The Internet and Jurisdiction Based on Contracts

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I. Introduction[1]

Thirty years ago, when the Brussels Convention was drafted, nobody spoke of the

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[1] The following literature will be quoted in abbreviated form only (all internet sites visited last in Nov. 2001): Arter Oliver/Jörg Florian S./Gnos Urs P., Zuständigkeit und anwendbares Recht bei internationalen Rechtsgeschäften mittels Internet unter Berücksichtigung unerlaubter Handlungen, Aktuelle Juristische Praxis (AJP) 2000, 277–296; Bachmann, Birgit, Internet und IPR, in: Michael Lehmann (Ed.), Internet- und Multimediarecht (Cyberlaw), Stuttgart 1997, 168–183; Burk Dan E., Jurisdiction in a World Without Borders, 1 Virginia J. of Law and Technology (1997), <http://vjolt.student.virginia.edu/graphics/vol1_art3.html>; Campbell Dennis (ed.), Law of International On-line Business: A Global Perspective, London 1998; Girsberger Daniel/Weber-Stecher Urs, E-Banking und IPR, in: Wolfgang Wiegand (Ed.), E-Banking – Rechtsgrundlagen, Berner Bankrechtstag BBT, Vol. 6, Bern 2001, 195–225; Grolimund Pascal, Geschäftsverkehr im Internet. Aspekte des internationalen Vertragsrechts, ZSR NF 119 I (2000), 339–378; Dickie R./Post David G., Law and Borders – The Rise of Law in Cyberspace, in: Immenga Ulrich/Lübben Natalie/Schwintowski Hans-Peter (Eds.), Das internationale Wirtschaftsrecht des Internet, Baden-Baden 2000, 171–226; Hance, Olivier/Balz, Suzan D., The new virtual money: law and practice, The Hague 1999; Johnson David R./Crawford Susan P./Jain Samir, Deferring to Contractual Choices of Law and Forum To Protect Consumers (and Vendors) in E-Commerce, in: Immenga Ulrich/Lübben Natalie/Schwintowski Hans-Peter (Eds.), Das internationale Wirtschaftsrecht des Internet, Baden-Baden 2000, 227–242; Junker Abbo, Internationales Vertragsrecht im Internet – Im Blickpunkt: Internationale Zuständigkeit und anwendbares Recht, RIW 1999, 809–818; Kaufmann-Kohler Gabrielle, Internet: mondialisation de la communication – mondialisation de la résolution des litiges? In: Internet, Quel tribunal décide? Quel droit s'applique? Colloque en l'honneur de Michel Pelichet, La Haye etc. 1998, 89–142; Id., Choice of court and choice of law clauses in electronic contracts, in: Aspects juridiques du commerce électronique, Séminaire de l'Association genevoise de droit des affaires, Zürich 2001, 11–62; Id., Arbitration Agreements in Online Business to Business Transactions, in: Robert Briner/L.Yves Fortier/Klaus Peter Berger/Jens Bredow (Eds.), Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl-Heinz

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Internet, much less about e-commerce. The same may be said of the Lugano Convention, which was drafted only some 15 years ago, and for most modern national private international law codifications. This paper will deal with the question of to what extent jurisdiction based on contracts concluded or performed in the e-business context need special rules or must be interpreted different from in the offline context. While these issues are relevant both regarding the law of international civil procedure and conflicts of laws, they may be more acute in international civil procedure because the rules on jurisdiction and procedure are less flexible than conflicts of law rules and thus cannot simply be interpreted flexibly. Thus, it is not surprising that the revision of the legal framework relating to international jurisdiction has been developed further in Europe than the 1980 Rome Convention on the Law Applicable to International Contracts.[2]

The following main issues are at the basis of the present analysis:

I. Determination of relevant connecting factors: (a) How can a contracting party, with whom there is no physical contact, be localized for purposes of jurisdiction, and (b) what is the role of appearance?
II. Party autonomy: (a) What are the requirements of a valid choice of forum if concluded electronically or in other words: to what extent are choice of forum

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Böckstiegel, Köln/Berlin/Bonn/München 2001, 355–369; Lehmann, Michael, Electronic Commerce und Verbraucherschutz in Europa, EuZW 2000, 517–521; Koch Frank A., Internet-Recht, München/Wien 1998; Mankowski Peter, Internet und Internationales Vertrags-recht, in: Jahresheft der Internationalen Juristenvereinigung Osnabrück 1997/1998, 69–117 (cited as Mankowski, Osnabrück); Mankowski Peter, Das Internet im Internationalen Vertrags- und Deliktsrecht, RabelsZ 63 (1999), 203–294 (cited as Mankowski, Internet); Markus Alexander, Revidierte Uebereinkommen von Lugano und Brüssel: Zu den Hauptpunkten, SZW 1999, 205–220, including the 1999 Draft; Mehrings Josef, Internet-Verträge und internationales Vertragsrecht, CR 1998, 613–621; Müller Carsten, Internationales Privatrecht und Internet, in: Hoeren Thomas/Queck Robert (Eds.), Rechtsfragen der Informationsgesellschaft, Berlin 1999, 259–287; Rüssmann Helmut, Internationalprozessrechtliche und internationalprivatrechtliche Probleme bei Vertragsschlüssen im Internet unter besonderer Berücksichtigung des Verbraucherschutzes, in: J. Tauss, J. Kollbeck, J. Mönikes (Eds.), Deutschlands Weg in die Informationsgesellschaft, Baden-Baden 1996, 709; Siehr Kurt, Telemarketing und Internationales Recht des Verbraucherschutzes, in: Jahrbuch des Schweizerischen Konsumentenrechts, Zurich 1998, 155–201; Staeheli Thomas, Kollisionsrecht auf dem Information Highway, in: Hilty Reto (Ed.), Information Highway, Bern 1996, 597–620; Stone Peter, Internet Consumer Contracts and European Private International Law, Information and Communications Technology Law Journal 9 (2000), 1 ff.; Weber Rolf H., E-Commerce und Recht, Zürich 2001; Weber-Stecher Urs, Internationales Konsumvertragsrecht, Zürich 1997.

[2] Rome Convention on the law applicable to contractual obligations, Official Journal C 027, 26/01/1998 p. 34–46, <http://europa.eu.int/eur-lex/en/lif/dat/1998/en_498Y0126_03.html>. However, the Rome Convention is currently being revisited with regard to adaptation to e-commerce, a Green Paper on that revision will be published in the course of 2002, <http://europa.eu.int/information_society/topics/telecoms/international/tabd/TABD%20Progress%20Report.pdf>, p. 9.

clauses enforceable, and to what extent can a party, in particular a consumer, invoke his or her 'home' jurisdiction as regards a counterparty with which he or she has contracted electronically? (b) To what extent must the existing rules regarding form and consent be adapted?

III. Place of performance: Where is the place of performance with regard to jurisdiction for online-contracts, for example, the delivery or licensing online of a software, an MP3 file, or payments through electronic banking?

The current revisions and projects in Europe for revisions of international treaties regarding jurisdiction deal with e-commerce in a very limited manner:

- The *Brussels I Regulation* (successor instrument of the *Brussels Convention*),[3] in force as of 1 March 2002, specifies in its Article 15(2) when a consumer may sue, or must be sued at his or her domicile or habitual residence in e-commerce situations, and the *draft of a revised Lugano Convention (the 'Lugano Draft')*[4] follows the same pattern.[5] The new Article 23(2) of the Brussels I Regulation authorizes the conclusion of a forum selection agreement by electronic means, as does the Lugano Draft.[6] Nevertheless, neither source has a specific provision on the place of performance for online contracts.
- There is only one specific rule for e-contracts in the *Draft Hague Convention of October, 1999 (the 'Hague Draft')*:[7] Article 4(2)(b) which allows electronic conclusion of forum selection agreements. There are no specifications for consumer contracts, unlike in the European *pendant*, nor is there a specific place of performance for online contracts (Art. 6), or a reference in the provision to the necessary minimum contacts (Art. 9) with respect to e-business situations.

II. Jurisdiction: Relevant Connecting Factors

What features must an e-business transaction have for it to be international? Although communication through the Internet is almost always cross border, the

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[3] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, official Journal L 012, 16/01/20001 p. 1–23, < http://europa.eu.int/servlet/portail/RenderServlet?search = - DocNumber&lg = en&nb_docs = 25&domain = Legislation&coll = &in_force = NO&an_- doc = 2001&nu_doc = 44&type_doc = Regulation > .

[4] Working Party on the Revision of the Brussels and Lugano Conventions, Revised Meeting Document No. 18, Brussels, 19, 23 April 1999. *See* also Markus, Annex.

[5] Lugano Draft Art. 13(1)(c).

[6] Lugano Draft, Art. 17(4).

[7] *Preliminary Draft Convention* on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission on 30 October 1999, < http:// www.hcch.net/e/workprog/jdgm.html > .

relevant connecting factors are not necessarily international. Whether a specific transaction is international in nature so that the legislation regarding international – rather than national – jurisdiction applies,[8] depends on whether the relevant connecting factors affect more than one country for the purposes of jurisdiction. In the e-commerce context, as in any other transaction, these factors concern in particular countries with which the persons involved are connected, such as by the corporate domicile or the branch of the plaintiff or the defendant, or a chosen forum. Thus, there would be no need to deviate from these rules with respect to e-commerce.[9] Statutory private international law on contracts (both conflict-of-law rules and rules on jurisdiction) usually looks to connecting factors related to persons, in particular their local environment, namely: for individuals, their domicile or habitual residence; for corporations, their corporate domicile; and for both, their professional or business headquarters or branch ('*Niederlassung*').[10] These connecting factors do not depend on the nature of the activity (or inactivity) of the contracting parties, nor do they depend on the specific chosen means of communication. Thus, no relevance must be attributed in that respect to the communication infrastructure such as the location of a personal computer from which the communication is introduced into the net, or a server.[11] The Geneva Roundtable of 2–4 September 1999,[12] adopted a resolution on internationality with the following content: '[C]ontractual clauses are international if they would be considered international under current law. However, ... [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.' This proposal was taken up by the drafters of the Hague Draft and led to a proposal according to which the Convention applies in the courts of a contracting state unless all the parties are resident in that State.[13]

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[8] Kaufmann-Kohler, Choice of Court, 16 note 3; Kropholler, *Europäisches Zivilprozessrecht*, 6. ed. Heidelberg 1998, Vor Art. 2 N. 6 f.

[9] Kaufmann-Kohler, Choice of Courts, 16–18; Id., Mondialisation, 112; Mankowski, Internet, 209, each with further references.

[10] Domicile: Art. 2 Lugano Convention (Brussels Convention), Art. 2, 20(1)(c) of the Swiss Private International Law Act (SPILA); Branch office: Art. 5 No. 5 Lugano/Brussels Convention. *See* Grolimund, 344, 357 f.

[11] Mankowski, 'Osnabrück', 77 f.; Mankowski, Internet, 209 at note 15. Different rules apply with respect to the place where a tort occurred, Girsberger/Weber-Stecher, e-Banking, 223f.

[12] 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, <http://cui.unige.ch/~billard/ipilec/>.

[13] *See* Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001, Interim Text, Prepared by the Permanent Bureau and the Co-reporters, <ftp://hcch.net/doc/jdgm2001draft_e.doc>, Art. 2(1); Electronic Commerce and International Jurisdiction, Ottawa, 28 February to 1 March 2000, Prel. Doc. No. 12 (August 2000), published in: <ftp://hcch.net/doc/jdgmpd12.doc>; Kaufmann-Kohler, Choice of Court, 18 at note 13.

A. Localizing Domicile/Headquarters

However, when a dispute arises, the issue must be resolved where the relevant domicile or headquarters or branch is located for purposes of jurisdiction. National laws have different solutions with respect to offline business, and which of these laws applies depends on the specific national forum where the issue is decided. Thus, certain countries such as the United Kingdom, Switzerland, and the Netherlands base their international jurisdiction on the registered domicile or branch in accordance with the so-called 'theory of incorporation', whereas in other parts of the continent, the '*Sitztheorie*' prevails, determining the centre of actual activity of a business as the relevant connecting factor.[14] These differences have not yet been eliminated:[15] Consequently, both the Brussels and the Lugano Conventions have left it to the national law of the forum to decide whether incorporation or the centre of activity is the relevant connecting factor (Art. 53 Brussels/Lugano Convention). While this *lex fori* approach has not changed in principle in the latest revisions,[16] the revised legislation now appears to allow the plaintiff to choose whether to sue the defendant at its statutory seat, or at the place of its central administration, or at its principal place of business,[17] thus

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[14] Grossfeld Bernhard, 'Internationales Gesellschaftsrecht', in: J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch. Einführungsgesetz zum Bürgerlichen Gesetzbuche, IPR, 14. Bearbeitung, Heidelberg 1998; Kindler, in: Münchener Kommentar zum BGB, Band 11, Internationales Handels- und Gesellschaftsrecht, EGBGB (Art. 50–237), München 1999, No. 258 ff., with numerous references.

[15] *See* Brödermann Eckart/Iversen Holger, Europäisches Gemeinschaftsrecht und Internationales Privatrecht, Beiträge zum ausländischen und internationalen Privatrecht, Bd. 57, Tübingen 1994, 60 ff.; Ebke Werner, Das Schicksal der Sitztheorie nach dem Centros-Urteil des EuGH, JZ 1999, 656–661.

[16] Article 59 Brussels I Regulation reads: 'In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.'

[17] Art. 60 Brussels I Regulation reads as follows:

1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:
   (a) statutory seat, or
   (b) central administration, or
   (c) principal place of business.
2. For the purposes of the United Kingdom and Ireland 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.
3. In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.'

reducing the number of differences between the various approaches. The same is true for the Hague Draft Convention (Art. 3).[18]

This, however, does not solve all problems in the present context:

i. If the *centre of activities or administration* is the relevant connecting factor ('*Sitztheorie*'), a specific problem of localization may arise in e-business situations: What is the connecting factor, for example, where three equal partners manage a business which is based only on activities on the net, or where the most important or even exclusive activity is operating an own server or, even more difficult, the server of a third party? One may conceive of another extreme example, the 'pure' virtual business, which has been established without using paper (usually over e-mail), corresponds with its customers and business partners exclusively over electronic media, and does not operate its own server.[19]

ii. If *incorporation* is the relevant connecting factor ('theory of incorporation'), the problem is often solved more easily, because the connecting factor is more clearly specified than the centre of activity, even though it is often fictitious.[20] However, even that theory fails where no registration has been made or is necessary (such as with respect to the '*société simple*' of Swiss law), and where no specific declaration of incorporation or registration has been made by the founders.

Under both theories, one may have to resort to ancillary connecting factors reflecting the closest connection with the persons operating or managing the business. Normally,

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[18] Art. 3 of the Hague Draft reads: Defendant's forum

1. Subject to the provisions of the Convention, a defendant may be sued in the courts of the State where that defendant is habitually resident.
2. For the purposes of the Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State –
   a. Where it has its statutory seat
   b. Under whose law it was incorporated or formed
   c. Where it has its central administration, or
   d. Where it has its principal place of business.

[19] *See* Mankowski, Osnabrück, 91 ff.

[20] The discrepancies between 'Inkorporationstheorie' and 'Sitztheorie' may have been somewhat mitigated by the 1999 CENTROS decision of the European Court, *see*, e.g., Lutter Marcus, 'Neue Entwicklungen im Gesellschaftsrecht der EU', in: Nobel Peter (Ed.), *Internationales Gesellschaftsrecht*, Bern 2000, 9–28; Edwards Vanessa, 'Case-Law of the European Court of Justice on Freedom of Establishment After Centros', 1 *European Business Organization Law Review (EBOR)* (2000), 147–155; Ebke Werner, 'Das Schicksal der Sitztheorie nach dem Centros-Urteil der EuGH', JZ 1999, 656–661; Behrens Peter, 'Das Internationale Gesellschaftsrecht nach dem Centros-Urteil des EuGH', IPRax 1999, 323–331; Forsthoff Ulrich, 'Rechts- und Parteifähigkeit ausländischer Gesellschaften mit Verwaltungssitz in Deutschland? – Die Sitztheorie vor dem EuGH', Der Betrieb 2000, 1109–1114.

this will not be the place where a server is located,[21] but rather the domicile or place of activity of the persons (individuals) operating the business.[22] If the business consists in operating a server, one may also consider the domicile or the operational centre of the operator of the server as the relevant connecting factor.[23]

B. Apparent Domicile or Headquarters

Another issue which arises more often in the virtual than in the 'real' world is appearance, because a contractual partner communicating exclusively over the Internet is rarely in a position to determine whether a top country level domain name or an indicated address corresponds with the registered corporate domicile or headquarters which are the bases of the relevant connecting factor.[24] It is thus important to determine whether a party who trusts in an apparent location or address should be protected, that is, by fixing the apparent and not the real domicile or headquarters as the connecting factor for jurisdictional purposes.[25] There have been quite different opinions to resolve the issue so far.[26]

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[21] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Official Journal L 178, 17/07/2000 p. 1–16, <http://europa.eu.int/eur-lex/en/lif/dat/2000/en_300L0031.html>. Art. 2(c) of the E-commerce Directive states unequivocally that the location of the equipment is irrelevant for determining the establishment of a service provider.

[22] Grolimund, 360; Kaufmann-Kohler, Mondialisation, 112; Mankowski, Internet, 227; Mankowski, Osnabrück, 91 at note 72 f., 92 at note 80.

[23] Weber, 66 ff. (limited however to Swiss conflict of laws aspects).

[24] Grolimund, 347 at note 34; Kaufmann-Kohler, Choice of Court, 17 at note 7; David Rosenthal, 'Das auf unerlaubte Handlungen im Internet anwendbare Recht am Beispiel des Schweizer IPR', Archiv für Juristische Praxis (AJP, St. Gallen) 1997, 1340–1350, 1340.

[25] Another question in the same context is whether a contracting party may trust in the identity of the party at the other line. For this issue, one may rely on the principle reflected in Art. 13 of the UNCITRAL Model Law on Electronic Commerce <http://www.uncitral.org/english/texts/electcom/ml-ec.htm>, which reads:

(1) A data message is that of the originator if it was sent by the originator itself.
(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent: (a) by a person who had the authority to act on behalf of the originator in respect of that data message; or (b) by an information system programmed by, or on behalf of, the originator to operate automatically.
(3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if: (a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or (b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.

[26] Rather opposed: Mankowski, Osnabrück, 89 f. Rather supportive (with certain distinctions) Grolimund, 358 f.; Weber, 50 (limited to substantive (sales) law); Kaufmann-Kohler, Mondialisation, 134 f. at note 207 (in the sense of a *forum non conveniens* correction).

The EU-Directive on Electronic Commerce, which entered into force in 2000,[27] requires that a service provider must indicate the name and address of its establishment and its registration (Art. 5(1)(b) and (d)). It makes clear that not only the mailing address must be indicated, but also the registeration, if any.[28] The same rule applies to the EU Consumer Protection Directives.[29] In cases where a service provider has various subsidiaries or is a group of companies with various registered offices, or where various centres of activity exist and the place indicated by the service provider does not correspond to the registered or active domicile or corporate headquarters,[30] does this rule demand that the address indicated be the relevant connecting factor for jurisdictional purposes rather than the 'real' domicile?

It may be argued that the answer must distinguish between various situations:

a. Where *consumer contracts* are concerned, one may presume that the service provider offers a forum selection agreement to the consumer by indicating a domicile or headquarters which do not correspond to the effectively acting business unit. This solution is supported by the principle *in favour of the consumer* which is a leading principle of European private international law. Consequently, a consumer should have the ability to sue the offeror at the

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[27] E-Commerce Directive note 22.

[28] Article 5 of the Directive reads:

'1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:
(a) the name of the service provider;
(b) the geographic address at which the service provider is established;
(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;
(d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register; ...'

[29] Art. 4(1)(a–g) of the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Official Journal L 144, 04/06/1997 p. 19–27, <http://europa.eu.int/eur-lex/en/lif/dat/1997/en_397L0007.html>; *see also* Amended proposal for a European Parliament and Council Directive concerning the distance marketing of consumer financial services and amending Directives 97/7/EC and 98/27/EC, <http://europa.eu.int/comm/internal_market/en/finances/consumer/disselen.pdf>, and Section VI. A. of the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce of 9.12.99, <http://www1.oecd.org/dsti/sti/it/consumer/prod/CPGuidelines_final.pdf>.

[30] The E-Commerce Directive does not distinguish whether the registration or the centre of activity is relevant. It merely states that the service provider must render the geographic address at which the service provider is established, Art. 5(b), and the information where the service provider is registered in a trade or similar public register (including the registration number), Art. 5(d).

place indicated based on his or her acceptance of the offered forum selection agreement at any time.[31] Within the scope of the Brussels and Lugano legislation, no recognition or enforcement problems arise because the court at the place of enforcement cannot question the correctness of the original court's basis for its determination of jurisdiction (see Art. 27 et seq. Brussels Convention; Art. 36 Brussels I Regulation). Outside the European framework, however, one should have no illusions (yet) with regard to recognition or enforcement of decisions based on that rule: If the State of the offeror does not accept this conclusion, it will not recognize such decisions, with the effect that it serves the consumer only if the offeror is active in the country of the consumer or has assets to attach there. A uniform approach to the question of appearance would therefore be advisable even beyond the reach of the European Treaties, for example, by an amendment to the Hague Draft. Such an approach would not be necessary, of course, if unification could be reached on the basis of substantive law rather than conflict-of-law rules only, for example, by creating an alternative dispute resolution system for internet consumer transactions.[32]

b. Regarding Business-to-Business ("B2B" *contracts*, the legal foundations of European law on international jurisdiction do not accept jurisdiction based on mere appearance, nor even a corrective mechanism corresponding to the escape clause in conflict of laws, such as the Anglo-American test of reasonableness[33] or *forum non conveniens* theory.[34] In addition, hypothetical forum selection agreements are not accepted. Thus, only situations in which the contractual partner specifies a domicile or headquarters or a branch in a manner which may be interpreted as an implied offer of a forum selection agreement must allow the other party the opportunity to accept the offer. However, such an offer should not easily be presumed: The European Court of Justice has emphasized in recent decisions that there must be a 'real' agreement on a specific forum, and that a forum selection agreement which is based on a fictitious place (such as an 'agreed' place of performance in general conditions) cannot be accepted.[35] However, unlike Business to

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[31] *See* Stone, at notes 110–112.

[32] *See* with regard to various initiatives in this context, Kaufmann-Kohler, Choice of Court, 44 ff.; Girsberger Daniel/Schramm Dorothee, Cyber-Arbitration, EBOR 3/2002 (forthcoming).

[33] For a commentary on the leading U.S. statutory and case law in that respect, *see* Kaufmann-Kohler, Choice of Court, 26–29, with numerous references.

[34] Art. 22 of the Hague Draft contains a limited *forum non conveniens* defense. However, this defense does not apply when a court's jurisdiction is on the basis of an exclusive choice of court agreement.

[35] ECJ, 20.02.1997, *MSG Mainschiffahrts-Genossenschaft eG/Les Gravières Rhénanes Sarl*, Nr. C-106/95, European Court Reports 1997 I–911, at para. 30–35 = IPRax 1999, 34, note Sebastian Kubis, id., at p. 10–14.

Consumer ("B2C") situations, a shift of jurisdiction to the place of the contracting party's counterpart should not be allowed even if the counterpart may in a specific situation be as worthy of protection as the consumer, such as a small or medium size enterprise (SME) who is exposed to a claim in a distant forum, because such extensive interpretation of the notion of 'consumer' bears the risk of diluting the existing framework of consumer protection.[36] A limited compensation (but no correction of the forum) may however be possible on the level of national substantive law, such as on the basis of *culpa in contrahendo* or the so-called '*Vertrauenshaftung*', according to which the misleading party is responsible for acts or omissions leading to damage of the other partner who has trusted the misleading party. While such corrections cannot lead to a deviation from the regular forum, they may impose damages on the responsible person, for example, in the amount of higher costs and fees of the misled partner due to his or her need to sue in a remote forum.

In the long term, however, legislative clarifications are recommended for both situations, such as the introduction into the European and national legislation of a reasonableness or fairness test such as the one developed by North American courts[37] and now reflected in section 110(a) of the Uniform Computer Information Transactions Act (UCITA),[38] or a modified *forum non conveniens* theory,[39] leading to jurisdiction based on confidence for specific factual situations, such as cases in which the offeror has a place of activity within the forum State even if it is not that place from which it has been active in a specific case. Such a correction may be more easily achieved by the Hague Draft than on the European level because it already proposes a minimum contacts rule (Art. 9).

Finally, an alternative correction should be envisioned such as the admission of forum selection clauses in contracts including consumers by each member State to the Hague Draft (as recommended by the 1999 Geneva Roundtable on Electronic Commerce and Private International Law[40]), or the worldwide introduction of an alternative dispute resolution system such as the one currently analysed by various bodies, including the European Commission.[41] Such a unification on the substantive level would make the conflict-of-laws approach redundant.[42]

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[36] Kaufmann-Kohler, Choice of Court, 21 f., with further references; Girsberger Daniel, KMU und Streiterledigung: Traditionelles und Alternatives (forthcoming).

[37] *See*, e.g., the overview given by Burk, at notes 40 et seq.; Kaufmann-Kohler, Choice of Court, 26–29, with further references.

[38] <http://www.law.upenn.edu/bll/ulc/ucita/ucita01.htm> Sec. 110(a) reads: 'The parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust.'

[39] *See, e.g.*, Kaufmann-Kohler, Mondialisation, 125, with further references in note 159, 134 f. at note 207.

[40] Note 12; Kaufmann-Kohler, Choice of Court, 28; 49f.

[41] *See* Kaufmann-Kohler, Choice of Court, 29 notes 54 ff.; Girsberger/Schramm (n. 32).

[42] *See* Kaufmann-Kohler, Choice of Court, 45 f.

III. Party Autonomy

A. Choice of Forum

1. B2B Contracts

Contracts which do not include a consumer leave the parties free to choose a forum or an arbitral tribunal in advance. The only particularities with respect to e-business lie in the form and evidence of an electronic forum selection or arbitration agreement. The recent revisions of the European legislation have taken these particularities into account: Both the Brussels I Regulation and the Draft of a revised Lugano Convention have clarified that forum selection agreements may be concluded electronically.[43] The same is true for the Hague Draft,[44] but not for the New York Convention which leaves it to the interpreter whether and to what extent electronic arbitration agreements are binding.[45] Even the existing – yet unrevised – legislation should be interpreted in that sense, based on the principle of functional equivalence.[46]

2. Consumer Contracts

Modern European law and national jurisdictions limit party autonomy in favour of the consumer. However, the current legal acts in Europe distinguish between 'active' and 'passive' consumers; only the latter are protected. Thus, both the Brussels and the Lugano Conventions describe various situations in which a business approaches the consumer actively, thereby making him or her 'passive', who must be protected in Private International Law. In contrast, an 'active' consumer is one who does not need to be protected if he or she takes the first step to conclude a contract with the offeror. In these latter cases, the same rules apply as to B2B contracts, but with the exception of certain consumer-credit agreements.[47]

Where a consumer is 'passive', he or she cannot waive in advance the possibility of

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[43] Art. 23(3) Brussels I Regulation.

[44] Art. 4(2)(b) Hague Draft.

[45] However, the UNCITRAL Working Group on Arbitration, in its 32nd session of March 2000, agreed that Art. II(2) of the New York Convention should be interpreted to cover the use of electronic means of communication and that it required no amendment for this purpose, *see* Report, A/CN.9/468 of 10 April 2000, no. 101, <http://www.uncitral.org/english/sessions/unc/unc-33/acn9-468.pdf>, para. 100 ff., page 22 f. Similar problems arise in national laws, but they are mitigated for example in the Swiss Private International Law Act (SPILA), Art. 5, 7, 178(1), *see* Grolimund, 351 f., and in the UNCITRAL Model Law on International Commercial Arbitration of 1985 (UN Doc. A/40/17 und UN Doc. A/RES/72, <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>; *see* Mankowski, Internet, at 214 ff.

[46] Kaufmann-Kohler, Choice of Court, 30 f.; Id., Arbitration Agreements, 358 ff., with further references.

[47] Art. 13(1) Nr. 1 and 2 Brussels/Lugano Convention.

suing the other party in his or her home country.[48] However, with a particular view to the special situations of contracting through the Internet, the new Brussels I Regulation clarifies that the rules in favour of a consumer apply only in the following situations:

- When the offeror has pursued business activity in the country of the consumer or directs such activity to that country, and
- when the contract at issue is part of that activity.[49]

Thus, it is no longer relevant whether the offeror has directed an explicit offer or advertisement to the country of the consumer in anticipation of the contract, or whether the consumer has undertaken activities in his or her home country in anticipation of such a conclusion, as was the case under the 'old' Brussels and Lugano Conventions.[50] Nevertheless, there has been controversy on the question in which circumstances a website is to be considered an 'activity' directed at the consumer's country. In order to clarify for e-commerce situations that a website which can be reached in the consumer's country is not *per se* sufficient to establish jurisdiction in that State, the European Council and the Commission have, after lengthy discussions, issued a common declaration, according to which it is necessary in addition, that:

- there has been an actual conclusion of a distance contract through the Internet, and, in addition
- the website encourages the consumer to conclude such an electronic contract.[51]

It is unclear what function and legislative importance such a common declaration has, in view of the fact that such an instrument is not foreseen as a formal act in European law. However, the statement is in line with the important opinion that so-called 'active' websites, but not 'passive' websites allow a consumer to sue the offeror at its domicile.[52] Nevertheless, the exact distinction between 'active' and

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[48] Art. 15 Nr. 1, Brussels/Lugano Convention.

[49] Art. 15(1)(c), Brussels I Regulation reads:

> 1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if: ... (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities. For the Lugano Draft, *see* Markus, Schwerpunkte, 45 f., 61.

[50] Art. 13(1) Nr. 3(a) and (b), Brussels/Lugano Convention.

[51] Common Declaration of the Council and the Commission regarding Art. 15 und 73 Brussels I Regulation, Announcement of the Council Nr. 44/2001 of 22.12.2000, Annex II, Official Journal Nr. L. 12/1 of 16.1.2001, http://europa.eu/int/comm/justice_home/unit/civil_de.htm reprinted in German in IPRax 2001, 261.

[52] Markus, 46; Id., SZW 1999, 214; Kaufmann-Kohler, Mondialisation, 135 ff.; Girsberger/Weber-Stecher, 234 ff., each with references; Stauder Bernd, 'Der Schutz des Konsumenten

'passive' websites is left to interpretation by the courts and further legal authority.

Conversely, the *Hague Draft* of 1999 has followed the original rules of the Brussels and Lugano Conventions in that respect, with the consequence that the well-known problems which have led to the revision of the European texts remain unresolved, namely:

- What activity or behaviour of the offeror is to be viewed as an express offer or advertisement;
- Under which circumstances such offeror publicity must be viewed as occurring in the State of the consumer;
- What are the necessary legal acts of the consumer, and
- In which place does the consumer have to undertake such acts.

It is recommended, therefore, to reconsider the current Hague Draft with a view to the common statement of the EU Council and Commission. That revised interpretation is, in my view, well-balanced: While it puts somewhat more responsibility on the shoulders of the offeror, that responsibility is not inappropriate, because an offeror is in a better position to evaluate the potential consequences of its cross-border activities in advance. Based on such an evaluation, within which the possible jurisdictions involved and their consumer protection statutes in these jurisdictions are important, the offeror may limit the circle of addressees geographically (e.g., by excluding addressees in certain countries)[53] or personally (e.g., by an expressed specification that the proposed contract should not serve personal but exclusively business purposes). One may even go as far as to accept an overall plaintiff's forum in international-consumer matters.[54] As a compromise one may envision a solution allowing each Member State to make a reservation, equivalent to the reservation to the principle of party autonomy in consumer contracts regarding jurisdiction.[55] Pending the enactment of such solutions, and in any event before concluding a contract, an offeror is well-advised to ask for the exact address of each prospective contractual partner:

- In order to be in a position to evaluate whether to limit its offer geographically, and
- To be prepared to evaluate the possible jurisdiction for suing, or being sued

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cont.
im E-Commerce', in: Trüeb Hans Rudolf (Ed.) Aktuelle Rechtsfragen des E-Commerce, Zürich 2001, 139–159, 155 f. Regarding the U.S. case law of the past years, which has influenced the European distinction between active and passive websites, *see* Arter/Jörg/Gnos, 282–284, 287 ff.; Koch, 56 ff., each with further references.

[53] Kaufmann-Kohler, Choice of Court, 28 at note 53, 37. For an account of existing websites in this respect, *see* id., at 12.

[54] See Stoffel, in this publication (as a general approach even beyond electronic contracting); Grolimund, 367 f. Partially different opinion: Siehr, 166 ff., with further references in note 40.

[55] Note 42.

by, the consumer should the consumer invoke his or her domicile as the forum.[56]

However, the privilege of having an exclusive forum at their domicile should be attributed only to persons who have not actively misled the offeror about their domicile or habitual residence, because otherwise the consumer protection purpose attempted by this additional forum could be abused.[57]

In conclusion, not much has changed in the European legal context despite the e-business revolution. However, it may be difficult to determine the relevant connecting factor at least where a contractual party uses no fixed infrastructure for performing its business activity. *De lege lata,* States which base their jurisdiction over commercial entities or persons on the centre of activities ('Sitztheorie') are forced to find new or at least more refined criteria for defining the corporate domicile or branch in order to distinguish them from 'virtual' connecting factors. One may think that this problem is mitigated by the recent preventive requirements of substantive law such as the obligation to indicate the relevant address of the service provider in the European Directive on Electronic Commerce.[58] However, such requirements serve their purpose only if they are vested with enforceable sanctions.[59]

In addition, the *importance of appearance* must be clarified with respect to the determination of jurisdiction (as well as the applicable law). In the author's opinion, it is not necessary or even advisable to depart from the principle of the closest territorial connection: Such a departure would result in new problems at least in B2B situations, because to date, there have been no clear foundations or indications for jurisdiction based on mere appearance. The same is not true for consumer transactions, because in international consumer transactions, the principle of most-favoured treatment of the consumer applies. Pending a uniform recognition of such interpretation, and in the B2B segment, however, the uncertainties will remain as long as the problem is not solved by the legislator. In order to exclude such uncertainties in specific transactions *de lege lata*, the parties should agree early on arbitration or a forum selection clause (combined with a choice of law clause). The counterpart of a consumer, however, must be aware of the risks regarding a distant forum, and take the necessary precautions, as long as no choice of forum is allowed on a global or at least regional level.

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[56] For an alternative approach such as the one taken by the UCITA (Note 38), *see* Kaufmann-Kohler, Choice of Court, 28 f.

[57] Similarly: Mankowski, Internet, 249 (regarding misleading offeror on consumer characteristics).

[58] Supra Note 21.

[59] The E-Commerce Directive does explicitly not affect national rules on private international law, *see* Preamble, Para. 23: 'This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.'

B. Questions of Form and Consent

International forum selection agreements must traditionally be in writing in many jurisdictions, including the EU and the EFTA States, as well as pursuant to the Hague Draft.[60]

As a rule, within the scope of application of the European and Draft Hague legislation on international jurisdiction, the rules on forum selection agreements must be applied and interpreted in an autonomous manner, leaving no room for national laws to apply.[61] Thus, the question of what acts and omissions amount to a formally valid acceptance of an offer which is deemed to be 'in writing', as well as what is to be understood as usage between the parties or an international custom (clauses b and c), must be resolved autonomously, rather than by reference to the national law of the forum or any other country.[62] Whether and to what extent the exchange of electronic declarations satisfies the criteria of 'in writing' has not been sufficiently clear to all those interpreting the current law. However, in the revised texts, some clarification has been achieved.[63] These clarifications have been adopted from the UNCITRAL Model Law on Electronic Commerce of 1996.[64] The writing requirement of Article 2 New York Convention should be interpreted similarly even without an express revision of its text.[65]

One could imagine the development in the future of an international custom as defined in clause (c) of the new European and Hague Draft legislations perhaps with respect to certain online contracts, for example, contracts which allow the acquirer to download software, should forum selection clauses become standard texts in such contracts.[66]

Additional questions arise.[67] In particular, no clarification has been made in the revised texts as to the question of consensus rather than form. In addition, it is still

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[60] Art. 17 Lugano Convention/Brussels Convention, Art. 23(3) Brussels I Regulation; Art. 4 Hague Draft. The revised text makes clear that an exchange of electronic expressions of will is sufficient regarding form, *see* Grolimund, 353 ff., Mankowski, Internet, 214 ff., both with references to dissenting opinions; Hance, 240; regarding digital form requirements in general Grolimund, 355 ff.; Siehr, 179 f.; Mankowski, Internet, 218 ff., with references.

[61] Mankowski, Osnabrück, 82 ff.; Grolimund, 353 f.

[62] *See* Kaufmann-Kohler, Choice of Court, 34 ff.

[63] Art. 23(3) Brussels I-Regulation; Art. 4(2)(b) Hague Draft.

[64] Art. 5 UNCITRAL Model Law on Electronic Commerce 1996, with additional article 5 bis as adopted in 1998, <http://www.uncitral.org/english/texts/electcom/ml-ec.htm>.

[65] *See* Kaufmann-Kohler, Arbitration Agreements, 362, with references in note 35; Mankowski, Osnabrück, 82 ff.; Grolimund, 353 f.

[66] *See* Kaufmann-Kohler, Choice of Court, 33 f., who is critical of this approach and would prefer the development of technical means of ensuring the later accessibility of unchanged messages.

[67] They are relevant in particular in B2B situations, because in B2C situations, the consumer may only agree to a forum selection in his favour or after a dispute arises.

[68] *See*, e.g., Girsberger Daniel, 'Gerichtsstandsklausel im Konnossement: Der EuGH und der internationale Handelsbrauch', IPRax 2000, 87–91, 89.

unclear where questions of form end and questions of consensus begin.[68] These questions are not internet-specific, but they are more acute in e-business, for example regarding the following questions, whether a text according to which a forum is thereby chosen is sufficient evidence of an agreement or even constitutes a non-rebuttable acceptance to an offer for a forum selection agreement:[69]

(a) Where the offeror has made reference to a forum selection clause in a side document, such as general conditions;
(b) Where the forum selection agreement is found only by way of reference to a website (in the form of a hyperlink);
(c) Where the forum selection agreement is concluded based on a mere mouse-click.[70]

There are various possibilities to resolve these issues, including the development of an autonomous interpretation of what constitutes the necessary consent. Nevertheless, one should examine further to what extent a registration system can be developed on a uniform law basis which would assure the quality of consumer protection by appropriate website structures.[71]

IV. Cross-Border Electronic Performance

According to the current law, a plaintiff may sue the defendant at the place of performance if that place is in a different country from that of the domicile of the defendant. The place of performance is defined as the location where an obligation must be performed in accordance with the contract (Art. 5(1), 1st sentence of the Brussels/Lugano Convention). The question where such performance must be made,

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[69] *See* the respective analysis of Kaufmann-Kohler, Choice of Court, 34–36, with many references.

[70] For a more detailed analysis of these problems, *see* Kaufmann-Kohler, Choice of Court, 25; 34–38; Mankowski, Osnabrück, 115 at note 178 f.; Id., Internet, 217.

[71] *See* Kaufmann-Kohler, Choice of Court, 29, 45 f. Art. 17 of the E-Commerce Directive regarding out-of-court dispute settlement reads:

'1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.
2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.
3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.' There are currently various initiatives going on in this context, *see* Kaufmann-Kohler, Choice of Court, 29 at note 54; 38 f.

will in the future be specified with regard to both the supply of goods and services.[72] The place of performance as defined in this provision ('State in which the goods were supplied in which the services were provided') remains a partially juridical term which must be interpreted in law, and not only a factual notion. Thus, in a more limited way than before, it is still subject to an interpretation which is influenced by national laws.

However, the only 'real' Internet-specific question is whether a specific forum exists at the place of performance when such performance is made online. For the resolution of this issue, one must distinguish between the European and the prospective worldwide law:

- The *European texts* contain a fallback clause for contracts which are neither supply of goods nor service agreements: clause (c) in connection with letter (a) provides for a general basis of jurisdiction at the place of performance. In contrast, certain commentators of the new European texts seek to interpret the notions of supply of goods and service agreements extensively so as to base jurisdiction on the location of the reception of the objects or service, that is the domicile or branch of the addressee of the performance. If this is not possible, for example, regarding mere lease or licence agreements where no property is transferred, clause (a) becomes relevant which will most probably retain the 'Tessili' and 'Groupe Concorde' theories established by the European Court of Justice,[73] according to which the place of performance must be determined by applying the law applicable to the relevant contract according to the conflicts rules of the forum.[74]
- The *Hague Draft* makes it clear that there can be no specific forum at the place of performance when the contract is not (either entirely or partially) an agreement relating to the supply of goods or services, such as a loan or a lease

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[72] Article 5 no. 1 letters a through c Brussels I Regulation read: 'A person domiciled in a Member State may, in another Member State, be sued:

1.(a) in matters relating to a contract, in the courts of the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies; ...'

A similar wording as in letters (a) and (b), but not (c) can be found in the Hague Draft, Art. 6 letters (a) and (b).

[73] ECJ, 6.10.1976, *Industrie Tessili Italiana Como/Dunlop AG*, Nr. 12/76, L. 1976, 1473, paras 13, 15; ECJ, 28.9.1999, *GIE Groupe Concord/captain of «Suhadiwarno Panjan»*, Nr. C-440/97, L. 1999 I–6307, para. 32.

[74] Bucher, Andreas, Vers une convention mondiale sur la compétence et les jugements étrangers, La Semaine Judiciaire (Geneva) 2000, 77–133, 85 f.

or a software license for that matter. Thus, in these cases, only the regular basis for jurisdiction applies (Art. 3 and 4). However, in the discussions held by experts in the meantime, specific rules for such contracts have been proposed which would introduce a presumption that the performance of online contracts is at the place where the information is provided.[75] This would normally lead to a plaintiff's forum. If no such clarification is introduced, there will probably be no specific place of performance for online contracts which cannot be considered purchase or service agreements, because the Convention must be interpreted narrowly with respect to fora other than those explicitly mentioned.[76]

V. Conclusion

There is no doubt that the Internet and the developments attached to it have a significant impact in the international arena which should and will lead to the need for interpretation and adaptation of the existing legal foundations in many respects. This conclusion applies in particular to consumer contracts, where it must be decided to what extent providers can be asked to become more active to protect themselves from being entangled in a litigation far away, and to what extent consumers should be allowed to claim particular protection. Perhaps, such protection should also be afforded to small businesses.[77] However, not only in B2C dealings, but also in the B2B context, many questions arise which cannot be answered by merely applying traditional rules.

The current revision of the European legal foundations on international jurisdiction has come a long way, but will have to be developed further. The same holds true with respect to the Draft Hague Convention which is, and should be, adapted to the latest trends in e-Commerce. More light should be shed in particular on the question of appearance, which in the author's view has not been sufficiently developed to assure legal security. Finally, the current process regarding non-traditional dispute resolution mechanisms such as ODR should be further examined and developed. This, however, is a separate subject, which will be dealt with elsewhere.[78]

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[75] Electronic Commerce and International Jurisdiction, Ottawa, 28 February to 1 March 2000, Prel. Doc. Nr. 12 (August 2000), published in: < ftp://hcch.net/doc/jdgmpd12.doc >; Proposal of the Swiss Government, Doc. Prel. Nr. 14 of April, 2001, p. 30.

[76] Accordingly, the Geneva Roundtable of September, 1999 (note 13), has recommended: that '[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'. *See* Kaufmann-Kohler, Choice of Court, 18 at note 12.

[77] See Ginsberger (note 36).

[78] See Ginsberger/Schramm (note 32). For some recent overviews, *see* Robert C. Bordone, 'Electronic Online Dispute Resolution: A Systems Approach – Potential, Problems and a Proposal' < http://eon.law.harvard.edu/h2o/property/jurisdiction/bordoneedit.html >;

Cont.

M. Scott Donahey, 'Current Developments in Online Dispute Resolution'; <http://cui.unige.ch/~billard/ipilec/horning1.doc>; M. Scott Donahey, 'Dispute Resolution in Cyberspace'; <http://cui.unige.ch/~billard/ipilec/horning2.doc>; Esther Van Den Heuvel, 'Online Dispute Resolution as a Solution to Cross-Border E-Disputes: An Introduction to ODR', <http://webnet1.oecd.org/pdf/M00001000/M00001592.pdf>; Richard Hill, 'Online Arbitration: Issues and Solutions'; <http://www.umass.edu/dispute/hill.htm>; Ethan Katsh, 'Dispute Resolution in Cyberspace', <http://www.umass.edu/legal/articles/uconn.html> (all visited 10.01).The author had the privilege of participating in a colloquium in Geneva on 16 November 2001, organized by Prof. Gabrielle Kaufmann-Kohler and Prof. Jürgen Harms of Geneva University, in which an ongoing project analysing Online Dispute Resolution (ODR) systems and regulation was discussed by technical and legal experts. A comprehensive report: T. Schultz/G. Kaufmann-Kohler/D. Langer/V. Bonnet, 'Online Dispute Resolution: The State of the Art and the Issues', Geneva2001, reprinted in: <http://www.online-adr.org/reports/TheBlueBook-2001.pdf> has been published.