Globalized Automatic Choice of Forum: Where Do Internet Consumers Sue?

Proposed Article 7 of the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters and its Possible Effects on e-Commerce

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I. INTRODUCTION

What does one do when a normal business transaction goes wrong? Furthermore, what if one party to the transaction is outside the jurisdiction where the injured party wants to sue? The injured party generally must go to a forum that has jurisdiction over the other party and sue in that court.1 But even if a court determines that it does have jurisdiction over the matter, collecting on a judgment may be impossible—even if the losing party has seizable assets in that forum.2 In addition, courts must deal with an entirely different problem for international transactions: deciding

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which country’s law to use. These issues may have significant substantive differences among Hague Conference member countries. In addition, consumer protection issues are made more complex by surging electronic commerce (e-commerce).

When a transaction goes awry, jurisdiction is of great consequence to a consumer who is looking for a resolution. Obstacles abound for consumers when the seller is conducting business outside the consumer’s country. For instance, it may be difficult to find a forum that can assert jurisdiction over a foreign business.

Although Article 7 of the proposed Hague Convention on International Jurisdiction and Foreign Judgments in Civil and

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3 Jack L. Goldsmith, Jurisdiction: Building Confidence in a Borderless Medium, at http://www.ilpf.org/events/jurisdiction/transcript/goldsmith_summary.html (last visited Sept. 17, 2001) (quoting Francis Gurry, Assistant Director General and Legal Counsel of the World Intellectual Property Organization (WIPO), as stating that “conflicts of law and jurisdictional questions are the most complicated for lawyers, let alone consumers”).


5 See Goldsmith, supra note 3. See infra notes 131-36 and accompanying text.


7 Goldsmith, supra note 3.

8 Id.

9 Id.
Commercial Matters (hereinafter “proposed Convention”) deals with many important issues such as intellectual property and free speech, its automatic choice of forum provision could render a significant blow to consumers. The proposed Convention has a judgment enforcement component that would require Hague member states to enforce the judgments rendered in other member states.\(^\text{10}\) Requiring a foreign state to enforce a judgment based on substantive law that is potentially very different from its own could be another serious problem the proposed Convention faces.\(^\text{11}\) Furthermore, the proposed Convention threatens to force websites “to the lowest common denominator,” to prevent litigation in a forum that provides better protections to consumers.\(^\text{12}\)

However, disregarding all other issues, the simple forced choice of forum matter could, in itself, drastically change the way the global Internet economy works just by predetermining where parties are forced to sue and be sued.\(^\text{13}\) For multi-million dollar business-to-business transactions, the trouble of maintaining a lawsuit in a foreign country may be well worth the effort, but what about disputes involving low-dollar business-to-consumer and business-to-business Internet transactions? Generally, these low cost transactions make a lawsuit not worthwhile because of costs and time.\(^\text{14}\)

\(^{10}\) See Love, supra note 4.  
\(^{11}\) See id.  
\(^{13}\) See id. Contra Goldring, supra note 2.  
Moreover, pursuing a lawsuit in a foreign jurisdiction adds yet another layer of complication and cost. Home consumers with relatively little bargaining power are becoming increasingly involved in common Internet transactions (some globally distant) and could be put at a great disadvantage.

The purpose of this Comment is to analyze the proposed Convention and its possible effects on e-commerce. In particular, attention will be focused on the effect of the automatic choice of forum clause. First, this Comment will detail an example involving the recent Yahoo! transnational judgment. This Comment will then explore many aspects of e-commerce. Next, existing and proposed legislation regarding transnational jurisdiction will be examined. Finally, this Comment will discuss ways to avoid jurisdiction and make a new proposal regarding choice of forum for the proposed Convention.

II. AN EXAMPLE

The distinction between sovereign laws has been in the forefront of the news in the Yahoo! case. National laws in France prohibit the display or selling of Nazi memorabilia.

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Through its American auction website, http://www.auctions.yahoo.com, Yahoo! users regularly listed and sold Nazi memorabilia.\textsuperscript{19} Two French organizations, the International League against Racism and Anti-Semitism (LICRA) and the Union of French Jewish Students,\textsuperscript{20} filed a lawsuit in French court against Yahoo!—and won.\textsuperscript{21} Normally, Yahoo! could have just ignored the French court’s ruling because the French court could not seize any of Yahoo!’s American assets.\textsuperscript{22}

The French Court ordered Yahoo! to come up with a solution to block French surfers from viewing Nazi items within ninety days.\textsuperscript{23} After ninety days, if Yahoo! failed to enact an adequate solution, the court would fine them one hundred thousand francs per day (about $14,000).\textsuperscript{24} Greg Wrenn, Associate General Counsel for Yahoo!, stated that “this is not the kind of order that American courts can enforce.”\textsuperscript{25} Later, in a declaratory action, a U.S. court ruled in his favor.\textsuperscript{26} The U.S. court agreed that the French order


\textit{Yahoo Hits Back at Nazi Ruling, Nov. 21, 2000, at http://news.bbc.co.uk/hi/english/world/europe/newsid_1032000/1032605.stm.}


\textit{Id.}

\textit{Id.}

was unenforceable in the United States. The two French groups vow to fight on at the U.S. appellate level. In this case, the U.S. court was dealing with free speech, but it is easy to see the problems that may arise with transnational jurisdiction.

III. IMPORTANCE OF E-COMMERCE

“The Internet is changing the way businesses sell everything from newspapers, music, groceries and airplane parts, to electronic equipment and natural gas.” In 2001, e-commerce brought in $600 million, up from $357 million in 2000. It has been forecast that “[b]y the end of 2002, more than 600 million people worldwide will have access to the Web, and they will spend more than US$1 trillion shopping online.”

The Internet is much more than just another link in the retail chain. “The ability to market and sell products and services from a single site to an unlimited geographic market, and to do so at low cost, is one of the great advantages flowing from online commerce.” However,

27 Id.
28 Id.
32 Id.
policy-makers, businesses, and consumers are faced with the challenges of operating in a world market.34 “With global online commerce promising to grow at a stunning rate, the world of consumer protection is changing.”35

An example of the tremendous Internet growth in sales,36 is shown by the data in Appendix I. This data changes rapidly, but “consistently show[s] ever-increasing commercial activity.”37 Internet auctions, as opposed to retail Internet sales, have helped spur this growth.38 More than thirty-five million users in the United States “have participated in online auctions, and eBay alone boasts more than 22 million registered users worldwide.”39

The Internet reduces the economic burden of starting a business, allowing almost anyone to set up shop with little or no expertise or capital to take advantage of this global marketplace.40 “The Internet's recent effect on traditional

http://www.butterworths.ca/sampleinternetandcommercelawincanada
(last visited Jan. 21, 2002).

34 Id.
35 Rosenthal et al., supra note 6, at 1.
36 See Statistics for Electronic Transactions, at
37 Christopher Paul Boam, The Internet, Information and the Culture of Regulatory Change: A Modern Renaissance, 9 COMM LAW CONSPECTUS 175, 194 (2001). See generally Michael Pastore, Online Consumer Sales Keep Increasing, at
38 David E. Sorkin, Payment Methods for Consumer-to-
39 Id. These Internet auctions generally involve person-to-
person transactions which make dispute resolution more difficult than when dealing with a reputable merchant.
40 See Press Release: Geneva Round Table on Electronic Commerce and Private International Law, available at
http://www.hcch.net/e/events/press01e.html (last visited Jan. 21, 2002).
business is due in part to the rapidity of its growth as a medium and in part to the potential for business growth." Internet businesses bypass conventional marketing routes because they can “reach customers, process orders and receive payment with greater speed, at lower cost and in higher volumes” by using e-commerce. In addition, when shopping online, consumers have higher expectations—expecting bargains and no lines. E-commerce’s reach is amazing:

- 304 million people have Internet access—forty-five percent are in the United States and Canada;
- Nearly one-third of U.S. households are regular Internet users;
- In 1998, the "Internet economy" generated over $300 billion in total revenue in the United States alone;
- "Commercial activity" on the Internet is expected to reach $100 billion in revenues in 1999;
- North American retailers generated $14.9 billion in online sales in 1998 and expect at least $36 billion in 1999 (a 145% increase);


41 Boam, supra note 37, at 194.
42 Stankey, supra note 30, at 11.
• Internet traffic continues to increase - visitors to retail sites rose 300% in 1998 and online retail orders grew by 200%.”

The global Internet greatly increases consumers’ ability to buy goods and services internationally.\textsuperscript{45} Therefore, e-commerce “brings the jurisdictional issues in relation to consumer protection sharply into focus.”\textsuperscript{46} However, the concept of e-commerce amplifies the “uncertainties that typically inhere in cross-border trade.”\textsuperscript{47} “Because Internet transactions are inherently global, they potentially implicate many different national regulations.”\textsuperscript{48}

The Internet may potentially change the way international commerce is conducted.\textsuperscript{49} Communication, contracting, and delivery can be made easier and less expensive for large and small international companies using the Internet.\textsuperscript{50} Internet consumers, therefore, are rewarded with “more choices and lower costs.”\textsuperscript{51} But, in a recent 2001 survey, eleven percent of consumers had at one time paid for


\textsuperscript{46} International Jurisdiction, supra note 44.

\textsuperscript{47} Goldsmith, supra note 3.

\textsuperscript{48} Id.


\textsuperscript{50} Goldsmith, supra note 3.

\textsuperscript{51} Id.
items they never received—up from six percent in 1999.\textsuperscript{52} The alarming growth in non-deliveries is surely a recipe for litigation.

\textbf{IV. THE INTERNET CONSUMER AND BUSINESS}

Why focus on just the consumer e-commerce aspects of the proposed Convention? Internet sales have been growing dramatically,\textsuperscript{53} and tinkering with the current legal system could positively or negatively influence sales. Furthermore, business-to-business international e-commerce has been occurring for years without widely developed regulation,\textsuperscript{54} but unprotected consumers have more to lose by the lack of regulation.\textsuperscript{55} "Until recently, consumer protection in most countries has been largely a domestic concern: U.S. consumers, for example, traditionally have done business with U.S. firms, relied on familiar protections, and sought relief in nearby courts."\textsuperscript{56}

Because the world is already experienced in handling business-to-business disputes, unanticipated problems may

\textsuperscript{52}Abdelmessih, supra note 43, at 3. \textit{See also} Stephanie Lewis, \textit{New Research from the Boston Consulting Group and Harris Interactive Shows Glitches in the 1999 Holiday Season are Unlikely to Deter This Year’s Online Shoppers}, Nov. 13, 2000, at http://www.bcg.com/media_center/media_press_release_subpage29.asp.


\textsuperscript{55}Swire, supra note 15.

\textsuperscript{56}Rosenthal et al., supra note 6, at 1.
appear when business-to-consumer disputes arise.57 “When disputes arise, businesses can appeal to national laws and to a well-established system of commercial arbitration.”58 However, “European and American law often treat consumer contracts differently from business-to-business contracts.”59 Usually, public policy is sympathetic to the consumers’ unequal bargaining position.60 Therefore, consumers generally have less ability to waive their rights, especially in contracts of adhesion.61 This policy helps the unsophisticated buyer.62 The main concerns in the private dispute resolution context are the beliefs that consumers are less sophisticated and that the legal information necessary to make a good consumer protection decision may not be easily accessible.63 To discount these concerns, it should be noted that the Internet’s very nature allows consumers a wide choice and restricts the normal “sales pressures that can create unfairness.”64 In addition, “information asymmetries and unconscionability are not as significant a concern.”65

Because consumers are “less sophisticated than businesses, and have fewer resources,” countries have an inherent interest in employing their “mandatory consumer protection laws to transnational consumer transactions.”66 A proposal that has been frequently discussed would enable Internet consumers to have the freedom to agree to private dispute resolution “if (a) the chosen law and forum are

57 Swire, supra note 15.
58 Id.
59 Id.
60 Id.
61 Id. See also International Jurisdiction, supra note 44.
62 Swire, supra note 15. See also International Jurisdiction, supra note 44.
63 Goldsmith, supra note 3.
64 Id. See also International Jurisdiction, supra note 44.
65 Goldsmith, supra note 3. See also International Jurisdiction, supra note 44.
66 Goldsmith, supra note 3.
clearly disclosed to the consumer, (b) the chosen forum is reasonably accessible and neutral, and (c) the chosen law provides reasonable, baseline consumer protections.”

However, “[c]onsumers anxious to purchase online must also balance the promise of unlimited choice, greater access to information, and a more competitive, global marketplace with the prospect that they will not [receive the] benefit[s] normally afforded by local consumer protection laws.”

Consumers are most interested in a secure and dependable Internet setting. However, consumers should be concerned about jurisdictional issues because businesses will pass on the increased costs created by regulation in the prices of goods and services. “Market economies work best when consumers can make informed purchasing decisions.”

Consequently, it is essential that consumers be truly aware of the protections they are giving up if country-of-origin regulations or forum selection clauses are allowed in the proposed Convention. “[C]hoice-of-law and choice-of-forum clauses could have profound effects on consumer rights,” especially in global transactions.

A positive line of attack has been established by the European Union for protecting consumers within its member nations. This consumer protectionism is developed by its Directive (98/27/EC) on Injunctions for the Protection of Consumer Interests. The Directive specifically recognized the inadequacy of then-existing mechanisms in ensuring compliance with consumer protection measures in a timely manner, and that the resulting ease with which infringing

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67 Id.
68 Geist, supra note 17, at 2.
69 Goldsmith, supra note 3.
70 Id.
71 Rosenthal et al., supra note 6, at 9.
72 Id.
73 Id.
74 Tassé & Faille, supra note 33.
conduct may escape enforcement "constitutes a distortion of competition" and diminishes consumer confidence.75

A. Lower Economic Barriers

Less expensive computers, along with increased Internet speeds and globally accepted data communication protocols “allow for lower economic barriers to entry for merchants and consumers.”76 If consumers use the Internet for purchases, they do not have to physically travel to purchase goods and thereby they may reduce their expenditures of time and money.77 “While not everyone in the world—or even the United States—can afford an Internet connection, the cost of bringing electronic commerce… to a poor person, or one located in a rural area with poor infrastructure, is much lower with Internet technology than with any preceding alternative.”78

The capital investment difference between businesses and consumers are almost indistinguishable due to the low costs.79 “Despite entrepreneurial risk [which may be minimal], the evidence, in terms of volume of business conducted through the Internet and market capitalization of Internet enterprises, overwhelmingly supports the proposition that the Internet already has revolutionized global commerce and will continue to draw a greater portion of trade under its umbrella.”80 Because the Internet exists, businesses can exploit a global customer base instantly and on a shoestring budget.81

75 Id.
77 Id. at 564-65. See also Rosenthal et al., supra note 6, at 1.
78 Perritt, supra note 76, at 565.
79 Id.
80 Id.
81 Rosenthal et al., supra note 6, at 1.
The lower costs to start up an Internet business entice more “small entities” into e-commerce “because the minimum economic scale of doing business is less.”82 As a result, an increasing number of small businesses trade with other small businesses and individual consumers.83 These small entity trades thereby produce an overall “lower average value” of Internet transactions.84

B. The Free Market Economy

Realistically, the free market does not afford personal consumers adequate protection because information access and economic leverage is in the hands of business.85 In many modern societies, governments have responded to this consumer-business inequality by enacting legislation to make the market a more balanced system.86 Many democratic communities have even enacted minimum protections disregarding party agreements, thereby restricting the freedom to contract.87 These “forced” protections are seen by many as necessary for “proper social functioning.”88 Whenever these pro-consumer restrictions are enacted, they help level the playing field between those with greater wealth and economic strength and weaker parties.89 Generally, in contract negotiations, those parties with economic advantages will use those advantages to the detriment of weaker parties.90

Nevertheless, European business is not completely opposed to submitting to the jurisdiction of consumers’

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82 Perritt, supra note 76, at 566-67.
83 See id. at 567.
84 Id.
85 Goldring, supra note 2.
86 Id.
87 Id.
88 Id.
89 Id.
90 Id.
The proposed Convention allowed jurisdictions to pick from consumer protection alternatives, it has been suggested that business would probably pick jurisdictions with the least restrictive regulations. However, “[c]onsumer groups in Europe have been strong advocates of retaining protective jurisdiction for consumers in the revised Brussels/Lugano Conventions.” If businesses and consumers are not satisfied with e-commerce regulation, “the marketplace will fall far short of its full potential.”

Laws that protect consumers are really a confession by legislatures that the freedom to contract chiefly benefits the welfare of business. “The politics (and much ideologically inspired language) about rolling back the apparatus of the nation-state is often really about the removal of legal requirements that limit the use of untrammeled power by the economically strong in ways that adversely affect the economically weak.” Government’s goal should be to encourage e-commerce, not to restrain it.

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91 International Jurisdiction, supra note 44.
92 Id.
93 Id.
94 Id.
95 Rosenthal et al., supra note 6, at 1.
96 Goldring, supra note 2.
97 Id.
V. WHY CYBERSPACE MAKES IT DIFFICULT TO PRESCRIBE LAWS

“The rapid emergence of these new technologies challenge what has been treated as a truism in cyberlaw—that the Internet is borderless and thus impervious to attempts to impose on it real-space laws that mirror traditional geographic boundaries.”

Cyberspace fundamentally challenges the bond between geographic location and the online world. Hence, the Internet is:

destroying the link between geographical location and: (1) the power of local governments to assert control over online behavior; (2) the effects of online behavior on individuals or things; (3) the legitimacy of a local sovereign's efforts to regulate global phenomena; and (4) the ability of physical location to give notice of which sets of rules apply. The [Internet] thus radically subverts the system of rule-making based on borders between physical spaces, at least with respect to the claim that Cyberspace should naturally be governed by territorially defined rules.

Many commentators have called for a separate jurisdiction for cyberspace, believing that “cyberspace is a community of its own, governed by norms of its own, independent of the law of the state.”

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99 Geist, supra note 17, at 48.
101 Id.
103 Sommer, supra note 102, at 1190. See also Rothman, supra note 102, at 127-28.
argue that an entirely new set of rules, based entirely on the type of contacts that occur over the Internet, is needed to bridge this gap. For instance, a consumer using the Internet “can electronically visit another forum, transact business in that forum, and cause effects in that forum—yet still be unaware that he has subjected himself to the laws of any particular forum.” On the other hand, “[p]eople transacting in cyberspace do things that would be regulated by state, national, or international law if they occurred in person or by telephone or mail. They defame, invade privacy, harass, and commit business torts. They make and breach contracts.”

It is important to decide whether or not a separate jurisdiction for cyberspace is needed because “electronic contacts over the Internet do not involve any contact with the physical world.” Therefore, “traditional notions of personal jurisdiction do not apply.” But, in comparison to the telephone system, many commentators have observed that “the Internet does not lack a physical location.” Although Internet “inhabitants” use the Internet over great distances, the communication begins “from a fixed location and ends at a fixed location.” In addition, the injuries that occur from Internet transactions must surely affect a person in a fixed location.

To further complicate cyberspace, it’s often difficult to tell where an Internet business is located, even for

104 Rothman, supra note 102, at 137.
105 Id. at 138.
107 Rothman, supra note 102, at 137.
108 Id.
109 Id. at 128.
110 Id. at 138.
111 Id.
sophisticated Internet shoppers. Many unsophisticated Internet consumers probably do not even stop to think about what happens if a dispute arises from a transaction. Furthermore, “[t]he Internet makes it more difficult to localize legally relevant conduct than preceding commerce technologies.” And, because Internet transactions are normally small in value, almost all consumers—balancing legal action costs against possible recovery—would not even contemplate a legal proceeding.

VI. EXISTING EUROPEAN MULTI-NATIONAL REGULATORY LAW

At the cutting edge of e-commerce jurisdictional regulation is the European Union. The European Union has its own communal laws on personal jurisdiction and judgment enforcement, called the Brussels and

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113 Goldsmith, supra note 3.
114 Perritt, supra note 76, at 570.
115 See Stankey, supra note 30, at 11.
117 Tassé & Faille, supra note 33.
Lugano\textsuperscript{120} Conventions, respectively. Where choice of substantive law is concerned, business-to-business European transnational sales are controlled by the “Rome Convention, the United Nations Convention on the Law Applicable to the International Sale of Goods, and established legal precedents.”\textsuperscript{121}

However, because the United States legal system is based on Anglo-American laws, it differs vastly from continental European laws on jurisdiction.\textsuperscript{122} It is possible that these differences will mean the United States will have difficulty joining in a treaty originating from European laws.\textsuperscript{123}

If a legal proceeding is brought against a defendant residing within the European Union, the 1968 Brussels and 1989 Lugano Conventions govern personal jurisdiction.\textsuperscript{124}

\footnotesize{(last visited Jan. 21, 2002) [hereinafter Brussels Convention]. See also Tassé & Faille, supra note 33.}

\footnotesize{120 Brussels Convention, supra note 119. See also Tassé & Faille, supra note 33.}

\footnotesize{121 Swire, supra note 15. See also Tassé & Faille, supra note 33.}

\footnotesize{122 Goldsmith, supra note 3.}

\footnotesize{123 Goldsmith, supra note 3 (citing Ishiguro, vol. I Official Transcript at 54-62).}

\footnotesize{124 Boam, supra note 37, at 195.}
According to these European Conventions, the general law is that personal jurisdiction is proper in the defendant’s domiciled forum. European courts believe that the “hallmark of fairness and impartiality of [a] rendering court” is the ability to objectively determine jurisdiction using standards. The personal jurisdiction of non-European Union domiciled parties is governed by the “traditional rules of the national forum,” which usually focus on “minimum activity or domicile.” Furthermore, these choices of forum can always be supplanted by an agreement of the parties. Although Western European countries have the Brussels and Lugano Conventions to “ensure enforcement of judgments within Europe,” these Conventions do not apply elsewhere.

According to one commentator, the latest proposed Convention version:

seems to be based on the premise that jurisdiction should be governed by specific rules, an approach followed in the Brussels/Lugano Conventions, rather than on the U.S. minimum contacts—fair play and substantial justice—due process approach. The crucial basis for jurisdiction will be the domicile, habitual residence, or principal place of business of the defendant. Specific rules will apply to supply and service contracts, consumer contracts, employment contracts, torts, and trusts. Multiple defendants may be sued in one action if they are sufficiently connected.

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125 Id.


127 Boam, supra note 37, at 195.

128 Id.

129 Goldsmith, supra note 3. See also Blumer, supra note 118, at 338.

VII. The Hague Convention on Private International Law

In existence since 1893, The Hague Conference on Private International Law (hereinafter “Hague Conference”) has made possible “multilateral agreements among nations on public law frameworks for private laws.”132 Global law harmonization has been the Hague Conference’s major goal.133 The Hague Conference’s delegates from member nations hold hearings, and over the years they have proposed international laws known as conventions on peace, war, child abduction, traffic laws, civil procedure, sale of goods, and more.134 These proposed laws are then transformed into treaties for ratification by the member nations.135

The Hague Conference includes fifty-eight member nations.136 Europe has thirty-six members: Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden,

131 Background, Establishment, and Status, at http://www.hcch.net/e/infosheet.html#Background (last visited Jan. 21, 2002).
132 Perritt, supra note 76, at 581.
133 James Love, As the Hague Diplomatic Conference Ends, the Internet and the Public Domain are at Risk, Jun. 20, 2001, at http://www.cptech.org/ecom/jurisdiction/badly.html. See also
Goldsmith, supra note 3.
135 See Goldsmith, supra note 3.
Switzerland, United Kingdom, and Yugoslavia. North America has three members: Canada, Mexico, and the United States.\footnote{137} South America has seven members: Argentina, Brazil, Chile, Peru, Suriname, Uruguay, and Venezuela.\footnote{138} Asia has six members: China, Israel, Japan, Jordan, the Republic of Korea, and Sri Lanka.\footnote{139} Africa has two members: Egypt and Morocco. Eurasia has two members: Turkey and the Russian Federation.\footnote{140} Oceania has two members: Australia and New Zealand—the newest member.\footnote{141} Because each country has one vote, it is easy to see that Europe—with its thirty-six member nations—has an advantage over all the other countries combined.\footnote{142} However, the United States alone accounts for more than forty percent of all online expenditures.\footnote{143}

Although “Europeans have been successful in harmonizing jurisdiction and judgments doctrines on a regional basis,” convergence with the jurisdictional laws of other countries, like the United States, seems difficult.\footnote{144} Courts easily assert the laws of the United States over foreign actions.\footnote{145} “U.S. long-arm statutes permit liberal assertions of personal jurisdiction, and the novel remedies available in the United States, such as punitive or multiple damages and disgorgement, make it difficult for other nations of the world to agree to enforce U.S. judgments.”\footnote{146}

\footnote{137} Id.\footnote{138} Id.\footnote{139} Id.\footnote{140} Id.\footnote{141} Id.\footnote{142} See generally Peter H. Pfund, The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters, 24 BROOK. J. INT’L L. 7, 15 (1998).\footnote{143} Grant, supra note 31.\footnote{144} Goldsmith, supra note 3.\footnote{145} Id.\footnote{146} Id.
The proposed Convention, initiated by the United States, is unlike many other Hague conventions in that it seeks to harmonize only the procedural rules, not substantive law. Nevertheless, “a mutually agreed-upon international jurisdictional system is integral to overcoming existing barriers to the satisfaction of foreign judgments,” which is the major goal of the proposed Convention. In addition, the incentive to “forum shop” would be greatly reduced by a truly operational and effective treaty. Lastly, “such a treaty could correct the discriminatory way in which American citizens are subjected to overly-broad assertions of jurisdiction by European countries.”

The United States has never been a party to a treaty enforcing judgments from other countries. Current international commerce expansion has caused a movement in the United States for the approval of the proposed Convention. One saving grace for the proposed Convention is a clause that allows foreign judgments from countries with laws manifestly different from the enforcing forum to be refused.

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150 Id. at 1239. See also Nguyen, *supra* note 147, at 149.

151 Strauss, *supra* note 149, at 1239.


153 *Preserving Free Speech*, *supra* note 152, at 403.

“Proponents believe the treaty will foster increased international business and provide uniform rules for parties engaged in worldwide transactions.”\textsuperscript{155} However, the proposed Convention excludes many types of civil and commercial matters,\textsuperscript{156} including “status and legal capacity of natural persons, domestic relations, wills and succession, insolvency, administrative law, taxation, customs, social security, arbitration and proceedings related thereto, and admiralty or maritime matters.”\textsuperscript{157}

One hotly debated issue is whether a suit should be brought in the country-of-origin or the country-of-destination.\textsuperscript{158} Originally, the proposal made the choice of forum mandatory in the country-of-destination; however, the proposal was made more business friendly by adding options for choice of forum agreements for consumers.\textsuperscript{159} At least one commentator has criticized this change, noting that “[i]t is… unreasonable to demand… consumers [adhere to country-of-origin jurisdiction].”\textsuperscript{160}

In 1965, the Hague Conference first attempted to develop a treaty on jurisdiction.\textsuperscript{161} In that version, the choice of court stipulation was not compulsory; furthermore, the treaty was worded to allow contracts to be voided if they were “obtained by an abuse of economic power or other unfair

\textsuperscript{155} Preserving Free Speech, supra note 152, at 403.
\textsuperscript{157} Traynor, supra note 130, at 6.
\textsuperscript{159} Jurisdiction and Applicable Law in Electronic Commerce, at http://www.iccwbo.org/home/statements_rules/statements/2001/jurisdiction_and_applicable_law.asp (Jun. 6, 2001). See also app. II.
\textsuperscript{160} Meller, supra note 16.
\textsuperscript{161} Love, supra note 4.
Whether the current treaty will contain a provision with special protections for consumers has yet to be finalized by the Hague Conference members. Conference delegations from Europe have been influenced by the Brussels and Lugano Conventions, in which European countries concluded that online consumers making purchases should not be offered fewer protections than during traditional face-to-face transactions. Furthermore, the Brussels and Lugano Conventions pronounced that “choice of court clauses in contracts should not override consumer protection laws.” In addition, according to European delegations, business exposure to legal action by individual purchasers in various jurisdictions is a genuine anxiety.

Ten years ago, “long before anyone was [seriously] considering the impact of the Internet,” the proposed Convention was initiated. This proposal, if enacted by the member nations, would serve to determine the choice of forum and force members to enforce judgments rendered in other member countries. As it currently stands, in business-to-consumer transactions, the proposed Convention has an option to require suits to be brought in the consumer’s forum, thereby making any contractual forum-selection clauses void or voidable. In business-to-business transactions, however, choice of forum clauses would be honored.

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162 Id.
163 International Jurisdiction, supra note 44.
164 Traynor, supra note 130, at 6.
165 International Jurisdiction, supra note 44. See also Dreyfus, supra note 122, at 455.
166 International Jurisdiction, supra note 44.
167 Id.
168 Love, supra note 158.
169 Id.
170 Id. (Oct. 1999 draft of Article 7).
171 Id.
The Hague Conference obviously thought that e-commerce may have serious implications in the proposed Convention because the organization has held two officially commissioned Round Tables on E-Commerce and Personal Jurisdiction to report back to the Conference.\textsuperscript{172} The first Round Table took place in the fall of 1999 in Geneva, Switzerland, and the second in the Spring of 2000 in Ottawa, Canada.\textsuperscript{173} Based on information gathered at these Round Tables, Article 7 of the proposed Convention has changed significantly since its introduction. Refer to Appendix II for the original\textsuperscript{174} and latest versions.\textsuperscript{175}

Small businesses may be particularly susceptible to the competitive disadvantages of being forced into a consumer’s jurisdiction because these businesses will have to become educated about the laws of all countries in which they transact business.\textsuperscript{176} “Approximately 90% of the value of electronic commerce today is generated by business-to-business transactions.”\textsuperscript{177} “Industry believes that [forced

\begin{footnotes}
\item[173] See id. See also Electronic Commerce, at http://www.hcch.net/e/workprog/e-comm.html (last visited Jan. 22, 2002).
\item[175] Part One of the Nineteenth Diplomatic Session, which was held from 6-22 June 2001, drew up the latest version of this interim text ("Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference"), available at ftp://hcch.net/doc/jdgm2001draft_e.doc (last visited Jan. 19, 2002).
\item[176] Meller, \textit{supra} note 16; Goldsmith, \textit{supra} note 3. See also Johnson, Crawford & Jain, \textit{supra} note 40.
\item[177] Goldsmith, \textit{supra} note 3 (citing Cochetti, vol. II Official Transcript at 177).
\end{footnotes}
jurisdiction] could hamper the growth of e-commerce.”

On the other hand, “business wants an Internet environment
in which regulation is predictable and non-burdensome.”

At the Internet Law & Policy Forum's 1999 Conference,
held in Montreal on July 26, 1999, Robert Pitofsky,
Chairman of the Federal Trade Commission, alleged that
“[jurisdictional issues] are the most important [problems]
that have to be worked out for Internet commerce to
thrive.” In addition, Francis Gurry, Assistant Director
General and Legal Counsel for the World Intellectual
Property Organization (WIPO), further observed that
“conflicts of law and jurisdictional questions are the most
complicated for lawyers, let alone consumers.”

The United States delegation to the Hague Conference
has criticized the provisions of the Brussels and Lugano
Conventions. Because the Brussels and Lugano
Conventions apply only to European countries, which have
comparable consumer protection rules, converting these
Conventions into a global convention may be unlikely
because non-European nations have much greater diversity
in their consumer laws. “The U.S. delegation opposes the
language in Article 7 because ‘it would create an absolute
rule against choice of forum clauses in consumer contracts.
That is not consistent with U.S. law, where such clauses may
be enforced [unless they are] unjust and unreasonable’. ”

“Consumer groups in the United States have been critical of
the position of the U.S. delegation” because the U.S.

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178 Meller, supra note 16. See also International Jurisdiction,
supra note 44.
179 Goldsmith, supra note 3. (citing, e.g., Pincus, vol. II Official
Transcript at 14). See also Rosenthal et al., supra note 6, at 1.
180 Goldsmith, supra note 3.
181 Id.
182 International Jurisdiction, supra note 44.
183 Id.
184 Id.
delegation’s stance has been heavily pro-business.\textsuperscript{185} Nevertheless, it is anticipated that the treaty will be eventually ratified by the United States.\textsuperscript{186}

\section*{VIII. Hague Convention Acceptance in American Courts}

Many observers believe that the “United States' law of territorial jurisdiction in civil cases is a mess.”\textsuperscript{187} Even if the United States ratifies the proposed Convention, it is not certain that United States courts will be compelled to follow its rules.\textsuperscript{188} This is true because:

\begin{quote}
[i]f the Constitution does, in fact, govern the international ambit of the United States' jurisdiction in these cases, there is a potential for conflict between the Constitution and the treaty. The existence of such a potential conflict would lead to the possibility that the treaty, at least in part, would be held invalid by United States courts. This could both damage U.S. relations with its treaty-making partners and undermine the treaty's purpose of promoting a coordinated and coherent international jurisdictional system. Such results would be particularly unfortunate at a time when the legal demands of the global economy have amplified the advantages of developing and maintaining a well-coordinated international jurisdictional system.\textsuperscript{189}
\end{quote}

Because the United States is a major economic powerhouse with a huge base of “contacts, transactions and [transnational] relationships,” many nations are considerably concerned about specific American legal concepts.\textsuperscript{190} Issues

\begin{footnotes}
\item \textsuperscript{185} Id.
\item \textsuperscript{186} Nguyen, supra note 147, at 146.
\item \textsuperscript{187} Kevin M. Clermont, Jurisdictional Salvation and the Hague Treaty, 85 CORNELL L. REV. 89, 89 (1999).
\item \textsuperscript{188} See Strauss, supra note 149, at 1238.
\item \textsuperscript{189} Id. (footnotes omitted).
\item \textsuperscript{190} Pfund, supra 142, at 15.
\end{footnotes}
like “long-arm jurisdiction, punitive, multiple and [exemplary] damages” are less common in Europe.\textsuperscript{191}
Although the United States is generally viewed as an especially important participant, it—like all other Hague Conference members—is entitled to only a single vote.\textsuperscript{192}

“The success of every international treaty seeking to reconcile legal differences depends on its binding character leading to uniform application throughout all signatory states.”\textsuperscript{193} But the United States’ reputation for following other ratified Hague Conventions is poor—generally ignoring them and choosing national law in their place.\textsuperscript{194} For instance, in \textit{Societe Nationale Industrielle Aerospatiale v. United States District Court},\textsuperscript{195} the United States Supreme Court held that the Hague Evidence Convention\textsuperscript{196} was non-compulsory, “not precluding parties who seek the evidence discovery located abroad from employing the far-reaching Federal Rules of Civil Procedure.”\textsuperscript{197} Another example in which the Supreme Court chose domestic law over a treaty was in a case dealing with the Hague Service Convention.\textsuperscript{198} But to its credit, the United States \textit{does} have a well-known

\begin{flushright}
\textsuperscript{191} \textit{Id.}.
\textsuperscript{192} \textit{Id.}
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{Id.} at 1285.
\textsuperscript{196} Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987).
\textsuperscript{198} Zekoll, \textit{supra} note 193, at 1285. \textit{See also} Fastiff, \textit{supra} note 197, at 486.
\end{flushright}
reputation for widely accepting and enforcing judgments rendered elsewhere.199

To illustrate this enforcement distinction,

[a]ssume that Apple Pi, a New Yorker with property in England, had a car collision at home in Ithaca, New York, with Franc Delta, a law professor from France. Imagine that Franc sues Apple in Paris. This jurisdiction is fine under France's Article 14, being personal jurisdiction based on the plaintiff's French nationality. Moreover, a judgment for Franc will be entitled under the Brussels Convention to recognition and enforcement against Apple's property in England. Now assume conversely that the collision occurred in Paris. Imagine that Pi sues Delta in New York. Jurisdiction based solely on the plaintiff's U.S. nationality is impermissible under U.S. law. If a default judgment were rendered, neither France nor England would enforce it, because the judgment is invalid for lack of personal jurisdiction. Even a litigated judgment would enjoy far less than automatic recognition and enforcement abroad.200

Fears regarding the American jurisdictional view are enlarged by the vague due process concept.201 “Due process… does not provide much protection against procedural unfairness, and a truly limited public policy defense is hardly a replacement for choice of law control.”202 “A treaty which did not preempt the rights of states to adhere to their old rules in transnational litigation [goes against the prevailing international view] that such a convention is obligatory in nature and requires uniform implementation throughout all Member States.”203

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199 Burbank, supra note 126, at 209, 232. See also Clermont, supra note 187, at 89.
200 Clermont, supra note 187, at 94.
201 Zekoll, supra note 193, at 1285-86.
202 Burbank, supra note 126, at 232.
203 Zekoll, supra note 193, at 1286.
IX. AVOIDING GOVERNMENT REGULATION

“The explosion of e-commerce on the Internet has stimulated governmental interest in low-cost dispute resolution mechanisms for transnational consumer disputes.” 204 Dispute resolution methods convenient to both consumers and businesses alike are desirable. 205 In addition, businesses can protect themselves by employing forms of jurisdictional avoidance. 206 Two likely ways to avoid government regulation are credit card chargebacks and geographic targeting/filtering.

A. Credit Card Chargebacks

Currently, the main Internet payment method is by credit card. 207 One familiar comfort for Internet consumers using credit cards is that they have “the same conveniences and legal protections that they are accustomed to receiving when making credit card purchases by telephone or mail order.” 208 Consumers have shown their comfort with credit cards 209 and they currently represent 15 billion online and offline transactions totaling $1.23 trillion in the United States alone. 210

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204 Henry H. Perritt, Jr., The Internet is Changing the Public International Legal System, 88 Ky. L.J. 885, 945 (2000).
205 Rosenthal et al., supra note 6, at 7.
206 See Perritt, supra note 76, at 574.
208 Stankey, supra note 30, at 11.
209 See Jerry W. Markham, Banking Regulation: Its History and Future, 4 N.C. Banking Inst. 221, 265 (2000).
In the United States, the credit card chargeback is the most frequent alternative dispute resolution (ADR) vehicle for consumer disputes.\footnote{Perritt, supra note 204, at 948.} "Major credit card networks extend charge-back protection internationally, and have adopted special consumer protection charge-back rules for electronic commerce."\footnote{Id. at 947.} When a dispute arises, a cardholder can have the issuer reverse the charge by issuing a chargeback to the merchant’s account.\footnote{Stankey, supra note 30, at 13.} However, credit card providers usually have narrow power to adjudicate any transactional dispute.\footnote{Perritt, supra note 207, at 20, 24.} This power is determined by the card issuer’s agreements between merchants and between cardholders.\footnote{Id. at 24-25.}

In the United States, the Fair Credit Billing Act\footnote{Fair Credit Billing Act, 15 U.S.C. § 1666 (1994).} regulates credit card providers.\footnote{Perritt, supra note 204, at 945-46.} Federal Reserve Board Regulation Z,\footnote{12 C.F.R. §§ 226.12-13 (1997).} the "high water mark in U.S. consumer protection law,"\footnote{Jane Kaufman Winn, Clash of the Titans: Regulating the Competition between Established and Emerging Electronic Payment Systems, 14 BERKELEY TECH. L.J. 675, 686 (1999).} provides important rules for United States credit card providers regarding "liability limitations, error and dispute resolution, and disclosure" in e-commerce.\footnote{Stankey, supra note 30, at 15; Perritt, supra note 204, at 946.} Regulation Z extends chargebacks only to consumers—not to businesses—in fulfillment of consumer protectionist public policy.\footnote{Perritt, supra note 204, at 946.}
Many informal dispute resolution mechanisms have been suggested to provide consumers with faster, less expensive resolutions than through the legal system. There is even a scheme for an online magistrate to handle Internet disputes with the same speed and in the same volume that exists in the online world.

The chargeback scheme seemingly satisfies businesses and consumers alike because the lack of adjudicated cases implies that personal consumers seldom pursue additional dispute resolution mechanisms beyond the chargeback. Seemingly, private regulation and alternative dispute regulation is particularly appealing to consumers. “Nevertheless, merchants bear the same high risk of fraud when accepting credit cards on the Internet, as they do in the physical world.”

The chargeback mechanism enables a private sector mediator—the credit card issuer—to be the dispute resolution specialist. These mediators welcome the added responsibility and cost of this alternative dispute resolution form because it encourages both consumers and merchants to use the credit card issuer’s products. The chargeback system is inexpensive, fast, and easy to use. Costs are almost nonexistent and an attorney is not necessary. “Intermediary-provided dispute resolution greatly reduces...”

222 Goldsmith, supra note 3.
224 Perritt, supra note 204, at 947.
225 See Goldsmith, supra note 3.
226 Stankey, supra note 30, at 15.
227 Perritt, supra note 204, at 949.
228 Id.
229 Id. at 948.
230 Id.
costs because the intermediary already has a relationship with both disputants."

Unlike the United States, European governments have not required credit card issuers to use chargeback mechanisms. However, chargebacks “are nevertheless fairly common in [European]… debit card agreements.” Therefore, European businesses may find chargebacks somewhat unfamiliar for credit card transactions. In addition, chargebacks do not solve all consumer or merchant problems. Interestingly, Canadian credit card issuers perceive that consumer-merchant transactional disagreements are “higher in electronic commerce than in conventional face-to-face commerce.”

B. Targeting and Filtering

Anywhere an Internet business website can be viewed makes it susceptible to the regulations of the viewer’s domicile, which can be almost anywhere. However, targeting can completely sidestep the lack of certainty over extraterritorial laws. Unfortunately, too much filtering can deprive consumers of the “benefits of global e-commerce,” which is one of the main purposes of the Internet. “Consumers in less attractive markets (perhaps smaller,

231 Perritt, supra note 204, at 949. See also Rosenthal et al., supra note 6, at 7; Sorkin, supra note 38, at 2.
232 Perritt, supra note 204, at 949.
233 Id.
234 Id. at 948-49.
235 Id.
236 Perritt, supra note 76, at 565. See also Sommer, supra note 102, at 1208.
237 Perritt, supra note 76, at 573. See also Sommer, supra note 102, at 1208.
238 See Perritt, supra note 76, at 573. See also International Jurisdiction, supra note 44.
poorer, or more remote places) would be hurt the most, as
companies may choose not to do business there.”

In an international study, the American Bar Association’s
Internet Jurisdiction Project recommended targeting as “one
method of addressing the Internet jurisdiction issue.”
Targeting, also known as jurisdictional avoidance, occurs
when an Internet business aims its selling only toward
specific forums or jurisdictions. “The concept of targeting
is the best solution to the theoretical challenge presented by
difficulties in localizing conduct in Internet markets.” For
instance, an Internet business could target as few or as many
countries as it wishes to sell to, thereby quashing the
“uncertainty associated with potential regulation by nearly
two hundred national sovereigns and thousands of
subordinate governmental entities.” Even more, if an
Internet business wanted to shun specific national
regulations, it could filter out certain countries from its sales
territory. In short, businesses could refuse to conduct e-
commerce with people in jurisdictions where they did not
want to be sued.

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239 International Jurisdiction, supra note 44.
240 Geist, supra note 17, at 39.
241 Perritt, supra note 76, at 573. See also International
Jurisdiction, supra note 44. See also Sommer, supra note 102, at 1208.
242 Perritt, supra note 76, at 573. See also Geist, supra note 17, at 37.
243 Perritt, supra note 76, at 573. See also Tassé & Faille, supra
note 33. See also Meeting of Experts on Electronic Commerce and
International Jurisdiction, Ottawa Preliminary Statement for the Ottawa
Meeting, 26 February - 2 March 2001 regarding the HAGUE
CONFERENCE ON PRIVATE INTERNATIONAL LAW Preliminary
Draft Convention on Jurisdiction and Foreign Judgments in Civil and
Commercial Matters Adopted by the Special Commission on 30 October
(last visited Jan. 21, 2002) [hereinafter Meeting of Experts].
244 Perritt, supra note 76, at 574. See also Geist, supra note 17, at 37.
Although targeting may have certain advantages, resources are expended when an Internet business attempts to ascertain the contracting party’s true destination or domicile. Filtering out destinations to not trade with may impinge on e-commerce with other countries and will certainly increase costs. Digitally-delivered products like downloadable software or business reports aggravate the cost issue. However, disclaimers by Internet businesses may protect them from the forced jurisdiction of consumers who may hide details like their true domicile. But this approach requires those businesses to be diligent in making sure they follow their own self-regulation.

At least with physically deliverable goods, the seller knows the delivery location in advance and may simply choose not to ship the product. But even blocking shipments does not limit the ultimate product destination, and therefore, the forum in which the business may be sued. However, it is not untenable for Internet businesses to use targeting techniques for their transactions. Using “payment systems, credit card systems, geographically targeted web sites, and other strategies” could easily allow an Internet business to filter or target particular countries. It is important to note that the “multi-regulatory exposure” threat has not yet slowed e-commerce growth.

245 Goldsmith, supra note 3. See also Rosenthal et al., supra note 6, at 6.
246 Goldsmith, supra note 3. See also Geist, supra note 17, at 1-2; Rosenthal et al., supra note 6, at 6.
247 Goldsmith, supra note 3. See also Meeting of Experts, supra note 243.
248 Meeting of Experts, supra note 243.
249 Id.
250 Goldsmith, supra note 3. See also Meeting of Experts, supra note 243.
251 Goldsmith, supra note 3. See also Rosenthal et al., supra note 6, at 7.
252 Goldsmith, supra note 3.
253 Id.
Yet, targeting and filtering necessary to comply with multi-national regulation detracts from the “speed and efficiency benefits of the Internet.”254 In addition, many commentators have observed that “uncertainty about multiple-jurisdictional exposure chills the expansion of Internet commerce, and might increase the cost of capital.”255 Differing views have developed on how multi-national regulation may affect both large and small businesses.256 Some commentators have suggested that smaller Internet businesses are disadvantaged because they are less able to afford the technology needed for targeting and filtering.257 Furthermore, for both large and small companies, legal expenses may be higher because more time is necessary to research multi-national regulations to aid in deciding which countries to target and filter.258 Legal expenses are not one-time costs because national regulations may change, requiring legal research to be constantly updated. On the other hand, large Internet businesses can also be disadvantaged because they may have physical locations in many countries, thereby subjecting these businesses “to the enforcement jurisdiction of many nations.”259

To achieve true global trading selectivity would mean each business would have to be very aware of the laws of the consumer’s jurisdiction. Even if an Internet business chose one additional country to trade in other than his or her own, the legal research required to ensure the market were legally acceptable would be staggering. This need for legal research

254 Goldsmith, supra note 3. See also Rosenthal et al., supra note 6, at 5.
255 Goldsmith, supra note 3.
256 Id.
257 Id.
258 Id. See also Rosenthal et al., supra note 6, at 5.
259 Goldsmith, supra note 3. See also Johnson, Crawford & Jain, supra note 40.
is perhaps the greatest reason for enacting a treaty to effect member states’ substantive laws.

Technological solutions to assist geographic filtering are being developed.\textsuperscript{260} Software is currently available to detect where an Internet user’s communication is originating.\textsuperscript{261} However, the software is not foolproof.\textsuperscript{262} Currently, accuracy reaches about ninety-eight percent.\textsuperscript{263} Furthermore, privacy tools can be used by users to effectively hide their true geographic origin.\textsuperscript{264}

X. CONCLUSION: A PROPOSAL

First, like many other matters excluded from the Convention,\textsuperscript{265} already existing private dispute mechanisms should be allowed in the proposed Convention. Any Internet transaction that goes wrong should first be handled through private alternative dispute regulation, like credit card chargebacks. This mechanism allows for dispute resolution that is as quick and efficient as the Internet transactions themselves. Credit card agreements surely have the possibility for leverage by business, but they have been around for a long time and are therefore comfortable to both businesses and consumers.\textsuperscript{266} Targeting and filtering, although costly, are surely the easiest way for businesses to avoid forced jurisdiction. Businesses should reinforce private dispute resolution with jurisdictional avoidance.

\textsuperscript{261} Id.
\textsuperscript{262} Id.
\textsuperscript{263} Id.
\textsuperscript{264} Id.
\textsuperscript{265} Theis, supra note 156, at 59. See also Traynor, supra note 130, at 6.
\textsuperscript{266} See generally Perritt, supra note 204, at 947-48.
Furthermore, any alternative dispute resolution mechanism must be conducted in good faith.

Second, similar to the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) asset exclusion provision, this Comment proposes that for e-commerce transactions, the transaction value be tied to any venue, forum, or choice of law provision contained within a transaction. For example, if businesses or consumers have more than $25 million in assets, the Texas DTPA "assumes" that the parties involved are sophisticated enough to waive its protections.\footnote{TEX. BUS. & COM. CODE § 17.45(4) (Vernon 2002). See Richard M. Alderman, Texas Consumer Law: Cases & Materials 5-6 (4th ed. 2001). See also Marc Christopher Mayfield, What You Should Know about the Texas Deceptive Trade Practices-Consumer Protection Act, at http://www.mcmpc.com/dtpa.htm (last visited Jan. 22, 2002). “If you are an individual residing in Texas, your analysis is fairly simple, and you may move on to look directly at your specific transaction. However, if you are a ‘business consumer,’ such as a partnership or corporation, you must look deeper at the definition of a consumer. A business consumer that has assets of $25 million or more or is owned or controlled by an entity that has assets of $25 million or more will not qualify as a consumer.” Id.} Likewise, the Texas DTPA also exempts from the Act transactions worth more than $100,000 if they involve a written contract.\footnote{TEX. BUS. & COM. CODE § 17.49(f)(1) (Vernon 2002).} In the proposed Convention, transactions over $10,000.00 should allow the parties to make binding contractual agreements as to venue, forum, and choice of law. These agreements must be made in good faith, clear, and prominent, and they must not be unconscionable. If a consumer is comfortable enough to spend $10,000 (or for that matter, has enough money in an Internet-ready form to consummate such a transaction), then he or she should be considered sophisticated enough to contract away his or her rights.

There are several reasons why the automatic choice-of-forum provision should be tied to the dollar level of the
transaction. In many cases, Internet sales are generated by small, often single-person, companies that are more like general consumers than traditionally perceived businesses.\textsuperscript{269} Ebay may be one place to look for these small, one-person “shops.”\textsuperscript{270} In addition, traditional businesses which sell online may have a legal staff (or access to one) and are probably more suited to negotiate agreement terms than “Mom and Pop” shops.\textsuperscript{271}

Consumer Internet transactions are usually small.\textsuperscript{272} Realistically, no one is going to pursue a lawsuit with a value of a few hundred dollars—even in small claims court—because the costs in time and effort are generally too great.\textsuperscript{273} Once an attorney becomes involved in a dispute, the costs increase considerably,\textsuperscript{274} making the possibility of a suit realistic only when large sums are involved.

The most reasonable venue to try a case is probably where the least sophisticated party is located.\textsuperscript{275} It is more harmful for a less sophisticated, poorer consumer who stands to lose $500 than for a big business to lose the same $500. Furthermore, “[r]equiring consumers to travel to a foreign… forum to seek redress in an unfamiliar legal system—either through a country-of-origin approach for jurisdiction, or by allowing companies to impose an exclusive forum by contract—would in many cases effectively deny consumers

\textsuperscript{269} Johnson, Crawford & Jain, supra note 40.
\textsuperscript{270} Perritt, supra note 76, at 566.
\textsuperscript{271} Cf. Johnson, Crawford & Jain, supra note 40.
\textsuperscript{272} Grant, supra note 31. Cf. Stankey, supra note 30, at 11.
\textsuperscript{273} International Jurisdiction, supra note 44. See also Rosenthal et al., supra note 6, at 2.
\textsuperscript{274} See Edward A. Purcell, Jr., Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court, 40 UCLA L. Rev. 423, n.125 (1992). “[F]orum selection clauses] function to give the companies significant advantage over individual claimants, especially those individual claimants who lack resources and sophistication.” Id.
access to judicial redress.” It is unlikely that a consumer from the United States will spend $700 for a plane ticket to Italy to pursue a lawsuit over $500 worth of undelivered goods ordered from an Italian website. However, once a purchase exceeds an arbitrary limit, it is assumed that the parties are equals because the dollar amount is substantial enough to cause all parties to seriously consider all the implications of the deal.

What will happen if low value disputes are brought to court? Default judgments would likely be rendered because the defendant is not likely to spend the money to defend itself in the plaintiff’s forum. Then, under the proposed Convention, the judgment can be enforced anywhere. Without the proposed Convention’s judgment enforcing provision, enforcing a judgment would still be a huge international problem—unless a defendant has assets located in the forum, it is not certain that the judgment could be enforced anywhere else.

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276 Rosenthal et al., supra note 6, at 10.
277 Id.
278 David E. Steinberg, Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg, 75 WASH. U.L.Q. 1479, 1486 (1997).

One also might argue that plaintiffs often choose inconvenient forums, in hopes that a defendant would find litigation to be so difficult and expensive that she defaults. Indeed, plaintiffs bringing small cases probably use this strategy to win occasional default judgments. Where the plaintiff seeks a small recovery, a defendant may find the cost of identifying and retaining local counsel in a distant forum to be prohibitively expensive.

Id.

279 See Blumer, supra note 118, at 386-87.
280 Goldsmith, supra note 3. See also Rosenthal et al., supra note 6, at 2.
However, under the proposed Convention, if the defendant has no assets in the country that renders the judgment, then the plaintiff is free to enforce the judgment in another country.\(^{281}\) This approach, although necessary for remedies, will surely bring added costs.\(^{282}\) These costs will make the realistic probability of going through the trouble and expense of seeing a judgment through to collection only reasonable in high dollar cases. This limitation furthermore reduces the likelihood of a case going to trial in the first place.\(^{283}\)

**XI. APPENDIX I**

| Total Value of Internet Transactions, 1998-2002\(^{284}\) |
|-----------------|-----------------|-----------------|-----------------|-----------------|
| 1998            | 1999            | 2000            | 2001            | 2002 estimated  |
| $39.9b          | $95.2b          | $187.0b         | $298.8b         | $446.3b         |

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\(^{281}\) See Blumer, *supra* note 118, at 394.


\(^{283}\) *International Jurisdiction, supra* note 44.

### Transaction Size at Commerce-Enabled Web Sites

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<thead>
<tr>
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<tr>
<td>$1 - 50</td>
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<td>$51 - 100</td>
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<tr>
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<td>$5580</td>
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<tr>
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### Gartner's Predictions for B2B Transactions, 2000 - 2004

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<tr>
<th>Region</th>
<th>Transactions in 1999</th>
<th>Transactions in 2004</th>
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<tbody>
<tr>
<td>World</td>
<td>145 billion</td>
<td>7.29 trillion</td>
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<tr>
<td>US</td>
<td>63% of above</td>
<td>39% of above</td>
</tr>
<tr>
<td>Europe</td>
<td>31.8 billion</td>
<td>2.34 trillion</td>
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\[285\] *Id.*  
\[286\] *Id.*
<table>
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<th>Region</th>
<th>Average Online Transaction Size</th>
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<tr>
<td>Asia-Pacific</td>
<td>9.2 billion 992 billion</td>
</tr>
<tr>
<td>Japan</td>
<td>11.1 billion 861 billion</td>
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<tr>
<td>Latin America</td>
<td>1 billion 124 billion</td>
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**Average Online Transaction Size by Year Started Using Internet**

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<tr>
<th>Year Came Online</th>
<th>Average Transaction Size</th>
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<tr>
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</tr>
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<td>1996 to 1997</td>
<td>$298</td>
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<tr>
<td>1998 to 1999</td>
<td>$187</td>
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287 *Id.*
### B2B Totals for US, Europe & Asia, 1998 - 2002 (in USD billions)\(^{288}\)

<table>
<thead>
<tr>
<th>Region</th>
<th>1998</th>
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<th>2001</th>
<th>2002</th>
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<td>400</td>
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<td>60</td>
<td>180</td>
<td>450</td>
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<td>20</td>
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<td>50</td>
<td>190</td>
<td>400</td>
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</table>

### Total B2C Revenues for US, Europe & Asia, 1999 - 2003 (in USD billions)\(^{289}\)

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<tr>
<th>Region</th>
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<td>US</td>
<td>75</td>
<td>150</td>
<td>250</td>
<td>400</td>
<td>750</td>
</tr>
<tr>
<td>Europe</td>
<td>25</td>
<td>30</td>
<td>40</td>
<td>50</td>
<td>60</td>
</tr>
<tr>
<td>Japan</td>
<td>25</td>
<td>30</td>
<td>50</td>
<td>75</td>
<td>250</td>
</tr>
</tbody>
</table>

\(^{288}\) Id.  
\(^{289}\) Id.

<table>
<thead>
<tr>
<th>Year</th>
<th>Online Sales</th>
<th>Offline Sales</th>
<th>% of Offline Ordering</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>$0.67 trillion</td>
<td>$9.0 trillion</td>
<td>7%</td>
</tr>
<tr>
<td>2000</td>
<td>$1.20 trillion</td>
<td>$9.7 trillion</td>
<td>12%</td>
</tr>
<tr>
<td>2004</td>
<td>$4.80 trillion</td>
<td>$12.1 trillion</td>
<td>40%</td>
</tr>
</tbody>
</table>

---

### Total Worldwide e-Commerce Revenues, 2004 (B2B & B2C)\(^{291}\)

<table>
<thead>
<tr>
<th>Region</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>North America</td>
<td>$3.5 trillion</td>
</tr>
<tr>
<td>Asia Pacific</td>
<td>$1.6 trillion</td>
</tr>
<tr>
<td>Western Europe</td>
<td>$1.5 trillion</td>
</tr>
<tr>
<td>Latin America</td>
<td>$81.8 billion</td>
</tr>
<tr>
<td>Rest of World</td>
<td>$68.6 billion</td>
</tr>
</tbody>
</table>

### Pure Online Transaction Sales, 2000 - 2002\(^{292}\)

<table>
<thead>
<tr>
<th>Category</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>eCommerce sales exclusively online</td>
<td>$48.6 bn (100%)</td>
<td>$129.8 bn (100%)</td>
<td>$269.2 bn (100%)</td>
</tr>
<tr>
<td>Credit card details accompanying order</td>
<td>$47.9 bn (5%)</td>
<td>$117.0 bn (1%)</td>
<td>$238.6 bn (7%)</td>
</tr>
</tbody>
</table>

\(^{291}\) *Id.*  
\(^{292}\) *Id.*
<table>
<thead>
<tr>
<th></th>
<th>North America</th>
<th>Asia Pacific</th>
<th>Western Europe</th>
<th>Latin America</th>
<th>Rest of World</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total (USD)</td>
<td>3.5 trillion</td>
<td>1.6 trillion</td>
<td>1.5 trillion</td>
<td>81.8 billion</td>
<td>68.6 billion</td>
</tr>
</tbody>
</table>

Forrester's Global e-Commerce Predictions For 2004\(^{293}\)

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\(^{293}\) Id.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total (USD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>$433 billion</td>
</tr>
<tr>
<td>2001</td>
<td>$919 billion</td>
</tr>
<tr>
<td>2002</td>
<td>$1.9 trillion</td>
</tr>
<tr>
<td>2003</td>
<td>$3.6 trillion</td>
</tr>
<tr>
<td>2004</td>
<td>$6.0 trillion</td>
</tr>
<tr>
<td>2005</td>
<td>$8.5 trillion</td>
</tr>
</tbody>
</table>

XII. APPENDIX II

ORIGINAL ARTICLE 7

Article 7  Contracts concluded by consumers
1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if

\[\text{Id.}\]

\[\text{Id.}\] The preliminary draft Convention, as provisionally adopted by the Special Commission on 18 June 1999, and revised at a meeting held at The Hague from 25-30 October 1999, available at http://www.hcch.net/e/conventions/draft36e.html (last visited Jan. 19, 2002).
a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and
b) the consumer has taken the steps necessary for the conclusion of the contract in that State.

2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.

3. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court -
   a) if such agreement is entered into after the dispute has arisen, or
   b) to the extent only that it allows the consumer to bring proceedings in another court.

LATEST ARTICLE 7296

[Article 7 Contracts concluded by consumers]297

296 Part One of the Nineteenth Diplomatic Session, which was held from 6-22 June 2001, drew up the latest version of this interim text ("Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference"), available at ftp://hcch.net/doc/jdgm2001draft_e.doc (last visited Jan. 19, 2002).

297 This Article consists of the first four common paragraphs with three different alternative solutions (including two variants of the second alternative) to meet the desire of some delegations to allow a choice of forum clause in consumer contracts in cases where the relevant law permits this, provided the agreement complies with the requirements of Article 4, paragraphs (1) and (2), and provided the agreement is valid as to substance under the applicable law. A fourth alternative solution has also been suggested: to exclude business to consumer contracts from the scope of the Convention. For that reason the whole of the Article is placed in square brackets. There is no consensus in respect to any of them either that one or more should be omitted or that any one of them should be preferred.
1. This Article applies to contracts between a natural person acting primarily for personal, family or household purposes, the consumer, and another party acting for the purposes of its trade or profession, [unless the other party demonstrates that it neither knew nor had reason to know that the consumer was concluding the contract primarily for personal, family or household purposes, and would not have entered into the contract if it had known otherwise].

2. Subject to paragraphs [5-7], a consumer may bring [proceedings] an action in contract] in the courts of the State in which the consumer is habitually resident if the claim relates to a contract which arises out of activities, including promotion or negotiation of contracts, which the other party conducted in that State, or directed to that State, [unless] [that party establishes that] 

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298 The purpose of this provision within brackets is to give some protection to the business party, especially in a long distance transaction such as in electronic commerce, where the business party cannot easily ascertain with whom it is dealing or the truthfulness of that person's representations. There was opposition to the insertion of this provision on the ground that it would be very difficult for a consumer to rebut an allegation that the business was unaware that the buyer was a consumer.

299 Not all proceedings brought by consumers are actions in contract. They may be actions for a common law tort or delict, or a civil claim on a ground provided for by a statute enacted for the protection of consumers. Some delegations wanted to confine paragraph 2 to actions in contract. There was no consensus on this point.

300 This is the so-called ‘small shop’ exception that seeks to protect a business party who has dealt with a foreign consumer, such as a tourist, entirely in its State of habitual residence. The question was raised whether there was a need to make such a provision that could only be of relevance to small transactions that are unlikely to become the subject of proceedings under the Convention.

301 This provision would place the burden of establishing that the two conditions in sub-paragraphs (a) and (b) were fulfilled on the business party. The fear was expressed that the burden would be too high for many small businesses. If this issue was not resolved one way or the
a) the consumer took the steps necessary for the conclusion of the contract in another State; and

b) the goods or services were supplied to the consumer while the consumer was present in the other State.]302

[3. For the purposes of paragraph 2, activity shall not be regarded as being directed to a State if the other party demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in the State.]303

4. Subject to paragraphs [5-7], the other party to the contract may bring proceedings against a consumer under this Convention only in the courts of the State in which the consumer is habitually resident.304

Alternative A 305

other, the question of on whom the burden lies, will remain uncertain and would lead to divergent interpretations. There was no consensus on this point.

302 There was no consensus on whether this condition should be added to that set out in sub-paragraph (a).

303 This proposal seeks to protect business parties, including those using electronic commerce, who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State. There is no consensus on this provision.

304 This is proposed as the general rule to which Alternatives A to C are exceptions.

305 This Alternative is a revised version of the solution that was presented to the informal discussions held in Edinburgh in April 2001: See Prel Doc 15, Annex III-A. It provides that a choice of forum clause in a consumer contract will be effective if valid under the law of the habitual residence of the consumer and the Contracting State in which recognition and enforcement is sought has made the declaration provided for in the proposed Article 25 bis. For the sake of convenience, that proposed Article is reproduced here as part of Alternative A. Several
5. Article 4 applies to a jurisdiction agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen.\textsuperscript{306}

6. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen, the consumer may bring proceedings against the other party in the courts of the State designated in that agreement.\textsuperscript{307}

7. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen, Article 4 applies to the agreement to the extent that it is binding on both parties under the law of the State in which the consumer is habitually resident at the time the agreement is entered into.\textsuperscript{308}

Add at the beginning of Article 25 the words:

‘Subject to Article 25\textsuperscript{bis}’

delegations objected to this proposal on the ground of its complexity, but there was no agreement that it should be omitted from the list of alternatives.\textsuperscript{306} This is the provision that appeared as Article 7(3)(a) in the preliminary draft Convention of October 1999. It is not controversial.\textsuperscript{307} This repeats the provision that appeared as Article 7(3)(b) in the preliminary draft Convention of October 1999. It is not controversial in so far as it allows the consumer to bring proceedings in the chosen forum in addition to other fora, including the forum under Article 7(2). The controversial issue is whether the proceedings brought by the consumer could be confined to the chosen forum.\textsuperscript{308} This provision contains a choice of law provision referring to the law of the consumer’s habitual residence the issues of whether the choice of forum clause is lawful as regards each party and whether it is substantially valid (including issues of public policy and reasonableness): See Report of the co-reporters, Prel. Doc. No 11 at p. 42.
1. A Contracting State may make a declaration that it will not recognise or enforce a judgment under this Chapter, or a declaration specifying the conditions under which it will recognise or enforce a judgment under this Chapter, where -

   a) the judgment was rendered by the court of origin under Article 7(2) [or Article 8(2)]\(^{310}\); and

   b) the parties had entered into an agreement which conforms with the requirements of Article 4 designating a court other than the court of origin.\(^{311}\)

\(^{309}\) If accepted, this Article should be placed among the articles dealing with recognition and enforcement.

\(^{310}\) The reference to Article 8(2) will be relevant if this solution is extended to individual contracts of employment.

\(^{311}\) Under this provision a State may declare that it will only recognise or enforce judgments under the Convention that are consistent with a choice of court clause. A State making the declaration would not be bound to recognise or enforce a judgment given in accordance with Article 7(2) if this jurisdiction was incompatible with the choice of court clause. On the other hand, a State not making the declaration would be bound to recognise or enforce a judgment rendered in accordance with Article 7(2) in other Contracting States, including a State that had made the declaration. But a non-declaring State would not be bound to recognise or enforce a judgment rendered by the chosen court, including one of a State that had made the declaration. A concern was expressed at this lack of reciprocity and fear of possible complexities that might be introduced if the declaration also specified conditions.
the declaration would exercise jurisdiction under the relevant Article in a corresponding case.]\(^{312}\)

3. Recognition or enforcement of a judgment may be refused by a Contracting State that has made a declaration contemplated by paragraph 1 in accordance with the terms of that declaration.]

[Alternative B\(^{313}\)]

[Variant I\(^{314}\)]

5. This provision may be departed from by a jurisdiction agreement provided that it conforms with the requirements of Article 4.

6. A Contracting State may declare that –

\(^{312}\) This provision is intended to prevent States that make a declaration under Article 25 bis (1) from denying recognition or enforcement of a judgment when that State does not treat such choice of court provisions as binding on its own consumers.

\(^{313}\) There are two variants in this Alternative. The basic rule is that stated in paragraph 4 above which limits the business party to the forum of the consumer’s habitual residence. Both Variants allow a departure from this rule, but differ in whether departure is allowed unless a declaration is made to the contrary (Variant 1) or whether a departure is not allowed unless a State makes a declaration to the opposite effect (Variant 2).

\(^{314}\) Variant 1 allows the parties to depart from the basic rule by an agreement that complies with the requirements of Article 4, but this choice of forum will not be regarded as excluding the forum provided for in paragraph 2 nor will a judgment rendered by the chosen forum (unless the consumer commenced the proceedings there or it coincided with the habitual residence of the consumer) be recognised or enforced in a State that makes a declaration to that effect. That State thereby ‘opts-in’ into the system of restricted jurisdiction over proceedings brought by the business party against the consumer.
a) it will only respect a jurisdiction agreement if it is entered into after the dispute has arisen or to the extent that it allows the consumer to bring proceedings in a court other than a court indicated in this Article or in Article 3; and

b) it will not recognise and enforce a judgment where jurisdiction has been taken in accordance with a jurisdiction agreement that does not fulfil the requirements in sub-paragraph a).]

[Variant 2

5. Article 4 applies to an agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen; or to the extent that the agreement permits the consumer to bring proceedings in a court other than the consumer’s habitual residence.

6. A Contracting State may declare that in the circumstances specified in that declaration –

   a) it will respect a jurisdiction agreement entered into before the dispute has arisen;

   b) it will recognise and enforce a judgment in proceedings brought by the other party given by a

315 Under Variant 2 pre-dispute choice of forum clauses are not binding on consumers except in States that have made a declaration that they will respect such an agreement and that they will recognise and enforce judgments given in pursuance of such agreements. Such States will not recognise and enforce judgments given in breach of choice of forum clauses. Whatever system of declaration is adopted, problems of reciprocity remain.
court under a jurisdiction agreement entered into before the dispute has arisen;

c) it will not recognise and enforce a judgment given by a court in which proceedings could not be brought consistently with a jurisdiction agreement entered into before the dispute has arisen.]}
5. Article 4 applies to a jurisdiction agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen.

6. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen –

   a) the consumer may bring proceedings against the other party under the Convention in the courts of the State designated in that agreement;

   b) the consumer may not bring proceedings against the other party under this Convention in any other court, unless the agreement permits the proceedings to be brought in that court;

   c) the other party may bring proceedings against the consumer under this Convention only if the agreement permits the proceedings to be brought in that court.

---

This Alternative limits the ‘white list’ jurisdiction that may be invoked by each of the parties in cases where a choice of forum agreement has been concluded between the parties. In essence there will only be ‘white list’ jurisdiction if the consumer brings proceedings in the chosen forum. Conversely, there will only be ‘white list’ jurisdiction in the chosen forum in relation to an action brought by the business party if the chosen forum coincides with the habitual residence of the consumer. If the consumer brings proceedings in the forum provided for under paragraph 2 or in any other ‘white list’ forum contrary to a choice of forum clause, that forum will be deprived of its ‘white list’ status. It will then depend on the national law of the forum to determine whether the consumer will be permitted to rely on that jurisdiction and it will also depend on the national law of the State addressed to determine whether a judgment rendered in a State other than that of the chosen forum will be recognised or enforced, even if, in the absence of a choice of forum clause, the court in the State of origin would have exercised a ‘white list’ jurisdiction, such as a jurisdiction under paragraph 2.
agreement permits the proceedings to be brought in the courts of the State in which the consumer is habitually resident.}]}