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THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS AND ITS SUITABILITY FOR AND INFLUENCE ON E-COMMERCE

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E-commerce is becoming more and more important. Apart from the apparently unlimited growth factor of the branch of the economy, it provides multiple benefits by its geographically boundaryless nature. The rapidity of the sales is the risk because users are exposed to while surging the internet. Example includes not only privacy issues, virus attacks, but also contracts one comes into without noticing. These incidents may happen, when one wants to buy and perhaps even use, one then often realizes that one has assigned to another jurisdiction in a venue on the other side of the world.

This paper addresses the problems arising from the non-applicability of the Hague Convention on Jurisdiction of Court Agreements for e-commerce. It scrutinizes these issues, analyzed the problems emerging from United Nations Convention to handle these problems.

Once the Hague Convention has entered into force, it is feared that some contracts agreements will be binding in every state. Though the Hague Convention only applies to business to business relations, its applicability is so broad that it also covers wide areas of consumer transactions.

The paper concludes that only by changing the consumer definitions for the purpose of the Hague Convention, will most of the problems disappear. This paper recommends therefore as amendment of Article 2 Hague Convention.

Word Length:
The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 15600 words.
ABSTRACT

E-commerce is becoming more and more important. Apart from the apparently unlimited growth factor of this branch of the economy, it provides multiple benefits by its geographically boundless nature. The flipside of the coin is the risk internet users are exposed to while surfing the internet. Examples include not only privacy issues, virus attacks, but also contracts one enters into without noticing. These contracts may mean, when one wants to fend and perhaps even sue, one then often realises that one has assented to exclusive jurisdiction in a venue on the other side of the world.

This paper addresses the problems arising from the unsuitability of the Hague Convention on Exclusive Choice of Court Agreements for e-commerce. It elucidates these issues, displays the problems emerging from that and proposes amendments to resolve these problems.

Once the Hague Convention has entered into force, it is feared that soon such agreements will be binding in every form. Though the Hague Convention only applies to business to business relations, its applicability is so broad that it also covers wide areas of consumer transactions.

The paper concludes that only by changing the consumer definition for the purpose of the Hague Convention, will most of the problems disappear. This paper recommends therefore an amendment of Article 2 Hague Convention.

Word Length
The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) compromises approximately 13600 words.
I INTRODUCTION

Everybody who has installed software, downloaded e-books or freeware or surfed the internet will in all likelihood have concluded several contracts, apart from possible acts of sale. Those contracts will have included, inter alia, choice of law agreements, relinquishment or at least limitation of indemnity and, most importantly, exclusive choice of court agreements. Alarmingly, those people will often not have taken notice of the contractual obligations they entered.

E-commerce is becoming more and more important. Increasing growth over the last 15 years and a percentage of 18 percent of the global sales illustrate this growing importance. This brings advantages and risks to both vendors and customers. Especially vendors run the risk of being liable for their homepages and products in foreign jurisdiction. This comprises a considerable jeopardy for the further growth of this branch of the economy, since the danger of possible costly trials in unknown jurisdictions deters online vendors from offering their products and services via internet or leads to a limitation of their offers to specific territories. A possible way out of this situation is the use of forum selection agreements, whereby, however, the recognition and enforceability of those agreements are without guarantee.

On 30 June 2005 the Hague Conference on International Private Law Member States signed the Hague Convention on Exclusive Choice of Court Agreements in business to business relations, which now has to be ratified. This Convention shall make exclusive choice of court agreements as effective as possible by setting up rules on recognition and enforcement. The validity of those agreements is thereby to be determined by the law of the state of the chosen court. Thus, its scope covers only business to business relations, ignoring consumers. Following the legal definition contained in the Hague Convention on Exclusive Choice of Court Agreements, the group of consumers is very narrow. This leads to the applicability of the Convention even to non-profit organisations and one-person businesses. The reference to national domestic law results in the danger of different assessment as to the validity of agreements in e-commerce, leading to legal uncertainty on this validity which undermines the purpose of the Convention.
Therefore, it seems to be more than questionable whether the Hague Convention in its current form allows for the specifics of e-commerce or rather presents an obstacle to the further development of e-commerce.

This paper introduces in Part I the reader to the Hague Convention, elucidating the background of its development and illustrating its scope. In Part II the reader will obtain an overview of e-commerce, its risks and measures to avoid them. Part III will show that the Hague Convention in its current form does not further e-commerce, but rather leads to confusion and uncertainty. To substantiate this thesis, first the concept of consumer for the purpose of the Convention will be scrutinised. Second, the effects of passing on of the determination to the law of the state of the chosen court whether exclusive choice of court agreements are valid or not will be examined. Thereby the different approaches the United States of America as precursor of internet jurisdiction and Germany take to assess the validity of those agreements will be illustrated.

This paper will conclude that the Hague Convention on Exclusive Choice of Court Agreements should be amended in respect of the meaning of consumer. This should be done by narrowing the definition of consumer and thereby narrowing the applicability of the Hague Convention only to business transactions. In respect of the assessment of the validity of forum selection agreements, it will be proposed to define the requirements in the Convention rather than passing this issue on to the courts of its Member States. Furthermore, the emerging problems will be lessened by the new consumer definition, too.

II THE HAGUE CONVENTION

The member states to the Hague Conference on International Private Law (hereafter Hague Conference) have agreed on the Hague Convention on Choice of Court Agreements (hereafter Hague Convention) in their last Diplomatic Session from 14 to 28 June 2005. To lay a cornerstone for the subsequent discussions, the author will give a brief overview of the Hague Conference, the developments which led to the Hague Convention in its current form and the content of the Hague Convention.
A Hague Conference on International Private Law

The Hague Conference was founded in 1893 and became an permanent intergovernmental organisation in 1951. Today 65 states are member to it, among them the United States of America (hereafter United States) and all member states of the European Union.¹ The purpose of the Hague Conference is to “work for the progressive unification of the rules of private international law”.² This purpose is achieved by setting up Special Commissions, consisting of governmental experts, who negotiate and draft multilateral treaties or conventions in private international law. Those drafts are subsequently discussed and adopted at a Plenary Session of The Hague Conference, a diplomatic conference.³ As of July 2005 the Hague Conference has adopted 37 international Conventions.

B The Hague Convention – Historical Overview

The Hague Convention on Choice of Court Agreements is the result of more than 10 years of negotiations between the member states of the Hague Conference. In 1992 the United States encouraged the Hague Conference to start negotiations on a convention governing jurisdiction and foreign judgments in civil and commercial matters. This happened against the background of increasing international trade and commerce, quickened by the United States’ desire to gain greater respect for its judgments abroad.⁴ The Hague Conference set up a Special Commission, which prepared the 1999 Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.⁵ This draft was mainly based on the Brussels Convention,⁶ which on its part is a demonstration of European civil law

¹ Hague Conference on Private International Law <www.hcch.net> (last accessed 21 July 2005), the members are as by July 2005 Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Jordan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Serbia and Montenegro, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela.
Therefore the Preliminary Draft, too, was subject to a wide civil law influence, leading to the United States refusing assenting to it. It became fairly soon apparent that a consensus on the Draft in that form would not be reachable at all. Therefore further deliberations took place, which led to the development of the 2001 Interim Draft as a consensus version. This text consisted to a large extent of square brackets and numerous options, containing more than 200 footnotes. At the end of the diplomatic session a lack of consensus on at least six major areas, amongst them e-commerce, internet, activity based jurisdiction and consumer contracts, put the feasibility of the Convention in its then form into question. It had become obvious that the convention comprised too many issues, and had to struggle with differences between civil and common law traditions as well as different approaches of the member states towards forum selection, particularly the one pursued by the United States. Especially, the unforeseeable effect of the internet and e-commerce became one of the pitfalls of the convention in this scope. Problems occurred in this area were the new developments, which raised questions as to how a contract concluded and performed online should be treated, as opposed to those concluded online but performed offline or concluded and performed offline. Additionally, questions arose as to what requirements such contracts have to meet to be held valid. Further related and controversial topics were the treatment of electronic signatures and the introduction of new security standards, as well as whether e-commerce and the internet need to be regulated at all. This uncertainty of the development of the internet led to the preparation of a note which scrutinised its impact on the project.

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8 The Interim Text was the outcome of the discussion in commission II of the first part of the diplomatic conference (6-22 June 2001) Hague Conference on Private International Law <www.hcch.net> (last accessed 21 July 2005).
12 For instance the introduction of the 128 bit encryption in 1999/2000, while before that over 40 years the 40 bit encryption has been standard.
As a result of this situation an informal working group has been set up in order to prepare a narrowed down edition of the convention. In 2003 the working group presented a proposal of a convention only dealing with exclusive choice of court agreements in commercial contracts. This proposal was pursued by two Special Commissions in December 2003 and April 2004, resulting in the Draft on Exclusive Choice of Court Agreements.\(^{15}\)

From 14 to 28 June 2005 another diplomatic session took place in The Hague, working on the basis of the 2004 Draft, introducing several amendments and leading to the final version, the Convention on Choice of Court Agreements, agreed upon on 30 June 2005.\(^{16}\) This Convention is currently subject to insertion of the last amendments and will then, according to Article 27, be open for signature by all states. The Hague Convention will enter into force when the requirements of Articles 31 (1) and 31 (2) Hague Convention, that is the second instrument of ratification, acceptance, approval or accession are met, and in accordance with Article 27 (4) Hague Convention, it is deposited with the responsible branch of the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

\textbf{C} \textit{The Hague Convention – Purpose}

The Hague Convention is designed to make “exclusive choice of court agreements as effective as possible in the context of international business”.\(^{17}\) This could raise the question whether these agreements are not effective at the moment. Looking at the abovementioned situation in the United States, it becomes clear, that, especially in transatlantic commerce, such agreements will not be enforced strictly. Within the European Union and the European Free Trade Association (EFTA) Member States, recognition and enforcement of forum selection agreements are regulated sufficiently, however, the effectiveness of those agreements becomes more than questionable in a worldwide context.\(^{18}\) The Hague Convention aims to provide certainty for business and commercial partners, stipulating that courts chosen by the


\(^{18}\) This will be illustrated later in this paper.
parties who have entered into a contract including an exclusive choice of court agreement have jurisdiction and other courts recognise and enforce judgments by the chosen court. These objectives shall be achieved by the three pillars of the Hague Convention. The first pillar, affecting the court chosen in the exclusive choice of court agreements, is to be found in Article 5 Hague Convention. This provision stipulates that the chosen court has jurisdiction and must exercise it. The second pillar is set up by Article 6 Hague Convention. According to this provision, all other courts in Contracting States are obliged not to establish jurisdiction. That means they have to dismiss or suspend proceedings before them. The third pillar, laid down in Article 8 Hague Convention, commits the court of a contracting state to recognising and enforcing judgments given by courts of other contracting states.

These basic obligations find their limits in several, generally applicable escape clauses, which stipulate that the chosen court can decline its jurisdiction when “the agreement is null and void” or “giving effect to the agreement would lead to a very serious injustice or would be manifestly contrary to the public policy of the State of the court seized”. Under similar conditions the seized court does not have to recognise or enforce the judgments given by other courts of Hague Member Countries. There are some further exceptions laid down in Articles 6 and 9 Hague Convention.

D The Hague Convention – Scope

The Hague Convention sets up several requirements as to its applicability. Article 1 Hague Convention sets up positive, while Article 2 sets up negative requirements. According to Article 1, the Hague Convention is only applicable in international cases, exclusive choice of court agreements, and civil and commercial matters. The terms international and exclusive choice of court agreement are thereby defined for the purpose of the convention in the subsequent provisions.

21 Article 6 (a) Hague Convention on Choice of Court Agreements.
22 Article 6 (c) Hague Convention on Choice of Court Agreements.
23 Articles 9 (a), (e) Hague Convention on Choice of Court Agreements.
24 Article 1 (2) Hague Convention on Choice of Court Agreements defines international with regard to jurisdiction, Article 1 (3) with regard to recognition and enforcement; Article 3 (a) defines exclusive choice of court agreement.
The negative requirements in Article 2 comprise several subject-matters which are excluded from the Convention. Probably the most important is the exclusion of consumers, confining the Hague Convention only to business to business (hereafter B2B) relations. The term consumer is legally defined as well and excludes parties to a contract that are “acting primarily for personal, family or household purposes”. This definition of consumer is to a certain extent narrow, virtually excluding, for instance, non-profit organisations, schools, as well as small and one-person businesses. Other exclusions in Article 2 Hague Convention are matters such as maintenance obligations, family law and succession, tort or infringement of intellectual property rights other than copyright or related rights.

III E-COMMERCE

E-commerce, that is any commercial activity conducted via electronic media, becomes more and more important, be it from an economic or from an overall standpoint. But this increasing importance also exposes the participants in e-commerce to considerable risks. This chapter will first introduce the reader to the growing importance of e-commerce and then move on to the risks e-commerce involves for both vendors and purchasers. In a third step the reader will be acquainted with the most prevalent methods of avoiding these risks.

A Overview and Advantages

"Electronic Commerce has the potential to be one of the greatest economic developments of the 21st century." This quote from the homepage of the Organisation for Economic Co-operation and Development (OECD) describes precisely what one can conclude from statistical data. The development of e-commerce and its value are closely connected with the number of world internet users. Both have grown explosively; 33,5 million internet users in 1996 produced a

25 Article 2 (1) (a) Hague Convention on Choice of Court Agreements.
27 Articles 2 (b), (c), (d), (k), (o).
total value of e-commerce of US$ 2.6 billion, in 2005 nearly 890 million internet users have increased this amount up to US$ 1 trillion. Thus, e-commerce has a stake of 18 per cent in the total value of worldwide commerce. These data impressively exemplify the economic importance and potential of e-commerce.

Besides the economic aspects, electronic trade provides invaluable advantages for purchasers of products or services on the one hand and for vendors on the other hand. To cite only few examples, the purchasers as well as the vendors benefit from effective, low-risk, low-cost and convenient payment methods; the costs to set up an e-business are extremely low; competitive pricing is favoured and factors such as time and distance become less relevant, if at all. The way of conducting e-commerce is thereby manifold. Contracts may be concluded and performed online, concluded online and performed offline, or the other way round.

B Risks in e-commerce for vendors

As illustrated, the internet provides a perfect platform for national and transnational electronic trade, benefiting both vendor and customer. But this perfect platform also has disadvantages. The transnationality of e-commerce can easily result in a lawsuit following the internet presence, the place where the service has been performed or the software been bought, giving rise to international litigation. If website owners clearly conduct business via a website over the internet, they are for instance always subject to the jurisdiction of the United States. The same applies to vendors, who operate websites, which allow other internet users to exchange data and information with the host computer, as long as the level of interaction reaches a

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38 Keller, above n 38, 15.
certain standard, which has to be determined on a case-to-case basis.\textsuperscript{40} This illustrates that nearly every vendor runs at least the risk to be sued in the United States.

A lawsuit could thereby be based on contractual obligations, copyright infringement, or even the mere possibility to order via a homepage from another country. This considerable risk, besides issues of data security and privacy, leads to substantial uncertainty on both sides of electronic trade and has the ability to produce costs that not only small businesses are hardly able to cope with.\textsuperscript{41}

\section*{Avoidance of risks}

The likelihood of multinational litigation may be limited - if not excluded - by means of an exclusive choice of court agreement. This particular forum selection agreement will in most instances appear as a standard form contract, which regulates several subject matters. The most common and nowadays in e-commerce virtually ubiquitous forms are clickwrap and browsewrap agreements. Due to those agreements often named in one breath with shrinkwrap agreements but treated differently legally, a differentiation is necessary. Unfortunately the terms are often mixed up and used inconsistently, fostered by a lack of definition.\textsuperscript{42} Therefore the paper will differentiate the terms by their characteristics rather than define them.

\subsection*{Shrinkwrap}

Etymologically stemming from the shrinkwrap, which coats software-containing boxes, shrinkwrap agreements are the prototype of non-negotiated contracts in mass-market retail software.\textsuperscript{43} The agreements are either visible between the clear shrinkwrap and the box or contained in the box, a sticker outside informing the purchaser of the agreement. It typically stipulates, that the user agrees with the terms and conditions of the agreement by removing the shrinkwrap.\textsuperscript{44} The content of

\textsuperscript{40} Zippo Mfg Co v Zippo DOT Com (1997) 952 F Supp 1119, 1124 (WD PA).
\textsuperscript{43} ProCD Inc v Zeidenberg (1996) 86 F 3d 1447, 1449 (7th Cir); Lothar Determann and Aaron Xavier Fellmeth “Don’t Judge a Sale by Its License: Software Transfers Under the First Sale Doctrine in the United States and the European Community” (2001) 36 U S F L Rev 1, 4-5.
\textsuperscript{44} Yale University Library <www.library.yale.edu> (last accessed 22 July 2005).
these agreements varies, but usually contains provisions on copyright, liability and choice of Court agreements.

2 Clickwrap

Clickwrap agreements, sometimes referred to as click-on or clickthrough agreements, usually appear as a pop-up window on the computer screen, when the user attempts to utilise a service, make a purchase or install software.\(^45\) These agreements present the terms to the user similarly to a paper contract – except they are not physically on paper.\(^46\) The user is required to assent to the terms before the service or installation commences, and to manifest this assent by clicking on an icon “I agree” or “I accept”. Sometimes users even have to type “I agree” via the keyboard to avoid excuses relating to dogs and cats walking over the computer or the mouse.\(^47\) The product or service cannot be obtained unless assent is given.\(^48\) Clickwrap agreements have nowadays superseded shrinkwrap agreements and are ubiquitous in e-commerce, be it downloading of anti-virus software, installing an operating system or logging on to computer networks.\(^49\) Clickwrap agreements usually contain provisions on liability, copyright, privacy, choice of Court and choice of law.\(^50\) But often vendors even insert clauses such as that they can collect and sell the user’s detailed personal information or install software that will capture every keystroke.\(^51\)

3 Browsewrap

Browsewrap agreements are most commonly used on websites,\(^52\) less frequently in software installation or download windows. The characteristics of these kind of agreements are their appearances, since they are only available via a hyperlink

\(^{45}\) K M Das “Forum Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the ‘Reasonably Communicated’ Test” (2002) 77 Wash L Rev 481, 482.


\(^{47}\) There have been some cases where persons refused to perform a contract on the basis that they did not assent, but their pet hit a key on the keyboard or the button on the mouse.

\(^{48}\) Specht v Netscape Communications Corp (2001) 150 F Supp 585, 594 (SD NY).

\(^{49}\) Nearly every university requires their students and staff to enter into a clickwrap agreement before logging on to the network. Similarly one usually has to enter in such an agreement when conducting online banking, online shopping, downloading and installing free- and shareware, and so forth.

\(^{50}\) Das, above n 45, 498.

\(^{51}\) So called Spyware, also known as Adware, Wikipedia the Free Encyclopedia <http://en.wikipedia.org> (last accessed 23 July 2005); famous example for users required to assent to the installation of adware is the web browser Opera <www.opera.com> (last accessed 22 July 2005).

\(^{52}\) Websites are commonly referred to as a collection of web pages. The start page of those pages is called homepage <http://en.wikipedia.com> (last accessed 21 August 2005).
placed on the vendor’s homepage, website or software. These agreements, opening in a separate window, claim to bind the users without them being required to indicate or manifest acceptance thereof, for instance by means of a mouse-click. They usually provide that using the websites or software constitutes acceptance of its terms and conditions. Users are sometimes requested or advised to read the terms and conditions before entering the website or commencing with the installations or downloads, but more often no references are made to the hyperlink at all.

D Preliminary Conclusion

Having given an overview of e-commerce, its advantages and risks, and remedies for the latter, it has become clear that this branch of economy will become more and more important. The Hague Convention will – once ratified by the member states – have a huge impact on B2B relations. Therefore it shall be scrutinised in the next part, whether the Hague Convention fits the specific needs of e-commerce, an area which is subject to ongoing development and is about to become ubiquitous in everyday transactions.

IV SUITABILITY OF THE HAGUE CONVENTION FOR E-COMMERCE

Though e-commerce and the Hague Convention seem to have not much in common at first glance, they do in fact have several overlaps. Perhaps the two most important intersections are exclusive choice of court agreements and B2B relations. First, clickwrap and browsewrap agreements normally contain exclusive choice of court agreements, which will soon, assumed its requirements are met, be governed by the Hague Convention on choice of Court agreements. Second, the Hague Convention is only applicable in B2B and the major part of the total value in e-commerce accounts for B2B. Against this background this part of the paper will argue that the Hague Convention in its current form does not give sufficient consideration to the specifics of e-commerce. Therefore it is first illustrated that the consumer definition contained in the Hague Convention is too narrow, leading to severe inconsistencies in countries with high requirements as to consumer protection. Second, it will be

53 K M Das, above n 45, 482.
demonstrated, that the passing on of the assessment of the validity of the exclusive choice of court agreements to the law of the state of the chosen court, leads to different results in different jurisdictions. This result hinders an undisturbed development of e-commerce. This part of the paper will also make suggestions as to an amendment of the Hague Convention in order to better suit the specific needs of e-commerce.

A Consumer

Article 2 (1) (a) Hague Convention stipulates that exclusive choice of court agreements to which a consumer is a party, do not fall under the applicability of the convention just as agreements relating to employment, Article 2 (1) (b). The term consumer for the purpose of the convention is thereby legally defined by Article 2 (1) (a) as a “natural person acting primarily for personal, family or household purposes”. By this provision the Hague Convention receives a limitation to B2B relations. The definition of consumer thereby is very similar to the one found in Article 2 (a) of the United Nations Convention on Contracts for the International Sale of Goods or section 1-201 of the Uniform Commercial Code. However, the definition of consumer for the purpose of the Hague Convention does not fit the specific needs of e-commerce, since it is too narrow and includes even one-person businesses and non-profit organisations in the scope of the Convention. The solution would be to examine the differences between merchants and consumers and then to exclude consumers form the Convention. This part of the paper will employ two examples to illustrate the emerging inequalities of the current consumer definition and conclude with a proposal for an amendment of the pertinent provision of the Hague Convention.

The first question arising is why are consumers excluded from the Convention. As described above, the Hague Convention initially was much more comprehensive. Its prior draft versions for instance comprised provisions dealing with specific needs of consumers in regard to provisions governing jurisdiction. But against the background of between then 59 to now 65 member states with in some areas huge differences in the legal regulation of consumer protection a consensus on

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58 Article 2 (1) (a) Hague Convention on Choice of Court Agreements.
60 Uniform Commercial Code1 UCC sec 1-201 (b) (11).
the inclusion of consumer protection provisions was not reachable. The two major oppositions have thereby been Europe and the United States. Europe, according to its legal tradition and current legislation, opined that consumers should be allowed to bring suits in the jurisdiction of their domicile, regardless of any contractual obligations, while the United States disapproved of this view. The inability of the Hague Conference to merge and harmonise the different approaches to consumer protection by the Hague Conference Member States finally led to a stalemate in negotiations and the exclusion of consumers from the subsequent drafts as well as a narrowing of the scope to B2B.

The second question arising from the exclusion of consumers from the scope of the Hague Convention relates to the actual difference between a consumer and its counterpart, business. The Convention defines consumer as a “natural person acting primarily for personal, family or household purposes”. Using this definition as a basis, it can be stated that by means of the words “natural person” and “primarily” one can easily reason that reversely every non-natural person as well as every natural person not “acting primarily for personal, family or household purposes” falls under the scope of the Hague Convention, thus representing business. This results in the applicability of the Convention to huge groups of small businesses, since they are non-natural persons and do not act primarily for personal, family or household purposes. Under the same reasoning non-profit organisations and finally one-person businesses, which also might be counted as natural persons, are not acting primarily for personal, family or household purposes, and therefore fall under the scope of the Convention. But against the background of consumer protection, one-person businesses and e-commerce, this narrow consumer definition is easily questioned. This is illustrated by elucidating the underlying principles of the necessity of consumer protection and the justifying differences between consumers and


64 To give only a brief overview of the variety of such organisations: Lions Clubs International, YMCA, Wikimedia Foundation, Solomon R Guggenheim Foundation, New Zealand Conservancy Trust.
businesses. Therefore, what makes consumers so in need of protection as opposed to businesses? Taking the main characteristics of consumers into account one gets down to at least three, which distinguish them and their transactions from those conducted by business. First, consumers, usually individuals or families, are in general exposed to an inequality of bargaining power as opposed to the vendor. Second, the value of the transaction is usually relatively low in business to consumer or consumer to consumer relations, while at the same time consumers often lack the financial resources of merchants. Third, consumers are generally not able to defend themselves internationally, nor can they be expected to act like merchants. The vendors, on the other hand, are expected to be endowed with commercial negotiation skills and to possess nearly equal bargaining power against each other. Furthermore, businesses generally aspire to profit out of contractual obligations. Having pointed out these characteristics, it seems more questionable whether this distinction can be upheld with regard to small businesses or one-person-businesses. This question arises against the background of e-commerce insofar that the internet provides not only an electronic trade platform for medium-sized and big businesses, but especially for very small internet start-ups. They are the businesses which in particular benefit greatly from the small initial expenses for founding a business. As result an increasing number of small businesses conduct trade via internet with other small businesses and consumers, while they produce only a low average transaction value. This increasing number of small and very small start-ups is mainly made up of one-person or small businesses. The characteristics of consumers, for example low transaction value, little bargaining power and a lack of ability to defend themselves as well as little financial resources, can often be found in these businesses too. The same applies to non-profit organisations. They are often exposed to unequal bargaining power against vendors too, for instance when they buy supplies for their work. Further, it seems at least questionable whether non-profit organisations will be able to defend

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68 Mary Shannon Martin, above n 63, 133.
69 Mary Shannon Martin, above n 63, 133.
70 Mary Shannon Martin, above n 63, 128.
themselves internationally; the transaction value is regularly not that high; they will not be expected to act like merchants or to be endowed with commercial negotiations skills. Eventually, non-profit organisations do not, as the name already implies, aspire to profit. This suggests that non-profit organisations are similar to consumers rather than to businesses, and that they are in need of protection as well. However, according to the narrow definition of consumer in the Hague Convention, they are clearly within the scope of the Convention. Similarly, the application of the characteristics to small businesses, especially one-person businesses, leads to the result that they rather resemble consumers. One-person businesses are, as opposed to medium and large businesses, not acting on a level playing field and unlikely to be able of international defence. They will as a rule have rather low transaction values and will be poorly endowed with commercial negotiation skills. This speaks in favour of at least one-person businesses being in need of protection similar to consumers. But again, according to the Convention, those businesses would fall in its scope too, since they do not act primarily for personal, family or household purposes.

On the other hand it seems arguable whether non-profit organisations, small businesses or probably home-based one-person businesses, should be excluded from the scope of the Convention, although they meet the requirements set up for not being a consumer for the purpose of the Convention. Employing two hypothetical examples may clarify these difficulties.

The Lions Club Wellington Host, a non-governmental and independent non-profit organisation, has to buy new shirts with an embroidered logo for members, who are to be introduced. Since the finances have just been reorganised, the shirts shall be as low-priced as possible. Eventually an e-vendor is found, offering shirts in a good quality at a low price via the website www.wellpriced-shirts.com. 10 shirts are ordered and paid online via credit-card. After two weeks the shirts with the embroidered logo are delivered, but they are faulty. After several summons for subsequent improvement the e-vendor refuses any further contact, let alone subsequent improvement or restitution. Considering suing, the Lions Club seeks legal advice. The solicitor will tell them that they are bound by a clickwrap agreement they entered into during the online-order. According to a provision within this agreement they have agreed on the exclusive jurisdiction of the Court of Annapolis, Maryland,
United States. Assuming the other requirements of the Hague Convention were met, the question as to its applicability with regard to B2B would have to be affirmed. Although the Lions Club does not aspire to any profit, but only want to buy new shirts for its members without aspiring to any profit, it would have to take legal proceedings in Annapolis, United States, since it is not a natural person and it is not acting for personal, household or family purposes. The assumable cost-benefit equation will against the background of the low transaction value and the high costs resulting from suing abroad, in all likelihood result in the Lions Club not suing.

In the second case the Lions Club is replaced by ACME, a one-man business in Lower Saxony, Germany, which conducts its business completely online, offering online-service for Linux-operating systems. To be able to send the invoices for its services in a secure form the owner decides to use Adobe Acrobat. This software will also be used for private purposes, to create pdf-documents containing the self-written poems of the owner. The business buys the software online via internet, downloads it via www.adobe.com and enters, by clicking on “I Agree” into a clickwrap agreement, which determines as a venue for legal proceedings the Superior Court of Santa Clara County, California. After having paid online via credit-card and downloaded the programme, the installation fails. After several attempts the business tries to recover its money, which is refused by Adobe. Assuming that the other requirements of the Hague Convention were met, the one-person-business would have to bring an action for restitution before the Superior Court of Santa Clara County. As against the price of the Software the business will in all likelihood not take legal proceedings in a distant and foreign jurisdiction, since the travel expenses alone would exceed the value of the claim.

It has been illustrated that in both hypothetical cases the users were subject to the Hague Convention regarding their status as a business, assuming the other requirements were met too. This would have led to possible actions having to be filed in a distant jurisdiction. On the contrary, in the case of improper performance of contract from their side, they were to be sued in this jurisdiction, too. It has further been illustrated that the distinction between the need of protection of consumer and merchant is hard to draw, especially in e-commerce with the huge number of small

73 US$ 299, see Adobe, above n 72.
and one-person businesses. This also applies to non-profit organisations, since their characteristics, too, are closer to those of consumers than those of businesses. This leads to the result that non-profit organisation and small and one-person businesses are - by the narrow consumer definition in the Hague Convention - actually deprived of the protection they deserve according to their proximity to consumers. It is not difficult to imagine that this risk is capable of setting up a considerable obstacle for the further development of e-commerce, since the risk of having to sue and being sued abroad, most probably outweighs the advantage e-commerce provides.

During the negotiations on the Hague Conference many issues dealt with the influence of e-commerce on the drafting, but relatively few with the definition of the consumer. In April 2000 a preliminary document has been published by the Hague Conference, dealing with specifics of e-commerce, internet and electronic data interchange.\footnote{Electronic Data Interchange, Internet and Electronic Commerce Preliminary Document No 7 (April 2000) Hague Conference on Private International Law <www.hcch.net> (last accessed 03 August 2005).} In this report the abovementioned problem has been addressed very briefly, resulting in doubts whether the traditional concept of consumer and business can be maintained in times of e-commerce. To avoid inequalities for one-person businesses it has been proposed to use the term “any natural person acting on his own behalf, regardless of the subject of the transaction” instead of consumer.\footnote{Electronic Data Interchange, Internet and Electronic Commerce, above n 74, 20.} This approach has the advantage that at least one-person businesses were –in most cases\footnote{They would not be excluded, when conducted only by one person, but registered as Limited Liability Company or similar enterprises.} - excluded from the Hague Convention. However, small businesses as well as every non-natural person, for instance non-profit organisations, were still within the scope.

In order to exclude small businesses from the Hague Convention one could draw a quantitative financial threshold. Every transaction which exceeds a set pecuniary limit would then not be regarded as consumer, but business transaction, while every transaction not achieving this limit would be considered as a consumer transaction, not falling within the scope of the Hague Convention. However, this approach has to deal with the critical issue as to the dimension of this threshold as well as the problem that medium and large businesses also conclude and perform contracts with low transaction values and could, additionally, even circumvent the
provisions of the convention on purpose, by splitting up their transactions and benefit from the then pertinent consumer protection. These concerns, regarding the dimension of the threshold and the likelihood of misuse by medium and large businesses, could be partly invalidated by employing a low threshold, for instance NZ$ 5,000 per transaction. On the other hand it has to be borne in mind that 65 States as members to the Hague Conference will probably ratify the Convention. Those States have different economic situations. While Sri Lanka has a gross domestic product (GDP) of US$ 4,000 per capita, Egypt of US$ 4,200 and Albania of US$ 4,900; the GDP of Germany amounts to US$ 28,700 per capita, of New Zealand to US$ 23,000 and of the United States to US$ 40,100. These data illustrate the bottom, the middle and the top of the economic scale of Hague Conference Member States and suggest that consensus on a fixed financial threshold cannot be realised without producing further unequal treatment.

Another proposal for the exclusion of small businesses from the Hague Convention could be to draw a threshold determining when a small business is not comprised by the scope of the Convention. This threshold could either be determined by the number of employees or the annual sales. However, this approach, too, holds several problems in store. The first problem is, again, the different economic situation in different member states, leading to difficulties in drawing a fixed financial threshold. The second problem relates to the manifold character economic activities and industries have, all resulting in different requirements for the number of employees. This makes the drawing of a threshold based on the number of employees difficult. A possible solution could be found in the efforts of the United States Small Business Administration (SBA), which has set up hundreds of tables, defining what in different sorts of industry the characteristics of a small business are by means of setting a limit either on the annual sales or the number of employers. However, this proposal fails to take the specifics of e-commerce into considerations. By forum selection agreements in click- and browsewrap agreements vendors try to limit the risk of being exposed to legal proceedings elsewhere. The Hague Convention enforces those agreements in B2B. When the thresholds based on the tables of the

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78 Enterprises, which have a high share in handcraft will naturally have more employees than those with a high grade of automation technology.
SBA or comparable indexes were employed, the question as to the enforceability of those agreements became complex and confusing for all participants, since the now nearly universal validity of at least clickwrap in B2B relations would be undermined. Every vendor would have to scrutinise the status of its customer as to whether it is business according to the SBA tables or not. This would lead to a disproportionate increase of time and effort which had to be spent, resulting in higher costs and eventually uncertainty and unpredictability. Therefore, a solution for small businesses operated by more than one person, which is both effective in use and able to reach consensus on, seems not to be achievable.

Thus, the following conclusion can be drawn. The Hague Convention – with regard to the definition of consumer in Article 2 (1) (a) – does not pay attention to the specific requirements of e-commerce. Since the consumer definition is very narrow, small businesses with only few employees or low annual sales, one-person businesses and non-profit organisations are within the scope of the Convention. This does not affect the aim of the Convention – to make exclusive choice of court agreements as effective as possible – but deprives those businesses and organisations of the protection they should receive and eventually contravenes the purpose of Article 2 (1) (a) Hague Convention. This lack of protection and the – according to the Hague Convention – strict enforceability of exclusive choice of court agreements, even though only embedded in wrap-agreements, places undue burdens on those parties, which are not able to defend themselves internationally. Those burdens will, in turn, lead to a hesitant attitude of affected parties towards the use of e-commerce and therefore present a considerable obstacle for the further development of this important branch of economy. Therefore, to better suit the specifics and needs of e-commerce, Article 2 (1) (a) Hague Convention should be amended in the following way.

Article 2 Exclusions from scope
1. This Convention shall not apply to exclusive choice of court agreements-
   a) to which a natural person is a party.
   b) to which a non-profit organisation is a party.

81 See generally Benjamin C Elacqua, above n 67, 99.
c) relating to contracts of employment, including collective arrangements.

This solution, however, still bears the risk that by the proposed amendment of Article 2 - the exclusion of natural persons – one-person businesses will be excluded, which might not deserve the same level of protection consumers do. Thereby it has to be borne in mind that most of the businesses conducted by natural persons, meet the abovementioned criteria. Only a very small share will account for businesses by natural persons, which do not meet the criteria, but conduct business with a high transaction value, are able to defend themselves internationally and are endowed with sufficient financial resources. Even though this might not be a perfectly satisfying solution, it minimises the current inequalities.

Therefore it can be concluded that the current form of Article 2 Hague Convention is too narrow and leads to considerable inequalities to the disadvantage of small businesses, one-person businesses and non-profit organisations. As illustrated, this can easily hinder the further development of e-commerce for those sectors. By the introduction of natural persons and non-profit organisations in Article 2 Hague Convention, a provision would be created, which better fits the special requirements of e-commerce. However, the problem to be feared still remains – unequal treatment of small businesses. As has been illustrated, a completely satisfying solution, for example the introduction of thresholds, holds the danger of contravening the main purpose of the Convention - to make exclusive choice of court agreements as effective as possible.

**B Agreement**

Article 3 (a) Hague Convention defines exclusive choice of court agreement for the purpose of the Convention.\(^82\) Proceeding with this definition, a forum selection agreement has to meet several requirements. The first requirement is that the exclusive choice of court agreement is not set up unilaterally; consequently a presupposition is the presence of an agreement.\(^83\) The question arises as to what

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\(^82\) "Exclusive choice of court agreement’ means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the Courts of one Contracting State or one or more specific Courts in one contracting States to the exclusion of the jurisdiction of any other Courts;" Article 3 (a) Hague Convention on Choice of Court Agreements.

\(^83\) Preliminary Draft Convention on Exclusive choice of court agreements Draft Report, above n 17, 17.
requirements an agreement has to meet to be one for the purpose of the Convention. It is answered neither explicitly by Article 3 nor by any other provision of the Hague Convention. However, the second and third chapter contain in Article 5 (1), 6 (a) and 9 (a) a clue, as to what could be decisive for the requirements. Article 5 (1) stipulates that the chosen court has to establish jurisdiction, “unless the agreement is null and void under the law of that state”. 84 Similarly, Article 6 (a) contains an exception for the courts not chosen. They do not have to suspend or dismiss the proceedings before them, if “the agreement is null and void under the law of the State of the chosen court”. 85 In the same way Article 9 (a) leaves it to the discretion of the court seized to recognise and enforce a judgment, as long as “the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid”. 86 These provisions determine the law of the state of the chosen court as basis for the assessment of the validity of the exclusive choice of court agreement. It can therefore be concluded that the Hague Convention does not want to set up any rules for the validity of exclusive choice of court agreements, but rather want to let the law of the states designated in the agreements determine the validity. Consequently, this conclusion can be taken as a basic principle, which underlies the Convention. This procedure is additionally supported by the fact that the validity of the exclusive choice of court agreement is, with regard to the capacity of the parties to enter in such an agreement, passed on to the Courts seized to establish jurisdiction, Article 6 (b) Hague Convention and the Court requested to recognise and enforce the agreement, Article 9 (b) Hague Convention. These provisions stipulate that the law of the state of the Courts seized or requested has to determine whether the parties had the capacity to enter in an exclusive choice of court agreement.

The question arises, whether this procedure, which presupposes a fictitious scrutiny as to whether an agreement has been concluded, by means of the law of the state of the Courts chosen, seized or requested, will further the purpose of the Hague Convention with regard to e-commerce, and if so, whether or not this will have a beneficial impact on e-commerce. It is argued that by this procedure the purpose of the Convention – to make exclusive choice of court agreements as effective as possible – is not undermined, but further obstacles for the development of e-

84 Article 5 (1) Hague Convention on Choice of Court Agreements.
85 Article 6 (a) Hague Convention on Choice of Court Agreements.
86 Article 9 (a) Hague Convention on Choice of Court Agreements.
commerce are erected. For that purpose the regulation of this matter in the United States and Germany shall be illustrated and examined.

1 Importance of the validity of wrap agreements for Hague Convention

One may ask why the question as to the validity of clickwrap and browsewrap agreements is important, since Article 3 (d) Hague Convention stipulates that exclusive choice of court agreements, which form part of a contract shall be treated as an agreement independent of the other terms of contract. Therefore one could argue that the validity of wrap agreements containing a forum selection agreement does not have any impact on the latter. However, the basic question as to the validity of exclusive choice of court agreements is only answerable in connection with the validity of wrap agreements, since those specific e-commerce agreements are not dealt with in most legislatures and only scarcely in case law.

2 United States

The United States has taken different approaches towards the validity of click-and browsewrap agreements, containing forum selection clauses. The specific relevance of the legal assessment by the United States arises from the major role it plays in the development of the Internet and e-commerce. Not only does the worldwide web and the internet emanate from the United States, but also the beginnings of e-commerce are found there. These special circumstances have led to the United States having the most developed judicature in this area, since they are the country with longest time dealing with those issues. This section will first illustrate the legal treatment of clickwrap and afterwards the legal treatment of browsewrap agreements. Therefore examples of legislation and case law will be examined. However, initially it shall be pointed out that perhaps the gist of the discussion centres on the issue of notice of wrap agreements.

(a) Clickwrap agreement

In an international survey, involving 39 different countries, which was conducted in 2001, 90 per cent of the respondents, who were mainly consumers, indicated that they never or at best sometimes read the agreement. 64 per cent indicated that they always click on “I Agree”, while at the same time 55 per cent did not believe that they entered into a legally binding contract when they click on “I
Agree". These numbers are alarming and illustrate that many users are in danger of contracting into terms and conditions that may not be in their best interest and that they might otherwise not agree to.

The question as to the validity of clickwrap agreements has been decided only in relatively few cases and is also partly covered by provisions of the Uniform Commercial Code (UCC). The leading decision and cornerstone for the assessment of the validity and legitimacy of one-sided forum selection clauses was probably *Carnival Cruise Lines Inc v Shute*. In this case the plaintiff, participant in a ship-cruise, tripped on the ship and was injured. Since the fall was allegedly due to a cruise-line’s negligence, the plaintiff sued the line before the United States District Court for the Western District of Washington. The Court held that it could not establish jurisdiction, since the ticket contained a forum selection agreement for California. The Court of Appeal reversed this, so that the case eventually came before the United States Supreme Court, which reversed it again. Its holdings were, inter alia, based on the plaintiff having had “sufficient notice of the forum clause”.

The perhaps most important outcome of this ruling has been that a necessary presupposition for the enforceability of forum selection agreements is notice to the one confronted with it. This decision and the necessity of notice of forum selection agreements was followed by several decisions dealing with similar incidents during cruise ship journeys, but served also as basis for subsequent decisions, which deal with forum selection clauses in clickwrap agreements. In *Capsi v Microsoft Network* the Superior Court of New Jersey held a forum selection clause valid, which was embedded in a clickwrap agreement. Similarly clickwrap agreements have been held valid in *Decker v Circus Circus Hotel*, *Motise v America Online* and

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88 See Adam Gatt, above n 118, 409.
90 *Carnival Line Inc v Shute*, above n 89, 587.
91 *Shute v Carnival Cruise Lines* (1990) 897 F 2d 377 (9th Cir).
92 *Carnival Line Inc v Shute*, above n 89, 587, 590.
In these decisions the particular user was held to have noticed the terms and conditions, which contained choice of court agreements, and to have assented to them by clicking on “I Agree”.

Article 2 UCC subsection 204, which deals with mass-market licenses, stipulates that contract formation can occur in any manner that shows agreement. Therefore, when a user is confronted with a pop-up window with the terms of the agreement in it and the user clicks on “I Agree”, this will be sufficient to show notice and sufficient for such agreement, since this clickwrap agreement meets the contract formation requirements in the same way as shrinkwrap agreements or agreements on the back-side of cruise-ship tickets do.

It can be concluded that the United States as precursor of jurisdiction in the area of e-commerce and internet, has based its case law mainly on the decision Carnival Cruise Lines Inc v Shute. Due to those decisions, clickwrap agreements containing exclusive choice of court agreements are nowadays generally held to be valid on the assumption that the users have had notice of the terms. Therefore the United States has not employed a complete new jurisdiction, but transferred the principles of contract formation and notice of standard business terms to the area of e-commerce.

(b) Browsewrap

The question as to the validity of browsewrap agreements is unequally more difficult to answer. Only few cases have dealt with the validity of those agreements and they have been decided in different ways.

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98 Formation in General.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Uniform Commercial Code2 UCC sec 2-204.


100 See as leading case, even though for shrinkwrap agreements ProCD Inc v Zeidenberg (1996) 86 F 3d 1447, 1452 (7th Cir); I Lan System Inc v Netscout Serv Level Corp (2002) 183 F Supp 2d 328, 336 (D Mass).
The first case which dealt with the issue of browsewrap agreements is *Specht v Netscape*. In this case it was questionable whether or not customers assented to terms of an agreement by downloading software from a homepage. The agreement was thereby only available via a separate website, which opened after a click on a hyperlink at the bottom of the homepage with the download button. The Software was downloadable without the necessity of scrolling to the bottom of the page and seeing the link. The question which arose was, whether this agreement should be held valid. On the one hand it was possible to download the software without noticing the link and therefore without taking notice of the terms. On the other hand it could be argued that Specht could have read the terms and had failed to do so. But the Court held that a hyperlink, located on the bottom of a homepage and leading to terms and conditions, was not sufficient to put the users on notice about the terms, since Netscape did not make it clear that the click on the download button should also manifest assent. The tenor that browsewrap agreements do not meet requirements as to the notice of the user, has been followed, inter alia, in *Pollstar v Gigmania Ltd.* In this case the Court had to decide whether there was a breach of contract. Thereby the necessary contract could have only been concluded by the visit and use of information from the plaintiff’s website, which contained a hyperlink to a separate website with terms and conditions. This separate website stipulated that a binding contract between the visitor and owner of the website would be concluded in different manners. Eventually the Court held that the hyperlink to the terms of the agreement, which appeared grey and not underlined against a grey background, was not sufficient to put the visitor in notice of the terms, a contract was therefore not concluded. Similarly browsewrap agreements have been held unenforceable in *Defontes v Dell Computer Corp*. In this case the Court held that the user did not receive sufficient notice of an arbitration clause, which was contained in a browsewrap agreement on the company’s homepage and therefore dismissed the motion of the defendants to stay proceedings and compel arbitration.

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103 *Specht v Netscape Commun Corp*, above n 101, 30.
104 See *Specht v Netscape Commun Corp*, above n 101, 30.
On the other hand there have been decisions which considered browsewrap agreements as enforceable, at least as far as they are plainly visible. In *Ticketmaster Corp v Tickets.com* \(^{107}\) the Court had to deal with the question of whether an intellectual property claim could be based on a contract. The contract could thereby only have been concluded via an assent of the defendant to a notice, which was placed on the homepage of the plaintiff, stating that anyone going from the homepage to the interior web pages accepts certain conditions. \(^{108}\) Thereby the users did not have to click on an “I Agree” button, but had to scroll down to the end of the homepage, where the terms were stated. Users with monitors not being exceptional large could not see those terms without scrolling down. The question arose whether the notice pointing to the terms at the end of the page was sufficient to establish a cause of action. The Court referred to *Specht v Netscape* \(^{109}\) and held that since in the current case the terms were plainly visible as opposed to *Specht v Netscape*, and additionally the offeror may specify that the offeree indicates assent by a particular action in connection with the offer, the contractual cause of action had been established. \(^{110}\) In *Register.com v Verio* the plaintiff alleged the defendant in breach of contract. The plaintiff offered an information service for internet domains and prohibited in its terms and conditions the use of this service by third parties for commercial purposes. \(^{111}\) The terms and conditions were available via click on a hyperlink, which was presented directly adjacent to the search template. The hyperlink was embedded in the sentence “[b]y submitting this query, you agree to abide by these terms”. \(^{112}\) The Court held that the defence of the defendant, not to have assented to those terms, was not possible. This was based, too, on the claim of the defendant not having assented because not having clicked on a button with “I Agree”. \(^{113}\) Therefore the agreement has been held valid. \(^{114}\) However, even those cases, tending to hold browsewrap agreements valid, have as a minimum requirement the knowledge of the parties about the manifestation of assent are treated differently. Taking Article 2 UCC subsection 204

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109 *Specht v Netscape Communs Corp* (2002), above n 83.
110 *Ticketmaster Corp v Tickets.com Inc* (6 March 2003), above n 89, 9-10.
112 *Register.com Inc v Verio Inc*, above n 111, 248.
113 *Register.com Inc v Verio Inc*, above n 111, 248.
114 *Register.com Inc v Verio Inc*, above n 111, 248.
into consideration, it seems more than questionable, whether browsewrap agreements show sufficient agreements to actually form a contract.

(c) Conclusion

It has become obvious that clickwrap agreements are generally held valid on the basis that the user affirmatively manifests assent. On the contrary, currently it seems unforeseeable whether or not browsewrap agreements will be held valid in the future. But at least it can be derived from the cases described that it is likely to boil down to the question of whether or not the user knew about the agreement. Following the reasoning of the decisions which dealt with the validity of clickwrap agreements, a development towards a general validity seems to be unlikely. This is especially backed up by the requirement of notice, which has been demanded in nearly all decisions since Carnival Cruise Lines Inc v Shute.

3 Germany

In Germany the validity of exclusive choice of court agreements is determined by different provisions in different statutes. The specific relevance of the legal assessment by Germany arises from its geographical location and political influence in the European Union as well as its status as representative of civil law as opposed to the United States. In Germany exclusive choice of court agreements are treated as a prorogation contract, the requirements as to the conclusion of a contract have to be met. First, a contract has to be concluded, in which the standard business terms are incorporated validly. The requirements as to the valid incorporation of standard business terms are governed by provisions set up in the German Civil Code (BGB). Second, the requirements as to exclusive choice of court agreements, set up in the German Code of Civil Procedure (ZPO) and, where pertinent, of the EC-Regulation 44/2001, have to be satisfied.

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119 EC-Regulation 44/2001, above n 56.
When one deals with the question as to whether standard business terms, containing exclusive choice of court agreements, are valid, one has therefore first to scrutinise whether the pertinent requirements of §§ 305 to 310 BGB are met regarding the standard business terms. Subsequently it has to be examined whether the requirements set up in § 38 ZPO and Article 23 EC-Regulation 44/2001 are satisfied. The §§ 305 to 310 BGB have been incorporated in the BGB recently in the course of the reform of the law of obligations in 2002. Before their incorporation they were part of a separate statute, which has in 1996 mainly been amended on grounds of a European Communities Council Directive, which aimed at the fortification of consumer protection. The main purpose of those provisions is therefore consumer protection. According to § 310 subsection (1) BGB the main part of these provisions is not applicable to “standard business terms which are proffered to a businessperson, a legal person governed by public law or a special fund governed by public law”. The Hague Convention is only applicable to B2B, whereby, as illustrated, the definition is a negative one based on the exclusion of consumers. The question arises, whether the term business for the purpose of the Hague Convention and for the purpose of § 310 subsection (1) BGB are the same. Businessperson for the latter purpose is legally defined in § 14 BGB as “a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity”. Therefore the business definition in the BGB is narrower than the implicit one in the Hague Convention. This leads to a split applicability of the §§ 305 – 310 BGB to exclusive choice of court agreements embedded in wrap agreements. Those concluded between businesses in both senses, for the Hague Convention and the BGB, are only subject to minimum requirements due to § 310 subsection (1) BGB, whereas all other forum selection agreements, falling under the scope of the Hague Convention, but not under the scope of § 14 BGB, for instance concluded with the abovementioned non-profit organisations, are subject to much higher requirements with regard to their validity. Subsequently, bearing this distinction in mind, the validity of exclusive choice of court agreements in clickwrap and shrinkwrap agreements under German law will be scrutinised.

120 EC-Directive 93/13, above n 56.
122 BGB, above n 111, sec 310.
123 BGB, above n 111, sec 14.
(a) Clickwrap agreements

Bearing in mind the abovementioned distinction between consumers and business for the purpose of the BGB, the German approach to the assessment of the validity of exclusive forum selection agreements is examined.

(i) Consumer for the purpose of the BGB

Wrap agreements, which contain a forum selection clause determining a Court in a European Union Member State as having exclusive jurisdiction, and which are concluded between a business and a consumer, the latter domiciled within the European Union, are subject to the EC-Regulation 44/2001. This Regulation sets up a very strict set of rules for consumer protection, which will often lead to forum selection agreements contained in wrap agreements being held invalid. A valid forum selection agreement, which departs from the consumer protection rules, can thereby only be entered into after the dispute has arisen, or the agreement endows the consumer with more rights, or both parties are domiciled in the same state and determine the Courts of this Member State as those which shall have jurisdiction. This narrow scope of applicability of forum selection agreements to contracts, to which a consumer domiciled in a European Union Member State is a party, leads to the invalidity of many forum selection agreements in wrap agreements, since they limit the choice of the consumer as to where to sue or haul the consumer before distant Courts outside his domicile. However, the provisions of the EC-Regulation are not applicable when none of the parties, no matter whether consumer or not, is domiciled in a European Union Member State. For the subsequent

125 Every forum selection agreement, which determines a Court or the Courts of a state not the one where the consumer is domiciled, is according to Article 17 EC-Regulation invalid, unless the exemptions in Article 17 EC-Regulation are given.
126 EC-Regulation 44/2001, above n 56, Article 17.
127 Inconsistency with EC-Regulation 44/2001, above n 56, Article 16 (1).
128 Inconsistency with EC-Regulation 44/2001, above n 56, Article 16 (2).
129 A forum selection agreement between a United States-American software company and a Dutch consumer, which determines the Courts of France as exclusive jurisdiction would be invalid, since none of the three exemptions would be given. Against this background the forum selection agreement of the software firm alturion, www.alturion.com (last accessed 15 August 2005), which determines exclusive jurisdiction for the Courts of Belgium, would be invalid in every case, where a consumer is party to the contract, who is domiciled in a European Union Member State.
130 Company A and Company B, domiciled in the United States and Egypt conclude a contract and enter into an forum selection agreement determining German Courts as having exclusive jurisdiction.
illustration it is assumed, that the EC-Regulation 44/2001 is not applicable, but only German law.131

Taking those businesses, which are covered by the consumer definition in the BGB, but on which the Hague Convention is still applicable due to its narrow consumer definition, the forum selection agreement has to meet the following requirements, based on the basic requirements a contract has to meet to be valid, since it is a procedural contract.132 This presupposes first an offer, acceptance and the incorporation of the standard business terms in the contract. An offer is defined as declaration of intention needing reception.133 Thereby this offer has to determine the content and subject in a manner that its acceptance is possible by a simple yes, which can also be made conclusive.134 In connexion with clickwrap agreements both requirements will in most cases be met.135 By the pop-up window with the contractual terms of the wrap agreement, the manufacturer of the software or e-vendor expresses an offer for using the software, service or whatsoever. By clicking on “I Agree” the offeree manifests assent to the offer and therefore acceptance of it. Further, the standard business terms, which contain the forum selection clause, have to be incorporated into the contract. That is, that the user of the standard business terms has to draw the attention of the other party to the terms and has to give this party, in a reasonable manner, the possibility of gaining knowledge of their content.136 Even though not bound to a specific form, the reference to the standard business terms has to be arranged and designed in a manner an average customer cannot overlook, even when just throwing a glance at it.137 This reference has to take place during the conclusion of the contract or beforehand.138 This leads to the necessity of the customer knowing about the terms, as opposed to the former legal practice. Those presuppositions are not satisfied, when the terms are printed on the backside of

131 This situation might not appear so often, but leads to numerous problems. See for this case and the situation where the validity has to be assessed under taking the EC-Regulation 44/2001 into consideration see Abbo Junker “Internationales Vertragsrecht im Internet” (1999) RIW 809.
132 Max Vollkommer in Ziller, above n 116, sec 38 margin No 4.
133 Othmar Jauernig and others Bürgerliches Gesetzbuch (3ed, CH Beck, München, 1984) sec 145.
134 Othmar Jauernig and others, above n 133, sec 145.
135 Except those cases, where a cat touches the mouse, steps on the mouse button and hereby clicks on “I Agree”, an unlikely, but nevertheless already happened scenario.
136 BGB, above n 111, sec 305 (1) (1),(2).
137 Helmut Heinrichs in Palandt Bürgerliches Gesetzbuch Kommentar, above n 121, sec 305 margin No 29.
138 Helmut Heinrichs in Palandt Bürgerliches Gesetzbuch Kommentar, above n 121, sec 305 margin No 30.
tickets, which are handed out after the contract has been concluded.\textsuperscript{139} This result is opposite to the abovementioned case \textit{Shute v Carnival}, which serves as cornerstone for the legal assessment of standard business terms in the United States. Additional to these requirements, the consumer must have the opportunity to take notice of the content of the standard business terms in a reasonable way.\textsuperscript{140} This rather broad requirement comprises - taking an average customer as yardstick - the readability of the terms and the need of unequivocally and coherent wording for an average customer.\textsuperscript{141} While the requirement of readability for an average customer comprises that the standard business terms shall be in a due proportion to the importance of the transaction, a text consisting of 7 pages ISO A4 format is all the same reasonable for an average customer.\textsuperscript{142} In case the standard business terms are incorporated sufficiently, they are additionally subject to a scrutiny as to their content.\textsuperscript{143} Thereby § 308 and § 309 BGB set up a catalogue of situations, where clauses of standard business terms will either depend on appraisals\textsuperscript{144} or generally be invalid\textsuperscript{145}. In case none of the requirements of those provisions are met, § 307 BGB stipulates that standard business terms are invalid, when they unreasonably disadvantage the contractual partner of the user.\textsuperscript{146} Additionally the clauses must not be surprising.\textsuperscript{147} A clause is deemed to be surprising, when it is objectively unusual and the user can not be expected to have reckoned with it.\textsuperscript{148} Of particular importance for the assessment under this aspect is the outward appearance of the contract.\textsuperscript{149}

\textsuperscript{139} Helmut Heinrichs in \textit{Palandt Bürgerliches Gesetzbuch Kommentar}, above n 121, sec 305 margin No 30.
\textsuperscript{140} Helmut Heinrichs in \textit{Palandt Bürgerliches Gesetzbuch Kommentar}, above n 121, sec 305 margin No 39.
\textsuperscript{141} Helmut Heinrichs in \textit{Palandt Bürgerliches Gesetzbuch Kommentar}, above n 121, sec 305 margin No 40.
\textsuperscript{142} Higher Regional Court (Oberlandesgericht) Köln (1997) 19 U 128/97.
\textsuperscript{143} GBG, above n 111, sec 307 - sec 309.
\textsuperscript{144} GBG, above n 111, sec 308.
\textsuperscript{145} GBG, above n 111, sec 309.
\textsuperscript{146} GBG, above n 111, sec 307; in doubt an unreasonable disadvantage is to be assumed, when a revision cannot be reconciled with essential basic principles of the statutory rule from which it deviates, or restricts essential rights or duties resulting from the nature of the contract in such a manner that there is a risk that the purpose of the contract will not be achieved.
\textsuperscript{147} GBG, above n 111, sec 305 (c) (1).
\textsuperscript{148} A clause has been hold to be surprising, when the standard business terms contained a forum selection agreement stipulating jurisdiction in Courts abroad, even though German law had to be applied; jurisdiction lacking any connection with headquarters and branch of businessperson; see Helmut Heinrichs in \textit{Palandt Bürgerliches Gesetzbuch Kommentar}, above n 121, sec 305 (c) margin No 5.
\textsuperscript{149} GBG, above n 111, sec 305 (c) (1); Helmut Heinrichs in \textit{Palandt Bürgerliches Gesetzbuch Kommentar}, above n 121, sec 305 (c) margin No 4.
Further requirements, which are shaped especially for electronic business transactions, are set up in § 312 letter (e) BGB. According to this provision the businessperson has to, inter alia, "enable the customer to retrieve and save in reproducible form the conditions of the contract including standard business terms incorporated in it upon conclusion of the contract".\textsuperscript{150} Since this does not affect the validity of standard business terms itself, but only leads in case of non-fulfilment to a different beginning of the revocation period, as far as the customer is entitled to a right of revocation,\textsuperscript{151} this provision will not be dealt with in detail.

Another requirement for the validity of the exclusive choice of court agreement is its form. § 38 (2) ZPO\textsuperscript{152} stipulates that the agreement "must be in writing or, in the event that it was made orally, confirmed in writing".\textsuperscript{153} In writing relates thereby to the meaning of writing for the purpose laid down in the EC-Regulation 44/2001,\textsuperscript{154} since its provisions were used as a pattern to form § 38 ZPO. This results in the following formal requirements.\textsuperscript{155} The forum selection agreement has to be "in writing or evidenced in writing",\textsuperscript{156} whereby "any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'".\textsuperscript{157} In this context the European Court of Justice held in \textit{Colzani v Ruwa} that standard business terms on the reverse side of a contract are – because they are not in writing or evidenced in writing – not validly incorporated in the contract, when no reference to them has been made in the contract.\textsuperscript{158} This means on the reverse that validity regarding the formal requirement "in writing" can only be assumed when the contract expressly refers to the standard terms. Transferring those principle to the pertinent case of clickwrap agreements containing forum selection

\textsuperscript{150} BGB, above n 111, sec 312 (e) (1) No 4.
\textsuperscript{151} BGB, above n 111, sec 312 (e) (3); an infringement of this duty to inform could also result in a claim for damages according to BGB sec 311 11, sec 280, which is focused on termination of contract, if the contract would not have been concluded in case of proper information.
\textsuperscript{152} Zivilprozessordnung (ZPO) – German Code of Civil Procedure.
\textsuperscript{153} Handelsgesetzbuch (HGB) - German Commercial Code sec 28 (2).
\textsuperscript{154} Actually ZPO sec 38 referred to Article 17 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention). This Convention has – except in its applicability between Denmark and the other Member States – been superseded by the EC-Regulation 44/2001. EC-Regulation 44/2001 Article 23 is largely identical with Article 17 Brussels Convention, but has taken the developments in electronic commerce into account; see also Max Vollkommer in Zoller, above n 116, sec 38 margin No 27.
\textsuperscript{155} Only those requirements set up in EC-Regulation 44/2001 Article 23 shall be displayed, which are pertinent for e-commerce, especially clickwrap agreements.
\textsuperscript{156} EC-Regulation 44/2001, above n 56, Article 23 (1) (a).
\textsuperscript{157} EC-Regulation 44/2001, above n 56, Article 23 (2).
\textsuperscript{158} Case C-24/76 Colzani v Ruwa [1976] ECR 1831.
clauses, which are entered into via a click on “I Agree”, those agreements satisfy at a first glance the requirement of being in writing or evidenced in writing by means of electronic communication, since one has to click on “I Agree”, and if one does not, one is not able to proceed with the installation or service. On the other hand the provision in the EC-Regulation might not allow such communication by electronic means, which is only durable via several steps. The underlying idea could be that the steps of highlighting the text of the agreement, which appears on the monitor, the copying and pasting of the text to a word processor and finally, the saving of this text is technically demanding and presupposes the presence of more than basic knowledge in computer applications.\footnote{see generally, even though with respect to the United Nations Convention on the International Sale of Goods Peter Kluth “UN-Kaufrecht: Keine Einbeziehung von AGB durch Abrufmöglichkeit im Internet” (2003) IHR 224, 224.} As opposed to these requirements, the Hague Convention has much lower formal requirements. It stipulates that the agreement has to be concluded or documented in writing or “by any other means of communication which renders information accessible so as to be usable for subsequent reference”.\footnote{Article 3 (c) Hague Convention on Choice of Court Agreements.} Accessibility thereby means that the information is retrievable in a way that it can be referred to on future occasions and shall include all possible ways.\footnote{Preliminary Draft Convention on Exclusive choice of court agreements Draft Report, above n 17, 20.} This paragraph has been inserted with the purpose to cover electronic means of data transmission.\footnote{Preliminary Draft Convention on Exclusive choice of court agreements Draft Report, above n 17, 20.} While it is for the purpose of the Hague Convention sufficient that the information is accessible, the pertinent provision in the ZPO – due to their origin – has somehow higher requirements. However, since many clickwrap agreements nowadays have an additional save or print button and the knowledge of computer users is increasing steadily, those cases are mainly dealt with in this paper.\footnote{Nevertheless the interesting question remains what should happen in borderline cases, where the requirements set up by the Hague Convention collide with those set up by the other instruments. Such cases could emerge, where the formal requirements are met for the purpose of the Hague Convention with its broad formality, whereas those – much narrower – set up by the ZPO and EC-Regulation 44/2001, are not.}

Finally, the exclusive choice of court agreement must not refer to subject matters, where exclusive jurisdiction is established automatically, such as actions in rem\footnote{HGB, above n 147, sec 24.}, law of rented or leased premises\footnote{HGB, above n 147, sec 24.} or environmental impacts\footnote{HGB, above n 147, sec 24.} This is congruent with the Hague Convention’s exclusions.\footnote{HGB, above n 147, sec 24.}
Summing up the requirements an exclusive choice of court agreement has to meet to be held valid under German law and one can easily see that these requirements are generally high. The requirements get even higher, when the forum selection agreement is embedded in a clickwrap agreement, which has been entered into by a consumer for the purpose of the BGB. However, in most cases all the requirements will be met, when a consumer in terms of the BGB clicks on “I Agree” in a clickwrap agreement. They pop up before a contract is concluded, give the user the possibility to read, understand and save them in a reproducible form. Additionally, choice of Court agreements are, with regard to their application, generally not deemed to be surprising in terms of § 305 (c) BGB. This militates in favour of the validity of standard business terms embedded in clickwrap agreements and containing exclusive choice of court agreements.

(ii) Business for the purpose of the BGB

With regard to those businesses, which are covered by the Hague Convention but fall under the definition of businessperson under the BGB, only some of the requirements illustrated above have to be satisfied.

First, in order to hold valid an exclusive choice of court agreement embedded in standard business terms, the latter have to be incorporated in the contract. But as opposed to the rather high requirements of standard business terms to which the other party is a consumer for the purpose of the BGB, the terms can be incorporated by any, even tacit, declaration of intent. The Appellate Court Bremen has recently decided that for the incorporation of standard business terms in B2B it is sufficient when the

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165 HGB, above n 147, sec 29 (a).
166 HGB, above n 147, sec 32.
167 Article 2 (2) (g), (i), (l) Hague Convention on Choice of Court Agreements.
169 For instance a contract with the subjet-matter of End-User-License-Agreements, setting up the contractual terms for the license agreement the user have to enter into before the installation commences.
170 In most cases the text can be saved separately, printed out directly, or at least selected and copied into another document, which then can be saved.
171 Max Vollkommer in Zoller, above n 116, sec 38 margin No 22.
172 Helmut Heinrichs in Palandt Bürgerliches Gesetzbuch Kommentar, above n 121, sec 310 margin No 4.
businessperson points noticeably to the terms and the other party does not object. These lower requirements originate in the more equal bargaining position and presence of experience in business relations. The incorporation of the standard business terms is not determined by § 305 II BGB but only § 145 BGB and the following, which govern the conclusion of a contract. Regarding the question as to whether an exclusive choice of court agreement can be concluded by a clause in clickwrap agreements it is referred to in the illustration above. The same applies to the requirements as to the formal requirements on exclusive choice of court agreements. This results in those agreements being generally valid in B2B relations.

(b) Browsewrap agreements

Browsewrap agreements can appear in two different forms. They can either appear as an inconspicuous hyperlink, which is only indicated as "TOS", but they can also appear as prominently highlighted links, which advertise that it is a link to the terms and conditions for the use of the website, software, and so on. However, due to the uncommonness of the latter, the subsequent scrutiny of browsewrap agreements will take only the former, as well as the distinction between consumer and business in terms of the BGB into consideration.

(i) Consumer for the purpose of the BGB

The validity of choice of Court agreements embedded in browsewrap agreements is determined by the same provisions as the just described validity of clickwrap agreements.

The first requirement – the presence of a valid contract – becomes difficult in cases where user just surf the web for pleasure or information. One could assume a contract sui generis between the offeror and the offeree, concluded by the offer to use the service or content of the website and implied acceptance by the usage of those

173 Higher Regional Court (Oberlandesgericht) Bremen, (2004) 1 U 68/03.
174 Terms of Service, see for example <www.nbc.com> (last accessed 18 August 2005); another example for an inconspicuous link is the website <www.barnesandnoble.com> (last accessed 18 August 2005) where the link to the terms of use is hardly visible in the lower left side of the site, held in a light grey against white background and not marked as hyperlink (that is underlined).
175 The only website which provides its standard business terms in that way found by the author is <www.amazon.de> (last accessed 18 August 2005), but not <www.amazon.com> (last accessed 18 August 2005). Nevertheless, even the former reference is not really conspicuous, has the user to scroll down the screen.
services or information.\footnote{There are several types of contract imaginable, dependant on the service or good delivered. Such can also bee freeware, shareware and so forth.} Taking this as a basis, the question as to the incorporation of the standard business terms comprising the forum selection agreement has to be answered. As stated above, the offeree has to expressly draw the attention of the user to the terms.\footnote{BGB, above n 111, sec 305 (2) (1).} It is not sufficient for this notice is a hidden or to be a mistakable hint.\footnote{Helmut Heinrichs in \textit{Palandt Bürgerliches Gesetzbuch Kommentar}, above n 121, sec 305 margin No 29.} The indications “TOS” or “terms of use” will for this purpose not be sufficient, especially not when they are not highlighted prominently, perhaps not even marked as a hyperlink or if the user has to scroll down to the end of the website to eventually see the hyperlink. Similarly it is not sufficient, when the standard business terms are merely mentioned in the homepage or website of the provider, since the offerees have to make clear that they want to conclude the contract only under incorporation of the standard terms.\footnote{Sonja Ludwig “Einführung in das Recht des Internet” (2001) Eurojuris Law Journal <www.eurojurislawjournal.net> (last accessed 18 August 2005).} This mere notice, however, does not express this intention. Therefore exclusive choice of court agreements embedded in browswrap agreements cannot be deemed to be valid. Another result would only be reached, when the offeree expressly draws the attention of the user to the condition that the contract shall only be concluded under incorporation of the terms, which are available by clicking on the hyperlink without any intermediate steps.\footnote{A suggested wording fort his situation would be ‘Users are only allowed to access this website, if they assent to its terms and conditions (to see those terms, pleas click here)’, otherwise it might be sensible in case of online orders to let customers scroll through the entire standard business terms in order to enable them to place the order.} In this case the question arises, whether those agreements would then be valid. The explicit drawing of attention as a first requirement would be met. The other requirements as to the valid incorporation seem to be fulfilled as well, so that the standard business terms would only have to meet the requirements set up in the review of subject matter described above.\footnote{As stated above this example shall not be dealt with in detail. However, a possible obstacle in holding such agreement under such circumstances valid would probably be BGB sec 308 number 5 and 6, which invalidate provisions, which contain fictitious declarations and fictional receipts.}

\begin{itemize}
\item[(ii)] Business for the purpose of the BGB
\end{itemize}

As illustrated above, the incorporation of standard business terms in B2B contracts for the purpose of the BGB does not act in accordance with § 305 BGB and the following sections, but rather is determined by the basic rules of formation of
contract. Therefore the e-vendor had to tender an offer to incorporate the standard business terms. An offer, a declaration of intention, which needs reception, could be seen in the display of the hyperlink. This hyperlink, not displayed prominently or highlighted otherwise, however, comprises no clue that the user of the service or product shall be subjected to any obligations or enters into an exclusive choice of court agreement. Therefore the reception of the declaration of intention is denied. Even against the background that an incorporation can take place by every tacitly concordant act of volition, the user must at least have had the opportunity to notice the intention of the vendor to include the standard business terms.

In 2002 the Higher Regional Court (Oberlandesgericht) Hamburg decided that it is not sufficient to enable the contracting party to find the standard business terms during a visit on the internet presence. The Court pointed out that the businessperson has to indicate transparently the standard business terms and his or hers intention to incorporate them. This could for instance happen by linking the terms with the offers or arranging and designing them in a way that every user has to pass them. Thereby the Court did not set up which requirements as to the unambiguousness of the link have to be met. In this case a picture agency sold pictures via internet to a TV guide. The latter used those pictures not only in the magazine, but also on its internet presence. The picture agency referred to its standard business terms, according to which an unauthorised use of the pictures leads to a forfeit and claimed this forfeit in a lawsuit against the publisher. Thereby the standard business terms were only available on a lower level of its website without any link to the homepage or to the websites. In 2003 the Regional Court (Landgericht) Bremen decided that the use of standard business terms in cases where the other party is a businessperson requires for their validity any, even tacitly concordant of act of volition. But it also emphasised the requirement of the party using the terms, to - not expressly - but noticeably, point to the standard business terms. If this requirement is met and the other party does not disagree, one could assume a valid incorporation.

183 Higher Regional Court (Oberlandesgericht) Hamburg, (2002) 3 U 168/00; see also Federal Court of Justice (Bundesgerichtshof) 102 (2003) 293, 304.
186 Regional Court (Landgericht) Bremen (2003) 7 O 733/03.
As above, even though the requirements are lower, the widespread form of hyperlinks for the browsewrap agreements, will in most cases not allow those agreements to be deemed valid. However, the question as to the validity of browsewrap agreements, which are referred to by a clear and unmistakable notice, remains here as well. The German Federal Supreme Court (Bundesgerichtshof) has decided for the reference to standard business term on the reverse side of contracts, that those shall be valid in business relations.\textsuperscript{187} This has been transferred to internet cases by different opinions in the literature, which argue that the availability of browsewrap agreements by clicking on a hyperlink, pointing to them, shall be sufficient for valid incorporation.\textsuperscript{188} This has been continued with a decision of the Higher Regional Court (Oberlandesgericht) Bremen, which held it to be sufficient to point in a paper contract to standard business terms, which are available under a defined uniform resource locator (URL).\textsuperscript{189}

In conclusion there have not been any decisions in the area of browsewrap agreements in Germany so far. However, one will expectedly have to distinguish between browsewrap agreements which have been expressly referred to and those, where this has not happened. While the former can be expected to be held valid, the latter is unlikely to be held valid.

\begin{flushleft}
\textbf{(c) Conclusion}
\end{flushleft}

As has been illustrated, the results of the assessment whether or not exclusive choice of court agreements are valid is strongly influenced by the distinction between consumer and business for the purpose of the BGB. However, since there have not been many decisions in this new area, future decisions will determine the direction. It can be assumed that those browsewrap agreements, not meeting the requirement as to the formation of contract, will not be held valid. This is likely to present an obstacle for the validity of browsewrap agreements, if they have not been expressly referred to. Clickwrap agreements containing forum selection agreements on the other hand are in most cases likely to be held valid in B2B relations. When a consumer for the purpose

\textsuperscript{187} Federal Court of Justice (Bundesgerichtshof) NJW-RR (1987) 112, 114.
\textsuperscript{188} Stephan Ott “Informationspflichten im Internet und ihre Erfüllung durch das Setzen von Hyperlinks” (2003) WRP, 945, 954.
\textsuperscript{189} Higher Regional Court (Oberlandesgericht) Bremen (2004) I U 68/03.
of the BGB is party to the contract, however, this cannot be taken for granted. This results in the following situation. Clickwrap agreements will in almost every case be held valid, no matter whether B2B or B2C.\footnote{Whereby B2C comprises only consumers for the purpose of the BGB, not for the purpose of the Hague Convention.} Browsewrap agreements on the other hand will in B2C generally be held invalid, whereas in B2B they will only be held valid if expressly referred to.

So the question arises whether these problems could be solved by the above proposed amendment of the consumer definition. If consumers would be, as suggested, characterised as natural persons, the consumers for the purpose of the BGB would be excluded, too. This led to the limited applicability of §§ 305 and the following BGB, which resulted in much lower requirements as to the incorporation. However, the problems as to the explicit reference to the terms would remain, since the other provisions would not be applicable.

4 \textit{Summary as to agreement for the Hague Convention}

Comparing the approaches of the United States as precursor of internet and internet-related jurisdiction and Germany, one comes to the result that both approaches resemble each other in many parts. However, probably the main difference is the distinction between consumer and business drawn in Germany and not used in the United States.\footnote{And via the EC-Regulation 44/2001 actually throughout all European Union Member States.} By this distinction the requirements set up to hold exclusive choice of court agreements valid are extremely high, especially for consumers for the purpose of the BGB, as opposed to the United States. It can be concluded that – despite the resemblances in the approaches – the results of the assessment of the validity of forum selection agreements will vary greatly on whether they are assessed by the law of the United States or Germany. This will eventually lead to problematic situations once the Hague Convention is ratified and comes into force. The Hague Conference Member States would have to recognise and enforce exclusive choice of court agreements, which are, according to their law invalid. As has been examined, the United States do not attach so much importance to consumer protection, whereas this is a common purpose within the European Union. The United States will hold clickwrap agreements unexceptionably valid, while browswrap agreements are likely to be held generally invalid. Even though the Hague
Convention holds, as mentioned before, some escape clauses in store, their requirements are very high. The court seized is only allowed to refuse recognition and enforcement, when this “would be manifestly incompatible with the public policy of the requested state”,\textsuperscript{192} which includes situations, where judgments are “incompatible with fundamental principles of procedural fairness of that State”.\textsuperscript{193} It seems more than questionable whether the abovementioned problems with the overlap of consumer for the purpose of the BGB and business for the purpose of the Hague Convention will create such a situation. If it would, the purpose of the Hague Convention would not be fulfilled. If it would not, the purpose would be met, but it would lead to serious inequalities for those groups which are consumers for the purpose of the BGB. Here the suggested amendment of the consumer definition in the Hague Convention would lessen the different treatment of forum selection clauses. Since the legal assessment of browsewrap agreements is handled similarly in the United States and Germany, it would at least result in a more homogeneously treatment of these instruments. Therefore the proposed amendment of Article 2 Hague Convention would produce relief for this issue too.

Another possible solution would be to insert a new provision, which stipulates the requirements exclusive choice of court agreements have to meet to be deemed valid. However, this undertaking seems difficult against the background that consensus had to be reached on such a provision between the 65 member states. Such consensus is highly unlikely when one takes the different requirements as to a valid forum selection agreement in the member states into consideration. Additionally, this provision would interfere with the basic principle of the Hague Convention not to govern substantial, but only procedural law.

\textbf{C \hspace{1em} Review of the suitability of the Hague Convention as to e-commerce}

The Hague Convention in its current form does not fit the needs of e-commerce. This is ascribed, inter alia, to the legal definition of consumer in Article 2 (1) (a) Hague Convention, which is too narrow. It includes non-profit organisations as well as one-person and other small businesses and thus, leads to manifest injustices. The problems, which emerge from the United States and Germany having taken different approaches towards the assessment of whether or not forum selection

\textsuperscript{192} Article 9 (e) Hague Convention on Choice of Court Agreements.
\textsuperscript{193} Article 9 (e) Hague Convention on Choice of Court Agreements.
agreements are valid, were illustrated. Once the Hague Convention enters into force, the different results of the assessment lead to serious inequality and inconsistency. These in turn result in uncertainty and hesitation particularly for small vendors using the electronic market and finally hinder the further development of this branch of the economy. An amendment is suggested, which excludes non-profit organisations and natural persons. However, this is in the knowledge that this could also have the opposite effect. It has been recognised that this would, in the end, abolish more inequalities than it would create. Additionally, this amendment would also lessen the difference in the treatment of the assessment whether or not forum selection clauses in wrap agreements are valid. The other alternative to introduce a new provision, which stipulates the requirements when an exclusive choice of court agreement is valid, is hardly, if at all, feasible.

V CONCLUSION

This paper has dealt with the question of whether the Hague Convention meets the specific requirements of e-commerce. It has been argued that against the narrow definition of consumer and the passing on of the assessment of the validity of those agreements to the courts of the state of the chosen court, two considerable problems emerge. First, the Hague Convention contravenes consumer protection in nearly the entire European Union. Second, the different approaches as to the legal assessment of exclusive choice of court agreements lead to uncertainty the side of small businesses. This has been illustrated by the examination of the approaches the United States and Germany take.

These problems present obstacles for the further development of e-commerce and hinder the participation of small and one person businesses as well as non-profit organisations. They are not able to assess the risks they have to take when acting internationally. But internationality is one of the most important values of e-commerce. When the aforementioned groups fear to be subject to foreign jurisdictions via enforceable agreements, without having the possibility bargain, it is highly likely that they will rather withdraw from further participation and focus either on a non-virtual line of business or limit their online business to their home jurisdiction. The advantages provided by e-commerce will then be lost to a large extent.
By means of an amendment of Article 2 Hague Convention many of the emerging problems were solved. It is proposed that this article should explicitly exclude natural persons and non-profit organisations. Thus, one-person businesses and non-profit organisations would get the protection they deserve. The European consumer protection would not present an obstacle to hold exclusive choice of court agreements invalid. The Hague Convention then addresses the specific requirements of e-commerce better. Additionally, to expand the protection to small businesses, it is proposed to find a definition, which demarcate those deserving protection from those, which do not.

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