

**THE DETERMINATION OF JURISDICTION IN CROSS-BORDER  
BUSINESS-TO-CONSUMER TRANSACTIONS: A CONSULTATION PAPER**

**APPENDIX 1**

*Introduction*

[1] The following is an overview of some of the national and international initiatives currently underway to address jurisdictional issues with respect to electronic commerce.

*American Bar Association Project: Transnational Issues in Cyberspace: A Project on the Law Relating to Jurisdiction*

[2] In 1998, the American Bar Association launched a major project on jurisdictional issues relating to the Internet "to explore the issues, uncertainties and conflicts created by the proliferation of electronic commerce" ("ABA Project")<sup>1</sup>.

*Scope of the Project*

[3] The ABA Project is intended to address personal, prescriptive and enforcement jurisdiction issues separately with respect to the following areas: advertising/consumer protection, intellectual property, payment systems/banking, data protection, public law/gaming, sale of goods, sale of services, securities and taxation. The American Bar Association has committed significant resources to this project.<sup>2</sup>

*The Draft Report*

[4] In July 2000, a draft report containing the preliminary results of the study was released. The report is titled "Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet ("ABA Report")<sup>3</sup>.

[5] The ABA Report notes that "the volume of cross-state contracts has increased and will continue to increase at a more rapid rate by virtue of the proliferation of electronic communications and the use of the Internet in commercial applications. Whether that increase will require a normative rethinking of jurisdictional principles similar to that which occurred in the middle of the 20<sup>th</sup> century is at the heart of much of the current consideration of effective Internet dispute resolution."<sup>4</sup>

[6] The goals of the ABA Report are stated as follows:

....to create a global summary of the law of jurisdiction and to explore the issues, uncertainties created by the proliferation of the electronic commerce.<sup>5</sup>

## UNIFORM LAW CONFERENCE OF CANADA

[7] The ABA Report notes that “the completion of this task was far more difficult than originally envisioned”.<sup>6</sup>

[8] However, the study indicates that the “reduction of legal uncertainty is critical to the development of an efficient and effective system to promote electronic commerce”.<sup>7</sup>

[9] By way of overview, the report summarizes criteria that it believes governments, interested organizations, legislatures and courts should consider in establishing rules, standards and policies to govern electronic commerce globally. Included in this summary are the following observations:

### *Jurisdictional Default Rules*

[10] Every Internet party should be subject to personal and prescriptive jurisdiction somewhere. In reasonable circumstances, more than one state may be able to assert both personal and prescriptive jurisdiction in electronic commerce transactions, as they have historically in physical transactions.

[11] Personal or prescriptive jurisdiction should not be asserted based solely on the accessibility in the state of a passive web site that does not target the state.

[12] Both personal and prescriptive jurisdiction should be assertable over a web site content provider (“sponsor”) in a state, assuming there is no enforceable contractual choice of law and forum, if:

- the sponsor is a habitual resident of the state or has its principal place of business in that state;
- the sponsor targets that state and the claim arises out of the content of the site; or
- a dispute arises out of a transaction generated through a web site or service that does not target a specific state, but is interactive and can be fairly considered knowingly to engage in business transactions there.

[13] Good faith efforts to prevent access by users to a site or service through the use of disclosures, disclaimers, software and other technological blocking or screening mechanisms should insulate the sponsor from assertions of jurisdiction.

- Purchasers and sellers should be encouraged to identify with adequate prominence and specificity, the state in which they habitually reside;

**THE DETERMINATION OF JURISDICTION IN CROSS-BORDER  
BUSINESS-TO-CONSUMER TRANSACTIONS: A CONSULTATION PAPER**

**APPENDIX 1**

- Sponsors should be encouraged to indicate the jurisdictional target(s) of their sites or services, either by: (a) defining the express content of the site or service, or listing destinations targeted or not targeted; and (b) by deciding whether or not to engage in transactions with those who access the site or service.

*Contractual Choice of Law and Forum*

[14] Absent fraud or related abuses, forum selection and choice of law provisions should be enforced in business-to-business electronic commerce transactions.

[15] In business-to-consumer contracts, courts should enforce mandatory, non binding arbitration clauses, where sponsors have opted to use them, and permit the development of a “law merchant” in exchange for:

- the sponsor’s agreement to permit enforcement of any resulting final award or judgment against it in a state where it has sufficient assets to satisfy that award or judgment; and
- the user’s acceptance of an adequately disclosed choice of forum and choice of law clauses.

[16] Jurisdictional choices should be enforced where the consumer demonstrably bargained with the seller.

[17] Jurisdictional choices should also be enforced if the choice of the consumer to enter into the contract was based on the use of a programmed, intelligent agent of Bot deployed by or on behalf of the consumer and whose programming included such terms as the nature of the protections sought, the extent to which such protections are enforceable and other factors that could determine whether the user should enter into the contract.<sup>8</sup>

*Targeting*

[18] The ABA Report notes that what constitutes targeting needs to be agreed upon globally. It suggests that generally, targeting should cover technological practices that sponsors use to purposefully avail themselves of the commercial benefits of the targeted states. Maintenance of web site, by itself, should not constitute targeting the world. At the other extreme, designing a web site whose only, or at least primary, relevance is to the population of a single forum clearly does target that forum.

## UNIFORM LAW CONFERENCE OF CANADA

[19] The critical issues are the intent of the web site sponsor and what constitutes sufficient evidence of intent. The site itself provides the first evidence of that intent. It may contain a list of jurisdictions it intends to target and filters to block participants from other states. It may contain a list of jurisdictions it does not intend to target. But filters may be by-passed, and stated intent may not reveal reality. When transactions are involved, the best evidence of intent is the willingness to deal with persons in the forum state.<sup>9</sup>

### *Global Online Standards Commission*

[20] The study also recommends that a multinational Global Online Standards Commission be empanelled to study the jurisdiction issue and develop uniform principles and global protocol standards working with other international bodies considering similar issues.<sup>10</sup>

### *Contractual Choice of Forum and Law Clauses*

[21] In the United States, choice of forum and choice of law clauses are enforced unless they are “unreasonable”. The ABA Report suggests that to the extent that the Internet is both limiting the ability of a seller to confine its market and consequently, dramatically widening the options available to buyers, the presumption of inequality in business-to-consumer transactions is called into question. More specifically, it suggests that “the policy reasons for refusing to enforce contractual choice of forum and law clauses in that context are correspondingly weakened”.<sup>11</sup>

### *Goal of ABA Project*

[22] It is further noted that, ultimately, the goal of the ABA Project is to determine whether there is a workable set of legal standards that can form a basis to answer the question of whose laws apply to Internet commerce and where disputes involving that commerce should be resolved.<sup>12</sup>

### *Response of United States Federal Trade Commission*

[23] Although the Federal Trade Commission has been asked to support the recommendations in the ABA Report, the Commission has indicated that it is “concerned that the proposed solutions run the risk of eroding consumer protection in the global marketplace”.<sup>13</sup>

[24] In particular, the Federal Trade Commission Bureau of Consumer Protection has expressed concern about “changes to the current framework that would: (1) give incentives to businesses to establish themselves, or rely on laws, in jurisdictions with

**THE DETERMINATION OF JURISDICTION IN CROSS-BORDER  
BUSINESS-TO-CONSUMER TRANSACTIONS: A CONSULTATION PAPER**

**APPENDIX 1**

weak consumer protections; (2) deny governments the right to protect their own citizens from fraud, unfairness, and deception; (3) deprive consumers of meaningful access to remedies; or (4) cause consumers to rely on insufficient, burdensome or unfamiliar protections.<sup>14</sup>

[25] In June 1999, the Federal Trade Commission held a public international workshop on “US Perspectives on Consumer Protection in the Global Electronic Marketplace.”<sup>15</sup> In its report on the workshop, the Commission notes:

The legal challenges raised by determining applicable law and jurisdiction have no simple solutions. Various countries and regions have various frameworks for handling these issues. Developing an international framework that protects consumers and is fair and predictable for business is key to supporting the long- term growth of e-commerce. Although a workable framework for applicable law and jurisdiction is only part of the global solution, it warrants careful consideration.<sup>16</sup>

[26] The FTC report specifically “cautions against moving to a country-of-origin approach, notwithstanding the problems posed by current systems which incorporate a country-of-destination approach for consumer protection.”<sup>17</sup>

***Hague Conference on Private International Law***

[27] The Hague Conference on Private International Law is currently working on a draft convention on jurisdiction and enforcement of judgments in civil and commercial matters. The international treaty would be a worldwide convention that would replace the *1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, which has not been entirely successful. The Convention only addresses the choice of forum, not the law that would apply to the case.<sup>18</sup>

[28] The objective of the project is to increase legal foreseeability and the reliability of judgments at international level for the benefit of all economic operators and private individuals.

***Preliminary Draft Convention - October 30, 1999***

[29] A preliminary draft Convention was adopted by a Special Commission of the Hague Conference on October 30, 1999<sup>19</sup>. The preliminary draft convention lays down special

## UNIFORM LAW CONFERENCE OF CANADA

rules of jurisdiction for consumer contracts. Article 7 of the draft text provides as follows:

### **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

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.

### *Commentary*

[30] By virtue of this paragraph, the consumer would be permitted to bring a legal action before the courts in which he or she is habitually resident or the consumer could chose to bring an action in the defendant's forum. However, the option given to the consumer of using the forum of his or her habitual residence would not be unlimited. It would only exist where the vendor had actively sought to reach the consumer in the consumer's home jurisdiction. Paragraph 3 is aimed at restricting the freedom of the parties to choose the court with competence to deal with disputes arising between them.

**THE DETERMINATION OF JURISDICTION IN CROSS-BORDER  
BUSINESS-TO-CONSUMER TRANSACTIONS: A CONSULTATION PAPER**

**APPENDIX 1**

*U.S. Opposition to Draft Text*

[31] At the October 1999 Conference it became clear that significant disagreement existed over the draft text and the policy decisions it reflected. In particular, the U.S. Delegation opposed the language in Article 7 on the basis that it would create an absolute rule against choice of forum clauses in consumer contracts. It was indicated that this would be inconsistent with U.S. law, where such clauses may be enforced if they are not unjust and unreasonable and it was expected that there would be vigorous opposition to the Convention in the U.S. if the U.S. Delegation were to accept an outright prohibition on choice of forum clauses. Therefore, the U.S. Delegation stated that the preliminary draft Convention was not a suitable basis for final negotiations without significant additional work. In February 2000, the United States formally suggested that the project be suspended indefinitely.<sup>20</sup>

*Expert Meeting in Ottawa*

[32] The Hague Conference held a meeting in Ottawa on February 28, 2000, to examine the issues raised by electronic commerce in relation to the international jurisdiction of the courts. During this meeting, delegates focused on targeting as a means of distinguishing when consumers should be entitled to sue in their home jurisdiction.<sup>21</sup>

*Conference separated into two parts*

[33] In May 2000, the Hague Conference decided not to suspend the project, but to postpone the Diplomatic Conference that was to have taken place in October 2000. In addition, the Diplomatic Conference was separated into two parts with the first part in June 2001 and the second in early 2002.<sup>22</sup>

*First Part of the Diplomatic Session – June 2001*

[34] The First Part of the Diplomatic Session took place in June 2001. The negotiations at that time illustrated “the difficulties inherent in producing a draft that is both widely acceptable and workable in the Internet environment.” The delegations were unable to agree a number of key electronic commerce issues, including consumer contracts. While they confirmed their dedication to the project in principle, it was decided that the Second Part of the Diplomatic Session could not be held before the end of 2002 and that Commission should meet again early in 2002 to thoroughly examine the nature and state of the conditions for a successful conclusion of the negotiations.<sup>23</sup>

**UNIFORM LAW CONFERENCE OF CANADA**

[35] The Resolution passed on June 23, 2001 stipulates that consultations were to be undertaken before the Second Part of the Session to determine the preconditions for the conclusion of the negotiations, relating both to the substance of the Convention and to the method and possible timetable for the future negotiations. Member States were encouraged to find a way in which to approach issues on which a broad consensus had not yet emerged, consider the manner in which negotiations might be conducted and determine an appropriate schedule for any future negotiations.

*Draft Text of Convention – June 2001*

[36] As a result of the discussions at the June 2001 Conference, a new text was prepared which contains numerous options and alternatives. The latest text of Article 7 of the draft Convention<sup>24</sup> provides as follows:

**[Article 7      *Contracts concluded by consumers***

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] –

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.]

[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.]



**THE DETERMINATION OF JURISDICTION IN CROSS-BORDER  
BUSINESS-TO-CONSUMER TRANSACTIONS: A CONSULTATION PAPER**

**APPENDIX 1**

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.

[Alternative A

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, the consumer may bring proceedings against the other party in the courts of the State designated in that agreement.

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.

Add at the beginning of Article 25 the words:

‘Subject to Article 25 *bis*

Insert [*Article 25 bis*

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)]; 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.

**UNIFORM LAW CONFERENCE OF CANADA**

[2. A declaration under this Article may not deny recognition and enforcement of a judgment given under Article 7(2) [or Article 8(2)] if the Contracting State making the declaration would exercise jurisdiction under the relevant Article in a corresponding case.]

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

[*Variant*

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 –

*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;

**THE DETERMINATION OF JURISDICTION IN CROSS-BORDER  
BUSINESS-TO-CONSUMER TRANSACTIONS: A CONSULTATION PAPER**

**APPENDIX 1**

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

[Alternative C

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 the courts of the State in which the consumer is habitually resident.]]

*April 2002 Meeting*

[37] A special meeting of the Hague Conference's Commission I (General Affairs and Policy of the Conference) was held on April 22-24, 2002 to consider how to proceed on the negotiations regarding the Convention. At the opening of the meeting, Australia and Japan took the position that the Conference should go back to the October 1999 draft of the convention, which had been rejected as unworkable by U.S. officials and business interests.<sup>25</sup>

## UNIFORM LAW CONFERENCE OF CANADA

[38] In the end, the Commission tentatively agreed to set up a new drafting committee to develop an entirely new draft by focusing on “core” provisions for the treaty. The committee is to submit its work to a formal meeting of a special commission in the first half of 2003. The Conference hopes to conclude the treaty with a final diplomatic conference before the end of 2003.<sup>26</sup>

### *European Union*

[39] In Europe, the main rules covering choice of forum and choice of law are the following:

- *The Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (“Brussels Regulation”), and
- *The Rome Convention on the Law Applicable to Contractual Obligations* (the “Rome I Convention”).

### *Brussels Regulation*

[40] In December 2000, the Council of Europe approved the Brussels Regulation to come into effect on March 1, 2002.<sup>27</sup> The Brussels Regulation is based on and replaces the *Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, Sept. 27, 1968. (The EFTA countries, Iceland, Liechtenstein, Norway, Switzerland and Poland apply the rules of the *Lugano Convention on Jurisdiction and Enforcement of Judgments on Civil and Commercial Matters*, Sept. 16, 1988, which is similar to the Brussels Convention).

#### *Scope of the Regulation*

[41] The Brussels Regulation deals with matters of jurisdiction in civil and commercial disputes within the European Union. The Regulation provides rules for determining the competent court in cases of cross-border disputes, including electronic commerce transactions within the European Union. The Regulation also deals with enforcement of foreign judgments. All EU Member States, except Denmark, are covered by the Brussels Regulation.

#### *Special Rules Covering Consumer Contracts*

[42] The Brussels Regulation sets out the following special rules with respect to consumer contracts:

**THE DETERMINATION OF JURISDICTION IN CROSS-BORDER  
BUSINESS-TO-CONSUMER TRANSACTIONS: A CONSULTATION PAPER**

**APPENDIX 1**

**Section 4 - Jurisdiction over consumer contracts**

*Article 15*

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:
  - (a) it is a contract for the sale of goods on instalment credit terms; or
  - (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
  - (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.
2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.
3. 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.

*Article 16*

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

## UNIFORM LAW CONFERENCE OF CANADA

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.
3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

### *Article 17*

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

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

### *Commentary*

[43] Under the new rules, consumers within the European Union are given the right to bring proceedings against vendors either in the courts of the Member State of the consumer's domicile or in the courts of the Member State of the vendor's domicile if:

- the contract is for the sale of goods on instalment credit terms, a loan repayable by instalments or for any other form of credit made to finance the sale of goods; or
- the vendor pursues commercial or professional activities in the Member State of the consumer's domicile, or in any manner directs such activities to that Member State, and the subject contract falls within the scope of such activities.

[44] Under Article 16, proceeding may only be brought against consumers in the courts of the Member State where the consumer is domiciled.

**THE DETERMINATION OF JURISDICTION IN CROSS-BORDER  
BUSINESS-TO-CONSUMER TRANSACTIONS: A CONSULTATION PAPER**

**APPENDIX 1**

[45] Article 17 of the Regulation prevents the parties to a consumer contract from agreeing to depart from the above provisions before a dispute has arisen.

[46] During the passage of the rules, the consumer provisions gave rise to particular interest and concern amongst business organizations, consumer organizations and other stakeholders.

[47] Business groups argue that the approach adopted in the Brussels Regulation will create legal uncertainty for companies using the Internet. For example, they have expressed concern that small and medium-sized enterprises will be burdened with substantial legal costs since they may have to defend themselves before the courts in all the Member States in which their activities might be accessible.<sup>28</sup>

[48] The European Council and Commission issued a joint statement regarding Article 15, which points out:

the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a web site uses does not constitute a relevant factor.<sup>29</sup>

[49] The joint statement does not provide detailed guidance on the interpretation of “directing activities to a Member state”.

[50] The Brussels Regulation does not contain provisions on the choice of law governing the substance of a dispute. Rather, such provisions are included in the Rome Convention of 1980.

***Rome I Convention***

[51] The 1980 EC Convention on the Law Applicable to Contractual Obligations (“Rome I Convention”) deals with which country’s law applies in contractual disputes<sup>30</sup>.

[52] The Rome I Convention was set up by the European Union. The parties to the Convention are the members of the European Union.

*Special Rules Covering Consumer Contracts*

[53] The Rome I Convention sets out the following special rules with respect to consumer contracts:

*Article 5 - Certain consumer contracts*

1. This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.
2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:
  - if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
  - if the other party or his agent received the consumer's order in that country, or
  - if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.
3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.
4. This Article shall not apply to:
  - (a) a contract of carriage;
  - (b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.



**THE DETERMINATION OF JURISDICTION IN CROSS-BORDER  
BUSINESS-TO-CONSUMER TRANSACTIONS: A CONSULTATION PAPER**

**APPENDIX 1**

5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

*Commentary*

[54] The basic principle of the Rome I Convention is the parties' freedom of choice of law. However, there are special rules concerning the choice-of-law in consumer contracts that do not allow the parties, under certain circumstances, to limit or exclude by contractual agreement, the mandatory rules of the law of the consumer's jurisdiction.

[55] For example, there are rights given to consumers by national legislation, such as rights to cooling of periods or the right to receive goods which are of satisfactory quality. If the contract meets one of the tests in Article 5.2, the court will apply the mandatory law of the consumer's country in deciding the parties' rights and obligations under the contract, regardless of any choice of law clause to the contrary. Article 5 will only be applied if the mandatory rules of the consumer's habitual residence provide the consumer with better protection than the protection afforded under the choice of law clause.

[56] In order to qualify for the protection of Article 5, the contract must satisfy any one of the following three conditions:

- The first condition is that the consumer contract was solicited by the vendor in the consumer's domicile, and the consumer completed all contract formation steps there.
- The second condition is where the vendor received the consumer's order through an agent in the consumer's country.
- The third condition concerns cross-border excursions for the purchase of goods.

[57] Excluded from the operation of the provision are contracts of carriage and contracts for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

*Review of the Rome I Convention*

[58] Although there has been some discussion within the European Commission to revise the Rome Convention to achieve a level of continuity between the Brussels Regulation and the Rome Convention with respect to electronic commerce, no such revisions are expected to be made in the near future.

## UNIFORM LAW CONFERENCE OF CANADA

---

<sup>1</sup> The American Bar Association Jurisdiction in Cyberspace Project empanelled in 1998 under the title, “Transnational Issues in Cyberspace: A Project on the Law Relating to Jurisdiction” (“ABA Jurisdiction in Cyberspace Project”), available online at <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html>

<sup>2</sup> See Terms of Reference for ABA Jurisdiction Cyberspace Project, available at <http://www.abanet.org/buslaw/cyber/initiatives/terms.html>

<sup>3</sup> Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet, American Bar Association, Jurisdiction in Cyberspace Project, available at (“ABA Jurisdiction Cyberspace Report”), available online at <http://www.abanet.org/buslaw/cyber/initiatives/draft.rtf>.

<sup>4</sup> ABA Jurisdiction Cyberspace Report, page 7.

<sup>5</sup> ABA Jurisdiction Cyberspace Report, page 19.

<sup>6</sup> ABA Jurisdiction Cyberspace Report, page 19.

<sup>7</sup> ABA Jurisdiction Cyberspace Report, page 19.

<sup>8</sup> ABA Jurisdiction Cyberspace Report, pages 20-26.

<sup>9</sup> ABA Jurisdiction Cyberspace Report, page 30.

<sup>10</sup> ABA Jurisdiction Cyberspace Report, page 24.

<sup>11</sup> ABA Jurisdiction Cyberspace Report, pages 34-37.

<sup>12</sup> ABA Jurisdiction Cyberspace Report, page 9.

<sup>13</sup> United States Federal Trade Commission, letter to the Section of Business Law, American Bar Association, dated November 20, 1999, a copy of letter is available online at <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html>

<sup>14</sup> United States Federal Trade Commission, letter to the Section of Business Law, American Bar Association, dated December 1, 1999, a copy of letter is available online at <http://www.abanet.org/buslaw/cyber/initiatives/jurisdiction.html>

<sup>15</sup> See “Consumer Protection in the Global Electronic Marketplace” Report, Federal Trade Commission, (“FTC Consumer Protection Report”) available at <http://www.ftc.gov/bcp/icpw/lookingahead/global.htm>

<sup>16</sup> FTC Consumer Protection Report, page iii.

<sup>17</sup> FTC Consumer Protection Report, page 4.

<sup>18</sup> For information on the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law, refer to <http://www.hcch.net/e/workprog/jdgm.html>

<sup>19</sup> Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law; Note: the preliminary draft Convention, as provisionally adopted by the Special Commission on 18 June 1999, was revised at a meeting held at The Hague from 25-30 October 1999. <http://www.hcch.net/e/conventions/draft36e.html>

<sup>20</sup> See 22 February 2000, Jeffrey D Kovar, US Department of State Assistant Legal Adviser for Private International Law, letter to J.H.A. Van Loon, Secretary General, Hague Conference on Private International Law, available at <http://www.cptech.org/ecom/hague/kovar2loon22022000.pdf>

**THE DETERMINATION OF JURISDICTION IN CROSS-BORDER  
BUSINESS-TO-CONSUMER TRANSACTIONS: A CONSULTATION PAPER**

**APPENDIX 1**

---

<sup>21</sup>"Electronic Commerce and International Jurisdiction", Ottawa, 28 February-1 March 2000, Summary of discussions prepared by Catherine Kessedjian with the co-operation of the private international law team of the Ministry of Justice of Canada, available at <http://www.hcch.net/e/workprog/jdgm.html>

<sup>22</sup> See Paper "Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference, submitted by the Permanent Bureau, available at <http://www.hcch.net/e/workprog/jdgm.html>

<sup>23</sup>*Ibid*

<sup>24</sup>See Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, available at <http://www.hcch.net/e/workprog/jdgm.html>

<sup>25</sup>See the Conclusions of Commission I (General Affairs and Policy of the Conference) of the XIXth Diplomatic Session – April 2002, available at <http://www.hcch.net/e/workprog/genaff.html> and <http://www.cptech.org/ecom>

<sup>26</sup>*Ibid*

<sup>27</sup> Regulation (EC) No 44/2001 (Brussels Regulation) available at <http://www.europe.eu.int.htm>

<sup>28</sup> For example see articles such as "*Self-Contradiction*" by Mark Powell & Angenita Pex *and* published in The Daily Deal, available online at [http://www.whitecase.com/article\\_eu\\_r.html](http://www.whitecase.com/article_eu_r.html); Also see Business Angles available online at <http://www.cobbetts.co.uk/angb2.htm> See also The Industry Standard available online at <http://www.thestandard.com/article/display/0,1151,20366,00.html>

<sup>29</sup>See Joint Statement on Articles 15 and 68 issued by the European Council and European Commission, available at [http://europa.eu.int/comm/justice\\_home/unit/civil\\_en.htm](http://europa.eu.int/comm/justice_home/unit/civil_en.htm)

<sup>30</sup> The Rome Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 80/EEC, 1980 O.J. (L 266) 2.