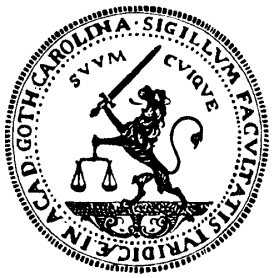

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Some Issues of Electronic Commerce in European Community Legislation

Master thesis
20 points

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Private International Law

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Contents

Summary

The rapid development of electronic commerce has affected the legislatory efforts within the European Union. In September of 1999 the European Commission presented an Amended Proposal for a Directive on Electronic Commerce. The Proposal aims to extend the fundamental European Community principle of free movement of services to Information Society Services as well, by introducing the country of origin rule. According to this principle, an Information Society Service, as long as it complies with the rules of the country where the provider is established, may not be restricted in other Member States. The relation between the country of origin rule and Private International Law is unclear. In particular, Art. 3 para 3 of the Proposal is drafted in a confusing way. In this work, the conclusion is drawn that the proposed Directive does not aim to specify the Private International Law of the provider's state as applicable law.

The Distance Selling Directive, published in 1997, harmonizes the Member States' consumer protective rules and aims to ensure consumer protection, when the consumer is purchasing online.

In the recent Proposal for converting the Brussels Convention on Jurisdiction, Recognition and Enforcement of Civil and Commercial matters into a Regulation, the European Commission has taken the development of information technology into account and has tried to update the provisions of the Convention. In particular Art. 15, regarding jurisdiction over conflicts with consumers has been adjusted. However, uncertainty remains, as the Commission suggests that the consumer shall be allowed to sue his counterpart in his home country, as soon as the other party has directed its activities to the consumer's state of habitual residence. It is unclear to what extent a web site can be considered as directed against a certain country. U.S. case law has dealt with the question and some guidance can be found in European considerations about advertisement law as well, but it is difficult to establish any clear principles.

Preface

Every work reflects its author. I guess that my thesis reflects the fact that I grew up in a bilingual family and I have always considered myself European rather than just Swedish. My strong feelings for Europe deepened during my childhood summers in Czechoslovakia and later school holidays at an Equestrian centre in Germany. I spent a couple of months in Italy in 1997. After a month at a German EU Representation Office in Brussels, it was a natural choice to spend my eighth law school semester in Heidelberg as an exchange student.

I would like to express my gratitude to Dr. Ian Walden, Centre of Commercial Law Studies, Mary and Westfield College, London, for suggesting the subject for my thesis and for supporting me during the first stage of this work. My thanks also go to Dr.Christoph Rittweger and his colleagues in the IT- department of Baker & Mc Kenzie, Frankfurt for useful literature advice and helpful comments.

Last, but not least, thanks to Professor Michael Bogdan, Lund, for accepting to be my supervisor, although I have written most of the work abroad.

1 Introduction

The rapid development of Internet and its commercial use is giving rise to legal difficulties. Many regulations will have to be reinterpreted or adjusted in face of the new challenges.

The proposal for a Directive on Certain Legal Aspects on Electronic Commerce[1] is a good example of the growing interest in information technology within the European Union. The Distance Selling Directive[2] is another example, published in 1997. The Community is working on several Directives of relevance to electronic commerce, i.a. a Distance Selling Directive for Financial Services and a Directive on Electronic Signatures.[3]

Noteworthy is also the Proposal for a Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters.[4] These issues are now regulated in the Brussels Convention of 1968. The Proposal has taken into account the new forms of commerce, which could not even be imagined when the work on the draft started.

Some of the key issues arising in electronic international commerce, are those of jurisdiction and applicable law. When natural and legal persons interact, conclude contracts etc, the choice of court and applicable law are referred to the rules of Private International Law. To which jurisdiction a certain advertisement action shall be considered as directed, is a problem of Public International Law.

Both Private International Law and Public International Law were once exclusively within the competence of the national states. As the European Union has extended its competence, this is no longer the case.

Several Community legislative products seek to harmonize advertisement rules.[5] The Proposal for a Directive on Electronic Commerce attempts to introduce the country of origin's rule, which means that a certain information society service, as long as it complies with the laws of the country where the service provider is situated, may not be restricted in other Member States.

Private International Law was a field considered to fall outside the competence of Community Law. However, the Treaty of Amsterdam has increased the Community competence with regard to this area. The harmonization of rules concerning recognition and enforcement of judgments in civil matters have been transferred to the first pillar, under title

[1] COM(1999)427
[2] Directive 97/7 EC, OJ L 117, 7.5.1997, p.15
[3] An up to date list is accessible at *http://europa.eu.int/comm/dg15/eu/media/index.htm*
[4] Accessible at *http://europa.eu.int/geninfo/query*
[5] See e.g. Council Directives 84/450 EEC, 87/102 EEC

IV of the Treaty, concerning Visa, Asylum and Immigration. However, as will be shown below, it is not clear, to what extent the Community has actually increased its competence in the field of Private International Law.

This review will start with a general, introductory description of the relationship between Community Law and national Member State law, with emphasis on Private International Law. Following some general notes about Private International Law, the relation between this concept and Community Law will be discussed.

The amended proposal for a Directive on Electronic Commerce is described with the intention to provide a general summary of its fundamental provisions and an implication of the problems connected with the country of origin rule, in particular its relation to Private International Law. The description of the Distance Selling Directive is merely intended to give the reader an overview of a community legislative product, resulting from the development of electronic commerce.

The second part starts with an overview of the Rome and Brussels Conventions, with a description of some rules particularly problematic with regard to electronic commerce.

Thirdly, some of the proposed changes to the Brussels Convention which are relevant to Internet, particularly the proposed changes to the jurisdiction over consumer contracts, are discussed and an attempt is made to analyse what consequences these changes may have, once they get into force.

2 PART ONE

2.1 The basic relation between Community law and National law

The supremacy of Community Law[6] was established by the European Court of Justice (the Court) in one of its very first landmark cases, *Van Gend en Loos*[7] in 1962. In this case the Court, speaking in general, emphasized the fact that the Community constitutes a new legal order of international law, to which the Community Member States have transferred parts of their constitutional powers.[8] Two years later the Court affirmed and developed this constitutional theory in another landmark case, *Costa v Enel*[9]. In a very teleological way of interpreting the Treaty, the Court repeated and amplified its statement signifying that the legal system of the Community is an integral part of the Member States' legal systems, and therefore the national courts are bound to apply Community regulations[10].

In later cases, the force and application of the principle of supremacy of Community Law became even clearer. In *Simmerthal*[11] the Court stated explicitly that all national courts must directly and immediately enforce a clear and unconditioned rule of Community Law, even if its own, national regulations are directly contrary[12].

As the Court wants to avoid creating new areas of jurisdiction for national courts, it tries to frame its judgments in a negative way, declaring that national courts must not apply national rules which would form an obstacle to the immediate applicability and effectiveness of Community Law. However, it is obvious that in a concrete case this could result in a change in the jurisdiction and function of national courts irrespective of the national, constitutional rules.[13]

The Court has repeatedly stated that every national rule must be compatible with Community Law, even if it falls in an area generally considered to be outside the competence of the Community. In the *Hubbard*[14] case it is

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[6] Note that the supremacy regards the **EC** Treaty and the European **Community** legislative acts (regulations being issued under the 2nd and 3rd pillars of the European Union are still intergovernmental acts, the importance of which remains to be seen.)
[7] C-26/62 [1963] ECR 1
[8] Craig, P and de Burca, G: *EU law- text, cases and materials,* 2nd ed., Oxford 1998, p.256-257 (In the following: *Craig and de Burca*)
[9] C-6/64 [1963] ECR 31
[10] Craig and de Burca, p.258
[11] C-106/77 [1978] ECR 629
[12] Craig and de Burca, p.260
[13] Craig and de Burca, p.262
[14] C-20/92 [1993] ECR I 3777

emphasized that the effectiveness of Community Law cannot vary according to the branches of national law it may effect. In the Hubbard case, law of succession was in question, in *Skanavi*[15] criminal law.

A large part of the case law of the Court regards the very core of the European Community: the Internal Market with the principles of the free movement of goods, persons, services and capital. Having begun by developing clear and distinct principles concerning the free movement of goods, the Court has continued by extending the principles from this particular area to the other three freedoms, trying to harmonize the rules concerning free movement, emphasizing that any such rule, even if not discriminatory, which may hinder interstate trade and movement is in principle contrary to Community Law and must be justified by the regulating state.[16] In *GB-Inno*[17] and *Yves Rocher*[18] the Court ruled that national advertisement regulations, although of non-discriminatory nature, have to be disregarded when constituting an obstacle to the free movement of goods. In *Boukhalfa*[19] the Court reasoned in a similar way regarding the free movement of persons.

2.2 Private International Law

Certain problems arise when a legal conflict contains some unfamiliar element; i.e. if there is some connection to one or more foreign countries. A common problem arises when the parties do not reside in the same country. In those cases some important choices have to be made, before even approaching the legal issue. First, the court has to decide if it has jurisdiction and if so, which law to apply. Those two questions are related, but must be kept apart. A court may according to its own rules of Private International Law have to apply the law of another country.

The final issue to solve is the question of recognition and enforcement of judgments.[20]

Those problems are seen as matters of Private International Law.[21] The name is somewhat misleading, since there is no "international" Private International Law. Each country has its own Private International Law, which is a part of its own legal system.[22]

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[15] C-193/94 [1996] ECR I 929
[16] Craig and de Burca, p.785. See cases as e.g. *Bosman* C 425/93 [1995] ECR I 4921, *Gebhard* C-55/94 [1995] ECR I 4165, *Alpine Investment* C-384/93 [1995] ECR I 1141
[17] C-362/88 [1990] ECR I 667
[18] C-126/91 [1993] ECR I 2361
[19] C-214/94 [1996] ECR I 2253
[20] North, P.M and Fawcett, J.J: *Cheshire and North's Private International Law,* Butterworth's, London 1992 , p.3 (in the following: *North)*
[21] Private International Law rules generally matters between private parties, not matters with public elements involved.
[22] North, p.7

Decisions on jurisdiction and which substantial law to apply on the case (*lex causae*), are not sufficient. Some questions, mainly of procedural nature, are always considered under the law of the deciding court (*lex fori*).[23] Further, there may be mandatory laws of the state of the court, considered as so important that the court is bound to apply them in any case, even when a foreign law, chosen by a choice of law rule governs the dispute.[24] The use of the *lex causae* could also lead to results, which the court is not willing to accept. In these cases the court can refuse to apply the *lex causae,* with reference being made to *ordre public.* This means that it would be against national public policy, ethical and social values etc, to apply certain regulations of the foreign law.[25]

In most countries, Private International Law has not been regulated to a large extent. However, certain unwritten principles do exist. Further, Private International Law is an area where the courts often have filled up non-regulated fields and existing rules are used by analogy.[26]

Inside the European Union far-reaching efforts have been made to harmonize rules of Private International Law, mainly in the Lugano and Brussels Conventions[27], as regards jurisdiction, recognition and enforcement of judgments in private and commercial matters. The Rome Convention regulates which law to apply on a contractual obligation between two parties. Those conventions are inter-governmental legislative products, as Private International Law has been considered to be a national issue until the changes provided for by the Treaty of Amsterdam.

Those conventions may well harmonize the European Union. However, one has to bear in mind that the difficulties remain when a country outside the Union is involved in a conflict.

2.3 The relation between Community law and Private International Law

As mentioned Private International Law was considered to fall outside the scope of Community Law, until the recent changes provided in the Treaty of Amsterdam. However, it has even in the past been impossible to completely evade conflicts between those two concepts. Even if not clearly stated by the European Court of Justice, it can be concluded that substantial national rules

[23] North, p.75
[24] North, p.137
[25] North, p.113
[26] Foss, M and Lenda, P: *"TRIP-Issues of Private International Law"*, NRCCL, Oslo; 2.5. Homepage of the NCCRL: *http:// www.jus.nio.no/iri/english/index.html*,
[27] The Brussels Convention solves the jurisdiction matters within the European Union, while the Lugano Convention regulates the relations between the EU and some of the EFTA countries (Norway, Iceland, Switzerland). As they contain almost identical regulations, reference will further on only be made to the Brussels Convention).

of Private International Law, as all other national rules, have to be left aside when they interfere with Community Law in a concrete case.[28] It has to be emphasized that it is still not clear, to what extent Private International Law has become a Community matter after the Treaty of Amsterdam.

Both the Convention of Rome and the Convention of Brussels contain stipulations[29], explicitly establishing the precedence of Community Law.

Although so maintained by some scholars[30], I would not see the provisions of the EC Treaty as conflicts rules. They can however not be considered indifferent to rules of Private International Law, as national legislators and courts have to formulate, interpret and apply their conflicts rules, with due regard to the provisions of the Treaty and the whole concept of Community Law.[31]

It agrees well with the tendency in the case law of the Court to presume that the national court can decide, in accordance with its Private International Law rules, the law of which country it should apply in a certain case. However, if this national rule constitutes an obstacle to the free movement in the Internal Market in the special case, it must be set aside. This would mean that the provisions of the Treaty do not oblige Member States to change their Private International Law rules, they just oblige them to consider the Treaty, in every concrete case. This would actually just be a logic consequence of the general loyalty clause, Art. 10 EC Treaty.

When adopting secondary legislative acts, mainly regulations and directives, the Community tries to harmonize the national rules of the Member States. However, generally the directives contain provisions, comparable to e.g. Art. 30 and Art. 46 (1) of the EC Treaty. These state that a Member State is entitled to make derogations from the regulations contained in the Directive under certain circumstances regarding public health, consumer protection, national security etc.

When harmonization has been effected to a sufficient extent, the rules of Private International Law become less important.[32] If all courts would apply the same substantial rules, the question of which law to apply would lose its importance.

However, the question of jurisdiction would remain important, even if all Member State legislation would be perfectly harmonized. The litigant who is allowed to "stay at home" has generally a certain advantage. The court

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[28] See Wouters, J "*Conflict of laws and the single market for financial services*", Advanced training course in banking and financial law of the European Union, Brussels 18-22/11 1996, p.68
[29] Art.57 resp. Art.20
[30] See Wouters, J (N.28, above), p.56-57
[31] Wouters, J (N.28, above), p.64
[32] North, p.10

always applies its own procedural rules, too, provisions which obviously vary in the Member States.

As a starting point, it can be maintained that directives do not contain conflicts rules[33]. This is not entirely true, however, as will be shown by studying the proposal for a Directive on Electronic Commerce.

2.4 The Proposal for a Directive on Electronic Commerce

2.4.1 Background and general provisions

In April of 1997, the European Commission adopted a Communication entitled "A European Initiative on Electronic Commerce"[34]. It emphasized the necessity of benefiting from the new, rapidly developing way of doing business and underlined the importance of ensuring a coherent regulatory structure based on the Single Market principles as soon as possible.

The Electronic Commerce Directive was one of the legislative products foreseen in the above mentioned Communication. The European Commission adopted a first proposal on 18 November 1998. After receiving and considering the opinion of the Parliament, the Commission presented a new amended version on 1 September 1999. The amendments are mainly of technical nature and do not modify the first Proposal in any extensive way.

The Proposal attempts to ensure that the Single Market principles of free movement of services and freedom of establishment will also apply to Information Society Services.

According to Art. 1 para 3, the Directive shall be without prejudice to the existing level of protection for public health and consumer interests as provided for by community legislation applicable to Information Society Services.

Information Society Services are defined in Art. 2 with a reference to Art. 1 para 2 of the Directive laying down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations[35], stating that Information Society Service is any service provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of the services.

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[33] See e.g. COM (1999)427 *The proposal for a Directive on Electronic Commerce,* Rec.7
[34] Accessible under: http//europa.eu.int/comm/dg15/eu/media/info/313.htm
[35] Directive 98/34 EC, OJ L 204, 21.7.1998, p.37 as amended by Directive 98/48 EC, OJ L 217, 5.8.1998, p.18

The *place of establishment* is the place where the operator actually pursues an economic activity through a fixed establishment, irrespective of where websites or servers are situated (Art. 2 (c) and Preamble, Rec. 9). The Directive applies only to providers established *within* the European Union.

The Proposal obliges the Member States to remove any prohibitions or restrictions in their legislation on the *conclusion of contracts with the use of electronic media* (Art. 9). Art. 11 contains regulations regarding the moment when the electronic contract must be considered concluded.

Art. 13 and 14 clarify the responsibility for *intermediaries*, i.e. service providers transmitting and storing information from third parties, establishing a liability exemption, when the provider plays only a passive role. To ensure fair trading and protection of consumers, the proposal contains regulations stating that the drawing-up of *codes of conduct* shall be encouraged (Art. 16) as well as certain *information* regarding formation of contract on-line has to be provided (Art. 10).

The Directive is *not applicable to* certain areas as taxation, personal data, the activities of notaries, representation and defence of clients before a court, gambling activities (Art. 22 para 1, 2).

Art. 22 para 3a contains specific regulations, stating that the imposing of restrictions to the free movements of Information Society Services can be permitted, if the restrictions are necessary to protect minors, for the suppression of hatred on grounds of race, sex, religion or nationality, for the protection of public health, public security or for consumer protective reasons. When not in an emergency situation a Member State is allowed to adopt those restrictions only if the Member State where the service provider has his fixed establishment has in vain been asked to undertake measures and the Commission has been notified, Art. 22 para 3b.

2.5 Article 3 (1) and (2); the Country of origin rule

2.5.1 The country of origin rule

Art. 3 para 1 and 2 of the Directive on Electronic Commerce contain the country of origin rule. This means that a service provider, as long as he complies with the regulations of the Member State where he pursues his activity (which has to be in accordance with the Directive), normally could not meet any restrictions in other Member States. The advantage of this principle is clear. Persons wanting to transmit material over the national borders will only have to act in accordance with one legal system.

If a conflict arises, the provider's activities are to be examined in the light of the law of the country where he is established. This principle seems to have been adopted from the Broadcasting Directive[36], which contains a similar rule in Art. 2 para 1.

So far, the country of origin rule seems fairly clear and simple to apply. However, as far as the Broadcasting Directive is concerned, The European Court of Justice has in the joined cases of *Konsumentsombudsmannen v de Agostini Svenska Förlag AB* and *v TV Shop Sverige AB*[37] opened up for the application of national law. The Court stated that the Broadcasting Directive only partially coordinates national legislation and does not have the effect of excluding completely and automatically the applications of national rules, other than those specially concerning the broadcasting and distribution of programmes. Further, it held that the Member States are not precluded from taking measures against an advertiser on the basis of its domestic legislation on protection of consumers, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from other Member States.

As will be shown in the following, the Proposal for a Directive on Electronic Commerce admits considerations of this kind as well.

As far as the relation to Private International Law is concerned, the Preamble, Rec. 7 states that the Proposal does not interfere with the application of the regulations of the Conventions of Brussels and Rome and does not aim to establish specific rules on Private International Law. This is well in accordance with the opinion that Internal Market Directives do not interfere with Private International Law, as this is an area, where the Community wishes to interfere as little as possible with national legislation .

However, the relation between the Proposal and Private International Law has not been considered to a large extent by legal commentators and cannot be so hastily dismissed.

2.5.2 Problems with the country of origin rule

According to the wording of Art. 3 para 1, the country of origin rule is to apply within the Directive's coordinated field. The coordinated field is in Art. 2 (g) defined as "the requirements applicable to Information Society service providers and Information Society services". This is an extremely broad definition, comprising all national and Community legislation applicable to Information Society Service providers on-line.

It can be maintained that the country of origin rule only applies on the provisions, explicitly mentioned in the Directive. However, an interpretation

[36] Directive 89/552 EC, OJ L 298 17.10.1989, p.23
[37] Joined cases 34, 35, 36/96 [1997] ECR I 3843

of this kind will make the principle rather meaningless, as this would require the drafting of several other directives, regulating the areas not mentioned in the Electronic Commerce Directive. It is more reasonable to assume that the Commission has actually made the same approach as in the Broadcasting Directive, which explicitly just regulates limited advertisement areas, but is meant to generally ensure the free flow of broadcasting services[38].

At a first glance, the country of origin rule has thus gained enormous importance, as it will apply to the whole spectrum of legal provisions related to Information Society services, such as official requirements on service providers, competition law and advertising law. Thus, it has received a legal importance dramatically exceeding its current status in Member States' legislation. As a consequence hereof, the risk of forum shopping may seem obvious, i.e. every Information Society Service provider will try to establish himself in the country within the European Union with the least strict laws.

However, studying the Proposal and drawing some immediate conclusions from it makes it obvious that this risk seems to be exaggerated to some extent.[39]

2.5.3 Derogations from the country of origin rule

A first important limitation of the country of origin rule is due to the fact that the Proposal only applies to service providers established within the European Union.

As far as providers established in third countries are concerned, the service receiving state is free to apply its own legislation. Furthermore, the Proposal is not applicable to certain important areas as i.e. Community rules concerning public health and consumer protection[40] (Art. 1 para 3), taxation, data protection, activities of notaries (Art. 22 para 1 and Annex I). As far as these areas are concerned, the application of the country of origin rule is always excluded.

Annex II lists areas, to which the Proposal applies, with the exception of the country of origin rule. Thus, the country of origin rule is excluded for copyrights protected by the Directive on the legal protection of topographies of semiconductor products[41], the Data Protection Directive[42], the insurance market, the emission of electronic money, unsolicited commercial communications by electronic mails and contractual obligations concerning consumer contracts.

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[38] For this conclusion, see e.g. *Hoeren,* MMR 4/1999 s.194-195, *Landvermann,* ZUM 11/1999 s.798, *Spindler,* ZUM 11/1999 p.781

[39] *Spindler,* ZUM 11/1999 p.781

[40] *Spindler* mentions the Distance Selling Directive as an example.

[41] Directive 87/54 EEC

[42] Directive 96/9 EC

As a last possibility, Art. 22 para 3 permits the Member States to introduce and apply its own rules under certain circumstances, when public health or security, consumer protection or other substantial interests are threatened.

As far as consumer protection is concerned, this implies that a difference must be maintained between the contractual obligations concerning consumer contracts, which are per se outside the scope of the proposal, and other consumer protective rules, which are covered by the country of origin rule, if no derogation can be made in accordance with Art. 22 para 3.[43]

These derogation possibilities do not make the country of origin rule meaningless. On the contrary, the proposal indeed foresees a substantial change to the Member States' current approach to information society services, even if it is actually a logical consequence of the fundamental Community principles of free movement of services over national borders. In all areas, not explicitly excluded from the Proposal's application area, the country of origin rule will apply. The derogations mentioned merely show that the risk for forum shopping may not be as big as it seems at first sight.

2.6 The relationship between the country of origin rule and Private International Law

As concluded above, the country of origin rule means that an information society service, which has given rise to a dispute, has to be considered under the laws of the Member State where the provider is established. This implies that not only the material rules of the state where the service provider is established, but the Private International Law of this state as well, must be considered when a conflict arises.[44] This will in the concrete cases limit the penetration of the country of origin rule, as the Private International Law of the provider's states may in concrete cases lead to the application of the laws of the receiving state.

Article 3 para 3 of the Proposal states

"*Paragraph 1* (Article 3 para 1= the country of origin rule[45]) *shall cover the provisions set out in Art. 9, 10, 11* (concerning treatment and conclusion of electronic contracts and information which is to be provided, respectively) *only in so far as the law of the Member State applies by virtue of its rules of Private International Law"*.

[43] *Spindler,* ZUM 11/1999 p.783
[44] For this conclusion, see *Spindler,* ZUM 11/1999 p.785 and *Hoeren,* MMR 4/1999 p.195, however critical to the consequences,
[45] The fact that Art. 3 para 3 actually only refers to Art. 3 para 1 must be a mistake from the drafters of the Proposal, as the country of origin rule would be meaningless without Art. 3 para 2.

It is not quite established whether "Member State" in this case means the provider's state. However, if this interpretation is accepted the wording may imply, that the country of origin rule is always applicable on provisions not in Art. 9, 10, 11[46]. However, this view must be opposed, as it would in principle mean that the country of origin rule takes precedence over the relevant state's Private International Law, establishing the country of origin rule as a general conflicts rule[47].

It seems highly improbable, that the Commission's intention has been to interfere with Private International Law to such a far reaching extent, in particular in view of its explicit statement in Rec. 7 ".. *this Directive does not aim to establish specific rules on Private International Law relating to conflicts of law or jurisdiction*.." Thus, it would seem that the Commission presupposes the validity of the Member States' Private International Law. Art. 3 para 3 has probably been drafted to merely underline that the parties' possibilities to choose which law to govern their contract etc. remains unaffected by the country of origin rule[48].

However, it is regrettable that Art. 3 para 3 is drafted in such a confusing way.

2.6.1 The country of origin rule; Concluding remarks

According to my interpretation, the country of origin rule will not have as far reaching consequences as some scholars have feared.[49] First, substantial areas are not even covered by the Proposal and remain under the competence of the individual Member States, even if they are connected to Information Society Services. Secondly, the Proposal mentions areas excluded from the country of origin rule, to which general choice of law rules will therefore apply. Thirdly, the Proposal foresees the possibility for the receiving state to apply its own rules in a concrete case, if certain, important interests are affected.

The relationship between the country of origin rule and Private International Law is not clear. In particular Art. 3 para 3 is unclearly drafted and confusing. The author of this paper agrees with the view that the Proposal does not aim to make the country of origin rule specify the Private International Law of the provider's state as applicable law, and that Art. 3 para 3, however regrettably indistinct, only aims to underline this conclusion.

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[46] *Spindler*, ZUM 11/1999, p.786,
[47] *Hoeren*, MMR 4/1999, p.195, *Spindler*, ZUM 11/1999 p.786
[48] *Spindler*, ZUM 11/1999, p.786. *Hoeren* sees this interpretation of Art. 3 para 3 as one of several possibilities, MMR 4/1999 p.195
[49] *Hoeren*, MMR 4/1999, p.194

The country of origin rule will get its major importance in the area of public law, as far as e.g. advertising is concerned. According to the present status of most Member States' laws, the state applies its own national law to advertising which has effects in that country. After the entering into force of the Proposal, all advertising has to be considered under the law of the provider's state, if the relevant advertising has not already been harmonized in Community legislation or if the Member State can get an exemption due to consumer protective interests etc. in accordance with Art. 22 para 2 and 3.

2.7 The Distance Selling Directive

2.7.1 Background and general provisions

The Distance Selling Directive was published in June 1997 and has to be implemented in the Member States national legislation within 3 years. When examining this directive, one has to bear in mind that it is very different from the Directive on Electronic Commerce. Being clearly drafted for the sake of the European consumers, it does not aim to simplify the trade and service provision over Internet, but to harmonize the Member States consumer protective legislation on a sufficient level, taking into consideration the special risks related to Internet based commerce.

The Directive applies, according to Art. 2 to most contracts concluded between a consumer and a supplier by means of distance communication. The latter is defined as any means of contract conclusion without the simultaneous physical presence of the supplier and the consumer (Art. 2 para 4). The Directive thus covers selling by i.a. telephone and fax as well as Internet commerce.

However, Art. 3 contains several exemptions. The Directive does not apply to contracts related to financial services, contracts concluded by vending machines, contracts concluded at an auction (Art. 3 para 1). In Art. 3 para 2 is further stated that goods intended for everyday consumption such as food and beverages, contracts for the provision of accommodation, transport etc. are excluded as well.

This implies that many of those contracts, which consumers generally conclude over Internet, are not covered by the directive.

Art. 4 states that the consumer has to be provided with certain information, regarding the identity of the supplier, price, payment arrangement etc. Information is also to be provided in written form. (Art. 5).

The regulation which is probably most favourable for the consumer is laid down in Art. 6. This article ensures him the right to withdraw from the concluded contract within 7 workdays, without penalty and without having

to give any reason. He can only be charged for the direct cost of returning the goods.

In many Member States, where the general consumer protective legislation is not very well developed, this will place the consumers in an extremely favourable position when ordering goods and services at distance, compared to when purchasing in person.

Art. 14 contains a minimal clause, stating that the Member States may introduce or maintain more stringent provisions to ensure a higher level of consumer protection, as long as they are compatible with the EC Treaty.

2.8 The relation between the Distance Selling Directive and Private International Law

The Distance Selling Directive seeks to harmonize the legislation of the Member States. A complete harmonization of national rules would render Private International Law rules concerning the choice of applicable law superfluous, as irrespective of which law chosen, the same substantial regulations would apply. The minimal clause in Art. 14, stating that Member States are free to maintain or introduce stricter provisions for the benefit of the consumers, implies that the national rules will remain different, however.

As will be shown below (*infra* 3.1.1) the Rome Convention on the choice of applicable law on contractual obligations takes as its starting point that contract parties are free to decide which law to apply to their contract. When no choice of law has been made, the contract is to be governed under the law of the country to which it is most closely connected. The Convention presumes that this is the law of the country where the part who has to perform the characteristic performance is domiciled. On the Internet, the characteristic performance would normally be the providing of goods or services, thus the law of the provider would apply to the contract. The consumer protective regulations of this state would be relevant.

However, the Convention states further, that under certain circumstances the consumers cannot be deprived of the protection, provided by the consumer protective legislation in their own country (*infra* 3.1.3).

This can in a concrete case get the consequence that a person selling goods or providing services on the Internet or through other media on which the Distance Selling Directive is applicable, would always have to comply with the consumer regulations of the consumer's state which have the strictest rules, if he intended to direct his activity towards the European Union Market, as it would not be sufficient to comply with the regulations laid down in the Distance Selling Directive.

Interpreting the relevant regulations this way, which seems accurate, would certainly create a huge obstacle to Internet based commerce.

If the service providers start to state at their webpages "NOT INTENDED FOR CONSUMERS", the effect of the Distance Selling Directive would eventually be detrimental to the consumers, which would be the total opposite of the intention of the directive drafters.

Art. 12 para 2 provides that the Member States must take the measures to ensure that the consumer does not lose the protection granted by the Directive by virtue of the choice of the law of a non-Member State. This provision only restricts the parties' possibilities to choose which law to apply on their contract. The rule does not affect general rules of Private International Law and can not be used for protecting the consumer if the application of less consumer protective legislation is the result of a normal application of rules of Private International Law.

2.9 Summary of Part One

Since the early 1960s the European Court of Justice has developed a consistent case law, interpreting the treaties of the European Communities teleologically. The supremacy of Community Law cannot be questioned. The Court has further repeatedly stated that all national laws, irrespective of what area they may concern, have to be set aside, when contrary to a Community regulation or creating an obstacle of any kind to the free movement of the Internal Market.

Private International Law concerns i.a. jurisdiction and choice of law when a dispute involving foreign elements arise. Although traditionally seen as rules of national law, the European Court of Justice has made clear that Community Law does not admit a national Court to apply its rules of Private International Law, if those would lead to a result not compatible with the intentions of the Community. The Treaty of Amsterdam has increased the Community competence in the field of Private International Law. However, it is still unclear to what extent.

Secondary Community legislation do sometimes contain explicit choice of law rules.

Information Technology has recently attracted a growing interest and the European Commission has taken several steps to introduce legislative acts, particularly addressing the potential problems associated with the use of the new medium.

The Proposal for a Directive on Electronic Commerce intends to create a free movement of Information Society Services on the Internet, by implying which rules the Member States have to lay down in their legislation and introducing the country of origin rule, which states that a service provider, complying with the rules of the Member State where he is established, may not be restricted when providing his services into the territory of other Member States.

The relation between the country of origin rule and Private International Law does not follow clearly from the Proposal. However, it seems to be in accordance with the intention of the European Commission to assume that not only the material rules of the provider's state, but its rules of Private International Law as well, has to be considered under the country of origin rule.

Several areas are explicitly excluded from the scope of the Proposal and the country of origin rule, respectively. However, the country of origin rule will be of great importance in the field of public law, e.g. as far as advertisement rules are concerned. This area has traditionally been considered under the laws of the receiving states.

The Directive on Distance Selling has to be implemented in the Member States' national legislation in June 2000 at the latest. It aims to harmonize the Member States' laws protecting consumers purchasing goods and services via telephone, fax or the Internet. Containing a minimal clause, it gives Member States the possibility to adopt stricter regulations for the benefit of their consumers.

3 PART TWO

3.1 The Rome convention on the Law Applicable to Contractual Obligations (1980)

3.1.1 General principles

The parties' freedom to choose which law is to govern their contract, is the general principle of the Convention, stated in Art. 3. It is to be stressed that the choice of law that the Convention lays down may result in the application of a law of a non-contracting state (Art. 2).

If no choice has been made, neither explicitly nor implicitly, the court has to apply the law of the country to which the contract is most closely connected, Art. 4 para 1. This *closest connection* method implies that all matters connected to the contract are brought together and weighted against each other in order to find out to which country the contract has the most natural connection.

Art. 4 para 2 contains a presumption. The contract shall be presumed to be most closely connected with the country where the party who is to effect the "characteristic performance" has his habitual residence. This is according to the Report on the Convention generally not the performance of money, but the performance for which the payment is due, e.g. the delivery of goods, the providing of services or transport. As for the geographic location, this is the country in which the party liable for the essential performance is habitually resident or has his central administration at the contract conclusion time.[50]

This presumption does not apply, however, when it is not possible to determine the characteristic performance (Art. 4 para 5).

3.1.2 Mandatory rules

The Rome Convention sets limits to Private International Law by providing mandatory rules, which have to apply irrespectively of the law chosen by the parties. In Art. 3 para 3 it is stated that the choice of law shall not, when all other elements relevant to the situation are connected with one country only, prejudice the application of mandatory rules of that law, i.e. rules which cannot be derogated from by contract.

[50] Giuliano, M and Lagarde, P: *Report on the Convention on the law applicable to contractual obligations*, OJ 1980 C 282, 1, Art.4;3 (In the following *Giuliano-Lagarde*)

Art. 7 para 1 provides the deciding court with discretion, by stating that the court is not restricted in the application of mandatory rules of a country not providing the governing law, but closely connected to the situation. In Art. 7 para 2 is further stated that the court is always free to apply its own mandatory rules.

An Ordre Public rule is to be found in Art. 16.

3.1.3 Consumer contracts

Consumer, as well as employment contracts have been subject to specific regulations, aiming at providing these two categories with certain benefits. The provisions regarding employees are to be found in Art. 6 and will not be further considered .

A consumer contract is a contract concluded with a person who acquires goods and services mainly for his private use, not for business purposes or resale. Though not explicitly mentioned, the special rules shall only apply when the consumer's counterpart acts in the course of his trade or profession[51]. The convention seeks to ensure that the consumer will not be deprived of consumer protective rules laid down in the legislation of the country where he has his habitual residence, even if another law has been chosen to govern the contract.

The choice of law made by the parties is not void. However, the rules of the consumer's habitual residence country will apply if they offer the consumer a better protection (Art. 5 para 2).

If no choice of law has been made the contract is to be governed by the law of the country where the consumer has his habitual residence. (Art. 5 para 3).

Those special provisions do apply under certain circumstances only, some of which are of special interest regarding information society activities and therefore relevant in this work.

For the application of the consumer protective rules, the contract conclusion must have been preceded by a *specific invitation* addressed to the consumer or by *previous advertising* in the country where he has his habitual residence and the consumer must in that country have taken all the *necessary steps* on his part for the contract conclusion.

[51] Giuliano-Lagarde, Art.5;2

3.2 Special problems regarding electronic commerce

In an online environment the first problem to solve is if a contract has at all been concluded, in view of the EU Member States' different regulations as to when a contract is considered binding. This matter will not be further considered here but it can be mentioned that the Directive on Electronic Commerce seeks to solve this issue by stating in Art. 11 para 1 that a contract is concluded when the recipient of the service has electronically received an acknowledgement of receipt of the recipient's acceptance from the service provider.

To make a choice of law should generally not be more complicated in the electronic world than in the real one. A simple solution for the web site provider could be to state at his website that e.g. British law will govern the concluded contracts.[52]

3.2.1 The closest connection method

Substantial problems arise when no choice of law has been made and the "closest connection method" is to be carried out. The contract shall as mentioned above according to Art. 4 para 2 Rome Convention be presumed to be most closely connected with the country where the party who is to effect the "characteristic performance" of the contract has his habitual residence at the conclusion time. One has to take into account that a web site on the Internet is often just an intermediary for other companies, offering air-line tickets, theatre tickets etc. The first problem is then to determine which performance is the characteristic one.

When this can not be determined, the general "closest connection" test has to take place. This method is fairly straightforward in the physical world where the geographic locations of the parties are generally clear, but its application on the Internet is difficult. It is often impossible to determine where one's counterpart is domiciled. Furthermore, the consideration of geographic location threatens the whole Internet idea, namely the non-importance of where the two Internet users happen to be at the moment.

Further, there are a number of places which could be of relevance to the contract; the customer's residence, the location of the operator, the location of the company the intermediary is working for, the place where the technical means are to be found etc.

[52] If the choice of law clause has been made a part of the contract is another question, which will not be developed here.

3.2.2 The consumer

As for consumer contracts, special difficulties arise. The Report on the Rome Convention[53] states that the consumer regulations are to be applied only in those cases, where the counterpart knows or has reason to believe that he is dealing with a consumer. This criterion, being rather logical under circumstances where the negotiating parties are or should be well aware of each otherss status, is difficult to apply on the Internet. When products as toys, sport shoes and music CDs are ordered, the service provider will generally be able to determine that he has to do with a consumer. However, one might well find situations when he cannot reasonably foresee that he is dealing with a consumer. The latter may then find himself deprived of mandatory protective rules in the legislation of his own country when a conflict arises.

3.2.2.1 Previous advertising

According to the Report on the Rome Convention this means that the trader shall have taken steps, e.g. mail order and door step selling, to market his goods or services in the country where the consumer resides. The undertaking of steps is defined as certain acts, as advertising in the press or on radio and television or by catalogues aimed specially at the consumer's country.[54]

The important place is the location where the offers or advertisements are perceived, not from where they were initiated.

Regarding Internet this would render the location of the server which contains the web page relevant[55]. When the server is located in another country, the consumer does actually himself import the advertisement or offer to his country by requesting the web page. This means that the consumer regulations will not apply, as they will not when a British consumer during his holiday in France buys a French magazine, brings it back home and then from England replies to an offer made in the magazine.

It is doubtful, however, if those two situations are as equal as they may seem at the first glance. The trader, promoting offers on his web page is well aware of the fact that his page could easily come to the attention of consumers in any country (often, this is even his purpose). For the consumer on the other hand, it is perhaps not so obvious that when requesting a web page situated on a server in a foreign country, he loses the consumer protective rules of his own country.[56]

[53] Giuliano-Lagarde, Art. 5;2
[54] Giuliano-Lagarde, Art. 5;3
[55] Foss, M and Lenda, P (see N.27, above), 4.3.2.2
[56] Foss, M and Lenda, P (see N.27, above), 4.3.2.2

3.2.2.2 A specific invitation

An invitation via e-mail cannot be considered different from an invitation to the consumer made by normal mail, as long as the consumer has an e-mail account under the national top level domain of his own country (e.g. .uk, .de).

However, the situation changes when the consumer has an e-mail address under one of the very popular generic top level domains, such as .com. It could in these cases be argued that this is not an offer to the consumer in his own country as it is not possibly predictable for the provider to determine where his presumable customers have their residence. On the other hand, a trader using e.g. hotmail for advertising must realize that he could reach cosumers all over the world. If not willing to expose himself to that risk, he may advertise in other ways. It is further disputable, if it is really a good idea to treat the consumer differently, depending on undern which top level domain he has his e-mail account. It would certainly create a difference which would be difficult to for the consumer to accept.

3.2.2.3 Necessary steps taken in the country of habitual residence

When considering the necessary steps on the consumer's part for the contract conclusion, the factual steps are relevant.[57] When replying to an e-mail, this does not create large problems. When filling in an order form directly onto the supplier's web server, the situation should not be treated differently, as the necessary steps are to be seen as the typing on the keyboard and clicking the appropriate buttons.[58]

Difficulties arise when the consumer is travelling or taking the steps to conclude a contract outside his country of habitual residence. This is of course a problem which exists even outside the Internet; such as the consumer on holiday abroad, replying by telephone to an offer he has received at home. However, the situation will appear much more frequently in the electronic world due to the abundant possibilities of utilizing Internet Cafés, answering e-mails from mobile telephones etc.

[57] Giuliano-Lagarde, Art.5;3
[58] Foss, M and Lenda, P (see N.27, above), 4.3.2.3

3.3 The Brussels Convention on the Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters (1968)

3.3.1 General principles, at today's stand

The Brussels Convention only provides solutions for disputes concerning civil and commercial law, i.e. private law, Art. 1 para 1, but not for matters related to public law.

Its fundamental principle is that every person domiciled in a contracting country should be sued in the courts of that state, Art. 2 para 1. As companies and other legal bodies are concerned, their seat is to be treated as their domicile. In order to determinate the seat, the court shall apply its own rules of Private International Law (Art. 59).

The convention does, however, provide alternative jurisdiction rules as well.

3.3.2 Contract matters

Concerning contracts, the parties may determine a court to have exclusive jurisdiction. This agreement does not even have to be written if the parties have an established practice between themselves, or it is generally known and observed in the particular area concerned, Art. 17.

If no such agreement has been made, Art. 5 para 1 states that a person can be sued "in the courts for the performance of the obligation in question".

3.3.2.1 The relevant obligation

The first problem to solve is to decide what is the relevant obligation[59]. The Court stated in its judgement *De Bloos v Bouyer*[60] that Art. 5 para 1 is not referring to any obligation under the contract but to the contractual obligation forming basis of the legal proceedings, the one which the contract imposed upon the defendant. If the plaintiff is seeking compensation a decision has to be made as to whether this claim involves an independent contractual obligation, thus falling within Art. 5 para 1, or whether it is a new obligation, replacing the not performed one (which would be outside Art. 5 para 1.) The national court where trial is sought has to settle the matter regarding the law applicable to the contract under its own rules of Private International Law.

[59] North, p.294
[60] Case 14/76 [1977] ECR 1497

The fact that a contract normally consists of several obligations is the main problem, since the principal obligation may be difficult to identify[61].

3.3.2.2 The place of performance

Secondly, the place of performance of the obligation has to be determined. This will normally be specified in the contract between the parties. If this is not the case, the deciding forum will have to determine the matter by the application of its own rules of Private International Law. The European Court of Justice has refused to adopt a Community definition[62].

3.3.3 Matters relating to tort

In matters relating to tort, the courts of the states where the harmful event occurred will have jurisdiction, according to Art. 5 para 3.The European Court of Justice has interpreted this as including the place where the harmful event occurred as well[63]. Further, the Court has stated that every place where the harmful event has caused damage to the injured party has jurisdiction[64] in the matter. The difficulties, which the application of those principles may cause on the Internet constitute a most interesting problem. Having less to do with electronic commerce, they will however not be considered here.

3.3.4 Consumer matters

The Brussels Convention contains special benefit rules concerning consumer contracts. These are to be found in Art. 13-15. If certain conditions are fullfilled, the consumer may bring proceedings against his counterpart either in the part where he is domiciled, according to the main rule in Art. 2 para 1, or in the state where the consumer himself is domiciled. The consumer may only be sued in his own country. The necessary conditions correspond to those of the Rome Convention[65], i.e. the consumer must before the contract conclusion have been subject to a special invitation or advertising in the state of his habitual residence and he must have taken all the steps necessary on his part to conclude the contract in this state as well.

For certain cases, e.g. cases regarding real estate the exclusive jurisdiction of one country is stated in Art. 16.

Further, the Brussels Convention deals with the important matters of recognition and enforcement of judgments. These questions are not of

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[61] North, p.295
[62] North, p.296
[63] *Bier v. Mines de Potasse d'Alsace*, [1976] ECR 1735
[64] *Sheville v. Presse Alliance*, [1995] ECR I 415
[65] This is no wonder, since those regulations were actually modelled on the consumer regulations in the Rome Convention.

particular interest from an Electronic Commerce perspective and will not be further studied.

3.4 Special problems regarding electronic commerce

The first problem could be to determine where a service provider on the Internet has his seat. Instead of referring to the rules of Private International Law of each contracting state, it would be preferable to lay down a distinct definition directly in the Convention.

With regard to contracts, it is necessary not only to determine what is the relevant obligation but also to decide where the performance of the obligation took place. This creates practical problems on the Internet. Would the place of performance be the country where the provider is seated, where the server is located or the customer's domicile. The matter becomes even more complicated when the contract regards an object that does not even exist outside the network, e.g. software.

As for consumer's matters, the problems are identical to those already discussed above (*supra* 3.1.2) concerning the law applicable to contracts.

An interesting issue concerns the regulation of advertisement.

Advertisement rules are considered part of public law, thus not falling within the scope of the Brussels Convention. It is generally accepted, that a state can only assume jurisdiction if the alleged infringing event falls within its own jurisdiction[66]. It is for every state to define the limits of its jurisdiction, but generally the mproblem to consider is whether the advertisement has taken place inside the territory of the state and whether the advertisement was directed towards the state. Ways to determine this is by examining whether the advertisement was easily accessible within the and in what language it was written.

On the Internet, the first question to be answered is if advertisement on a web page is directed to any country at all, the Internet user being the person active by requesting the page.

This is in my opinion, however, a far too formal approach. On the other hand, it would be preposterous to consider advertisement directed to the whole world as soon as it is accessible on the Internet. In this situation the web page should be considered as an entity and different factors, such as language, price etc should be brought together and weighted against each other. The outcome of this procedure would lead to a conclusion regarding what countries the page was directed to. On the other hand, this test must be

[66] Foss, M and Lenda, P (see N.27, above), 3.3

done with discretion. It is obvious that a web page in English could not be considered as directed only towards the Internet users in countries where English is the official language.

3.5 A New Proposal

The Commission has recently put forward a proposal for amending the Convention of Brussels[67]. Work has also started on a draft for amending the Rome Convention. This proposal does, however, only regard the choice of law applicable to tort and is not intended to regulate the choice of law on contractual obligations. As for the nearest future, it is to presume that the Rome Convention at today's stand will continue to rule the choice of law applicable to contractual obligations.

Some of the proposed changes to the Brussels Convention will now be described.

3.6 The Proposal for a New Regulation concerning Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial matters

3.6.1 Background

The work on a parallel revision of the Brussels and Lugano Conventions was initiated in the end of 1997. The Commission presented its first proposal in the beginning of 1998[68]. The proposal was presented to the European Parliament, which has not yet given its opinion , and to the Council. The Commission continued its work, presenting a second proposal in the summer of 1999. The purpose of the proposal is to replace and update the Brussels Conventions and its protocols, among other things taking into account the new forms of commerce.[69]

3.6.2 Main changes

3.6.2.1 Change of the legal structure

The first important proposed change to notice is the aim of the Commission to turn the Brussels Convention into a Regulation, to change its legal structure from being intergovernmental to become a part of Community

[67] See N.4, above
[68] OJ C 33, 31.1.1998
[69] The Commission's Explanatory Mermorandum to its *Proposal for a Council Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters,* Art.2 para 1, accessible at *http://europa.eu.int/geninfo/query*

Law. The Commission motivates this with the need for obtaining free movement of judgments in civil and commercial matters. This purpose could best be achieved by laying down the rules in a mandatory legal Community instrument, not dependent on national law transposing the content of the regulations (Preamble, Rec. 6).

The Brussels Convention has to continue to exist, however, since Art. 65 EC Treaty, which constitutes the legal ground for the Regulation is located under the Title IV of the EC Treaty, concerning Visa, Asylum, Immigration and other policies related to the free movement of persons. This title is not applicable in the UK, in Ireland and in Denmark[70].

3.6.2.2 An autonomous definition of the seat of a legal person etc.

The Proposal takes over the fundamental structure and principles of the Convention, thus repeating the basic principle that every person should be sued in the courts of the country of his domicile. As for legal persons, the reference to Private International Law has been abolished. An autonomous definition is laid down in the new Art. 57, stating that a company or other legal person or association of natural or legal persons is domiciled at the place where it has its statutory seat or central administration or principal place of business.

However, the reference to national conflicts rules is kept with regard to validity, nullity and dissolution of legal persons and decisions of their managing bodies.

3.6.2.3 An autonomous definition of the place of performance

The place of the performance of the obligation, Art. 5 para 1 has been given an autonomous definition both in the case of the sale of goods and in the case of the provision of services.

Art. 5 para 1b states that the place of performance shall in the case of sale of goods be the place in a Member States where under the contract the goods were delivered or should have been delivered and in the case of service providing, the place in a Member State where under the contract the services were provided or should have been provided.

3.6.2.4 Consumer contracts

The most far-reaching changes concern consumer contracts, which are, as analyzed above, subject to certain conditions in the Brussels Convention. The provisions concerning consumers are found in Art. 15 f in the Proposal. Considering the special need to protect consumers, as explicitly emphasized

[70] Protocols annexed to the Treaty on the European Union and to the Treaty establishing the European Community; *Protocol on the position of the United Kingdom and Ireland* and *Protocol on the position of Denmark*

in the Council's Resolution on the Consumer Dimension of the Information Society[71], the Commission proposes an enlarged area for application of the consumer protective rule, i.e. the consumer's possibility to sue his counterpart in the country of his own habitual residence.

Art. 15 is proposed to apply to all kind of consumer contracts, except for transport contracts[72].

Further, the Commission proposes a removal of the old condition stating that the consumer must have taken the steps necessary on his part in his own country for being able to benefit from the consumer rules. The Commission emphasizes that the criterion for applying the protective rules should be that the consumer's counterpart has *directed his activity* towards the consumer's state, the necessary link thus consisting of the directed activities.

Art. 15 states as follows:

"...jurisdiction shall be determined by this section...."

"c) in all other cases, [if] 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, and the contract falls within the scope of such activities."

According to the Commission, this is to make clear that Art. 15 applies to consumer contracts concluded via an interactive web site accessible in the state of the consumer's domicile. However, the regulation shall not apply, when the consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his domicile country[73].

The former Art. 14, providing that proceedings against a consumer may be brought only in the country where he is domiciled has received an important amendment stating that the consumer may only be sued in the *place* where he is domiciled. The Commission explains this obvious depart from the principle that the Regulation only applies to International jurisdiction, and not to jurisdiction within a Member State, as warranted by the concern to enable the consumer to sue his counterpart as close as possible to his home[74].

[71] OJ C 23 1999, p.1
[72] Contracts were both travel and accommodation are included (package holiday) are not excluded, however.
[73] The Commission's Explanatory Memorandum (see N.67, above), comments on Art.15
[74] See N.67, above, comments on Art.16

3.6.2.5 Other changes

The Proposal further aims to simplify the procedure for the declaration of enforceability of judgments, by making the first stage of the enforcement virtually automatic.

The last change to be mentioned here regards an amendment to the former Art. 17 concerning prorogation of jurisdiction, declaring that any communication by electronic means which provides a durable record of agreement, shall be equivalent to writing.

3.7 Comments on the changes

Replacing the Convention with a *Regulation* would above all simplify and improve the procedure for amending and changing it. Not being an intergovernmental document any longer, making an amendment to the Regulation would follow the normal rules of the EC Treaty for amending Community Legislation.

The introduction of an *autonomous definition of the seat* of a legal person would be a useful move, especially as the proposed wording "statutory seat or central administration or principal place of business" is unusually clear and would probably cause no interpreting problems.

As the *autonomous definition of the place of performance* is concerned, it is a welcome attempt to try to introduce a common definition.

However, I am not convinced that it would make much difference, with regard to the Internet.

For contracts regarding delivery of goods as books, toys, food and clothes, the situation would probably create no difficulties, since the place were the goods have been delivered or should have been delivered in most cases would be sufficiently clear. However, electronic commerce often concerns the providing of services or the providing of products as programs and other software. The definition of the place of performance as the place where "under the contract the services were provided or should have been provided", still gives no clear answer to the question if the relevant place is the place where the customer's computer is located, or the location of the server, or the location of the service provider's computer. When ordering a calculation program, it is typically not delivered to the customer's computer. Instead, the customer often downloads the programme himself from an intermediary or the service provider.

The commerce involving this kind of products, especially music, is growing.

The Commission intends to eliminate the problem of determining "*the obligation in question*" by stating that their "pragmatic determination of the

place of enforcement" applies regardless of the obligation in question, even where this obligation is the payment of the financial considerations of the contract[75].

The proposed, amended regulations on *consumer contracts* have given rise to substantial anxiety among people and companies doing business on-line, fearing that they will have to contend with potential litigation in every Member State or will have to specify that their products or services are not intended for certain Member States[76]. As the proposal is drafted, this fear seems justified.

The removal of the condition stating that the consumer had to take all the steps necessary on his part for the conclusion of the contract in his country of habitual residence to trigger the consumer protective regulations appears justified in view of how much more mobile today's society is, compared to the conditions when the Brussels Convention was drafted in 1968.

However, I do not agree with the Commission's determination to apply the consumer protective rules as soon as an interactive web site is accessible from the consumer's domicile state. This would have far too extensive consequences for the business conduct on the Internet.

3.7.1 Activity directed towards the consumer's State

The European Commission has chosen to make the consumer protective rules applicable, when the consumer's counterpart has directed his activities to the State of the consumer's habitual residence.

The Commission draws a rather uncertain borderline, stating that an interactive web page will render the consumer protective rules applicable, whereas a passive web site will not[77].

Under these circumstances it could be useful to start with a look at recent U.S. case law with regard to juridiction of the states in cases concerning Internet. The U.S. case law is abundant compared to the European one and some common principles have been established.

3.7.1.1 U.S. principles

Beginning with the *International Shoe* case[78] the U.S. Supreme Court has developed principles regarding State jurisdiction over non resident defendants, so called "long arm statutes".

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[75] See N.67, above, comments on Art.5

[76] See e.g. Mike Pullen's article *"EU's dangerous threat to e-commerce"*, Legal Week, 2/9/1999

[77] See N.67, above

[78] *International Shoe*, 326 U.S 310 (1945)

First, the non resident defendant must have had *minimum contacts* with the forum, resulting from an affirmative act on his part. These contacts must have put the defendant on notice that he should reasonably anticipate being haled into court in the forum state.[79]

Secondly, it must be fair and reasonable to require the non resident to defend suit in the forum state[80].

Two broad classes of jurisdiction have been recognized with regard to the defendant's *minimum contacts* with the forum state:

a). The court may find **General jurisdiction** when the defendant's contact with the forum are unrelated to the dispute. The contacts with the forum must have been systematic and continous enough so that the defendant might have anticipated defending any type of claim there. Given the nature of General Jurisdiction, a person or corporation has a right to structure his/its affairs to avoid the General Jurisdiction of a certain state's courts.

General Jurisdiction exists when a non resident makes a substantial number of direct sales into the forum, solicits business regularly and advertises in a way specially targeted at the forum market[81].

Advertising in national media and publications does not as such constitute enough continous and substantial contact with the forum state to create General Jurisdiction[82].

b). The **Special Jurisdiction** focuses the minimum contacts analysis on the relationship between the defendant, the forum and the litigant. The facts of the dispute have to arise out of the defendant's contacts with the forum state. One single act directed towards the forum state can be enough for allowing the forum court to exercise Specific Jurisdiction. Further, the defendant must have *directed activities* towards the forum state, thus have purposefully availed himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of the forum law.

In U.S. case law is established that Specific Jurisdiction requires an offer purposefully directed at the forum, as when the defendant voluntarily seeks out a forum corporation to contract. The placement of a product into the commerce is not enough to satisfy the purposeful availment requirement for minimum contacts. An action, indicating an intent or purpose to serve the market in the forum is necessary.[83]

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[79] *World Wide Volkswagen Corp. v. Woodson*, 444 U.S 286 (1980)
[80] *Stuart v. Spademan,* 772F.2d 1185 (5th Cir.1985)
[81] *Modern Mailers Inc. v. Johnson and Quin Inc.,* 844 F. Supp. (E.D Pa. 1994)
[82] See cases as *Hearst Corp. v. Goldberger,* No. 96 Civ. 3620 (PKL) (AJP), 1997 U.S. Dist, *Geckling v. St. Gerorge's School,* 773 F 2d. (3rd. Cir. 1985)
[83] *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102 (1987)

The courts have found sufficient contact with the forum state when the defendant has made telephone calls, sent correspondence into the forum and attended a meeting with the plaintiff there as well[84]. Further, sufficient contact was found when the defendant had directed 12 communications to the forum, had engaged in negotiations that would create rights and obligations in the forum and had initiated contracts with the forum over telephone and through mail[85].

With regard to Internet, the courts seem to agree on some common principles:

The mere creation of a web site is not an act purposefully directed towards a forum state if there are no other activities connected to the forum[86]. Advertising on the Internet is similar to advertising in a national newspaper and although the web sites may be accessible all over the world, they can not be considered as directing activity at or purposefully avail their creators to a certain jurisdiction, as long as products can not be purchased and contractual relations are not formed[87]. However, merely contracting with a resident of the forum state would not be enough either.

Concerning Internet case law, the courts have distinguished three different situations[88]:

1. In the first situation the defendant clearly does business over the Internet by entering into contracts with residents of other states which involve the knowing and repeated transmission of computer files over the Internet[89].

The home states of the users may exercise personal jurisdiction. If the business conducting activities are continous enough, General Jurisdiction may exist. If not, the circumstances have to be considered under the criteria for Specific Jurisdiction.

2. The "middle level" consists of cases concerning interactive web sites where the user can exchange information with the host computer. Generally, no General Jurisdiction exists. Whether Specific Jurisdiction does exist must be determined by examining the level of interactivity between the parties on

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[84] *Carteret Savings Bank F.A. v. Shushan*, 954 F. 2d. (3d Cir. 1992)
[85] *Grand Entertainment Group Ltd. v. Star Media Sales Inc.*, 998 F. 2d. (3d. Cir. 1993)
[86] See cases as *Bensusan Restaurant Corp. v. King*, 126 F. 3d.25 (2d Cir.1997), *SF Hotel v. Energy Investments Inc.*, 968 F. Supp. 1032 (D. Kan. 1997), *Jolly v. Weber*, 977 F Supp. 327 (D.N.J 1997) and *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356 (W.D.Ark. 1997)
[87] See *Jolly v. Weber* (N.86), *Blackburn v. Walker Oriental Rug Galleries Inc.*, F. Supp. No. 97-5704 (U.S. Dist 1998)
[88] See cases as *Tom Thompson v. Handa Lopez Inc.*, No. Civ.A. SA97-CA 1008 EP and *Jolly v. Weber* (N.86)
[89] A famous case in this category is *CompuServe v. Patterson*, 1996 FED App. 0228P (6th Cir.), 89F.3d. 1257

the web site.[90] It is crucial to determine if the web page holder due to his Internet activities has purposefully availed himself of the jurisdiction of the forum state.

3. In the third category fall passive web sites that solely make information available to interested parties. In those cases, the minimum contacts requirement with the forum is not fulfilled, making the exercise of personal jurisdiction by the forum state impossible.[91]

Unfortunately, even if the above mentioned categories are generally accepted by most U.S. Courts, the case law is unclear and inconsistent.

CompuServe v Patterson[92] is considered to be a case falling under the first category. Patterson, a barrister domiciled in Texas had contracted with the national computer network CompuServe, head quarted in Ohio, to allow distribution of his software on the network. Patterson subsequently learned that CompuServe was distributing other software under a name very similar to that of his product and demanded monatory compensation for the infringement. CompuServe filed suit in Ohio, seeking a declaratory judgment that they had not infringed Patterson's trade mark. Patterson moved to dismiss for lack of personal juridiction.

The Ohio court found Specific Jurisdiction over Patterson by arguing that the conflict had arisen out of the contract he had concluded with Compuserve and that Patterson had put his wares into the stream of commerce in Ohio.

However, the decision has been critisized. Burk[93] emphasizes that the court did not find Patterson's contact with Ohio continous and substantial enough to create General Jurisdiction. Specific Jurisdiction was found solely due to the fact that the court combined the contract with Patterson's Ohio sales. However, Burk points out rightly that the contract *had nothing to do with the dispute*, as the dispute regarded the alleged infringement of Patterson's trade mark. This implies that one of the conditions for exercising Personal, Specific Jurisdiction was not fulfilled, namely that the dispute must have arisen out of the defendant's contact with the forum.

Maritz[94] is to place in the second category. In this case the Californian defendant had put up a web site as a promotion for its upcoming services.

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[90] See *Tom Thompson v. Handa Lopez Inc,* (N.88), *Maritz Inc. v. CyberGold Inc.,* 947 F Supp 1328 (E.D.Mo.1996) and *Zippo Mfg.Co v. Zippo Dot Com Inc.,* 952 F. Supp 11119 (W.D.Pa 1997)

[91] See *Bensusan Restaurant Corp. v. King,* 126 F. 3d.25 (2d Cir.1997) *and Jolly v. Weber* (N.86)

[92] See N.89, above

[93] Burk, D: "*Jurisdiction in a World without Borders*", http://vjolt.student.virginia.edu/graphics/vol1/homeart_3.html

[94] See N.90, above

The service consisted of assigning users an electronic mailbox and then forwarding advertisement for products and services that matched the users' interests to those electronic mailboxes. Users were encouraged to add their address to a mailing list to receive updates about the service.

The court in Missouri rejected the defendant's argument that his web site was solely passive, holding that the defendant's conduct amounted to "active solicitation" and promotional activities and that the defendant "indiscriminately responded to every user" who accessed the site and found that the defendant thus had purposefully availed him self to the juridiction of the courts of Missouri.

In *Zippo*[95] a Pennsylvanian court exercised personal jurisdiction over a defendant established in California. The court held that the defendant, having contracted with 3000 individuals and seven Internet Providers in Pennsylvania had not only been advertising on the Internet, but had been conducting electronic commerce in Pennsylvania.

In the *Heroes* case[96] the court seems to have followed the reasoning in *Maritz* and *Zippo*, finding Specific Jurisdiction after they have considered not solely the existence of a web site, accessible i.a. in the home state of the plaintiff, but the interactivity of the parties, too.

Cases as *Hearst* [97], *Bensusan*[98], *Blackburn*[99], *Cybersell*[100] and *Weber* are usually placed in the third category. The courts have in those cases rejected Personal Jurisdiction, as the defendants' only contacts with the forum consisted of passive web sites.

However, in the *Inset*[101] case the defendant's contact with the forum state (Connecticut) consisted solely of posting a passive web site that was accessed by approximately 10 000 Connecticut residents and maintaining a toll free number. The court held this sufficient to exercise personal jurisdiction over the defendant. The court followed this reasoning in *Telco*[102], stating that advertisement on a passive web site, accessible in the forum state was enough to create General Jurisdiction. In *Heroes*, the purposeful availment requirement was considered fulfilled, as the defendant had posted a web site on the Internet and advertised in a national newspaper.

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[95] See N.90, above
[96] *Heroes Inc. v. Heroes,* 958 F. Supp. 1 (D.D.C 1996)
[97] *Hearst Corp. v. Goldberger* (N.82)
[98] See N.91, above
[99] See N.87, above
[100] *Cybersell Inc. v. Cybersell Inc.,* 130 F.3d. 414 (9th. Cir. 1997)
[101] *Inset Systems, Inc. v. Instruction Set, Inc.,* 937 F. Supp.161 (D.Conn.1996)
[102] *Telco Communication v. An Apple A Day Foundation Inc.,* 977 Supp. 404 (E.D. Va 1997)

3.7.1.2 Conclusion

In seeking guidance to the interpretation of the "directed activities" in the new proposal, the U.S. case law, in which the courts have found Special Jurisdiction, is relevant. The wording of the Proposal for the Regulation presupposes that the dispute arises from the defendant's contacts with the consumer's state, as does the U.S. concept of Special Jurisdiction. However, U.S. case law shows that the concept of *directed activity* is not easy to apply when a dispute arises. It is difficult to draw a clear border between passive web sites just providing information and web sites interactive enough to be considered as directing activities toward a certain state or several states. The European courts will probably develop a rather inconcistent case law, just as the U.S. Courts have done.

An interesting point in the American doctrine of extending personal jurisdiction to non residents is the "fair and reasonableness" test. Before extending their jurisdiction in a concrete case, the U.S. courts, after having determined that the minimum contacts requirement is fulfilled, must examine if it would be fair and reasonable to exercise their jurisdictional powers in concreto.

This reasonableness prong exists to protect defendants against unfairily inconvenient litigation. The court must consider the burden on the defendant in light of other factors, including ."the forum state's interest in adjudicating the dispute" and "the plaintiff's interest in obtaining convenient and effective relief"[103].

This possibility of considering the effects of the court's exercise of its judicial powers in the concrete case does not exist in the Commission's Proposal.

3.7.1.3 Some European considerations

As far as the European Union is concerned, it can be useful to have a look at pre-Internet case law considering the applicability of the advertising laws of a certain state. Most legal systems take the view that advertising measures may be considered under local law, as soon as they are directed towards this territory (which does not mean that the advertising actions may not be directed against other territories as well). The place where advertising measures are actually carried out is irrelevant. Decisive is not the public that the advertiser actually wanted to reach, but how his advertisement may reasonably be interpreted by the receivers. Even if the case law considers the scope of a state's advertisement laws, and does not deal with jurisdiction issues, it may be useful to study, as it concerns the interpretation of the expression "directed activity".

[103] *World Wide Volkswagen* (N.77)

In the *Scanorama case*[104], a Swedish court had to decide if a flight magazine, available at both domestic and international flights, was directed towards a Swedish public, and therefore had to be in accordance with the strict Swedish tobacco and alcohol advertisement rules. The court held that the decisive factors were in what territories the magazine was mainly spread and if the advertisements were directed to the Swedish public. In this case, the court did not find Swedish law applicable, as the magazine was mainly available on International flights and was written in English. Furthermore, the court found the content of the magazine aimed at foreign readers and did not hold the advertisements in questions to be directed towards a Swedish public.

On the contrary, the higher Regional Court in Frankfurt am Main, Germany applied German Advertising Law on American advertisements in an U.S. scientific journal, which had only a couple of hundreds of German subscribers[105].

Following the approach of the Frankfurt Court, all Internet activities would have to be seen as directed towards Germany, as soon as they could be requested from Germany. However, most German commentators oppose this view, stressing the necessity to consider all circumstances in the concrete case in order to determine if an Internet activity is directed towards Germany[106]. The language of the web site is often mentioned as a relevant factor. A German web site would prima facie be considered as directed towards Germany, Switzerland and Austria. However, the use of English on the web site does naturally not lead to the conclusion that it is only directed against countries where English is the first language. Of further relevance is the nature of the offered service. A local vendor, advertising online about his home delivery of cookies in his home village in the north of Sweden can of course not be considered as directing his activities towards Germany. A service provider's advertising in other media, e.g. in local television and newspapers, imply that even his online activities are directed towards this country[107].

So far, only one German case deals explicitly with the question if an Internet activity can be considered as directed towards the German public[108]. The case considered applicability of German Advertisement Law. The service provider, who was established outside Germany, offered an interactive website, where the customer could order a fountain pen. The web site was drafted in English. According to a previous German court decision, the service provider was prohibited to market the fountain pen in Germany. However, German customers could of course request the Internet web site. The court held that the fact, that it was possible to access the web site from

[104] MD 1989:6
[105] OLG Frankfurt am Main, decision from 25/10/1990
[106] See e.g. *Kotthoff,* CR 11/97, s. 676 ff, *Ruessmann,* K & R 10/1998 s. 422 ff
[107] *Ruessmann,* K & R 10/1998 s. 424
[108] OLG Frankfurt am Main, decision from 3/12/1998

Germany, was alone not enough to consider it as directed towards the German market. In the concrete case, the court found the web site directed to the German public. It emphasized the fact that the fountain pen was presented as a "world wide" offer, with no special notification that it was not aimed at German customers. In addition, the provider regularly presented her fountain pen at Frankfurt exhibitions.

An interesting point is that the pen provider could prove that she did not comply with orders from Germany. No deliveries were actually made to Germany. However, according to the court this was irrelevant, as this fact was not apparent from the web site.

Too far reaching conclusions may of course not be drawn from a single decision. However, the court did oppose the view that an Internet activity is directed towards a certain territory, as soon as it can be accessed from that territory. Further, it confirmed that the language used must not be given a determining importance.

The decision is doubtful to the extent that it states that a web page has consequences on the German market, even if no deliveries actually take place there. Clearly, the German customers can see and be influenced by the offer, even if they are prevented from ordering the product. On the other hand, the customer would be influenced in exactly the same way when accessing a web page with the notification "This offer is not directed to German customers".[109] As the court in this latter case, rightly, does not find the activities directed towards the German public, it would be logical to find the activity not directed towards the German public in the former case either.

3.7.1.4 Conclusion

The concept of directed activity has not been focused on to a very large extent in European literature and case law. However, decisions and comments on the applicability of local advertising law is relevant, as the application of advertising law generally requires a certain impact on the relevant territory and that the advertising activities have been directed to this territory. The proposal for turning the Brussels Convention into a Regulation considers the matter of the competent court. This is certainly another problem than the law applicable to advertisement actions. However, it has turned out to be useful in the attempt to interpret the expression of directed activities.

The circumstances of the individual case will probably have to be considered. A matter remaining unclear is whether a sole declaration on the web site, naming the jurisdictions it is not aimed at, will always be enough to exclude the competence of the courts of these states.

[109] *Kotthoff*, K & R 3/1999 s. 139 ff.

From my point of view, it is important to maintain a pragmatic view, when determining to what country a certain activity has been directed. It is indeed important to maintain a high level of consumer protective rules. On the other hand, it would be detrimental even for the consumers, if the commercial activities on the Internet would decrease, as a result of the service providers' fear to be sued in foreign courts.

3.8 Concluding remarks; The proposed changes to the Brussels Convention

The intention to reform and update the Brussels Convention is indeed laudable. Even if the Convention still provides a good framework of jurisdiction rules it may need updating after more than thirty years in force.

The attempt to introduce autonomous definitions not referring to the Member States' rules of Private International Law, makes the regulations easier to apply and increases the legal certainty.

However, as one of the explicit purposes of the reform was to adopt the Brussels Convention to the Internet, it is disappointing that some of the problems related to this medium seem to remain.

As far as consumer contracts are concerned, the removal of the condition that the consumer has to take the contract concluding steps in the country of his habitual residence is to be welcomed. This condition is unnecessarily restrictive when we are entering the 21th century.

As has been shown by studying U.S case law and some existing European advertisement cases and comments, the wording *directed activity* is not unproblematic to interpret. Some guidance can be found in European comments on the directing of advertisement measures against a certain jurisdiction. It seems problematic to express any common guidelines. Furthermore, the circumstances in the concrete case have to be considered. This may lead to legal uncertainty and there is a risk that the area in which the consumer protective rules apply will be extended to such a large extent that it will result in a disproportional obstacle to the Online activities, which the Commission is so strongly attempting to promote.

3.9 Summary of Part Two

The Private International Law, as far as choice of law on contractual obligations and jurisdiction are concerned, has been harmonized in the European Union in the Conventions of Rome and Brussels.

The Convention of Rome states as its main principle, that the parties to the contract are free to determine what law to apply on their relation. When no

choice of law has been made, the closest connection method is to be carried out.

As for consumer contracts, the Convention states that a consumer cannot be deprived of the consumer protective legislation of his country, as long as certain conditions regarding the contract conclusion are fulfilled, namely that the contract conclusion has been preceded by previous advertising or a specific invitation directed to the consumer in his country of residence. Further, the consumer has to have taken all the steps necessary for the contract conclusion in his own country.

The Brussels Convention takes as its starting point that every person should be sued in the state of his habitual residence. However, regulations providing alternative jurisdiction are contained as well. As far as consumers are concerned, the Brussels Convention specifies conditions corresponding to those of the Rome Convention. When those are fulfilled, the consumer gets the advantage of having the possibility to always sue his counterpart in his own country of habitual residence.

With regard to the Information Society, certain problems arise when the regulations of the Conventions are to be applied, as they generally take a geographic location as their starting point. The geographic location does not matter in an Online environment and it is often impossible to determine where a user is seated or where a server is located.

In the proposal for changing the Brussels Convention to a Regulation, attempts have been made to reduce the problems which the new communication media give rise to. Although the proposal is an ambitious attempt which has managed to clarify certain regulations it has unfortunately failed to provide a clear solution to one important problem, namely under which circumstances the consumer protective rules shall apply. The criterion *activity directed to the consumer's state of habitual residence* can be expected to cause legal uncertainty and it will be necessary to wait for the interpretation of the European Court of Justice.

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