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I. Introduction: issues and perspectives

The purpose of this paper is to review choice of court and choice of law clauses in contracts entered into electronically ("e-contracts"). We will start by assessing the facts. What do we find on the web in terms of choice of court and choice of law clauses? Are they used at all? If they are, then how? For what transactions, business to business or business to consumer? A random site survey will give us some insight into present practice1.

We will then consider the legal analysis. In that context, we will first have to address a preliminary issue, i.e. when do we face an international as opposed to a domestic contract? We will next examine whether in international contracts, clauses such as those identified by the site survey are enforceable at all. To answer this question, we will have to distinguish between business to business and business to consumer transactions. If the clauses are enforceable as a matter of principle, then we will have to examine the requirements they must meet: do they have to be in writing? If so, what constitutes "a writing" in the electronic environment? Moreover, choice of court and choice of law clauses will necessarily be part of the supplier’s general terms of contract. Under what circumstances will these clauses be validly incorporated into the contract? Or, in other words, when will the client be deemed to have given his or her consent?

These are the main issues which we will address. We will do so from an European perspective, although some of the main differences vis-à-vis US law primarily will be highlighted.

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1 The survey was carried out in August 1999; this paper does not take into account any changes which may have been made to the site contents since such time.
II. Site survey

When visiting commercial sites that offer goods and services, one makes the following main observations:

A. Geographical limitations

- Many sites provide for geographical limitations, primarily by restricting delivery to a given country. Specifically, multinational groups often have national sites servicing customers of a given country. These national sites, or subdivisions of the sites, may or may not provide for different legal regimes. Here are a few examples:
  
  www.sony.ch/bpe/shop/: delivery and billing to Switzerland only (business to business).
  
  www.buy.hp.co.uk: delivery only in the UK (choice of English law and courts). Same for other HP national sites.
  

- Sometimes the geographical restriction only refers to certain of the products or services offered on the site.
  
  www.ubs.ch.

- Sites with geographical restrictions sometimes carry a warning.
  
  www.buy.hp.co.uk: "[i]f you choose to access this Site from outside the United Kingdom, you do so on your own initiative and are responsible for compliance with applicable local laws."

B. Content of sites with respect to general terms of contract

- Many sites have no indication at all about general terms of contract, to say nothing of dispute resolution methods or applicable law.

- However, most sites refer to terms for use of the site, including in particular intellectual property rights and liability for information on the site. These terms sometimes include choice of law and choice of court provisions, which apparently only relate to use of the site and not to contractual issues.
www.virginmega.com: selling CDs worldwide.

- Other sites do refer to general terms of contract. These may be quite extensive or limited to just a few terms, for instance on the site’s return policy, or on the availability of the goods, or on payment terms. Among the sites providing for general terms, some include a choice of law clause and, less frequently, a choice of court provision. The way in which these general terms appear – or do not appear – on the screen and the content of the choice of law and choice of court clauses are set forth below.

C. **Display and acceptance of general terms**

Where there is a reference to general terms of contract, do they appear on the screen? Does the client have to accept them? How?

- Most sites do not display the general terms automatically\(^2\). They merely have a short reference to general terms at the bottom of all or only some of the pages, in particular the page bearing the order form. That reference sometimes mentions that the general terms of the supplier govern all orders placed online:

  www.compusanet.com:80/terms.asp (“use of this site subject to these terms and conditions”),

- Others merely state “see terms of use” or similar wording.


- More often, but not always, the client can click on a field to scroll through the terms.

  www.beyond.com/indexb.

- On some sites, general terms appear on the webpage leading to the order form. For instance, Easyjet’s terms of transportation appear on the page leading to the reservations and one must click on “proceed” to be able to make a reservation.


\(^2\) On these issues, see in particular CHISSICK/KELMAN, pp. 86ff.
• On most sites, it is not necessary for the client to indicate acceptance of the terms of contract before placing an order.

www.beyond.com/indexb.

• On some sites, apparently less common, there is a warning that by using the site, or placing an order, or making a payment, the client accepts the terms and conditions of the supplier.

www.buy.hp.co.uk (however, the warning appears at the top of the general terms, which the client only accesses if he chooses to do so).
www.culturall.com, where the client is said to accept the terms of the supplier by making the payment.
www.francecontacts.com/marche displays the following wording at the bottom of the order form: “pris connaissance et accepté les conditions de vente ou de prestation de services du marchand” (which are accessible if the client clicks on the related link).

• On a more limited number of sites, the client must expressly accept the general terms, e.g. by clicking on a block “I agree with/accept the terms and conditions ...”, or else he or she cannot proceed to place an order.

www.authorize.com: to register a domain name with ENIC.
commerce.westgroup.com: to order US legal literature from abroad, one must fill out the order form and click on a block “agree to terms/check out” appearing above the field that sets out the terms and conditions.
www.nic.ch: to register a .ch domain name, one must click on “I accept the terms and conditions”. Just below, the first provisions appear on a small window from which all terms are accessible.
www.networksolutions.com: to register a .com domain name with NSI, one must, at the last stage of the process, click on “I accept the networksolutions service agreement, which does not appear on the screen, but can be viewed if accessed.”

D. Content of choice of law and choice of court clauses

• There appear to be more choice of law clauses than choice of court provisions. For instance, the following sites contain only the former type of clause:

commerce.westgroup.com (Minnesota law).
www.compusanet.com:80/terms.asp (Massachusetts law).
• Other sites contain both a choice of law and a choice of court provision. The choice is practically always in favour of the law and the courts of the supplier.

  www.nic.ch: Swiss law and Zurich courts.
  www.networksolutions.com: Virginia law and courts.

• When the supplier is a subsidiary of a multinational group, then the choice is generally in favour of the country of the subsidiary's place of business, not that of the parent company.

  www.buy.hp.co.uk (business to business site; for consumers, however, the general terms refer to Californian law and there is no choice of court).
  www.sony.ch/bpe/shop/.

• Sometimes the choice of law or choice of court clause states that it governs only to the extent allowed by "local" law or similar wording.

  www.buy.hp.co.uk.

**E. Business to business v. business to consumer sites**

• Some sites are clearly labelled as business to business sites. On others, this qualification is only clear from the access procedures (e.g. www.buy.hp.co; www.chs.ch/fr/home.htm). Still other sites service individuals as well as businesses (which only becomes clear from the information requested in filling out the order).

• There is apparently no distinction made between business to business transactions and business to consumer transactions when it comes to choice of law and choice of court clauses, although some sites do make a distinction with respect to other contract terms, such as warranty provisions.

**F. Assessment: need for guidance**

This survey shows that most site operators have not yet focused on choice of law or choice of court issues, or at least not sufficiently. Some guidance on how to set up a site in this respect is thus overdue.
III. Internationality of e-contracts

A. An obsolete requirement?

In non-electronic transactions, one must assess whether a contract is international or not in order to determine what set of rules governs it. De lege lata, the same holds true for e-commerce. De lege ferenda, however, the enactment of substantive rules to govern all e-contracts, whether international or not in the traditional sense, is worth serious consideration. Indeed, many of the issues that would need to be covered by such substantive rules are affected much more by the specificity of the medium than by the geographical reach of the transaction.

This applies in particular but not exclusively to rules on consumer protection. It is also true with respect to rules on the incorporation by reference of choice of court and choice of law clauses. Similarly, as we will see, online dispute resolution mechanisms must be created to resolve disputes arising out of e-contracts. Though the need for such mechanisms may be greater when the parties are located far apart, they would be equally useful for litigants residing or based within the same country.

B. Traditional internationality test

Despite this possible development, let us review the traditional internationality test. Generally speaking, it requires contacts with at least two legal systems\(^3\). This means, first, that the mere use of the Internet as a means of

\(^3\) (i) For choice of court clauses, we rely on Art. 17 of the Brussels/Lugano Conventions and of the Revised Lugano Draft, as well as on Art. 23 of the Draft Brussels Regulation which, pursuant to Art. 67 of the Amsterdam Treaty, will take over the contents of the revised Brussels Convention. All of these provisions refer to the domicile of one of the parties. In addition, they all address the international jurisdiction of the courts chosen (see e.g. para. 4, Preamble, Brussels Convention). As a result, the internationality of a choice of court clause may arise out of the domicile of the parties or, if they are both domiciled in the same state and choose a court of that state, out of the fact that they thereby oust the jurisdiction of a court of another state, where for instance the contract giving rise to the dispute was performed.

(ii) For choice of law clauses, we rely on Art. 1(1) of the Rome Convention on the law applicable to contractual obligations, which applies to contract obligations in “any situation involving a choice between the laws of different countries”. As a result, a contract is international mainly if it is entered into by parties domiciled in different states, or if its place of performance is located in a state other than that of the parties’ domicile. The wording of Art. 1(1) also includes situations that are international merely because the
communication and contract conclusion does not make the contract international *per se*\(^4\). In other words, if two parties domiciled in the same state enter into a contract electronically, which contract is to be performed in that state, then the contract is not an international, but a domestic contract. As such, it is governed by the rules on domestic contracts, which are outside the scope of our topic. The fact that technical equipment, e.g. the server, is located abroad or that data messages may be routed through foreign countries makes no difference. Indeed, a consensus has emerged that these factors are too arbitrary and uncertain to be taken into account\(^5\).

Consequently, e-contracts with suppliers whose sites provide for geographical restrictions\(^6\), with the result that the supplier only services customers within the state where he is himself established, do not qualify as international.

The traditional internationality test also means that, in order to ascertain the existence of contacts with at least two legal systems, one must locate actors and actions, primarily by identifying the domicile, residence or place of business of a party or the place of performance of a contract. In determining these geographical locations for e-contracts, one may run into two main difficulties:

- the domicile, residence or place of business of a party may be unknown, as e-mail addresses or domain names do not always show a location (or not necessarily a location that corresponds to reality)\(^7\);
- many e-contracts are performed online by downloading information onto the client’s computer. Where does such performance take place? Though one may answer “at the domicile of either one of the parties”, which would refer us back to the first difficulty, it is obvious that this answer does not reflect the nature of online performance.
C. Application to e-com

Among many other issues, the difficulties outlined above were addressed at the Geneva Roundtable on Electronic Commerce and Private International Law, a colloquium organized by the Hague Conference and the University of Geneva on September 2-4, 1999\textsuperscript{8}, attended by about 100 experts from 26 countries representing all sectors interested in electronic commerce: industry operators, consumers, governments, international organisations, both regional and worldwide, governmental and non-governmental, and academics and practitioners specialising in this area of the law. The issues addressed were divided among seven commissions, one of which dealt with choice of law and choice of court\textsuperscript{9}. Each commission prepared a set of specific recommendations\textsuperscript{10} and the plenary session issued a set of general recommendations\textsuperscript{11}.

As a solution to the difficulty of localising actions and actors on the Net, the Roundtable made the following recommendations:

- on actions, “[i]f the performance takes place online, the place of performance is not appropriate as a connecting factor. In that case, the relevant connecting factors are the location of each of the parties involved”\textsuperscript{12}. In other words, when determining whether a contract is international or not, performance is of no significance if it occurs online.

- on actors, there will be a presumption of internationality, “unless all parties are habitually resident in the same country, and this fact is known to the parties or clearly identified at or before the time of contracting.”\textsuperscript{13}

\textsuperscript{8} http://cui.unige.ch/~billard/ipilec.

\textsuperscript{9} Commission 3, for which Prof. Margaret G. STEWART (Chicago-Kent University), Mr. David GODDARD (New Zealand), and the author acted as rapporteurs.

\textsuperscript{10} The recommendations of Commission 3 appear as Annex 1 hereto.

\textsuperscript{11} The general recommendations of the Roundtable are summarised in Annex 2 hereto. A general report on the works and conclusions of the Roundtable will be posted on the site referred to above in footnote 8 and on the site of the Hague Conference, http://www.hcch.net.

\textsuperscript{12} Annex 2 no. 3; Annex 1 no. 2(a).

\textsuperscript{13} Annex 1 no. 2(b). In connection with choice of court clauses, a specific – controversial – issue deserves mention here: is a choice of court international if two parties who reside in the same country choose a foreign court? Following the Roundtable, a provision on territorial scope was added to the Hague Draft (Art. 2). Accordingly, the Convention’s provisions on jurisdiction apply in the courts of a contracting state unless all the parties are resident in that state. However, even then, the provision of Art. 4 on choice of court agreement does apply if the parties have selected a court of another contracting state (see also Hague Conference, Information Note prepared for the expert meeting at Ottawa.
In this same context, the Roundtable emphasised the need for identification of the players on the Net as a requirement for the proper operation of e-com\textsuperscript{14}. Serious players will undoubtedly satisfy this need as a way of building consumer confidence. This was recognised for instance when the ICC Guidelines on Marketing over the Net were drafted\textsuperscript{15}. It is equally emphasised in the OECD Consumer Protection Guidelines for E-Commerce\textsuperscript{16}. Similarly, extensive identity disclosure requirements have made their way into legislative texts, such as the European Distance Selling Directive\textsuperscript{17} and the E-Com Directive\textsuperscript{18}.

### IV. Choice of court clauses

Three main aspects of choice of court clauses raise issues peculiar to the electronic environment: first, the enforceability of choice of court clauses; second, the form requirement and, in particular, the need for a writing; and third, the incorporation by reference of the clause into the contract. This is not to say that there are no other significant issues. However, they are either not specific to e-contracts\textsuperscript{19} or are of less practical relevance\textsuperscript{20}.

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\textsuperscript{14} Annex 2 no. 7.


\textsuperscript{17} Art. 4 and 5; although it unfortunately does not always require the supplier to state his address (see FALLO, p. 274).

\textsuperscript{18} Art. 5.

\textsuperscript{19} E.g. the effect of the clause, which is presumed to be exclusive under European law (Art. 17 Brussels/Lugano Convention, Art. 17 Revised Lugano Draft, Art. 4 Hague Draft, Art. 23 Brussels Regulation which was slightly amended to clarify that the exclusivity is a mere presumption), but non-exclusive under US law, a rule that Section 110(b) of the Uniform Computer Information Transactions Act (UCITA), approved by the National Conference of Commissioners on Uniform State Laws on 23-30 July 1999, seeks to codify (http://www.law.upenn.edu/bl/ulc/ucita/ucita200.htm). On UCITA, see also footnote 47 below.

\textsuperscript{20} E.g. some form requirements, like the one which accords with the practices of the parties, Art. 4(2)(c) Hague Draft and Art. 17(1)(b) Brussels/Lugano Conventions (old version and, subject to different numbering for the Brussels Regulation, new versions) which both allow the conclusion of a choice of court agreement “in accordance with a usage which is regularly observed by the parties” (Hague Draft) or “which accords with practices which the parties have established between themselves” (Brussels/Lugano Conven-
A. Admissibility/Enforceability

Is a choice of court clause in an e-contract admissible or enforceable at all as a matter of principle? Here one must distinguish between business to business and business to consumer transactions. If we were to pick keywords for each one of these categories, then party autonomy would prevail for the first one and the need for protection would characterise the second.

1. Business to business

Inter-company trade of goods is about to accelerate into so-called “hypergrowth”, surging from $43 billion in 1998 to $1.3 trillion in 2003. If services carried out online were added, the increase would be even more staggering. These figures relate to the US only, but companies in Europe and Japan are anticipated to enter the “hypergrowth” stage of e-commerce about two to four years later. Some industries will reach that stage earlier than others. Computer and electronics are the most advanced, but aerospace, telecommunications and automobile industries are not far behind. Compared to these projections, the figures for the evolution of business to consumer e-commerce over the same period are considerably lower, $8 billion to $108 billion. Hence, one should beware of equating, as some do, e-commerce with consumer issues. It is obvious that the two are not equivalent.

In e-contracts that do not qualify as consumer transactions, there are no limitations on the enforceability of a choice of court clause, except for the requirements of form and consent. In particular, no link is required

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21 Contracts for employment are also characterised by a need for protection of the weaker party (see the new section 4(a) in the Revised Lugano Draft and in the Draft Brussels Regulation, which mirrors the provisions on consumer and insurance contracts). They are not discussed here because at this stage of technical evolution, employment contracts entered into electronically are unlikely to be more than a marginal phenomenon.

22 Forecasts by Forrester Research, reported in *The Economist*, A survey of business and the Internet, 26 June 1999.

23 On the definition of a consumer transaction, see below IV.A.2.a. In addition, the dispute must arise out of a particular legal relationship (e.g. Art. 17 Brussels/Lugano Convention).

24 Art. 17 Brussels/Lugano Conventions; Art. 17 Draft Lugano Revision; Art. 23 Draft Brussels Regulation; Art. 4 Hague Draft.

25 See below IV.B and C.
between the courts chosen and the contract or the dispute, nor are there — contrary to American practice — any reasonableness or fairness tests imposed, nor are convenience standards involved. This lack of limitations in the existing rules led the Geneva Roundtable to recommend that party autonomy govern in business to business e-contracts, a proposition that was widely accepted.

Despite this broad consensus regarding party autonomy, one issue remains unresolved. In e-contracts much more so than in “real life” contracts, the chosen forum may be very distant from the claimant’s place of business. If the claimant in a business to business transaction is a small or medium enterprise (“SME”) and, as such, is not entitled to consumer protection, the choice of court clause will be enforceable by virtue of the principle of party autonomy. This raises the following dilemma: what if the forum is so far away that the claimant SME ends up being effectively deprived of any remedies? Such a result would amount to a denial of justice. To avoid this result, should the choice of court be disregarded, out of fairness to the claimant? But does this not in turn become unfair to the defendant, who hoped to secure some predictability with a contractual choice of court and who now may have to litigate in such a distant forum that the costs involved make its right to a defence illusory? Or should the notion of “consumer”, which encompasses only natural persons, be extended to SMEs, with the result that the forum selection clause would then be unenforceable?

In view of several factors including the existing consensus over party autonomy in commercial transactions, the heated debate over the legitimacy of e-consumer protection, and the difficulty of defining a SME for these purposes, it seems unrealistic at this stage to attempt to broaden consumer protection to include small businesses. The problem of access to justice could, however, be resolved differently. If e-contracts entered into by SMEs were

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26 See provisions referred to in footnote 24 above.
27 See in particular The Bremen v. Zapata Off-Shore Co., 407 U.S. 1; see also Section 110 UCITA, referred to in footnote 19 above, which provides that the parties may choose an exclusive forum, unless it is unreasonable or unjust.
28 Art. 22 Hague Draft, which provides for a limited forum non conveniens defence allowing a court to decline jurisdiction, does not apply whenever that court’s jurisdiction arises out of an exclusive choice of court agreement.
29 Annex 2 no. 4; Annex 1 no. 3.
30 See below IV.A.2.a.
31 In favour of the inclusion of small businesses, WEBER-STECHER, pp. 88ff. and p. 343; Art. 110(a) UCITA, referred to above in footnote 19, includes some protection of SMEs by way of the requirement that the choice may not be “unreasonable and unjust”.
to include a clause providing for online dispute resolution, by way of arbitration or otherwise, the SME would have perfectly satisfactory access to justice, consistent with its own mode of operation.

2. Business to consumer

a) Definition of consumer contract

Under European law, exclusive pre-dispute choice of court clauses in consumer contracts are unenforceable. But what is a “consumer contract”? A consumer contract is defined according to three criteria: the parties, the type of contract, and the territorial link between the contract and the consumer.

(i) Parties

The “consumer” is consistently defined as a natural person acting for purposes outside of his/her trade, business or profession. This definition


34 Art. 17.3 and 15 Brussels/Lugano Conventions and Revised Lugano Draft; Art. 23(5) and 17 Draft Brussels Regulation; Art. 4.3 and 7.3 Hague Draft. Generally, for a comprehensive list of EU actions in connection with consumer protection in electronic commerce, http://europa.int/com/comm/dg24/library/legislation/index.en.html.

35 Art. 17.3 Brussels/Lugano Conventions and Revised Lugano Draft; Art. 17 Draft Brussels Regulation; Art. 7 Hague Draft.

applies in the context of the Brussels/Lugano Conventions, the Rome Convention and pertinent directives. Accordingly, neither small enterprises nor individuals acting in a professional or commercial capacity, e.g. to set up a business, are consumers\textsuperscript{37}.

The “supplier” is consistently defined as a natural or legal person entering into contracts in a commercial or professional capacity\textsuperscript{38}.

This definition of “supplier” implies that consumer to consumer transactions, which play an increasing role in connection with Internet auctions, are not covered by consumer protection rules. One may argue that some protection is needed in the event of unequal bargaining power, for instance when the consumer in the supplier function benefits by an \textit{Informationsvorsprung}\textsuperscript{39} or informational advantage. Rather than extending an already controversial protection, it may again be more promising to attempt to set up adequate online dispute resolution mechanisms and to incorporate related clauses into the relevant e-contracts. Indeed, if such mechanisms were available, the protection issue would become moot.

(ii) Type of contract

The type of contract giving rise to consumer protection has progressively been broadened to encompass all contracts for the supply of goods or services\textsuperscript{40}.


\textsuperscript{38} Art. 2(3) Directive 97/7 referred to in footnote 36 above; Art. 7(2) Hague Draft; Art. 13(1)(c) Revised Lugano Draft; Art. 15(1)(c) Draft Brussels Regulation.

\textsuperscript{39} Thus, \textit{WEBER-STECHER}, pp. 93-95 and 342-343.

\textsuperscript{40} Art. 13(1)(3) Brussels/Lugano Conventions and Revised Lugano Draft; Art. 15(1)(c) Brussels Regulation; Art. 7(1) Hague Draft; we do not deal here with the contracts set out in particular in Art. 13(1)(a-b) Brussels/Lugano Conventions, nor with the exceptions to the rule, e.g. Art. 13(3) Revised Lugano Draft and Art. 15(3) Draft Brussels Regulation, because they are of little relevance in our context. The same is true for the longer list of exceptions contained in Art. 3 Directive 97/7 referred to in footnote 36 above, because that Directive only contains a choice of law (Art. 12), and no choice of court provision.
(iii) Territorial link between contract and consumer

Only the consumer who contracts at home is protected. The consumer who leaves his/her usual environment is deemed to have assumed the risk that he/she will not be protected. This rationale gives rise to two geographical requirements. In Article 7 of the Hague Draft for instance, these requirements have the following wording:

“A plaintiff […] may bring a claim in the courts of the State in which it is habitually resident, if

a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and

b) the consumer has taken the steps necessary for the conclusion of the contract in that State” (emphasis added).

Article 13(1)(c) of the Revised Lugano Draft and Article 15 of the Draft Brussels Regulation contain similar language:

“In matters relating to a contract concluded by a […] consumer […], jurisdiction shall be determined by this Section […], if […]

(c) […], the contract has been concluded with a person who pursues commercial or professional activities in the State of the consumer’s domicile or, by any means, directs such activities to that State or to several States including that State, and the contract falls within the scope of such activities” (emphasis added).

As opposed to these formulations, the present language of the Brussels/Lugano Conventions as well as of the Rome Convention41 uses more restrictive wording in granting protection if:

“(a) in the State of the consumer’s domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertis-
The language in the new texts raises two main questions in the context of e-commerce: one about the activities “directed” towards the consumer’s state and another about the place where the consumer takes the steps necessary to enter into the contract.

**b) Does it matter where the consumer clicks on the mouse?**

Under the Hague Draft, the mouse click by which the consumer submits an order must occur within the state of his/her habitual residence, while the Revised Lugano Draft and the Draft Brussels Regulation dispense with such a requirement, i.e. the consumer may enter into the contract while travelling abroad. Which version is preferable? Is there a justification for treating someone who accesses the site from his or her computer at home differently from someone who does so on a laptop while on holiday or on a business trip?

We believe that the evolution of communication and the increased mobility of people have made this distinction obsolete, not to speak of the technical difficulties of ascertaining the geographical place from which the site was accessed. Hence, the Lugano and Brussels Drafts must be regarded as the preferred alternative.

**c) Does a supplier “direct” his activities towards a given state by maintaining an interactive site accessible from that state?**

Sites with geographical restrictions are easy to deal with: either the state at issue is within the area served so that the activity is clearly “directed” to that state, or the state is outside such area and the activities are not so directed.

Sites without geographical restrictions cause more difficulties and their status is heavily debated. When the user completes the order form before

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42 On the application of these requirements to the e-environment, see BOELE-WOELKI, no. 5.2.2, who is of the opinion that a consumer accessing a site would not meet these requirements; and for a contrary opinion, see MANKOWSKI, pp. 240ff. and KAUFMANN-KOHLER, Mondialisation, pp. 138-140.

43 On the distinction between an interactive and a passive site developed by US case law and the difficulties in importing it into Europe, KESSEDIAN, Règlement des différends, Part 2, Section 2.
submitting it, he/she must usually fill in his/her address, including the country. To fill in the country field, the user can most often simply click on a country scrolling through a – generally very long – list. Is this not an indication that the supplier intends to serve all the countries listed44?

Admittedly, such an indication does not dispose of the objection that the user was not solicited by the supplier in his home country, but that he was the one seeking a supplier abroad, because he went out surfing on the Net. This objection is not convincing for the following primary reasons:

- If the user had contracted after reading an advertisement in a newspaper distributed in his home country, there would be no question that he would be protected. Is buying a newspaper not very similar to accessing a website?
- If the user had seen a commercial on TV, there would be no question that he would be protected. Is switching on the television and choosing a channel not very similar to accessing a website? Or will it at least not be very soon, as the Internet moves from a pull to a push medium and is accessed through a television set?
- An additional consideration is the anticipated boom of e-consumer contracts and the fact that online shopping is becoming part of daily life, as much as going to the supermarket. If all these consumers are denied protection, an important social acquis of the last decades will be lost. This would represent a step backwards, which is not acceptable.

d) The culture clash and how to overcome it

It is often felt that there is a real clash of cultures between US and European law in consumer protection matters. And indeed, in common law jurisdictions, pre-dispute choice of court clauses are enforceable against consumers as a rule, subject to a fairness test45. Two recent American court decisions


have enforced choice of court clauses contained in e-consumer contracts and the Uniform Computer Information Transactions Act (UCITA), a model act on software licensing, promulgated by the (US) National Conference of Commissioners on Uniform State Laws in July 1999, allows for exclusive forum selections, provided that the choice is not "unreasonable and unjust".

In *Caspi*, four named plaintiffs, domiciled in New Jersey, Ohio and New York, filed a class action in New Jersey against two Microsoft companies for breach of an online subscriber agreement providing for online computer services. The agreement contained an exclusive forum selection in favour of the courts of the State of Washington. Microsoft moved to dismiss the action for lack of jurisdiction. In reliance on *Carnival Cruise*, a decision in which the Supreme Court enforced a choice of court clause appearing in small print on a cruise ticket, the New Jersey Court enforced the choice of forum clause.

In assessing the enforceability of the clause, the Court paid particular attention to the online display and sign-up process. Registration could only proceed after the potential subscriber had an opportunity to view and had assented to the subscriber agreement. That agreement, including the forum selection clause, appeared on the computer screen in a scrollable window next to boxes providing the choices "I agree" or "I don't agree". The subscribers were thus free to scroll through the terms of the contract before clicking their agreement. The clause, which was the first item in the last paragraph, was presented in the same format as all other contract provisions. Therefore, the Court held that the plaintiffs had adequate notice of the clause.

Further, the Court held that the clause did not raise any public policy concerns. It added – which is significant for our purposes – that there was "no reason to apprehend that the nature and scope of consumer fraud protections afforded by the State of Washington are materially different or less broad in scope than those available in this State". What if they had been materially different?

Finally, the Court held that enforcement of the choice of court clause would not inconvenience a trial. Given the fact that the named plaintiffs resided in different States and that, if the class were certified, numerous

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48 Enforceability is the rule, subject to three exceptions: (1) fraud or "overweening" bargaining power; (2) violation of strong public policy; (3) serious inconvenience.
additional plaintiffs with different domiciles would be involved "the inconvenience to all parties [would be] no greater in Washington than anywhere else in the country". "Anywhere else in the country"... and what about anywhere else in the world?

Like Carnival Cruise, this was a domestic US case, not an international one. Would the outcome have been different if the exclusive choice had been in favour of a foreign court, with or without materially different standards of consumer protection? The question is open. If the answer is in the affirmative, then the gap between US and other common law jurisdictions, on the one hand, and Europe, on the other, would not be as wide, nor would the culture clash be as violent, as generally conceived.

Whatever the extent of the clash, the Geneva Roundtable suggested an approach to overcome it. Considering the present state of the law, it deemed it unrealistic to strive to achieve a unified solution for all online choice of court clauses. Indeed, this would imply forcing some countries to accept a solution contrary to their tradition, an unpromising proposition. As a compromise, a choice of court clause would be deemed enforceable if made by a consumer resident in a country that has declared such clauses to be enforceable. In other words, if a French resident enters into a contract with a choice of a US court, that court would dismiss the action brought by the US supplier, assuming that France, or the EU on its behalf would not make the enforceability declaration envisaged. If an Australian resident agrees to the same clause, the US court would accept jurisdiction, assuming again that Australia would make the enforceability declaration. The consumer’s home country would thus have the final say, a solution that appears fair to both the consumer, who can rely on the law of his living environment, and the business, which may block deliveries to certain countries by various means if it does not wish to litigate there.

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49 This was also true of Decker, referred to in footnote 46 above.
50 The Bremen, referred to in footnote 27 above, in which the Supreme Court affirmed the enforcement of a contractual choice of the London courts, is not determinative, because it involved a business to business transaction.
51 Obviously, even assuming a positive answer, differences would remain: in the area of domestic forum selections, and in the overall approach (a strict rule of unenforceability v. an inconvenience and fairness test applied to specific circumstances).
52 Annex 1 no. 4(b) and Annex 2 no. 6. On this proposal, see also Kessedjian, Règlement des différends, Part 2, Section 2.
53 Annex 2 no. 5.
Admittedly, even with this compromise solution, traditional litigation remains too expensive for most consumer disputes, as is the risk of having to litigate in a faraway forum. The risk remains for the business where the choice of its own court is not enforceable and for the consumer in the reverse situation. That risk cannot be eliminated by private international rules on court jurisdiction. It can only be eliminated by the institution of online dispute resolution mechanisms, a solution that we have been advocating for several years now and which the EU has now made a priority\(^{54}\) and for which the E-Com Directive has paved the way\(^{55}\).

Another solution to these difficulties is the system of site certification that Prof. Kessedjian put forward at the Geneva Roundtable\(^{56}\). Under this system, which may be inspired from efforts such as those of the ICC and other private organizations, a site may be certified if it complies with minimum standards of consumer protection and provides for certain defined online dispute resolution procedures. Preferably, that online procedure would be an arbitration, which finally disposes of the dispute without any possible recourse to the courts. However, one could also consider a non-binding mechanism like mediation, automated negotiation, or some other type of alternative dispute resolution (ADR). A site that provides for an acceptable online dispute resolution mechanism and minimum consumer protection would be certified as a “good” site and would be allowed to provide for the jurisdiction of its home courts\(^{57}\). This would be its “reward” for being a “good” site.


\(^{55}\) Art. 17(1) E-Com Directive requires that state legislation allow effective use of out-of-court schemes, including by appropriate electronic means.

\(^{56}\) Annex 2 no. 5. See also the detailed proposals on ADR combined with a site trustmark or label system of Kessedjian, Règlement des différends, Conclusion, amended version.

\(^{57}\) Annex 2 no. 5. On the certification system and choice of law, see below V.B.2.b.
B. **Written form**

1. **Functional equivalence**

Under European law, choice of court clauses must traditionally be in writing. It is true that less stringent forms have made their way into the Brussels and Lugano Conventions, but these forms are unlikely to play a significant role in electronic commerce\(^{58}\).

The writing requirement does not imply the need for a signature\(^{59}\). Hence the issue here is not one of digital signature, but merely whether an electronic message complies with the less restrictive requirement of written form.

In today's world, a data message should be considered the equivalent of a writing, if it is accessible for later reference. The newly drafted texts expressly so provide:

- the Revised Lugano Draft (Art. 17 para. 4) and Draft Brussels Regulation (art. 23(3)): “Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’;

- The Hague Draft (Art. 4 para. 2): “[a choice of court] agreement [...] shall be valid as to form, if it was entered into or confirmed
  a. [...];
  b. by any other means of communication which renders information accessible so as to be usable for subsequent reference;”

Although the Lugano/Brussels wording only mentions durability and not accessibility, as does the Hague Draft, it makes sense to interpret these provisions in the same manner and to consider that they all require the three tradi-
tional characteristics of writings: durability, which implies reliability, and accessibility.\(^{60}\)

Even before these texts come into force, the existing Article 17 Brussels/Lugano Conventions and similar wording in national law\(^{61}\) can be construed to mean that an electronic message is equivalent to a writing, if it is later accessible. Such a construction is based on the following texts:

- first and foremost, in line with the general principle of functional equivalence, Article 6 of the UNCITRAL Model Law on Electronic Commerce stipulates that the writing requirement “is met by a data message if the information contained therein is accessible so as to be usable for further reference”;
- similarly, Article 1.10 of the UNIDROIT Principles of International Commercial Contracts defines the term writing as “any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form”;
- the E-Com Directive in its Article 9(1) also adopts the principle of functional equivalence when requiring that the Member States must “ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means”;
- Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration, which can be referred to by analogy, provides that “[a]n agreement is in writing if it is contained […] in an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement”\(^{62}\).

\(^{60}\) **Kessedian**, *Règlement des différends*, Part 2, Section 1.

\(^{61}\) The wording of Art. 5 of the Swiss Private International Law Act, for instance, expressly covers e-commerce, as it provides that the choice of forum agreement may be entered into “in writing, by telegram, telex, telexcopier, or any other means of communication which can be evidenced by a text”.

\(^{62}\) **Boele-Woelki**, no. 5.1.1, also reaches the conclusion that the writing requirement is met if the agreement can be later reproduced (she does so by analogy with Art. 2 New York Convention to be construed in accordance with Art. 7 UNCITRAL Model Law on Arbitration); of the same opinion, **Juncker**, p. 813; **Mankowski**, p. 219. Others, however, deem that the writing requirement is not met, e.g. Rufus **Pichler**, “Internationale Gerichtszuständigkeit im Online-Bereich”, *Jahrbuch junger Zivilwissenschaftler 1998, Vernetzte Welt – globales Recht*, Stuttgart 1999, p. 229.
2. What does the data message have to cover?

If one accepts these definitions, which reflect the contemporary notion of writing, a data message undoubtedly meets the writing requirement if it can be made available for further reference. This raises two questions: how can a data message be made available later in an unchanged form and what must be made available?

From the texts just quoted, the answer to the second question is obvious: the “agreement”. The “agreement” is composed of an offer and an acceptance. Thus, the message or messages must cover (i) the offer and acceptance or the declarations of intent of each party, which includes (ii) the identity of parties, especially of the client, and (iii) the contents of the choice of court provision 63.

The contract terms and choice of court set out on the site can be regarded as an invitatio ad offerendum or as an offer 64. In the first case, when the client clicks on “I agree” or similar wording, he or she makes the offer, and the supplier’s e-mail confirmation is the acceptance. In the second case, the site content is the offer and the client’s click constitutes the acceptance. Though it requires the supplier “to acknowledge the receipt of the recipient’s order without delay and by electronic means” 65, the E-Com Directive is silent on whether that acknowledgement is an acceptance or merely a confirmation of the (already concluded) contract.

Under both alternatives, two technical issues may create difficulties. On the one hand, if a client disputes being the issuer of a given data message (be it an offer or an acceptance), it may not be possible to trace his/her identity, unless some form of electronic identification, for instance by way of the credit card PIN, or digital signature, is used 66. On the other hand, the contents of the general conditions, including the choice of court clause, may be

63 KAUFMANN-KOHLE R, Mondialisation, p. 129 notes 185 and 186 with references.
64 GISLER, pp. 111-113; most authors hold the view that the site is an invitatio (loc. cit. with citations; Thomas HOEREN, Rechtsfragen des Internet, Köln 1998, p. 119; David ROSENTHAL, Projekt Internet, Was Unternehmen über Internet und Recht wissen müssen, Buchs 1997, pp. 329ff.), but this may be too categorical a view. Hence, to ensure that the site contents are not regarded as an offer, a supplier should indicate so, e.g. by mentioning “without commitment” or similar language.
65 Art. 11(1). This requirement does not apply to contracts entered into exclusively by e-mail (Art. 11(3)) and can be waived in business to business transactions (Art. 11(1)). According to the Whereas Clause no. 34, such acknowledgement may also take the form of the online provision of services.
66 Whereas Clause no. 35 states that the E-Com Directive does not affect the Member States’ possibility to maintain or establish requirements concerning secure electronic signatures.
changed at any time after contract conclusion. There is thus a risk of manipulation\textsuperscript{67}. The E-Com Directive seeks to avoid this by requiring that contract terms and general conditions be made available to the client "in a way that allows him to store and reproduce them"\textsuperscript{68}. The same requirement is found in the OECD Guidelines for e-consumer protection\textsuperscript{69}. The durability and hence the written form requirement will only be fulfilled in all cases if these issues are addressed by appropriate technological means.

3. Trade usages as a substitute for writing?

In their existing and future versions, the Lugano and Brussels Conventions further provide for choice of court agreements in a form which conforms with trade usages\textsuperscript{70}. Under the existing version, a court which does not follow the principle of functional equivalence and, thus, does not equate a data message and a writing, may nevertheless resort to this latter form to enforce an online choice of court clause.

In \textit{Mainschiffahrts-Genossenschaft}\textsuperscript{71}, a 1997 ECJ case, one of the parties, following the contractual negotiations, sent a "confirmation" letter with contract terms not previously agreed upon, including a choice of (its own) court. Upon receipt, the other party remained silent and performed the contract. The ECJ held that the parties had validly entered into a choice of court agreement, provided there was a usage of international trade pursuant to which a party’s silence following a confirmation letter was deemed an acceptance and the parties were aware or ought to have been aware of such usage. The ECJ specified that the existence of a usage must not be determined by reference to a national law, nor by reference to international commerce generally, but by reference to that particular area of commerce in which the parties are active\textsuperscript{72}. It added that parties are deemed to have knowledge of a given usage if they had previous dealings between themselves or with other trading partners

\textsuperscript{67} Pietro GRAF FRINGUELLI/Matthias WALLHÄUSER, "Formerfordernisse beim Vertragschluss im Internet", CR 1999, p. 99.

\textsuperscript{68} Art. 10(3). This requirement also applies to contracts concluded exclusively by e-mail and cannot be waived in business to business transactions (Art. 11(1) and (4) \textit{a contrario}).

\textsuperscript{69} Art. III.C.

\textsuperscript{70} Art. 17(1)(c) Brussels/Lugano Conventions and Revised Lugano Draft; Art. 23(1)(c) Draft Brussels Regulation; Art. 4(2)(d) Hague Draft.

\textsuperscript{71} ECJ 20 February 1997, Case C-106/95 \textit{Mainschiffahrts-Genossenschaft (MSG) v. Les Gravières Rhénanes SARL}, ECR I-911.

in the same area, or if the usage is generally known and regularly observed among trading partners of that area. The ECJ confirmed these holdings in Castelletti in 1999 and added that no specific publicity of the usage is required.

Courts that do not accept that electronic communication is equivalent to a writing may hold that there is a usage in e-business that choice of court agreements are validly entered into by clicking on a field “I accept the terms and conditions of contract”.

With the increasing volume and sophistication of online transactions, there is also another possibility, i.e. that a usage develops pursuant to which a user, by placing an order online, will be deemed to validly accept the general terms which are referred to and accessible on the site, including the choice of court agreement, even without clicking his/her consent.

These possibilities generate uncertainty about the enforceability of choice of court clauses. Uncertainty will not foster trust in e-business. It would thus be far more preferable to accept the principle of functional equivalence and to develop technical means of ensuring the later accessibility of unchanged messages, as well as guidelines on the proper set up of sites, an objective that we will address in the following section.

C. Incorporation by reference

1. Traditional rules

The site survey discussed at the outset of this paper shows that online choice of court clauses are always incorporated in general contract terms. These terms must be made part of the contract for the choice of court to be enforceable. How is this achieved in an electronic environment? To answer this question, one must first review the rules on incorporation by reference for “real life” contracts before transposing these rules to online transactions. From the ECJ’s case law on Article 17 Brussels Convention, one can distill

73 ECJ MSG, referred to in footnote 71 above; ECJ Castelletti, referred to in footnote 72 above.
74 ECJ Castelletti, referred to in footnote 72 above.
75 See also BOELE-WOELKI, no. 5.1.1.
76 See II. above.
the following rules about the incorporation by reference of choice of court clauses:

- The incorporation of the choice of court clause is governed by the Convention which is based on procedural objectives, not by the law applicable to the merits of the contract, which latter law governs the incorporation of all other terms.\(^{78}\)

- There must be an express reference in the effective contract wording to the general conditions; a specific reference to the jurisdiction agreement is not required. The ECJ stated this rule in a situation involving a contract which set out the effective contract wording on the front of the document, and the general conditions on the back.

- The silence of one party following a unilateral declaration by the other party interested to incorporate general terms is not an acceptance of those terms.

- The general conditions must be accessible to the user, who must be able to review them exercising ordinary care. This does not imply that the choice of court clause is set out in bold print or otherwise conspicuously displayed. However, it does suggest that the clause must be readable.\(^{79}\)

- Moreover, the clause should preferably be drafted in a language that the user understands. Though the ECJ held that national law cannot impose a language requirement;\(^{80}\) one cannot rule out that, if the user proves that he/she does not understand the language of the clause, its enforceability may be put into question.\(^{81}\)

From the rules set out above, it seems clear that the user need not expressly accept the choice of court clause, nor even have actual knowledge of it. Though cases insist on the fact that there must be consent, i.e. an offer and an acceptance – in a substantive and not merely formal manner – they also state that form requirements are set up to ensure the reality of the consent.\(^{82}\) This leads one to conclude that form may substitute for consent, at least in the absence of exceptional circumstances, e.g. if a user proves that, because of the language used, he/she was in no position to understand the choice of court clause.

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\(^{78}\) ECJ Benincasa, referred to in footnote 36 above, no. 25.


\(^{80}\) ECJ 24 June 1981, Case 159/80, Elefanten Schuh, ECR 1671; ECJ Castelletti, referred to in footnote 72 above, restated that, in another context, national law cannot lay down particular requirements (nos. 34-39).

\(^{81}\) Hélène Gaudemet-Tallon, Note to Elefanten Schuh, Rev. crit. 1982, p. 152.

\(^{82}\) ECJ Salotti, referred to in footnote 77 above.
Moreover, in connection with the form of trade usages of Article 17(1)(c), the ECJ, while restating that reality of consent was the goal of the form requirements, held that consent was presumed whenever there was a usage. By analogy, consent may be presumed whenever there is a writing properly incorporated into the contract.

2. Application to e-contracts

a) Equal treatment of e-com and non e-com, or again functional equivalence

Applying these rules to e-contracts leads to the conclusion that online choice of court clauses by reference are enforceable. There is no reason to apply different or more restrictive rules to e-commerce as opposed to contracts entered into offline. This principle of equal treatment of e-commerce and non e-commerce formed the first recommendation of the Geneva Roundtable. It was agreed that differential treatment should only be adopted when the specificities of online dealings so mandated.

In connection with incorporation by reference, enforceability also arises out of Article 5bis of the UNCITRAL Model Law, which seeks to facilitate incorporation in an electronic environment by removing the uncertainty about the applicability of traditional incorporation rules:

"Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message".

More than in paper-based transactions, electronic commerce heavily relies on incorporation by reference in order not to overload data messages with quantities of text. And more than in paper-based transactions, electronic commerce also has the resources available to make incorporated documents easily accessible. It would be foolish not to make use of these resources.

83 ECG MSG referred to in footnote 71 above, no. 16; ECJ Castelletti referred to in footnote 72 above, no. 20.
84 Annex 2 no. 1; see also Annex 1 no. 6.
b) How must a site be set up to ensure incorporation?

Telling a site operator that the traditional incorporation rules apply to his contracts does not tell him how to set up his site to comply with these rules. Some further guidance is needed and it could be provided in form of guidelines such as the following:

- Express wording stating that the contract is governed by the general terms is required. That wording should be displayed on the screen in such a fashion that it cannot be missed. It should not simply appear in small print at the bottom of some unrelated page and it should not just read “see general terms”. It could for instance appear on the order form page just before the field “click to proceed with order”. It should set out this type of language “this order and all aspects of the contractual relationship between the parties are governed by the general terms, which are made part of this contract and can be accessed by clicking here”.

- Because that wording is not in a contract signed by both parties but on a webpage set up by one of them and filled in by the other, it is highly advisable that, before being able to place the order, the user be required to click on a field with the language “I accept the general terms”.

- A user exercising normal care must be able to review the general terms, i.e. he/she:
  - must have the ability to click on a field to scroll through the terms;
  - that field must be well-positioned and easy to locate;
  - the presentation of the general terms must be clear and simple (no small illegible print, sufficient space between paragraphs, headings, etc...);
  - the general terms should be drafted in the same language as the site, because the user who fills in the blanks is expected to understand that language.

If these requirements are fulfilled, it is not necessary to have the general terms appear automatically on the screen in full text.

3. Conclusion by an electronic agent

One last question: can a choice of court clause be entered into by an electronic agent? The answer is yes\(^6\). In conformity with Article 13(2)(b) of the

\(^6\) See Section 206 UCITA, referred to in footnote 19 above.
UNCITRAL Model Law, a message, be it the offer or the acceptance, will be attributed to the originator “if it was sent [...] by an information system programmed by, or on behalf of, the originator to operate automatically. The addressee is entitled to regard the message as being that of the originator, primarily if it properly applied control procedures previously agreed by the originator for that purpose”.

V. Choice of law clauses

The site survey discussed at the outset of this paper showed that in e-contracts choice of law clauses appear more often than choice of court provisions. Are these clauses enforceable as a matter of principle? If they are, what requirements must they meet? In terms of form? In terms of consent and incorporation by reference into the parties’ contract? Here again, we must distinguish between (A) business to business and (B) business to consumer transactions.

A. Business to business

Choice of law clauses in commercial e-contracts are unproblematic. There is a wide consensus that party autonomy should govern87.

1. General rules

Article 3 of the Rome Convention on the law applicable to contractual obligations enforces broad party autonomy: an international contract is governed by the law chosen by the parties. There is no requirement for a reasonable relationship between the contract and the law chosen.

The choice must be reasonably certain under the terms of the contract or in the circumstances of the case. Hence, the choice can be either express or implied88. A fortiori, an enforceable choice can be expressed by way of the incorporation of general terms which include a choice of law provision. Contrary to choice of court clauses, choice of law provisions do not need to be in writing. Beyond these rules, whether the parties have validly consented to a

87 Annex 1 no. 7 and Annex 2 no. 4.
choice of law depends on the substantive provisions of the law purportedly chosen. A party may, however, rely on the law of his/her country of habitual residence to show a lack of consent if it is not “reasonable to determine the effect of his conduct” in accordance with the law chosen.

2. Application to e-com

Considering these rules, the only real question in an electronic environment is whether the parties have validly consented to the choice of law and properly incorporated it into their contract. Since the choice of law is not subject to any form requirements, this is exclusively a substantive issue. That substantive issue is governed by the purported lex causae. It is the lex causae that decides whether a click wrap agreement is sufficient acceptance of the choice of law, whether the user must have an opportunity to access and review the clause, what the conditions are for the format and the placement of the clause (conspicuousness, size, readability, language, etc.).

Rather than applying a national law to decide the validity of consent, it would be far more preferable to apply uniform rules or, at least, to rely on generally accepted guidelines. This would improve the certainty and contribute to the development of a standard practice for the conclusion of e-contracts. These rules or guidelines should be identical to those applying to choice of court clauses.

3. Contents of choice of law: the emergence of transnational rules?

Experience will tell whether the Internet will provide a privileged terrain for the development of transnational rules in line with the global nature of the medium. At present, one can only detect some movement in this direction. For instance, the ICC advises parties choosing its Model International Sales Contract not to select a domestic law, but to refer to the CISG even for contracts without its scope of application. Further, there is a growing trend,

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89 Art. 3(4) and 8 Rome Convention.
90 See III.C above.
not specific to the electronic environment, for parties to choose UNIDROIT Principles to govern their contracts.\(^{93}\)

Finally, it is interesting to note that a Canadian court has recently considered whether sending unsolicited bulk e-mail through the Internet, or spamming, was a breach of an access contract, which the parties had subjected to the rules of Netiquette.\(^{94}\) The Court searched for the rules of Netiquette by reviewing court cases and state statutes, which were not applicable as such. It came to the conclusion that Netiquette contained a rule prohibiting spamming. Before reaching this conclusion, it stated:

"The Internet is a potent legitimate means of advertising, selling on the Internet benefiting retailers and consumers alike. The use of the Internet is in its relative infancy. In the words of counsel, it is an "unruly beast". Or so it will certainly become without a foundation of good neighbor commercial principles." (emphasis added).

"Neighbours" in the meaning of the 21st century; neighbours whose neighbourhood is the world linked through the Internet.

**B. Business to consumer**

1. Admissibility

   \(\textit{a) What room for choice of law clauses?}\)

There is little room left for choice of law clauses in consumer contracts under European law. If there were no room at all, whether satisfactory or not, the answer to our question would be easy and simple. However, there is some room left and this makes matters highly complex, because it becomes necessary to determine \textit{how much} room and in \textit{what situations}. In this area, European law affords consumer protection by two different methods: first, by way of protective conflict of law rules and, second, by way of protective substantive rules, which substantive rules determine their own scope of territorial application.

\(^{93}\) UNIDROIT Principles of International Commercial Contracts; whether the parties expressly refer to the Principles or these are considered as an expression of the \textit{lex mercatoria}, general principles of law or similar notions (Michael J. BONNELL, \textit{The UNIDROIT Principles in Practice; the Experience of the First Two Years}, http://www.unidroit.org/english/principles/pr-exper.htm; see also Klaus Peter BERGER, \textit{The Creeping Codification of the Lex Mercatoria}, The Hague 1999).

(i) Conflict of law rules

Article 5 of the Rome Convention allows a choice of law in a consumer contract, provided that the choice does not deprive the consumer of the protection afforded by the mandatory rules of his/her country of residence. A consumer contract is defined by the same three-pronged test as it is for choice of court purposes (parties, contract, territorial connection). Since this test raises no distinct issues regarding choice of law clauses, we refer to the discussion in that latter context. Here as well, the test requires a territorial link between the contract and the consumer's country of residence. Such a territorial link exists in particular where the contract conclusion was preceded by advertising in that country and the consumer has taken all steps necessary to enter into the contract there.

Interestingly, the recent US model uniform law on software licensing or UCITA provides for a similar solution. In a consumer transaction, an agreed choice of law cannot displace mandatory consumer protection rules that would apply if the choice were not made. Article 7 of the Rome Convention may supersede the rule in Article 5. Indeed, whatever the law chosen by the parties, a court may enforce the "mandatory rules" or *lois d'application immédiate* of another country with a close connection to the situation regardless of the otherwise governing law. These *lois d'application immédiate* can either be part of the *lex fori* (Art. 7.1) or of the law of a third state (Art. 7.2), "third" because it is neither the *lex fori* nor the *lex causae*.

The interaction between Articles 7 and 5 is unclear. If the mandatory rules addressed in Article 7 are intended to protect the consumer, their application would duplicate the very purpose of the rule set forth in Article 5. Hence, it has been proposed that Article 5 applies to consumer protection implemented by contract law and Article 7 applies to protection by way of the regulation of business practices.

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95 Above IV.A.2.
96 Or the supplier has received the order in the consumer's country of residence, or the supplier has "lured" the consumer into travelling abroad and placing his order there.
98 The scope of Article 7.2 is restricted by the fact that several states, including Germany and the United Kingdom, have reserved the right not to apply it.
99 Fallon, pp. 271ff.
(ii) Substantive rules

The following directives and national implementing legislation have a bearing on the rules applicable to consumer e-contracts:

- Directive 93/13 on unfair contract terms lists terms which are not enforceable against the consumer. In Article 6(2), it provides that the Member States must “ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has a close connection with the territory or more Member States”.

- Directive 97/7 on the protection of consumers in respect of distance contracts primarily imposes information duties on the supplier and affords the consumer a right of withdrawal. It defines its scope of territorial application in Article 12(2) in the same terms as the previous Directive.

- The proposed Directive concerning distance marketing of consumer financial services provides for a right of reflection before the contract conclusion and for a right of withdrawal thereafter. It defines its scope of application by the following language, which is somewhat different from that used in the two former Directives:
  “11.3 Consumers may not be deprived of the protection granted by this Directive when the law governing the contract is that of a third country and the consumer is resident in the territory of the Member State and the contract has a close link with the Community”.

- Directive 99/44 on certain aspects of the sale of consumer goods and associated guarantees provides minimum rules on sales warranties and defines its scope in the same manner as Directives 93/13 and 97/7 (Art. 7(2)).

Contrary to the foregoing texts, the contract rules of the E-Com Directive only govern if they are part of the applicable law designated as such by the Rome Convention. The Directive covers, among other issues, the application of the “internal market clause” and the country of origin principle in Article 3, as well as online contracts in Articles 9 to 11. The country of origin principle means that a service provider is free to render information society

services within the internal market if he complies with the national provisions of the Member State in which he is established. Pursuant to Article 3(3) and the Annex to the Directive, this principle does not apply to online consumer contracts. For business to business contracts, it only governs insofar as the law of the Member State applies by virtue of the rules of private international law (Art. 1(4)) and it does not restrict the parties’ freedom to choose the law applicable to their contract (Annex).

b) Little room for choice of law clauses and vast area for uncertainty

Where does this all lead us? Let us look at an example. Assume that a consumer resident in Germany enters into an e-contract for the online supply of software licenses with a company based in the United States. The general contract terms, which are validly incorporated, provide that the contract is governed by the laws of Virginia. A dispute arises and an action is brought before a German court. Is the choice of law valid?

If the court considers that the requirements of Article 5(2) of the Rome Convention are met, especially that the territorial link exists, it will compare the protection afforded by Virginia law with that provided by mandatory German rules, including legislation implementing EU directives, and will apply whatever rules are more protective, here presumably German rules. But even where German law is no more protective, the national laws implementing EU directives may still come into play in any event, if the situation falls within their territorial scope of application.

However, the court may also come to the conclusion that the requirements of Article 5(2) of the Rome Convention are not fulfilled. For instance, it may hold that access from Germany to an interactive website is not equivalent to an offer or advertisement in that country. In that case, the court may still have to apply national German laws implementing EU directives. It will have to do so if the situation at bar is within the directives’ scope of application\textsuperscript{101}. Since most directives at issue provide that they will govern regardless of the otherwise applicable law whenever there is a “close connection” between the situation and the EU, much will depend on the definition of

\textsuperscript{101} Kurt Siehr, “Drittstaatenklauseln in Europäischen Richtlinien zum Verbraucherschutz und die Schweiz”, in Der Einfluss des europäischen Rechts auf die Schweiz, Festschrift für Professor Roger Zäch, Zurich 1999, p. 601.
“close connection” adopted by implementing legislation. And one knows that not only is the scope of application not the same from one directive to the other, but the implementation varies widely from country to country. If the court then reaches the conclusion that the situation is within the scope of application of the relevant implementing legislation, then the court will apply such legislation, possibly in conjunction with provisions of the law chosen by the parties.

Now where has this lead us? At the end of a sophisticated exercise involving the application of difficult conflict rules, the comparison between substantive rules of different legal systems with all the pitfalls of comparative law, and the determination of the territorial scope of substantive rules similar to lois d’application immédiate. Is this not asking too much of a judge in a consumer dispute? Is it not simply unfeasible? Complexity and uncertainty are particularly significant problems in this context. What the consumers, the site operators, and the courts or other dispute “resolvers” need is a simple, transparent legal framework.

2. How to achieve transparency?

To overcome these difficulties, there are two possible approaches: a conflict of law approach and a substantive one.

a) Conflict of law approach

The reader will remember the solution proposed for choice of court clauses in business to consumer disputes: such clauses would be enforceable if the state of the consumer’s residence has issued a statement to this effect.


103 Directives 93/13 and 97/7 will only displace a third country law if it is chosen by the parties and in case of a close connection, while the proposed Directive on the online marketing of financial services will displace a third country law whether chosen by the parties or not and in case of a close connection to the EU and if the consumer resides in a Member State.


105 IV.A.2.d above.
Otherwise they are null and void. The same proposal may apply to choice of law clauses: the law chosen by the parties governs a business to consumer contract whenever the consumer is a resident of a state which has issued an enforceability statement. Otherwise it is null and void.

b) **Substantive approach**

The substantive approach would consist of drafting uniform rules with minimum standards for the protection of e-consumers. Though it reached no firm recommendation, the Geneva Roundtable noted the significant uncertainty and undesirable complexity as well as the difficulty of identifying solutions based on conflict of law rules. Therefore, it suggested a further review of the possibility of substantive harmonization\(^\text{106}\). It further proposed to work on a system of site certification\(^\text{107}\), which we have already addressed in the context of choice of court clauses\(^\text{108}\). Under this system, raised by Catherine Kessedjian, a site may be certified if it complies with minimum substantive rules of consumer protection including warranty provisions\(^\text{109}\). In our view, these standards should further include compliance with guidelines on the presentation of the site and general terms, disclosure requirements, and possibly a right of withdrawal. 

One may object to the substantive approach on the ground that it will introduce a different regime of consumer protection for e-commerce and for non e-commerce. Abandoning the goal of equal treatment\(^\text{110}\) may be the price one has to pay for the harmonization of e-consumer protection, as it is unrealistic to expect that further uniformity will be achieved on a worldwide scale.

Whether they are linked to a certification system or not, the substantive rules may be the product of private institutions, preferably bringing together representatives of both industry and consumers, or of scholarly efforts such as the UNIDROIT Principles of International Contracts, or the result of negotiations within international organizations to take the form of a recom-

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107 Annex 2, no. 5.
108 Above IV.A.2.d.
109 In addition to providing easy access to a dispute resolution mechanism free of charge to the consumer.
110 Above IV.B.2.a.
mendation, model law or even of a treaty. All of these possibilities have their pros and cons and the test for selecting one rather than another can only be feasibility.

More than the format, what matters in order to achieve a meaningful result is that the substantive rules are coupled with an effective dispute resolution mechanism. That mechanism can only be an online scheme and must build in self-executing enforcement of the decision, e.g. by way of automatic credit card charge backs. The best substantive rules will be useless if they cannot be enforced.

VI. Conclusions: an action plan

At the close of this review, we can draw the following conclusions, which take the form of a true action plan:

→ For business to business transactions:
  • Party autonomy governs in both choice of court and choice of law clauses.
  • There is a need to design and implement effective online dispute resolution mechanisms.

→ For business to consumer transactions:
  • There is a need to develop uniform substantive rules on an international level. The initiator and vehicle for such rules (guidelines, model law, treaty) will mainly depend on feasibility.
  • There is a great need for effective dispute resolution systems, coupled with self-executing enforcement mechanisms.

→ For both:
  • The development of substantive rules and the creation of dispute resolution mechanisms may be combined with a system of site certification, an avenue that requires further urgent investigation.

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• In the meantime, there is a need for an immediate review of the set-up of commercial sites to maximize the chances that choice of court and choice of law clauses are enforceable.

In other words, if the law intends to keep pace with technology, there is plenty of hard work ahead.
GABRIELLE KAUFMANN-KOEHLER

GENEVA ROUND TABLE ON THE QUESTIONS OF PRIVATE INTERNATIONAL LAW RAISED BY ELECTRONIC COMMERCE AND THE INTERNET

University of Geneva and the Hague Conference on Private International Law

Geneva 2, 3 and 4 September 1999

Commission III – Choice of law, choice of forum

Draft recommendations

1. These recommendations apply to international choice of law and choice of forum clauses concluded on-line.

2. Such contractual clauses are international if they would be considered international under current law. However,
   a. if the contract is to be performed electronically, the place of performance shall be disregarded in determining whether the clause shall be regarded as international, and
   b. the clause shall be treated as international unless all parties are habitually resident in the same country, and this fact is known to the parties or clearly identified at or before the time of contracting.

3. In business to business transactions, the fact that the contract is concluded on-line does not require different treatment with respect to choice of court clauses.
   The same rules apply to consumer to consumer transactions.

4. In business to consumer transactions:
   a. The Commission could not reach agreement on whether choice of court clauses should be enforceable or not as a matter of general principle;
   b. The Commission therefore proposes, as a compromise approach, insertion in the Hague draft of a new paragraph 7(3)(c) along the following lines:
      “A consumer may make choice of forum agreement [...]”
(c) if the agreement is entered into by a consumer who is habitually resident in a state which has declared that such agreements are enforceable against such consumers.”

5. The Commission considers that the form requirements set out in Article 4(2) of the Hague Draft adequately cover the needs of e-commerce contracts.

6. The Commission considers that no special rules are required in relation to incorporation by reference of choice of court or choice of law clauses in the electronic environment, endorses Article 5bis of the UNCITRAL Model Law on Electronic Commerce, and emphasises that the focus should be on functional equivalents.

7. In business to business transactions, the principle of party autonomy should govern.

8. In relation to choice of law clauses in business to consumer transactions, the Commission
   a. considers that the present situation gives rises to significant uncertainty and undesirable complexity; and
   b. had difficulty identifying solutions based on conflict of laws rules, and therefore suggests further review of the possibility of substantive harmonisation.

9. The Commission recommends that a functional equivalence approach be taken to writing requirements in the context of arbitration.

10. The present status of the law has not been completely investigated with respect to arbitration agreements in consumer transactions, and specifically with the interaction between national legislations restricting arbitration agreements and the New York Convention.
The Hague Conference on Private International Law and the University of Geneva

Press Release

Geneva Round Table on Electronic Commerce and Private International Law

The Hague Conference on Private International Law, an intergovernmental organisation whose objective is the unification of private international law norms (essentially conflict of laws, procedure and judicial co-operation), and the University of Geneva (Switzerland), recently organised a Round Table discussion on issues of jurisdiction and applicable law arising out of electronic commerce and Internet transactions.

This meeting took place on 2, 3 and 4 September 1999 in Geneva and was attended by one hundred experts representing the different sectors interested in electronic commerce: industry, operators, consumers, governmental experts and international organisations, both world-wide and regional. Twenty-six countries, as well as fourteen international governmental and non-governmental organisations were represented.

Seven commissions met simultaneously on the following subjects: contracts, torts, choice of court and choice of law clauses, service of process, applicable law to data protection, evidence and legalisation, standards of procedure for on-line dispute resolution.

During the first plenary session, Professor Henry H. Perritt Jr., Dean of Chicago-Kent College of Law, presented several highlights advocating the importance of the Internet for economic growth. He asserted that the Internet differed from other technologies in two majors respects: firstly, it is inherently global; secondly, it enormously reduces the economic barriers to entry into commerce. As a result, the number of electronic commerce providers, smaller enterprises and smaller-value-transactions appearing on the market increases dramatically. Those characteristics mean that traditional regulatory strategies to protect consumers and other important societal values, which depend to a large extent on the co-operation of large enterprises that serve as intermediaries in commerce, will be less effective because there will be so many more small enterprises doing business throughout the world. Professor Perritt concluded that the development of a new public law framework for private ordering
and harmonisation was necessary in order to address the problems posed by e-commerce.

Professor Catherine Kessedjian, Deputy Secretary General of the Hague Conference on Private International Law, then introduced the work of the Round Table and focused her remarks on a number of issues. She stated that the Internet is the first medium to offer the possibility to execute and perform entirely on-line (i.e. without physical presence) a vast number of contracts for sale of immaterial goods and for the provision of services (notably financial and intellectual). Although the Internet was initially created so that each connected computer could be identified, the present trend towards anonymity may create an adverse environment for the development of electronic commerce and should be assessed in view of the interests at stake in that context. The Internet is also a medium which contributes to increase the scale of damages once a tort is committed over the net. The damage is instantly suffered on a number of markets in different parts of the globe and has wide-ranging effects. The prevention of these damages is almost impossible as the access providers do not want and probably are not in a position to play the role of regulator. Thus, the development of appropriate dispute resolution mechanisms becomes crucial as proper remedies would not be effective without them. It is also imperative that a clear framework is proposed to allow operators to know in advance what law will be applicable to their undertaking. Without such clear guidelines, development of electronic commerce will suffer. Although these are global problems which should be resolved by international co-operation via the competent organisations, States have already undertaken some isolated legislative initiatives. It is in view of these developments that the Permanent Bureau of the Hague Conference, under the mandate that it has to explore private international law questions of e-commerce, took the initiative to assess the pertinence of existing norms, notably for applicable law and jurisdiction, and convene the Round Table so that recommendations could be adopted towards any necessary adaptation. Professor Kessedjian also explained how these recommendations will be relevant for current and future work of the Hague Conference, particularly the current negotiations on a world-wide Convention on jurisdiction and the effects of judgments in civil and commercial matters.

Prior to the Round Table, Rapporteurs had been designated for each commission, i.e. for Commission I on contracts: Prof. Katharina Boele-Woelki (Utrecht) and Prof. Bernd Stauder (Geneva); for Commission II on torts: Prof. Cristina González Beilfuss (Barcelona) and Dr. Peter Mankowski (Osnabruck); for Commission III on choice of forum and choice of law: Prof.
Gabrielle Kaufmann-Kohler (Geneva), Mr. David Goddard (Wellington) and Prof. Margaret G. Stewart (Chicago-Kent); for Commission IV on the law applicable to data protection: Ms. Mary Shaw (Philadelphia), Mr. Ulf Bruehann (European Commission) and Mr. Spyros Tsouilis (Council of Europe); for Commission V on service abroad: Ms. Marie-Thérèse Caupain (Vice-President UIHJ), Mr. Luc Claes (UIHJ, Brussels) and Mr. Frederic A. Blum (National Association of Process Servers, Philadelphia); for Commission VI on taking of evidence abroad: Mr. Jan M. Hebly (Rotterdam); for Commission VII on on-line dispute resolution and standards of procedure: Prof. Helmut Rüssmann (Saarbrücken) and Prof. Ethan Katsh (Massachusetts).

Such rapporteurs were requested to prepare the substantive work of the commissions. A questionnaire, together with documentation, was made available to future participants and provided the framework for the discussions. These questionnaires and documents are available for consultation from the Geneva Round Table website at http://cu.unige.ch/~billard/ipilec (username ipilec; password unige).

Each commission adopted recommendations, which were presented at the second plenary meeting and discussed by all experts present. The full report of the Round Table will be available on the website of the Hague Conference at http://www.hcch.net/ by the end of November 1999.

At present the recommendations of the Round Table may be synthesised as follows:

As far as possible, instead of the creation of new norms for electronic commerce and Internet operations, existing principles, rules, and procedures can and should be applied, in particular by way of interpretation, including the use of functional equivalents. This is not only true for the validity of choice of court and choice of law clauses in contracts entirely executed electronically by application of principles laid down by the UNCITRAL Model Law on Electronic commerce, but also, as a general rule, for the Hague Conventions of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

When new norms are needed, they should be technologically neutral.

For on-line contracts in general, in the matter of jurisdiction and applicable law, if the performance of the relevant obligation takes place off-line,
the existing rules of private international law referring to the place of performance remain relevant. If the performance takes place on-line, the place of performance is not appropriate as a connecting factor. In that case, the relevant connecting factors are the location of each of the parties involved.

In business-to-business electronic transactions, party autonomy should be the leading principle, as regards both applicable law and jurisdiction. As regards jurisdiction, article 4 of the proposed preliminary draft Convention on jurisdiction and judgments was considered fully appropriate to provide operators with a flexible and adapted legal framework to uphold the validity of choice of court clauses.

For business-to-consumer transactions, further assessment is required in the light of all the interests involved. Particularly, during the second plenary, Professor Catherine Kessedjian proposed to avoid the traditional dichotomy between the "country of origin" (i.e. that of the seller or provider) and the "country of reception" (i.e. that of the consumer). She proposed to start with a process of site-certification along the lines of the work done within the ICC and other private organisations. This certification process should include minimum substantive rules of protection for the consumer including warranties, and a fair and easy dispute resolution mechanism which could possibly be free of charge to the consumer. When a site has obtained the certification label, it could provide for the application of the law of the country of origin and for the courts of that country for the residual cases which could not be solved by the dispute resolution mechanism part of the certification. If a site has not been certified, then the law and the courts of the consumer's location would be competent.

In the interim, before such a certification system is available and fully in place, rules could be developed to allow countries to differ in the protection they afford to consumers residing on their territory. This principle could be enshrined in a provision amending the present drafting of article 7, paragraph 3, of the proposed convention on jurisdiction and judgments and read: "If the agreement (i.e. the choice of court clause) is entered into by a consumer who is habitually resident in a State which has declared that such agreements are enforceable against such consumers".

Identification of players over the net is essential to the well functioning of e-commerce. This principle is in line with the draft European directive on electronic commerce, the Best Business Practice principles and the ICC guidelines on marketing over the net.

In matters of tort and jurisdiction, it is difficult to depart from one of the two connecting factors: defendant's or victim's habitual residence forum.
No definite conclusion could be reached. Some participants would require that the victim's habitual residence forum coincide with at least part of the injury. The preliminary draft Convention on jurisdiction and judgments (article 10) will have to be reviewed in light of the discussions.

In the matter of data protection, the Round Table recognised that data collection, personal data included, and processing thereof are inherent to electronic commerce. The dichotomy between systems which do not accept general standards and those which require a rigid *a priori* framework for the collection and transfer of data should be avoided. Furthermore, it is necessary to carry out a study on the most relevant system of applicable law which would also allow a greater role to self-regulation and model contracts such as those proposed by the ICC and in line with the principles recommended by the Council of Europe.

In matters of security of systems (confidentiality, integrity, authentication, non-repudiation and availability), the Round Table came to the conclusion that the need for confidentiality should not be considered as a bar to the use of electronic forms of transmission. Techniques currently do exist to protect confidentiality. It was suggested that States should encourage the use of those techniques.

Finally, the Round Table encouraged the development of on-line dispute resolution mechanisms and of standards of procedure relevant for this new method of dispute resolution.

Further information on the work of the Geneva Round Table may be obtained from:

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Selected bibliography

I. Legislative and other initiatives

UNITED NATIONS

http://www.un.or.at/uncitral/e

EUROPEAN UNION

http://www.europa.eu.int/
http://www.ispo.cec.be/ecommerce/policypapers.html
http://www.cordis.lu/esprit/src/ecomcomx.htm


EUROPEAN UNION AND EFTA COUNTRIES

International Chamber of Commerce

http://www.iccwbo.org


The Hague Conference on Private International Law

http://www.hcch.net


OECD — Organisation for Economic Co-operation and Development

http://www.oecd.org

Guidelines for Consumer Protection in the Context of Electronic Commerce, December 1999

II. Publications (authors listed here are cited by their name only)

Oliver Florian, Urs Arter, Jörg Gnos, “Zuständigkeit und anwendbares Recht bei internationalen Rechtsgeschäften mittels Internet unter Berücksichtigung unerlaubter Handlungen”, AJP/PJA 2000, p. 277


Eric A. Caprioli, Renaud Sorieul, Le commerce international électronique: vers l’émergence de règles juridiques transnationales, Clunet 1997, p. 323, p. 328

François Dessemontet, “La dématérialisation des conventions”, *AJP/PJA* 1997, p. 939

M. Scott Donahue, “Current Developments in Online Dispute Resolution”, *Journal of International Arbitration*, December 1999, p. 115


Michel Jaccard, *La conclusion de contrats par ordinateur*, Bern 1996

Abbo Junker, “Internationales Vertragsrecht im Internet”, *RIW* 1999, p. 809


Gabrielle Kaufmann-Kohler, “Court Jurisdiction and Electronic Commerce”, *UNCITRAL Colloquium*, New York, 01/06/98; [http://cui.unige.ch/~billard/ipilec](http://cui.unige.ch/~billard/ipilec)

Catherine Kessedjian, “Private International Law Aspects of Cyberspace – Global Communication, Universal Jurisdiction”, *ASIL/NVIR Fourth Joint Conference*, 05/07/97


Dirk Langer, "Vertragsanbahnung und Vertragsschluss im Internet – Rechtswahl und Verbraucherschutz –", publication forthcoming in *The European Legal Forum* (D)


Peter Mankowski, "Das Internet im Internationalen Vertrags- und Deliktsrecht", *RabelsZeitschrift* 1999, p. 203

Felix Schöbi, *Vertragsschluss auf elektronischen Weg: Schweizer Recht heute und morgen*, publication forthcoming

Ivo Schwander, "La vente par Internet et le droit international privé suisse", H. et B. Stauder (edition), *La protection des consommateurs acheteurs à distance*, vol. 6, *Etudes de droit de la consommation*, Zurich (Schultbess) and Brussels (Bruylant) 1999, p. 289


III. Websites in conjunction with E-commerce and legal issues (in addition to those referred to in I. above)

A. **Online Dispute Resolution**

http://www.arbiter.wipo.int/domains/index-fr.html  
WIPO  
Site of the WIPO Arbitration and Mediation Center for the resolution of disputes arising out of the abusive registration and use of an Internet domain name. Decisions issued by the Administrative panels concerning cases filed with the Center that are not restricted are posted on this site.

B. **Electronic Commerce Law in General**

http://www.abanet.org  
AAA  
The American Arbitration Association site

http://www.gbde.org  
GBDe  
Global Business Dialogue on Electronic Commerce is a company-led response to the need for strengthened international co-ordination.

http://www.tabd.org  
TABD  
TransAtlantic Business Dialogue Alliance for electronic business

http://cui.unige.ch/~billard/ipilec  

http://www.internet-juridique.net/  
France  
Legal aspects of Internet; legal articles, information on cryptography and digital signature; global view on the French Courts decisions in relation with Internet; glossary of websites classified by topic
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<td><a href="http://www.perkinscoie.com/resource/ecommerce.html">http://www.perkinscoie.com/resource/ecommerce.html</a></td>
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<td><a href="http://www.online-recht.de/es.html">http://www.online-recht.de/es.html</a></td>
<td>Germany</td>
<td>Case compilation; more than 270 decisions rendered by German Courts; provides a search service</td>
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