ANNEX B

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Memorandum

TO: Ottawa II Participants

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CHOICE OF COURT AND CONSUMER CONTRACTS - ANNOTATED VERSION

Annexed to this memorandum are:

- an annotated version of the redrafted Article 7 presented to the Ottawa informal meeting in February/March 2001 by the consumer jurisdiction working group (the homework set by Mr Trooboff, as participants will recall!);

- a suggested redraft of Article 7 to reflect the concerns raised about certain ambiguities and errors, in the course of discussion on Thursday 1 March 2001. The redraft is not (except in one respect) intended to alter the policy underpinning the group's draft, but rather to ensure that that policy is more accurately and more clearly expressed.

The one respect in which the redraft takes a different policy direction from the Ottawa draft results from the work done preparing an annotated version of that draft. In the course of that work, it became apparent that the proposed Art 25 bis did not operate in a satisfactory way where a consumer seeks to enforce a judgment obtained on the basis of Art 7(2) in a State other than the habitual residences of the consumer and the business. One solution to this difficulty would be to adapt Art 25 bis to provide for declarations by States in relation to enforcement of judgments under Art 7(2) where there was a forum clause designating a court other than the court of origin. The redraft has been prepared on this basis, not as a proposal but simply to stimulate debate. This issue, and the best approach to solving it, require considerable further analysis and discussion.

The objective of the redraft is to provide a useful basis for future discussions. Suggestions for ways in which it could be clarified, or improved in other ways to advance that goal, are very welcome.

CHOICE OF COURT AND CONSUMER CONTRACTS

Version 0.4a (presented to Plenary Session)

NOTE: The use of square brackets in this text indicates matters which require further consideration.

Article 7

1. This Article applies to contracts concluded between a [natural][1] person who concludes a contract for personal, family or household purposes,[2] (the consumer), and a person who concludes a contract for the purposes of its trade or profession[3] (the business) [, unless the business demonstrates that it neither knew nor had reason to know that the consumer was concluding the contract for personal, family or household purposes[4] and would not have entered into the contract if it had known otherwise[5]].

2. A consumer may bring proceedings in the courts of the State in which it is habitually resident[6] if the conclusion of the contract to which the claim relates

[arises out of
was entered into as a result of
falls within the scope/framework of][7]

activities which the business engaged in in that State, or directed to[8] that State [, unless:[9]

a. the consumer took the steps necessary for the conclusion of the contract in another State;[10] and

b. {all steps by the parties to perform the contract were taken in that other State}[11]].

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

a. includes the promotion, solicitation or negotiation of a contract;[12] and

b. [shall not be regarded as being directed to a State if the business demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in that State.][13]

4. Subject to paragraph (5), a business may bring proceedings against a consumer under this Convention only in the courts of the State in which the consumer is habitually resident.[14]

5. Article 4 applies to an agreement between a business and a consumer only:[15]

a. if the agreement is entered into after the dispute has arisen;[16]

b. to the extent that it allows the consumer to bring proceedings in the courts of a State other than the State in which the consumer is habitually resident;[17]

c. [if at the time the agreement is entered into, both the consumer and the business are habitually resident in the same State, and the agreement confers jurisdiction on the courts of that State, provided that the agreement is not contrary to the law of that State; or][18]

d. to the extent that such agreements are binding on the consumer under the law of the State in which the consumer is habitually resident.[19]

Article 25

"Subject to Article 25 bis ..."[20]

[**Article 25 bis**[21]

Recognition or enforcement of a judgment may be refused if the judgment was rendered under Article 7 by a court other than a court designated in an agreement [entered into before the dispute arose] which conforms with the requirements of Article 4 and which is enforceable under the law of the State of the court addressed.]

[1] In the group's report to the meeting it was suggested that the word "natural" might be superfluous, since it was difficult to imagine a person other than a natural person entering into contracts for personal, family or household purposes. Subsequent discussion suggested that, though infrequent, such cases do occur – for example where a corporation is formed to own a family farm including the farmhouse, or to own a shared holiday home, or where a professional owns a house via a trust with a corporate trustee as a form of asset protection in jurisdictions where incorporation by professional firms is not permitted. Thus there is a policy choice to be made here, which will determine whether or not the word in square brackets is retained: should the protection conferred by the clause be confined to natural persons, or should it extend to other vehicles for entering into contracts for personal, family or household purposes? This issue will need to be discussed at a future meeting.

[2] The group felt that defining a "consumer" by reference to the positive concept of contracting for personal, family or household purposes, rather than by reference to the negative concept of contracting "outside its trade or profession" (as in the October 1999 draft), was simpler and clearer. In particular, it seems likely that businesses dealing on the internet will want to ask those with whom they deal questions designed to shed light on whether those persons are consumers – most individuals will find it much easier to answer the question "are you buying this for personal, family or household purposes?" than the question "are you buying this for purposes other than your trade or profession?" The latter question requires the respondent to have some idea of what is meant by "trade or profession", and to understand and respond to a question framed in a negative rather than a positive form. So the proposed definition is likely to permit more "user-friendly" questions.

[3] Article 7 is concerned only with contracts between consumers and businesses, and not with consumer to consumer contracts. So an integral element of its application is that one party be a business – defined here as a person concluding a contract for the purposes of its trade or profession. The possibility of defining a business as a person contracting other than for personal, family or household purposes was considered by the group, but rejected on the grounds that this might be broader than the preferred definition, could well cause confusion, and might lead to the Article being applied in inappropriate cases.

[4] The words in square brackets before this note take their inspiration from the Vienna Sales Convention (Art 2(a)) and the Hague Sales Convention (Art 2(c)).

The argument for their inclusion is that they would enable businesses dealing at a distance, in particular over the Internet, to achieve greater certainty as to whether this Article applied, and in particular whether or not a forum clause included in the contract would be effective. The working group did not adopt the suggestion made by some participants in the plenary session that the convention should provide for binding self-identification as a consumer, or binding declarations that a contract is not being entered into for family etc purposes. It was felt that that proposal went too far in effectively enabling consumer s to "opt out" of the protection which Art 7 is intended to confer. But it was suggested by some that the words in square brackets went some way to addressing the concerns of businesses to achieve greater certainty and predictability, without unduly trenching on consumer protection objectives.

Many members of the working group felt that the words in square brackets probably should not be included in the Article, as they added little to the proposed new para 3(b), and made the Article significantly more complex. Some considered the inclusion of the words to be positively undesirable, and prejudicial to the protection of consumers. It was pointed out that the words are taken from conventions that do not apply to contracts to which a consumer is a party, and that their inclusion in Art 7 for the different purpose of delimiting the scope of consumer protection provisions in a convention which does apply to consumer contracts would have more far-reaching effects on consumers.

However it was decided that it was useful to retain the words in this discussion draft, as a focus for consultation and further debate.

[5] The final words within square brackets were proposed by some members of the working group on the basis that if the business would have contracted with the other party even if the business had known that the other party was a consumer, albeit on different terms and conditions, then the business

was willing to contract on the basis that Art 7 would govern jurisdiction, and had no basis for objecting to the application of that Article. The business might well be able to argue that it would have contracted on different terms, and that the misstatement made by the consumer either affected the consumer's entitlement to the relief claimed, or rendered the consumer liable to the business. But the business could reasonably, in these circumstances, be required to make that argument before a court that it was prepared to submit to if the other party was a consumer. The group did not consider this argument in detail, but agreed that the qualification should appear in the square brackets as a focus for consultation and further debate.

6 Para 2 sets out the circumstances in which a consumer can bring a claim under the Convention in his or her habitual residence, subject to the provisions in relation to choice of forum clauses in para 5. This is a white list ground of jurisdiction – any resulting judgment in favour of the consumer will be enforceable under the Convention, subject to Art 25 bis (discussed below). Note that this is not an exclusive jurisdiction – the consumer is able to bring a claim in other white list fora such as the habitual residence of the defendant, or the State in which a branch is situated, or under the Articles concerned with jurisdiction in contract cases or jurisdiction based on activity carried on in the forum (subject to any effective choice of forum clause under para 5).

7 The group did not have time to discuss the precise words to be used to link the conclusion of the contract with the activities that the business engaged in in the forum, or directed to the forum. (The words used in the October 1999 draft were "is related to".) The words set out in square brackets indicate varying degrees of relationship between the activities and the conclusion of the contract. The phrase "falls within the scope of" is drawn from the new Brussels Regulation (Art 15(1)(c)), and the alternative phrase "within the framework" is found in the Commission's statement in relation to the new Art 15. The appropriate degree of connection, and the words to be used to describe it, require further discussion.

8 There has been considerable criticism of the use in Article 7 of the concept of activities "directed to" a State, on the grounds that where a business advertises or transacts using the Internet it can be described as directing its activities to the world at large, with the result that this is no longer a meaningful limit on the operation of Art 7. The working group felt that this concern was, on closer examination, primarily a concern that businesses be able to make a conscious and effective decision *not* to deal with particular jurisdictions, rather than indicative of a need to be able to identify particular States that are being targeted. This concern is addressed in para 3. Although the concept of directing activities is somewhat imprecise, and will often be satisfied in every State where a business makes use of the Internet, the group felt that this was the most appropriate term to use for the purposes of para 2. It may well be the best we can do, in any event: no more precise term which led to appropriate results was identified in the course of the group's discussions.

9 The exception to para 2 set out in square brackets was the subject of considerable discussion by the group. No firm conclusion was reached, but it was felt that it would be helpful to include the text in square brackets to indicate the nature of the issues that were considered, and to stimulate further discussion of those issues.

The basic idea that prompted the proposal to include text along these lines was that there should be a "safe harbour" within which Art 7 did not apply, for what could loosely be described as "purely domestic transactions, so far as the business was aware". The paradigm case given was where a consumer has seen (while at home in her habitual residence) a website advertising the business, then later visits the city in which the business has retail premises, sees the premises while walking past, remembers the name, goes in, and makes a purchase face to face, over the counter. In such a case the business has no reason to expect that it is entering into a contract to which Art 7 might apply, and exposing itself to jurisdiction in the consumer's habitual residence – and it is not alerted to the possible need to modify the contract to reflect this exposure.

Some members of the group felt that in cases such as these, there was an insufficient link between the activities of the business directed to the consumer's habitual residence, and the conclusion of the contract, with the result that para 2 would not apply in any event. Others pointed out that this depended on the strength of the connection required by para 2 – if a site is intended to encourage potential visitors the

world over to visit the store, would the resulting sale "arise out of" the activities? would it be within the framework of the activities? the lively debate in the group suggested that, at the least, there was room for some uncertainty here! One important conclusion that can be drawn, however, is that the tighter the required link between activity directed to the consumer's habitual residence and the contract concluded by that consumer, the less the need for any such safe harbour.

There was also much discussion of the proper scope of the "safe harbour". It was generally felt that Art 7(1)(b) of the October 1999 draft, which limits the application of Art 7 to cases where the consumer "has taken the steps necessary for conclusion of the contract in [the State in which the consumer is habitually resident]" is too restrictive. A New Zealand consumer buying software online from a US company which deals worldwide should not be treated differently if the contract is concluded, and the software downloaded, while that New Zealander is on a short trip to Australia, to take one example discussed by the group. The October 1999 draft would deny protection in such a case. The words in square brackets would not be satisfied in that example, however, since the supplier took steps to perform in the US, by transmitting the software from the US.

It proved difficult to identify boundaries for the "safe harbour" that could not be shown to operate in an artificial way in some cases, and that did not depend on the use of language that some group members found vague and unhelpful, especially in the context of internet transactions. In particular, reference to place of performance (in subpara (b), within double brackets) was considered particularly unsuited to Internet transactions. Some members of the group argued forcefully that this concern was not resolved by speaking of "steps by the parties to perform the contract", while others felt this was a more factual and more workable concept. Another concern raised was that if "steps to perform" was given a wide interpretation, the exception might not apply to a purely domestic transaction simply because a phone call or internet message was routed via another State (though others doubted that this was a step taken by a party).

It seems clear that the need for a "safe harbour" for dealings which appear to the business to be purely domestic requires further consideration and debate, as does the drafting of any provision along these lines.

[10] This is simply the requirement in subpara 7(1)(b) of the October 1999 draft, expressed in negative terms.

[11] There were significant issues as to the meaning and appropriateness of this subpara: see note 9 above.

[12] This subpara ads little if anything to the concept of activity directed to a State, and is included merely as a helpful and non-exhaustive illustration of the types of activity contemplated. Compare the reference to "soliciting business through means of publicity" in the October 1999 draft.

[13] Subpara (b) is based on the approach used by securities regulators in some countries, and employed by the International Organisation of Securities Commissions (IOSCO), to ascertain whether an offer of securities is addressed to the public in a particular jurisdiction for he purposes of regulation of retail offerings of securities. The idea is that a business can, by appropriate means, make it clear that it does not intend to deal with consumers in one or more identified States – thus enabling the business to manage its exposure to jurisdiction in certain States.

The requirement that the business have taken "reasonable steps" to avoid contracting with consumers in the State is technology neutral, and can evolve as technology changes and as the legal environment changes (eg changes in privacy laws, affecting what it is reasonable for businesses to ask and to retain). Depending on context, such steps might include inquiries of the consumer, checking Internet Protocol (IP) addresses, checking credit card numbers, requiring an address to be provided, requiring a telephone number to be provided, and so forth. The requirement would not be satisfied if, for example, the business merely asked consumers where they were resident but turned a blind eye to factors indicating a different place of residence, or deliberately sought not to discover the true position.

The group felt that subpara (b) was potentially a significant step towards providing businesses with better tools to manage jurisdictional risk, without prejudicing consumer protection objectives. However the concept was new to many participants, and requires further consideration and evaluation in the light of consultation, and investigation of experience to date in the securities field.

[14] Para 4 is intended to provide that the only white list jurisdiction available to a business bringing a claim against a consumer (a rare event, but not inconceivable) is the consumer's habitual residence (or, if there is a forum clause which is effective under para 5, the chosen forum). The drafting of para 4 requires some improvement, to ensure it clearly achieves this objective.

The words "under this convention" make it clear that para 4 does not affect the ability of a Contracting State to exercise grey zone jurisdiction in a claim by a business against a consumer – thus allowing a Contracting State to exercise grey zone jurisdiction on the basis of a forum clause which is not effective for Convention purposes under para 5. (As noted in the plenary discussion at Ottawa, the working group's tacit assumption was that the reference in Art 17 to Art 7 would be omitted.)

One issue that was not addressed by the working group was whether the grey zone preserved by para 4 should apply *only* where there is a choice of another forum (the case that motivated the provision for a grey zone), or whether para 4 should also open up the possibility of grey zone jurisdiction on other grounds in claims by a business (as on its face it appears to do). This requires further consideration.

[15] Para 5 specifies the circumstances in which a forum clause in a contract between a consumer and a business will be effective to confer exclusive jurisdiction on the chosen court, thus excluding the forum provided for in para 2 (as well of course as any other fora that might have applied under other provisions of the Convention).

[16] Subpara (a) is found in the October 1999 draft, and is uncontroversial.

[17] Subpara (b) ensures that if there is a forum clause, the consumer can bring a claim in the chosen forum if the consumer wishes to do so, and will be able to enforce the resulting judgment under the convention. In other words, forum clauses always operate in favour of the consumer.

[18] This new subpara is based on Art 17(3) of the Brussels Regulation. It is intended to ensure that where there is a purely domestic transaction (eg where a Canadian bank lends to a Canadian resident) and there is a submission to the courts of the one State with a connection with the transaction (in our example, the courts of Canada), a subsequent change of habitual residence by the consumer (eg a move to the United States) does not prevent the other party from relying on the forum clause and bringing proceedings in Canada under Art 4.

[19] Subpara (d) is a significant new provision, which enables a Contracting State to determine under its national law the extent to which its habitual residents will be bound by forum clauses. This development of the "Geneva proposal" preserves the status quo on this controversial issue for States which treat such clauses as always ineffective (subpara (d) will never apply to a French consumer, for example), and for States which enforce such clauses against consumers in some cases (eg the United States, and some other common law countries). As noted in the plenary discussion, the test should be applied at the time the contract is entered into: the redraft makes this clear.

One concern expressed in relation to this subpara was that it refers the question to national law, and renders the operation of Art 7 dependent on the application of national law. (And as pointed out in the plenary discussion, advising a consumer on the prospects of recovery could require advice on two different national laws – one for the purposes of Art 7(5)(d), and the other for the purposes of Art 25 bis.) This concern is justified: reference to national law is a last resort in any Hague convention. But reference to national law seems hard to avoid without creating even greater problems. The only alternatives are attempting to codify agreed principles for enforcement of forum clauses in consumer contracts – which seems an impossible task at present – or some sort of declaration regime. One option might be for each State to declare whether or not forum clauses are binding on consumers who are habitually resident in that State. But few if any States consider that such clauses are always valid, or want to expose their

consumers to unqualified enforcement of such clauses: if the status quo conditions for validity under each State's laws are to be preserved for the habitual residents of that State, references in the declarations to national law would be inevitable – we would back where we started.

Alternatively, States might be permitted to declare that they will treat Art 7(2) jurisdiction as not being available whenever there is a forum clause designating a forum other than the consumer's habitual residence, without reference to the clause's validity. This approach is possible, but the main objection to it is that it will result in an overly broad exclusion of judgments from enforcement under the convention even in circumstances where every State concerned would agree that the particular clause is ineffective.

The concern about reference to national law is somewhat reduced by the observation that the issue will arise primarily where a consumer brings proceedings in the consumer's habitual residence, and the business challenges her right to do so – so it will be the law of the forum that the court will be applying to determine this issue. The para 5(d) test is not relevant to the ability of the consumer to sue in a contractually designated forum, since this is permitted in any event under subpara (b). Nor will the issue normally arise at the jurisdiction stage where the business proceeds in the chosen court, and this is challenged by the consumer: the ability of the court to hear the claim will typically depend on national law, preserved by para 4 in this respect, and not on whether or not para 5(d) applies. But the possibility cannot be excluded: suppose a French business sells data to a US consumer via the Internet, and the contract contains a choice of forum clause designating the French courts. If the business proceeds against the consumer in France in reliance on the clause, and French law allows this if and only if our Convention renders the choice valid, the French court would have to apply US law in applying para 5(d). And of course the question of national law of another State could well arise at the enforcement stage, if the consumer does not voluntarily appear and an attempt is made to enforce the judgment in another Contracting State: the judgment will be enforceable under the Convention if and only if one of the limbs in para 5 is satisfied.

[20] This amendment to Article 25 qualifies the enforceability of white list judgments by reference to the new Art 25 bis, set out below. It is somewhat unorthodox in terms of the structure of the Convention to provide that white list jurisdiction may not lead to an enforceable judgment – but this approach appears to be an economical, and reasonably clear and simple, method of achieving the compromise position that was canvassed in Basle in December 2000.

[21] This new Article allows (but does not require) a State to decline to enforce a judgment given under Art 7(2), where there was a forum clause designating a court other than the court which gave the judgment, and under the law of the State of the court addressed that clause would be enforceable against a consumer. (The drafting is not beyond criticism – the provision could be read to apply where there is *no* forum clause. This was not the group's intention, and the attached redraft more accurately reflects the provision's objectives.)

A few illustrations may be helpful.

First, suppose a German consumer buys software from a US business, via the Internet, and the standard terms applicable to contracts entered into through the website provide for exclusive jurisdiction in the courts of New York. The consumer can sue in New York, and the white list will apply, by virtue of Art 7(5)(b): the resulting judgment will be enforced in every Contracting State. The consumer can also initiate proceedings in Germany by virtue of Art 7(2): we can assume the conditions in that para will be met, and none of the limbs of para 5 apply. In particular, para 5(d) does not apply as under German law such clauses are not binding on consumers (in the usual way, the reference to German law must be treated as a reference to German domestic law, excluding conflicts rules). So the German court will proceed to hear and determine the claim.

Putting to one side the question of voluntary appearance by the business, what will happen when the consumer seeks to enforce the judgment in the US? The US Court must enforce the judgment unless it finds, under Art 25bis, that the forum clause in question would be treated as binding under US law on that consumer. Many forum clauses are not treated as binding on consumers under US law – so the judgment may well be enforceable.

What is the position in the unlikely event that the business seeks to sue the consumer? The business can sue in Germany, the consumer's habitual residence, under Art 7(4). If the business seeks to sue in the US on the basis of the choice of the courts of New York, there is no white list jurisdiction (Art 7(5) does not apply) but there may be grey list jurisdiction as permitted by Art 7(4), depending on the law of New York. Any resulting judgment would, as a grey list judgment, not be enforceable in Germany or other Contracting States.

Second, consider the converse case of a German business, US consumer, and a forum clause (in otherwise identical terms) designating German courts.

If the US consumer wishes to sue in Germany, she can do so under the Convention by virtue of Art 7(5)(b), and the resulting judgment will be enforceable in every Contracting State.

If the US consumer seeks to sue in the US, on the other hand, the business may oppose this in reliance on the forum clause, invoking Art 7(5)(d). The US court will determine whether the forum clause is binding on the US consumer. If it is binding, the US court will decline to hear the claim, and there will be no judgment. If it is not binding under US law, Art 7(2) applies and the claim can proceed: the resulting judgment will be enforceable in other Contracting States. Notice the symmetry of the outcomes here.

If (exceptionally) the business seeks to sue the consumer, as in the first example there is no problem if the business sues in the consumer's habitual residence – in this case, the US. If the business seeks to proceed in Germany, in reliance on the forum clause, the German court will need to inquire whether the forum clause is binding on the consumer by virtue of Art 7(5)(d): if it is, the German court will hear the claim and its judgment will be enforceable under the Convention. If the German court concludes that the clause is not binding on the consumer under US law, it could entertain the claim under national law (ie on grey list grounds) – but there may not be any applicable grey list ground under German law, in which case the courts will not hear the claim. (Notice that the German court does, in this rare situation, face the unenviable task of ascertaining and applying the US law on this difficult topic.)

Finally, let us return to the first example, but suppose that after judgment is given in favour of the consumer in Germany under Art 7(2), the consumer seeks to enforce the judgment in Canada, where the US business also has significant assets. The Canadian court is required to ask whether the forum clause would have been enforceable under *Canadian* law. The working group's general approach was that States which treated forum clauses in consumer contracts as effective would not enforce the German judgment, while those which do not treat such clauses as effective would enforce the German judgment: hence the reference to the law of the court addressed. But this simple duality breaks down when one considers the possibility of different laws providing for enforceability under different conditions. With this in mind, the reference to Canadian law seems somewhat odd, as Canada has no interest in applying its regime of consumer protection to this issue, and the forum clause is unlikely to have been drafted with the relevant conditions in mind. Nor can this be seen as a reference to the law which Canada would apply to the question of enforceability under its private international law rules: that would be an essentially circular enquiry, since the answer would presumably be that this issue fell to be determined by reference to the Convention.

The working group did at one stage briefly consider limiting Art 25 bis to the situation where the court addressed is the court chosen in the forum clause: this eliminates the problem of reference to a third system of law, but effectively requires States that consider forum clauses to be effective to disregard those clauses in many cases, inconsistently with what they perceive to be their common interest in giving effect to such clauses, and not permitting them to be circumvented by enforcement in any State but the designated State.

This illustration seems to highlight a significant problem with the clause. How can it best be resolved? This issue requires further analysis and discussion.

One possible solution would be a declaration regime, under which States are required to declare whether or not they will enforce *under the Convention* a judgment given on the basis of Art 7(2) by a court in State A in circumstances where the parties have entered into a forum clause designating State B's courts,

without reference to the validity of the clause under any system of national law. This recreates the binary choice that the working group had in mind in the course of its work. Of course nothing would prevent a State which entered such a declaration taking a more nuanced approach to enforcement under national law: the declaration would only relate to enforcement under the Convention. Notice also that this is not quite so crude a mechanism as declarations in respect of the exercise of jurisdiction, since in cases where a forum clause is ineffective in the US, for example, the US court would hear a claim brought by a consumer in the US and the resulting judgment would be enforced in States which had not entered a declaration.

The attached redraft seeks to give effect to this approach.

CHOICE OF COURT AND CONSUMER CONTRACTS

Version 0.5 (incorporating drafting suggestions arising out of discussions of the draft presented to the Ottawa II meeting, and further analysis of that draft)

NOTE: The use of square brackets in this text indicates matters which require further consideration.

Article 7

1. This Article applies to contracts concluded between a [natural] person who concludes a contract for personal, family or household purposes, (the consumer), and a person who concludes a contract for the purposes of its trade or profession (the business) [, unless the business demonstrates that it neither knew nor had reason to know that the consumer was concluding the contract for personal, family or household purposes and would not have entered into the contract if it had known otherwise].

2. A consumer may bring proceedings in the courts of the State in which it is habitually resident if the conclusion of the contract to which the claim relates

   [arises out of

   was entered into as a result of

   falls within the scope/framework of]

   activities which the business engaged in in that State, or directed to that State[, unless:

   a. the consumer took the steps necessary for the conclusion of the contract in another State; and

   b. {all steps by the parties to perform the contract were taken in that other State}].

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

   a. includes ~~the promotion, solicitation~~ soliciting business by means of publicity, and ~~or~~ negotiati~~on~~ng ~~of a~~ contract~~s~~; and

   b. [shall not be regarded as being directed to a State if the business demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in that State.]

4. ~~Subject to paragraph (5), a~~ A business may bring proceedings against a consumer under this Convention only:

   a. in the courts of the State in which the consumer is habitually resident; or

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

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

   a. if the agreement is entered into after the dispute has arisen;

   b. to the extent that it allows the consumer to bring proceedings in the courts of a State other than the State in which the consumer is habitually resident;

   c. [if at the time the agreement is entered into, both the consumer and the business are habitually resident in the same State, and the agreement confers jurisdiction on the courts of that State, provided that the agreement is not contrary to the law of that State; or]

   d. to the extent that such agreements are binding on the consumer under the law of the State in which the consumer is habitually resident at the time the agreement is entered into.

Article 25

"Subject to Article 25 bis ..."

[**Article 25 bis**

1. [A Contracting State may make a declaration that it will not recognise or enforce a judgment under this Chapter, or a declaration specifying the conditions under which it will recognise or enforce a judgment under this Chapter, where:

   a. the judgment was rendered by the court of origin under Article 7(2); and

   b. the consumer and the business had entered into an agreement which conforms with the requirements of Article 4 designating a court other than the court of origin.

2. Recognition or enforcement of a judgment may be refused by a Contracting State that has made a declaration contemplated by paragraph 1 in accordance with the terms of that declaration. ~~if the judgment was rendered under Article 7 by a court other than a court designated in an agreement [entered into before the dispute arose] which conforms with the requirements of Article 4 and which is enforceable under the law of the State of the court addressed.~~]