussels 1 Regulation, it is important to determine the extent to which Member States jurisdiction rules are consistent and predictable when the consumer contracts via

³⁴ Basedow, note 29 supra at p.702.

³⁵ Remien, note 29 supra at p.75.

³⁶ Kotuby, note 33 supra at p.20 and p.11-12 and 17.

³⁷ Beaumont, note 32 supra at p.228.

³⁸ Kotuby, note 33 supra at p.3-4 *et seq* who asserts that Article 65 provides just that, an extension of community competence to matters not strictly limited to the proper functioning of the internal market.

the WWW with a business situated in a non-Member State. Indeed, the EU Commission has acknowledged the practical significance of EU competence vis-à-vis global electronic commerce when it said that a “sound, predictable and *internationally co-ordinated* framework,” was needed for the development of electronic commerce.³⁹ Nevertheless, despite the academic consensus, it has yet to be tested whether each Member State, the EU collectively, or both⁴⁰ have competence under EU law to implement such measures. The movement of particular⁴¹ national competencies to the European Union by the process of parallelism⁴² has resulted in the “Communitisation”⁴³ of policies and “a new division of powers”⁴⁴ not previously within the European Union’s explicit remit. In addition to parallelism, the European Union has sought to ‘communitarise’ or ‘harmonise’ substantive and procedural rules of its Member States in line with the Union’s increased competencies post-Treaty of Amsterdam.⁴⁵ Importantly, after five years from the introduction of the Treaty

³⁹ European Commission, “US Perspectives on Consumer Protection in the Global Electronic Marketplace, Federal Trade Commission Notice requesting academic papers and public comment, Comments by the European Commission,” 21st April 1999, http://www.e-global.es/e-comm01_en.pdf at http://www.e-global.es/libros_005.htm#1 (obtained 20/12/00). Emphasis added. See also the European Commission, “Opinion of the Economic and Social Committee on the Proposal for a Council Regulation (EC) on jurisdiction and enforcement of judgments in civil and commercial matters,” (COM (1999) 348 final - 99/0154 - (CNS)) at http://www.esc.eu.int/fr/docs/fr_docs_op_February.htm and C117 26 April 2000 006, at para.4.2.2.

⁴⁰ Beaumont, note 32 supra. See also Takis Tridimas, and Piet Eeckhaut, “The External Competence of the Community and the case-law of the Court of Justice: Principle versus Pragmatism,” (1994) 14 YEL 143.

⁴¹ Ole Lando, “Lex Fori in Foro Proprio,” (1995) 2 MJ 359 at p.366.

⁴² Lando, *ibid*.

⁴³ “Communitisation,” SCADplus Glossary, *ibid*, at <http://www.europa.eu.int/scadplus/leg/en/cig/g4000c.htm>.

⁴⁴ Jörg Monar, “Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation,” (1998) 23 EL Rev 320 at p.323.

⁴⁵ Basedow, note 29 supra.

of Amsterdam, matters involving the free movement of persons will be under the “exclusive”⁴⁶ remit of the First Pillar, having been transferred by way of Communitisation.⁴⁷ The effect of this transfer now has significant implications for disputes requiring reference to international private laws⁴⁸ such as consumer contracts entered into via the WWW with businesses not situated in an EU Member State. The ability of Member States to accede to the Hague Conference on Private International Law’s future Convention on Choice of Court Agreements is a significant example of the scope and effect of Community competence. Remien’s theoretical approach suggests that measures under Article 65 could be taken by Member States regardless of whether the measures were for “intra-European” disputes⁴⁹ or not. Remien’s point is persuasive on the basis that individual Member States have previously been able to adopt international conventions and treaties on cross-border matters with non-Member States. However both Israël and Kotuby have rightly observed that the communitarisation of jurisdiction rules in the Brussels 1 Regulation via Title IV now equips the European Union with external competence in matters relating to the free movement of persons.⁵⁰ Beaumont also maintains that external competence is justified when the matter concerns the proper functioning or

⁴⁶ Monar, note 44 supra at p.329.

⁴⁷ Klaus-Peter Nanz, “The Schengen Agreement: Preparing The Free Movement of Persons in the European Union,” in Roland Bieber and Joerg Monar, (eds), *Justice and Home Affairs in the European Union The Development of the Third Pillar*, European University Press, Brussels, 1995.

⁴⁸ Beaumont, note 32 supra at p.227-228.

⁴⁹ Remien, note 29 supra at p.74.

⁵⁰ Israël, note 28 supra where she argues that the free movement of goods and services are unaffected by the Treaty of Amsterdam. Kotuby, note 33 supra at p.22.

advancement of the Internal Market.⁵¹ Since consumers can contract with businesses situated in Member and non-Member States, it is crucial that consumers are provided with certain and predictable jurisdiction rules regardless of where the business is domiciled. However, Beaumont qualified his assertion that external Treaties such as the Hague Conference's proposed Convention "...are likely to regulate things which go well beyond the proper functioning of the community's internal market."⁵² As the first chapter and the earlier remark by the European Commission confirmed, a consistent, predictable and harmonised jurisdiction rule, premised on the business intentionally targeting consumers via web sites, is required for electronic consumer contracts. This objective is "inextricably linked"⁵³ to both the aims of the Internal Market (the free movement of judgments between Member States) and the global regulation of electronic commerce via consistent jurisdiction rules. It is submitted therefore that there is merit in both Basedow and Remien's assertions that a joint consensus from the EU Member States and the Community is required for the EU to have external competence in cross-border matters involving defendants situated in non-Member States.⁵⁴ Kotuby also concludes his analysis by recommending such a "flexible approach."⁵⁵ Given the inextricable link between Articles 15-17 of the Brussels I Regulation, the global nature of electronic commerce and the need to provide consistent juridical protection for

⁵¹ Beaumont, note 32 supra at p.228.

⁵² Ibid.

⁵³ Kotuby, note 33 supra at p.15.

⁵⁴ Basedow, note 29 supra at p.704 and Remien, note 29 supra at p.76.

⁵⁵ Kotuby, note 33 at p.29.

consumers regardless of where the defendant is domiciled, a consistent approach amongst EU Member States and non-Member States alike is desirable and necessary. Given the inherent restrictions of the Brussels 1 Regulation and the need for jurisdiction rules for consumer contracts to apply with certainty and predictability, the European Union and its Member States must reach joint consensus on a future global instrument which contains rules of jurisdiction for electronic consumer contracts over businesses situated in non Member States. Alternatively, if a future global instrument is not politically preferred, each Member States' internal jurisdiction rules must be amended to ensure that the consumer who contracts via the WWW with a business can establish jurisdiction in his domicile when the business has intentionally targeted him via an active or interactive web site.

The introduction of the Brussels 1 Regulation was an example of Community efforts towards completion of the Internal Market.⁵⁶ In particular, the Preamble to Brussels 1 Regulation reinforced the requirement for a 'Community legal instrument' to achieve the objective that rules of jurisdiction and enforcement of judgments would be dealt with consistently throughout the European Union.⁵⁷

⁵⁶ Article 65/95 TEU.

⁵⁷ Ibid. Interestingly, whilst a formal decision has yet (at the time of writing) to be made with regard to the type of instrument that will replace the Rome Convention, it is expected that it will be replaced by a Community Instrument for predominantly the same reasons as the replacement of the Brussels Convention by the Brussels 1 Regulation ; Lorna E. Gillies, "Electronic Contracts and Consumer Welfare: Modernisation of the Rome Convention on Contractual Obligations," Proceedings of the ERA Trier Conference "E-commerce: Challenges for Private and Tax Law," London, 13th May, 2004. Paper on file with author.

However Denmark continued to opt out of Title IV of the Treaty.⁵⁸ As a result, the Brussels Convention continues to apply in matters concerning Denmark.⁵⁹ Fennelly has rightly observed that Denmark's opt out represented "(T)he most serious negative aspect"⁶⁰ of the reorganisation of the Treaty Pillar structure. Until such time that Denmark does adopt Title IV, it is submitted that there will be fragmentation⁶¹ of judicial cooperation between the Member States and consequently no harmonisation of regional (vertical) jurisdiction rules. The continued application of both the (unamended) Brussels Convention and Brussels 1 Regulation will affect both the consumer's ability to establish jurisdiction in his own domicile and the EU's objective to improve the compatibility of international private laws. The lack of 'harmonisation'⁶² will continue to result in an imbalance in the application of jurisdiction rules throughout the EU together with a corresponding impact in facilitating conflicts justice to parties domiciled in different EU Member States. The continued fragmentation of jurisdiction rules also has implications for consumers seeking to establish jurisdiction against a business situated in a non-Member State. For example, a consumer from Denmark and a consumer from England each enter

⁵⁸ Denmark, Ireland and the United Kingdom initially opted out of Title IV but in the end Denmark remained the only Member State not to opt in to Title IV.

⁵⁹ Brussels 1 Regulation, note 1 supra at Recital 22.

⁶⁰ Nial Fennelly, "The Area of "Freedom, Security and Justice," and the European Court of Justice – A Personal View," (2000) 49 ICLQ 1 at p.3.

⁶¹ It has been suggested that the extent of external community competence depends on whether the matter falls within Title IV or VI of the Treaty; Giorgio Gaja, "How Flexible is Flexibility Under the Amsterdam Treaty?" (1998) 35 CMLR 855. Monar, note 44 supra at p.327 suggests that this is largely dependant upon the *legal personality of the Union ...* (emphasis added).

⁶² Kotuby argues that if Community legislation does not "harmonise a particular field" this would not appear to affect the overriding effect of Community competence over national law *per se*, but that in any event, analysis is required to determine the extent of Community law over Member State action; note 33 supra at p.13.

into a contract with a Canadian business via that business' web site. Both consumers want to sue the Canadian business in their own jurisdiction. Unlike the English consumer, the Danish consumer will have to apply the rules in Articles 13-15 of the Brussels Convention (subject to Articles 4 and 5(5)) to establish jurisdiction over the Canadian business in Denmark. The Danish consumer will have to establish that the Canadian business had a branch or agency in a Contracting State. The Danish consumer will have to establish that the Canadian business' web site constituted a specific invitation or advertising to him in Denmark. In addition, the Danish consumer will also have to demonstrate that the contract was concluded in Denmark. By contrast, the English consumer must demonstrate that the Canadian business's branch directed its commercial activities towards English consumers via its web site and that his contract was concluded as a result of such commercial activity. As long as the application of jurisdiction rules continues to be fragmented amongst the EU Member States, consumers throughout Europe will have to use different jurisdiction rules in order to establish jurisdiction against a business domiciled in a non-Member State. From a practical perspective, both the English and the Danish consumer will have difficulty in establishing jurisdiction under Articles 15(1)(c) of Brussels 1 Regulation or Article 13(3) of the Brussels Convention respectively. The Canadian business will be unable to predict with certainty whether its online activities will constitute directed activity to the English consumer or a specific invitation or advertising to the Danish consumer. Furthermore the Danish consumer can only rely on Article 13(3) if he concluded

the contract in Denmark. Despite the EU's intentions and Treaty objectives, there is no harmonisation of juridical protection for consumers contracting via the WWW.

4. ELECTRONIC COMMERCE ACTIVITY IN THE EUROPEAN UNION: DEVELOPMENT OF THE INFORMATION SOCIETY

The European Union has a vested interest in the development and regulation of 'Information Society Services.'⁶³ "Information society services" are defined as " ... any service, normally provided for remuneration, at a distance, by electronic means and at the request of a recipient of services."⁶⁴ The European Union acknowledged that in addition to technical and commercial solutions, legal measures were required to regulate the emerging electronic marketplace and the continued development of the Information Society. As Chapter One demonstrated, technical measures and contractual devices are not sufficiently consistent and predictable connecting factors for determining the jurisdiction of an electronic consumer contract. However given the dematerialised, global nature of electronic commerce activities, the application of protective jurisdiction rules for consumers should not be confined to where the defendant

⁶³ European Commission, Directorate-General XIII, Telecommunications, Information Market and Exploitation of Research. To date, three Action Plans for the Information Society have been introduced by the European Commission ; "E-europe: An Information Society for All," issued 8th December 1999 (details available at <http://europa.eu.int/scadplus/leg/en/lvb/l24221.htm>). "E-europe 2002," issued 13th March 2001 (available at <http://europa.eu.int/scadplus/leg/en/lvb/l24226a.htm>) and most recently "E-europe 2005" issued 28th May 2002 (available at <http://europa.eu.int/scadplus/leg/en/lvb/l24226.htm>).

⁶⁴ Article 1(2) of the Directive 98/34/EC (as amended by Directive 98/48EC) laying down a procedure for the provision of information in the field of technical standards and regulations.

is domiciled in an EU Member State.⁶⁵ The EU Commission acknowledged this point as follows,

“...the need for strengthened *international coordination* in order to create an enabling framework for the global electronic marketplace...which is a fundamental element of the Information Society.”⁶⁶

Nevertheless, in the last five years the European Union has only introduced measures to regulate electronic commerce activity between parties situated in different Member States.⁶⁷ These measures were introduced largely in response to developments in the Information Society,⁶⁸ the E-Europe Action Plan⁶⁹ and the increase in the growth of on-line trading between businesses and

⁶⁵ For example the European Commission's Information Society Directorate has a range of themes and programmes on development of the Information Society, including those for “Citizens and Consumers” available at http://www.europa.eu.int/information_society/index_en.htm. Furthermore in respect of consumers, the Directorate has introduced Euroguichets to, inter alia, “distribute the results of comparative tests, develop cross-border studies and assist consumers with problems arising from cross-border transactions,” http://www.europa.eu.int/information_society/topics/citizens/index_en.htm.

⁶⁶ See European Commission, Directorate -General XIII, Telecommunications, Information Market and Exploitation of Research, “Communication from the Commission to the European Parliament, The Council, The Economic and Social Committee and The Committee of the Regions The Need for Strengthened International Coordination,” COM (98) 50 at <http://www.ispo.cec.be/eif/policy/com9850en.html>. Words italicised for emphasis.

⁶⁷ Julia Hörnle, “The European Union Takes Initiative in the Field of E-Commerce,” Commentary 2000 (3) The Journal of Information, Law and Technology (JILT), <http://elj.warwick.ac.uk/jilt/00-3/hornle.html>.

⁶⁸ European Commission, DG XIII, “Communication from the Commission to the European Parliament, The Council, The Economic and Social Committee and The Committee of the Regions The Need for Strengthened International Coordination,” COM (98) 50, <http://www.ispo.cec.be/eif/policy/com9850en.html> (obtained 11/09/00). The Commission's Communication highlighted the need for legal frameworks for the global electronic market place in response to increasing demand and scope of services; Figure 1 and para.2.4.

⁶⁹ European Commission, “eEurope 2005: An information society for all,” 21/22 June 2002, COM(2002) 263 final available at http://europa.eu.int/information_society/eeurope/2002/news_library/documents/eeurope2005/eeurope2005_en.pdf at http://europa.eu.int/information_society/eeurope/2005/all_about/action_plan/index_en.htm. See Lori Enos, “EU Tackles Online Consumer Confidence,” E-commercetimes.com, 26 March 2001, <http://www.ecommercetimes.com/perl/story/8426.html> (obtained 27/03/01).

consumers.⁷⁰ According to the EU Commission's Consumer Policy Strategy 2002-2006,

“In the context of the eEurope Action Plan adopted in 2000, the Commission has developed a strategy to build consumer confidence online, made up of four elements; high quality e-commerce codes, quality alternative dispute resolutions (ADRs); clear and consistent laws and effective enforcement.”⁷¹

These initiatives have included, *inter alia*, the ‘Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market’ (hereafter the Electronic Commerce Directive) and the ‘Directive on the Protection of Consumers in respect of Distance Contracts.’⁷²

The Electronic Commerce Directive was created to provide guidance and rules for the national regulation of electronic commerce activities.⁷³ However, Recital 23 of the Directive's Preamble specifies that it would “not seek to make

⁷⁰ John Goldring, “Netting the Cybershark: Consumer Protection, Cyberspace, the Nation-State, and Democracy,” in Brian Kahin and Charles Nesson (eds), *Borders in Cyberspace Information Policy and the Global Information Infrastructure*, The MIT Press, Cambridge, Massachusetts, 1997.

⁷¹ Consumer Policy Strategy 2002-2006 European Commission, “Communication From the Commission to the European Parliament, The Council, The Economic and Social Committee and The Committee of the Regions, Consumer Policy Strategy 2002-2006,” Brussels COM (2002) 208, http://www.europa.eu.int/consumers/policy/intro/consumer_policy_strategy_en.pdf and http://europa.eu.int/comm/consumers/policy/intro/intro_en.html at para.3.1.4.

⁷² ‘Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market’, (Directive on electronic commerce), 2000 OJ L178, also at http://www.europa.eu.int/eur-lex/en/lif/dat/2000/en_300L0031.html.

‘Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts’, (Directive on Distance Selling), 1997 OJ L0007, also at http://europa.eu.int/eur-lex/en/lif/dat/1997/en_397L0007.html. Journal of the Law Society of Scotland, “Consumer Rights enhances by amendments to draft distance selling directive,” (1999) 44 JLSS 37. More recently EU initiatives have extended to a Directive on the Distance Marketing of Consumer Financial Service ; see the Commission's proposed Directive 2002/65/EC of the European Parliament and of the Council concerning the Distance Marketing of Consumer Financial Services and Amending Council Directives 90/619/EEC, 97/7/EEC and 98/27/EEC, 23 September 2002 available at <http://register.consilium.eu.int/pdf/en/02/st03/0363-rlen2.pdf>.

⁷³ Graham Pearce and Nicholas Platten, “Promoting the Information Society: The EU Directive on Electronic Commerce,” 2000 4 ELJ 363 ; Trevor Smale and Jack Upton, “E-Commerce Untangling the International Web,” 2000 5 EU Counsel 6, 43.

provision for rules of international private law nor affect existing rules.” The Electronic Commerce Directive allows for the regulation of Information Society Service providers by subjecting them to their own state’s regulatory regimes, where they exist. It is not for the consumer to enforce these. Information Society Service providers are therefore subject to regulation of their online activities from their “Country of Origin.”⁷⁴ At that time of revision of the Brussels Convention, concerns were expressed by the Confederation of British Industry (CBI) that the proposals for consumer contract jurisdiction rules in the Brussels 1 Regulation would clash with the “Country of Origin” principle in the Electronic Commerce Directive.⁷⁵ Geist remarked that the Country of Destination approach reinforces the point made in Chapter One that consumers must be provided with effective juridical protection when contracting with foreign businesses online.

“The origin versus destination debate has polarised [industry and consumer] groups, making it difficult to reach a compromise that recognizes that effective consumer protection does not depend solely on which law applies ... that business must shoulder some of the risk arising from e-commerce transactions.”⁷⁶

Nevertheless, both Stone and Dutson, and more recently Øren, confirm that the basis of jurisdiction of the Directive and the Regulation are different.⁷⁷ It is submitted that these authors are all correct in their assessment of these two

⁷⁴ Will Roebuck, “Jurisdiction and E-Commerce,” [2002] CTLR 29.

⁷⁵ Pearce and Platten, note 73 supra at p.175 ; Stuart Dutson, ‘E-Commerce – European Union Transnational E-Commerce,’ 2000 16 CLSR 105 at p.106.

⁷⁶ Michael Geist, “Is There a There? Towards Greater Certainty for Internet Jurisdiction,” 2001 16 Berkeley Tech Law Journal 1345. Words in brackets added.

⁷⁷ Dutson, *ibid* and Peter Stone, “Internet Consumer Contracts and European Private International Law,” 2000 9(1) Information and Communications Technology Law 5.

Community instruments. The purpose of the Electronic Commerce Directive is to provide a framework for Member States to regulate Information Society Service providers. By contrast, the Brussels 1 Regulation provides jurisdiction rules for consumer contracts in favour of the consumer's jurisdiction. Articles 15-17 of the Brussels 1 Regulation exemplify the "Country of Destination"⁷⁸ principle since any dispute is to be determined by the place where the business' online activities are directed towards. As Stone, Dutson and Øren⁷⁹ confirm the rationale for these two EU instruments, and the references to 'jurisdiction' contained within them, are different and therefore do not conflict with each other. These three authors correctly maintain that the Brussels 1 Regulation provides rules of *personal* jurisdiction whereas the Directive is premised on *subject-matter* jurisdiction. Moreover, the Electronic Commerce Directive is a *public* law measure which provides a framework for Member States to regulate the provision of information society services via Information Society Service providers situated in their jurisdiction. The Brussels 1 Regulation provides private, juridical rules for natural persons, such as consumers. Article 3 of the Electronic Commerce Directive confirms that it does not seek to limit or restrict international private law's provisions for consumer protection.⁸⁰ Therefore it is correct that the aims of the Electronic Commerce Directive and the Brussels 1 Regulation do not conflict since, as Turner and Traynor confirm, the Electronic

⁷⁸ Pearce and Platten, note 73 supra at p.374-375.

⁷⁹ Joakim S.T. Øren, "International Jurisdiction Over Consumer Contracts in e-Europe," 2003 52 ICLQ 665 at p.668.

⁸⁰ Article 3, Electronic Commerce Directive, note 72 supra ; Stone, note 77 supra at p.12; Pearce and Platten, note 73 supra at pp.374-378.

Commerce Directive is “silent”⁸¹ on the matter of jurisdiction for cross-border disputes between consumers and businesses. As the present author has previously remarked, the European Union’s preference for the “Country of Origin” principle to regulate the activities of Internet Service providers within Member States’ territories is maintained and therefore does not affect the juridical protection for consumer provided by the Brussels 1 Regulation.⁸²

As the previous chapter demonstrated, certain and predictable rules of jurisdiction⁸³ are required firstly for the protection of consumers who contract with foreign sellers via the WWW and secondly for businesses to predict the legal consequences of contracting with foreign consumers. According to Auf der Mar,

“(C)onsumer protection issues are particularly tricky for online merchants, since they routinely provide for jurisdiction of the courts at the consumer’s domicile and for the application of his or her national law.”⁸⁴

Whilst it has been suggested that the changes to the Brussels Convention were “uncontroversial”⁸⁵ and “minor in nature,”⁸⁶ one of the most contentious,

⁸¹ Mark Turner and Mary Traynor, “Electronic Commerce (EC Directive) Regulations 2002 – Worth the Wait?” 2002 18 CLSR 396 at p.399.

⁸² Gillies, note 1 supra.

⁸³ In Europe the Rome Convention on Contractual Obligations will also be replaced in due course by a Community Instrument as part of the European Union’s Framework for Judicial Cooperation in Civil and Commercial Matters; note 15 supra.

⁸⁴ Rolf Auf der Mar, ‘Internet-Enabled Distribution Models,’ 1999 IBL 264.

⁸⁵ European Parliament, “Agreement on e-commerce jurisdiction,” 20th September 2000, http://www.europarl.eu.int/dg3/sdp/pointses/en/ps000920_enb.htm (obtained 6/10/00).

⁸⁶ Wendy Kennett (ed), “Current Developments: Private International Law,” (1999) 48 ICLQ 465 and 966.

controversial⁸⁷ and important set of rules to be replaced by the Regulation related to electronic consumer contracts.⁸⁸ Indeed the European Parliament acknowledged that the proposals for Articles 15-17 had "...given rise to a fierce debate."⁸⁹ Until 2002, any consumer wishing to sue a foreign business in his jurisdiction would have had to satisfy Articles 13-15 of the Brussels Convention. Moreover, as this chapter will demonstrate, there would have been difficulties in applying those Articles to electronic consumer contracts. During the negotiations to replace the Brussels Convention, it was necessary to consider the extent to which any changes to consumer contract jurisdiction rules had to encompass electronic commerce. Indeed the UK Government's Department of Trade and Industry succinctly summarised the issue,

"(T)he (Brussels) Convention pre-dates the Internet and in the absence of any case law it is not clear how Article 13 applies to electronic commerce and websites in particular. The revised version agreed by Member States in May 1999 aimed to address this..."⁹⁰

The controversy⁹¹ focused on revision of the following aspects of the jurisdiction rules for consumer contracts. Firstly, the restricted scope of the

⁸⁷ Wendy Kennett (ed), "Current Developments: Private International Law The Brussels 1 Regulation," (2000) 50 ICLQ 725.

⁸⁸ Peter Stone, "The Treatment of Electronic Contracts and Torts in Private International Law under European Community Legislation," 2002 11(2) ICTL 121.

⁸⁹ European Parliament, "Agreement on e-commerce jurisdiction," note 15 supra.

⁹⁰ United Kingdom Department of Trade and Industry Consultation Paper "European Commission Proposals for Changes to Article 13 of the 1968 Brussels Convention," Copyright Department of Trade and Industry, 12th April 2000 at <http://www.dti.gov.uk/cacp/ca/ecommerce.htm> (obtained 20/04/00). Word in brackets added. The DTI's comment was subsequently repeated at "International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters," "Issues Paper 3, International Electronic Commerce," November 2000, <http://law.gov.au/publications/hagueissues3.html> (obtained 25/06/01), Chapter Four infra.

⁹¹ Both internal between the different Commission DG's and external to those with a vested interest in the proposals: Kennett, note 87 supra at p.735 and Stone, note 88 supra at p.122 and 124 *et seq.*

consumer contract jurisdiction rule had to be affirmed. In particular, the definitions of consumer and consumer contract also had to be reconfirmed, with particular regard to whether legal persons such as small and medium sized enterprises (SME's) should benefit from juridical protection intended for traditional consumers. Secondly, and most importantly, the jurisdiction rules for consumer contracts had to be modified to apply to contracts conducted electronically via web sites on the WWW. The jurisdiction rules for consumer contracts had to incorporate a new connecting factor that established a sufficiently certain and predictable link between the level of activity on a business' web site and the business' intention to contract with consumers in specific jurisdictions. Thirdly, given the 'dematerialised' nature of electronic commerce via the WWW, the consumer jurisdiction rule had to stipulate whether or not the contract had to be concluded in the consumer's domicile. Lastly, the effect of jurisdiction agreements in an electronic consumer contract, for example in click-wrap agreements on business' web sites, also had to be reconsidered. The extent to which the provisions in the Brussels 1 Regulation sought to address those issues will now be considered in turn. It will be demonstrated that despite adaptation, the application of Articles 15-17 of the Brussels 1 Regulation will still generate inconsistent results in determining which jurisdiction should hear a dispute over an electronic consumer contract. Moreover, the rules of jurisdiction in Schedules 4 and 8 to the 1982 Act and CPR 6.20(5) must also be amended in order to provide certainty and

predictability when a consumer wishes to sue a business situated in another part of the United Kingdom or a non-Member State.

5. JURISDICTION RULES FOR ELECTRONIC CONSUMER CONTRACTS IN THE BRUSSELS 1 REGULATION

5.1 Introduction

One of the categories, “sub-code(s)”⁹² or “*lex specialis*”⁹³ of jurisdiction rules that has always been provided in the Brussels Convention was for ‘certain consumer contracts.’⁹⁴ Initially, the original Brussels Convention contained limited provisions for consumer contracts. The special ground of jurisdiction in Articles 13-15 of the Brussels Convention was introduced to provide protection of the consumer as the contractually weaker party.⁹⁵ The Jenard Report acknowledged that special status ought to be afforded to consumer contracts under the Convention.⁹⁶ Furthermore, the special grounds of jurisdiction for consumer contracts required to be interpreted independently based on the objectives of the Convention.⁹⁷ Article 13 determined how jurisdiction would be established for certain types of consumer contracts. Firstly, such contracts

⁹² A. Briggs, “The Brussels Convention,” (1993) 13 YEL 511. Word modified for syntax.

⁹³ C-96/00 R. *Gabriel v Schlanck & Schick GmbH* [2002] ECR I-6367.

⁹⁴ The others being for insurance contracts and employment contracts, *supra*.

⁹⁵ Reaffirming *Bertrand v Ott*, where the European Court stated that Article 13 could not be extended to cover the sale of goods between businesses by instalments. Indeed, Article 13 of the Brussels Convention was amended to take into account the issue of consumer protection together with the proposals for the Rome Convention on contractual obligations. See Alan Dashwood, Richard J. Hacon, and Robin C. A. White, *A Guide to the Civil Jurisdiction and Judgments Convention*, Kluwer Law and Taxation Publishers, Deventer, 1987 at p.28.

⁹⁶ “Report by Mr. P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, 3 June 1971,” 1979 OJ C59/1 (hereafter ‘the Jenard Report’), at p.33.

had to be for the “sale of goods on instalment credit terms, or [for] loans expressly made to finance the sale of goods and repayable by instalments.”⁹⁸

The original version of the Brussels Convention therefore only applied initially to these types of consumer contracts. The Brussels 1 Regulation now states that jurisdiction rules for consumer contracts will apply, *inter alia*,

“

Article 15

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

- (a) it is a contract for the sale of goods on instalment credit terms; or
- (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
- (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or other establishment, be deemed to be domiciled in that State.

3. [...]”⁹⁹

The ability of the consumer to raise proceedings in his domicile is premised on establishing that the contract is a “protected”¹⁰⁰ consumer contract in accordance with Article 15(1). The Brussels 1 Regulation provides jurisdiction rules for three types of consumer contract. The first type of consumer contract is for the sale of goods on instalment credit terms (Article 15(1)(a)). The second type of consumer contract is or for a loan to finance the sale of goods or for any

⁹⁷ C-89/91 *Shearson Lehman Hutton v TVB* [1993] ECR I-139.

⁹⁸ *Ibid*, word in brackets substituted.

⁹⁹ The provision which excludes transport contracts, other than package holidays ; Brussels 1 Regulation, note 1 *supra* at pp.6-7

¹⁰⁰ Stone, note 88 *supra* at p.123.

other form of credit, made to finance the sale of goods (Article 15(1)(b)).¹⁰¹

Thirdly, the remit of Article 15 extends to *any other* consumer contract for the supply of goods and services subject to the requirements of Article 15(1)(c).¹⁰²

It is this part of Article 15(1) that is most relevant to establishing the jurisdiction of an electronic consumer contract. The exclusive rule that consumers are entitled to sue businesses either in the business' or the consumers' jurisdiction is retained in Article 16 of the Brussels 1 Regulation. Article 16 provides

“

Article 16

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.
2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.
3. ...”¹⁰³

However, as the previous chapter explained, from a legal, practical and financial perspective a consumer will want to take advantage of the ability to sue a foreign business in their own jurisdiction.

5.2 Retaining the Restricted Definitions of ‘consumer’ and ‘consumer contract’ in the Brussels 1 Regulation

If the consumer wishes to rely on the provisions of Article 15(1), he must be a ‘consumer’ and the contract must be a ‘consumer contract’. The original 1968 Convention did not define the precise meaning of a ‘consumer contract.’

¹⁰¹ Brussels 1 Regulation, note 1 supra. Lorna E. Gillies, “Rules of Jurisdiction for Electronic Consumer Contracts – Scottish Perspectives,” 2001 2 SLPQ 124 at p.132.

¹⁰² Gillies, *ibid* ; Frederic Debussere, “International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?” 2002 10 IJLIT 344 at p.356-357.

¹⁰³ A right of counter-claim provision ; Brussels 1 Regulation, note 1 supra at pp.6-7.

Instead, guidance on the meaning of a consumer contract derived from the Official Reports to the Convention and subsequent Accession Conventions and the Protocol on Interpretation. In its explanation of the purpose of Section 4 of the original Brussels Convention, the Jenard Report stated

“(T)his Section relates to the sale of goods where the price is payable in a series of instalments, and to the sale of goods where the sale is contractually linked to a loan (Abzhalungsgeschäfte). The rules here adopted are similar to those applicable in the national law of the Member States and, like them, stem from a desire to protect certain categories of persons. Article 13 provides that this Section applies independently of the rest of the Convention, and like Article 7, without prejudice to the provisions of Articles 4 and 5(5).”¹⁰⁴

According to the Jenard Report, the protection of the buyer or borrower was regarded as paramount and consequently such individuals could only be sued where they were domiciled. According to Briggs, the original Brussels Convention provided an “unusually wide”¹⁰⁵ basis for a consumer to sue a seller in his or her own jurisdiction. Nevertheless in *Bertrand v Ott*,¹⁰⁶ the first case to consider the exclusive rules of jurisdiction for consumer contracts in the original¹⁰⁷ Brussels Convention, the ECJ held the rules of jurisdiction provided in Article 14 (now Article 16) had to be “strictly limited to the objectives proper to Section 4 of the said Convention.”¹⁰⁸ According to the ECJ, those

¹⁰⁴ “Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice,” 1979 OJ C59/71 (hereafter ‘the Schlosser Report’), at p.33, also referred to in C-99/96 *Hans-Hermann Mietz v Intership Yachting Sneek BV* [1999] ECR I-2277.

¹⁰⁵ Briggs, note 92 supra.

¹⁰⁶ (150/77) *Bertrand v Ott* [1978] ECR 1431.

¹⁰⁷ Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments*, 2nd ed, LLP, London, 1997 at p.61.

¹⁰⁸ *Bertrand v Ott*, note 106 supra at p.1445.

“objectives” were specifically “inspired by a desire to protect certain categories of buyers.”¹⁰⁹ The ECJ confirmed that the categories of buyers to which Section 4 provided a “jurisdictional advantage” were those buyers who were economically weaker

“...in comparison with sellers by reason of the fact that they are private financial consumers and are not engaged, when buying the product acquired on instalment credit terms, in trade or professional activities.”¹¹⁰

Accordingly, the jurisdiction rules for consumer contracts were to be treated independently from the rest of the Convention and only applied to very specific categories of protected consumer contracts.¹¹¹ It will be demonstrated that the philosophy of Articles 13-15 still operates on that basis today. In *Bertrand*, the ECJ refused to consider whether a small business could be as economically disadvantaged as an individual private consumer when contracting with a company for the purchase of goods or services. The ECJ therefore ensured that only specific categories of buyers would be able to take advantage of the exclusive jurisdiction rules enshrined in Section 4 of the Convention. The consumer jurisdiction rules were therefore to be applied restrictively.

Article 13 of the 1978 Accession Convention provided a more precise, but still restricted,¹¹² meaning of the terms “consumer” and “consumer contract.” The 1978 Accession Convention provided two important clarifications on the scope

¹⁰⁹ Ibid.

¹¹⁰ Ibid at p.1446.

¹¹¹ *Bertrand v Ott*, note 106 supra.

¹¹² Briggs and Rees, note 107 supra at p.60. The Schlosser Report refers to the term consumer as “central” to Section 4, Schlosser Report, note 104 supra at p.118.

of Articles 13-15. Firstly, Article 13 defined the meaning of consumer as “a person who acted out with their trade or profession when concluding a contract with the other party.” Secondly, the application of Article 13 of the Brussels Convention extended to *any other contract* for the supply of goods or services. In ruling that the agreement between the parties in *Hans-Hermann Mietz v Intership Yachting Sneek BV*¹¹³ was not a consumer contract, the ECJ referred to the earlier decision in *Benincasa* where it said,

“ “... in order to determine whether a person has the capacity of consumer ... reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned.” ”¹¹⁴

The court in *Mietz* confirmed that “(T)he status of consumer is thus not reserved only to those persons who are economically weak or disadvantaged.”¹¹⁵ The definition of a consumer in Article 13 of the Brussels Convention was not strictly limited to its “formal definition.”¹¹⁶ The Schlosser report confirmed that natural persons acting as consumers were to be afforded protection under Section 4, as follows

“...for future purposes that only *final consumers acting in a private capacity* should be given *special protection* and *not* those contracting in the course of their business to pay by instalments for goods and services used.”¹¹⁷

¹¹³ *Mietz*, note 104, supra.

¹¹⁴ *Mietz*, *ibid* citing *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-3767.

¹¹⁵ *Mietz*, *ibid*.

¹¹⁶ Briggs and Rees, note 107 supra at p.60.

¹¹⁷ Schlosser Report, note 104 supra. Emphasis added. Reference to this particular aspect of the Schlosser Report was recently affirmed in the ECJ’s decision in *C-96/00 R. Gabriel v Schlanck & Schick GmbH*, note 93 supra.

The decision of the ECJ in *Shearson Lehmann Hutton Inc. v TVB* exemplified the remit of Articles 13-15.¹¹⁸ In that case the ECJ made it clear that not only did Article 13 "...define the consumer as a person acting 'for a purpose which can be regarded as being outside his trade, business or profession...'"¹¹⁹ Janssens maintains that since Article 13 did not specifically exclude legal persons from its remit, legal persons could rely on the protective provisions of Article 13. However, it is submitted that the ECJ in *Shearson*, and subsequently in *Benincasa v Dentalkit*,¹²⁰ correctly specified the types of contracts given juridical protection under Article 13.¹²¹ The ECJ confirmed that the provisions contained in Article 13 could therefore only have applied in respect of

"...a private final consumer, not engaged in trade or professional activities...who is bound by one of the contracts listed in Article 13 and who is a party to the action, in accordance with Article 14."¹²²

Therefore, no matter the manner of communication used between the consumer and foreign seller, the consumer can rely on Articles 15-17 provided they enter into the contract as a private, final consumer for their own private use or consumption. More recently, in *Standard Bank v Apostolakis (No.1)*,¹²³ it was held that a private investor who invested in foreign exchange contracts for the

¹¹⁸ *Shearson Lehman Hutton*, note 97 supra.

¹¹⁹ Ibid at p.1-188. Thomas Janssens, "The Shearson judgment of the European Court of Justice: Problems raised by the "Europeanisation" and "Communitisation" of the Term "Consumer" in the Brussels Jurisdiction and Judgments Convention," 1995 4 ERPL 605.

¹²⁰ *Benincasa*, note 114 supra.

¹²¹ Ibid.

¹²² Ibid. Article 13-15, as Briggs acknowledged that it did not therefore apply as between consumer and seller or supplier – not if the consumer has "assigned his claim to a non-consumer," note 92 supra at p.512.

¹²³ *Standard Bank London Ltd v Dimitrios and Styliani Apostolakis (No 1)* [2000] IL Pr 766.

purposes of profit and not disposable income was a consumer for the purposes of Article 13 of the Brussels Convention. The respondents initially raised proceedings against the claimants in Greece as a result of serious losses on certain investments alleged to have been caused by the claimant's previous conduct. The claimants commenced their own proceedings against the respondents in the English courts to obtain an injunction restraining the proceedings in Greece. At the first hearing, the respondents argued firstly that the contract was a consumer contract and that the provisions of Article 13 applied, and secondly that the exclusive jurisdiction agreements were unfair contract terms in accordance with the Unfair Contract Terms Regulations 1994 and 1999, thereby rendering the contract void. The respondents averred that the claimants had specifically invited them to enter into a contract.¹²⁴ The respondents maintained that under Regulation 5(1) of the 1999 Regulations, a limitation on their right to sue only in England caused "a significant imbalance in the parties' rights and obligations."¹²⁵ The court accepted that it was not in the parties' "trade, business or profession"¹²⁶ to enter into exchange contracts. The court held that as the respondents sought to obtain a profit that was specifically for their own private use or consumption they were deemed to be consumers. In reaching that decision, the court had to consider the purpose of the contract itself and not simply the "subjective situation of the person [ie the

¹²⁴ A point that was confirmed in the second report of the case, *Standard Bank v Apostolakis (No.2)* [2001] Lloyd's Law Reports 240 at p.248.

¹²⁵ Ibid at p.249-250 and recently affirmed in *Picardi v Mr and Mrs Cuniberti* (2003) 19 Const. L.J. 350.

¹²⁶ Ibid at p.248 affirming Longmore J in *Standard Bank (No.1)*, note 123 supra.

consumer] concerned.”¹²⁷ The courts are predominantly concerned with the *purpose* behind the contract and not the situation of the parties to the contract.¹²⁸

As stated earlier, for Article 13 to apply, a consumer who entered into an electronic consumer contract would therefore have had to ensure that he came within the definition of a ‘consumer’ in order to assert jurisdiction under Articles 13-15. Whilst the legitimate consumer would be able to satisfy this requirement, businesses would have to be satisfied that the other party contracting via its web site was a consumer. A business can anticipate or foresee contracts with consumers in particular countries when it uses an active or interactive web site to specifically target those jurisdictions. As the second report of the *Standard Bank* case confirmed, the consumer has to satisfy the court that the “threshold requirement of Article 13” has been met; that is, prior to conclusion of the contract, the consumer had been specifically targeted by the business in his own jurisdiction.¹²⁹

The ECJ’s “policy of construing the various heads of special jurisdiction strictly, so that they apply only to the extent necessary to fulfill their objectives”¹³⁰ continued to restrict the operation of Articles 13-15 to private consumers. The decision *Francesco Benincasa v Dentalkit Srl*,¹³¹ specifically confirmed

¹²⁷ *Standard Bank (No.1)*, note 123 supra per Longmore J at p.772, in accordance with the ECJ’s decision in *Benincasa v Dentalkit*, note 114 supra. Words in square brackets added.

¹²⁸ *Mietz*, note 104 supra.

¹²⁹ *Standard Bank (No.2)*, note 124 supra at p.248.

¹³⁰ 1994 ELRev 537 at p.538.

¹³¹ *Benincasa*, note 114 supra.

that juridical protection in Article 13 did not apply to small and medium sized enterprises. The ECJ ruled that the contract was not a consumer contract as

“...an agreement intended to establish a trade or profession must be deemed to have been concluded for the purpose of a trade or profession.”¹³²

The Advocate General stressed the necessity for a Community interpretation of “consumer contract.”¹³³ Indeed, the ECJ in *Bertrand* reiterated the Schlosser Report and ruled that Article 13 could only apply to private consumers and not for the purposes of a trade or profession.¹³⁴ Interestingly, Advocate General Colomer’s Opinion pointed out that it was the *activity in question*, namely the purchasing of goods or services for private purposes, and not the *individual party to the agreement* that formed the basis of Article 13.¹³⁵ This is an important point for consumer contracts conducted by electronic commerce. Since the basis of Article 13 was to provide particular rules of jurisdiction for the purchase of goods or services for private purposes, Article 13 ought to have reflected the consumer’s ability to contract by electronic commerce to ensure such juridical protection was preserved. The Advocate General concluded that Article 13 could not be extended to cover situations where *any party* in an economically weaker position than the other party to the contract could rely on asserting protective jurisdiction contained in Article 13.¹³⁶ In *Benincasa*, the

¹³² Ibid at p.I-3772.

¹³³ Ibid, per AG Colomer. Reference was made to the previous Preliminary Ruling in *Shearson* that, in turn, referred to *Handte* in support of such an interpretation and *Bertrand* in respect of Article 13 in particular.

¹³⁴ Ibid at p.I-3778.

¹³⁵ Ibid at p.I-3781. Emphasis added.

¹³⁶ Ibid, emphasis added.

ECJ sought to ensure that a restrictive interpretation applied to the meaning of a consumer contract.¹³⁷ The Advocate General's remarks clarified that Article 13 did not cover contracts entered into by legal persons such as small to medium sized enterprises.

On more than one occasion during negotiations on the Brussels 1 Regulation, the argument was put forward by representatives of businesses and the e-lobby¹³⁸ that businesses, including small to medium sized enterprises (SMEs), should be provided with the same juridical protection as the traditional, less experienced consumer. The main reasons for the argument was that in comparison to the foreign business trading via a web site, SME's were also in an economically weaker position and lacked knowledge of the foreign seller's jurisdiction and laws in the same way as the traditional consumer. However, earlier authority from the ECJ's judgment in *Benincasa* affirmed that the interpretation of the word 'consumer' "... must be strictly construed."¹³⁹ The ECJ held that Article 13 could only apply to natural persons entering into private contracts with no link whatsoever to the person's trade or professional activities. If the proposals to replace Article 13 of the Brussels Convention had been extended to include legal persons such as SMEs then this would have been a shift in EU policy and by implication an extension of substantive and juridical protection for consumers.

¹³⁷ In accordance with the Schlosser Report.

¹³⁸ Stone, note 77 supra and Adrian Briggs, *The Conflict of Laws*, Clarendon Press, Oxford, 2002 at p.67-68 ; Øren, note 79 supra.

¹³⁹ *Benincasa*, 114 supra at p.I-3795.

Therefore, whilst the basis for determining who is deemed to be a consumer for the purposes of the Brussels 1 Regulation has not changed,¹⁴⁰ the types of contract deemed to be a “consumer contract” have extended. It is right that the specific definition of “consumer” derived from the 1978 Accession Convention and ECJ decisions should still operate in the context of Article 15 of the Brussels 1 Regulation. The traditional consumer must be provided with juridical protection when contracting with a foreign business via the WWW. Equally, a foreign business should only be sued by a consumer in the consumer’s jurisdiction provided that consumer was targeted by the business to contract for their own private use or consumption. If the provisions of Article 15 had been extended to legal persons, such as small and medium sized enterprises, then this would have been a disincentive to businesses investing in technology to target foreign markets. However, it is submitted that in the absence of specific guidance on the meaning of the connecting factor “directing such activities,” the consistent application of Article 15 vis-à-vis electronic consumer contracts will continue to be hindered.

6. THE NEW CONNECTING FACTOR: WHEN IS A BUSINESS DEEMED TO BE DIRECTING ITS ACTIVITIES VIA A WEB SITE TO CONSUMERS IN OTHER JURISDICTIONS?

Article 13(3) of the 1978 Accession Convention established jurisdiction over any other consumer contract for the sale of goods or the provision of services.

This jurisdiction rule was subject to two requirements which will now be

¹⁴⁰ And hence this decision at ECJ level has remained steadfast (*cf* the decision of the Scottish Sheriff Court in *BJ Mann Advertising*, *infra* regarding whether a small business could be deemed

considered. It will be demonstrated that both requirements would have hindered the operation of Article 13 vis-à-vis establishing jurisdiction of an electronic consumer contract in the consumer's jurisdiction. Firstly, the contract had to be preceded by a specific invitation or advertising to the consumer in his domicile. Secondly, the consumer had to take steps to conclude the contract in his domicile. Despite these requirements, it is clear that the overall application of Article 13 widened in comparison to analogous provisions in the original Brussels Convention. The Schlosser Report on the 1978 Accession Convention confirmed¹⁴¹ that the difference between the 1968 and the 1978 Conventions was premised on the European Community's increasingly "broader based" objective towards consumer protection. Indeed, the Jenard Report previously affirmed

"(T)he rules here adopted are similar to those applicable in the national law of several of the Member States and, like them, stem from a desire to protect certain categories of persons. Article 13 provides that this Section applies independently of the rest of the Convention, and like Article 7, without prejudice to the provisions of Articles 4 and 5(5)."¹⁴²

This remark reiterates the hierarchy of juridical protection for consumers over the *actor sequitur* principle in the Brussels Convention. The Schlosser Report summed up the consequences of a failure to provide sufficient juridical protection for consumers to compliment consumer protection rules.

"(I)ntolerable tensions would be bound to develop between national legislation and the 1968 Convention in the long run if the Convention

to be a consumer).

¹⁴¹ Schlosser Report, note 104 supra at p.117.

¹⁴² Jenard Report, note 96 supra at p.33.

did not afford the consumer much the same protection in the case of transfrontier contracts as he received under national legislation.”¹⁴³

It is submitted that if the jurisdiction rules for consumer contracts had not been amended by the Brussels 1 Regulation, the additional requirements in Article 13(3) would have had to be satisfied in order to determine the jurisdiction of an electronic consumer contract.¹⁴⁴ Indeed, it has been commented on more than one occasion¹⁴⁵ that the requirements of Article 13 were “...intended to apply to cross-border marketing.”¹⁴⁶ The Guiliano and Lagarde report on the Rome Convention on Contractual Obligations made the following (oft cited) observations on the consumer provisions of the Rome Convention.

“Thus the trader must have done certain acts such as advertising in the press, or on radio or television, or in the cinema or by catalogues aimed specifically at that country, or he must have made business proposals individually through a middleman or by canvassing. If, for example a German makes a contract in response to an advertisement published by a French company in a German publication, the contract is covered by the special rule. If, on the other hand, the German replies to an advertisement in American publications, even if they are sold in Germany, the rule does not apply unless the advertisement appeared in special editions of the publication intended for European countries. In the latter case the seller will have made a special advertisement intended for the country of the purchaser.”¹⁴⁷

The two requirements of Article 13(3) would have had to be satisfied when determining the jurisdiction of an electronic consumer contract. Firstly, before

¹⁴³ Schlosser Report, note 104 supra at p.117.

¹⁴⁴ Article 13(3)(a) and (b), 1978 Accession Convention, 1978 OJ L304 at p.5; Briggs and Rees, note 107 supra at p.61.

¹⁴⁵ *Gabriel*, note 93 supra.

¹⁴⁶ Briggs and Rees, note 107 supra at p.61 who suggest that “...the nature of the advertising is a matter of degree,” *ibid*.

¹⁴⁷ “Council Report on the Convention on the law applicable to contractual obligations, by Professors Mario Giuliano and Paul Lagarde,” 1980 OJ C282 (hereafter the “Giuliano and Lagarde Report”) at p.24, as referred to in the DTI Guidance Note.

conclusion of the contract, the seller either had to send invitations addressed to consumers or advertise to consumers in their jurisdictions.¹⁴⁸ Secondly and significantly, the consumer was obliged to conclude the contract in his or her own jurisdiction. In any event, the two requirements of Article 13(3) would have been difficult to establish vis-à-vis an electronic consumer contract. The basis of juridical protection repeated twice in the previous quote from the Guiliano and Lagarde report required the business to have specifically advertised to a foreign consumer in that consumer's jurisdiction. Since there was no case law specifically on the application of Article 13(3) to electronic consumer contracts, it is necessary to consider previous decisions of the ECJ on Article 13 of the Convention in order to highlight the potential difficulties in establishing the requirements of both Article 13(3) of the Convention or Article 15(1)(c) of the Brussels 1 Regulation to electronic consumer contracts.

It is submitted that the case law after the 1978 Accession Convention demonstrated that there had to be a *link* (albeit not a causal connection)¹⁴⁹ between the advertising and the inducement of the consumer to enter into the contract with the seller or supplier. In *Shearson Lehmann Hutton Inc. v TVB*,¹⁵⁰ the question before the ECJ was whether "...before conclusion of the contract

¹⁴⁸ 1978 Accession Convention, note 144 supra and Briggs and Rees, note 107 supra.

¹⁴⁹ The *Hutton v TVB* case raised the issue of the relationship between the consumer contract and prior advertising. *Hutton* averred that in accordance with the Schlosser Report, it was necessary to establish a clear link or "causal connection" (at p.I-145) between the consumer contract in dispute and the advertising which preceded it (a view that was also espoused by the German government (ibid at p.I-150)). *TVB*, on the other hand, maintained that there was no requirement for a causal link between any advertising and a consumer contract, arguing instead that a broad interpretation of subparagraph 3(a) of Article 13 was sufficient.

¹⁵⁰ *Shearson Lehmann Hutton*, note 97 supra.

the other party to the contract with the consumer advertised in newspapers in the State of the consumer's domicile..."¹⁵¹ and if so, whether a *connection* with the advertising and conclusion of the contract was needed.¹⁵² The Commission took the view that for the purposes of Article 13, advertising had to be an activity "*targeted...in that State* by the provider of services."¹⁵³ With regard to the link between the advertising and the consumer contract, the Commission regarded such a relationship as "... purely chronological inasmuch as the advertising [in the consumer's domicile] must precede the conclusion of the contract."¹⁵⁴ From these remarks it is clear that the business' advertising or specific invitation had to be intended for particular consumers, take place within the consumer's jurisdiction and precede the contract between the parties. Briggs expressed concern with AG Darmon's reasoning in *Shearson* in that a consumer could establish jurisdiction under Article 13 without having necessarily seen the business' advertisement beforehand.¹⁵⁵ However in the interests of efficacy, if the business intended to use an advertisement for the purpose of obtaining business in the consumer's jurisdiction, it was only necessary that the business' advertisement (whether the consumer saw it or not) preceded the parties' contract. As the first chapter demonstrated, since it is the purpose and nature of web sites to be available globally and simultaneously to consumers in different

¹⁵¹ Note 149 supra at p.I-142.

¹⁵² A point confirmed by Gerald Spindler in his criticisms of Article 13 in relation to electronic commerce; "Private International Law and Consumer Protection," http://www.e-globasl.e/010_privatelaw_spindler.pdf at http://www/e-global.es/libros_001.htm#2 (obtained 20/12/00).

¹⁵³ Note 149 supra at p.I-154. Words italicised for emphasis.

¹⁵⁴ Ibid. Words in brackets added for emphasis.

¹⁵⁵ Briggs, note 92 supra at p.514-515.

countries, web sites neither constitute advertising nor a specific invitation to consumers in one particular country. Essentially, there needs to be a more accurate connecting factor that can be applied to the dematerialised, global accessibility of the WWW and still precede the electronic consumer contract.

The requirement for a specific invitation in Article 13(3) recently culminated in the ECJ case *R. Gabriel v Schlank & Schick GmbH*.¹⁵⁶ In that case, the ECJ was requested to consider whether Gabriel could bring proceedings against Schlank & Schick, domiciled in Germany, for payment of money from a prize draw in the courts of his Austrian domicile. In order to claim his prize, Gabriel was required to order goods from Schlank & Schick. The ECJ observed that, in comparison to Articles 5(1) and 5(3) of the Convention, Article 13(3) was “tailor-made for Mr. Gabriel’s situation”¹⁵⁷ in seeking recovery of the prize money owed to him. Advocate General Jacobs confirmed that

“(T)he purpose of the second and third cumulative conditions is to ensure a sufficiently strong connection between the contract and the country of domicile of the consumer.”¹⁵⁸

The Gabriel case confirmed that Article 13 was a “*lex specialis*” in relation to Article 5(1)¹⁵⁹ and that it only applied if Mr. Gabriel had entered into the contract with Schlank & Schick “for a purpose outside his trade or

¹⁵⁶ *Gabriel*, note 93 supra.

¹⁵⁷ *Gabriel*, *ibid* in the Opinion of AG Jacobs at A32.

¹⁵⁸ *Gabriel*, *ibid*.

¹⁵⁹ In the sense that it must be considered prior to ascertaining whether the special rules of jurisdiction in Article 5(1) should be applied.

profession.”¹⁶⁰ The ECJ held that Mr. Gabriel’s contract satisfied this definition. Furthermore, the ECJ held that the two specific requirements ie prior advertising or invitation and conclusion of the consumer’s contract in his domicile for Article 13(3) to operate referred to

“ ... all forms of advertising carried out in the Contracting State in which the consumer is domiciled, whether disseminated generally by the press, radio, television, cinema *or any other medium*, or addressed directly, for example by means of catalogues *sent specifically to that State*, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman.”¹⁶¹

The ECJ accordingly held that Mr. Gabriel had received a specific invitation by Schlank & Schick to purchase goods in order to receive his prize money and that he took all the steps necessary to conclude the contract in Austria. Had Mr. Gabriel received a personal invitation via email instead, the requirement of a specific invitation in the consumer’s domicile would have been satisfied. By comparison, the requirement of specific invitation would not have been satisfied if business used a web site to seek out orders from consumers in other jurisdictions such as Mr. Gabriel. Web sites do not constitute a form of advertising addressed directly to consumers. Since web sites are inherently global, dematerialised and accessible in many jurisdictions simultaneously, they are not the equivalent of specific invitations, advertisements by newspaper, radio or television or the issuing of catalogues in the consumer’s jurisdiction.

¹⁶⁰ *Gabriel*, note 93 supra at p.6367.

¹⁶¹ *Gabriel*, *ibid* at para.44 of Judgment. Words italicised for emphasis.

More recently, the English Court of Appeal ruled in *Rayner v Davies*¹⁶² that the defendant had neither advertised in nor sent invitations specifically to the claimant's domicile to confer jurisdiction upon the English courts. The defendant was a marine surveyor domiciled in Italy who had been approached by Mr. Rayner for a survey of a yacht. Mr. Rayner then claimed breach of contract and negligence. The Court of Appeal upheld the decision at first instance that the contract was not a consumer contract for the purposes of asserting jurisdiction under Article 13 of the Brussels Convention. The court also upheld the ECJ decision in *Gabriel* that the first requirement of Article 13(3) required the seller to have actively sought business in the consumer's domicile by prior advertising or a specific invitation. The court confirmed that "the Convention is looking for ... the solicitation of business ..." ¹⁶³ in the consumer's jurisdiction. Furthermore, with regard to the requirement for a specific invitation, the court confirmed that Mr. Davies' (subsequent) fax to Mr. Rayner was not a specific invitation in accordance with Article 13(3) as Mr. Davies had already met Mr. Rayner in Italy to discuss and agree contractual terms. The court was therefore satisfied that Mr. Rayner had sought out Mr. Davies' services in Italy and therefore

"... there had been no marketing of the defendant's service here and the offer letter cannot properly be described as such." ¹⁶⁴

¹⁶² *A. Rayner v R. Davies*, [2003] 1 All ER (Comm) 394 (CA).

¹⁶³ *Rayner*, *ibid.*

¹⁶⁴ *Rayner*, *ibid.*

This case is also particularly relevant as on appeal the claimant sought to introduce new information regarding the respondent's web site. The court remarked that whilst the claimant had "examined" the web site,

"(T)here was no suggestion of the web site being "interactive". There was no reliance on the web site itself either being "advertising" or being a "specific invitation"."¹⁶⁵

In essence, for Article 13(3) to operate, the court confirmed that even if the claimant's business been sought by the defendant, the claimant would have to show that he took steps to conclude the contract which, the court said, amounted to " ... writing or any action taken in consequence of an offer or advertisement."¹⁶⁶ Furthermore, the court confirmed that Article 13(3) would only apply to consumer contracts when those requirements were satisfied, which reiterated the restrictive application of the provisions. Even though the court confirmed no evidence had been led that the respondent's web site was interactive in nature, it would still not have constituted a specific invitation or advertising.

The second requirement of Article 13(3) was that the consumer had to take the steps necessary to conclude the contract in his own jurisdiction. Whilst the ECJ did not make an explicit ruling in *Shearson Lehmann Hutton Inc. v TVB* on the issue, the Commission did not think that there required to be a causal link between advertising and the ensuing consumer contract. The Commission maintained that proving such a causal link would be difficult and costly for

¹⁶⁵ *Rayner*, *ibid.*

¹⁶⁶ *Rayner*, *ibid.*

consumers to establish. Briggs and Rees have suggested that it would not have been unduly onerous on the consumer to ascertain the necessary steps required by Article 13(3).¹⁶⁷ Those authors maintain that as long as the consumer did all that was necessary to conclude the contract in his or her own domicile, this would have been sufficient for the second requirement of Article 13(3) to apply.¹⁶⁸ However, it is submitted that the very nature of this requirement restricted the application of Article 13 to situations where the consumer concluded the contract in his own jurisdiction. In the absence of guidance from the ECJ, the consumer could not have relied upon Articles 13-15 when he took steps *elsewhere* to conclude the contract. Indeed, the European Commission confirmed that this requirement was a

“...proved deficiency in the text of the old Article 13, namely that the consumer could not rely on this protective jurisdiction when he had been induced, at the co-contractor’s instigation, to leave his home State to conclude the contract.”¹⁶⁹

When the consumer contracts with a business via a web site, he could be deemed to be taking all the necessary steps to conclude the contract whilst in his domicile. However since web sites are accessible simultaneously in different countries, there would have been problems in establishing that the consumer was present in his domicile and not another country at the time the contract was concluded over the web. Furthermore, if the requirement was necessary then it

¹⁶⁷ Briggs and Rees, note 107 supra at p.61.

¹⁶⁸ Ibid.

¹⁶⁹ European Commission, “Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,” COM (1999) 348 FINAL 99/0154(CNS), Brussels 14th July 1999, at p.16.

would have been too onerous for a consumer to prove that he contracted with the seller via a web site whilst in his jurisdiction. For example, a consumer does not need to be situated in his own jurisdiction when he contracts with a business via that business' web site. For example, an English consumer accesses a French business' web site to browse the goods on offer whilst in his own jurisdiction. The consumer then travels to another jurisdiction (Spain) and whilst there accesses the business' web site to order and pay for goods. If the consumer had contracted in England (and the web site constituted a specific invitation or advertising) Article 13 would have applied. However, even if the business' web site constituted a specific invitation or advertising to consumers in Spain, the English consumer could still not rely on Article 13. First, since the consumer was not domiciled in Spain, the business could argue that by analogy with the observations in the Giuliano and Lagarde report, the web site was not intended for English consumers contracting in Spain. Second, if the web site was intended for consumers in England, Article 13 could not be used since the contract was not concluded by the consumer in England. The fact that the consumer took advantage of the global, dematerialised nature of electronic commerce to contract with the seller whilst present in Spain meant that he would not have been able to take advantage of the juridical protection provided by Article 13. The only way in which a consumer could argue that Article 13 could have applied in that situation was if the consumer had to travel to Spain in order to access the business' web site and entered into a contract. However as Chapter One demonstrated, web sites are communication tools that enable businesses

and consumers to contract with each other at a distance and regardless of location. A further example which reinforces the dematerialised nature of electronic commerce is the increasing availability of third generation, wireless technology in (predominantly laptop) personal computers that enables the mobile consumer to access the WWW. Despite the consumer having the convenience of entering into a contract online whilst travelling on a boat or aeroplane between two jurisdictions, he would have not been afforded the protection of Article 13 since the contract was not concluded in his jurisdiction. To ensure that Articles 13-15 were applied with certainty and predictability, a business would require confirmation that the contract was concluded when the consumer was present in his domicile and not another country. The consumer could be expected to confirm his personal details such as his address by clicking on a drop-down list of countries or postcodes. However this would not necessarily satisfy the requirement that the consumer took the steps necessary to conclude the contract in his own domicile. Alternatively, the business could check the Internet Protocol (IP) address of the consumer's computer to identify the consumer's location when the contract was being concluded. Given the volume of online transactions, the cost and time associated with such investigations would outweigh the benefit of contracting with foreign consumers. Furthermore, Article 11(1) of the Electronic Commerce Directive requires information society service providers to provide confirmation of the consumer's order when that order is made by electronic means. Article 11 confirms that both the order and acknowledgement are deemed to be received

“when the party to whom they are addressed are able to access them.” Article 11 would therefore be satisfied if the consumer was able to access the order acknowledgement in another jurisdiction. In the above example Article 11 would be satisfied if the consumer received the order confirmation in either Spain, England or whilst travelling between different jurisdictions. It was therefore appropriate that the requirement for the consumer to conclude the contract in his own jurisdiction was not included in Article 15 of the Brussels I Regulation.

Therefore, in order to satisfy the requirements of Article 13 in establishing the jurisdiction of an electronic consumer contract, a consumer would have had to assert that a business’ web site was either an advertisement intended for, or a specific invitation addressed to, him in his domicile. In addition, the consumer would have had to conclude the contract in his own jurisdiction. As stated earlier, since web sites are available globally on the WWW, a web site cannot constitute a specific individual invitation addressed to a particular consumer. One of the main purposes of a web site is to facilitate the search for information and the promotion of goods and services to consumers in different jurisdictions simultaneously. In comparison to a mail order catalogue, web sites are not addressed to or directed towards individual consumers in one jurisdiction. Therefore, it is doubtful given the comments cited on analogous provisions in the Rome Convention that a web site would have constituted advertising or a specific invitation for the purpose envisaged by Article 13.

The remarks quoted earlier tended to suggest advertising or an invitation directed to consumers *in a particular country*, a requirement which would not have adequately reflected the nature of business' "globally equivalent,"¹⁷⁰ dematerialised marketing operations invested in their web sites. As the present author and Øren have previously affirmed, the requirements imposed by Article 13 were therefore outdated as far as electronic commerce is concerned.¹⁷¹ It is therefore necessary to consider the extent to which the connecting factors in Article 15(1)(c) operate to establish jurisdiction of an electronic consumer contract.

6.1 Application of Article 15(1)(c) of the Brussels 1 Regulation to Electronic Consumer Contracts

Article 15(1)(c) makes Article 16 applicable for consumer contracts conducted by electronic means. As the present author and Øren have previously confirmed, Article 15(1)(c) is regarded as "... perhaps one of the most significant aspects of the new Regulation and [...] one that will cause continued legal debate and discussion."¹⁷² These provisions state that jurisdiction will be established firstly in all other cases if, either the business pursues commercial activities in the Member State or by "any means directs its professional or commercial

¹⁷⁰ Chris Reed, *Internet Law, Text and Materials*, 2nd ed, Cambridge University Press, 2004 at p.5 ; Chapter One infra.

¹⁷¹ Lorna E. Gillies, "Adapting International Private Law Rules for Electronic Consumer Contracts," in Charles E.F. Rickett, and Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge University Press, 2003 and Øren, note 79 *supra et seq.*

¹⁷² Gillies, note 101 *supra* at p.132 ; Øren, note 79 *supra* at p.670-672.

activities” to the Member State of the consumer’s domicile or to other States including ‘individual Member States’ and secondly that the consumer contract falls within the scope of such activities. Each of these requirements will be considered in turn. The reference to ‘all other cases’ is important. From the consumers’ perspective it is a significant extension of the policy of protection afforded to them, as it now includes consumer contracts that do not fall into the traditional¹⁷³ categories of consumer contract in Articles 15(1)(a) or (b)¹⁷⁴ and the consumer no longer has to conclude the contract in their domicile in comparison to Article 13 of the Brussels Convention.¹⁷⁵ The European Commission confirmed that the latter requirement could be “difficult or impossible to determine,” and was deemed superfluous in establishing jurisdiction under Article 15(1)(c).¹⁷⁶ For the ‘first alternative’,¹⁷⁷ of Article 15(1)(c) to operate, the business must have been pursuing, or seeking out, commercial activity in the Member State where the consumer is domiciled. As Øren points out, it would be necessary to consider if the business was pursuing commercial activities in a Member State in a “continuous and systematic

¹⁷³ European Commission, “Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,” COM (1999) 348 FINAL 99/0154(CNS), Brussels 14th July 1999, at p.15, obtained at http://www.europa.eu.int/eur-lex/en/com/pdf/1999/en_599PC0348.pdf.

¹⁷⁴ Gillies, note 101 supra at p.132.

¹⁷⁵ European Commission, “Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,” COM (1999) 348 FINAL 99/0154(CNS), Brussels 14th July 1999, at p.16. Debussere, note 102 supra at p.351-355.

¹⁷⁶ European Commission, *ibid* at p.16.

¹⁷⁷ Øren, note 79 supra at p.677.

way.”¹⁷⁸ Alternatively, the business’ commercial activity must have been *directed to* the Member State of the consumer’s domicile in some way in order to instigate the protective provisions for consumers domiciled in that Member State. Therefore if a business uses a web site to direct its professional or commercial activities to, *inter alia*, a consumer domiciled in a Member State in such a way that a consumer contract¹⁷⁹ is concluded in accordance with that business’ activities, then jurisdiction can be established against that business in the consumer’s domicile in terms of Article 15(1)(c). A business situated or having a branch or agency in an EU Member State that uses the WWW¹⁸⁰ to promote and provide their goods or services via web sites to consumers domiciled in Europe must therefore be able to foresee or predict with certainty the implications of the Regulation’s provisions.¹⁸¹ Whilst the phrase ‘any means’ is very wide, it is the extent to which a business directs its activities to a consumer via its web site that will determine jurisdiction¹⁸² of the parties’ dispute and ultimately what choice of law rules will be applied to the consumer contract.¹⁸³

¹⁷⁸ Øren, note 79 supra at p.676.

¹⁷⁹ Termed “direct contracts with consumers,” in the Opinion of the Economic and Social Committee on the 1999 proposal for the Brussels I Regulation; note 79 supra at para.2.2.4.

¹⁸⁰ Or for that matter any other form of traditional or electronic media for marketing purposes.

¹⁸¹ European Commission, supra at p.17. Michael Docherty and Roland Fletcher, “Responding to the legal problems of electronic commerce,” (2000) 5 Communications Law 2; Bristows, “Consumer contracts and jurisdiction – changes to the Brussels Convention,” 2001 IHL 66; Gillies, note 101 supra at p.133 ; Joaquim-J. Forner, “Special Jurisdiction in Commercial Contracts: From the 1968 Brussels Convention to Brussels-one Regulation,” 2002 ICCLR 13(3), 131 ; Debussere, note 102 supra at p.361-362; Stone, note 88 supra at p.122 and Gillies, in Rickett, and Telfer (eds), note 171 at p.368 ; Øren, note 79 supra.

¹⁸² European Commission, “Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,” note 173 supra at p.16.

¹⁸³ Øren, note 79 supra at p.671.

The European Commission regarded the ‘directing activities’ connecting factor as the “philosophy of Article 15.”¹⁸⁴ However, despite the European Commission’s obligation under Article 65 to have reported on Article 15 within two years of the Brussels 1 Regulation being introduced,¹⁸⁵ the meaning of “directing activities” remains to be clarified.¹⁸⁶ In the context of contracting electronically via a web site,¹⁸⁷ the connecting factor ‘directing activities’ has been equated to different degrees or spectra¹⁸⁸ of web site activity. As the next chapter will demonstrate, the courts in the United States have developed their established test for ascertaining personal jurisdiction, derived from *Zippo Manufacturing v Zippo Dot Com*,¹⁸⁹ by determining the level of activity generated by a business’ web site and how that activity was directed to or ‘targeted’¹⁹⁰ towards the particular State in question (ie where the plaintiff is domiciled). The Hague Conference has also considered case law from the United States’ courts to determine the applicability of analogous consumer jurisdiction provisions in their draft jurisdiction and judgments convention.¹⁹¹

¹⁸⁴ European Commission, note 173 supra at p.16.

¹⁸⁵ Ibid at p.17.

¹⁸⁶ Gillies, note 101 supra at p.132-133; Lorna Gillies, “New European Rules for Electronic Consumer Contracts,” 2001 CLSR 17(6) 395 at p.397 ; Debussere, note 102 supra at p.360 ; Gillies, note 171 supra at p.369.

¹⁸⁷ Business marketing activities can of course be conducted via traditional (for example television, radio and newspapers) as well as new forms of media (for example e-mail and mobile telephones) however discussion of these are out with the scope of this Thesis ; Øren, note 79 supra at p.678.

¹⁸⁸ Chapters Two and Three infra.

¹⁸⁹ *Zippo Manufacturing v Zippo Dot Com, Inc.* 952 F.Supp, 1119, discussed Chapter Three infra.

¹⁹⁰ Chapter Three considers the targeting tests espoused in *ALS Scan v v Digital Service Consultants Inc.*, 293 F.3d 707 (4th Circuit 2002) and Geist, note 76 supra.

¹⁹¹ For example, the remarks made by Avril Haines in “The Impact of the Internet on the Judgments Project: Thoughts for the Future,” Hague Conference on Private International Law, Preliminary Document No. 17, <http://www.hcch.net>, Chapter Four infra.

As the first chapter demonstrated, the level of activity of a web site has been frequently¹⁹² distinguished as ‘active’, ‘passive’ or ‘interactive.’¹⁹³ A web site that enables a consumer to conclude a contract by going through a series of steps or pages on that web site, such as <http://www.easyjet.co.uk>, is an ‘active’ web site.¹⁹⁴ Conversely where a web site is nothing more than information source to those browsing its pages,¹⁹⁵ it is regarded as a ‘passive’ web site. The European Commission’s proposals had previously confirmed that

“(T)he fact that a consumer simply has knowledge of a service or possibility of buying goods via a passive web site accessible in his country of domicile will not trigger the protective jurisdiction.”¹⁹⁶

By comparison, when a web site contains information and facilitates communication with potential consumers such as information request options¹⁹⁷ or sign up facilities to receive information on goods or services by e-mail¹⁹⁸ the web site constitutes an ‘interactive’¹⁹⁹ web site. An interactive web site provides a method of communication between the parties, for example via a facility to receive email newsletters or request information, and may therefore lead to the conclusion of a contract between the parties.²⁰⁰ These definitions

¹⁹² Chapter One supra and Three, infra on what constitutes an active, passive or interactive web site in the context of determining specific personal jurisdiction in the United States.

¹⁹³ See Preliminary Draft Report for a Council Regulation (EC) (COM (1999) 348 final – C5-0619/1999 – 99/0154 (CNS)) by the Committee on Legal Affairs and the Internal Market <http://cyberia.ie/~twinkle/draftep.doc> at “Explanatory Statement.”

¹⁹⁴ <http://www.amazon.co.uk> and <http://www.easyjet.co.uk>

¹⁹⁵ For example <http://www.woodrows.co.uk>.

¹⁹⁶ European Commission, note 173 supra at p.16.

¹⁹⁷ For example <http://www.ghost.co.uk> (this site also has an email order facility).

¹⁹⁸ For example <http://www.cashmerecompany.co.uk>.

¹⁹⁹ Debussere, note 102 supra.

²⁰⁰ Ibid, for example <http://www.tous.es>.

seek to distinguish ²⁰¹ how businesses operate web sites as a means of transmitting information and contracting with potential consumers. ²⁰² As Chapter Three acknowledges, the “Sliding Scale” test has been considered by the United States’ courts in cases predominantly concerned with determining the jurisdiction of IP infringements, domain names disputes, defamation and personal injury cases as opposed to consumer contracts. As the previous section of this chapter illustrated, the European Commission and Parliament did acknowledge the distinction between active and passive web sites in earlier drafts of the Regulation. However it is submitted that, despite Øren’s view to the contrary, ²⁰³ reference to “consumer contracts concluded via an interactive web site” in the comments on the European Parliament’s amendments to the draft proposals should include reference to ‘active’ web sites. The reason for this view is that the Commission compares interactive web sites with the consumer’s inability to contract via ‘passive’ web sites. ²⁰⁴ Since the consumer can communicate and enter into a contract with businesses via an interactive web site, the consumer should be able to establish jurisdiction on the basis that the interactive web site constitutes activity directed towards that consumer.

²⁰¹ See the European Commission’s comments on the interpretation of ‘active’ and ‘passive’ sales (derived from the application of Article 4(b) of the Block Exemption Regulation) in its ‘Guidelines for Vertical Restraints’ (on EC Competition Rules), 2000 C291/1.

²⁰² Gillies, note 101 supra at p.132.

²⁰³ Øren, note 79 supra at p.679.

²⁰⁴ See also Chapter Two infra and Debussere, note 102, infra at p.357.

The European Commission's interpretation of "active" and "passive" sales²⁰⁵ in its "Guidelines for Vertical Restraints" provides an interesting illustration on to how such sales are treated under EU competition law rules.²⁰⁶ Essentially, the Commission concludes that "the use of the Internet is not considered a form of active sales into such territories or customer groups, since it is a reasonable way to reach every customer."²⁰⁷ However the definition of active sales in these Guidelines begins with a specific reference to "...actively approaching individual customers inside another distributor's exclusive territory or exclusive customer group..."²⁰⁸ thereby limiting the definition of 'active' sales in this context.²⁰⁹ The present author has previously noted that "(T)he European Commission regards passive selling as the situation where a customer views a website which leads to contact with the seller."²¹⁰ The Commission went as far as to say that the language of a web site "plays normally no role in that respect."²¹¹ Whilst the EU's Guidelines are interesting, the present author has previously remarked that

"only define active and passive sales in relation to distributors targeting goods for sale to *customers or group of customers in another*

²⁰⁵ See European Commission, "Guidelines for Vertical Restraints" note 201 supra at p.12 para.50; Gillies, note 101 supra at p.132 and Gillies, note 171 supra at p.369.

²⁰⁶ Gillies, *ibid.* The Guidelines refer to Article 4(b) of the Block Exemption Regulation.

²⁰⁷ *Ibid.*

²⁰⁸ European Commission, "Guidelines for Vertical Restraints" 2000 C291/1, note 201 supra at p.12 para.50.

²⁰⁹ The Guidelines specify that the restriction of active sales is one exception to the Block Exemption Regulation, which is explained at C291/12 para.50.

²¹⁰ Gillies, note 171 supra at p.369.

²¹¹ *Ibid.* Note however that the European Commission regarded "language barriers [as] still an obstacle to cross-border transactions," (word in brackets substituted) "Jurisdiction and applicable law in cross-border consumer complaints – Socio-legal remarks on an ongoing dilemma concerning effective legal protection for consumer-citizens in the European Union (ECLG/157/98 – 29/04/98)," at para.1, http://europa.eu.int/comm/consumers/policy/eclg/rep01_en.html (obtained 28/08/00).

distributors' exclusive territories or customer group, ²¹² hence the relevance to competition law.” ²¹³

There is no requirement to distinguish groups of customers and territories attributed to businesses for the purposes of international private law. ²¹⁴

Therefore, similar guidance on what constitutes ‘directing such activities’ must be clarified in the context of jurisdiction rules in Article 15(1)(c) of the Brussels 1 Regulation. ²¹⁵ In order to clarify the application of Article 15 applying to consumer contracts conducted by electronic means, the European Commission Justice and Home Affairs Directorate issued a Statement on Articles 15 and 73. ²¹⁶ The Commission acknowledged that in accordance with Article 16 above, consumers would be able to sue businesses in their own jurisdiction but that this would be subject to the requirements set out in Article 15. The Commission confirmed that if a business had “targeted” a consumer by means of the WWW, the contract would fall under the protection of Article 15. Given the Commission’s rejection of “ring-fencing” as an indicator of directing commercial activities, it is submitted that targeting must constitute a positive act by the seller to contract with the consumer. Therefore, from a practical perspective it is good practice for businesses to ensure that their web sites clearly state which jurisdictions they are targeting with a view to conducting

²¹² European Commission, “Guidelines for Vertical Restraints” 2000 C291/1, note 201 supra at p.12, para. 51.

²¹³ Gillies, note 171 supra at p.369.

²¹⁴ Gillies, *ibid* at p.369.

²¹⁵ Gillies, *ibid* at p.369 ; Øren, note 79 supra at p.683 and reiterated at p.686.

²¹⁶ European Commission, Justice and Home Affairs DG, “Statement on Articles 15 and 73,” http://www.europa.eu.int/comm/justice_home/unit/civil/justciv_conseil/justiciv_en.pdf obtained at http://www.europa.eu.int/comm/justice_home/unit/civil_en.htm ; Stone, note 88 supra at p.125. For a full copy of the Statement, see Appendix (i).

commercial activity. However, the Directorate stressed ²¹⁷ the point that the before consumers would be entitled to sue businesses in their own jurisdiction, there had to be a contract concluded as a result of the previous directed activity.²¹⁸ Øren points out that this term is crucial to the operation of Article 15 and that it should not be made “redundant” simply by the existence of a consumer contract. However, as the previous section of this Chapter argued, even if the consumer did not observe the business’ web site (or contract via the web site), provided the business intentionally targeted its web site at the consumer’s jurisdiction the contract is subject to Article 15. It is submitted that the alternative requirements of Article 15(1)(c) also reinforce the point made by the Commission that even if the consumer is technically prevented from contracting with the business via an interactive web site, the subsequent contract is still subject to the protective provision of Article 15 since the contract “*falls within the scope of such [previous] activity*”²¹⁹ directed to the consumer. The Directorate confirmed that the mere accessibility of a web site was insufficient to establish jurisdiction in the consumer’s domicile.²²⁰ It is suggested again that the reference to “mere accessibility” was to ‘passive’ web sites. Nevertheless, the Directorate did concede that

“...a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means.”²²¹

²¹⁷ The Statement reads “...the Council and Commission stress...” at http://www.europa.eu.int/comm/justice_home/unit/civil/justciv_conseil/justciv_en.pdf at http://www.europa.eu.int/comm/justice_home/unit/civil_en.htm.

²¹⁸ Kennett, note 87 supra at p.728.

²¹⁹ Article 15(1)(c), word in bracket and italics added for emphasis.

²²⁰ Affirming the DTI’s view, note 90 supra.

²²¹ Statement on Article 15, note 216 supra. Øren, note 79 supra at p.670.

Whilst an 'active' web site would have exemplified that point, the Commission did not confirm whether this view extended to 'interactive' web sites. Furthermore, the Statement did not confirm if the language choices or currency payment options on a web site were relevant factors in determining whether a business' web site constitutes activity directed towards foreign consumers. Bristows suggests that the language and currency of a web site would demonstrate that the business directed its activities to a particular country.²²² However, with respect, this underestimates the potential for multiple language and currency options on web sites. As the next Chapter will illustrate, Geist does not endorse the use of language or currency as factors determining targeting since such factors can now be adjusted in 'real time'²²³ when the consumer is completing his order online. For example, a US business' web site could provide (automatically or on request) a currency conversion from US dollars to Euros when a Spanish or Italian consumer orders goods online. The Commission's statement "by whatever means" appeared to place more weight on the intrinsic nature and effect of web site activity on a consumer contract (ie the extent to which the web site enables the consumer to contract with the business) as opposed to the (technological) features of a particular web site (ie language or currency options on the web site). It is submitted therefore that if a business' web site enables a consumer in another jurisdiction to communicate with a business and a contract is concluded as a result of that activity *by any other means*, for example a telephone conversation or fax order form, the web

²²² Bristows, note 181 supra.

²²³ Geist, note 76 supra.

site is interactive in nature and must enable the consumer to rely on the protective jurisdiction of Article 15(1)(c). Despite the Commission's statement, the connecting factor "directing activities" in Article 15(1)(c) remains ambiguous. Even if the ECJ interprets the connecting factor, such interpretation will inevitably remain behind web site technology. Furthermore, any interpretation will ultimately be reliant on cases being referred by national courts to the ECJ. Since only national courts of last instance can now make such references to the ECJ, delays will result in determining an autonomous interpretation of "directing such activities." Such delays will contribute towards the gap between the continued development of web site technology and the legal basis of Article 15(1)(c). A delay in the precise interpretation of "directing activities" will have an impact on consumer and business confidence in electronic commerce. As Chapter One argued, if a business intentionally targets its activities towards consumers in foreign jurisdictions via an active or interactive web site, any dispute between the parties must be heard in the consumer's jurisdiction. Equally businesses must be able to determine with a degree of predictability whether the commercial activities they participate in via their web sites constitute activities directed towards consumers in foreign jurisdictions for the purposes of Article 15(1)(c). Øren repeats Geist's sentiment on the polarised views of the "Country of Origin" and "Country of Destination" principles. Øren confirms businesses investing in and using technology to contract with consumers in other jurisdictions ought to be aware of the risks inherent in such activities and should not expect to be relieved from being sued

in the consumer's domicile if held to have directed commercial activities there.²²⁴ It is submitted that the connecting factor "directing activities" must enable the consumer who contracts via a foreign business' active or interactive web site to sue the business in his own jurisdiction. It is therefore imperative that, in the same way that a specific invitation or advertising was intended for consumers had to be established in accordance with Article 13, businesses must intend that their active or interactive web sites targeted consumers in particular jurisdictions and that the consumer's contract was concluded as a result of the business targeting its web site towards them.

6.2 Summary of Article 15, Brussels 1 Regulation

The EC Treaty has provided for the protection of consumers throughout Europe. The European Union has upheld the traditional view of the consumer as the contractually weaker party by providing consumers with juridical protection as well as substantive legal protection. Subject to Article 15, Article 16 of the Brussels 1 Regulation enables consumers to raise proceedings in their own jurisdiction against businesses situated in other EU Member States. In order to take advantage of advertising and selling via web sites to consumers across Europe, businesses will be required to comply with the rules of jurisdiction in Article 15(1)(c). Businesses with a branch or agency in an EU Member State will have to consider the benefits and risks of conducting business on-line with consumers domiciled in Europe. Small and medium sized enterprises, those very

²²⁴ Oren, note 79 supra.

businesses that have been encouraged to take advantage of global electronic commerce, might be dissuaded from conducting their commercial activities via electronic commerce as a result of the Brussels 1 Regulation.²²⁵ Nevertheless given the limited scope of Article 15, the meaning of the connecting factor ‘directing such activities’ and the distinction between active, passive and interactive web sites have all yet to be tested by either the UK courts or the ECJ. The distinction between the types of web sites used by businesses in promoting their business activities have been considered in several decisions from the federal and district courts in the United States. In due course the ECJ will have to provide guidance on the extent to which businesses are deemed to be directing their activities to consumers via web sites. Until that time, as Bristows attests,²²⁶ uncertainty will remain as to whether businesses operating interactive web sites will be subject to the consumer’s jurisdiction in accordance with Article 15(1)(c). If the EU does not amend Article 15(1)(c) or provide further detailed guidance on the scope of its application, the ECJ must provide an autonomous interpretation instead. Such interpretation will have to have due regard to the active-interactive-passive spectrum of web site activity. Furthermore as the next Chapter will demonstrate, assuming the EU Commission or the ECJ endorses the active-passive spectrum of web site activity, the “directing activities” connecting factor will require modification to incorporate a ‘target’- based test to ensure that

²²⁵ Nicole Goldstein, “Brussels 1: A Race to the Top,” 2001 2 Chi. J. Int’l L. 521.

²²⁶ Bristows, note 181 supra.

the scope of a business' online operations can be determined with far greater accuracy.²²⁷ Finally, jurisdiction can also be established over a business not situated in an EU Member State when that business has a branch or agency in an EU Member State. However, as the next section will demonstrate, this provision does not provide the legal certainty consumers need when contracting with a foreign seller in the globally equivalent electronic marketplace.

7. ALTERNATIVE CONNECTING FACTOR – JURISDICTION FROM THE OPERATIONS OF THE BUSINESS' BRANCH/AGENCY

Article 13 previously provided that jurisdiction could be established over a business on the basis of the actions of a business' branch, agency or other establishment. These provisions ensured that businesses could not argue that they did not target consumers and ensured that consumers were afforded protection in accordance with equivalent rules under Article 5(5) of the Convention. In the context of cross-border commerce, it is entirely feasible that consumers will enter into contracts with a business' branch or agency situated in an EU Member State via a website.

In *Brenner and Peter Noller v Dean Witter Reynolds*,²²⁸ the focus was whether the German court had jurisdiction over a contract when the other party to the

²²⁷ Geist, note 76 supra and Chapter Three infra.

²²⁸ (C-318/93) *Brenner and Peter Noller v Dean Witter Reynolds* [1994] ECR I-4275. *Brenner and Noller* commenced court proceedings against *Dean Witter Reynolds* (an American company with an agency in Germany) for breach of contractual and tortious obligations owed to them under their contract. After the case was dismissed at first instance and on appeal, *Brenner and Noller* appealed to the Bundesgerichtshof.

contract was domiciled in a non-Contracting State and there was no branch, agency or other establishment involved. The Advocate General was initially concerned with what jurisdiction rules applied when one of the parties is domiciled in a non EU Member State.²²⁹ The Advocate General confirmed that Article 13 was subject to Articles 4 and 5(5) as follows,

“The express reference to Article 4 in the first paragraph of Article 13 is thus a reminder that the scope of Articles 13 to 15 is limited to cases where the defendant is domiciled in a Contracting State.”²³⁰

Article 13-15 of the Brussels Convention could therefore be used against those defendants domiciled in non-Contracting State that had a branch, agency or other establishment in a Contracting State. If such a branch or agency was involved in the contract with the consumer, then the seller could be subject to proceedings in the consumer’s domicile. As there was no such branch or agency in the *Brenner* case, the Brussels Convention could not apply. This case provided a clear indication that the provisions relating to consumer contracts contained in Articles 13 to 15 only applied to consumers domiciled in a Contracting State if the defendant was also domiciled in a Contracting State or had a branch, agency or other establishment there. A consumer could only rely upon Article 13 to 15 of the Brussels Convention if he was able to demonstrate with certainty that the business or its branch sent an invitation or advertised to a consumer in his or her own domicile. A business’ web site would therefore still have to constitute a specific invitation or advertising in the consumer’s

²²⁹ In his Opinion to the ECJ, Advocate General Darmon confirmed that the very same three questions, which arose in *Shearson*, also occurred in this case, *ibid* at p.1-4277 and 4278: *Shearson*, note 97, *supra*.

country²³¹ that enabled the consumer to contract with the agent or branch whilst in his or her own domicile.²³² The same concerns vis-à-vis web sites constituting specific invitations or advertising and the consumer concluding the contract in his own jurisdiction considered earlier would have been just as problematic had the business operated via an agent or branch in a Member State.

The provisions of Article 15(2) are just as significant for businesses situated in or out with an EU Member State. This section allows for jurisdiction to be established when the business' branch, agency or other establishment is situated in an EU Member State and the dispute is concerned with the operation of the 'branch, agency or other establishment.' Article 15(2) will operate even though the business' principle place of business is not in an EU Member State. The question is whether Article 15(2) extends to the activities of a business' agent or branch undertaken via a web site. As Chapter One indicated, web sites are a means of instantaneous communication between parties situated in different jurisdictions. If the agent or branch used a web site to direct and conduct commercial activities with foreign consumers and the dispute arose as a result of those activities, jurisdiction should be established where the branch, agency or other establishment is situated.

An important question that follows from this is whether a web or host server located in an EU Member State constitutes a 'branch, agency or other

²³⁰ Ibid at p.I-4281.

²³¹ For example a web site domain name ending with '.co.uk'.

establishment'. Schu did not view a web server as a branch, agency or other establishment. In his comparison of jurisdictions in Europe and the United States, he maintains that the physical location of a server is irrelevant to a contract.²³³ Whilst the drafters of the Regulation did not take the opportunity to clarify this important matter, the point was affirmed in the Electronic Commerce Directive which states, *inter alia*,

'...the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located.'²³⁴

It is the present author's view that the 'location' or 'presence' of a web server in a Member State will not establish jurisdiction in that place. Firstly, as the present author has previously observed, "the web server is a conduit of information, similar to a telephone or a fax machine."²³⁵ Secondly, the web server needs to receive information from the business if that web site is to be available and of commercial use to the business. That information may well come from the business via another web server or servers. Therefore, the server's location is of secondary importance to the nature of the business' operations on their web site. Indeed, difficulties would arise in ascertaining jurisdiction of a branch, agency or establishment under Article 15(2) if more than one server was involved in transmitting the web site's content. Thirdly, what matters for the purposes establishing jurisdiction under Article 15 is

²³² For example www.amazon.com.

²³³ Reinhard Schu, 'The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?' 1997 International Journal of Law and Information Technology Vol 5 No 2 192 at pp.204, 207 and particularly pp.221-222.

²³⁴ The Electronic Commerce Directive, 2000 OJ L178, note 72 supra.

²³⁵ Gillies note 171 supra at p.367.

whether and to what extent a business' web site actively or passively directs that business' activities to consumers. Indeed, the web site owner's actions might fall in between these two recognised parameters of web site activity and content.²³⁶ However, the web server's location does not appear to have concerned those who proposed the Regulation. The Regulation makes it clear that it is where the activities on a web site are *directed towards* as opposed to where they *come from* that will enable jurisdiction to be established in the case of electronic consumer contracts. Given the labyrinth of networks that make up the Internet and the time and money that would be required to establish where a server or servers are located, this is a realistic approach. Furthermore, in the time it could take for a server to be identified, another server or servers could be used and the rule establishing jurisdiction could be subjected to a form of on-line forum shopping. Therefore, the European Commission or the European Court of Justice should confirm that the location of a web server does not establish jurisdiction under Article 15(2).

²³⁶ As exemplified by Brian K. Epps in "Maritz, Inc, v Cybergold, Inc.: The Expansion of Personal Jurisdiction in the Modern Age of Internet Advertising," 1997 32 Ga L Rev 237 at p.255 *et seq* where he discusses US Supreme and Federal Court cases on this point.

8 THE EFFECT OF JURISDICTION AGREEMENTS IN AN ELECTRONIC CONSUMER CONTRACT

Article 17 provides that where the parties have entered into a jurisdiction agreement,

“

Article 17

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or
2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.”²³⁷

When parties are at a distance to one another, the jurisdiction and choice of law clauses will be included in a standard form contract. Consumers are unlikely to be able to enforce any preference of a particular jurisdiction upon a foreign business. However, the principle of party autonomy is limited when jurisdiction rules provide consumers with juridical protection.²³⁸ As Chapter One demonstrated, whilst a consumer and business can contract instantaneously via a web site, they do not do so on a face-to-face basis. Given that the legal and practical constraints which limit the consumer's ability to negotiate contractual terms with a foreign business are compounded by electronic commerce,²³⁹ it is necessary to consider how consumers are protected from unfair terms such as a choice of forum clause in standard form, click-wrap agreements. Article 17

²³⁷ Brussels I Regulation, 2001 OJ L12/1 note 1 supra at pp.6-7.

²³⁸ Christopher Withers, “Jurisdiction Clauses and the Unfair Terms in Consumer Contract Regulations,” [2002] LMCLQ 1-160, 56 at p.61.

²³⁹ Withers, *ibid* at p.65.

provides three alternative rules²⁴⁰ to govern jurisdiction agreements and provides juridical protection for consumers only when the business is situated in an EU Member State or when each party is domiciled in a different part of the United Kingdom. The first requires the agreement to have been made between the parties after the dispute arose.²⁴¹ The second enables the consumer to commence proceedings ‘...in courts other than those indicated in this Section.’²⁴² Thirdly, Article 17(3) allows jurisdiction to be conferred on a Member State provided that the consumer and business were domiciled or habitually resident in the same Member State.²⁴³ The important point about Article 17(3) is that any jurisdiction agreement in a consumer contract cannot conflict with the consumer protection rules of the Member State concerned.²⁴⁴ Whilst each of the requirements in Article 17 could easily operate when the consumer contracts with a business via a web site, the substantive criticism of Article 17 is that it only operates when the defendant business is situated in an EU Member State. Consumers are not therefore provided with adequate, certain and predictable juridical protection when they enter into a contract with a business situated in a non EU Member State. Withers has suggested that consumers can “take it or leave it” in deciding whether to contract with a foreign business.²⁴⁵ However, as Chapter One indicated, since the consumer is the legally inexperienced party and can only communicate with the foreign business

²⁴⁰ Gillies, note 101 supra at p.132.

²⁴¹ Article 17(1) Brussels I Regulation, note 1 supra ; Gillies, *ibid* at p.132.

²⁴² Article 17(2) Brussels I Regulation, note 1 supra ; Gillies, *ibid*.

²⁴³ Gillies, *ibid*.

²⁴⁴ Gillies, *ibid*.

²⁴⁵ Withers, note 238 supra at p.61.

by the WWW, such an attitude will impede consumer confidence and limit the commercial success of electronic commerce to businesses.

In determining whether a jurisdiction agreement is to be upheld, the courts of Member States have had to balance Article 15 of the Brussels Convention (now Article 17, Brussels 1 Regulation) with the requirements of the EC Directive on Unfair Terms in Consumer Contracts.²⁴⁶ The Directive on Unfair Terms in Consumer Contracts seeks to regulate, *inter alia*, the operation of unfair terms in consumer contracts such as jurisdiction agreements and (by Regulation 6) choice of law clauses in favour of the law of a non-Member State. The recent ECJ case *Cape Snc v Idealservice Srl*²⁴⁷ confirmed, in accordance with Article 2(b), that the Directive only applies to consumers as “natural persons.” In *Oceano Grupo Editorial SA v Quintero and Others*,²⁴⁸ the ECJ held that the jurisdiction clause in the contract used by *Oceano Grupo* was deemed to be unfair to consumers in accordance with the 1999 Regulations. The plaintiff company had previously entered into a number of contracts to sell encyclopaedias to consumers and tried to take action against them in the lower courts. However, the Spanish Tribunal Supremo had previously ruled that the jurisdiction clauses in these contracts were unfair in terms of the Directive. The local court then requested a Preliminary Ruling from the ECJ as to “whether

²⁴⁶ 1993 OJ L95/29.

²⁴⁷ (C-541/99) *Cape Snc v Idealservice Srl* [2001] ECR I-9049.

²⁴⁸ *Oceano Grupo Editorial SA v Quintero and Others* [2000] ECR I-4941 ; considered in “Courts must decline unfairly conferred jurisdiction,” 2000 EU Focus 58, 7. See also Simon Whittaker, “Judicial Interventionism and Consumer Contracts,” 2001 117 LQR 215. See also Clifford Chance, “Case Comment Ocean Grupo Editorial SA v Quintero,” 2000 11 Practice Law

Courts of their own motion could decide whether or not the term in a contract was unfair.”²⁴⁹ The ECJ held that if the term of the contract was unfair, then it was appropriate for the national court whether to refuse jurisdiction on that basis. Withers has criticised the *Oceano Grupo* decision. Since a jurisdiction agreement is subject to the tests of fairness and transparency under the 1999 Regulation, Withers was not convinced that considering fairness alone was the most appropriate method of determining the applicability of a jurisdiction agreement in that case.²⁵⁰ Withers’ rationale was premised on the “commercial value” of jurisdiction agreements to businesses.²⁵¹ Indeed, it is submitted that this value is enhanced further when businesses contract via web sites with consumers. As Chapter One demonstrated, businesses need to be able to predict with certainty the legal effect of undertaking commercial activities with consumers in distant jurisdictions. To that extent, the ability of the business to specify a preferred forum in advance is crucial if the business wants a particular law to govern the parties’ contract. When this observation is combined with Gatt’s findings that consumers are not necessarily aware of the effect of click-wrap agreements,²⁵² the fairness and transparency of a choice of forum clause in a click-wrap agreement will become more difficult for businesses to establish. Withers maintained that since the 1999 Regulations can be upheld in terms of

for Companies Part 8 56 ; Editorial Comment, “Unfair Terms and the Role of the Courts,” 2000 Consumer Law Today Vol. 23,1.

²⁴⁹ “Court obliged to join local authorities in fight against unfair contract terms,” case comment on *Oceano Grupo*, *ibid* , 2000 IHL 50.

²⁵⁰ Withers, note 238 *supra* at p.62.

²⁵¹ Withers, note 238 *supra* at p.61.

²⁵² Adam Gatt, “Electronic Commerce – Click-wrap agreements: The Enforceability of Click-Wrap Agreements,” (2002) 18 6 CLSR 404 at p.408.

Article 57(3) of the Brussels Convention as a “national law...govern(ing) jurisdiction...”²⁵³ then

“...Article 57(3) would have the dramatic effect of imposing, in addition to the formal requirements of Article 17, a new substantive requirement that the jurisdiction clause in question (*sic*) not cause a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”²⁵⁴

A judicial determination of the relationship between the Directive and Articles 17 and of the Brussels 1 Regulation²⁵⁵ has not been requested from ECJ or the UK courts. Withers argued that the irrespective of Article 17, the effective operation of a jurisdiction agreement may, on the motion of a party or the court, be subject to the tests of fairness and transparency in accordance with the Directive. As the *Oceano* and *Standard Bank* cases demonstrate, the courts refused to uphold a choice of forum clause when in each case the clause, whilst valid under the Brussels regime, was held to be unfair under the Directive. It is submitted therefore that the 1999 Regulations provide a basis for refusal to uphold a jurisdiction agreement if the consumer can establish that the choice of forum is not fair and the clause was not intimated to the consumer with the effect that “the clause will lead to a significant imbalance in the parties’ rights and obligations.”²⁵⁶ In the context of electronic commerce, a jurisdiction agreement should not prevent a consumer from being able to sue a foreign business in his own jurisdiction. As Withers suggests, a choice of forum will

²⁵³ Withers, note 238 supra at p.64. Additional wording in brackets added.

²⁵⁴ Ibid.

²⁵⁵ Bearing in mind the changes to jurisdiction agreements in Article 17 and any change to Article 57/ its equivalent.

²⁵⁶ Withers, note 238 supra at p.58.

not be deemed fair if it restricts the consumer to suing the business in the business' jurisdiction alone.²⁵⁷ If such a clause was inserted into a click-wrap agreement on a web site it would fail the first test of fairness, even if the click-wrap agreement was sufficiently transparent and all its terms could be viewed or retrieved before the consumer clicked "I accept" in accordance with Article 8 of the Electronic Commerce Directive. Therefore it is right and fair that Article 17 should not prevent the consumer from being able to sue in his own jurisdiction.

9. APPLICATION OF UNITED KINGDOM JURISDICTION RULES WHEN DEFENDANT IS NOT DOMICILED IN AN EU MEMBER STATE

9.1 Intra-United Kingdom Jurisdiction Rules in Schedule 4 to the 1982 Act

The 1982 Act provides rules of jurisdiction when the consumer and business are domiciled in different parts of the United Kingdom. These rules are the "Intra-UK" rules²⁵⁸ and are contained in Schedule 4 to the 1982 Act. Collins explained that these rules are "closely modeled on the 1968 Convention."²⁵⁹ Following the Maxwell Committee Report, the United Kingdom adopted an Intra-UK model based and modified on the 1978 Accession Convention. The 1982 Act provided an "opportunity"²⁶⁰ to facilitate legal certainty and predictability of jurisdiction rules applicable between parties domiciled in

²⁵⁷ Withers, note 238 supra at p.58.

²⁵⁸ Paul R. Beaumont, *Anton and Beaumont's Civil Jurisdiction in Scotland*, 2nd ed, W. Green, Edinburgh, 1995 at p.49, and Alistair Mennie, "Civil Jurisdiction and Consumer Contracts," 1987 SLT (News) 181.

²⁵⁹ Lawrence Collins, *The Civil Jurisdiction and Judgments Act 1982*, Butterworths, London, 1983, Chapter 6, p.127.

²⁶⁰ Collins, note 259 supra at p.134-135 and Beaumont, note 258 supra at p.3.

different parts of the United Kingdom.²⁶¹ In the context of an electronic consumer contract, consumers in one part of the United Kingdom will rely on these rules when contracting over the web with a business situated in another part of the United Kingdom. The rules for consumer contract jurisdiction were set out in Schedule 4²⁶² to the 1982 Act as follows:-

“

Schedule 4

Title II of 1968 Convention as Modified for Allocation of Jurisdiction within UK

Section 4 – Jurisdiction over consumer contracts

Article 13

In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called “the consumer”, jurisdiction shall be determined by this Section, without prejudice to the provisions of Articles ...5(5) and 8(b), if it is:

- (1) a contract for the sale of goods on instalment credit terms, or
- (2) a contract for the loan repayable by instalments, or for any other form of credit, made to finance the sale of goods, or
- (3) any other contract for the supply of goods or a contract for the supply of services and ... the consumer took in the part of the United Kingdom in which he is domiciled the steps necessary for the conclusion of the contract.

* * * *

This Section shall not apply to contracts of transport or insurance.

²⁶¹ P.M. North, “Is European Harmonisation of Private International Law a Myth or Reality? A British Perspective,” in Th. M. De Boer, *Forty Years On: The Evolution of Post War Private International Law in Europe, Symposium in Celebration of the 40th Anniversary of the Centre of Foreign Law and Private International Law, University of Amsterdam, on 27 October 1989*, Kluwer, Deventer, 1990 at p.33 *et seq.*

²⁶² A. E. Anton, *Private International Law*, 2nd ed, W. Green, Edinburgh, 1990 at p.175-176 (where he discusses Schedule 8 rules, of which Schedule 8 Rule 3 is the same as it is in Schedule 4).

Article 14

A consumer may bring proceedings against the other party to a contract either in the courts of the part of the United Kingdom in which that party is domiciled or in the courts of the part of the United Kingdom in which he himself is domiciled.

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the part of the United Kingdom in which the consumer is domiciled.

These provisions shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending.

Article 15

The provisions of this Section may be departed from only by an agreement:

- (1) which is entered into after the dispute has arisen
- (2) which allows the consumer to bring proceedings in courts other than those indicated in this Section,
or
- (3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same part of the United Kingdom, and which confers jurisdiction on the courts of that part, provided that such an agreement is not contrary to the law of that part.”

These rules enabled consumers to bring their disputes before the courts of the part of the United Kingdom in which they were domiciled. However, very few reported cases considered the application of Articles 13 to 15 of Schedule 4 to the 1982 Act.²⁶³ *Waverley Asset Management Ltd. v Saha*²⁶⁴ is the only reported case that has considered whether the matter in dispute was a ‘consumer contract’ and if the Scottish court had jurisdiction. A dispute arose between a Scottish company and an individual domiciled in England. The pursuer sought to enforce the contract with the defender for the purchase of units in a unit trust and raised an action in the Sheriff Court. The court did not accept the

²⁶³ Attributed by the (perceived) low value of consumer contract disputes generally ; Michael Chissick and Alistair Kelman, *Electronic Commerce Law and Practice*, 3rd ed, Sweet and Maxwell, London, 2001.

²⁶⁴ *Waverley Asset Management Ltd. v Saha* 1989 SLT (Sh Ct) 87.

defender's claim that the contract constituted a consumer contract since unit trusts were not 'goods'.²⁶⁵ The case is interesting in a number of ways. First, it was the only case to consider Article 13 in Schedule 4 to the 1982 Act. Second, Article 13 of Schedule 4 was only considered as a result of the defender's (albeit unsuccessful) objection to the Scottish court having jurisdiction over the dispute. Third, the case is interesting as the Scottish court interpreted the meaning of 'goods' in Article 13 of Schedule 4 by reference to another UK statute without reference to EU authority on Article 13 to assist. If a consumer contract had been entered into by electronic commerce between parties domiciled in different parts of the United Kingdom, Article 13 of Schedule 4 could have been used provided the consumer concluded the contract where he was domiciled. The most significant aspects of Article 13 in Schedule 4 was that there was no requirement for a business in one part of the United Kingdom to have sent a specific invitation or advertised to a consumer in another part of the United Kingdom. In addition, the consumer had to conclude the contract where he was domiciled. Furthermore, the goods contracted for had to satisfy the definition of goods in the Sale of Goods Act 1979. Despite the Scottish Executive's suggestion that the changes to the consumer jurisdiction rules were "minor"²⁶⁶ in nature, reform of the Articles 13-15 in Schedule 4 was necessary for the

²⁶⁵ Ibid at p.88A. The Sheriff pointed out that there was no definition of goods provided in the 1982 Act, and that reference required to be made to the Sale of Goods Act 1979. In the 1979 Act, 'goods' were defined in the following terms, " 'Goods' includes all personal chattels other than things in action and money, and in Scotland, all corporeal moveables except money," Sale of Goods Act 1979, section 61, cited in *Waverley Asset Management*, ibid at p.88B.

²⁶⁶ Scottish Executive Civil Justice Department, "New Rules on Civil Jurisdiction," 2002 SLT (News) 39 at p.40.

following reasons. First, Schedule 4 had to reflect the ability of consumers to contract with foreign businesses via web sites. Second, the intra-UK rules had to be aligned with analogous rules in Schedule 1 to the 1982 Act as amended by the Civil Jurisdiction and Judgments Order 2001. The amendments to Schedule 4 were also necessary since national law cannot circumvent Treaty objectives and furtherance of the Internal Market. Furthermore given the ECJ's refusal in *Kleinwort Benson v Glasgow City Council*²⁶⁷ to interpret analogous jurisdiction rules applicable when the parties are situated in different parts of the same Member State, Schedule 4 had to be amended.

In response to the Brussels 1 Regulation, the United Kingdom amended the jurisdiction rules for consumer contracts in Schedule 4 as follows:

“

Jurisdiction over consumer contracts

7.(1) In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this rule and rules 8 and 9, without prejudice to rule 3(e) and (h)(ii), if

- (a) it is a contract for the sale of goods on instalment credit terms; or
- (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
- (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the part of the United Kingdom in which the consumer is domiciled or, by any means, directs such activities to that part or to other parts of the United Kingdom including that part, and the contract falls within the scope of such activities.

(2) This rule shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation, or to a contract of insurance.

²⁶⁷ [1997] 4 All ER 641 (HL).

8.(1) A consumer may bring proceedings against the other party to a contract either in the courts of the part of the United Kingdom in which that party is domiciled or in the courts of the part of the United Kingdom in which the consumer is domiciled.

(2) Proceedings may be brought against a consumer by the other party to the contract only in the courts of the part of the United Kingdom in which the consumer is domiciled.

(3) The provisions of this rule shall not affect the right to bring a counter-claim in the court in which, in accordance with this rule and rules 7 and 9, the original claim is pending.

9. The provisions of rules 7 and 8 may be departed from only by an agreement

(a) which is entered into after the dispute has arisen; or

(b) which allows the consumer to bring proceedings in courts other than those indicated in those rules; or

(c) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same part of the United Kingdom, and which confers jurisdiction on the courts of that part, provided that such an agreement is not contrary to the law of that part.”²⁶⁸

The amendments to Schedule 4 to the 1982 Act reflect Articles 15-17 of the Brussels 1 Regulation and apply when the consumer and business are domiciled in different parts of the United Kingdom. The main benefit to the consumer contracting online with a business in another part of the United Kingdom is that he is no longer required to conclude the contract where he is domiciled. However, it must be established that the business was either pursuing commercial activities or “directing activities” to that part of the United Kingdom where the consumer was domiciled. As with Article 15(1)(c), the amendment by the 2001 Order in Council does not provide a definitive meaning of what constitutes “directing activities” when the business seeks custom from consumers via a web site. The connecting factor in Schedule 4 will not provide

²⁶⁸ Civil Jurisdiction and Judgments Order SI 2001/3929.

a certain and predictable result in favour of the consumer's jurisdiction. Schedule 4 must be amended further to ensure that active and interactive web sites constitute commercial activities directed towards consumers in different parts of the United Kingdom.

9.2 Jurisdiction over a Business Situated in a non EU Member State

The 1982 Act has provided rules of jurisdiction where one party is domiciled in the United Kingdom and the other party is domiciled in non EU or EEA Member State.²⁶⁹ The rules for such disputes are contained in Schedule 8 to the 1982 Act. It is important to note that the rules in this Schedule are particular to the law of Scotland. There are no corresponding rules for England and Wales in the 1982 Act.²⁷⁰ Section 20 of the 1982 Act states that regard should be had, *inter alia*, to principles derived by and relevant decisions from the ECJ as well as the Official Reports to the Brussels Conventions. It is useful to consider how these sources have influenced the interpretation of the rules contained in Schedule 8 given that the rules only apply when the consumer is domiciled in Scotland and the business is situated in a non-EU Member State. As Chapter One confirmed, consumers are increasingly contracting via the WWW with businesses situated in non-EU Member States. Scottish consumers have to use the rules in Schedule 8 to the 1982 Act to establish that the Scottish court has jurisdiction over a foreign business. The rules were also recently amended by

²⁶⁹ The country in which the other party is either domiciled or situated (in the case of a business) is often referred to as a "third country."

²⁷⁰ William W. McBryde, *The Law of Contract in Scotland*, 2nd ed, W Green, Edinburgh, 2001.

the 2001 Order in Council. The impact of these rules for consumers contracting electronically with foreign businesses has therefore increased and must be evaluated.

Prior to the amendments by the 2001 Order in Council, the special rules of jurisdiction for consumer contracts in Schedule 8 were contained in Rule 3 as follows.

“

Jurisdiction over consumer contracts

3 – (1) In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called the “consumer”, subject to Rule 4 (exclusive jurisdiction), jurisdiction shall be determined by this Rule if it is –

- (a) a contract for the sale of goods on instalment credit terms; or
- (b) a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
- (c) any other contract for the supply of goods or a contract for the supply of services, if –
 - (i) the consumer took in Scotland the steps necessary for the conclusion of the contract: or
 - (ii) proceedings are brought in Scotland by virtue of section 10(3).

(2) This Rule shall not apply to contracts of transport or contracts of insurance.

(3) A consumer may bring proceedings against the other party to a contract only in -

- (a) the courts for the place in which that party is domiciled
- (b) the courts for the place in which he himself is domiciled: or
- (c) any court having jurisdiction by virtue of Rule 2(6) or (9).

(4) Proceedings may be brought against a consumer by the other party to the contract only in the courts for the place where the consumer is domiciled or any court having jurisdiction under Rule 2(9).

(5) Nothing in this Rule shall affect the right to bring a counterclaim in the court in which, in accordance with this Rule, the original claim is pending.

(6) The provisions of this Rule may be departed from only by agreement

–

- (a) which is entered into after the dispute has arisen: or

(b) which allows the consumer to bring proceedings in a court other than a court indicated in this Rule.”

Rules 3(1) and 3(2) defined the scope of the Rule 3’s application. Rule 3 provided that a consumer could raise proceedings either in the courts where they are domiciled or where the other party is domiciled.²⁷¹ The requirement for the consumer contract to have been “...preceeded by a specific invitation addressed to him [ie the consumer] or by advertising...” was omitted from Rule 3(1)(c).²⁷² The omission of that requirement from Rule 3 has significant implications for both the consumer and the business contracting via a web site. The consumer could assert jurisdiction over a foreign business without having to establish that the business sent a specific invitation or used advertising in accordance with analogous provisions in Schedule 1 to the 1982 Act. A Scottish consumer suing a Canadian business in Scotland would not therefore have had to demonstrate that the Canadian business’ web site constituted a specific invitation, advertising or activity directed towards Scottish consumers. Whilst this omission may have facilitated legal certainty for the consumer, Rule 3 operated against foreign businesses seeking custom via web sites. Nevertheless, the scope of Rule 3 was restrictive as it required the consumer to conclude the contract in Scotland. As with Article 13 of the Brussels Convention, this requirement would have been unduly onerous for the consumer to establish when contracting with a foreign business via a web site. Alternatively, the Scottish consumer could have raised

²⁷¹ Rule 3(a) and (b). Or indeed by virtue of Rule 2(6) or (9).

²⁷² Anton, note 262 supra at p.176. Words in square brackets added. “Report on the Scottish Committee on Jurisdiction and Enforcement, under the Chairmanship of The Honourable Lord Maxwell,” (hereafter the Maxwell Committee Report) at para.13.88 *et seq*, p.226-228 and Beaumont, note 258 supra at p.271.

proceedings against the business in the business' jurisdiction. As Chapter One observed given the time, expense and uncertainty in pursuing legal proceedings in another jurisdiction combined with the specific issues of identity and geographical location of the business operating via the WWW, the consumer who contracted via a web site was unlikely to take advantage of that alternative. Equally, a foreign business contracting with a Scottish consumer would not necessarily have been aware of the effect of Rule 3 in Schedule 8. Anton is therefore correct in his assertion that Rule 3 could have enabled a consumer to forum shop²⁷³ in his own jurisdiction. The global, dematerialised nature of business activities via the WWW compounds the Scottish consumer's ability to raise proceedings against a foreign business in Scotland. Nevertheless, the Scottish court could have declined jurisdiction. Section 22(1) of the 1982 Act provides that

“Nothing in Schedule 8 shall prevent a court from declining jurisdiction on the ground of *forum non conveniens*.”

If the Scottish court held that it was not the most appropriate jurisdiction, then it would decline jurisdiction and remit the case to another more appropriate court. A foreign business was likely to argue in response to a case brought under Rule 3 that the consumer did not conclude the contract in Scotland. If changes to Rule 3 in Schedule 8 had not been made then foreign businesses contracting with Scottish consumers via the WWW would have relied more frequently on the plea of *forum non conveniens* to restrict the Scottish consumer's claim being heard in Scotland.

²⁷³ Anton , note 258 supra at p.176-177.

The case law on Schedule 8 to the 1982 Act appears to fall into two distinct categories. The first category is where the dispute is entirely within the jurisdiction of the Scottish courts rendering the dispute a purely domestic matter. In these cases it is not necessary to consider international private law rules unless the choice of law is in dispute or another law is to be applied. The second category applies when the defendant is not domiciled in Scotland or another part of the United Kingdom. However, there does not appear to be very many reported cases in the latter category that have considered Rule 3 in Schedule 8. Nevertheless, the following cases provide some insight into the interpretation of the Schedule 8 rules by the Scottish courts prior to amendment by the Civil Jurisdiction and Judgments Order 2001. In *Chris Hart (Business Sales) v Niven*²⁷⁴ the court held that the contract was a consumer contract. However, on appeal the Sheriff Principal noted that the appellant's argument relied upon the decision in the English case *R&B Custom Brokers Co Ltd v United Dominion Trust Ltd*²⁷⁵ as well as the Schlosser Report, the Maxwell Report on jurisdiction in Scotland and the ECJ's decision in *Bertrand v Ott*.²⁷⁶ In his determination of the appeal, the Sheriff Principal considered the particular nature of the consumer contract provisions that, according to the Jenard Report and *Bertrand v Ott* case, were designed to protect the consumer as the economically weaker party.²⁷⁷ The Sheriff Principal held in this case that the

²⁷⁴ *Chris Hart (Business Sales) v Niven* 1992 SLT (Sh Ct) 53.

²⁷⁵ *R&B Custom Brokers Co Ltd v United Dominion Trust Ltd* [1988] 1 All ER 847.

²⁷⁶ Note 106 supra, where the European Court gave a restrictive interpretation to the meaning of Articles 13 to 15 of the Convention.

²⁷⁷ *Ibid* at p.55D-F.

defenders were buying privately and were accordingly in an economically weaker position than the pursuers. The appeal was refused on the grounds that the contract was a consumer contract. The interesting aspects of this case were the factors that the Sheriff Principal took into account when determining whether the contract was a consumer contract or not. The Sheriff Principal pointed out the nature of the contract and the defenders' conduct prior to the conclusion of the contract. The Sheriff Principal also made reference to the particular contract the defenders were required to sign, as well as the fee being charged by the pursuers in connection with the purchase and the limited grounds for revocation of the contract itself.²⁷⁸ By taking all of those factors into account, combined with the guidance from the Official Reports and particular²⁷⁹ case law of the ECJ on Article 13, the Sheriff Principal upheld the Sheriff's earlier decision and dismissed the action for lack of jurisdiction. This case demonstrates that the Scottish courts will uphold the independent meaning of Article 13 of the Brussels Convention in cases that are not strictly speaking of an 'international' nature as in this case.

Until recently, the decision in *BJ Mann (Advertising) Ltd v Ace Welding & Fabrications Ltd*,²⁸⁰ demonstrated how the Scottish court extended the definition of consumer in Rule 3 of Schedule 8 to include a business that

²⁷⁸ Ibid at p.55H-J.

²⁷⁹ Cf the Sheriff Principal in *Prostar Management Ltd v Twaddle* 2003 SLT (Sh Ct) 11 at p. 14-15 commented that the Sheriff Principal in *Chris Hart* erred in not following the ECJ decision in (C-361/89) *France v Di Pinto* [1991] ECR I-1189 in determining whether the contract was a consumer contract.

²⁸⁰ *BJ Mann (Advertising) Ltd v Ace Welding & Fabrications Ltd* 1994 SCLR 763.

purchases goods out with its own trade. The definition of consumer was temporarily expanded and the remit of juridical protection for consumers extended by that case. The pursuers raised an action for recovery of sums owed by the defenders in Glasgow Sheriff Court in accordance with the parties' jurisdiction agreement. The defenders argued that the court should not have jurisdiction as the agreement between the parties was a consumer contract. The court held at first instance and on appeal that the contract was a consumer contract. The most significant aspect of the decision for this analysis was that the defender was a limited company.²⁸¹ The Sheriff Principal upheld the Sheriff's earlier decision that the purchase of goods was outside the defender's trade.²⁸² Moreover, the Sheriff Principal also accepted that the pursuer had imposed a standard form contract on the defenders, rendering them the contractually weaker party.²⁸³ The question remained whether legal persons could be deemed to be consumers if they purchase goods or services out with their trade or professional activities.²⁸⁴ Indeed, depending on the terms of the contract, businesses of any size may be deemed to be in a contractually weaker position when contracting online with foreign businesses. This case conflicted with the earlier decision in *Benincasa* which confirmed that Articles 13-15 applied only to private, final consumers. The *BJ Mann* decision rendered it

²⁸¹ Indeed, the Sheriff Principal noted that this was the "first case in which it had been held that a limited company was a 'consumer' within the meaning of rules 3(1) of Sched.8 to the 1982 Act"; *ibid* at p.765-B ; Andrew Stevenson, "Businesses as "Consumers"; Jurisdiction Within Scotland," 2000 33 Civ P.B, 4.

²⁸² *Ibid* at p.764-E.

²⁸³ *Ibid*, at p.764-F.

²⁸⁴ A matter pointed out by the Sheriff Principal in *Prostar Management Ltd v Twaddle*, note 279 *supra*.

possible for businesses to be provided with the degree of protection intended for natural persons as traditional consumers. However, given more recent authority, this decision should now be treated with caution. The definition of consumer in Rule 3 of Schedule 8 has now been clarified by two subsequent decisions. These decisions ensure that a consistent and predictable rule is provided for the juridical protection of Scottish consumers.

The application of Rule 3 of Schedule 8 has now culminated in two cases, *Semple Fraser WS v Quayle*²⁸⁵ and *Prostar Management Ltd v Twaddle*. In *Semple Fraser*, the court applied *Benincasa* to determine whether the contract was a consumer contract. A firm of solicitors raised an action for payment of fees against a former client who had moved to England. The defender claimed that he should be sued, as a consumer, in the courts of his domicile. The court held that evidence was necessary to establish whether the defendant received services from the solicitor for his own private use or in connection with his role as a company director. The decision in *Semple Fraser* was specifically followed both at first instance and on appeal in *Prostar Management v Twaddle*.²⁸⁶ In *Prostar*, the pursuer sued the defender for sums owed under an agency agreement. The defender argued that since the contract was for management services to assist him in his profession as a footballer, the contract was out with his trade or profession as a footballer and that since the contract was a consumer contract, the pursuers should have sued him in his domicile. However the

²⁸⁵ *Semple Fraser v Quayle* 2002 SLT (Sh Ct) 33 and *Prostar*, note 279 supra.

²⁸⁶ *Prostar*, note 279 supra.

appeal court in *Prostar* upheld the decision in *Semple Fraser* that a consumer must be purchasing goods or services for their own private use or consumption.²⁸⁷ Furthermore, the Sheriff Principal in *Prostar* rejected the decisions in both the *Chris Hart* and *BJ Mann Advertising* cases on the basis that the meaning of ‘consumer’ in Rule 3 of Schedule 8 should not be extended to enable businesses to claim they are consumers in any contract deemed not within their immediate trade or profession. The decision in *Prostar* is correct as it reiterates the objective of Rule 3 to provide juridical protection for the private (Scottish) consumer acting out with his trade or profession when he contracts with a business for his own private consumption. The decision in *Chris Hart* extended juridical protection intended for traditional consumers to legal persons and would therefore have conflicted with EU law. The decision would have been to the detriment of juridical protection for traditional consumers and increased uncertainty for foreign businesses seeking business from Scottish consumers. Furthermore, the *Prostar* decision indirectly reiterated the importance of businesses being able to predict with certainty when their commercial activities will subject them to the jurisdiction of the Scottish courts.

The case of *Lynch & Co v Bradley*²⁸⁸ considered parts of Rule 3 of Schedule 8 to the 1982 Act. The pursuers were a firm of solicitors and raised proceedings for the payment of their fees. At a hearing before Sheriff Murphy, the defender

²⁸⁷ Referred to as the “private consumption” test applied in *Semple Fraser* and also referred to in *Standard Bank (No.1)* (which was an unreported case at that time) note 123 supra ; *Prostar*, note 279 supra at p.11 and 14 respectively.

²⁸⁸ 1993 SLT (Sh Ct) 2.

contended that the matter was a consumer contract since he was the consumer of services provided by the pursuers. The pursuers contended that the matter was not a consumer contract as "...the services had been carried out in Glasgow Sheriff Court, that the defender had instructed the pursuers in Glasgow and that his instructions had not been solicited by advertisement or by any other method." The pursuers brought Article 13 in Schedule 1 and Articles 13 and 14 in Schedule 4 to the attention of the Sheriff. Nevertheless, Sheriff Murphy held that the matter was a consumer contract as the defender was deemed to be a "consumer" for the purposes of Rule 3 in Schedule 8. By instructing solicitors to act on his behalf in court (ie the provision of services), the Sheriff was satisfied that the consumer had done everything necessary to conclude the contract with the pursuers in Scotland. Accordingly, any action for non-payment of fees by the defender would have to be brought in the jurisdiction of his domicile in accordance with Rule 3 of Schedule 8. This case demonstrates that despite the absence of a specific invitation or advertising, a consumer who concluded a contract in Scotland with a business could have relied on Rule 3 in Schedule 8. If a Scottish consumer concluded a contract via a foreign business' website in Scotland, there was no requirement in Rule 3 that the business' web site had to constitute a specific invitation or advertising to Scottish consumers. Whilst Rule 3 provided greater protection for consumers than Articles 13-15 of the Brussels Convention, businesses situated out with Europe would have been exposed to the jurisdiction of the Scottish courts more frequently than businesses situated in an EU Member State. Rule 3 had to be amended to

include the requirement that a foreign business intended to target Scottish consumers via an active or interactive web site. As stated earlier, the requirement that the consumer must conclude the contract in his domicile is superfluous when the parties communicate via the global, dematerialised WWW and therefore had to be removed. Such a change would have increased legal certainty for the consumer and predictability of result for the business. Given that the WWW increases the opportunity for consumers to contract with businesses situated in non EU Member States, Rule 3 of Schedule 8 had to be amended. There are benefits to consumers and businesses in the revision of Rule 3. First, there will be an increase in legal certainty for the consumer if the principle requirement in Rule 3 is that the business' online activities have to target consumers. Second, the requirement for the consumer to have concluded the contract in Scotland is restrictive when the consumer does not need to be physically present in his own jurisdiction to contract with the business online. Third, such amendments will limit the possibility of the foreign business successfully pleading *forum non conveniens*. Nevertheless, the 2001 Order in Council replaced jurisdiction rules for consumer contracts in Schedule 8 with the following rules,

“

Jurisdiction over consumer contracts

3.(1) In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, subject to rule 5, jurisdiction shall be determined by this rule if

- (a) it is a contract for the sale of goods on instalment credit terms; or
- (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
- (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in Scotland or, by any means,

directs such activities to Scotland or to several places including Scotland, and the contract falls within the scope of such activities.

(2) This rule shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

(3) A consumer may bring proceedings against the other party to a contract only in

- (a) the courts for the place in which that party is domiciled;
- (b) the courts for the place in which he is himself domiciled; or
- (c) any court having jurisdiction by virtue of rule 2(f) or (i).

(4) Proceedings may be brought against a consumer by the other party to the contract only in the courts for the place where the consumer is domiciled or any court having jurisdiction under rule 2(i).

(5) The provisions of this rule shall not affect the right to bring a counterclaim in the court in which, in accordance with this rule, the original claim is pending.

(6) The provisions of this rule may be departed from only by an agreement

- (a) which is entered into after the dispute has arisen; or
- (b) which allows the consumer to bring proceedings in courts other than those indicated in this rule; or
- (c) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Regulation State, and which confers jurisdiction on the courts of that Regulation State, provided that such an agreement is not contrary to the law of that Regulation State.”²⁸⁹

As the extract from the 2001 Order above demonstrates, the same issues that arose with analogous rules in Schedules 1 and 4 to the 1982 Act as amended are also evident in the amendments to Schedule 8 to the 1982 Act. Akin to Schedule 4, the requirement that the Scottish consumer has to conclude the contract in Scotland has been removed from Schedule 8. This change ensures that the Scottish consumer does not have to be present in Scotland whilst contracting with a foreign business via a web site. However like Schedules 1 and 4, the consumer can only raise proceedings in his own jurisdiction

²⁸⁹ Civil Jurisdiction and Judgments Order, note 268 supra.

provided the business had either pursued professional activities or “directed activities” towards the jurisdiction. Again, the connecting factor “directing activities” must be amended to ensure that a business’ active or interactive web site constitutes commercial activity targeted at Scottish consumers. Such an amendment is needed to ensure that a consumer can establish jurisdiction in Scotland with certainty and that a business can predict the potential for such claims with greater consistency. The rule governing jurisdiction agreements has also been clarified. Whilst the parties can agree a jurisdiction after their dispute has arisen, the other two alternatives are the most relevant for contracts conducted online. Schedule 8 will uphold a jurisdiction agreement in favour of another forum. For example, a Scottish consumer contracts with a Mexican business via that business’ web site. If the Mexican business’ click-wrap agreement includes a choice of forum clause in favour of the Mexican courts, Schedule 8 will uphold this choice. In the absence of any protection under the Unfair Terms in Consumer Contracts Regulations 1999, the Scottish consumer will have to bring proceedings in Mexico. From the Scottish consumer’s perspective, the combined lack of physical contact with the business, the “take it or leave it” nature of the click wrap agreement and this rule in Schedule 8 are all disincentives to the consumer contracting with foreign businesses in the first place. The practical effect of this rule will hinder the Mexican business’ endeavours to obtain business from Scottish consumers. Alternatively, the parties’ agreement can only confer jurisdiction on another EU “Regulation state” provided both parties are domiciled or habitually resident in that

Regulation state and the agreement itself is not contrary to the law of that state. Given the inequality of bargaining power between the parties and the inherent uncertainties vis-à-vis location and identity of the parties, provided the business intended to target the Scottish consumer via its web site, a jurisdiction agreement in an online click-wrap agreement should not restrict the Scottish consumer from being able to raise proceedings in Scotland regardless of where the business is situated.

9.3 Summary of Rule 3 in Schedule 8 to the 1982 Act

As this section has demonstrated, Rule 3 in Schedule 8 to the 1982 Act will become increasingly important and relevant to consumers who want to sue a business situated in a non-EU Member State. Unless there is a jurisdiction agreement in favour of another jurisdiction, a Scottish court is unlikely to accept a plea of *forum non conveniens* when a consumer has entered into and concluded a contract with a business via the business' active or interactive web site intended for such consumers. If the business contracted to provide the goods or services to the Scottish consumer, such a plea is unlikely to succeed. The contract will be sufficiently connected with Scotland if the business targets and contracts with Scottish consumers via its web site and subsequently delivers the goods to the consumer in Scotland. Rule 3 of Schedule 8 must be amended further so that foreign businesses that operate active or passive web sites with the intention of targeting Scottish consumers are bound by it. Nevertheless, the greatest limitation in Rule 3 is the opportunity for businesses not situated in the

EU to include a jurisdiction agreement in their click-wrap agreements which will limit the consumer's ability to raise proceedings in Scotland.

9.4 Application of Non-Convention/Common Law Rules in the English Courts

As has been demonstrated, Rule 3 in Schedule 8 to the 1982 Act only applies when the consumer is domiciled in Scotland and the business is situated in a non-Member State. Since these rules do not apply in England, English consumers must establish jurisdiction under the Civil Procedure Rules (CPR). It is appropriate to consider whether analogous rules in England require adaptation and whether Scots and English law should adopt a coordinated approach. The “procedural character”²⁹⁰ of the English common law rules assert jurisdiction on the basis of the defendant being served the proceedings whilst in England or, with leave of the court, out with England. Part 6 of the CPR sets out the different ways in which service of the proceedings may occur. These are listed in of Part 6, paragraph 20(5) of the Rules. In addition to service by post, “service by certain electronic means”²⁹¹ is now possible. The CPR also contains particular provisions for service on companies in addition to requirements under the Companies Act 1985. Briggs points out that where the subject matter does not fall within the definition of a “civil and commercial matter” these rules are used by the English courts in order to determine

²⁹⁰ P. M. North, and J. J. Fawcett, *Cheshire and North's Private International Law*, 13th ed, Butterworths, London, 1999 at p.285. Briggs, note 138 supra at p.91 *et seq.*

²⁹¹ Briggs, *ibid* at p.92.

jurisdiction of the dispute.²⁹² For service out of a jurisdiction to be invoked under the CPR, the court has to be satisfied not only that the claim has been brought in accordance with the rules, but also that England is the proper forum for the matter in dispute²⁹³ and that the claim "...has a reasonable prospect of success on its merits."²⁹⁴ Further, paragraphs 5-7 of Part 6, CPR contains rules for service out of the jurisdiction where the matter is one involving a contract. There are a number of prerequisites to the application of paragraphs 5-7. The contract either has to have been entered into in the jurisdiction, or by agents in the jurisdiction, governed by English law or containing a choice of forum clause. Each of these connections could be established when a consumer contracts via the WWW. First, an English consumer could be deemed to have entered into the contract in England when they receive an acceptance from the foreign seller. Since the contract between the consumer and the foreign business is instantaneous, the consumer will conclude his contract with the seller wherever he is situated. However not every consumer will be able to establish that his contract was concluded in England. If a consumer takes the initiative to contract with a foreign seller on his laptop computer whilst travelling between jurisdictions or in a third jurisdiction, jurisdiction of the English courts will not be established. Second, a consumer could enter into a contract via the WWW with an agent of the seller if that agent was also situated in England. If the agent is instructed to obtain business from consumers in

²⁹² Briggs, *ibid* at p.91.

²⁹³ Briggs, *ibid* at p.105 *et seq.*

²⁹⁴ Briggs, *ibid* at p.100 and p.106.

England, it should not matter whether the agent uses a telephone, fax or the WWW to do so. This alternative requirement may be of benefit to the consumer who cannot establish that his contract was concluded in England. However, this alternative will not be available to the consumer if the foreign business' agent or branch is not domiciled in England. Even if a web server was located in England, as with Article 17 of the Brussels 1 Regulation, a web server will not constitute a branch or agency. Third, if the click-wrap agreement contains a jurisdiction or choice of law clause in favour of England then the consumer could establish jurisdiction over the foreign seller. However a foreign business that wishes to avoid the possibility of service out under the CPR is unlikely to include such clauses in its click-wrap agreement. Nevertheless, this option should still be retained in Paragraph 6 of CPR. For these reasons, it is necessary for Paragraph 6 of the CPR to be amended, primarily to reflect the consumer's ability to contract with a foreign business via the WWW but also to ensure that the business can predict in advance whether the English court will grant service out. The English court should permit 'service out' under the CPR when the business or its agent uses an active or interactive web site with the intention of contracting with English consumers. For the reasons given earlier, the requirement that the consumer concludes the contract in his domicile should be abolished and replaced with the requirement that the business used its active or interactive web site with the intention of contracting with an English consumer.

9.5 The Application of the Lugano Convention in the United Kingdom

The Lugano Convention allocates jurisdiction when the dispute concerns a defendant domiciled in a European Free Trade Association (hereafter 'EFTA') state. A significant difference between the Brussels and Lugano Conventions is that cases under the Lugano Convention cannot be referred to the European Court of Justice for a Preliminary Ruling. Nevertheless, the decisions deriving from the European Court of Justice are often taken into account when similar matters arise under the Lugano Convention. Schedule 3 to the 1991 Act contains the rules of jurisdiction for consumer contracts. The jurisdiction rules for consumer contracts are contained in Articles 13 to 15 of the Lugano Convention and are identical²⁹⁵ to those Articles in the Brussels Convention. The Lugano Convention has not yet been amended and must now be amended to adequately reflect the provisions of the new Brussels 1 Regulation.²⁹⁶ Furthermore, Articles 13-15 of the Lugano Convention must be adapted to ensure that the consumer's jurisdiction is established when a business uses an active or interactive web site to contract with consumers in other EEA or EU Member States.

10. CONCLUSION

The European Union has led the development of regional rules of jurisdiction for electronic consumer contracts.²⁹⁷ This was in response to the European Union's Framework for Judicial Cooperation in both Civil and Commercial

²⁹⁵ Civil Jurisdiction and Judgments Act 1991, c.12, Introduction and General Note, at 12-16.

²⁹⁶ North and Fawcett, note 290 supra at p.283.

Matters and to provide updated jurisdiction rules for electronic consumer contracts. Immediately after the Brussels 1 Regulation was approved by the European Parliament, it was reported ²⁹⁸ that the US Internet Advertising Agency demanded that the Regulation should not be implemented until a Global Summit considered the issue of jurisdiction for electronic commerce. As this chapter has considered, the Brussels 1 Regulation does not currently operate amongst all EU Member States. Articles 13-15 of the Brussels Convention still apply when the consumer is domiciled in Denmark. The fragmentation of jurisdiction rules amongst the EU Member States does not facilitate a consistent and predictable approach in establishing jurisdiction in the consumer's domicile. As this Chapter has demonstrated, the requirements of Articles 15-17 will continue to hinder the ability of the consumer to establish jurisdiction of an electronic consumer contract in his own jurisdiction. As far as the Brussels 1 Regulation is concerned, Articles 15-17 only apply where the business is either situated or has a branch or agency in an EU Member State. The rules of jurisdiction for consumer contracts in Schedules 4 and 8 to the 1982 Act and the CPR rules must also be amended to ensure that a Scottish or English consumer can establish jurisdiction over a foreign business in the part of the United Kingdom where the consumer is domiciled. Regardless of where the foreign business is situated, it should only be subject to the jurisdiction of the consumers' domicile when the business specifically intended to target consumers in their own jurisdiction via an active or interactive web site. The

²⁹⁷ Hörnle, note 67 supra ; Øren, note 79 supra at p.695.

connecting factor “directing activities” in Article 15(1)(c) of the Brussels I Regulation and Schedules 1,4 and 8 to the 1982 Act currently hinders the effective application of juridical protection for consumers. If the European Commission or ECJ do not amend this connecting factor further, a lack of certainty and predictability will prevail in establishing that the dispute should be heard in the consumer’s jurisdiction.

²⁹⁸ Sarah Left, “The death of EU ecommerce: MEPs slam etail regulation,” 1 December 2000, <http://www.silicon.com>.