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University of Helsinki  
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**Dispute Resolution in International  
Electronic Commerce**

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Licentiate of Laws

ACADEMIC DISSERTATION

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## PREFACE

A preface is a crossing. It is the first page to introduce the reader to a venture upon which the writer embarked years before. For the author, it signifies the closing of a chapter in his life, of an academic journey, where he has followed a path, sometimes wondering for several months and sometimes producing an astonishing number of pages per day. Although the work of the writer often seems to be a very solitaire task, the luckiest writers have an institution and funding to support them, but most of all, a network of persons around them without which the writer would have never made it to the preface.

The present research project was carried out at the Institute of International Economic Law, University of Helsinki with the generous financial support of the National Technology Agency of Finland (TEKES), Merita Bank (now Nordea Bank Finland), Telia Finland, the Promotional Foundation of the Telecommunication (TAES), the Foundation for Legal Research (Oikeustieteen tutkimussäätiö) and the University of Helsinki. It is to all of them that I remain in gratitude.

I am grateful to many people, but unfortunately have not the space to name them all. At the institute I owe much to director Veijo Heiskanen, who was also my project's initial supervisor, and his successor Pia Letto-Vanamo. My project's two supervisors, professor Jan Klabbers and professor Lena Sisula-Tulokas, have provided me with invaluable guidance and have not spared time in assisting me. Professor Heikki E.S. Mattila and professor Christina Ramberg took the task of preliminary examiners, and professor Ramberg kindly agreed to be my opponent – for which I am grateful. Gunilla Häkli, Eeva Laurila and Leena Huovinen at the institute's library never hesitated to search for the sources I was craving for. The institute's secretary Anna-Maija Ekström did an excellent job in taking care of the routines of our institute and my project.

My colleagues at the institute deserve a special thank for supporting me in my task – both intellectually and physically – as we often deliberated on legal problems after our floorball sessions. Kai Kokko and Juha Perttula, thank you for your time and thoughts.

My wife Mervi and the rest of my family – there are no words to describe how invaluable you all are to me.

Järvenpää, December 2004

*Tapio Puurunen*



# TABLE OF CONTENTS

<b>PREFACE</b> .....	III
<b>TABLE OF CONTENTS</b> .....	V
<b>ABBREVIATIONS</b> .....	XI
<b>PART I – INTRODUCTION</b> .....	1
I. A NOVEL BUSINESS ENVIRONMENT .....	2
II. LEGALLY PROBLEMATIC FEATURES .....	7
III. BUSINESS AND CONSUMER DISTRESS – SOURCES OF DISPUTES .....	8
A. BUSINESS-TO-BUSINESS ELECTRONIC COMMERCE .....	8
B. PECULIARITIES AND PROBLEMS .....	10
1. PARTY IMBALANCES .....	10
2. DISPUTE RESOLUTION: THE SCENARIO .....	11
IV. INTERNATIONAL LAW AND REGULATION – THEORETICAL UNDERPINNINGS .....	15
A. DEFICIENCIES IN INTERNATIONAL LAW AND REGULATION .....	15
B. DEFORMALIZATION OF INTERNATIONAL LAW AND REGULATION .....	20
C. INTERSECTION BETWEEN PUBLIC AND PRIVATE INTERNATIONAL LAW .....	22
V. FRAMEWORK FOR ANALYSIS .....	24
A. A NEW FIELD OF LAW .....	24
B. THE FOUR VENTURES AND THE ARGUMENTS .....	26
C. CONTOURS OF THE FOUR VENTURES .....	30
<b>PART II – THE LEGISLATIVE JURISDICTION OF STATES OVER TRANSACTIONS IN INTERNATIONAL ELECTRONIC COMMERCE</b> .....	689
I. INTRODUCTION – THE PROBLEM .....	689
II. JURISDICTION IN GENERAL .....	697
III. INTERNATIONAL LAW BASES FOR THE EXERCISE OF LEGISLATIVE JURISDICTION APPLIED TO INTERNATIONAL ELECTRONIC COMMERCE .....	700
A. GENERAL REMARKS .....	700
B. TERRITORIAL JURISDICTION .....	704

C.	EXTRATERRITORIAL JURISDICTION .....	707
1.	SUBJECTIVE AND OBJECTIVE TERRITORIALITY .....	709
2.	THE NATIONALITY PRINCIPLE .....	711
3.	THE PASSIVE PERSONALITY PRINCIPLE .....	713
4.	THE PROTECTIVE PRINCIPLE .....	715
5.	THE EFFECTS DOCTRINE .....	719
a.	THE EFFECTS DOCTRINE AS AN INTERPRETATION OF THE OBJECTIVE TERRITORIAL PRINCIPLE .....	720
i.	THE BRITISH VIEW .....	720
ii.	THE US APPROACH .....	722
iii.	DEVELOPMENTS WITHIN THE EUROPEAN UNION .....	725
iv.	THE THREE APPROACHES AND INTERNATIONAL ELECTRONIC COMMERCE .....	728
b.	THE EFFECTS DOCTRINE AS AN INTERPRETATION OF THE PROTECTIVE PRINCIPLE .....	730
6.	THE UNIVERSALITY PRINCIPLE .....	731
IV.	RESOLUTION OF CONFLICTS INVOLVING THE EXERCISE OF LEGISLATIVE JURISDICTION .....	732
A.	INTRODUCTION: CONCURRENCY AND HIERARCHY .....	732
B.	THE NATIONAL LEVEL .....	735
C.	THE INTERNATIONAL LEVEL .....	737
1.	REASONABLENESS AND THE BALANCING OF INTERESTS .....	738
2.	WEIGHING LEGALLY RELEVANT FACTS .....	744
3.	METHODS OF CONFLICT RESOLUTION .....	747
V.	SUGGESTIONS FOR THE ALLOCATION OF LEGISLATIVE JURISDICTION OVER TRANSACTIONS IN INTERNATIONAL ELECTRONIC COMMERCE .....	748
VI.	CONCLUSION .....	753

<b>PART III – THE JUDICIAL JURISDICTION OF STATES OVER INTERNATIONAL BUSINESS-TO-CONSUMER ELECTRONIC COMMERCE FROM THE PERSPECTIVE OF LEGAL CERTAINTY .....</b>	<b>402</b>
I. INTRODUCTION .....	402
II. THE EUROPEAN APPROACH – JUDICIAL JURISDICTION UNDER THE BRUSSELS CONVENTION AND SUBSEQUENT REFORMS .....	410

A.	INTRODUCTION .....	410
B.	THE BRUSSELS CONVENTION AND AMENDING CONVENTIONS: GENERAL SCOPE OF APPLICATION AND E-COMMERCE .....	413
1.	GENERAL APPLICATION .....	413
2.	JURISDICTIONAL BASES .....	417
C.	JURISDICTION OVER CONTRACTUAL CLAIMS IN INTRA-EU BUSINESS-TO-CONSUMER E-COMMERCE .....	420
1.	THE BRUSSELS CONVENTION ON JURISDICTION AND AMENDING CONVENTIONS .....	420
a.	PROTECTING CONSUMERS BY STATUS .....	420
b.	PROTECTING CONSUMERS BY GENERALLY APPLICABLE PROVISIONS .....	430
2.	SUBSEQUENT REFORMS: COUNCIL REGULATION ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS .....	437
D.	JURISDICTION OVER NON-CONTRACTUAL CLAIMS IN INTRA-EU BUSINESS-TO-CONSUMER E-COMMERCE .....	446
E.	CONCLUSION: THE DIVIDING LINE BETWEEN CONTRACTUAL AND NON-CONTRACTUAL CAUSES OF ACTION .....	452
III.	THE UNITED STATES APPROACH – MINIMUM CONTACTS AND REASONABLENESS .....	456
A.	INTRODUCTION .....	456
B.	MODERN DOCTRINE CONCERNING PERSONAL JURISDICTION OVER CONTRACT AND TORT CLAIMS .....	457
1.	THE DEVELOPMENT OF THE MODERN DOCTRINE .....	457
2.	DOCTRINAL DISTINCTION BETWEEN CONTRACT AND TORT CLAIMS IN THE PERSONAL JURISDICTION ANALYSIS .....	461
3.	PROTECTING CONSUMER AND STATE INTERESTS UNDER THE MINIMUM CONTACTS AND REASONABLENESS TESTS .....	472
4.	LEGAL CERTAINTY AND THE NEED FOR REFORM .....	476
C.	PERSONAL JURISDICTION OVER CONTRACT AND TORT CLAIMS IN INTERSTATE E-COMMERCE .....	479
1.	MINIMUM CONTACTS IN NON-CONTRACTUAL CAUSES OF ACTION .....	480
2.	MINIMUM CONTACTS IN CONTRACTUAL CAUSES OF ACTION .....	491
3.	CHANNELING CONSUMER PROTECTION POLICIES THROUGH THE REASONABLENESS TEST IN E-COMMERCE .....	493

4. REFORMS .....	499
D. PROTECTING THE INTERESTS OF PARTIES THROUGH VENUE RULES AND THE DOCTRINE OF FORUM NON-CONVENIENS IN E-COMMERCE .....	502
IV. THE BRUSSELS CONVENTION/EC REGULATION AND THE US APPROACH – COMPARISONS AND CONCLUSIONS .....	509
A. LEGAL CERTAINTY AND INDIVIDUAL JUSTICE .....	509
B. GENERALITY AND SPECIFICITY: THE ROLE OF COURTS .....	513
C. RESPONDING TO THE B2C E-COMMERCE CHALLENGE .....	517
<b>PART IV – CHOICE OF LAW IN EUROPEAN BUSINESS-TO-CONSUMER ELECTRONIC COMMERCE – A TRAIL OUT OF A POLITICAL IMPASSE .....</b>	<b>789</b>
I. INTRODUCTION .....	789
II. FITTING THE ROME CONVENTION INTO E-COMMERCE .....	791
1. THE ALLEGATION .....	791
2. SPECIFIC CONSUMER PROTECTION PROVISIONS .....	792
a. THE CONSUMER .....	793
b. CIRCUMSTANCES AND METHODS OF PROTECTION .....	794
3. MANDATORY RULES .....	799
4. DEFINING MANDATORY RULES .....	799
5. SPECIFIC CONSUMER PROTECTION RULES AND OTHER PROVISIONS ON MANDATORY RULES .....	800
SCOPE OF THE CONCEPTUAL UNCERTAINTY .....	801
6. CONCLUSION .....	802
III. THE COMMUNITY DIMENSION .....	802
1. THE ROME CONVENTION AND COMMUNITY LAW .....	802
2. CONTOURS OF THE COMMUNITY STANDARD .....	804
3. COMMUNITY PRINCIPLE SECURING A HIGH LEVEL OF PROTECTION .....	806
4. CONSUMER NOTION CLARIFYING THE STANDARD AND THE PRINCIPLE .....	808
a. PASSIVE GLANCER .....	808
b. ACTIVE AND CRITICAL INFORMATION SEEKER .....	809
c. CONFIDENT CONSUMER .....	811
IV. CONCLUSION: REFLECTIONS AND RECOMMENDATIONS ON FUTURE ACTION .....	813



<b>PART V – INTERNATIONAL ONLINE DISPUTE RESOLUTION – CAVEATS TO PRIVATIZING JUSTICE</b> .....	1
I. INTRODUCTION .....	1
II. DEFINITION AND TYPES OF ON-LINE DISPUTE RESOLUTION MECHANISMS .....	3
A. DEFINITION .....	3
B. TYPES OF ONLINE DISPUTE RESOLUTION AND PREVENTION SERVICES .....	4
III. CURRENT BUSINESS-TO-CONSUMER ONLINE DISPUTE RESOLUTION MECHANISMS – SOME PROCEDURAL BENEFITS AND A RANGE OF PITFALLS .....	8
A. THE TASK .....	8
B. FOUR SERVICES .....	10
C. BENEFITS AND PITFALLS .....	12
1. PROCEEDINGS ARE SPEEDY BUT GENERALLY TOO EXPENSIVE .....	12
2. CONFIDENTIAL AND NOT TRANSPARENT .....	13
3. EMPHASIS ON MINIMALISM, INFORMALITY AND CLIENT DIRECTION REQUIRES PROPER SAFEGUARDS .....	16
4. PARTICIPATION AND ENFORCEMENT .....	18
5. LIMITED OVERSIGHT .....	20
6. CONCLUSION .....	21
IV. UNCERTAINTY ABOUT THE APPLICABLE LAW .....	21
A. PARTY AUTONOMY AND NATIONAL NORMS.....	21
B. UNEQUAL ACCESS TO AND POWER OVER THE APPLICABLE LAW .....	23
C. MANDATORY RULES .....	24
D. MINIMUM PROTECTION THROUGH SPECIAL CONFLICT RULES .....	26
V. SYNTHESIS AND PROPOSALS FOR REFORM .....	28
A. INSUFFICIENCY OF INFORMATION, EDUCATION AND SELF-DEVELOPMENT .....	28
B. INTERNATIONAL STRUCTURING THROUGH LOCALIZATION .....	30
1. THE JURISDICTIONAL AVENUE .....	31
2. THE APPLICABLE NORMS .....	34
3. RECOGNITION AND ENFORCEMENT .....	36

<b>PART VI – SYNTHESIS</b> .....	1
I. INTRODUCTION .....	1
II. LEGISLATIVE JURISDICTION AND THE DEFICIENCIES IN INTERNATIONAL LAW .....	2
A. THE NORMATIVE SYSTEM .....	2
B. CRITIQUE OF THE PROPOSED THEORY CHANNELLING JURISDICTION THROUGH INTERNET OPERATORS .....	5
III. DETERMINING JURISDICTION AND THE APPLICABLE LAW THROUGH TARGETING .....	8
A. THE PROBLEM OF LEGAL CERTAINTY .....	8
B. THE TWO POLES: COUNTRY OF ORIGIN AND COUNTRY OF DESTINATION .....	10
C. THE MIDDLE WAY – TARGETING/DIRECTING ACTIVITIES TO STATES .....	12
1. CONTRACTUAL DISPUTES .....	16
2. NON-CONTRACTUAL DISPUTES .....	19
IV. TOWARDS A MULTIFACETED APPROACH .....	23
A. NEW STAKEHOLDERS .....	24
B. METHODS OF REGULATION .....	27
C. ALTERNATIVE AND ONLINE DISPUTE RESOLUTION .....	30
<b>BIBLIOGRAPHY</b> .....	I
<b>INDEX</b> .....	XLVI

## **PUBLISHED ARTICLES**

PART II	18 JOHN MARSHALL JOURNAL OF COMPUTER & INFORMATION LAW 689-753 (2000)
PART III	8 UNIVERSITY OF CALIFORNIA DAVIS JOURNAL OF INTERNATIONAL LAW & POLICY 133-254 (2002)
PART IV	ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 789-816 (4/2003)
PART V	14 FINNISH YEARBOOK OF INTERNATIONAL LAW 1-36 (2003)

## ABBREVIATIONS

ABA	= American Bar Association
A.B.A.J.	= American Bar Association Journal
ADR	= Alternative Dispute Resolution
A.F.D.I.	= Annuaire Français de Droit International
AG	= Aktiengesellschaft (German public limited liability company)
Akron. L. Rev.	= Akron Law Review
Alb. L. Rev.	= Albany Law Review
Alb. L. J. Sci. & Tech.	= Albany Law Journal of Science and Technology
amend., amends	= amendment(s)
Am. J. Comp. L.	= American Journal of Comparative Law
Am. J. Int'l L.	= American Journal of International Law
Am. J. Int'l L. Supp.	= American Journal of International Law Supplement
Am. Rev. Int'l Arb.	= American Review of International Arbitration
Am. Soc'y Int'l L. Proc.	= American Society of International Law Proceedings
Apr.	= April
Ariz. St. L.J.	= Arizona State Law Journal
art., arts.	= article(s)
Aug.	= August
bankr.	= bankruptcy
BBB	= Better Business Bureau
BGB	= Bürgerliches Gesetzbuch (German Civil Code)
BEUC	= Bureau Européen des Unions de Consommateurs
Brit. Y.B. Int'l L.	= British Yearbook of International Law
B.U. Int'l L. J.	= Boston University International Law Journal
B.U.J. Sci. & Tech. L.	= Boston University Journal of Science and Technology Law
B.V.	= Besloten vennootschap (Dutch limited liability company)
BW	= Burgerlijk Wetboek (Dutch Civil Code)
B2B	= Business-to-Business
B2C	= Business-to-Consumer
C.A.D.C.	= United States Court of Appeals for the District of Columbia Circuit
Cal.	= California

Cal. L. Rev.	= California Law Review
CC	= Civil Code
C.D.Cal.	= District Court for the Central District of California
Cert denied	= Certiorari denied
CFI	= Court of First Instance
ch., chs	= chapter(s)
chem.	= chemical
Chi.-Kent L. Rev.	= Chicago-Kent Law Review
Chi. L. Rev.	= Chicago Law Review
Cir.	= Circuit
civ.	= civil
CML.Rev.	= Common Market Law Review
cmt., cmts	= comment(s), commentary
Co.	= Company
col., cols.	= column(s)
Common Mkt L. Rev.	= Common Market Law Review
Const.	= Constitution
Cornell L. Rev.	= Cornell Law Review
CPLR	= Civil Practice Law and Rules
CPR	= Center for Public Resources
CTLR	= Computer and Telecommunications Law Review
D.Ariz.	= District Court for the District of Arizona
D.Conn.	= District Court for the District of Connecticut
D.D.C.	= District Court for the District of Columbia
Dec.	= December
D.Mass.	= District Court for the District of Massachusetts
D.N.H.	= District Court for the District of New Hampshire
D.N.J.	= District Court for the District of New Jersey
D.Or.	= District Court for the District of Oregon
D.S.C.	= District Court for the District of Southern Carolina
DTI	= Department of Trade and Industry
Duke L.J.	= Duke Law Journal
e-commerce	= electronic commerce
e-mail	= electronic mail

E.C.	= European Community
ECE.	= European Committee on Crime Problems, Select Committee of Experts on Extraterritorial Jurisdiction
E.C.J.	= European Court of Justice
ECLG	= European Consumer Law Group
ECLR	= Electronic Commerce & Law Report
E.C.L.R.	= European Competition Law Review
E.C.R.	= European Community Reports
ECSC	= European Coal and Steel Community
ed., eds.	= edited/edition
EDI	= Electronic Data Interchange
E.D.La.	= District Court for the Eastern District of Louisiana
E.D.Mich.	= District Court for the Eastern District of Michigan
E.D.Mo.	= District Court for the Eastern District of Missouri
E.D.Pa.	= District Court for the Eastern District of Pennsylvania
E.D.Tex.	= District Court for the Eastern District of Texas
E.D.Va.	= District Court for the Eastern District of Virginia
EEC	= European Economic Community
e.g.	= for example
EGBGB	= Einführungsgesetz zum Bürgerlichen Gesetzbuch (German Conflict of Laws Code)
Emory L. J.	= Emory Law Journal
et al.	= and others
E.T.M.R.	= European Trade Mark Reports
ETNO	= European Telecommunications Network Operators' Association
EU	= European Union
Eur Bus. L. Rev.	= European Business Law Review
Eur. J. Int'l L.	= European Journal of International Law
Eur. L. Rev.	= European Law Review
Eur. Parl. Doc.	= European Parliament Working Session or Session Documents
FAA	= Federal Arbitration Act
Feb.	= February
Fed. Comm. L.J.	= Federal Communications Law Journal
Fed. R. Civ. P.	= Federal Rules of Civil Procedure

Fla. J. Int'l L.	= Florida Journal of International Law
Fla. St. U. L. Rev.	= Florida State University Law Review
Fordham Int'l L. J.	= Fordham International Law Journal
F.R.D.	= Federal Rules Decisions
F.Supp.	= Federal Supplement
F.2d, F.3d	= Federal Reporter
G.A.O.R.	= General Assembly Official Records
GBDe	= Global Business Dialogue on Electronic Commerce
Ger. Y.B. Int'l. L.	= German Yearbook of International Law
GmbH	= Gesellschaft mit beschränkter Haftung (German limited liability company)
Greighton L. Rev.	= Greighton Law Review
Hamline L. Rev.	= Hamline Law Review
Harv. L. Rev.	= Harvard Law Review
Hastings L. J.	= Hastings Law Journal
HE	= Hallituksen esitys (Finnish Government bill)
ICANN	= Internet Corporation for Assigned Names and Numbers
ICC	= International Chamber of Commerce
I.C.C.L.R.	= International Company and Commercial Law Review
I.C.J.	= International Court of Justice
I.J.C.L.P.	= International Journal of Communications Law and Policy
ILC	= International Law Commission
I.L.M.	= International Legal Materials
Inc.	= Incorporated
Indiana. L. J.	= Indiana Law Journal
Ind. L. Rev.	= Indiana Law Review
indus.	= industry
ins.	= insurance
Int'l J. Comm. L. & Pol'y	= International Journal of Communications Law and Policy
Int'l & Comp. L. Q.	= International and Comparative Law Quarterly
Int'l J. L. & IT	= International Journal of Law and Information Technology
IP	= Internet Protocol
IRC	= Internet Relay Chat
ISP	= Internet Service Provider

ITU	= International Telecommunications Union
J.	= Justice, Judge
Jan.	= January
J. Consumer Pol’y	= Journal of Consumer Policy
J. Contemp. L.	= Journal of Contemporary Law
J. Crim. L. & Criminology	= Journal of Criminal Law and Criminology
JHA	= Justice and Home Affairs
J. Int’l Arb.	= Journal of International Arbitration
J. Int’l Econ. L.	= Journal of International Economic Law
J. Legal Advoc. & Prac.	= Journal of Legal Advocacy and Practice
J. Marshall J. Computer & Info L.	= John Marshall Journal of Computer and Information Law
J. Small & Emerging Bus. L.	= Journal of Small and Emerging Business Law
Jurimetrics J.	= Jurimetrics: The Journal of Law Science and Technology
JZ	= Juristenzeitung
K.B.	= King’s Bench
Ky. L.J.	= Kentucky Law Journal
L.	= Law
La. L. Rev.	= Louisiana Law Review
Law & Contemp. Probs.	= Law and Contemporary Problems
Law & Pol’y Int’l Bus	= Law and Policy in International Business
L.Ed.2d.	= Lawyer’s Edition
LG	= Landgericht (German District Court)
L.L.C.	= Limited Liability Company
Ltd.	= Limited
Mar.	= March
Mass.	= Massachusetts
Michigan L. Rev.	= Michigan Law Review
Minn. L. Rev.	= Minnesota Law Review
n., nn.	= footnote(s) in other references
N.C.J. Int’l L. Com. Reg.	= North Carolina Journal of International Law and Commercial Regulation
N. C. L. Rev.	= North Carolina Law Review
N.D.Ala.	= District Court for the Northern District of Alabama

N.D.Cal.	= District Court for the Northern District of California
N.D.Ill.	= District Court for the Northern District of Illinois
N.D.Ohio	= District Court for the Northern District of Ohio
N.D.Tex.	= District Court for the Northern District of Texas
N.E.2d	= North Eastern Reporter
NJW	= Neue Juristische Wochenschrift
NJW-RR	= NJW-Rechtsprechungs-Report
N. M. L. Rev.	= New Mexico Law Review
no., nos.	= number(s)
Nov.	= November
NV	= Naamloze vennootschap (Dutch limited liability company)
NW. U. L. Rev.	= Northwestern University Law Review
N.Y.	= New York
N.Y.S.2d	= West's New York Supplement
N.Y.U. J. Int'l L. & Pol.	= New York University Journal of International Law and Politics
Oct.	= October
ODR	= Online Dispute Resolution
OECD	= Organization for Economic Co-operation and Development
Ohio N.U.L.Rev.	= Ohio Northern University Law Review
Ohio St. J. on Disp. Resol.	= Ohio State Journal on Dispute Resolution
O.J.	= Official Journal
OLG	= Oberlandesgericht (German Appellate Court)
p., pp.	= page(s)
para., paras.	= paragraph(s)
P.C.I.J.	= Permanent Court of International Justice
Plc	= Public Limited Company
PLI/Pat	= Practising Law Institute, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series
proc.	= procedure
PSTN	= Public Switched Telephone Network
pt.	= part
pub.	= public
RabelsZ	= Rabels Zeitschrift für ausländisches und internationales Privatrecht
RdC	= Recueil des Cours



Reh'g denied en banc	= Rehearing denied en banc
rev.	= revised
Rev. Litig.	= Review of Litigation
RIW	= Recht der Internationalen Wirtschaft
Rutgers Computer & Tech. L. J.	= Rutgers Computer and Technology Law Journal
Tul. L. Rev.	= Tulane Law Review
S.A.	= Société Anonyme (French limited liability company)
San Diego L. Rev.	= San Diego Law Review
S.Ct.	= Supreme Court Reporter
S.C.L.Rev	= South Carolina Law Review
S.D.N.Y.	= District Court for the Southern District of New York
S.D.Ohio	= District Court for the Southern District of Ohio
S.D.Tex.	= District Court for the Southern District of Texas
Sept.	= September
ser.	= series
sess.	= session
sched., scheds	= schedule(s)
sec., secs	= section(s)
SME	= Small and Medium Sized Enterprise
Stan. J. Int'l L.	= Stanford Journal of International Law
Stan. L. Rev.	= Stanford Law Review
stat.	= statute
St. John's L. Rev.	= Saint John's Law Review
TCP	= Transmission Control Protocol
Temp. L. Q.	= Temple Law Quarterly
Tex. Int'l L.J.	= Texas International Law Journal
Transnat'l L. & Contemp. Probs.	= Transnational Law and Contemporary Problems
Tul. J. Int'l & Comp. L.	= Tulane Journal of International and Comparative Law
U.C. Davis J. Int'l L. & Pol'y	= University of California at Davis Journal of International Law and Policy
U.C. Davis L. Rev.	= University of California at Davis Law Review
U.C.I.T.A.	= Uniform Computer Information Transactions Act

UCLA L. Rev.	= University of California, Los Angeles Law Review
U. Col. L. Rev.	= University of Colorado Law Review
U. Dayton L. Rev.	= University of Dayton Law Review
UKMIL	= United Kingdom Materials in International Law
U. Miami Inter-Am. L. Rev.	= University of Miami Inter-American Law Review
U. Miami L. Rev.	= University of Miami Law Review
U.N.	= United Nations
UNCITRAL	= United Nations Commission on International Trade Law
UNIDROIT	= International Institute for the Unification of Private Law
U.N.T.S.	= United Nations Treaty Series
U. Pitt. L. Rev.	= University of Pittsburgh Law Review
U.S.	= United States/United States Reports
U.S.C.	= United States Code
U.S.C.A.	= United States Code Annotated
U.S. Const.	= United States Constitution
U.S.P.Q.	= United States Patent Quarterly
v.	= versus
VA. J. L. & Tech.	= Virginia Journal of Law and Technology
Vill. L. Rev.	= Villanova Law Review
vol., vols.	= volume(s)
WAP	= Wireless Application Protocol
Washburn L.J.	= Washburn Law Journal
Wash. & Lee L. Rev.	= Washington and Lee Law Review
W.D.Ark.	= District Court for the Western District of Arkansas
W.D.N.Y.	= District Court for the Western District of New York
W.D.Pa.	= District Court for the Western District of Pennsylvania
WIPO	= World Intellectual Property Organization
WL	= Westlaw
Wm & Mary L. Rev.	= William and Mary Law Review
WTO	= World Trade Organization
Yale J. Int'l L.	= Yale Journal of International Law
Yale L.J.	= Yale Law Journal
Yale L. & Pol'y Rev.	= Yale Law and Policy Review

## PART I – INTRODUCTION

On the 4-5<sup>th</sup> of November 1999 various stakeholders gathered in Brussels for a public hearing organized by the European Commission. Their task was to debate and seek to influence the European legislature on two topical issues. The first question concerned the bases on which a court would determine that it had jurisdiction to hear a dispute between a business and a consumer engaged in cross-border electronic commerce. The second question concerned the law the court should apply once it had declared itself competent to hear the case at hand. Both questions gave rise to bitter dispute between consumer protection organizations and industry representatives. The former claimed that consumers should be able to resort to their home courts and rely on their home consumer protection laws when engaging in cross-border electronic commerce, while the latter insisted that this would be too burdensome especially for Small and Medium-sized businesses.

The questions raised are not unique to the European Union. Some months earlier the US Federal Trade Commission had organized a public workshop on US perspectives on consumer protection in the global marketplace and the Hague Conference on Private International Law was – and still is – working on an international convention on jurisdiction. In addition to being inherently international, the questions form part of a larger legal scenario affecting dispute resolution in international electronic commerce: on what basis may a State impose its policies – notably consumer protection policies – on activities and resources that are not wholly within its territory? And a parallel question emerges: on what basis should States take into account policies of foreign States when deciding on the reach of national policies? States may express these policies through prescriptive competence – legislation, administrative or judicial decisions – and may enforce them through judicial and non-judicial means, mainly through courts exercising judicial jurisdiction and applying those policies through choice of law to a dispute at hand.

In fact, even the fundamental legal issues are not new. They have been the concern of public and private international lawyers long before the information technology revolution gained momentum. What is new is the context that invariably affects the content and application of the norms. And it is this new setting – economically and socially weaker parties operating in an inherently international business environment that is hard to localize and that has enormous spill-over effects – that raises a string of basic questions: what theories influence decisions on prescriptive and adjudicatory jurisdiction, and those on the applicable law? Do present theories and their application give a viable solution to the various problems the electronic environment has raised? If the solutions adopted on the national and

international plane are not adequate, how could they be revised to give businesses and consumers the legal certainty and individual justice they crave for in international electronic commerce?

While these questions were awaiting proper response – and still largely are -, various international, supranational, national and private bodies began setting up alternative dispute resolution schemes for electronic commerce litigants. The costs and practicality of litigating a typically low-value transaction provoked access to justice concerns and pushed for alternative solutions. These developments are recommendable, but do not dispense with a number of fundamental problems: should States regulate such bodies, if so, which States; to what extent should such bodies take into account State policies; what standards should the body adhere to and what guarantee is there that those standards are adhered to?

In addressing the questions presented, the present study, however, aims at revealing more than practical difficulties and practical answers: it seeks to contribute to our understanding of how public and private international law work, of their benefits and defects. And it also seeks to illuminate how norms on jurisdiction and applicable law operate, and how international law and regulation are being deformed to address the emerging deficiencies.

The study is organized into an introduction, four separate articles and a synthesis. Before entering into the articles, a more substantial analysis is given of the nature of the new business environment and its legally problematic features (Sections I and II), the characteristics of the dispute resolution scenario (Section III), the theoretical underpinnings of international law and regulation (Section IV) and a framework for analysis including the central claims of the thesis (Section V).

## **I. A NOVEL BUSINESS ENVIRONMENT**

The fabric of international commerce has changed dramatically during the past decades. The features of contemporary capitalism have had a profound impact: unprecedentedly large and powerful transnational corporations have proliferated the international scene, global competition has intensified and globalization has taken root. Globalization describes the present political, economic and cultural atmosphere of increasing integration and interdependence of world-wide socio-economic life, where information, money, goods, services and people flow more frequently and quickly throughout the globe. Among the main catalysts of globalization are world-wide communication webs created by information and communication technology that, on its part, is moving societies along a route towards an information society. According to the European Commission:

“The world economy is moving from a predominantly industrial society to a new set of rules – the information society. What is emerging is often referred to as the *new economy*. It

has tremendous potential for growth, employment and inclusion. (...) The sheer scale of information available creates huge opportunities for its exploitation through the development of new products and services. Transforming digital information into economic and social value is the basis of the new economy, creating new industries, changing others and profoundly affecting citizens' lives.”<sup>1</sup>

The origins of the information technology revolution may be dated as far back as to the late 19<sup>th</sup> century, but especially the most impressive post-World War II advances have truly accelerated the pace of the revolution: the transistor, the computer and the creation of international information and communication networks. In 1962 J.C.R. Licklider of the Massachusetts Institute of Technology presented his “Galactic Network“ concept in which a globally interconnected set of computers would enable people to access data and programs from any site.<sup>2</sup> From his initiative, development work begun at the U.S. Defense Advanced Research Projects Agency for building the ARPANET. That initiative launched a process that, through the efforts of different stakeholders, eventually produced a giant network that interconnects innumerable smaller groups of linked computer networks, that is, the Internet.

Compared to earlier communication networks, such as telephone networks, the Internet’s design provides several technical advantages. First, the network is decentralized and capable of operating even if a part of it collapsed. Second, the idea of open architecture networking means that various kinds of networks can be interconnected through meta-level “Internetworking Architecture” and thus generally imposing only pragmatic requirements on the types of networks capable of being included therein. Third, a communications protocol (presently known as the TCP/IP) has been devised that uses packet switching where, unlike in circuit switching, computers do not have to remain open during the whole

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<sup>1</sup> An Information Society for All – Communication on a Commission Initiative for the Special European Council of Lisbon, 23 and 24 March 2000, COM(1999) 687 final (italics as in the original). For a set of analyses of the contours of information society and debate whether certain societies may be claimed to have transformed into an information society, see Fritz Machlup, *THE PRODUCTION AND DISTRIBUTION OF KNOWLEDGE IN THE UNITED STATES* (Princeton University Press, New Jersey, 1962); Alistair S. Duff, *INFORMATION SOCIETY STUDIES* (Routledge, London & New York, 2000); Daniel Bell, *THE COMING OF POST-INDUSTRIAL SOCIETY – A VENTURE IN SOCIAL FORECASTING* (Basic Books, New York, 1973); Herbert Schiller, *WHO KNOWS: INFORMATION IN THE AGE OF THE FORTUNE 5000* (Ablex Publishing Norwood, New Jersey, 1981) and “The World Crisis and the New Information Technologies”, 18 *Columbia Journal of World Business* 86-90 (1983) and *CULTURE, INC.: THE CORPORATE TAKEOVER OF PUBLIC EXPRESSION* (Oxford University Press, New York, 1989); Manuel Castells, *THE RISE OF THE NETWORK SOCIETY* (2<sup>nd</sup> ed., Blackwell Publishers, Oxford and Malden, Mass., 2000).

For a critical analysis of the debate, see Frank Webster, *THEORIES OF THE INFORMATION SOCIETY* (2<sup>nd</sup> ed., Routledge, London and New York, 2002).

<sup>2</sup> Internet Society (ISOC), *All About the Internet – History of the Internet*, at <http://www.isoc.org/internet/history/cerf.shtml> (visited 31 Dec. 2004).

transaction process and the link between them is not broken even in case of a system failure along the network, nor do the computers have to operate at the same communications speed.<sup>3</sup> Fourth, the communications protocol makes it possible to create a network that is not designed for one application only. Of the two commercially most important Internet applications, the software for electronic mail was developed in 1972 and the World Wide Web was inserted into the system in 1995.

Prompted by its formidable features, businesses began to utilize the Internet for commercial purposes and often spoke of electronic commerce. From the outset, one should distinguish the Internet from electronic commerce. As a wider concept than the Internet, electronic commerce connotes the electronic processing and transmission of data either to effect transactions consummated entirely electronically (direct electronic commerce) or to support electronic transactions that contain also physical components, such as the sending of physical goods by regular mail (indirect electronic commerce). Although the former practice provides a more complicated scenario for legal analysis and merits special focus, the present work will not neglect the latter as businesses and consumers utilize it widely.

In fact, electronic commerce may include a variety of different technologies used for transmitting information for commercial purposes. The telegraph no doubt made it possible to take orders from overseas in the 19<sup>th</sup> century, and could well be included in the definition. Nevertheless, the effective history of significantly large-scale electronic commerce began with Electronic Data Exchange in the 1970's and 80's, through which businesses transmitted amongst themselves a range of documents, such as invoices, purchase orders and financial data. Electronic Data Interchange has, however, been used by businesses in what is called business-to-business electronic commerce, and focusing any analysis of electronic commerce on EDI alone would give a distorted view of the Internet's potentials in global commerce involving a larger variety of transacting parties than businesses.

In fact, one of the remarkable features of the Internet is that for the first time in the history of international commerce, consumers may transact effectively with businesses throughout the world in so-called business-to-consumer electronic commerce. Numerous businesses have realized the benefits the electronic environment may offer. Businesses may ideally gain global presence while making substantial savings on costs, may improve their competitiveness by novel business opportunities, customize their products on basis of information gathered from consumers and streamline their business chains. Internet marketing, for example, exhibits several advantages compared to previous techniques: Information may be transmitted instantly at any time throughout the globe, may be presented in a structured format, may be updated at insignificant cost and marketers may use interactive

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<sup>3</sup> See Joseph F. Ruh Jr., *Introduction to the Internet*, in Joseph F. Ruh (ed.) *The Internet and business: A Lawyer's Guide to the Emerging Legal issues* (1996), at <http://offcomputer.roshd.ir/cla/ruhbook/Default.htm> (visited 31 Dec. 2004).

technology in presenting the information. Ideally, consumers have corresponding benefits: a global selection of businesses, new products and services at lower prices and better quality of service, as well as customized service that responds rapidly to their needs.<sup>4</sup>

Information and communications technology has also attracted a variety of business enterprise. While mere access providers offer access to the Internet, commercial online services provide access to the Internet plus various other services, such as e-mail, directories, online discussion groups and retail portals.<sup>5</sup> Service providers are offering such a multitude of services that it becomes difficult to categorize a business under a specific label. Indeed, current services offer often very diverse services, such as auction sites, currency converters, real estate guides and dispute resolution services. More importantly, current industries, the banking, insurance, travel and retail industries, among others, have taken advantage of the Internet by adjusting their business practices into the electronic environment.

There would be no point in insisting that the Internet were just a combination of older media and not much different from them. Law firms have mushroomed online, as have legal resources posted by universities, government authorities, private database providers, such as West Law<sup>6</sup> and Lexis<sup>7</sup> or international law firms, such as Baker & McKenzie's e-law alert<sup>8</sup>. Moreover, the medium may be used to preparing class actions<sup>9</sup>, the health care industry provides medical services through the Internet<sup>10</sup>, several universities and secondary educational authorities provide distant education<sup>11</sup>, and the Internet caters for an amazing variety of other entrepreneurship on-line. If this were not enough, the Internet has truly changed the way we communicate and maintain our social and business contacts.

There are various estimates on how the Internet and electronic commerce have grown in recent years – the amount of revenue generated, the number of people online and the size of the share of business-to-consumer electronic commerce of total electronic commerce, etc. – each differing with the development of electronic commerce. The latest reports estimate that globally, 604 (CIA's World Factbook) to 655 (ITU) million people were online in 2002 and 709 (eMarketer) to 934 (Computer

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<sup>4</sup> See European Commission, *Electronic Commerce – An Introduction*, at <http://www.ispo.cec.be/ecommerce/answers/introduction.html> (last updated 2 July 1998) (visited on 4 Aug. 2003, on file with the author).

<sup>5</sup> See *America Online*, at <http://www.aol.com>; *Compuserve*, at <http://www.compuserve.com>; *SBC Prodigy*, at <http://myhome.prodigy.net/> and *Microsoft Network*, at <http://www.msn.com> (visited 31 Dec. 2004).

<sup>6</sup> See <http://www.westlaw.com/> (visited 31 Dec. 2004).

<sup>7</sup> See <http://www.lexis.com> (visited 31 Dec. 2004).

<sup>8</sup> See <http://www.bakerandmckenzie.com/BakerNet/Resources/default.htm> (visited 31 Dec. 2004).

<sup>9</sup> See e.g. <http://www.classaction.com> (visited 31 Dec. 2004).

<sup>10</sup> See e.g. <http://www.doctorinternet.co.uk> (visited 31 Dec. 2004).

<sup>11</sup> For an illustrative portal, see Distant Education Clearinghouse, at <http://www.uwex.edu/disted/home.html> (visited 31 Dec. 2004).

Industry Almanac) million are online in 2004.<sup>12</sup> Although the dot-com crash has had an impact on the growth of electronic commerce, the retail market has been growing steadily. According to Forrester Research, US online retail sales soared up to US\$ 76 billion in 2002, up 48 percent over the prior year and were estimated to approach US\$ 100 billion in 2003. Collectively, retailers broke even in 2002, up from a loss of 6 percent in 2001, and 70 percent of retailers reported positive operating margins. In 2002 online retail sales amounted to 3,6 percent of total retail sales and their share were expected to grow to 4,5 percent in 2003.<sup>13</sup> Electronic commerce still takes, however, a fraction of total retail sales. In the EU, for example, the share is currently around 1-2%, but prospects are promising in the EU, as well, with estimates that in 2006, 54% of European Internet users will shop online.<sup>14</sup>

Broadband connections are gaining popularity: In May 2002 there were 26 million broadband users and 79 million narrowband users in the US while in May 2003 the ratio had changed to 38/69 million users.<sup>15</sup> With fix-rate broadband connections consumers are likely to spend more time on the Internet, have access to technically more demanding electronic commerce applications, thus increasing electronic commerce's potential.<sup>16</sup> Recent innovations in mobile communication technology have also promising potentials to boost electronic commerce: the Mobile phone industry is giving businesses and consumers, for example, better and faster access through GPRS technology that allows the transmission of pictures and moving image. Indeed, the 2003 IDC/World Times Information Society Index (ISI) ranked Sweden as "the world's top IT country": 69 percent of the population had access to the Internet, 29 percent had broadband at home, and 64 percent were online shoppers.<sup>17</sup>

The important fact is that electronic commerce is growing and not which of the several forecasters' "educated guesses" are the most accurate. Even after the dot-com crash, the Internet offers considerable possibilities and shows signs of growth. The pervasiveness of the new technology is

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<sup>12</sup> ClickZ Network, *Population Explosion!*, (10 Sept. 2004) at <http://www.clickz.com/stats/sectors/geographics/article.php/151151> (visited 31 Dec. 2004).

<sup>13</sup> Forrester Research, *Online Sales Soared 48 percent in 2002, According to Latest Shop.org/Forrester Study* (15 May 2003) at <http://www.forrester.com/ER/Press/Release/0,1769,801,00.html> (visited 31 Dec. 2004).

<sup>14</sup> See First Report on the Application of Directive 2000/31/EC of the European Parliament and of the Council of June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, COM(2003) 702 final, at 5.

<sup>15</sup> Nielsen/NetRatings (17 Jun. 2003), at [http://www.nielsen-netratings.com/pr/pr\\_030618\\_us.pdf](http://www.nielsen-netratings.com/pr/pr_030618_us.pdf) (visited 31 Dec. 2004).

<sup>16</sup> See, for example, UCLA Center for Communications Policy, *The UCLA Internet Report, Surveying the Digital Future, Year Three* (Feb 2003), at <http://ccp.ucla.edu/pdf/UCLA-Internet-Report-Year-Three.pdf> (visited 31 Dec. 2004).

<sup>17</sup> See ClickZ Network, *Swedes Top Tech List*, at [http://www.clickz.com/stats/sectors/geographics/article.php/5911\\_2227651](http://www.clickz.com/stats/sectors/geographics/article.php/5911_2227651) (visited 31 Dec. 2004).



indeed only one essential component of the new technological revolution and even that has well proved its existence without accurate and coherent predictions on its growth.

## II. LEGALLY PROBLEMATIC FEATURES

The Internet has challenged present normative tools used to regulate international commerce. The main reasons behind the challenge may be traced to the Internet's characteristics.

Due to its inherently decentralized architecture, no one controls the Internet. The network is an immensely complex web: in its core one finds physical backbones that link several other networks together, while in other parts networks are connected through satellite and wireless connections. Unless a State wishes to isolate itself completely from the international community, it has, at least at present, no effective means to control a portion of the Internet that coincides, for example, with its territorial boundaries. Moreover, no central authority controls Internet activity and no State may effectively regulate it. In fact, certain functions are not exercised by states: for example, a non-profit corporation (ICANN) representing the interests of the Internet community is charged with the technical administration of the domain-name system.<sup>18</sup>

The Internet is a truly international and, in fact, a global environment. Activity that did not previously touch other countries at all may now have global effect, as the posting of material on a Website may illustrate. This means that each and every country has a stake in developing the Internet and tailoring a secure and functioning legal environment to it. A Website may be visible throughout the world and thus a Website offer may have virtually an infinite number of recipients. Conduct that may be intended only to a local audience may have enormous spill-over effects. In short, conduct is hard to localize to a given territorial area.

The Internet obscures the notion of location even further. It may be accessed from virtually any physical location and there is no way a party can always determine where the other party is physically located. Equally, as Websites – or more properly, the servers in which they are stored – may be mirrored or may have encrypted addresses, it is hard to determine their location. Obscene messages may be routed from one network to another in discussion groups with no centralized location. Names and addresses do not necessarily reveal location as people may have anonymous e-mail addresses and websites may contain a universal code, such as .com, .net or .info, and even country-codes may be granted to non-residents. Messages may be routed through networks that hide their clients' identity: anonymous remailers mask the origin of the e-mail of the computer from which their clients browse

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<sup>18</sup> See <http://www.icann.org/> (visited 31 Dec. 2004).

the Internet.<sup>19</sup> Information is thus constantly changing and not tied to any location. This threatens traditional parameters of legislation, where persons and ownership titles must be clearly demonstrated and localized: the parameters are challenged where a norm refers to certain legally relevant conduct occurring at a certain location in an environment where persons' mobility has gained unprecedented importance.

In fact, legal concepts, such as place of performance, place of conclusion of the contract and location of a harmful act may not function properly on the Internet. Various questions arise. Where is harmful content located: on the server on the other side of the globe or as a copy on the viewer's computer? How do we understand location in electronic commerce or can it, as a legal term, be viably applied? Or must we change traditional concepts that have served us so well so far? If the problems are generated by technology – can we solve them through technology? States are confronted with an environment that challenges the law on a wide range of issues throughout the field of law. Electronic commerce and its taxation, intellectual property, privacy, data security and cybercrimes, such as hacking or the distribution of child pornography, provide some examples of the scope of the challenge.

### III. BUSINESS AND CONSUMER DISTRESS – SOURCES OF DISPUTES

#### A. BUSINESS-TO-BUSINESS ELECTRONIC COMMERCE

The vast majority of electronic commerce is conducted among businesses. International business has built for itself particular international structures. Examples include international treaties, such as the 1980 UN Convention on International Sale of Goods<sup>20</sup>, the *lex mercatoria* and projects aiming at codifying it, such as the 1994 UNIDROIT Principles of International Commercial Contracts<sup>21</sup> and the Principles of European Contract Law.<sup>22</sup> Moreover, businesses benefit from a range of alternative dispute resolution structures that make cross-border business more reliable and efficient. In adjudicatory processes parties direct a third neutral party to make a binding determination of the issues

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<sup>19</sup> See e.g. Stuart Biegel, *BEYOND OUR CONTROL – CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE* 112 (MIT Press, Cambridge, Mass. & London, 2001); Ugo Draetta, *INTERNET ET COMMERCE ÉLECTRONIQUE EN DROIT INTERNATIONAL DES AFFAIRES* 47 (Bruylant, Brussels, 2003).

<sup>20</sup> Reprinted in 19 I.L.M. 671 (1980).

<sup>21</sup> International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts 1994*, at <http://www.unidroit.org/english/principles/contracts/main.htm> (visited 31 Dec. 2004).

<sup>22</sup> Ole Lando & Hugh Beale (ed.), *THE PRINCIPLES OF EUROPEAN CONTRACT LAW – PART I & II* (Kluwer, The Hague, 2000).

(e.g. arbitration and contractual adjudication), whereas in consensual processes parties retain the power to control the outcome and any terms of resolution (e.g. negotiation and mediation). The main international instruments devised include the UNCITRAL Conciliation Rules (1980) and Arbitration Rules (1976),<sup>23</sup> the American Arbitration Association International Dispute Resolution Procedures (2003)<sup>24</sup>, the International Chamber of Commerce Rules of Conciliation and Arbitration (1998)<sup>25</sup> and the London Court of International Arbitration – Arbitration Rules (1998).<sup>26</sup>

This structure-building has been extended to the electronic commerce arena, as well, as measures such as the 1996 UNCITRAL Model law on Electronic Commerce and Model Law on Electronic Signatures<sup>27</sup> and various regional normative schemes illustrate.<sup>28</sup> The normative environment emphasizes freedom of contract and party autonomy: parties may agree whom to contract with, which law should apply to their contract and where disputes should be settled. States have not enacted a large-scale system of norms from which parties may not derogate and which gives certain classes of businesses a number of safeguards.<sup>29</sup> Rather, businesses are protected through generally applicable norms carving out certain undesirable conduct, as illustrated by norms dealing with fraud, misleading statements, duress, coercion and the obligation to observe good faith and fair dealing.

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<sup>23</sup> UNCITRAL 1980 Conciliation Rules, G.A. Res. 35/52; UNCITRAL Arbitration Rules (1976), GA Res. 31/98.

<sup>24</sup> Available at <http://www.adr.org/> (visited 31 Dec. 2004).

<sup>25</sup> Available at <http://www.iccwbo.org/court/english/arbitration/rules.asp> (visited 31 Dec. 2004).

<sup>26</sup> Available at <http://www.lcia-arbitration.com/arb/uk.htm> (visited 31 Dec. 2004).

<sup>27</sup> UNCITRAL Model Law on Electronic Commerce with Guide to Enactment with additional article bis adopted in 1998 GA Res. 51/162 (1996), and UNCITRAL Model Law on Electronic Signatures with Guide to Enactment, GA Res. 56/80 (2001), at <http://www.uncitral.org/en-index.htm> (visited 31 Dec. 2004).

<sup>28</sup> For European developments, see Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions – A European Initiative in Electronic Commerce, COM(97) 157 final and Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. (L 178) 1; for developments in South East Asia, including the e-Asean Framework Agreement (24 Nov. 2000), see ASEAN's electronic commerce site at <http://www.aseansec.org/4925.htm> (visited 31 Dec. 2004); for developments in the Asia-Pacific, see Asia-Pacific Economic Cooperation, 1998 *APEC Blueprint for Action on Electronic Commerce* and other resources at [http://203.127.220.67/apec/apec\\_groups/som\\_special\\_task\\_groups/electronic\\_commerce.html](http://203.127.220.67/apec/apec_groups/som_special_task_groups/electronic_commerce.html) (visited 31 Dec. 2004).

<sup>29</sup> This does not mean that more limited measures do not exist. See e.g. Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents 1986 O.J. (L 382) 17, Articles 17-19.

## B. PECULIARITIES AND PROBLEMS

### 1. PARTY IMBALANCES

Once the Internet was capable of supporting cross-border business-to-consumer electronic commerce, States and other stakeholders realized that they were faced with a new phenomenon. There is naturally nothing new about consumer commerce, that is, commerce involving a person who contracts for the supply of goods or services for a purpose that can be regarded as being outside his trade or profession. The consumer has been regarded as being economically and socially disadvantaged *vis-à-vis* businesses, and therefore States have generally imposed extra obligations on businesses and given consumers additional rights. Before the advent of the Internet, consumers bought products and services from distant countries only in rather exceptional cases and instead, shopped at local or national establishments. Now the Internet has, along with other electronic commerce media, elevated the weaker party onto the global plane.

The local or national commercial environment offers consumers several advantages. Consumers can benefit from the protection of their local laws, the national consumer protection authorities, local courts and alternative dispute resolution mechanisms, such as consumer complaint boards, and national enforcement procedures. Businesses have establishments within the local area where consumers can complain physically and businesses are receptive not only to consumer dissatisfaction due to the prospect of adverse publicity in local media, but also to pressure from national consumer protection authorities and organizations.

In cross-border electronic commerce, however, consumers are usually one-shot purchasers and do not normally engage in long-term intensive business relations. This may be changing with the introduction of new business products and services, such as financial services, but the point remains valid if compared to business-to-business commercial relations or, indeed, consumer purchases from the local grocery or department store. In fact, the electronic environment encourages consumers to search for best offers throughout the world and has increasingly given them technical tools to this effect.<sup>30</sup> Consumers are therefore at a greater danger of encountering not only fraudulent businesses but also businesses with different conceptions on how to deal with consumers e.g. how clearly and in what format information should be provided. Consumers may not be aware enough to check issues as carefully as businesses routinely do, such as the exact content of contractual terms. In typical e-consumer contracts businesses naturally use ready-made texts, standard forms and clauses, and in

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<sup>30</sup> See, for example, <http://www.vertaa.fi> (visited 31 Dec. 2004) (a Finnish service for comparing the prices of different commodities offered by leading international and national online retailers).

adhesion contracts the bargaining scenario takes a different tone as consumers are given the terms on a take it or leave it basis and regrettably often in non-user friendly and hardly retrievable format. These problems are exacerbated in cross-border electronic commerce with different currencies, languages and business habits.

Consumers may also find themselves disadvantaged with respect to technology. The seller may decide how she presents the information: he may use links and banners and other devices to induce consumers into placing an order, hiding important contractual information and possibly giving a misleading picture of the company. Payment technologies, such as credit cards, may also not offer the same safeguards or the same conditions for consumers in all States. This is not to say that the Internet has in every respect deteriorated the imbalance between businesses and consumers. Businesses may, for example, take the medium to offer consumers information about the terms of the contract and even to enlighten them of their rights – something that is not an economically viable option when using other distant selling media, such as telemarketing.<sup>31</sup>

## 2. DISPUTE RESOLUTION: THE SCENARIO

As a business environment, the Internet offers a potentially global clientele with negligible set-up and running costs and an environment where the typical merchandise is a low-value product or service that can often be transmitted electronically at virtually no cost. Once it becomes necessary to lay the map of the off-line world on top of the map illustrating the enormously complex world-wide network of networks, problems arise with respect to the Internet's features discussed above: control, spill-over effects of conduct and the obscurity of the notion of location. These problems torment dispute resolution providers. The challenge is to apply traditional off-line norms to an electronic environment where conduct is increasingly difficult to localize.

The idealistic view was that the Internet could offer a business environment where one could transact independently of physical borders. As libertarians in the 1990's claimed, "Cyberspace" is a separate place from the physical world. It needs and can create its own law and legal institutions and "Cyberspace participants", that is, those who care most deeply about the new digital trade in ideas, information and services, would be the most appropriate actors to take on the task.<sup>32</sup> Johnson & Post, for example, argue that geographical borders do not make sense in Cyberspace nor are there any

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<sup>31</sup> See Christina Hultmark, *Konsumentskydd på Internet – rättseconomiska synpunkter*, JURIDISK TIDSKRIFT, No. 1, 80-89 (1998-99).

<sup>32</sup> See David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN L. REV. 1367-1402 (1996).

physical borders therein: no State has control over Cyberspace to enforce its commands; borders have demarcated the relationship between physical proximity and the effects of any particular behaviour, but Cyberspace activity may have effects throughout the globe; a local sovereign has no legitimacy to regulate global behaviour; and finally, in Cyberspace there are no borders that give notice of which sets of rules apply. Therefore, efforts to regulate Cyberspace are likely to prove futile, at least in countries wishing to participate in global electronic commerce.<sup>33</sup> This must be regarded as utopia as people operating online are physical people whose online conduct has effects on the off-line world: off-line norms are applied and borders demarcating one legal system from another do have legal effect.

The problems may be illustrated by looking at a basic dispute resolution scenario where the main questions concern the legislative jurisdiction, judicial jurisdiction, choice of law, the recognition and enforcement of judgments and alternative dispute resolution.

Legislative, prescriptive or regulatory jurisdiction dictates which State or States may, under international law, regulate certain conduct. In fact, through norms on legislative jurisdiction, States may create a viable regulatory structure for business-to-consumer electronic commerce by determining which States have legislative jurisdiction over which activities. This would resolve essential questions of policy allocation on the international law level, rather than suspend them and move the question of applicable law to the dispute resolution level.<sup>34</sup> However, as will be argued below, businesses and consumers cannot generally ascertain with enough certainty whether their home State has legislative jurisdiction over their activities in international electronic commerce. In the absence of a stable and predictable legal framework essential for business-to-consumer electronic commerce, the question of applicable law is generally left to courts.

Once a suit is filed with a court, it must determine whether it has jurisdiction to hear the case. In this respect, for example in the United States, the court must decide whether it has subject-matter jurisdiction, that is, jurisdiction to entertain specified classes of cases, and whether it has personal jurisdiction, that is, jurisdiction to subject persons or things to the process of the courts or administrative tribunals of the State.<sup>35</sup>

Suppose a small Finnish business decided to sell its products or services to American consumers. The business would have to face the possibility of having to defend itself before US courts. Distance creates extra litigation costs, such as travelling expenses and costs of hiring a local lawyer. Distance also signifies different legal systems: as national courts always apply national procedural laws, the business

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<sup>33</sup> Ibid., at 1367-1371.

<sup>34</sup> See V. Heiskanen, *Dispute Resolution in International Electronic Commerce*, 16 J. INT'L. ARB. 29, 36 (1999).

<sup>35</sup> See generally G.B. Born, *INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES COURTS* 512 (3d ed., Kluwer, The Hague, 1996).

would also be aware of pro-plaintiff juries, class actions and substantially high damages. Conversely, if US courts rejected the claim, consumers would have to litigate in Finland. If litigation in domestic courts is usually prohibitively expensive for consumers where litigation costs outweigh the value of the claim at stake and the efforts invested, it is radically more so before foreign courts. There may be no guarantee that the consumer may recover dispute resolution costs from the losing party, especially where the business is a small foreign business. There may also be no guarantee that a business responds to claims or agrees to resolve the dispute by particular means. Even where unwarranted, consumer mistrust drives consumers to transact with off-line and online local establishments, even where an overseas business offered the same product or service at a lower price.

However, these problems are aggravated: in addition to the US, the business' website would also be accessible in Mexico or Canada, or Singapore etc. Even if the business had drafted its website to conform with US laws and had an American lawyer on its staff, as it had prepared itself for US markets, it would be in danger of having to litigate in numerous other States. Without any pertinent international rules, any efforts at targeting would not screen the business from other jurisdictions.

At present there is a dearth of international business-to-consumer e-commerce cases that involve a traditional private law breach of contract and questions may arise doubting the sense of giving jurisdiction any priority. While the present landscape is characterized by too high litigation costs in the typical consumer dispute scenario, consumers may manage to get the case to courts through other means. Consumers may resort to a class action or contact public alternative dispute resolution bodies, such as the Finnish Consumer Complaint Board, although such avenues are not available in all States and may not be effective. More importantly, the cost-problem may well change to some extent in the near future. Businesses are introducing more high-value products, such as financial and travel services into e-commerce to which regulators have sought to establish a functioning legal environment.<sup>36</sup>

Once a court has established jurisdiction over the Finnish business, it must determine what law or laws it applies to the dispute. In this task the court looks again at its own rules of private international law. Although especially in business-to-consumer disputes judicial jurisdiction has a strong impact on applicable law as the forum uses its own legal system to determine the applicable law and is bound to apply mandatory forum rules, in a civil dispute commenced by a private litigant the court frequently applies to the dispute not its own but a foreign system of law where mandated by its choice of law rules. It goes without saying that businesses and consumers are interested in what law(s) the tribunal applies. The choice of law rules will determine which law applies to the validity of the choice of forum

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<sup>36</sup> See e.g. Directive 2002/65/EC of the European parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, 2002 O.J. (L217) 16.

and law clause typical in electronic commerce adhesion contracts, and which law(s) apply to the substance of the dispute.

The localizing effect applies also to substantive law questions. Businesses have to adjust their business to the inherently international environment, but do not know how they should draft their Web sites (marketing, language requirements etc) and contracts (e.g. what terms fall foul for different mandatory consumer laws): whether to invest resources in finding what foreign consumer protection norms may apply and to take them into account; how to shield themselves from having to defend themselves in foreign courts – in essence, how to define their market area and determine the norms applicable thereto. Such uncertainty stifles electronic commerce and undermines its advantages and potential for growth and is a fertile source for dispute.

If the Finnish business or the American consumer(s) prevailed in the litigation, they would then try to have the judgment recognized and enforced in the courts of a State where the defendant has assets that would satisfy the claim. The final hurdle is a high one and can frustrate the plaintiff's whole journey. On a global scale, the forum where recognition is sought may have markedly different rules on recognition and even where recognition and enforcement is secured through the right channels, where, for example, there is a treaty on the matter between the two States, the small Internet trader may turn out to have dispersed its assets throughout various jurisdictions or to have only negligible assets.

Finally, if parties are able to benefit from the characteristics of the novel environment, the argument goes, they could utilize those characteristics in the dispute resolution process, as well. As courts have proved to be a too expensive and inconvenient place to resolve disputes, businesses have often resorted to alternative dispute resolution methods, such as arbitration, mediation and negotiation. Indeed, business-to-consumer electronic commerce disputes may well be channeled to online dispute resolution mechanisms that would alleviate many of the jurisdictional, applicable law and recognition and enforcement problems. International online alternative dispute resolution, however, is by no means devoid of difficulties: who controls them, when should they exercise jurisdiction, what norms should they abide by and apply, should their decisions be enforceable, etc. Consumers may well end up with an unsatisfactory decision with little chance to have it corrected. To address these grievances, one must look at the normative structure claiming applicability over international electronic commerce, to its deficiencies and its deformatization.



## IV. INTERNATIONAL LAW AND REGULATION – THEORETICAL UNDERPINNINGS

### A. DEFICIENCIES IN INTERNATIONAL LAW AND REGULATION

The international normative system is often juxtaposed against domestic normative systems in order to highlight aspects of its deficiencies.<sup>37</sup> It is regularly asserted that the institutions that make and apply international law are only of rudimentary character: there is no legislature to update the law to match emerging needs, only a limited court structure to interpret and apply it and no executive authority to enforce the law.<sup>38</sup> Those accustomed with the subject are fully aware that States have set up various mechanisms for the adjudication and enforcement of specific obligations, as well as established international and supranational organs with regulatory authority. Nevertheless, the statement remains generally valid.

International law's weakness and indeterminacy springs from several sources, and critical international legal studies, for example, have questioned whether a positive system of international law exists.<sup>39</sup> The international law-making machinery is substantially more ineffective and imprecise than national legislative machineries. Customary law is difficult to extract from masses of often defective or incomplete documentation of state practice, judicial decisions, diplomatic records etc., and it may be difficult to discover the necessary *opinio juris* as the motivation behind certain State practice. The individual instances of practice are always diverse, they differ in time, space and in relation to actors involved, and the circumstances surrounding the practice may vary considerably.<sup>40</sup> One may find nowhere any *a priori* allocative criteria, and legal equivalence of State conduct forming "uniform" practice is always subject to an authoritative decision.<sup>41</sup> While there are also other means for selecting relevant State practice, international law contains no prescriptions on how to select the characteristics under which precedents are classified, and what degree of abstraction and precision should be employed in such a process.<sup>42</sup> Moreover, custom does not seem to be adequate for the regulation of

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<sup>37</sup> Or, as Prosper Weil would address some of these deficiencies as the "pathology" of the international normative system. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).

<sup>38</sup> See e.g. Louis Henkin, *INTERNATIONAL LAW: POLITICS AND VALUES* 3 (Martinus Nijhoff, Dordrecht, 1995).

<sup>39</sup> On this approach to international law, see e.g. Martti Koskenniemi, *FROM APOLOGY TO UTOPIA – THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (Lakimiesliiton kustannus, Helsinki, 1989); David Kennedy, *INTERNATIONAL LEGAL STRUCTURES* (Nomos, Baden-Baden, 1987).

<sup>40</sup> Ulrich Fastenrath, *Relative Normativity in International Law*, 4 E.J.I.L. 305, 317 (1993).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*, at 317-318 (explaining two other means, i.e. through using concepts that express certain value judgment or identifying the characteristics under which precedents are grouped).

novel and rapidly evolving phenomena in present times, which require specific formulation and enactment<sup>43</sup>. Nor would general principles be qualified to perform the task.

Of the sources of international law, treaties have emerged not only as the primary tool of norm-creation, but also as the most suitable device for purposefully directed law-making. Nevertheless, even the treaty instrument – that most resembles the national statute of the sources – cannot divest international law of its relative inefficiency and indeterminacy. Treaties may take considerable time to be negotiated, signed and ratified – if they ever materialize –, may eventually contain fewer norms or fewer parties than originally anticipated or may only materialize regionally or even bilaterally. Treaties may give rise to different interpretations due to the indeterminacy of concepts that may be rooted deeply in national legal terminology or may contain general norms that are susceptible to various interpretations.

The deficiencies in international treaty-making are also linked to the element of consent. Disagreement on the objective(s) of the treaty may continue throughout the treaty-making process and water down the final outcome: second thoughts may be oppressed and a deceptive atmosphere of concord maintained that is especially visible when the mechanism of consensus is employed.<sup>44</sup> Treaty-making is also infected with the juxtaposition of judicial rigour and textual unambiguity, on the one hand, and the acceptability of the text, on the other hand. The more demanding and precise the obligations are, the less likely States are to ratify, and the more readily certain political positions are spared the more likely the treaty is to attract parties.<sup>45</sup> Ambiguities may be deliberate and relate to the core of the treaty due to lack of consensus on the meaning of certain concepts and the issue is left open for further debate or conflict.<sup>46</sup> Proponents of the orthodox view of treaty interpretation have gained support from the International Court of Justice on the role of the interpreter.<sup>47</sup> The view distinguishes between law-making and law-applying – legislation and adjudication, where law-appliers are to carry out the wishes of the law-maker. Proponents of the orthodox view – whether belonging to the textualist, subjectivist or teleological school of interpretation – have, however, criticized each other and have been targeted especially by conventionalists<sup>48</sup> and international legal critics.

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<sup>43</sup> For earlier commentaries, see Wolfgang Friedman, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 121 (Columbia University Press, New York, 1964).

<sup>44</sup> Bruno Simma, *Consent: Strains in the Treaty System*, in R. St. J. Macdonald & D. M. Johnston (eds.) *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 485, 488 (Martinus Nijhoff, Dordrecht, 1986).

<sup>45</sup> See *id.*, at 489.

<sup>46</sup> *Id.*

<sup>47</sup> For illustrations, see the ICJ's decision in *Admission to the United Nations Case*, Advisory Opinion, 1948 ICJ Rep. 57.

<sup>48</sup> See e.g. Stanley Fish, *Fish v. Fiss*, 36 *STAN. L. REV.* 1325 (1984).

This brings us to profound deficiencies in the field of international law: the conflicts and incompleteness of international legal discourse. The question is “how autonomous and independent actors can be brought together in support of or under the rubric of some notion of the common good, when authority for a definition of that good must remain with the same autonomous and independent actors.”<sup>49</sup> In fact, this dilemma manifests itself in the sources of international law that are “desperately seeking a theory worthy to be so called”<sup>50</sup> and this is the crucial “battleground” between positivism and critical international legal studies.<sup>51</sup> It is the latter that are not content with analytical linguistics that provides for a dynamic understanding of legal rules or with legal hermeneutics. Rather, the critical approach emphasizes the relationship between international law and international politics having a direct effect on the law’s openness.

Koskenniemi argues that in contemporary world, social conflict must still be solved through political means. The rhetoric among international lawyers must, for reasons internal to the ideal itself, rely on political principles to justify any outcome. A showing that international law is objective, i.e. independent of international politics, requires a battle on two fronts. On the one hand, law must be concrete, that is, separate from theories of natural justice: law must be based on something concrete – actual behaviour, will or interest of States – otherwise it will fall for utopianism. On the other hand, law must be normative and must keep distance from State behaviour. It must be applied irrespective of political preferences of State and in this sense must not be an apology for the legal subject’s political interest. However, the two requirements cancel each other as a rule or a principle cannot be both concrete and normative at the same time. Within this argumentative structure each substantive position taken may be subjected to valid criticism, but the structure itself cannot justify any. In fact, the structure does not have the kind of distance from politics for which the Rule of law once seemed necessary: A position may only be taken by political choice that must ultimately defend itself in terms of a conception of justice.<sup>52</sup>

The concreteness/normativity juxtaposition may be visible in attempts at explaining the origin of the law’s substance.<sup>53</sup> On the one hand, the substance emerges from the sovereign liberty to legislate international norms that bind oneself. Where norms have not been established, the metaprinciple of

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<sup>49</sup> Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 E.J.I.L. 1 (1991).

<sup>50</sup> Bruno Simma, *Editorial*, 3 E.J.I.L. 215 (1992).

<sup>51</sup> Carty, *supra* note 49.

<sup>52</sup> For this discussion see Koskenniemi *supra* note 39 and Martti Koskenniemi, *The Politics of International Law*, 1 E.J.I.L. 4 (1990).

<sup>53</sup> *The Politics of International Law*, id., at 13

sovereign liberty or the “*Lotus* principle”<sup>54</sup> prevails. On the other hand, the normativity standpoint looks at assumed criteria or “sources” to separate State behaviour from law. Both approaches remain vulnerable to arguments. The doctrine of sovereignty is problematic. Rules and principles are more or less indeterminate in content and the binding force of most rules would be illusory if the existence of different interpretations rendered the principle applicable. Even more, the conflict of liberty cannot be resolved by resorting to “liberty”. These problems are manifest especially in jurisdictional disputes. The “sources” avenue, for its part, is full of dualisms expressing the normativity/concreteness juxtaposition. One State may argue on basis of consent, the other from what is just. Both must, however, rely on each other to be justifiable, thus coming down to the question as to what States “really” will or what the content of justice “really” is. Neither is answerable on the premises of the Rule of law.

These premises affect the whole of international law, including custom and treaty interpretation. The doctrine of customary law is indeterminate because it is circular. Its two elements – the material and the psychological – cannot be identified independently of the other. As Koskenniemi argues:

“Customary law doctrine remains indeterminate because it is circular. It assumes behaviour to be evidence of states’ intentions (*opinio juris*) and the latter to be evidence of what behaviour is relevant as custom. To avoid apologism (relying on the state’s present will), it looks at the psychological element from the perspective of the material; to avoid utopianism (making the distinction between binding and non-binding usages by reference to what is just), it looks at the material element from the perspective of the psychological. It can occupy neither position in a permanent way without becoming vulnerable to criticism compelled by the other.”<sup>55</sup>

The treaty interpreter is faced with a dilemma.<sup>56</sup> She is faced with texts that are often indeterminate in meaning and outcome and with external factors that influence her decision-making. She must follow the legislator’s commands, which will often prove difficult. Moreover, she is strained by the clash between material justice and formal or legal justice. This dilemma cannot be resolved by meta-norms as they too suffer from the same symptoms as the norms the conflict between which they are supposed to resolve.

However, as Smith points out, if rules are viewed as objects that are in a sense absolute, they must be either determinate or indeterminate: determinists claim that rules have a fixed meaning and are outcome determinate and indeterminists claim that rules are mere epiphenomena.<sup>57</sup> But if rules are

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<sup>54</sup> See Part II, p. 708, at n.79.

<sup>55</sup> Koskenniemi *supra* note 52, at 26.

<sup>56</sup> See Derek C. Smith, *Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in U.S. v. Alvarez-Machain*, 6 E.J.I.L., No. 1, 1 (1995) that has strongly influenced the present introductory discussion.

<sup>57</sup> *Id.*, at 17.

viewed as “processes or dynamics that form part of a complex system, they need not exhibit fixed properties in order to be significant phenomena”. Rules do not have to be either determinate or indeterminate, but have a “reciprocal and changing relationship to other rules, judicial decision-making, interpretative constructs and to the field of action they are intended to regulate”.<sup>58</sup> A rule is therefore determinate not solely because it is simple and presented through unambiguous language, but also because:

- “1) it does not conflict with other rules in the system;
- 2) the interpretative constructs related to the rule are universally or almost universally shared among interpreters;
- 3) the field of action being regulated is relatively simple; and
- 4) the normative decision-making (dispute resolution) procedures are functional, authoritative and regarded as legitimate.”<sup>59</sup>

Determinacy – the relationship between rules and interpretative constructs – is therefore relative to the environment in which it operates. It changes over time and place, through purposeful or non-purposeful action and its two components affect each other mutually. Internal constructs relate to the rule itself, to knowledge that allows the decision-maker to read the normative text. External constructs do not act to define the rule, but define the decision-maker’s approach – her political, social and moral preferences, and both are in a reciprocal relationship to legal rules.<sup>60</sup>

Finally, the paradox presented by critical legal scholars between freedom and order, is a characteristic of the international system itself. In spite of its shortcomings as a normative system, it is still a normative dynamic system poised between stagnate order and freedom: “international law moves back and forth between the competing doctrines of consent and objective order to allow for the existence of both order and freedom.<sup>61</sup> International law is capable of resolving disputes by functioning between rule-based order and autonomy. Law interpreters and appliers are not entirely rule-bound and not allowed to use unfettered will, but work in a state of complexity.<sup>62</sup> International law is, in fact, to be seen as a continuum, with indeterminacy and change on the one end and rigid and clear-cut rules on the other. The system would not function if all international regulation were to be allocated on the one end only. International law would either become unresponsive to individual justice and stagnate, unable to adapt to the richness of varying fact-patterns in international life or too political, arbitrary and legally uncertain.

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<sup>58</sup> Id.

<sup>59</sup> Id, at 17-18.

<sup>60</sup> Id, at 19.

<sup>61</sup> Id, at 22.

## B. DEFORMALIZATION OF INTERNATIONAL LAW AND REGULATION

The positivist and formal conception of international law and regulation has been confronted with a process of deformalization. It has been claimed that global law is no longer a monopoly of the traditional and formal law-creating agencies. Global power and authority are undergoing fundamental transformations and hence are strengthening the significance of the private sphere in the creation and enforcement of laws governing international commercial relations.<sup>63</sup> As Cutler has pointed out, there are three trends in governance that are challenging the conventional conception of world order.<sup>64</sup> First, political, social and economic life is being juridified: legal concepts, institutions and ideologies are used increasingly to legitimize claims to political authority. Second, the forms of regulation and governance are subject to growing pluralism – an increasing number of regulatory orders, legal forms and subjects of law operating beyond the State territory. Third, governance is being privatized by various arrangements. One may illustrate these phenomena by focusing on the subjects of law, their respective domain of operation within the global environment, and on the sources of law.

The traditional subjects of law on the international plane are States. However, even though viewed by formalist theory as “apolitical” or “invisible”, transnational corporations have emerged as de facto legal subjects of international law and have strong influence on norm-creation, adjudication and the enforcement of legal norms. What has emerged, in Cutler’s words, is a mercatocracy, that is, the elite association of transnational merchants, private lawyers and their associations, government officials and international organizations.<sup>65</sup> Their emergence is linked with the substantial increase of private power in international affairs.<sup>66</sup> These actors have deformed the regulatory, adjudicatory and enforcement domain of States. They are engaged in the unification and harmonization of law through different institutions and operate a vast array of self-regulatory schemes. They are engaged in dispute settlement through negotiation, mediation and arbitration that operate in the private sphere, where public authority has often no access. This deformalization has at least sought to shift elements of political importance, notably in the area of mandatory laws, such as consumer protection, beyond the supervision and reach of the public eye and resolution by State courts.

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<sup>62</sup> Id., at 25.

<sup>63</sup> A. Claire Cutler, *PRIVATE POWER AND GLOBAL AUTHORITY – TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 1* (Cambridge University Press, 2003).

<sup>64</sup> Id., at 16-59.

<sup>65</sup> Id., at 185.

<sup>66</sup> On the rise of private power in international affairs, see especially, Susan K. Sell, *PRIVATE POWER, PUBLIC LAW – THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (Cambridge University Press, 2003).

Pluralism is also visible in the sources of law. The nature of treaty and custom has led law-apppliers to utilize a number of other legal arguments. General principles of law recognized by civilized nations and equity have given rise to a development that may be described as international law's deformalization.<sup>67</sup> This is a response to the problems outlined above: rigid norms may prove too inflexible for a case at hand and are acceptable only if given, for example, semantically ambiguous or evaluative expressions that enable a balancing of interests. Deformalization, however, brings into the picture familiar dangers that ad-hoc decision-making on basis of very generally formulated norms do: legal certainty, uniformity and generality is compromised for the sake of increased justice and particularity, and the canons of orthodox interpretation are violated by shifting power from law-makers to law-apppliers.

A number of ways have been presented to alleviate the problems caused by strict formalism, but these arguments have attracted large opposition.<sup>68</sup> The debate is not restricted to the field of international law, but has been frequently erupted with respect to law in general. It is often argued that binding force is not an on/off phenomenon: legal norms may be organized into a hierarchical order with certain norms being more compelling than others. Deformalization may also open up various kinds of standards to law-apppliers than formalism would allow. Standards that may not meet the formal criteria of sources of law may still be worthy of consideration: so-called "soft law" may encompass a vast variety of stipulations by States, international bodies and other international actors and may influence decision-making. Finally, it is often claimed that a distinction may be made between principles and rules, the former having a weight character and the latter a more absolute on/off character.

In fact, a global law has been claimed to have emerged that grows "*mainly from the social peripheries, not from the political centres of nation-states and international institutions*. A new 'living law' growing out of fragmented social institutions which had followed their own paths to the global village seems to be the main source of global law".<sup>69</sup> Indeed, global law grows out of the "ongoing self-reproduction of highly technical, highly specialized, often formally organized and rather narrowly defined, global networks of an economic, cultural, academic or technological nature".<sup>70</sup> The best-known example of such "law" is no doubt the global *lex mercatoria* – originally a body of rules and principles laid down by merchants for the purpose of regulating their dealings. The *lex mercatoria* is shaped, among others, by commercial usages, arbitral decisions and decisions of various international organizations, as well as unification and

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<sup>67</sup> See e.g. Martti Koskenniemi, *Introduction*, in Martti Koskenniemi (ed.) *SOURCES OF INTERNATIONAL LAW* xi, xx-xxiv (Dartmouth, Aldershot, 2000).

<sup>68</sup> See *id.*, at xxii-xxiii.

<sup>69</sup> Gunther Teubner, "*Global Bukowina*": *Legal Pluralism in the World Society*, in Gunther Teubner (ed.) *GLOBAL LAW WITHOUT A STATE* 3, 7 (Dartmouth, Aldershot, 1997) [italics as in the original].

<sup>70</sup> *Id.*

harmonization projects. There are those lawyers, mainly French, who claim that the *lex mercatoria* qualifies as a maturing independent global legal order that finds its sources in, for example, commercial practices, codes of conduct and decisions of arbitral tribunals.<sup>71</sup> And there are those, mainly British and American, who discard the law merchant through positivist arguments of unity of law and State, of the *sine qua non* nature of exclusive territory and coercive power and the adequacy and exclusivity of doctrines of private international law and the formal sources of public international law. However the debate evolves in the future, one must recognize the power of the argument and debate over the dividing line between political and apolitical, national and international, binding and non-binding, and public and private.

### C. INTERSECTION BETWEEN PUBLIC AND PRIVATE INTERNATIONAL LAW

The establishment of a legal structure for international electronic commerce involves both public and private international law. Private international law is employed throughout the present study in a wide sense, including international procedural law (judicial jurisdiction). All States have promulgated private international rules on both judicial jurisdiction and choice of law. In a crude sense it may be claimed that public international law regulates activity among nation States, international organizations and to a limited extent also individuals, while private international law regulates activity among individuals or other non-state entities, such as corporations. The former is international law and the latter municipal law.<sup>72</sup> Public international law regulates matters between States – the use of force, diplomatic immunity, international jurisdiction etc. – and private international law regulates matters that have not normally attracted equally vehement political debate – family law, international commercial transactions, jurisdiction of courts and choice of law in private matters, etc. In this respect it is often observed that “[t]here is, at any rate in theory, one common system of public international law ... but ... there are as many systems of private international law as there are systems of municipal law”.<sup>73</sup>

Historically, public and private international law have been treated as distinct legal systems that operate more or less independently, although for centuries the two were hardly thought of as distinct branches of law.<sup>74</sup> Nevertheless, the distinction between the two is problematic and has blurred considerably. Private international law operates at least in three ways: as a domestic conflict of laws

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<sup>71</sup> Id., at 9-10.

<sup>72</sup> P.M. North & J. J. Fawcett, *CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW* 12-13 (12<sup>th</sup> ed. Butterworths, London, 1992).

<sup>73</sup> Id.

<sup>74</sup> F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 *RECUEIL DES COURS* 9, at 24 (1964 I) (“a fruitful and effective history of public international law starts some four centuries later than the history of conflict of laws”).



system localizing international transactions to a national system thus giving extraterritorial effect to foreign law; giving individuals the possibility to delocalize their transaction by excluding the application of national law and judicial systems; but also exhibiting some similarities to public international law “as a source of governance that may be formulated internationally or transnationally through hard law in the form of international conventions or soft law in the form of model laws, codes, principles, and guidelines that are accepted as law voluntarily by commercial actors.”<sup>75</sup>

In fact, public and private international law have not developed in isolation of each other, and the foundations and status of private international law have been under dispute.<sup>76</sup> Public international law has had a growing influence on the realm of private international law – municipal law – and courts adjudicating private disputes have had to take more often cognizance of international law norms. Private international law techniques, for their part, have influenced the interpretation of international jurisdictional norms. Private international law has become increasingly international and uniform through international treaties and other unification ventures and through the influence of private actors in public matters, whereas State are acting as private commercial actors and public international law has developed to embrace individuals, for example, in the field of human rights.

A similar caveat should be made to the distinction between private law and public law. Private law has traditionally encompassed norms regulating private relations between both individuals and corporations alike, whereas public law concerns the organization of the State itself, the relationship between its organs, and the relationship between State organs and individuals when the organs exercise public functions over individuals or guard the public interest. Criminal law is special; it is neither regarded as private law nor generally public law proper. Nevertheless, it may be regarded as public law as the State imposes sanctions on individuals for certain undesirable conduct.<sup>77</sup>

The focus of the present study offers a prime example of the weakening distinction between public and private law. Consumer law seeks to protect consumers also as a group and ensure that companies operate in the market in conformity with the public interest. It includes both contract law rules as well as those of a more public law character, for example, those regulating the market. In fact, the ideals behind a welfare state have injected private law a number of rules more of a public-law nature seeking to protect the weaker party. The basic values behind private law have been changing and

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<sup>75</sup> Cutler, *supra* note 64, at 39-40.

<sup>76</sup> See *id.*, at 48-49.

<sup>77</sup> See e.g. Ingrid Detter, *THE INTERNATIONAL LEGAL ORDER* 24 (Dartmouth, Aldershot, 1994).

arguably a new branch of law has emerged: social civil law. In this respect researchers on social contract law have examined what kind of contract law a welfare-type of society should promote.<sup>78</sup>

The need to protect weaker parties has indeed been so strong that a number of regional international treaties have provided separate consumer protection provisions with respect to jurisdiction and the applicable law. The private/public law distinction has provoked scholarly discussion about the reach of public international law norms of jurisdiction and so-called mandatory norms in choice of law questions. The latter involves the wider question whether public laws are outside the ambit of private international law as courts in many countries, including British and American courts, decline to give full effect to foreign public law, unless mandated by international law. The need to protect consumers has also attracted international initiatives that seek to give consumers better protection, dispute about conflicting levels of protection and concerns about losing national public law control over norm-creation and dispute resolution to the private sphere.

## V. FRAMEWORK FOR ANALYSIS

### A. A NEW FIELD OF LAW

With the advent of computers in the late 1940's, legal scholarship began to focus on the possibilities information technology could offer to the development and practice of law. The answer was, as has been the case in various other fields of law, legal specialization. Legal informatics, as the discipline is often called, drew its impetus from Jurimetrics, a field of law driven by the pioneering works of American lawyer Lee Loevinger examining the relationship between law and technology. Jurimetrics never gained acceptance in Europe and neither did later Peter Seipel's computer law as coined in his 1977 doctoral thesis.<sup>79</sup> Rather, in the early 1970's scholars adopted the term *Rechtsinformatik*, legal informatics. The technological developments of the late 1960's and 1970's moulded legal informatics, which broadened its scope to address the emerging legal problems brought about by ever-increasing and evolving role of information in society.<sup>80</sup>

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<sup>78</sup> See e.g. Thomas Wilhelmsson (ed.) *PERSPECTIVES OF CRITICAL CONTRACT LAW* (Dartmouth, Aldershot, 1993); Roger Brownsword et al., (ed.) *WELFARISM IN CONTRACT LAW* (Dartmouth, Aldershot, 1994); Thomas Wilhelmsson, *SOCIAL CONTRACT LAW AND EUROPEAN INTEGRATION* (Dartmouth, Aldershot, 1995).

<sup>79</sup> Peter Seipel, *COMPUTING LAW: PERSPECTIVES ON A NEW LEGAL DISCIPLINE* (Liber, Stockholm, 1977).

<sup>80</sup> See generally, Egbert J. Dommering, *An Introduction to Information Law – Works of Fact at the Crossroads of Freedom and Protection*, in Egbert J. Dommering, and P. Bernt Hugenholtz (eds.) *PROTECTING WORKS OF FACT – COPYRIGHT, FREEDOM OF EXPRESSION AND INFORMATION LAW* (Kluwer, Deventer/Boston, 1991); Ahti Saarenpää, *Oikeusinformatiikka* [Legal

As a science, legal informatics focuses primarily on the storage, delivery, publication, search and use of information in all forms.<sup>81</sup> It examines the different forms of relationships that emerge between law and information as well as law and teleinformatics. Legal informatics may justifiably claim to be a legal discipline in its own right, but noteworthy is that many of its elements may be allocated to other legal disciplines, such as computer crimes to criminal law, electronic commerce to commercial law and so forth. It is multidisciplinary both within and without law and may be seen mostly as a legal theory having substantial contacts with substantive law. In its present form legal informatics may be divided into four more or less distinct fields. The study of legal information processing concentrates, generally speaking, on how information processing may be utilized in legal life, whereas the study of legal information focuses on the introduction and use of legal databases. The third is teleinformatics law, which examines the interpretational and regulative problems arising from the introduction and use of teleinformatics and is, together with information law, often referred to as information technology law to pinpoint their rather tenuous distinction.

The present study touches upon several fields of law, including international law, the conflict of laws, consumer law, comparative law and EC law, but also information law or, jointly expressed, informational technology law. Prompted by the information technology innovations of the 1990's and the European Union's efforts to create a single and viable European information society, information law has emerged as a significant sector of legal informatics. Information law refers to a field of law under which the production, handling, communication, marketing, protection and storage of information are examined.<sup>82</sup> It now comprises such areas as privacy, publicity, telecommunication, data protection and – electronic commerce.

There are several reasons for including electronic commerce in the study of information law. The latter examines the private and public development of the information infrastructure and information markets from a legal perspective. Needless to say, electronic commerce is an information market built on both an open and closed network infrastructure where information-based products and services are the subject of commerce. The fact that electronic commerce may also be indirect, that is, where the transaction occurs entirely through electronic means, save that the subject-matter of the transaction is delivered non-electronically, e.g. through regular mail, should be no reason to delete it from the study

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Informatics] in Heikki E. S. Mattila, (ed.) *ENCYCLOPÆDIA IURIDICA FENNICA* VII 713-726 (Suomalainen lakimiesyhdistys, Jyväskylä, 1999).

<sup>81</sup> Ahti Saarenpää, *Oikeusinformatiikka: tiedettä ja toimintaa* [Legal Informatics: Science and Action], in Antti Rautava and Kaisa Sinikara, *TIETOHUOLTO JA JURIDIikka* [Information Services and Law] 101, 104 (Suomen tieteellinen kirjastoseura, Helsinki, 1992).

<sup>82</sup> Ahti Saarenpää, *Informaatio-oikeus* [Information Law], in Heikki E. S. Mattila (ed.) *ENCYCLOPÆDIA IURIDICA FENNICA* VII 206 (Suomalainen lakimiesyhdistys, Jyväskylä, 1999).

of information law. If a distinction is insisted upon, one might regard the non-material elements of indirect electronic commerce as falling under information law to the exclusion of the material parts of the contracting process.<sup>83</sup> Even then, the distinction would be problematic as material products, such as books or music, may be information products. The fact that information law deals with the rights and duties of those using open and closed networks, including consumer rights and hence consumer protection, ties electronic commerce even more firmly to information law.

Information law covers a broad field and encompasses more specialized fields, such as Internet law or the typically American cyberlaw.<sup>84</sup> Both, however, address specific types of networks among the closed and open networks examined by its parent discipline. They may be regarded as a practical application of information law: while the systematic basis of the former is grounded on the specific technical, mental and functional space created by networks, the theoretical basis of the latter is anchored to an information theory based on information sciences and information economics.<sup>85</sup>

## B. THE FOUR VENTURES AND THE ARGUMENTS

The present work continues the line of contributions to the study of Internet law. In exploring the current international legal environment in which businesses-to-consumer electronic commerce is conducted, the study concentrates on dispute resolution and the legal structures that should be in place to prevent disputes. It focuses on business-to-consumer electronic commerce, understood as comprising primarily the Internet and its most important applications – the World Wide Web and e-mail. In spite of this focus, as reiterated in Part II, the study also reflects, where appropriate, on scenarios involving other media (fax, telephone) that may be used in conjunction with the Internet. It embraces both direct and indirect electronic commerce and concentrates on commercial activity that involves an international (or interstate) element, thus leaving purely intra-national (or intrastate) commerce aside.

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<sup>83</sup> This distinction would follow the lines of the EU E-commerce Directive as interpreted in the implementing Finnish law that leaves the material elements of the contract outside the definition of “information society services” and therefore outside the ambit of the Directive. See Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. (L 178) 1, Recital 17 and Article 2(a); Laki tietoyhteiskunnan palvelujen tarjoamisesta 5.6.2002/458 [implementing law], Article 2; Hallituksen esitys Eduskunnalle laiksi tietoyhteiskunnan palvelujen tarjoamisesta ja eräiksi siihen liittyviksi laeiksi, HE 194/2001 vp [Government Bill].

<sup>84</sup> For a particularly telling example among the vastly expanding number of works on cyberspace law, see Steven Hoffer, *World Cyberspace Law* (New York: Juris Publishing 2000).

<sup>85</sup> Tuomas Pöysti, TEHOKKUUS, INFORMAATIO JA EUROOPPALAINEN OIKEUSALUE 368 [Efficiency, Information and the European Judicial Area] (University of Helsinki 1999).

The study explores four topics that are essential to the subject matter covered: (a) the legislative jurisdiction of States – on what basis may States regulate electronic commerce and claim validly that their norms should be abided by; (b) judicial jurisdiction – in which circumstances may a court exercise jurisdiction over an electronic commerce dispute; (c) the applicable law – which State’s law the court may or has to apply; and (d) alternative dispute resolution – what alternative out-of-court avenues do businesses and consumers have to settle their dispute and what norms apply to those recourses.

The six main arguments are, respectively, as follows.

- (1) States have failed to erect a normative system that would accommodate the interests of different States to regulate international business-to-consumer electronic commerce. Consumer law may be termed private law and there is some authority for claiming that generally, international law on jurisdiction does not restrict the jurisdiction of States in civil or private law questions. However, even where consumer law is regarded as belonging not wholly within the sphere of private law, but also having a strong public law character, or that international law on jurisdiction may apply to private and civil law matters as well, international law contains only a set of principles that may justify a very wide variety of extraterritorial regulation over international electronic commerce. Moreover, states have failed to provide a method for prioritizing them and resolving, where appropriate, disputes arising out of concurrent jurisdiction. In fact, current theories and norms are vague and devoid of an acceptable level of legal certainty. The norms and theories tend to over-emphasize discretion, whether couched in terms of interest balancing, reasonableness, close contacts or comity, through which States may forward their policies surprisingly freely over international electronic commerce. These institutions do not really help to coordinate various national policies in a centralized and systematic way. The state of international law is detrimental to businesses, consumers and the growth of international electronic commerce.
- (2) A comparative analysis of the approaches of two legal entities, the United States and the European Union, on the exercise of judicial authority over extraterritorial electronic commerce reveals a number of issues. US federal and state courts have not managed to establish a sufficiently legally certain test based on the Due Process Clause of the US Constitution and the Supreme Court’s case law. Rather, different courts use different theories that give rise to various interpretations. While one theory is gaining support, it

nevertheless carries several shortcomings. The rather low level of legal certainty is attributed to the legal system's emphasis on individual justice and case-by-case application of generally formulated norms. In fact, to a large degree, decision-makers do not benefit from specific authoritative guidance on the reach of national jurisdiction, and where such guidance exists, it is often pro-forum, confusing and inconclusive. Consequently, the norm-developing process of state and federal courts has in many cases been rather unfruitful and helped to confuse rather than solve essential questions. Again, indeterminacy prevails. Although one deals with a constitutional test in interstate matters, the same principles are applied in the international context and may serve as apology for local policies on the private international law level.

- (3) In the European Union, a continental approach is taken that emphasizes legal certainty more than the American system and more rule-like norms than judicial discretion. However, even the union's legislature has had difficulties in defining a sufficiently precise and legally certain test for exercising jurisdiction over extraterritorial electronic commerce. In this sense, both legal systems give courts considerable discretion to apply forum policies to international electronic commerce. While certain discretion is naturally recommendable to fit the norm into various fact-patterns, the opportunity to tailor clear norms for electronic commerce was not taken. Although US and European courts will be looking for a number of similar elements in determining their jurisdiction over business-to-consumer disputes, they will have severe difficulties in tailoring an international instrument due to their different general approach.
- (4) In the sphere of determining which law should be applied to extraterritorial electronic commerce, the European Union organs have had similar difficulties as in the sphere of judicial jurisdiction. The question is not solely about the discretion/precise obligations dichotomy, but about substantial indeterminacy as under the provisions of the pertinent Convention national courts are left unsure what the provisions mean in international electronic commerce and what kind of balance they should make between the rights of businesses and consumers. The peculiar legal framework in which the norms operate does, however, give law-appliers assistance in law-application that is lacking in disputes between parties outside the territorial sphere of the pertinent Convention.

- (5) Two theories are frequently asserted by businesses and consumer organizations. The country of origin principle claims that jurisdiction and applicable law should be exclusively the concern of the State where the business is established. The country of destination principle claims that such questions are within the realm of the consumer's home State. Neither principle is satisfactory and a middle way should be found. There are specific normative and technical solutions available that provide businesses and consumers legal certainty as to jurisdiction and applicable law questions in electronic commerce, and especially in Europe, provide a solution to the political impasse between consumer representatives and the industry. In short, the theory of targeting through technological means allows businesses to delimit their market area and give a legally certain balance to the rights between businesses and consumers. However, even such highly recommendable solutions may possibly fail due to the deficiencies in international law or may have to be tailored only to specific causes of action. As with other solutions offered, States may not necessarily be persuaded to adopt them, as States may fear of having to limit the power they have – or think they have – over international business-to-consumer electronic commerce.

Moreover, jurisdictional and applicable law questions may emerge, at least for the time being, only in rather marginal cases, as consumers cannot afford to litigate or litigation may be absolutely unattractive due to the low value of the claim and high litigation costs.

- (6) In this respect, deformalization tendencies especially manifested through alternative online dispute resolution may well provide a viable exit out of the deadlock of uncertainty that public and private international law have erected. However, a publicly or privately managed international ODR system and other private ODR services must take a substantial number of caveats into account. Otherwise they cannot win the confidence of consumers and States guarding consumer interest. Consent to jurisdiction and applicable law may be arranged through the targeting theory by taking advantage of localization criteria, thus rendering the theory even more attractive. However, even if the general idea is to find an alternative way to formal regulation and dispute resolution and thus to the deficiencies of international law and regulation, such schemes are not immune from the legal and policy restrictions that States and other stakeholders have been pushing forward on the public level. Questions of consumer protection will have

an impact on the success of such alternative schemes as issues of public law character are intruding into the private realm and projecting the deficiencies of international law and regulation into alternative dispute resolution. Once these restrictions are dealt with, alternative online dispute resolution may provide a widely accepted solution to access to justice, jurisdictional and applicable law questions.

### C. CONTOURS OF THE FOUR VENTURES

The first article on legislative jurisdiction is concerned with general public international law that applies to all States engaging in international electronic commerce. As the purpose is to examine the limits public international law imposes on the exercise of legislative jurisdiction, it does not deal with municipal law as such or with private international law. Nevertheless, a number of domestic and regional views (US, UK and EU) on certain jurisdictional bases will be presented to show the differing approaches.

The second article takes a more complex approach. The article examines two approaches on judicial jurisdiction – one regulating judicial jurisdiction among states in a federation (US) and one regulating judicial jurisdiction among nation States through an international regional instrument (EU). While the US analysis would not, strictly speaking, deal with norms of an international character, there is not a significant difference in how US courts deal with jurisdictional matters in cases between US States, on the one hand, and between the US and other nation States, on the other hand. Furthermore, US law provides at present the most vivid case law on judicial jurisdiction in electronic commerce and the approaches presented therein have already had an impact on international developments.

The European Union is taken as another subject of inquiry, not only because it is, along with the US and Japan, one of the leading electronic commerce centres of the world, but because it has unified certain national laws on judicial jurisdiction by way of treaty (and later by Community Regulation). The European Court of Justice, moreover, has ruled on the interpretation of the treaty provisions. The European approach is, of course, of importance when a global treaty is negotiated that embraces business-to-consumer electronic commerce.

The third article on choice of law then concentrates solely on European Union developments. It was prepared in anticipation and in response to the Green Paper on the Conversion of the Rome Convention that deals with the applicable law to contractual obligations, thus excluding non-contractual obligations from its ambit.<sup>86</sup> The Rome Convention on the Law Applicable to Contractual Obligations is internationally by far the most sophisticated instrument in force dealing with applicable law issues in

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<sup>86</sup> COM (2002) 645 final.



international commerce. However, the article does not follow the lines of the second article and take a comparative venture between US doctrines and the Convention's approach. Different US jurisdictions take significantly differing approaches to determining the law applicable to non-contractual causes of action and such a trend is visible in scholarly works, as well.<sup>87</sup> This complexity and confusion is aggravated in the conflict rules applicable to contracts.<sup>88</sup> The US Supreme Court has interpreted the Constitution's Due Process Clause, the Full Faith and Credit Clause, the Privileges and Immunities Clause, and the Equal Protection Clause to give wide leeway to courts in choice of law matters.

Although US law on personal jurisdiction and especially its adoption into electronic commerce has been confusing, the Constitution sets substantial limits on its exercise and various States have decided to extend their jurisdiction up to the limits set by the Constitution. By contrast, there is little judicial review of choice of law decisions under the Constitution.<sup>89</sup> In fact, the United States lacks a uniform and comprehensive set of norms binding on all states. However, there have been important developments in business-to-consumer electronic commerce choice of law questions in the US. The National Commissioners on Uniform State Laws has prepared a revised version of Article 2B of the Uniform Commercial Code (UCC), presently known as the Uniform Computer Information Transaction Act. Still, it applies only to licenses and its content is controversial: only Maryland and Virginia have adopted it and other States are enacting "bomb shelter" legislation to avoid the application of the Act through contractual agreement to apply Virginia or Maryland law.<sup>90</sup>

It should also be noted that the present study has not devoted a separate article to the issues of recognition and enforcement of judgments. True, such issues are important for electronic commerce litigants and in a global electronic environment there are practical considerations that in many cases make it difficult to enforce judgments. Nevertheless, both in the EU and the US the fundamental problem the electronic environment has posed relates to jurisdiction. If provisions on judicial jurisdiction in international or federal instruments were amended, federal and international norms on the recognition and enforcement of judgments would generally follow suit. Where jurisdiction is exercised in accordance with the Brussels Convention and the EC Regulation, States may refuse recognition and enforcement only in very exceptional cases. The same applies to the relationship between personal and subject-matter jurisdiction, and the full faith and credit clause of the US Constitution, while with respect to foreign judgments, US states rely on state law and especially state common law that has often adopted the doctrine of comity.

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<sup>87</sup> Born, *supra* note 35, at 616.

<sup>88</sup> *Id.*, at 653.

<sup>89</sup> Michael Traynor, *Conflict of Laws, Comparative Law, and the American Law Institute*, 49 AM. J. COMP. L. 391, 392-393 (2001).

The enforcement of judgments should be distinguished from executive jurisdiction. The latter deals with the question whether a State may act within the borders of another State.<sup>91</sup> This question will not be addressed either.

The fourth, and at the same time last article, touches on contemplated solutions to the problems inherent in business-to-consumer electronic commerce dispute resolution. Although the analysis focuses especially on a number of US and EU online dispute resolution mechanisms, the perspective is nevertheless international as the examined norms and the suggested solutions may be implemented in a form or another globally. It covers both jurisdiction and choice of law questions as well as disputes involving contractual and non-contractual claims.

As it has become apparent, the study does not seek to uncover each and every problem area arising in international business-to-consumer electronic commerce and suggest ways how they all could be resolved on the international level. US choice of law questions, EU choice of law in non-contractual matters, and the recognition and enforcement of judgments have not been given separate treatment. Such a mammoth task would no doubt exceed by far any reasonable limits nor would it be necessary in light of the aims of the present study. Rather, the idea is to concentrate on those topics that not only are most important for purposes of the present study, but have also been subject to most international development or richness of concentrated case law. It is these topics that not only back up the main claims of the venture, but are also the most fruitful objects of research. And in the end, a general solution is presented in the form of a multifaceted approach that, although not resolving all problems, provides a viable alternative that may enrich the future, more extensive studies concerning the areas that have been given less attention.

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<sup>90</sup> Irene Kosturakis, *Software Licencing and UCITA*, PLI/PAT 437, 445-446 (2003).

<sup>91</sup> See e.g. Malcolm Shaw, *INTERNATIONAL LAW* 457 (4<sup>th</sup> ed., Cambridge University Press, 1997); Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 310 (5<sup>th</sup> ed., Oxford University Press, 1998).

## **PART VI – SYNTHESIS**

### **I. INTRODUCTION**

The present study has based itself on a number of assumptions on what goals norms should pursue in the regulation of international electronic commerce. The legal system must provide transacting parties with clear indication of the choices they make take: businesses and consumers must be able to comprehend clearly the available choices and risks in a plurality of legal systems. When disputes arise, parties must have access to legal remedies to enforce those choices. Norms serve to protect private and collective interests, and should prescribe whose interest will prevail in a given case.

Norms should also function to protect the public interest of a State or that of the international community (in so far as that interest can be identified in a case at hand), which may or may not coincide with the private or collective interest. As with the latter interests, public interests are varied and do conflict regrettably often. Indeed, the question is not only of conflict of laws but of conflicts of political power, and the task of norms is to co-ordinate the reach of national policies and provide a solution to jurisdictional and choice of law conflicts. Finally, norms should mediate between the various interests to promote smoothly functioning markets.

To this effect, law should act, through its various sources and processes, as a valuable tool for the coordination of divergent interests and for crystallising interests into norms where they merge. The preceding articles have sought to show how different jurisdictional and applicable law norms, as well as those relating to alternative dispute resolution, function in the electronic environment, the problems they have caused and possible solutions thereto. Ideally, a specific area of law would be guided by a single overarching theory that gave clear guidance to norm creation, development and interpretation within that area. It has become apparent that such a theory is still to be created.

This concluding part will first synthesize the deficiencies of international law concerning legislative jurisdiction and reflect on the solution presented thereto. States have referred the question of jurisdiction and applicable law to the level of law-application – to national and regional courts – and have thus shown incapable of devising a legally certain business environment for businesses and consumers alike. National courts, for their part, have been given wide discretion to put forward national policies. While discretion is often necessary to protect the individual justice of the litigating parties and for the flexible application of norms, mass-scale transactions need a stable and predictable legal environment. The section will then synthesize the suggestions made on each following problem area. It is first argued that attempts at putting forward the country of origin principle or country of

destination principle in questions of jurisdiction and applicable law may prove futile. Second, by developing the middle way between these two poles – the concept of targeting –, States may well make progress in devising international solutions to jurisdiction and applicable law questions in international electronic commerce. Third, even developing the targeting concept will require States to compromise and modify their current approaches to the extent that it may fall foul for the deficiencies of international law. In this respect, international law will still be bound by the same restrictions that are the source of the present problems in the first place: uncertainty and low level of normativity.

Lastly, in light of such problems, it is not surprising that Internet stakeholders have sought alternative ways to erect a legally certain and stable framework. These alternatives refer to deformed regulation and dispute resolution through private means. While Part V concentrated on the latter, a brief analysis is given of the former to illustrate the contours of the multifaceted approach, that is, the privatized alternative to formal regulation and formal dispute resolution mechanisms. The prime examples of how such a multifaceted approach may work in practice – alternative and online dispute resolution – may well provide a viable way out of the deficiencies of formal law. However, even if the general idea is to “leave formal law and regulation – and the deficiencies of international law – behind” and resolve disputes through alternative avenues, such schemes are not immune from the legal and policy restrictions that States and other stakeholders have been pushing forward on the public level. Questions of consumer protection will have an impact on the success of such alternative schemes as issues of public law character are forcing their way into the private realm and projecting the deficiencies of international law into alternative dispute resolution. Once these restrictions are dealt with, alternative online dispute resolution may provide a widely accepted solution to access to justice, jurisdictional and applicable law questions.

## II. LEGISLATIVE JURISDICTION AND THE DEFICIENCIES IN INTERNATIONAL LAW

### A. THE NORMATIVE SYSTEM

The theory of strict territoriality has not kept immune from modern developments in human interaction, nor have States remained reluctant to develop new jurisdictional bases. A strict territorial theory may be inadequate on its own, as it favours the territorial State without paying respect to the interests of other States. Indeed, the restrictions of strict territoriality themselves have provoked States to claim rights to extraterritorial regulation. Nevertheless, when used as an aspect of a wider theory or system of jurisdictional and conflict of laws, the territorial theory offers several advantages. What better way to ensure the effective regulation of businesses by States in which businesses have significant

assets, and the resolution of disputes by a court that has access to legally significant evidence and witnesses and a firm understanding of local interests. Nevertheless, the advantages of the territorial theory must always be examined within the international framework, as conduct is often not exclusively territorial and the interests of States and commercial parties often vary.

Through international law States have attempted to recognize the various State interests involved by allowing a number of bases for the exercise of extraterritorial jurisdiction. These bases legitimize State legislative jurisdiction over various different fact patterns involved in international electronic commerce, and there would seem to be nothing objectionable about extraterritorial jurisdiction *per se*. However, the international jurisdictional structure raises strong concerns as international law has failed to stipulate the permissive limits on extraterritorial jurisdiction in a legally certain and comprehensive way. International law on jurisdiction has not been purposefully developed into a coherent and systematic set of norms. If this were not enough, it has also failed to establish a workable system of priority among the permissible bases. There is again nothing inherently objectionable about concurrent jurisdiction and in fact, concurrency is a frequent phenomenon and often perfectly acceptable. Objections erupt when concurrency gives rise to conflicting obligations and legal uncertainty, and when conflicting claims cannot be prioritized.

While recognizing that international business-to-consumer electronic commerce has grown and most transactions do not give rise to dispute, it would function more effectively if businesses and consumers did not have to operate in an unpredictable system where legislative jurisdiction is allocated in a retroactive ad-hoc manner. In this respect, international disputes should be pre-empted by allocating legislative jurisdiction in a coherent and comprehensive manner – a goal that still remains unattained.

The reasonableness and balancing of interest models have shown certain basic weaknesses: how to determine the interests of other States in an environment where little State practice exists; how to determine the importance of the measure to the international political, legal or economic system where there is no consensus on how international law should be developed; should the consumer interest as a class interest be taken into account; how to transplant the reasonableness test to countries that have no historical or theoretical background on which to reflect it; and how to defend the subjective character of the tests, the impossibility of mandating the legislature to an *a priori* determination of reasonableness in every case where it becomes applicable – a task entrusted to the judiciary –, or the fact that concurrency is not resolved.

In fact, as Bowett has argued, neither the principles of jurisdiction nor general principles of law (equality of States, the principle of non-intervention and of territorial integrity) can, in themselves, provide the necessary balance of interests, but rather, can only provide the legal context within which

an extensive and non-exhaustive list of actors is addressed.<sup>1</sup> The problem is not resolved by rephrasing the basic test:

“Although it is usual to consider the exercise of jurisdiction under one or other of more or less widely accepted categories, this is more a matter of convenience than of substance. There is, however, some tendency now to regard these various categories as parts of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states.”<sup>2</sup>

The theory does not resolve the question of concurrency but merely moderates its consequences, does not fit well into electronic commerce where transactions lack a physical centre of gravity, thus resulting often in a policy argument, does not ensure objective and disinterested application, and still resorts to a retroactive ad-hoc procedure. In essence, even if a theory of international jurisdiction were restricted to the consideration of relevant “legal contacts” and excluded “political, economic, commercial and social interests”,<sup>3</sup> and even if such restrictions were welcomed because they forwarded a sense of objectivity, the theory would have to take into account the concerns of the weaker party in one way or another – and the extent of protection she deserves.

One is therefore far – in fact, too far – from getting close to the conditions for determinacy enumerated by Smith in Part I. The rules are principles, not simple, not presented through unambiguous language, they conflict with other rules (principles) in the system, the interpretative constructs are not universally or even almost universally shared by interpreters, the field of action to be regulated is not simple and although the International Court of Justice may be considered as legitimate,

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<sup>1</sup> D.W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 BRIT. Y.B. INT’L L. 1, 24 (1982).

<sup>2</sup> R.Y. Jennings & A.D. Watts (eds.), *OPPENHEIM’S INTERNATIONAL LAW* 457-58 (9th ed., Longman, Harlow, 1992). See also I. Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 301-302 (5th ed., Oxford, 1998) and the International Court of Justice’s judgment in the *Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 I.C.J. Rep. 4 dealing with nationality:

“...the Court must ascertain [...] whether the factual connection between Nottebohm and Liechtenstein [...] appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.”

<sup>3</sup> See F. A. Mann, *The Doctrine of International Jurisdiction Revisited after Twenty Years*, 186 RECUEIL DES COURS 26-31 (1984-III), discussed in Part II, pp. 744-747.

the ICJ has not proven to be a popular avenue for States to resolve disputes concerning legislative jurisdiction and States have to a large degree reserved the function of law-ascertainment to themselves.

## B. CRITIQUE OF THE PROPOSED THEORY CHANNELLING JURISDICTION THROUGH INTERNET OPERATORS

Part II of the present thesis sought to give a solution to the allocation of legislative jurisdiction over transactions in international electronic commerce. The idea was to promote an international consensus on the conferral of jurisdiction on the State where an Internet operator is registered to conduct business. This approach was argued to have several advantages: (1) it was based on territoriality, the least controversial of all international law bases; (2) it would regulate the market structure indirectly, through Internet operators; and (3) it would provide an effective normative structure for international electronic commerce as regulation would be effected by territorial States and devices could be created for giving legal certainty to consumers on which State has regulative jurisdiction.

In spite of its advantages, the solution shows how difficult it is to devise solutions to international jurisdictional problems that run into the structure of international law in an inherently global environment by relying on a variation of the territoriality principle. In fact, the approach could persuade a number of businesses to move to jurisdictions with low consumer protection standards, especially where operators competed for customers. Although businesses may prefer to deal with operators that are established in the same country, the possibility of changing their business activities to foreign operators with relatively little inconvenience may well open the floodgates. It may be argued that these steps would not necessarily be within the best interests of the business, if one views high consumer protection norms as a marketing asset for businesses: a website indicating that the business abides by Finnish consumer protection regulations could well prove beneficial provided that consumers knew or were informed that the Nordic countries have rather high consumer protection standards. Nevertheless, it is important to note that, as indicated in Part II, various devices will be needed to complement the solution, such as mandatory signs indicating where the service provider hosting the web site is established.

The function and problems of the proposal may be illustrated by recent electronic commerce regulation that has resorted to an adaptation of the territoriality theory. The “country of origin” principle provides that, when engaging in international electronic commerce, a business needs to

comply only with the prescriptions of the State where it is established. The EU legislator has used the principle in the Television without Frontiers Directive<sup>4</sup> and the Electronic Commerce Directive.<sup>5</sup>

The caveat of diverging interests in cross-border conduct has produced two main lines of opinion that reflect key concerns. The typical industry claim is that the country of origin principle shields businesses from an untenable obligation to audit the consumer protection laws of numerous States. Such an arrangement is, according to them, prone to strengthen the growth and development of international electronic commerce. The principle helps to alleviate legal uncertainty as it lowers obstacles to market entry caused by divergent national laws. Criticism has emanated especially from consumer protection organizations. The claim is that a universal country of origin principle would jeopardize the current level of consumer protection and it would be odd to shift the obligation to audit the laws of numerous States from businesses to consumers, as consumers are certainly less able to perform it. Moreover, businesses would move to locations with the lowest consumer protection norms. This would result in “negative competition” between different legislators, who would have to consider lowering their consumer protection standards.<sup>6</sup>

In fact, the Electronic Commerce Directive illustrates how the country of origin principle was finally adopted only in special circumstances and in a limited form. As a general observation, the legal framework that makes harmonization of laws possible, current successful (partial) harmonization and the whole enforcement machinery of Community obligations, indicate that the country of origin principle has better chances of operating within the EU than internationally.<sup>7</sup> The corollary principle of mutual recognition enshrined in Article 49 EC (ex Article 59) of the Treaty Establishing the European Community prohibits Member States from hampering the free movement of information society services through national legislation, and together with the existing body of community law, reduces the

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<sup>4</sup> Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, 1989 O.J. (L 298) 23.

<sup>5</sup> Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. (L 178) 1.

<sup>6</sup> See BEUC, *BEUC's detailed comments on the proposal for a directive on certain legal aspects of e-commerce*, at <http://www.beuc.org> (visited 31 Dec. 2004).

<sup>7</sup> Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, COM(1998)586 final, at 16:

“It is clear that the Internal Market approach followed in this Directive, and in particular the application of the country of origin rule, cannot be taken, at this stage, as a model for possible future international negotiations, in view of the fact that this approach can only be followed when a sufficient degree of legal integration exists.”



need for new rules. In fact, as its title suggests, the Directive was able to target specific issues rather than to regulate complete areas of law.

The Electronic Commerce Directive harmonizes a number of subjects<sup>8</sup> and there has been disagreement over whether the country of origin principle's application is restricted to those areas.<sup>9</sup> A restrictive interpretation would clearly support the Directive's limited scope. Leaving aside such general issues, the Directive pays special attention to limiting the principle's application in the area of business-to-consumer electronic commerce. In Article 1(3), the Directive

“complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services”.<sup>10</sup>

Furthermore, States may restrict, subject to certain conditions, the freedom to provide Information Society services from other Member States, if such measures are necessary for the protection of public health and consumers.<sup>11</sup> While the Commission reported in November 2003 that no State had notified such restrictions to the Commission<sup>12</sup>, this may speak in favour of the principle's workability only within its limited sphere of application within the Community, but is no evidence that it would work globally.

Part II did not claim that the presented solution was devoid of problems, and in hindsight is more likely to fail than to succeed. It is probable that, in line with the main argument of the thesis, States will be unwilling to accept such a solution. The main objection against the proposed solution lies in the fact that States will find the allocation rules arbitrary: Internet operators may seem dispersed in presence –

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<sup>8</sup> National provisions on Information Society services relating to the internal market arrangements, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

<sup>9</sup> Lokke Moerel, *The Country-of-origin Principle in the E-commerce Directive: the Expected 'One Stop Shop'*, 7 C.T.L.R. 183 (2001). See also John Dickie, *INTERNET AND ELECTRONIC COMMERCE LAW IN THE EUROPEAN UNION* 23 (Hart Publishing, Oxford 1999).

<sup>10</sup> Again, the wording of the Article has created confusion. While the Commission has emphasized that the Directive and other directives apply concurrently, does the last part of the article indicate that national provisions implementing minimum harmonization directives remain effective where they go further than minimum harmonization and do not “restrict the freedom to provide Information Society services”? May a State therefore apply those national provisions only to domestic providers and not to those established in other Member States? See Lokke Moerel, *id* at 188-189.

<sup>11</sup> Article 3(4)-(6).

<sup>12</sup> First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, COM (2003) 702 final.

legal creatures that may move from one jurisdiction to another with relatively little effort. Businesses may shift their operations from one operator to another with rather low costs. Consumer pressure groups will object to the solution, and it may well turn out to be an insurmountable and time-consuming task to establish norms through available international law-creation devices. There will certainly be States that will object, as they will not be prepared to alter the apologetic norms and relinquish the right that, in their opinion, international law has conferred on them to regulate extraterritorial conduct and thereby also their power – at present more apparent than actual – to protect their consumers.

It would also seem that even if the country of origin principle provided a non-workable solution internationally and outside specific circumstances, a strict application of the country of destination principle would in fact sanction the exercise of extraterritorial jurisdiction without any in-built co-ordinative machinery. As such, it is likely to fail to nourish the discussion on the resolution of jurisdictional conflicts, but rather to confirm the liberty that States have under international law to exercise jurisdiction with few real restraints. The country of destination principle has no generally accepted definition: it is not a jurisdictional principle under international law, but rather a descriptive term for the notion that “the destination” country of the commercial actor’s activities has jurisdiction. Therefore, it is likely to serve as an apologetic weapon for the exercise of State policies over extraterritorial activities and to exploit the unfortunate state of international law. In fact, the principle is more likely to find application under specific legal structures and conditions.

### III. DETERMINING JURISDICTION AND THE APPLICABLE LAW THROUGH TARGETING

#### A. THE PROBLEM OF LEGAL CERTAINTY

The absence of a legally certain and functioning structure for addressing overlapping and conflicting claims of legislative jurisdiction has moved the resolution process to the private international law level. In this respect, the US and EU systems, as well as negotiations in the Hague Conference of International Law have illustrated some of the symptoms enumerated in Part I in international or interstate norm creation and application.

The first symptom concerns the question of generality and specificity.<sup>13</sup> There may be several reasons for adopting general norms. The norm may be intended to live through future technological developments (technological neutrality), apply to various different fact-patterns or emphasize individual justice conferred by court discretion. In such cases the specific application of the norm is left for

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<sup>13</sup> See Part III, at 513-517.

courts.<sup>14</sup> The US system is peculiar in that the Supreme Court has taken to establish a case law in applying the Due Process Clause, as the generality of the Clause has given the Court substantial leverage to decide on the limits of due process. Nevertheless, the lawmaking agencies have not intervened in spite of demands expressed particularly in scholarly works.

However, it may be that there is such a disagreement, whether between States or other influential stakeholders, over the norm's specific content that the issue is in fact left for courts to resolve. Courts may be faced with the task either because the norm-setting institutions have explicitly decided to do so or because courts are given inadequate guidance through the normative measure itself or through ulterior instruments, as the consumer protection provisions of the Brussels Regulation may illustrate.<sup>15</sup>

The second symptom addresses the question of the factual and geographical scope of normative instruments. An international measure may have to be curtailed with respect to substance, because prevailing disagreement over its substance does not give bright chances for its acceptance.<sup>16</sup> Consumer issues may in fact stand at the forefront of such issues with States unwilling to compromise their rights – whether real or apparent – to protect consumers.<sup>17</sup> The international measure may also have to restrict itself to a specific region in which the legal and political environment is most fertile for international harmonization and unification of norms dealing with business-to-consumer electronic commerce.<sup>18</sup>

These symptoms are illustrative of the tendency to lapse into an apology for politics as States pursue different social goals without an agreement on common goals.<sup>19</sup> This danger is present especially on the global level where jurisdictional questions relating to consumer commerce are debated but also, although to a lesser magnitude, in more closely knit forums, such as the EU. In the United States the common goals have been set by the Constitution, but law-appliers (or one may even speak of law-creators) may be influenced by exterior motivations, as illustrated by the impact the conservative/liberal composition of the Supreme Court has had on the Court's case law. On both sides of the Atlantic,

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<sup>14</sup> See Part III, at 509-513.

<sup>15</sup> See Part III, at 437-446.

<sup>16</sup> For example, the 1980 Rome Convention on the Law Applicable to Contractual Obligations, 19 June 1980, 1998 O.J. (C 27) 36, eventually restricted itself to questions of applicable law in contractual causes of action, and the Rome II project has been launched more recently. See Part IV, at 791, n.16.

<sup>17</sup> The Hague Conference had to confine its work to business-to-business contracts. See *infra* note 77 and accompanying text.

<sup>18</sup> In this respect, one need only refer to the great advances made on questions of consumer protection and private international law in the EU.

<sup>19</sup> See Martti Koskenniemi, FROM APOLOGY TO UTOPIA – THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 2 (Lakimiesliiton kustannus, Helsinki 1989).

courts and legislatures have sought to tackle with the needs of legal certainty and individual justice in international electronic commerce, but have produced norms that give substantial discretion to national and lower courts. Discretion is by no means objectionable *per se*, but in each case its extent must be measured against the needs of legal certainty.

Once international norms applicable to business-to-consumer electronic commerce are created, there are several ways to ensure that States do not give precedence to national policies. The norms may be mandatory in application, directly applicable, may be given autonomous meaning and interpreted by an international court and may entail enforcement proceedings in case of infringement. Such purposefully created instruments – the Brussels Convention, the Brussels Regulation and the Rome Convention – are in sharp contrast to the federal norms regulating interstate and international commerce that have sprung from the indeterminate pronouncements of the Supreme Court and a vast number of lower courts seeking to distil the applicable norms and give their own interpretations thereto. Nevertheless, such safeguards are difficult to create outside specific legal frameworks and following the failure of the Hague Conference to achieve consensus on consumer protection issues, it is unlikely that such international safeguards can be established in the near future.

#### B. THE TWO POLES: COUNTRY OF ORIGIN AND COUNTRY OF DESTINATION

The proponents of the country of origin principle have argued for its application within the sphere of private international law, and its operation, like that of the country of destination principle, may be regarded as a combination of policy and the theory of close contacts. The policy arguments are familiar. The development of international electronic commerce requires that businesses should have to face action only in the courts of the State where they are established (or should be permitted to choose the forum through a choice of forum clause) and not, as a general rule, in the consumer's home courts. Businesses should also not, as a general rule, be bound by the consumer's home laws but only by the laws of the State of establishment (or should be able to choose the applicable law through a choice of law clause). Those rejecting the principle have put forward the contrary, pro-consumer arguments.

It has become apparent that within the sphere of private international law, the operation of the country of origin principle has been at least as curtailed than with respect to legislative jurisdiction. The Electronic Commerce Directive states that it “does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts”.<sup>20</sup> Nor does the country of origin principle apply to contractual obligations concerning consumer contracts.<sup>21</sup> This exclusion may be

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<sup>20</sup> Article 1(4).

<sup>21</sup> Article 3(3) in conjunction with the Annex.

attributed to the desirability of not interfering with the work of the Community legislator in the area of private international law. The Directive thus does not prejudice the application of the consumer protection provisions of the Rome Convention, the Brussels Convention, the Brussels Regulation and, in the future, the Rome I and Rome II Regulations, if adopted.

European Conventions, as well as Community instruments and initiatives on private international law issues, have not favoured the principle with respect to disputes arising between businesses and consumers in spite of strong industry objections. The Brussels Convention and Regulation are based on the *actor sequitur forum rei* maxim, which expresses the right of every sovereign to govern persons and property within its territory and residence or domicile provide a strong connecting factor. However, the exceptions to the maxim indicate that neither the place of establishment nor a forum clause selecting that forum have generally been thought desirable connecting factors for establishing jurisdiction in business-to-consumer disputes. Specific weaker-party rules on contractual disputes do not indicate that the business could never sue the weaker party before the courts of the State of establishment. Rather, the exceptions to the general territoriality rule are justified by close contacts or a policy decision. In cases of sales by credit and instalment terms, a policy decision was taken to favour consumers without any connecting factors, whereas in all other cases the specific conditions provided the necessary connecting factors.

The significance of the territorial theory and its relationship with the private international theory of close contacts will depend on how the consumer protection provisions and the general provisions on contractual actions are applied to electronic commerce disputes. And as indicated above, the operation of the provisions seldom grants jurisdiction to the courts of the State where the business is established. The Rome Convention bases itself not on a general territoriality rule but on the contractual freedom to choose the applicable law and where it is not chosen, on general presumption of closeness of contact and exceptions, including policy exceptions thereto. The specific consumer protection provisions pose similar issues as those in the Brussels Convention and Regulation.

With respect to non-contractual disputes, the Brussels Convention and Regulation are not based on strict territoriality or on finding which State has the closest contact to the dispute. The European Court of Justice's decision in *Bier v. Mines de Potasse d'Alsace*<sup>22</sup> provided plaintiffs with an option to sue either in the place where the damage occurred or the place of the event giving rise to it, as both could constitute a significant connecting factor. The solution clearly favours victims, including consumers.

The proposed Rome II Regulation departs from such a victim-favourable approach without resorting to the country of origin principle either. The Commission's proposal states that the *Bier* solution "reflects the specific objectives of international jurisdiction but it does not enable the parties to

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<sup>22</sup> *Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*, 1976 E.C.R. 1735.

foresee the law that will be applicable to their situation with reasonable certainty”.<sup>23</sup> Considering the various interests at stake, the solution would go beyond the victim’s legitimate expectations.<sup>24</sup> Striking a compromise between the territoriality theory and giving the victim a choice, the law shall be of the country where the damage arises or is likely to arise. However, in line with the aim of applying the law that reflects the centre of gravity of the situation, the proposal states that if the obligation is manifestly more closely connected with another country, the law of that country shall be applied.<sup>25</sup>

The doctrines elaborated by the US Supreme Court and lower courts should make it clear – more so than the EU instruments within their sphere of application – that in the United States, no clear choice has been made between the country of origin and the country of destination principles. Rather, courts examine the minimum contacts and reasonableness tests on a case-by-case basis by measuring the facts of the case against due process concerns: no a priori policy decision is made that consumers should be protected in all contractual or non-contractual cases. Any international solution that would have the chance of being acceptable to the US would have to find a place in between the two poles.

### C. THE MIDDLE WAY – TARGETING/DIRECTING ACTIVITIES TO STATES

Recognizing the tension between the two opposing principles embedded with policy concerns and the underlying theory of establishing close contacts between the State and the subject matter or the defendant, the thesis has examined recent attempts at resolving the deadlock. It was suggested in Part IV that the Community legislature balanced the needs of businesses and consumers in contractual causes of action by requiring or giving an option to e-commerce traders to indicate on their Web site or e-mail communications those countries which their site or message is directed at. The instrument should specify in detail the contents and form the indication – or the targeting clause – should take, for example, by providing a uniform label downloadable from the EU’s official Web site.<sup>26</sup> Not only could the solution be applied to the proposed Rome I Regulation, but also to the Brussels Regulation and put forward as a model for compromise between EU and US views on judicial jurisdiction in, for example, the Hague Conference.

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<sup>23</sup> Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations (“Rome II”), COM (2003) 427 final, at 11.

<sup>24</sup> *Id.*

<sup>25</sup> Article 3(3).

<sup>26</sup> That clause could be based on the available technology currently used for trustmarks, where the issuing body certifies the mark. Consumers could click on the mark and be directed to the certifier’s Web site where they could check whether the business still has the right to use the mark. For examples, see Part V, p. 5.

The scheme applies to businesses that pursue commercial or professional activities or direct such activities to the consumer's State of domicile or several States including that State through the targeting clause, and where the contract falls within the scope of such activities. States negotiating the norms may wish to exclude certain contracts from the scheme, such as certain contracts for transport to which other international norms apply, and matters for which exclusive jurisdiction is normally provided (e.g. immovable property). They may also grant special status to contracts for the sale of goods on instalment credit terms or for any other form of credit that consumers take to finance the purchase in line with the Brussels Regulation, or exclude them from the scheme.

For claims falling under the scheme and where the consumer's State is targeted, a consumer would have the choice of bringing an action either in the courts of the State where the business is domiciled or in the courts of the State of her domicile.<sup>27</sup> The consumer could be sued only in the courts of her domicile. It would be irrelevant where the consumer was at the moment of contracting or where she took all the steps necessary on her part for the conclusion of the contract. However, businesses could take orders from consumers in non-targeted States and could, in such cases, direct litigation to the courts of their domicile through a forum clause. In the absence of a forum clause, the default norms would apply, which would make the use of such a clause highly recommendable. If the scheme were optional – which is also recommendable –, then those businesses that decided not to utilize the scheme would be bound by present default norms.

With respect to the applicable law, the same scheme uses the targeting clause to ensure that the consumer does not lose the protection afforded by the mandatory rules of the State where the consumer is habitually resident by a choice of law clause in a contract concluded between such a

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<sup>27</sup> See Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, Article 59:

“1. In order to determine whether a party is domiciled in the Member State whose courts are seized of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seized of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.”

And Article 60(1):

“For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business.”

consumer and the business targeting that State.<sup>28</sup> Where no choice was made, the law of the country of the consumer's habitual residence would govern the contract.<sup>29</sup>

The scheme would benefit businesses that could tailor their international activities according to their resources: for dispute resolution purposes they would need to preoccupy, at least with respect to contractual obligations, only with the consumer protection norms of the targeted State(s) in addition to those of the chosen law, which would normally be law of the place where the business was habitually resident or had its central administration. Businesses could also transact confidently with consumers from non-targeted States, as the choice of law would be enforced. Where no choice of law was made, the forum would apply the instrument's non-consumer specific choice of law rules, which would render the use of such clauses recommendable. For consumers, targeting would signify confidence that national consumer protection provisions were abided by and access to justice concerns were addressed through the targeting clause. It is presumed that consumers are more confident to buy goods or services from sites that target their State and this would give businesses an incentive to target those States.

The scheme is thus meant to serve as a model for an international instrument and would have to be tailored to the other provisions of such an instrument. Therefore, a consumer could, for example, sue a trader who had not included that State in its targeting clause, but was domiciled in that State.

The scheme presented is tailored in such a way that the grounds for exercising jurisdiction correspond as closely as possible to those determining the applicable law<sup>30</sup> and any divergence would have to be clearly justified.<sup>31</sup> The terms "domicile" and "habitual residence" are taken from the

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<sup>28</sup> In addition to the targeting clause, the two other circumstances enumerated in Article 5(2) of the Rome Convention, 1998 O.J. (C 27) 36, may trigger the protective norms: (1) if the other party or his agent received the consumer's order in that country, or (2) if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

<sup>29</sup> The drafters may also declare that the scheme does not apply to: (a) a contract of carriage; (b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence, and that Notwithstanding these provisions, the scheme applies to a contract which, for an inclusive price, provides for a combination of travel and accommodation. See Rome Convention *id.* Article 5(4)-(5).

<sup>30</sup> In practice, in a large proportion of cases where the consumer has availed herself of the consumer protection provisions of the Brussels Convention and Regulation, the mandatory rules will be those of the forum. See Richard Plender & Michael Wilderspin, *THE EUROPEAN CONTRACTS CONVENTION* 150 (Sweet & Maxwell, London, 2001).

<sup>31</sup> Compare, for example, Article 5(2) of the 1980 Rome Convention, 1998 O.J. (C 27) 36 ("if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.") and Article 15 of the Brussels Regulation, 2001 O.J. (L 12) 1 (no such provision).



European instruments and have not been changed, as the possibility of a situation where the country of the consumer's domicile is not the same as his habitual residence is rather remote.<sup>32</sup> Where the forum of the targeted State exercised jurisdiction and applied forum mandatory rules that overrode certain provisions of the chosen law, the forum would be permitted to apply both domestically mandatory and internationally mandatory rules protecting the consumer's interests. Again, businesses should be confident that where they contracted with consumers outside the targeted States and used a forum clause, they would not be bound by mandatory consumer protection rules, and exceptions thereof would have to be clearly articulated.<sup>33</sup> It would also follow that States participating in the scheme should not endanger its function by inconsistent exercises of legislative jurisdiction, which could be tailored into the system through a variation of the country-of-origin principle.

Finally, the suggested scheme's strength lies in the fact that it enshrines generally recognized legal principles. Part III examined the juxtaposition of legal certainty, and especially its predictability aspect, with individual justice and found that work should be done on both in the EU and the US. The scheme addresses *legal certainty* concerns by providing clear and predictable rules that transacting parties can rely on by clarifying in concrete terms the indeterminacy of present law on both shores of the Atlantic. *Individual justice* is recognized by giving fair rules and options to both businesses and consumers. The norms are sufficiently specific and do not require extensive judicial balancing of interests. The scheme responds to the *legitimate expectations* of both parties, especially if governments are required to inform their businesses and consumers of the scheme. Finally, although consumer protection concerns are addressed, these are secured by emphasising the parties' *individual autonomy* and *freedom of contract*.

The task now is to examine how the proposed solution relates to the jurisdictional and applicable law norms on both sides of the Atlantic and what impact it would possibly have on those norms. As it is suggested that an international effort should follow the proposal, it will be important to highlight its appeal in the eyes of the two most important economic powers in international electronic commerce – the United States and the European Union. For this purpose, the targeting theory should ideally fulfil as many of the criteria both systems have laid down as possible, and a compromise must be found where they conflict. As the European model seems to give more lucrative prospects of conforming to international law than the US model, the suggestion has drawn on it.<sup>34</sup>

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<sup>32</sup> See PLENDER & WILDERSPIN, *supra* note 30, at fn. 56.

<sup>33</sup> See e.g. the relationship between Article 15(1) and Article 5(5) of the Brussels Regulation, 2001 O.J. (L 12) 1..

<sup>34</sup> Mann has claimed that

“the general impression which they [International Shoe Co. v. Washington and other Supreme Court personal jurisdiction cases] create in the international lawyer's mind is that due process as understood in modern American law cannot provide firm guidance to the doctrine of international civil jurisdiction”

## 1. CONTRACTUAL DISPUTES

*Minimum contacts and reasonableness, close contacts, centre of gravity or most significant relationship.* These terms are derived from US and European doctrines of judicial jurisdiction and applicable law and are by no means synonymous legal terms.<sup>35</sup> Rather, their purpose here is to highlight that in each case, a sufficiently strong link is required between either the forum and the defendant or a State and the contract or occurrence. The targeting clause confirms that the business intended to target the States mentioned therein and create a strong relationship with the forum. In the US, this connotes that the business purposeful availed itself of the State's benefits, or "purposefully directed" its efforts towards residents of such State by creating a "substantial connection" with the forum State<sup>36</sup> or "continuing obligations" between itself and forum residents<sup>37</sup>. One single contract would have to suffice for jurisdictional and applicable law purposes – a matter to which the US Supreme Court has declined to give a hard and fast rule, but which the European instruments have recognized.<sup>38</sup> Hence, not only an inference would arise as to reasonableness – jurisdiction would be reasonably exercised.<sup>39</sup>

Such explicit acknowledgement would dispense with the need to examine the various particulars that US courts have focused on with little success: the site's interactivity and commercial nature,

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and that

"the international lawyer has to recognize that what the [Brussels] convention accepts is likely to be consistent with the demands of international law and that what it leaves to the individual States for application in their relations with third parties may not necessarily be inconsistent with international law, though rejection by the Ten may be a blemish, an argument for criticism and the starting point for a progressive development of international law". F. A. Mann, *The Doctrine of International Jurisdiction Revisited after Twenty Years*, 186 RECUEIL DES COURS 68-69 (1984-III).

Even in face of Mann's caveat, US constitutional jurisprudence, and especially recent cases dealing with electronic commerce examined in Part III, do provide a field from which to draw possible solutions to international problems.

<sup>35</sup> For example, US doctrines of personal jurisdiction (minimum contacts) and choice of law (centre of gravity) are different tests. See e.g. *Hanson v. Denkla*, 357 U.S. 235, at 254 (1958) "[Florida] does not acquire that jurisdiction by being the 'center of gravity' of the controversy or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law".

<sup>36</sup> *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Burger King Corp. v. Rudzewicz* 471 U.S. 462, 475 (1985).

<sup>37</sup> *Travelers Health Ass'n v. Commonwealth of Virginia*, 339 U.S. 643, 648 (1950); *Burger King Corp. v. Rudzewicz* 471 U.S. 462, 476 (1985).

<sup>38</sup> *Burger King Corp. v. Rudzewicz* 471 U.S. 462, 476, fn. 18 (1985).

<sup>39</sup> For discussion on the reasonableness test in electronic commerce, see Part III, pp. 493-499.

language, currency, the existence of or the number of transactions completed, the potential for sale, as well as various attempts at forum avoidance.<sup>40</sup> In fact, in Part III, it was suggested that resort be made to a targeting-based analysis that sought to identify the parties' intentions and to assess the steps taken to either enter or avoid a particular jurisdiction.<sup>41</sup> Without favouring consumers over businesses, the test would focus on foreseeability and not on the web site's interactivity: (1) was there a jurisdictional clause, how was consent obtained, was the clause reasonable; (2) how was technology used to target or avoid a specific jurisdiction; and (3) what knowledge the parties had or ought to have had about the geographic nature of the online activity?<sup>42</sup>

Such a solution seems recommendable from the perspective of US law and the Supreme Court's jurisdictional doctrines. However, from an international viewpoint (and especially a European one), it is doubted whether anchoring consumer protection on a court-based case-by-case reasonableness test would satisfy legal certainty concerns. It is also questionable whether a consumer – and even a European “active and critical information seeker” – could be realistically deemed able to perform such risk analyses in par with businesses.

The targeting scheme presented in Part IV was written especially in anticipation to the European Commission's plans to modify and transpose the Rome Convention into a Community instrument. It is therefore argued to fit into the Community's legal structure,<sup>43</sup> including forum and choice of law questions relating to consumer contracts. Furthermore, the scheme may also be applied with little modification to the Brussels Regulation, which, it seems, is based on the rationale that businesses be allowed to direct their activities to certain States, but fails to furnish sufficiently clear indication on how this could be achieved.<sup>44</sup>

*Explicit Consent to the Consumer's Forum and Protective Law.* The targeting clause itself may also be seen as a choice of forum and law clause through which the business voluntarily subjected itself to the jurisdiction of the consumer's State of domicile, and to the application of that forum's laws where no choice was made and of the more protective provisions of the protective law where a law was chosen. The notions of consent to jurisdiction and autonomy to select the applicable law are, of course, well established by US law, European instruments and international law.<sup>45</sup> Defendants not physically present

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<sup>40</sup> See Part III, pp. 491-493.

<sup>41</sup> See Part III, pp. 501-502.

<sup>42</sup> *Id.*, at 234.

<sup>43</sup> See Part IV, pp. 813-816.

<sup>44</sup> See Part IV, p. 816.

<sup>45</sup> See e.g. *M/S Bremen & Unterweser Reederei v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907 (1972); Restatement (Second) Conflict of Laws § 187 (1971); Brussels Regulation, 2001 O.J. (L 12) 1, Articles 23 and 24 (prorogation of jurisdiction); 1980 Rome Convention, 1998 O.J. (C 27) 36, Article 3. See e.g. *Serbian and Brazilian Loans Cases* (1929)

in the State could consent to the jurisdiction of its courts either before or after the suit was instituted and to designate the law applicable to their dispute. The targeting clause would thus satisfy the need to protect the consumer by applying the law or protective norms presumed most convenient and possibly more favourable to her than the law of the State where the business is established. This advantage should not be underestimated. In the Hague Conference, the United States has been hostile to granting consumers an unqualified right to sue in their own jurisdiction as it has feared that American businesses would have to face action throughout the world. Thereafter, the Conference decided to exclude consumer contracts from the Convention. This is not surprising, as there have been concerns that the Hague Convention is, in essence, an attempt to impose the principles of the Brussels Convention and Brussels Regulation on the US and the rest of the world<sup>46</sup> – an accusation that the present suggestion would hopefully avoid.

American courts have not opted for a strict rule holding jurisdictional or arbitration clauses in consumer contracts unenforceable and this applies to choice of law provisions, as well. Instead, they have examined choice of forum clauses to see whether they are unconscionable. Choice of forum clauses are valid unless (1) the chosen governing state had no interest in the parties or the dispute, or (2) the assignment of jurisdiction to another state was unreasonable or was against the public policy of the forum.<sup>47</sup> These tests may produce a number of objectionable results, at least in the European lawyer's eyes, as the Supreme Court's decision in *Carnival Cruise Lines Inc., v. Shute* may indicate.<sup>48</sup> However, recent cases show that courts are prepared to strike down arbitration and forum clauses in click-wrap agreements where consumers are expected to travel throughout the country to one locale to arbitrate minimal sums (e.g. US\$55).<sup>49</sup> Businesses serving millions of Americans throughout the country may not limit venue to their backyards through means that shield them from liability instead of providing a neutral forum in which to arbitrate disputes.<sup>50</sup> Courts have focused on whether the consumer would be deprived of her day in court. This has not been the case even where the clause prohibited class actions, if the consumer had access to the selected forum's small claims courts, had only to travel to the neighbouring state and claimed for reasonable attorneys fees' and court costs under the selected forum's consumer laws.<sup>51</sup>

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P.C.I.J. Ser. A Nos 20-21 at 122; Lord McNair, *The General Principles of Law Recognized by Civilized nations*, 33 BRIT. Y. B. INT'L L. 1 at 4-6, 15-16 (1957).

<sup>46</sup> Will Roebuck, *Jurisdiction and E-commerce*, 8 C.T.L.R. 29, 32 (2002).

<sup>47</sup> See Restatement of the Law Second, Conflict of Laws 2d §186-188 (1971).

<sup>48</sup> See Part III, p. 498.

<sup>49</sup> See *Comb v. PayPal*, 218 F.Supp 2d 1165 (N.D.Cal 2002).

<sup>50</sup> *Id.*

<sup>51</sup> *Forrest v. Verizon Communications*, 805 A. 2d 1007 (D.C. 2002).

If such reasoning prevails, which is all but certain, and countries on both sides of the Atlantic paid attention to consumers' access to justice concerns, the significance of forum clauses in consumer contracts would diminish considerably in the international setting where litigation involves much more than crossing the Potomac River. The targeting clause would help businesses to define their market area and risks of litigation far better than the forum selection clause.

It also seems that there are sufficiently strong policy grounds on both sides of the Atlantic to consider the present suggestion as a viable option. It could be argued that there is a sharp difference in consumer protection policies between the European Union and the US, as the Supreme Court treats all contracts the same irrespective of the economic power of the parties.<sup>52</sup> Nevertheless, it may also be argued that the policy differences between the two are not necessarily as deep as it is often claimed, as decisions of lower courts have shown that the US is by no means wholly insensitive to consumer concerns<sup>53</sup> and the pertinent cases of the Supreme Court are either not explicit or have met with wide opposition from scholars and consumer protection organizations, among others. Be as it may, the strength of the scheme is that it seeks to mediate between the two by recognizing the (presumed) rationale behind the consumer protection provisions of the European instruments and the minimum contacts/reasonableness test, as well as US emphasis on party autonomy and the need to shield US (as well as European) businesses from risks they are not prepared to take.

## 2. NON-CONTRACTUAL DISPUTES

*Targeted States.* Part IV specifically tailored the targeting principle to contractual causes of action arising in business-to-consumer electronic commerce. A holistic approach would pose the more difficult question whether the targeting principle could also be applied to non-contractual causes of action. It could be presumed that the targeting clause indicated the intention or foresight of the businesses to the

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<sup>52</sup> See Part III, pp. 475-476, 478-479. Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 123 (1992); Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1202 (1984).

<sup>53</sup> See e.g. American Bar Association, *London Meeting Draft, Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet* 87 (1998), at <http://www.kentlaw.edu/cyberlaw/docs/drafts/draft.rtf> (visited 31 Dec. 2004). The Draft referred to *State ex rel Meierhenry v. Spiegel*, 277 N.W.2d 298 (S.D. 1979) where the attorney general of South Dakota sued an Illinois-based mail order business that had charged excessive interest rates from South Dakota consumers in violation of South Dakota law. The State Supreme Court found that the choice of law provision designating Illinois law was void as against the public policy expressed in the South Dakota usury statute. The Draft also recognizes that "other American choice of law cases recognize the possibility that that the public policy of one state may override a choice of law provision in a contract, but avoid invalidating the contract because of similarity of the competing substantive laws" and refers to e.g. *Aldens v. Miller*, 610 F.2d 538 (8<sup>th</sup> Cir. 1979).

extent that this were required under current norms and indicated that they directed their commercial or professional activities to those States.

In the United States, the Supreme Court has been divided on the stream of commerce theory, that is, whether putting a product in the stream of commerce alone satisfied purposeful availment or whether the defendant would have to do something more that showed an intent or purpose to serve the forum State's markets. As an often-quoted decision of a US District court in *Bensusan* put it in citing Justice O'Connor's plurality opinion in *Asahi*: "Creating a site, like placing a product in the stream of commerce, may be felt nationwide – or even worldwide – but, without more, it is not an act purposefully directed toward the forum State".<sup>54</sup> However, the targeting clause would arguably extend personal jurisdiction over businesses that had targeted the forum State as the targeting clause would indicate that the defendant's purpose was to serve the forum State's markets and that she expected that the products or services would be purchased by consumers in the forum State.<sup>55</sup>

The clause thus goes beyond mere "foreseeability" or "awareness" to more "purposeful" conduct and this character separates targeted Web sites from mere "passive Web sites". Businesses targeting the forum State could be found to fall under the "doing business" category of the *Zippo* sliding scale if they had contracted with forum residents. However, when approaching the dividing line between passive and non-passive sites, the *Zippo* court emphasised the interactivity and commercial nature of the site, although it seems that an inference could be made that the business purposefully directed its activities to targeted States through the targeting clause, perhaps even in certain cases where the site did not (yet) support purchases.<sup>56</sup> In fact, the targeting test could assist the court in establishing the necessary elements of the *Calder* "effects" test for intentional torts as enumerated in *Panavision* (the defendant intentionally targeted the plaintiff in the forum).<sup>57</sup>

It seems that the targeting clause would also support a finding that the forum was not unreasonably burdensome for the defendant.<sup>58</sup> It is the defendant who makes a decision to serve the forum market and to accept the possibility of having to litigate therein. In adopting such an international solution, States would have to agree on such a policy decision as deeming litigation in targeted States reasonable forms the basis of the suggestion. It would, in fact, be contrary to the consumer's legitimate expectations if a business targeted that State and then claimed unreasonableness.

European approaches to non-contractual causes of action also include "targeting" notions. In *Shevill v. Presse Alliance SA* the European Court of Justice ruled that the courts of each contracting

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<sup>54</sup> *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295, 301 (1996).

<sup>55</sup> See Part III, pp. 463-465.

<sup>56</sup> Part III, pp. 482-485, 489-491.

<sup>57</sup> Part III, pp. 487-489.

<sup>58</sup> Part III, p. 466.

States where the defamatory publication was distributed and in which the victim claimed to have suffered injury to his reputation had jurisdiction to rule on the injury caused in that State to the victim's reputation.<sup>59</sup> Part III noted that if the ruling were extended to cover other torts than defamation, the nature of the Web site or the intentions of the defendant might have little impact for jurisdictional purposes. Nevertheless, two recent European cases argue that this is not the case at least as far as trademark disputes are concerned, and it is in these cases that a targeting clause would prove useful.<sup>60</sup>

In *Euromarket Designs Inc. v. Peters & Another*<sup>61</sup>, before the English High Court of Justice, an American company conducted business through a chain of stores under the name "Crate & Barrel" in the US. It brought action for trademark infringement against the Irish defendants who had a shop in Ireland under the same name. Jacob J. held that the defendants had not carried business in the UK, although their site could be accessed from the UK. The site had not advertised its business in the UK or offered and operated a real service to the UK. The second case, *Bonnier Media Ltd v. Smith*,<sup>62</sup> then applied a similar reasoning to the Brussels Convention and the implementing national provision – Schedule 1 to the Civil Jurisdiction and Judgments Act 1982. There, the crucial question was the location of a wrong that was said to have been committed via the Internet. Lord Drummond Young ruled upon a trademark and passing-off case, although (in dictum) he could not see why a similar reasoning should not be applied to other delicts, such as defamation and negligence. Although a person who set up a Web site could be regarded as potentially committing a delict in any country where the site was seen, it did not follow that he actually committed a delict in every country of the world. In his opinion, a Web site should not be regarded as having delictual consequences in any country where it is unlikely to be of significant interest: by rigorous application of the maxim *de minimis non curat praetor*, if the impact of a Web site in a certain country was deemed insignificant, no delict had been committed there. For this, it would be necessary to look both at the content of the site and at the commercial and other context in which the Web sites operated. In the case the Web site was held to have such significant effects: in a somewhat *Calder*-like reasoning, the judge found that the defendants had intended to set up a site designed to pass themselves off as pursuers, and made use of a name sufficiently close to the pursuers' trade mark as to infringe that trade mark. Moreover, their acts were clearly aimed at the pursuers' business centred in Scotland and their acts were intended to have their main effect in Scotland.

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<sup>59</sup> Part III, pp. 448-449.

<sup>60</sup> See also *Carpoint S.P.A. v. Microsoft Corporation*, Tribunal of Rome (Ninth Section), 2 Feb. 2000, E.T.M.R. 802 (2000). Appeal rejected by the Board of Appeal of the Tribunal of Rome (Ninth Section), 25 Feb. 2000, discussed in Part III, p. 520.

<sup>61</sup> (2001) FSR 288, (2000) ETMR 1025.

<sup>62</sup> 2002 SCLR 977.

*Non-targeted States.* The question becomes more complicated with respect to non-targeted States and it seems clear that the theory could not be used to curtail personal jurisdiction over non-contractual causes of action: it would apply in the positive sense as affirming the intent of the defendant to direct its activities or target that State, but not in the negative sense as shielding the business from non-contractual liability for damage in non-targeted States. In fact, the targeting theory suggested would connote that, for example, if a defective product damaged a third party consumer in a non-targeted State, the courts of that forum could not exercise jurisdiction, even though such a consumer had not relinquished her right to resort to her home courts or law under the scheme. This would run counter to the philosophy behind tort law, that is, to protect persons from a variety of harm in contrast to the interest in having promises performed.<sup>63</sup> Although the situation might be somewhat different with respect to the applicable law if the targeting clause were deemed determinative of the question whether a business marketed its products in a given State,<sup>64</sup> it is unlikely that the inclusion of non-contractual causes of action with respect to non-targeted States would secure enough support in international negotiations, which would lead to the exclusion of non-contractual causes of action altogether.

The reason why the targeting theory could work in contractual but not in non-contractual causes of action, stems from the fact that courts on both sides of the Atlantic exercise jurisdiction more readily over non-contractual causes of action than contractual causes of action,<sup>65</sup> and especially under the European instruments, where jurisdiction is apparently granted over foreign defendants in matters concerning “torts, delicts and quasi-delicts” more liberally than in the US.<sup>66</sup> Giving businesses the right to shield themselves from the victim’s jurisdiction in non-contractual claims by consumers through the targeting clause would run counter to the norms applicable both in the United States and the European Union<sup>67</sup> – and would not have realistic chances of being accepted.

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<sup>63</sup> See Part III, p. 461.

<sup>64</sup> See Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual obligations (“Rome II”), COM (2003) 427 final. Article 4 on product liability states that “the law applicable to a non-contractual obligation arising out of damage or risk of damage caused by a defective product shall be that of the country in which the person sustaining damage was habitually resident, unless the person claimed to be liable can show that the product was marketed in that country without his consent [...]”. In case of mobile consumers, the Commission thought it appropriate not to extend protection to victims sustaining damage in States where the product was not marketed as “the connection to the place where damage is sustained no longer meets the need for certainty in the law or for protection of the victim. Id, at 15-16.

<sup>65</sup> Part III, p. 471 (United States) Part III, pp. 446-452 (European Union).

<sup>66</sup> For an illustrative example where the Brussels Convention is applied to the facts of World-Wide Volkswagen, see Ronald A Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661, 695 (1999).

<sup>67</sup> See Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual obligations (“Rome II”), COM (2003) 427 final. The proposal stipulates that the law applicable in product



It is admitted that problems remain. Even a test concerning contractual causes of actions presents problems of accommodation, although they may possibly be accommodated into the European instruments by amendment. Not the least of the problems for the United States is the fact that the Constitution is not subject to change by treaty or statute. However, the due process is defendant-oriented, in that procedural due process is a bare minimum: it includes the defendant's right to be adequately notified of charges or proceedings involving her, as well as the opportunity to be heard at these proceedings. The state long-arm statutes may provide defendants more protection than the Constitutional limit and are generally also applicable to defendants located outside the United States.<sup>68</sup> Thus giving defendants more protection through an international instrument would not violate the Constitution and the scheme could be put in place without amending the Constitution.<sup>69</sup> Another problem relates to the distinction between contractual and non-contractual actions in a future instrument, what to do, for example with negligent misstatements.<sup>70</sup> Although present approaches are not entirely satisfactory, this would not necessarily be a bar in future negotiations.

#### IV. TOWARDS A MULTIFACETED APPROACH

States are confronted with a difficult dilemma: how to coordinate the reach of their national policies in such a way that addresses the concerns of both businesses and consumers, the States involved and that secures a fertile ground for the development of international electronic commerce. Of two options – either let present provisions apply or provide common norms – neither seems satisfactory. The main argument of the present study illustrates the unfortunate state of international norms that troubles the first option. The second option is compromised by the difficulties international norm-creation has had in providing prompt international remedies to contemporary problems – a tendency which the Hague Conference's decision to concentrate only on choice of court agreements in business-to-business contracts confirms. The targeting scheme presented has the potential to remedy at least part of the uncertainty in business-to-consumer electronic commerce and should be developed further. However,

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liability cases is that of the country in which the person claimed to be liable is habitually resident if he can show the product was marketed in that country without his consent. If that person sold the defective product directly to the victim habitually resident in a non-targeted State, can it feasibly be claimed that he had not marketed that product in that State? Such a situation would differ radically from the typical case envisaged by the Commission: “a German tourist buying French-made goods in Rome airport to take to an African Country, where they explode and cause him to sustain damage”. *Id.*, at 14, fn. 25.

<sup>68</sup> Gary B. Born, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 68 (3d ed., 1996).

<sup>69</sup> See especially Ronald A Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661, 701-02 (1999).

<sup>70</sup> See Part III, pp. 452-456.

while it is hoped that the present suggestion will not fall foul for the compromising factors of the second option, it is unfortunately more unlikely than likely that States would now take promptly an enlightened approach and endorse it. The basic problem of finding an international solution that responded to the needs of concreteness and normativity tormented the question of legislative jurisdiction and was shifted to the level of retroactive ad-hoc dispute resolution on the private international law level.

It now remains to be synthesized that international regulation has moved to find alternative ways to regulate international commerce and that such an avenue should encompass international electronic commerce, as well. It is first noted that the variety of actors participating in or having influence over international norm-creation has expanded as a consequence of the emergence of private actors, and stakeholders have paid attention to alternative regulatory methods to formal regulation. It is then argued that, given the troublesome state of international law, a solution would be not to focus on traditional formal methods of dispute resolution (litigation) and elaboration of international norms applicable thereto. Rather, attention should be paid to alternative dispute resolution and to tailor pertinent international norms to serve a multifaceted approach. As will be seen, this avenue involves lower hurdles than the creation of a formal international structure through formal mechanisms, and may well provide more suitable responses to those involved in dispute resolution. What is emphasized, however, is that the safeguards disputing parties and especially consumers need in such an approach do concern States and may project the deficiencies in international law and regulation onto the private realm. Internet stakeholders must therefore take an active role and present States with attractive alternatives that take into consideration the caveats made to the privatization of justice in Part V.

#### A. NEW STAKEHOLDERS

As the Internet is increasingly used as a medium for cross-border commerce, both public and private stakeholders have had to decide how to tackle with emerging questions. From the outset, States throughout the world have given private stakeholders a significant role to play. In their separate and joint statements leading IT-States have declared that the private sector should lead while the role of the government is to step back and oversee private initiatives. According to them, the Internet should develop as a market driven arena and not as a regulated industry. Where collective action is necessary, governments should emphasise industry self-regulation and private sector leadership, and any

government action should be transparent, minimal, non-discriminatory and predictable to the private sector.<sup>71</sup>

Although these policy approaches favour the private sector, they seek a balance between government and private sector action and do not exclude either one. In this respect, one of the general ideas of early libertarians has survived: those most closely affected should participate in regulative decisions. Rather than referring to “Cyberspace participants”, States grounded the term on a more realistic base and included governments, the private sector, the wider community, and international organizations.<sup>72</sup> Indeed, common problems and common platforms have sparked a wide range of different participants, each having an input to give to the development of electronic commerce.

There are a number of important stakeholders, who have joined efforts to tackle dispute resolution problems in international electronic commerce. Consumers are represented by national and international organizations and pressure groups (e.g. the Telecommunications Research and Action Center, the National Consumers League and Consumer Action in the US, the European Consumers Organization in the EU and Consumers International more internationally) have guarded consumers’ interest in various electronic commerce issues, such as spamming, unfair commercial practices, jurisdiction and applicable law. Recognizing the inherently international character of electronic commerce consumer issues, different consumer organizations have established international forums (e.g. the Transatlantic Consumer Dialogue) for discussion and for issuing recommendations to governments. The industry has also been active through private input and diverse organizations, such as the Direct Marketing Association – the largest trade association in the world for businesses interested in interactive database marketing – the US Council of Better Business Bureaus and the Federation of European Direct Marketing, as well as through discussion and recommendatory forums such as the Transatlantic Business Dialogue and the Global Business Dialogue.

A third intermediary stakeholder group peculiar to electronic commerce comprises different access, service and content providers (America Online, Sonera) and their associations (Commercial Internet Exchange Association). In a simplified form, access providers provide access to the Internet, service providers provide access and also access to their servers containing several services, and content providers sell certain content: financial data, yellow pages, software etc. They may well share important concerns with businesses, but are also preoccupied about issues specific to their business area, such as

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<sup>71</sup> The White House, *A Framework for Global Electronic Commerce* (1997), at <http://usinfo.state.gov/topical/econ/group8/summit98/issue/summary.htm>; US-UK Release Statement Supporting E-commerce (1999), at <http://www.usembassy.it/file9901/alia/99020312.htm>; Japan-United Kingdom Joint Announcement on Global Electronic Commerce (2001), at [http://www.mofa.go.jp/policy/economy/e\\_commerce/joint0101.html](http://www.mofa.go.jp/policy/economy/e_commerce/joint0101.html) (all visited 31 Dec. 2004).

<sup>72</sup> Id.

their liability for the information transmitted between businesses and consumers and obligation to monitor content.

Finally, a fourth group of stakeholders having a direct interest in electronic commerce issues is States, acting either on their own (e.g. through legislative and judicial action) or through international organizations, such as the OECD, UNCTAD or WIPO. In addition to these four groups of actors, there are other stakeholders that provide forums for discussion and influence among the four groups, and research on electronic commerce issues, for example, academic and professional entities that focus on Internet-related issues (the American Bar Association's Internet Jurisdiction Program, the Harvard Law School Berkman Center for Information and Society, etc).

Electronic commerce regulators have to consider a range of issues that they have had to consider in more traditional environments, but to which Internet technology has given a specific character. Ideally, any attempt at introducing new electronic commerce regulative measures – or deciding on inaction – should take into consideration the views of all major Internet stakeholders. Indeed, there are several examples of collaborative work to this effect as workshops and public hearings organized by the European Commission and the US Federal Trade Commission illustrate – although the eventual impact of any given group on the norms created has varied.

To be sure, as noted in Part I, the influence that non-state actors have recently had on international norm-creation has increased considerably. One has witnessed the expansion of institutions in which State and non-state actors are sitting around the same table, and of transnational non-governmental organizations.<sup>73</sup> States are increasingly realizing that effective regulation of electronic commerce issues can normally only be achieved through international co-operation involving novel stakeholders. They have also witnessed how non-state actors can influence and enforce national policies. Similarly, non-state actors have lobbied for certain jurisdictional, applicable law and ADR norms through various electronic and non-electronic forums – accessible global platforms for all interested parties to take part in the process.

Non-state actors may also influence and enforce State policies through the courts. In The Yahoo! litigation, for example, the France-based International League Against Racism and Anti-Semitism (LICRA) and the French Union of Jewish Students brought action against Yahoo! to bar French residents from accessing Web-based auctions of Nazi artefacts.<sup>74</sup> Faced with a French ruling asking it to find a way to bar such access, Yahoo! brought an action before the US District Court in San Jose

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<sup>73</sup> Jessica Matthews, *Power Shifts and Citizen Innovation* (Interview by Steven Ferry), GOVERNMENT TECHNOLOGY (Aug. 1999), at <http://www.govtech.net/magazine/visions/aug99vision/jessicamfldr/jessicamatthews.phtml> (visited 31 Dec. 2004).

<sup>74</sup> *UEJF and Licra v. Yahoo! Inc. and Yahoo France*, N° RG: 00/05308 Paris County Ct. 20 Nov. 2000, at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (visited 31 Dec. 2004).

California.<sup>75</sup> The episode is a vivid example of non-state actors enforcing State policies in electronic commerce. Noteworthy is that, in addition to the parties, the cases have engaged various non-state actors: 14 organizations filed friend-of-the-court briefs in support of Yahoo!

The contribution of non-state actors should be seen as a positive input into international norm creation and will give a more balanced selection of views of those to whom regulation is directed at. For example, non-state actors do not often share the views of governments and, as pointed out by Francis Gurry, are sceptical about governments' ability to regulate the Internet: governmental regulation may lead to technological conditioning of the medium; individual laws will lead to a morass of different and conflicting laws; and governments may decide to attempt to tax electronic commerce and destroy its fragile growth.<sup>76</sup>

## B. METHODS OF REGULATION

While international norm-creation encompasses a variety of stakeholders, there are a number of available informal regulatory instruments. Formal regulation, self-regulation and co-regulation provide valuable components to norm-creation, but in many cases they may prove to be insufficient or undesirable on their own. No doubt an international set of norms laying down norms for dispute resolution should not be based solely on formal regulation, which may take considerable time, downplay industry initiative, neglect the interests of stakeholders and be too inflexible to meet market conditions. Such a conclusion is more evident in light of the methods currently available for global regulation.

The deficiencies in international norm-creation examined in Part I torment the field covered by the present study. As has been noted, the Hague Conference on Private International Law has been preparing a convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters since 1991. In February 2002 the Permanent Bureau noted that there were at least six issues, in respect of which a lack of consensus created obstacles, two of which were the Internet and Electronic commerce, on the one hand, and consumer contracts, on the other hand.<sup>77</sup> As the problems with the former related mainly to instances where the parties had not made a choice of forum, the Bureau suggested that in this respect the work could concentrate on business-to-business electronic commerce

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<sup>75</sup> *Yahoo! Inc. v. La Ligue Contre Racisme et l'Antisémitisme, et al.*, 169 F Supp 2d 1181 (N.D. Cal., 2001). The case is currently on appeal before the US Court of Appeals for the Ninth Circuit.

<sup>76</sup> Francis Gurry, *The Politicization of Jurisdiction*, in Internet Law & Policy Forum 2000 Annual Conference, at <http://www.ilpf.org/events/jurisdiction2/conf00d1.pdf>, 22, 27-28 (visited 31 Dec. 2004).

<sup>77</sup> Hague Conference on Private International Law, *Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Programme of the Conference* 7, Preliminary Document No 16, Feb. 2002.

where a choice of forum was made.<sup>78</sup> Consultations could continue on the implications of the Internet and electronic commerce in co-operation with international organizations, such as WTO, OECD and WIPO, as the consultations would have to address policy issues and focus on jurisdiction for business to business contracts in the absence of a choice of forum clause; special rules for consumers and employees; and non-physical torts and intellectual property rights.<sup>79</sup>

This is one of the many instances where international treaty negotiators have had to limit their scope and are still preparing the jurisdictional instrument after 13 years of work. The different approaches the US and the EU have taken toward consumer protection – which contributed to the exclusion of consumer protection from the Hague project – illustrate the obstacles encountered. However, compared to other sources of international law, treaties are still generally the fastest and most precise method of international norm-creation. Due to the global character of the Internet, a long-term goal should encompass a global legal framework. Even though the EU has made significant progress in the area and has indicated that progress may be made better regionally than globally, even regional (and national) solutions must eventually be aligned together.

With respect to other methods of regulation, it is doubtful that self-regulation, on its own, will manage to satisfy the differing interests of consumer advocates and the industry and different State consumer protection policies, when libertarian netizens do not form a unified interest group in an isolated virtual area.<sup>80</sup> Several studies show that a notable part of businesses fail to adopt any recognized self-regulatory standards while the number of Internet related complaints has increased considerably.<sup>81</sup> Relying on international competition to drive businesses and dispute resolution providers to adopt codes of conduct or best practices, for them to develop high enough standards to meet government and consumer concerns, and for a number of standards to get wide acceptance to facilitate consumer recognition is an uncertain process. The development of the *lex mercatoria* among merchants having a

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<sup>78</sup> Id., at 8.

<sup>79</sup> Id., at 8.

<sup>80</sup> See Stuart Biegel, *BEYOND OUR CONTROL? CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE* 124 (MIT Press, Cambridge, Mass. 2001). For an example of dispute resolution by the online community itself, see Ethan Katsh & Janet Rifkin, *ONLINE DISPUTE RESOLUTION* 52-54 (Jossey-Bass, San Francisco, 2001).

<sup>81</sup> See, for example, Consumers International, *Should I Buy? Shopping online 2001: An International Comparative Study of Electronic Commerce*, at <http://www.consumersinternational.org/publications/searchdocument.asp?PubID=33&regionid=135&langid=1> (visited 31 Dec. 2004) Consumers International, above n 2 (11% of EU and US sites examined gave any information about what to do if the customer had a problem with the goods, services or the web site, 26% of sites engaging in cross-border commerce mentioned which country's laws would apply in case of dispute, 33% of retailers that sent goods also sent information on how to return them. In its executive summary the study notes that: 'internet shoppers still face big problems, despite the existence of laws and guidelines, which we found were being widely flouted').

common interest cannot either be drawn in support, as there is no such common interest on the content of the norms between businesses and consumers. This is not to say that self-regulation may not be a valuable component in the regulation of e-commerce. Whereas the process is referred to as “uncertain”, it is recognized that in many areas of business, a wide number of businesses abide by self-regulatory measures in line with high consumer protection standards. What is also uncertain is how to achieve widespread compliance on a larger, especially geographical, scale.

The norms enumerated by formal regulation may be general in character and should be complemented by more specific measures. In this respect soft law may be a valuable tool. It may well be a more practical device to control cross-border behaviour, cheaper, more flexible and quicker to develop than formal regulation,<sup>82</sup> especially in a dynamic electronic environment. Co-regulation combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical experience.<sup>83</sup>

The variety of platforms may be considerably varied with respect to creating the soft law that specifies and implements the co-regulative norms and can encompass regional or even global interest groups. Proper forums must be found for the industry, consumer protection organizations and other e-commerce stakeholders to agree on measures that implement the necessary soft law measures. There are currently vivid examples of multilateral and bilateral forums that either have engaged in such task or would be well suited for such purposes, such as the US-EU Transatlantic Business Dialogue and the Transatlantic Consumer Dialogue or the co-operation between the European Consumer’s Organization (BEUC) and the Union of Industrial and Employers’ Confederations of Europe (UNICE).<sup>84</sup>

The Electronic Commerce Directive is a good example of this new approach. In Articles 16 and 17 it refers to ‘codes of conduct’ to establish self-regulatory rules governing the activities of businesses, and to extra-judicial procedures for dispute settlement.<sup>85</sup> As elaborated by the European Commission, co-regulation should, however, be used only where a number of conditions are fulfilled.<sup>86</sup> The instrument defining the norms should contain the objectives, the norms themselves, enforcement and

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<sup>82</sup> European Consumer Law Group, *Soft Law and the Consumer Interest*, ECLG/071/2001 (March 2001), at [http://europa.eu.int/comm/consumers/policy/eclg/rep03\\_en.pdf](http://europa.eu.int/comm/consumers/policy/eclg/rep03_en.pdf) (visited 31 Dec. 2004).

<sup>83</sup> European Governance – a White Paper, COM(2001) 428 final, at 21.

<sup>84</sup> See <http://www.beuc.org/> and <http://www.unice.org/> (visited 31 Dec. 2004). The Federation of European Direct marketing has launched an EU project, the CCForm, which creates a recommended business process, supported by an online multi-lingual complaint form, and accompanied by a well-researched international legal commentary. Over seventy participants from across Europe have worked on CCform, including representatives from large companies, SMEs and consumer organisations, as well as legal experts and software researchers. The six topic Panels include consumer affairs and Alternative Dispute Resolution Systems. See <http://www.ccform.org> (visited 24 Apr. 2003, pages on file with the author).

<sup>85</sup> Directive 2000/31, 2000 O.J. (L 178) 1.

<sup>86</sup> COM(2001) 428 final, at 21.

appeal mechanisms and effective monitoring. It should bring added value and serve the general interest; should not call into question fundamental rights or major political choices, be used only where rules need not be applied in a uniform way in every State, be compatible with competition rules and the rules agreed must be sufficiently visible, and participating organizations must be representative, accountable and capable of following open procedures in formulating and applying agreed rules. Finally, public authorities must retain the possibility of intervening where necessary.

Any regulative effort should pay attention to the regulative tools available and especially co-regulation may be worthy of examination in the regulation of, for example, marketing practices<sup>87</sup> and online dispute resolution, and provided that the caveats mentioned are respected. Together with self-regulation, it may play a worthwhile role in creating measures that diminish the likelihood of disputes – codes of conduct, best practices, trust-marks, self-regulatory sanctions for non-compliance and so on – as well as erecting functional alternative dispute resolution mechanisms. What is therefore required is a multilateral and hybrid approach – a joint venture of stakeholders, including governments, utilizing a variety of alternative regulative processes – that focuses on alternative dispute resolution.

### C. ALTERNATIVE AND ONLINE DISPUTE RESOLUTION

It has been claimed that those engaged in setting international norms have not been able to provide a viable mechanism for the resolution of international business-to-consumer disputes. States have different notions of when and to what extent consumers should be protected. Conflicting State interests are channelled not only through regulation but also through courts applying national mandatory consumer protection norms. In this sense, courts do enforce national policies either by objective application of the law or through more or less parochial action. The absence of clear coordinating norms harms not only businesses and consumers but also the development of international electronic commerce.

If this were not enough, in the overwhelming majority of disputes in international electronic commerce, consumers lack access to justice. The litigation avenue is prohibitively expensive if costs are juxtaposed with the value of the claim at stake. Consumers may be tempted to stick to low-value

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<sup>87</sup> In the Nordic countries, a general clause on good marketing practice has been in place for nearly thirty years. The clause is interpreted with due regard to the consumer, business and societal conditions prevailing from time to time by using soft-law. See Hagen Joergensen, *Nordic Experience of Interplay With Soft Law - Can Experiences inspire a Legislative Model*, Conference - Towards A Harmonized View On Fair Trading In Europe, Stockholm Friday March 9<sup>th</sup> – Saturday March 10<sup>th</sup> 2001, at <http://www.fs.dk/uk/acts/misc/hjfairuk.htm> (visited 11 Feb. 2004, on file with the author).



purchases until a functioning international legal structure is created that renders them confident, but it is especially in low-value purchases that the access to justice problems are most severe.

Part V offered a solution that based itself on recent national and international initiatives. Given the deficiencies in international law and regulation, it is proposed that States and pertinent stakeholders should engage in a multifaceted and hybrid venture that channels dispute resolution not to courts but to alternative online dispute resolution bodies. In fact, ADR bodies have been established by various actors, including States, international and national organizations and private businesses. ADR and ODR bodies are generally confidential, emphasise minimalism, informality and client direction and offer services that seek an amicable solution to the dispute without the constraints of inflexible procedural and substantive law.

Moreover, ADR – and especially ODR that takes advantage of the features of information and communication technology – provides relatively speedy proceedings that are far more inexpensive than court proceedings. Such alternative methods to resolve disputes are particularly suitable for disputes that often involve questions of fact and not of law.

Attractive as ODR may seem, Part V argued that the presence of a weaker party nevertheless brings along State interests. The examination of a number of ODR services revealed that the industry is still in its infancy and has much to improve in terms of costs, transparency, proper safeguards, enforcement, oversight and in securing that consumers have certain protective rights, that is, issues of both procedural and substantive law.<sup>88</sup> This does not mean that viable ODR systems could not be created and the fruits of the examination pointed to those issues that an ODR project should bear in mind.

The benefits of ADR and ODR could be combined with consumer protection and business needs by international structuring through localization. In this sense, localization refers to a range of benefits consumers would enjoy if the process were conducted in their own country: the more elements are localized, the more confident consumers become. The three levels of localization are:

- (1) *The jurisdictional level.* This may refer to the actual physical location of the ODR body (place of establishment), but may be fulfilled through other quasi-localizing criteria: the language used, the nationality of the decision-maker or her familiarity with the consumer's legal system etc.;
- (2) *The applicable law level.* Localization does not necessarily play a significant role with respect to procedural norms, provided that certain generally accepted principles are

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<sup>88</sup> See Part V, pp. 12-22.

abided by (accessibility, transparency, oversight etc.). Localization does, however, play a significant role with respect to the applicable substantive norms: consumers will be more confident to transact with businesses and use an ODR that protects the rights conferred on consumers by their consumer protection norms.

- (3) *The Recognition and Enforcement level.* Businesses and consumers will be confident to use ODR services if the rights conferred on them through localization are recognized and enforced.<sup>89</sup>

Localization may be effected through a targeting clause belonging to an alternative dispute resolution scheme that indicates which ODR(s) the business uses for disputes with residents of the targeted State. The consumer should benefit from the localizing factors on all three levels if the business had included the consumer's State in such a clause. Party autonomy is respected: even where a business targeted the consumer's State, the parties could agree, after the dispute has arisen, to use other ODR bodies. Moreover, businesses would perhaps be more likely to utilize an ODR targeting clause if they do not have to litigate abroad. Where the State is not targeted, the choice of the business would prevail. However, the ODR body should not be a rubber stamp of the businesses' interests and if the generally recognized principles were not followed, consumers would not be bound by the decision. Moreover, the solution could actually work independently from court proceedings, in case there was no consensus for devising the targeting scheme for judicial jurisdiction and applicable law, or could complement such a system by giving an option for consumers to use either an ODR service or courts in disputes with business targeting their State.

The suggested system carries an invaluable advantage, as it is not dependent on lengthy negotiations for an international instrument for questions on jurisdiction, applicable law and the recognition and enforcement of judgments. It would also give a non-mandatory avenue to resolve disputes in areas to which the targeting system was not applicable, as alternative dispute resolution would be available to both contractual and non-contractual causes of action. The system could start as an experiment within, for example, the EU and show its potential in that environment, and could be initiated by a variety of stakeholders in a multilateral and hybrid approach. Most importantly, the system would only improve the present legal framework for dispute resolution in international electronic commerce and, provided that the suggested safeguards were complied with, would find its place at the centre of dispute resolution in international electronic commerce.

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<sup>89</sup> See Part V, pp. 31-38.

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Appeal rejected by the Board of Appeal of the Tribunal of Rome (Ninth Section), 25 Feb. 2000 (Italy).

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## INDEX

- adhesion contracts (I)10, 13, (V)25
- access to justice (I)2, 30, (III)411, (IV)798, 812, (V)2, 5, 8, (VI)2, 14, 18, 30
- antitrust laws (II)720, 724, 728, 732
- arbitration (I)9, (II)695, (V)3, 7, 9, 11, 13, 19, 20, 23, 25-8, 35, 37
- arbitration clause (II)7, (V)25, (VI)18
- ARPANET (I)3
- balancing of state interests (II)738-744, (III)495-6, 506, (VI)3-4
- choice of law clause (III)434, (IV)789, 795, 808, 814, (V)23-5
- Convention on the International Sale of Goods (I)8, (III)435
- codes of conduct (IV)790, (V)5, 25, (VI)28-30
- comity (II)741-2, (III)460
- competition law (II)703, 710, 725-6, (III)426-7
- conciliation (V)7, 19, 22, 25
- contractual cause of action and non-contractual cause of action, distinction between (III)452-456, 461-472, 519-520, (VI)22
- Clearing House (V)6, 29, 30, 33
- consumer
- active (III)423, 427-28, 430, 437, 521, (IV)795-97, 807-8, 811, (V)5, 34, (VI)17
  - definition (III)420-21, (IV)793-94
  - passive (III)423, 427-8, 521, (IV)795-97, 807-8, 811, (V)34
  - imbalance in bargaining power (I)10-11, (II)695-6, (III)405, 420, 424, (IV)789, (V)24-5
  - policy (EC) (III)411-2, 444, (IV)804-13, (V)28-9
- co-regulation (II)754, (VI)27, 29-30
- country of destination principle (I)29, (III)439, (IV)807, (VI)2, 5-8, 10-12
- country of origin principle (I)29, (III)439, (IV)807, (VI)2, 8, 10-12
- criminal law (I)23-4, (II)700-2, 716, 718, (V)11
- Critical Legal Movement (I)17
- customary international law (I)15-6, 18, (II)24, 29, 50, 59-60, 63
- cyber law (I)26
- Cyberspace (I)11-12, (II)690, 715, 717, (VI)25
- effect doctrines (II)719-730, (III)463, 465, 468-71, 477, 487-9, 493, 499, 501, 510, (VI)20-1
- electronic commerce
- consumer (II)694, (III)403, (IV)789-91
  - definition of (I)4, (II)691, (III)403, (IV)789
  - direct (I)4
  - growth of (I)5-6, (II)693, 713, (III)404, (IV)789-90
  - indirect (I)4
- Electronic Data Interchange (I)4, (II)691
- equality of states (II)705, (VI)3
- forum clause (III)428-31, 475, 498-99, 512, (VI)18
- forum non conveniens* (III)416-7, 436, 502-10
- forum shopping (III)415, 445, 449, 451, 512
- generality of law (I)21, (III)410, 442, 513-54, (VI)8-9
- globalization (I)2
- Hague Conference on Private International Law (I)1, (III)521-22, (IV)803, 816, (VI)8, 10, 12, 18, 23, 27-8
- ICANN (I)7, (V)21, 32
- implementation doctrine (II) 726-8



individual justice (I)2, 20, 28, (II)9, 43, 63, (III)410, 478, 509-11, 552, (VI)1, 9

Information Law (I)26

Internet

- growth of (I)5-6, (II)693, (III)403-4, 406
- nature of (I)3-5, 7-8, 11-2, (II)689-692, 744, (III)403
- operators (II)748-53, (V)4, (VI)5-8
- Service Provider (II)691, 750, (V)7, 18, 20, 23, 31, (VI)5, 25-6

Japanese law (III)407-8

jurisdiction

- direct (III)414-15
- general (III)418, 460-1, 480-1, 516, 521
- indirect (III)414
- specific (III)461, 476, 480-1, 483, 502, 516, 521

legal certainty (I)2, 21, 27-9, (II)697, 731, 751, (III)405, 408-19, 428-31, 436-7, 439, 442-45, 450, 452, 454, 456, 476-80, 498-502, 509-512, 514, 516, 518-20, (IV)790, 796, 801-2, 815, (V)1, 21-30, (VI)5, 8-10, 15, 17

Legal Informatics (I)24-5

legality principle (V)28-30

*lex mercatoria* (I)8, 22, (V)32, (VI)28

Libertarians (I)11, (VI)25

mandatory rules (I)13-5, 21, 24, (II)703, (III)433, (IV)792-816, (V)25-6, 37, (VI)13-5, 30

mediation (I)14, (V)3, 7, 11, 13, 17-19, 22, 28, 35

negotiation (I)14, (V)3, 7-8, 11, 13, 17, 32, 35

non-contractual cause of action and contractual cause of action, distinction between (III)452-456, 461-472, 519-520, (VI)22

non-interference, principle of (II)745, (VI)3

positivism (I)15

public international law

- concurrency of jurisdiction (I)27, (II)696, 712, 732-5, 747-8, (VI)3-4
- deformalization of (I)14, 20-1, 30, (VI)2
- determinacy of (I)19-21, (VI)4-5
- hierarchy of principles (I)27, (II)697, 732-5, (VI)3
- general principles of (I)16, (II)747, (VI)3
- and municipal law (II)705-6, 735-37
- and international politics (I)17, (VI)1-2, 4, 8-9 and Private International Law (I)22-, (II)702, 739, (VI)13-14, 21, 24

public law and private law (I)23-4, (II)702-4

reasonableness (II)738-744, (III)463, 466, 470, 472-479, 481, 483, 493-499, 502, 508, 510, 514-17, 519, (VI)3

reciprocity, principle of (II)745

*res communis* (II)731

*res nullius* (II)731

self-regulation (II)753-5, (VI)24, 27-8, 30

small and medium sized enterprises (I)1, 12-4, (II)696, (III)403, 497, (IV)794, 797, 814

soft law (I)21, (VI)29-30

sovereignty (I)18, (II)698, 704-6, 749, (III)460, 463, 477, 495, 512

stream of commerce (III) 451, 463-5, 468, 484-7, 489, 499, 515, (VI)19

targeting/directing (I)13, 15, 17, 29-30, (II)744, (III)426-28, 440-44, 449, 453, 484, 486-87, 501-52, 518, 520-21, (IV)813-16, (V)34, 37, (VI)12-23, 32

treaty interpretation (I)16-17, (III)416, (IV)791-92, 803, 805

trustmark (III)790-1, (V)5, 7, 11, 20, 33, 36, (VI)30

UNCITRAL (I)9, (V)14, 22, 25, 37

UNIDROIT (I)8, (V)25

United States Federal Trade Commission (I)1, (VI)26

venue (III)456, 498, 502-9, 512

web sites

- active (III)426-7, 441, 443-4, 500, 521,  
(IV)794-99, (VI)20

- interactive 440, 444, 489-91, 499-501, (VI)16-  
17, 20

- passive (III)440, 443, 449, 483-4, 486, 489-90,  
499-500, 504, 517, 521, (IV)794-9, (VI)20

Zippo test (III)480, 482-3, 489-90, 493, 499-501, 504,  
518, (VI)20