Jurisdictional Issues and Consumer Protection in Cyberspace: The View from “Down Under”

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1 Introduction

Numerous transactions in cyberspace involve contact between consumers and vendors of goods or services. Given the ease with which such contact can be established over great physical distances, many of the transactions will be international in the sense that each of the transacting parties will be based in different countries. For example, a consumer who resides in Australia may buy a pair of shoes from a business located in Sweden via the website of the business. On its face, such a transaction will have links to two countries: Australia and Sweden. At the same time, links to other countries might also arise – eg if the website of the Swedish business is supported by a server machine situated in the USA, or if the purchased shoes have been manufactured by a company in China.

These sorts of transactions will not only have links to two or more countries; they will also have links – actual and/or potential – to two or more legal systems. Thus, they may be deemed to be not just international in character but also interlegal.

Should there arise a legal dispute in connection with such a transaction, three main issues will need to be tackled. In the first place, it will be necessary to determine which country’s court has competence to resolve the dispute. This issue is often summed up in terms of forum jurisdiction or simply jurisdiction. The second main issue concerns which country’s law should be applied to resolve the dispute. This issue is often summed up in terms of legislative or prescriptive jurisdiction or simply choice of law. The third issue concerns the extent to which a judicial decision made in one country may be recognised and enforced in other countries. This issue is often summed up in terms of enforcement jurisdiction or simply enforceability.

The outcome of each of these issues will tend to have great significance for consumers. Returning to the above hypothetical example of an Australian consumer purchasing shoes from a Swedish business, let us assume that the consumer finds that the delivered shoes do not match the description of them given on the vendor’s website
It will obviously be much less costly for the consumer to seek redress in such a case through the Australian courts rather than through a Swedish court. As for the issue of choice of law, this will be important to the consumer given that considerable variation may exist between the respective laws of each country dealing with contract and consumer protection. Finally, even if the consumer succeeds in litigation, the favourable judgement of the local court will not be of much help if it cannot be enforced overseas.

In this paper, we shall focus on the issues that arise with respect to forum jurisdiction. For reasons of time and space, we do not cover all such issues but focus on a selection of the main such matters. It should also be emphasised that we are primarily concerned with situations in which (at least) one of the parties to an Internet transaction is based in Australia and (at least) one of the other parties to the transaction is located outside Australia. Jurisdictional issues in relation to interstate, albeit wholly Australian, transactions are not treated here.

2 Rules on jurisdiction

2.1 General remarks

Rules governing jurisdiction are primarily national in character; ie, they are part of, and stem from, a country’s domestic legal system. Further, when determining whether it has jurisdiction over a particular matter, a court will apply the laws of the country to which it belongs (lex forum).

Rules on jurisdiction vary from country to country. Points of variation typically arise in relation to the extent to which States give their respective courts jurisdiction over matters that are only partly or not at all related to their respective territories. Variation also arises, for instance, in relation to the extent to which States have special jurisdictional rules for matter involving consumers. We look at such rules further below.

At the same time, some of the municipal rules on jurisdiction are based on, or incorporated into, certain treaties and other international instruments. Examples of such instruments are provided further below. Particularly in Western Europe, national rules on jurisdiction have been considerably harmonised by international instruments. It goes without saying that, where applicable, these instruments will determine the permissible limits of a State’s jurisdiction.

2.2 Australian rules in a nutshell

In Australia, the issue of jurisdiction tends to be broken down into two sub-issues: that of personal jurisdiction – whether the court has competence to apply its processes to a
particular defendant; and that of subject-matter jurisdiction – whether the court has competence to hear a particular type of claim. Both types of competence will need to be found before a court may exercise jurisdiction over the legal dispute in question.

Regarding personal jurisdiction, the point of departure at common law is that a defendant will be subject to the court’s jurisdiction if the defendant (i) is present in the territory governed by the court at the time of service of the writ or (ii) submits to jurisdiction. Under the rules of court, service \textit{ex iuris} may also be available at the court’s discretion in certain circumstances. Proceedings in relation to tort may be served \textit{ex iuris} if:

- the tort was committed within the forum;\textsuperscript{2} or
- the tort had damaging effects within the forum.\textsuperscript{3}

Proceedings for enforcement of a contract or damages for its breach may be served \textit{ex iuris} if:

- the contract was made within the forum; or
- the contract was breached within the forum; or
- the contract is governed by the law of the forum.\textsuperscript{4}

Service \textit{ex iuris} may also be permitted when the plaintiff seeks an injunction to compel or restrain the performance of any act by the defendant, within the forum, which infringes upon the plaintiff’s rights in that forum.\textsuperscript{5}

Regarding subject-matter jurisdiction, if the proceedings concern a tort that was committed outside the territory, the so-called ‘double actionability’ test will need to be satisfied independently of the criteria for personal jurisdiction being met. This test is:

(a) that the events giving rise to the action would amount to a tort if committed in Australia;
(b) that the events giving rise to the action would give rise to liability of a broadly similar kind under the law of the place where they occur.\textsuperscript{6}

If one of the above-listed conditions for service \textit{ex iuris} obtains, a stay of proceedings may be granted if it can be shown that the court is a ‘clearly inappropriate’ forum to hear the case.\textsuperscript{7} This criterion departs somewhat from the test that focuses on what is the ‘clearly more appropriate’ forum.\textsuperscript{8} The criterion has proven difficult to satisfy.\textsuperscript{9}

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\textsuperscript{1} For NSW, see generally Supreme Court Rules 1970 Pt 10.
\textsuperscript{2} See eg Supreme Court Rules 1970 (NSW), Pt 10 r 1A(1)(d).
\textsuperscript{3} See eg Supreme Court Rules 1970 (NSW), Pt 10 r 1A(1)(e).
\textsuperscript{4} PE Nygh, \textit{Conflicts of Laws in Australia} (Butterworths, 1995, 6\textsuperscript{th} ed), 50.
\textsuperscript{5} See eg Supreme Court Rules 1970 (NSW), Pt 10 r 1A(1)(d).
\textsuperscript{6} McKain \textit{v} Miller (1991) 174 CLR 1.
\textsuperscript{7} Voth \textit{v} Manildra Flour Mills Pty Ltd (1990) 171 CLR 538, 565.
\textsuperscript{8} See \textit{Spiliada Maritime Corporation v Consulex Ltd} [1987] 1 AC 460, 477.
same time, application of such a criterion could help make it relatively easy – at least in
theory – for Australian courts to assert jurisdiction with respect to certain transborder
cyberspace transactions.

Australian law embraces what is commonly termed the principle of party autonomy. This
means that the parties to a contract are free to make a binding agreement between
themselves as to which country’s courts shall be competent to judge a dispute between
them in relation to the contract and as to which country’s laws shall apply to resolve the
dispute.10

In the absence of a valid agreement between the parties as to forum jurisdiction, the rules
outlined above will apply. If the parties have not made a valid agreement as to the proper
law of the contract, the contract will generally be governed by the law of the forum with
which the contract is most closely connected.11

2.3 Consumer protection

In Europe, certain restrictions have been placed on the principle of party autonomy.
These restrictions typically apply in situations where there exists a qualified degree of
difference between the parties in terms of their respective negotiating strengths. An
important example of such a situation is when a business sells goods or services to a
consumer; the latter is deemed as being in a weaker position than the business. Thus, the
jurisdictional rules in Europe stipulate that the vendor may only sue the consumer in the
country where the latter is domiciled, while the consumer may always sue the vendor in
the consumer’s country of domicile.12 Special protections for consumers apply also in
relation to choice of law.13

Australian law lacks such rules. However, certain legislation – most notably the Trade
Practices Act 1974 (Cth) (hereinafter TPA) – provides a measure of special protection for
consumers with respect to jurisdictional matters. Section 67 of the TPA provides that in
cases where Australian law would normally govern the operation of a contract for the
supply of goods or services by a corporation to a consumer, the conditions and warranties
of Pt V Div 2 of the Act will apply notwithstanding a contractual term stipulating that
foreign law will govern operation of the contract.

10 See generally Nygh, supra n 4, 292.
11 Id, 34.
12 See the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgements in Civil and
Commercial Matters, Arts 13–15; Lugano Convention of 1988 on Jurisdiction and the Enforcement of
December 2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and
Commercial Matters, Arts 15–17.
3 Legal complications in cyberspace

3.1 General remarks

Current rules governing jurisdiction are resolved to a large extent through applying geographical criteria. One attempts to identify the physical places in which the various activities have occurred. For instance, in the case of contract, one asks questions, such as: where was the contract entered into?; where were the contractual obligations breached? The problem in the context of Internet transactions is that these sorts of questions are often difficult to answer conclusively. On the Internet, we lack many of the points of reference we are used to from the physical, off-line world. The Internet is a medium that essentially ignores national boundaries. In this respect, it can be termed borderless.

Concomitantly, in many cyberspace transactions it is often relatively difficult to identify the full parameters of the transactions, including the identity, domicile and other status of the parties to them. An e-mail address, for instance, is not always a reliable indicator of where a person/organisation is domiciled/established.

These uncertainties are exacerbated by ambiguities and gaps in the existing rules on jurisdiction. These rules derive largely from the pre-Internet era and take little account of trade that occurs in a digital context. Hence, their application to contracts entered into over the Internet is often problematic. For example, to what extent are digitised products (defined further below) to be properly classified as ‘goods’ or ‘services’? Can a website be properly regarded as a business establishment or a place of business? Yet again, can a website properly constitute a ‘specific invitation’ addressed to particular consumers?

In the next section, we examine some of these questions more closely.

Very little case law exists that addresses these sorts of questions directly. Indeed, there is little case law in general that deals with jurisdiction in relation to cyberspace transactions. This is especially so in Australia.

So far, only one court case in Australia has dealt directly with jurisdictional issues in cyberspace: see Macquarie Bank Ltd v Berg.14 In this case, the court declined to grant the plaintiff an interlocutory injunction to prevent publication, by a US resident, on a website located outside Australia, of material alleged to be defamatory under NSW law. The court justified its decision on the following grounds: (a) doubts about the enforceability of such an injunction; (b) reluctance to impose NSW defamation rules on other parts of the world (given that website operators would experience technological difficulties in complying with a possible court order against publication of the material in NSW alone); (c) concern for freedom of expression.

14 Unreported, Supreme Court of NSW, Simpson J, 2.6.1999.
It is difficult to draw any conclusions from this one case as to how Australian courts generally are likely to handle interlegal issues with respect to cyberspace.

Not surprisingly, the country with the most extensive body of case law on jurisdictional issues occasioned by Internet usage is the USA. Most of the cases are intrational in scope. Many of them arise in the context of alleged trademark infringements; very few concern consumer contracts. The basic line emerging from this case law is that (personal) jurisdiction shall be determined, to a large extent, on the basis of an assessment of the character and degree of contact – both through and outside the Internet – between the defendant and the State in which the plaintiff is resident. A central factor taken into account in this regard is the degree of interactivity of the defendant’s website. The greater the degree of interactivity between the website and a particular State, the greater is the likelihood of a court of that State being able to assert jurisdiction over the website operator. Concomitantly, the mere fact that the website is accessible from that State will usually be insufficient to establish jurisdiction. It is likely that this case law will have some influence on Australian courts.

3.2 Selected problems

3.2.1 The location of the server

In some cases, it has been argued that the geographical location of the server that supports the website in question, is to be used as a basis for jurisdiction. This is a fairly naive way of thinking; the location of the server is not a suitable criterion for determining jurisdiction. Where a server is located will often have little to say about the territory or territories to which the website is most closely connected in reality. Take for example, the situation where a Swedish radio station uses a website, in Swedish, to spread anti-Semitic propaganda – an activity that is clearly illegal under Swedish law. The mere fact that the server is located in the USA could not reasonably prevent the exercise of jurisdiction by a Swedish court. Moreover, a consumer will rarely be aware of the physical location of the website he/she visits, as will the vendor in those cases when it leases storage space on the server. Further, were the geographical location of the server to be regarded as decisive, vendors would easily be able to avoid the jurisdiction of consumer-friendly States by simply placing their websites on servers located in States with relatively poor regimes for consumer protection.

16 See especially Compuserve, Inc v Patterson, 89 F3d 1257 (6th Cir 1996).
17 However, the location of the server might affect the enforceability of a court decision.
18 The example is taken from T Carlen-Wendels, Näjuridik (Norstedts, 2:1, 1998) 47.
Similar considerations apply with respect to attempts at arguing that a website will have a stronger connection to one State than another solely on the basis of the domicile of the vendor operating the site. There is no necessary link between the vendor’s State of domicile and the State to which the website appears most naturally connected.

3.2.2 Does the display of goods on a website constitute an offer?

Traditionally, the display of goods in a catalogue and the display of goods in a store have been classified as invitations to treat, not as offers. From this follows that the display of goods on a website normally does not constitute an offer. This is the main rule. However, if the language used in the shop display is couched in the language of an offer, what would normally be an invitation to treat can be treated as an offer capable of an acceptance.

Moreover, in the US case of *Lefkowitz v Great Minneapolis Surplus Stores*, it was held that advertising a fur stole ‘worth $139.50’ for only $1 under the concept of ‘first come first served’, constituted an offer. The court held that if the alleged offer ‘is clear, definite, and explicit, and leaves nothing open for negotiation’, it may constitute an offer.

Applying *Lefkowitz* to the Internet is a rather interesting experience. For example, where a business sells downloadable software via a fully automated website, the alleged offer is clear, definite, explicit and leaves absolutely no room for negotiation. Furthermore, since there is possibly no real limit to how many copies of the software the business can sell, the argument on which the whole principle on invitation to treat is built, falls apart.

The basic thought behind limiting the effect of an alleged offer to only that of an invitation to treat, is that a merchant can never know how many might be interested in the alleged offer and therefore it would not be fair for the merchant to be in breach of a contract if he cannot sell due to lack of supply. This rationale has little relevance for the example above.

Finally, even if the statement does not use language sufficient to make it equal to an offer, it may still give rise to liabilities under, say, trade practices legislation if it is deceptive or misleading.

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19 *Partridge v Crittendon* [1968] 2 All ER 421.
20 *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401.
21 *Esso Petroleum Ltd v Commissioners of Customs and Excise* [1976] 1 All ER 117; *Reardon v Morley Ford Pty Ltd* (1980) 49 FLR 401.
22 *Lefkowitz v Great Minneapolis Surplus Stores* (1957) 86 NW 2d 689.
23 *Id*.
24 Section 52 of the TPA is of prime relevance here.
3.2.3 Digitised products

There has been debate about whether digitised products should be considered as goods or services or perhaps as some entirely new category of product. A digitised product is a product that has been transformed from a physically tangible object to a purely digital combination of binary code. Typical examples would be CDs, videos, software and books.

The issue has some relevance for determining, *inter alia*, the applicability of certain consumer protection provisions in the TPA which extend only to contracts for the provision of goods or services. Section 4(1) of the TPA gives an extensive definition of goods, which includes ‘electricity’, but does not conclusively resolve the issue. Other legislation also fails to address whether or not digitised products may be considered as goods. Some Australian case law suggests that software can be accepted as goods. Other case law holds that the sale of software should not be treated as a sale of goods.

At the same time, distinguishing between goods and services in an online context might actually be quite easy (assuming that goods must be tangible objects to which transferrable ownership rights adhere). If a consumer enters into a contract for the provision of a digitised product and has at the time the contract is fulfilled some tangible item, the transaction is best characterised as one for the supply of goods. If, on the other hand, the consumer is left without any tangible item, the transaction is best characterised as one for supply of services. Taking an example, if a consumer buys a paper version of the Encyclopaedia Britannica in an ordinary bookstore, this is clearly a supply of goods. If the consumer orders a paper version of the encyclopaedia via the Internet, this is also clearly a supply of goods. If the consumer buys the encyclopaedia via the Internet and takes delivery of a digitised version, this is still a supply of goods. But if the consumer contracts with Britannica.com for on-line access to the latter’s database, the consumer contracts for the supply of a service, since, unlike in the three first instances, the consumer is left with nothing tangible at the time the contract is fulfilled.

3.2.4 Website disclaimers

Since a website can be accessed from anywhere in the world and thus have potential legal consequences in any State, businesses have in many cases taken measures to limit those consequences by adding legal disclaimers to their websites.

Great variations exist from State to State in terms of the extent to which a disclaimer may limit liabilities. To construct one disclaimer that would be globally effective is probably

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26 See eg ss 56 and 67.
27 See *Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd* [1983] 2 NSWLR 48, in which Rogers J held hardware and software to be goods.
28 *Caslec Industries Pty Ltd v Windhover Data Systems Pty Ltd*, NSW (Unrep.) 1992; Fed #580.
impossible and would, of course, be very costly since it would require knowledge of every legal system in the world. Another problem is language. A disclaimer written in Danish would probably have little effect in an Australian court.

Disclaimers that include a choice-of-law clause face several difficulties. First of all, such clauses are not recognised in all situations, and generally the validity of the clause would be determined not by the law stated in the clause but according to the law of the State where the affected party is located. It might also be very difficult to show that the visitor to the website not only read but also accepted the choice-of-law clause.

The effectiveness of the disclaimer might also vary in relation to what liabilities the disclaimer actually tries to avoid. Beside the choice-of-law type disclaimers discussed above, there are typically four different types of disclaimers:

1. Responsibility statements – It is very common, on all sorts of websites, to have links to other websites. A responsibility statement typically states that the uploader of one website does not take any responsibility for the content on the websites to which it is linked.

2. Liability statements – These attempt to disclaim liabilities arising from the website contents. The effectiveness of such disclaimers depends very much on the types of liabilities they address. Obviously if persons could injure themselves or suffer physical damage to property as a result of relying on the content of a website, a disclaimer for such liability might not have any effect at all. Further, some States may even make it an offence to seek to restrict certain types of liability.

3. Territory statements – Given the technical difficulties in limiting access to a website using geographical criteria, there is increasing use of disclaimers to the effect that the website will only be open for dealings with persons from certain countries. Such limitations can obviously be desirable in various respects; eg to limit the risk of trademark infringements and/or to limit the risk of advertising something that is illegal in particular States.

4. Copyright statements – It is also fairly common for the disclaimer to include, or be displayed in conjunction with, some statement as to how the information on the website may be used.

The legal validity of disclaimers has been discussed in several Australian cases. They have been held to have some value, for example, in relation to s 52 of the TPA. But it is clear that their value is predicated on their being adequately brought to the attention of the persons to whom they are addressed. And it is clear that the weight given by a court to disclaimers will depend on an assessment of all of the circumstances of the particular case. In relation to a territorial disclaimer, for instance, a court is unlikely to attach much weight to a statement on a website stipulating ‘Intended for UK residents only’,

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29 See eg s 67 of the TPA referred to above.
30 See Motor Accidents Authority of New South Wales v North Cronulla Investments Pty Ltd [1999] FCA 972.
32 Id.
when the website operator targets Australian users (eg by sending email advertisements to the latter).

### 3.2.5 Extraterritorial application of TPA

A major issue for Australian consumers with respect to Internet transactions is the extent to which the Trade Practices Act 1974 (Cth) may apply to website operators based outside Australia. The TPA applies to infringements of it committed within Australia by any corporation, local or foreign, and to infringements committed outside Australia by companies incorporated or carrying on business in Australia or by Australian citizens or residents (s 5(1)). Actions in relation to breaches committed outside Australia may only be brought with consent of the Attorney-General (s 5(3)).

Thus, in order for an action under the TPA to be successfully brought against an overseas-based website operator, it must be established that the operator either conducts business in Australia or has infringed the TPA in Australia. There is no case law dealing specifically with the ambit of the TPA in respect of such operators.

Regarding claims under s 52 (which prohibits misleading or deceptive conduct in trade or commerce), case law suggests that infringement occurs not at the place from where the infringing activity originates but at the place where the activity is intended to have effect. This line would seem to make it easier to bring, for example, misleading advertising on a foreign website within the scope of the TPA. However, mere ‘passive’ advertising that is not aimed at Australian consumers or not followed up by commercial interaction with Australian consumers, might be insufficient to found a claim under the Act.

### 6 International developments

#### 6.1 General remarks

Steps have been taken to harmonize and unify the respective sets of national rules on private international law. This harmonization process has occurred largely through the adoption of multilateral treaties and it has come furthest in Europe. As noted above, several of the European treaties contain rules that make special provision for certain consumer contracts on account of the fact that consumers are typically weaker than the businesses with whom they contract.

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33 See Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd (1993) 117 ALR 507, 518–520. See also, inter alia, New Zealand Post v Leng (unreported, High Court of NZ, Williams J, 17.12.1998) which takes a similar line in relation to the equivalent provisions of the Fair Trading Act 1986 (NZ). Note that case law on the tort of misrepresentation establishes that the place of the tort is the place where the misrepresentation is intended to be received: Voth, supra n 7, 568.

34 Cf the approach of the US courts as outlined above.
As outlined below, work is underway to revise these treaties in order partly to reflect the development of e-commerce. During the revision process, there has been considerable debate about whether or not the special jurisdictional rules in favour of consumers should be expressly extended into the online environment, with many businesses strongly critical of such an extension.\textsuperscript{35}

So far, however, the special protections for consumers have been retained and partly improved in the work on the new instruments – a development that makes good sense in our opinion. Consumers’ need for protection is just as great in an e-commerce context as it is in a traditional transactional context. And e-commerce is unlikely to flourish if consumers lack confidence in their ability to expeditiously maintain and pursue their domestic legal rights. Moreover, vendors’ expectations about the risk of being sued in foreign courts are probably not diminished in relation to e-commerce transactions; if anything, such expectations are probably greater. Even if vendors are faced with significant uncertainties and costs because of the extension of the present jurisdictional rules governing transnational consumer contracts to the electronic environment, they are probably better able and better placed, on average, to cope with such problems than are consumers.

6.2 The proposed Hague Convention

A proposal has been made for a new convention regulating international jurisdiction and enforcement of international judgments – the Hague Convention\textsuperscript{36}. In 1992, when work on drafting the Convention was initiated, no one could foresee the enormous growth of the Internet and the impact this growth has had on the number of contacts occurring between individuals, companies and organisations from different countries. The Internet has considerably complicated the completion of the Convention. Yet it also augments the importance of the Convention as a legal instrument attempting to take account of the realities of cyberspace.


There are currently 47 States, from all over the world, taking part in the negotiations. In light of this, there can be little doubt that the Convention, if it comes into effect, will play a large role in the development of cross-border transactions.

Article 7 of the Convention specifically regulates consumer contracts. The most recent version of Art 7 (as presented in late April 2001 at a meeting organised in Edinburgh) reads as follows:37

*Article 7 Contracts concluded by consumers*

1. This Article applies to contracts concluded between a natural person who concludes a contract primarily for personal, family or household purposes, (the consumer), and a person who concludes a contract for the purposes of its trade or profession (the business) [unless the business 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. A consumer may bring proceedings in the courts of the State in which the consumer is habitually resident if the conclusion of the contract to which the claim relates arises out of activities which the business engaged in, in that State, or directed to that State [unless:

   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 that other State].

3. For the purposes of paragraph (2) activity by the business:

   a. includes the promotion, solicitation or negotiation of contracts; and
   b. shall not be regarded as being directed to a State if the business demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in that State.

4. A business may bring proceedings against a consumer under this Convention only:

   a. in the courts of the State in which the consumer is habitually resident; or
   b. if the business and the consumer have entered into an agreement to which paragraph 5(a) or (c) or (d) applies, in the court designated in that agreement.

5. Article 4 applies to an agreement between a business and a consumer only:

   a. if the agreement is entered into after the dispute has arisen; or
   b. to the extent that it allows the consumer to bring proceedings in the courts of a State other than the State in which the consumer is habitually resident; or
   c. [if at the time the agreement is entered into, both the consumer and the business are habitually resident in the same State, and the agreement confers jurisdiction on the courts of that State, provided that the agreement is not contrary to the law of that State; or]

37 The bracketing indicates that there is a certain amount of disagreement in relation to the bracketed parts and that further discussions will be needed.
d. to the extent that the agreement is binding on the consumer under the law of the State in which the consumer is habitually resident at the time the agreement is entered into.’

Article 7 is loosely based upon the consumer protection rules offered by the 1968 Brussels Convention. The main rule is that a business can only sue the consumer in the consumer’s forum (Art 7(4a)). Article 7(4b) and 7(5), read together, provide some exceptions to that rule. The most controversial exception is found in Article 7(5d). This provision has been criticised for rendering the operation of Art 7 dependent on the States’ national laws.

It is no secret that Article 7 has met considerable resistance. For some States – particularly those outside Europe – such protection is rather alien.

Article 7 defines the term consumer as ‘a natural person who concludes a contract primarily for personal, family or household purposes’ (emphasis added). The addition of ‘primarily’ is of importance. There has been a fair bit of dissatisfaction in relation to the narrow definitions of consumer used before, and various methods have been suggested for determining who is to be considered a consumer.38 The inclusion of ‘primarily’ allows some scope for the situation where, for example, a person might have acquired software primarily for writing love letters but occasionally uses it to write something related to their business.

The definition of ‘business’ is relatively straightforward and the bracketed part obviously aims to protect the good faith of businesses. It seems only logical that a business relying on the good faith provision must have taken some reasonable steps to avoid entering into contracts with consumers.

Article 7(2) regulates under what circumstances a consumer can sue the business in their home forum. This can be done in all cases except where, for example, a person who habitually resides in State A goes to State B and makes a purchase and has it delivered (or picked up) in State B. However, the Internet introduces some interesting perspectives on the use of the phrase ‘engaged in, in that State, or directed to that State’. At the moment there is no real consensus as to how the Internet fits with this phrase.

Article 7(3a) should simply be seen as ‘a helpful and non-exhaustive illustration of the types of activities contemplated’.39

Article 7(3b) gives businesses the chance to avoid the risk of contracting in undesirable forums. This is very important for Internet-related situations because a website can be accessed globally. There has been discussion on what exactly constitutes ‘reasonable

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38 For example, Jeff Kovar (the head of the US delegation) has, in an informal context, suggested that what a person states on their tax return can be used to define who is to be considered a consumer.

39 Working group report on consumer contracts from the Ottawa II meeting, prepared by Mr David Goddard on 22.3.2001.
steps’. It seems fairly certain that a business using this defence would have to show that it had taken active measures to avoid the contact.40

Regarding future work, the first diplomatic conference on the proposed Convention will be held in June 2001. The second such conference is scheduled for the end of 2001 or the beginning of 2002. As for the prospects of the proposed Convention coming into force, there appears to be a great desire for its adoption but many controversial issues have still to be resolved. The question of consumer protection is just one such issue.

6.3 The new EC Regulation

An EC Regulation was adopted in December 2000 to update and replace the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters.41 The Regulation addresses jurisdictional and enforcement issues with respect to EU Member States only. It will enter into force on 1.3.2002.

Of greatest significance for our purposes, is Art 15 of the Regulation. This amends and replaces Art 13 of the Brussels Convention which deals with jurisdiction for certain consumer contracts. Article 15 reads as follows:42

‘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 Article 5(5), if:

(1) it is a contract for the sale of goods on instalment credit terms; or
(2) 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
(3) 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 countries including that Member State, and the contract falls within the scope of such activities.

Where a consumer enters into a contract with a party who is not domiciled in a 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 that branch, agency or establishment, be deemed to be domiciled in that Member State.

This section 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.’

40 Id.
42 The text in bold indicates where the provisions differ from Art 13 of the Brussels Convention.
The changes made by Art 15 are intended to make it easier to bring Internet-based marketing and contractual operations within the ambit of the special jurisdictional rules for consumer contracts. However, Art 15 remains rather nebulous on many significant points relating to e-commerce. For example, there is no detailed guidance on the meaning of the expression ‘directs such activities’ (Art 15(1)(3)) in the context of Internet-based marketing and contracting. In its explanatory memorandum to an earlier draft of the Regulation, though, the EC Commission appears to limit inclusion of website activities within the scope of Art 15(1)(3) to those carried out via interactive websites; the mere fact that a vendor’s website is accessible from a particular state is apparently not sufficient to deem the vendor as having ‘directed’ activity to that state for the purposes of Art 15(1)(3). The Commission does not elaborate on what is exactly meant by an interactive website. It seems safe to assume, though, that interactivity entails a facility for exchange of information between the website and those visiting it, including a facility for placement of purchase orders.

Other uncertainties concern, inter alia:

- whether digitised products may constitute goods;
- whether a website may constitute a ‘branch, agency or other establishment’ (Art 15(2)); and
- the issue of protection of the vendor’s good faith (including the extent of such protection).

At the same time, Art 15 dispenses with the requirement set down in Art 13(1)(3)(b) of the Brussels Convention (that ‘the consumer took in that State the steps necessary for the conclusion of the contract’). This omission breaks with the basic assumptions upon which current law builds and will probably enable a consumer who is situated in, eg, the vendor’s State when he/she enters into an electronic contract with the vendor, to enjoy the special protection extended by Art 15 even when it is doubtful that the consumer expects or should be entitled to expect that he/she can sue in the court of the State where he/she is domiciled.

7 Final remarks

In discussing the jurisdictional aspects of Internet transactions, the Swedish jurist, Thomas Carlen-Wendels, has remarked that ‘as long as different countries have different laws and cultures, there are no good principles for jurisdiction, only less bad ones’.

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44 See further Foss & Bygrave, supra n 25.
45 Cf Art 7(2)(a) of the draft Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters which retains such a requirement.
46 See further Foss & Bygrave, supra n 25.
47 Carlen-Wendels, supra n 18, 38 (our translation).
These comments are apposite. And they also hint at the fact that legal mechanisms for resolving disputes arising out of cross-border transactions are not always the most appropriate.

Indeed, empirical evidence suggests that the current jurisdictional rules for consumer contracts in Europe frequently do not result in effective protection for consumers in the event of cross-border legal disputes, particularly when *small claims* are at stake. The majority of consumer disputes concern small claims. Court litigation in such cases is usually too time-consuming and costly for consumers.

Thus, in the long run, it is desirable to establish and utilise extra-judicial organs for resolving, quickly and cheaply, (inter)legal disputes involving consumers. The EC Directive on e-commerce specifically includes a provision to encourage the establishment of such bodies. At the same time, numerous issues arise with respect to these organs’ competence, enforcement powers, placement and operational medium. For instance, to what extent should such organs deal only with Internet-related disputes? To what extent should they operate primarily as ‘virtual’, online bodies? We will not pursue these sorts of issues here but they need further attention.

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48 For a summary of the evidence, see the EC Commission’s Action Plan on consumer access to justice and the settlement of consumer disputes in the internal market (COM (96) 13 final, 14.02.1996), 8–11.