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International Electronic Contracts: A Note on Argentine Choice of Law Rules

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INTERNATIONAL ELECTRONIC CONTRACTS

A Note on Argentine Choice of Law Rules

BY MARIO J.A. OYARZÁBAL*

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I. INFLUENCE OF THE GLOBALIZATION OF COMMUNICATIONS ON PRIVATE INTERNATIONAL LAW RULES

At the beginning of the twenty-first century, private international law still uses essentially the same method developed by the great German jurist, Savigny, over a hundred years ago. His method, which may be considered "classic" today, consisted in correlating in a logical and rational manner every legal relation with a particular legal system. Each relation has its "definite seat," a "legal territory to which, in its proper nature, it belongs or is subject."¹ In a contractual relation, for instance, reference is made to the place where the contract is performed, and in a tort claim, to the place where the infringement is committed. Recently, however, it has been argued that this approach is not easily adaptable to the context of the Internet; that in a digitalized world, courts will no longer be able to play the game of localizing legal relations under the protection of one or another national law.²

It has been said that we face today a non-geographical and non-territorial means of communication, where the notion of "place" matters less and less.³ *Where* activities occur (or, more precisely, where the legal expert deems them to have occurred) might not be the right question in order to allocate jurisdiction and choose the applicable law in international Internet-related disputes.⁴ Regarding contractual matters, it traditionally has been difficult to determine *where* an obligation was considered to have been performed. In electronic contracts, the question which arises most frequently is *what* constitutes performance: making the data accessible to the average user or providing individual guidance to make sure that he actually gets it?⁵ We wonder, therefore, if it is at all sensible, or even possible, to continue locating legal relationships anywhere in trans-territorial cyberspace, referred to by Wil-

1. FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS 133 (William Guthrie trans., 2d ed. 1880) (1849).

2. See Paul E. Geller, *Conflicts of law in Cyberspace: International Copyright in a Digitally Networked World*, in THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT 30 (P. Bernt Hugenholtz ed., 1996). Paul E. Geller is the Professor of International Intellectual Property at the University of Southern California Law Center.

3. Matthew Burnstein, *A Global Network in a compartmentalised Legal Environment*, in INTERNET, WHICH COURT DECIDES? WHICH LAW APPLIES? QUEL TRIBUNAL DÉCIDE? QUEL DROIT S'APPLIQUE? 23-26 (Katharina Boele-Woelki & Catherine Kessedjian eds., 1998).

4. *Id.* at 27.

5. See Herbet Kronke, *Applicable Law in Torts and Contracts in Cyberspace*, in INTERNET, WHICH COURT DECIDES? WHICH LAW APPLIES? QUEL TRIBUNAL DÉCIDE? QUEL DROIT S'APPLIQUE?, *supra* note 3, at 79.

liam Gibson as a "space that isn't a space."⁶ Or if that change from geography to cyberspace does not require a change in the approach to conflicts of law.⁷

By making the present study, we do not intend to build an Internet-specific *system* of private international law, applicable to all cases presenting acts, situations, objects or conducts connected to the Internet, and developing new guidelines to be followed in order to reach a fair solution to all cyber-cases. Such a system would be neither useful nor desirable. It is submitted that the law applicable to acts committed or to contracts entered into or performed over the Internet should differ as little as possible from the law applicable to those occurring outside the Net in real space. This will help give certainty and predictability to activities online. Rather than building a new system, we will highlight specific aspects of the Internet within the general system of the international law of contracts. Instead of creating new rules for the virtual world, we will interpret and apply the classic rules of traditional private international law intended for the real world to future cyber-disputes, taking into consideration their special characteristics.

This task will be approached in the following order: Section II will make a brief reference to the work carried out by the United Nations Commission for International Trade Law, on the set up of uniform rules for electronic commerce. Sections III, IV and V will study the solutions to cases falling within the scope of application of the international treaties ratified by Argentina. Sections VI through IX will be devoted to the analysis of the Argentine national laws dealing with international cases. Yet, as the application of a foreign law as specified by convention or statute is not unrestricted, section X will study the operation of public policy and fraud as exceptions to normal choice of law rules. Section XI will go on to address matters appertaining to procedure and so-called "international judicial assistance." After examining the applicability of traditional private international law rules to the new cases involving the use of modern technologies, we will be ready to describe, and comment, upon the ideas of some authors to create an international set of material rules especially designed for the Internet, that could be called *lex electronica*, and would be the legal expression of "globalization." The last section will make some final considerations on the different approaches that have

6. WILLIAM GIBSON, COUNT ZERO 38 (1986), quoted by Geller, *supra* note 2, at 28.

7. See Geller, *supra* note 2, at 28.

been suggested for the regulation of conflicts arisen from the use of the Internet, which could, to some extent, clarify the current doctrinal discussion.⁸

II. THE MODEL LAWS ON ELECTRONIC COMMERCE AND ON ELECTRONIC SIGNATURES, ADOPTED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

Among the steps taken towards the harmonization and unification of the law applicable to the methods of communication and storage of information alternative to those using paper, it is worth highlighting the work of the United Nations Commission on International Trade Law (UNCITRAL), which by 1985 had already passed a Recommendation on the Legal Value of Computer Records. Since then, the Commission has adopted two Model Laws: The Model Law on Electronic Commerce with Guide to Enactment (1996), and the Model Law on Electronic Signatures (2001).⁹

Both Model Laws reflect the most modern trends in comparative law regarding electronic commerce, which makes them very reliable in situations where parties opt to use the new available technologies in their international transactions.

Furthermore, the Model Laws may become useful tools in the interpretation of existing international conventions and other international instruments as well as Argentine national laws imposing or implying obstacles to the use of electronic communica-

8. Argentine literature: see especially Fernando Gago, *Contrato en Internet, ley aplicable - autonomía de la voluntad* [2000-C] REVISTA JURÍDICA ARGENTINA LA LEY [L.L.] 1053-58; Sara L. Feldstein de Cárdenas, *Contrato cibernético internacional ¿Una realidad o un enigma?*, in OBLIGACIONES Y CONTRATOS EN LOS ALBORES DEL SIGLO XXI – HOMENAJE AL PROFESOR DOCTOR ROBERTO M. LÓPEZ CABANA 661-71 (Oscar J. Ameal ed., 2001); María Blanca Noodt Taquela, *Comercio electrónico en el Mercosur*, 4 Revista Uruguaya de Derecho Internacional Privado [R.U.D.I.P.] 85-103 (2001); Osvaldo J. Marzorati, *Reflexiones sobre jurisdicción y ley aplicable en Internet*, in AVANCES DEL DERECHO INTERNACIONAL PRIVADO EN AMÉRICA LATINA – *Liber Amicorum* Jürgen Samtleben 301-24 (Jan Kleinheisterkamp & Gonzalo A. Lorenzo Idiarte eds., 2002); Mario J. A. Oyarzábal, *Juez competente y contratos electrónicos en el derecho internacional privado*, [2002-IV] JURISPRUDENCIA ARGENTINA [J.A.] 3-11; Mario J. A. Oyarzábal, *La ley aplicable a los contratos en el espacio transnacional*, 201 EL DERECHO [E.D.] 709-724 (2003); RICARDO L. LORENZETTI, *COMERCIO ELECTRÓNICO* 205-07, 255-56 (2001).

9. UNCITRAL Model Law on Electronic Commerce, G.A. Res. 162, U.N. GAOR, 51st Sess., Annex I, U.N. Doc. A/Res/51/162 (1996), available at www.uncitral.org/english/texts/electcom/ml-ecomm.htm (last visited March 31, 2004).

tions, for example, by prescribing that certain contractual clauses must be in written form.

The hope is that Argentina will consider these instruments when revising its laws as a way of strengthening certainty in the use of automatic data processing and of guaranteeing users of computer-based information equal treatment as that given to users of paper-based documentation, these objectives being essential to foster economy and efficiency in international trade. By incorporating the procedures prescribed by the Model Laws in its legislation, Argentina will create a media-neutral environment for any technically viable means of commercial communication.¹⁰

III. THE TREATIES OF MONTEVIDEO OF 1889 AND 1940

The Treaties of Montevideo on International Civil Law, Feb. 12, 1889 (arts. 32-37, 39) and Mar. 19, 1940 (arts. 37-38, 40-42)¹¹, designate the applicable law to international contracts relying on "places" as connecting factors.

A difficult question, however, will be to determine where a product in electronic form or digital information existed at the time of conclusion of the contract, where the offer (or the accepted offer) was made, or where a barter concluded online was performed.

As long as the Internet is used only as a means of communication for the conclusion of contracts concerning goods or services to be delivered or provided offline, nothing changes as compared to doing so by letter or on the telephone. But when the goods or services or the subject-matter of a contract have no significant relationship with a place, or when the contracting parties or the goods move to a foreign country with the purpose of entering into or performing a contract, it is no longer possible to apply the rules of the Treaties of Montevideo without examining their suitability in the new context. Thus, it is clearly important that the parties agree on a duly documented choice of the applicable law.

10. See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) [hereinafter Guide], paras. 2-6. The Argentine Law No. 25.506 on Digital Signature, and the Decree No. 427 of Apr. 16, 1998 that introduced the use of digital signatures within the Government, do not regulate all fundamental legal aspects of electronic commerce; see *infra* § IX.

11. O.A.S.T.S. No. 9, reprinted in II REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 34 (1973). [hereinafter O.A.S.T.S.] The 1889 Treaty has been ratified by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay. The 1940 Treaty is in force between Argentina, Paraguay and Uruguay.

IV. THE UNITED NATIONS CONVENTION ON CONTRACTS FOR
THE INTERNATIONAL SALE OF GOODS, SIGNED IN
VIENNA ON APRIL 11, 1980¹²

Professor Siegfried Eiselen from the University of Potchefstroom for CHE in South Africa, has written a complete and authorized study on the formation of contracts covered by the above mentioned convention in the context of the use of newer technologies and applications such as fax, electronic data interchange (EDI) and the Internet.¹³ The result of his research, carried out at the Max Planck Institute für ausländisches und internationales Privatrecht in Hamburg, is that the CISG and its underlying principles are robust and flexible enough to properly respond to the changes and challenges posed by the new forms of communication, and that virtually no change needs to be made to the Convention.

It is thus worth studying some questions related to the validity of electronic communications within the scope of applicability of the CISG.

First, it is important to point out that the Convention only mentions electronic means of communication such as "telegram" and "telex" and not other methods like fax, EDI and e-mail.¹⁴ There is no indication, however, that the Convention intended to exclude any specific means of communication from its scope of application. These technologies were simply not available at the time the CISG was adopted in 1980. Therefore, there is a gap in the Convention, which must be filled according to the general principles of freedom of form and party autonomy on which the Convention is based.¹⁵ These principles suggest a widely inclusive interpretation of *all electronic forms of communication*.

Consequently, under the terms of this Convention, when a communication has to be rendered in writing, this requirement will be met by means of an EDI or an e-mail. Even in the case of international sales contracts between parties whose places of business are in states which have made a declaration in accordance

12. The United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/Conf. 97/18 (1980) [hereinafter CISG] available at <http://www.uncitral.org/english/texts/sales/CISG.htm>. In force for Argentina: Jan. 1, 1988.

13. See Siegfried Eiselen, *Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980*, 6 EDI LAW REVIEW 21-46 (1999).

14. CISG, *supra* note 12, at art. 13.

15. See *id.* at arts. 7.2, 6, 11.

with Article 96, the question whether an EDI or e-mail constitutes writing is dependent on the interpretation of Article 13 of the Convention in the expanded definition submitted. This is so because, in terms of Article 96, a contracting state may exclude the application of Article 11 which allows communications by any means, not necessarily in writing¹⁶, but it is not allowed to make exceptions to Article 13. Ergo, the definition of "writing" is dependent on the interpretation of the CISG and not on the law of the country making the declaration.¹⁷

It is also important to determine when an electronic communication becomes valid and binding for the parties within the framework of the CISG. The Convention makes use of two different approaches for communications *inter absentes*: during the formation of the contract when dealing with instantaneous communications, the "reception theory" is adopted¹⁸; during post-contractual communications, the "dispatch theory" is used, except when the reception system is expressly adopted.¹⁹

When the reception theory is used, in order to meet the requirements of the Convention, the message must effectively reach the recipient, either delivered to him personally or placed at his disposal at a place where he usually receives such communications or where he should expect to find communications in the normal course of business. This is the principle underlying Article 24 and guiding its interpretation. Therefore, the e-mail address or the VANS (value-added network service) supplied by the recipient should suffice to meet the requirements for validity set by the CISG. In the case of EDI, the message has to be delivered to the recipient's VANS mailbox when the *store and forward system* is used, or to his computer system. Likewise, in the case of e-mail, the message has to be delivered to the recipient's e-mail address. Whether someone has read it or not has no importance. It suffices that the message is in a readable or process-able form.

According to Professor Eiselen, whose opinion we share, the reception system provides a fair solution to the distribution of risk when electronic communications are used.²⁰ Both EDI and e-mail are instantaneous forms of communication like telex, which has been specifically mentioned, and this provides a valuable clue to

16. Argentina made such declaration upon ratifying the Convention.

17. *Contra* Eiselen, *supra* note 13, at 36 and authors cited in n.102.

18. See CISG, *supra* note 12, at arts. 24, 15, 20.1.

19. *Id.* at art. 27.

20. CISG, *supra* note 12, at arts. 15, 20.1.

determine the moment that the period of time for acceptance of an offer contained in an EDI or e-mail begins to run.²¹

After the contract has already been concluded, and unless otherwise expressly provided in Part III of the Convention, the general rule is that a message will be validly made if the sender sends the message by appropriate means, despite of a delay or error in the transmission or its failure to arrive.²² It is only necessary that the message be sent in such a manner that it will normally reach the recipient (dispatch theory). Once again, analogy is a very conducive method for dealing with the newer technologies. Thus, it is licit to assimilate the use of an EDI or e-mail to a letter sent by mail or a telex. Once the sender has launched the message to the correct e-mail address or VANS of the other party, the act of sending is complete and the requirements of Article 27 should be considered fulfilled.

Before coming to a close, it is important to consider briefly the material scope of application of the CISG in the context of electronic commerce. Article 1.1 provides that the Convention applies to contracts for the sale of goods between parties whose places of business are in different states, unless the goods were bought for personal, family or household use.²³ That includes the sale of digital material such as software, music and video recordings, and documents. Though there is no physical transmission of goods, they are goods which can also be bought in physical form.²⁴ However, license agreements, cession of industrial property, and intellectual rights, very common on the Internet, are excluded because they are not goods in the sense of the CISG. Countertrade transactions and service contracts are also excluded because they are not "sales".²⁵

V. THE HAGUE CONVENTION ON THE LAW APPLICABLE TO CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, CONCLUDED ON DECEMBER 22, 1986²⁶

The application of the Hague Convention to electronic com-

21. *Id.* at art. 20.1 in fine.

22. *Id.* at art. 27.

23. *Id.* at art. 2(a).

24. See ALFONSO L. CALVO CARAVACA & JAVIER CARRASCOSA GONZÁLEZ, *CONFLICTOS DE LEYES Y CONFLICTOS DE JURISDICCIÓN EN INTERNET* 76-77 (2001).

25. *Id.* On the definition of "sales" and "goods," see generally ALEJANDRO M. GARRO & ALBERTO L. ZUPPI, *COMPRAVENTA INTERNACIONAL DE MERCADERÍAS - CONVENCION DE VIENA DE 1980* 72-83 (1990). See also CISG, *supra* note 12, at arts. 2-4. .

26. The Hague Convention on the Law Applicable to Contracts for the

merce has been succinctly analyzed by Professor Herbert Kronke, from the University of Heidelberg, in the international colloquium in honor of Michel Pelichet organized by the Molengraaff Institute of Private Law, University of Utrecht and the Hague Conference on Private International Law.²⁷ His sharp observations are reproduced hereafter and only some personal comments will be added.

First of all, it is necessary to determine whether, under the Hague Convention, the term "goods" comprises data, images, information and software. It apparently does, if a parallel with the CISG is to be maintained as the Explanatory Report by Professor Arthur von Mehren²⁸ recommends. However, "rights" were deliberately excluded from its scope of application,²⁹ thus it is unclear if "knowledge" is included.

With regard to the determination of the applicable law to the contract, the basic principle of party autonomy³⁰ and the subsidiary application of the law of the place of business of the seller³¹ pose no special difficulties in the context of the Internet. However, the exceptions to the principle of the *lex venditori* are far more complex.

Article 8.2(a) submits the contract to the law of the State where the buyer has his place of business if negotiations were conducted, and the contract concluded by and in the presence of the parties, in that state.³² This will never happen in the case of a contract entered into over the Internet. Besides, the reason for applying the buyer's law is that the seller has sought out the buyer in his country and must be taken to have submitted himself to that law. But a website, by its nature, is directed to all countries. So the clear-cut distinction in situations where one party is passive and the other is active in commencing negotiations and

International Sale of Goods, Dec. 22, 1986, [hereinafter Hague Convention] available at <http://www.hcch.net/e/conventions/text31e.html>. Ratified by Argentina on Oct. 4, 1991. This Convention has not yet entered into force. See generally Text, Explanatory Report and Status Report available at <http://www.hcch.net/e/conventions/menu31e.html>.

27. See Kronke, *supra* note 5, at 75-78.

28. A.T. von Mehren, The Explanatory Report, Convention on the Law Applicable to Contracts for the International Sale of Goods, para. 23 (1987), reprinted in HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAWS, PROCEEDINGS OF THE EXTRAORDINARY SESSION OF OCTOBER 1985: DIPLOMATIC CONFERENCE ON THE LAW APPLICABLE TO SALES CONTRACTS 709, 755 (1987) [hereinafter Explanatory Report], para. 23, available at <http://www.hcch.net/doc/expl31.pdf>.

29. *Id.* at para. 34.

30. Hague Convention, *supra* note 26, at art. 7.

31. *Id.* at art. 8.1.

32. *Id.* at art. 8.2(a).

finally concluding the agreement disappears in electronic commerce.³³ One solution could be to introduce in this rule of conflicts of law the concept of "target." If the seller has specifically targeted consumers in a particular country, it would be consistent to decide that the law of the buyer should apply. A website could be presumed to have targeted a country when it is in a national language, uses national currency, etc. But this approach is not unanimously endorsed by the experts. Yet, the requirement that the contracting parties have to be present in the buyer's State at the time of entering into the contract, proves another obstacle to the application of Article 8.2(a) to electronic commerce.

Article 8.2(b) provides that the contract is also governed by the law of the buyer's state if the seller is required to deliver the goods in that state.³⁴ But what is "delivery" on the Internet? Uploading the data, making them accessible to the buyer, or downloading them to the information system of the latter? It is argued that the whole distinction between *dettes quérables* and *dettes portables* may become obsolete in the new context.

Finally, according to Article 9, a sale by auction or on exchange is governed by the law of the state where the auction takes place or the exchange is located.³⁵ Online auctions are already popular in the United States and Europe, and may become a mass phenomenon. In Argentina, *MercadoLibre.com*³⁶ is associated to *eBay.com*³⁷, the major online marketplace worldwide, with local sites in twenty countries. The Internet is also used by organizations such as the New York Stock Exchange (NYSE e-broker)³⁸ for conducting transactions. In such cases, it can be argued that the law where the exchange organization is located should apply. However, the situation is far less clear when the auction takes place entirely on the Internet and is not organized by an institution, or if it consists of a spontaneous exchange among various parties with various places of business or habitual residence involved.

Professor Kronke conceives two possible solutions to these problems: either a radical simplification of the Convention's rules

33. See Herbert Kronke, *Electronic Commerce und Europäisches Verbrauchervertrags-IPR: Zur Umsetzung der Fernabsatzrichtlinie*, RECHT DER INTERNATIONALEN WIRTSCHAFT [R.I.W.] 985-988 (1996).

34. Hague Convention, *supra* note 26, at art. 8.2(b).

35. *Id.* at art. 9.

36. See <http://www.mercadolibre.com.ar>.

37. See <http://www.ebay.com>.

38. See <http://www.nyse.com>

providing for express choice of law applicable to the contract by the parties, or the exclusion of electronic commerce altogether from the Convention's scope of application.

VI. PARTIES' FREEDOM TO CHOOSE THE APPLICABLE LAW

It is a well-established practice for electronic contracts to include an express choice of law clause, because companies are normally very careful to identify the legal consequences of their contracts.³⁹ A standard choice of law clause stating that "this agreement shall be governed by the Argentine Law" (usually the place of business of the service or Internet provider) is either sent to the user in writing or appears on the screen while the user is using the website and its services.⁴⁰ There can also be an inferred or implied choice. An inferred choice concerns the parties' actual intentions, and is to be drawn from the terms of the contract and the conduct of the parties, viewed in their entirety. But it must be a real choice by the parties, not a hypothetical one. The choice must be "clearly demonstrated."⁴¹

In Argentina, the parties' freedom to choose the governing law is accepted only in the case of international contracts, i.e., those presenting objective connections with a number of separate municipal systems of law. In Internet matters, a contract to be performed entirely online (e.g., the sale of a software product, an electronic book or a music recording to be delivered over the Internet by downloading the goods to the information system of the buyer, or a service performance as providing access to an online library or a database, etc.) shall be deemed "international" if the parties are domiciled or resident in different countries.⁴² The location of the information system of the originator and of the addressee of a data message is not a connecting factor. Only the place of business or the habitual residence of the parties counts. The Model Law on Electronic Commerce wisely introduces this

39. See JOHN DICKIE, *INTERNET AND ELECTRONIC COMMERCE LAW IN THE EUROPEAN UNION* 85 (1999).

40. See America Online Argentina's "Terms of Usage", available at <http://www.aol.com.ar>

41. Hague Convention, *supra* note 26, at art. 7.1; see Explanatory Report, *supra* note 26, at para. 47; see also Gago, *supra* note 8, at 1055-58.

42. See generally Sara L. Feldstein de Cárdenas, *Contrato cibernético internacional ¿Una realidad o un enigma?*, in *OBLIGACIONES Y CONTRATOS EN LOS ALBORES DEL SIGLO XXI*, *supra* note 8, at 665.

approach in Article 15.4.⁴³

Moreover, the parties' choice of law shall not have the effect of depriving the Internet consumer (*typically weak party*) of the protection afforded by the *mandatory rules* of the law of the country in which he has his habitual residence. Thus, a company with its place of business in a foreign country advertising its products through its website and selling them via the Internet to consumers residing in Argentina, cannot derogate by contract the Argentine mandatory rules that guarantee the consumer a minimum level of protection. Had the parties fraudulently tried to evade the Argentine controls by means of the choice of the law of a foreign country as the applicable law, the contract will have no legal value in Argentina.⁴⁴

Nonetheless, the prominence of party autonomy in the choice of law applicable to contracts in cyberspace should be emphasized both for technical reasons and for fairness to all potential parties involved. Therefore, a well-documented and subsequently accessible and usable proof of such choice is of utmost importance.⁴⁵

VII. THE APPLICABLE LAW IN THE ABSENCE OF CHOICE

Cases in which the parties have not chosen the applicable law to the contract are more likely to occur in one-off transactions, like the ones concluded by e-mail or on the telephone, since the parties will usually have no opportunity to incorporate their standard terms and conditions.⁴⁶ It can also be the case of a company selling its goods or services over a website that decides it is good marketing policy not to establish terms and conditions that are excessively long and detailed.⁴⁷

To the extent that the law applicable to the contract has not been chosen, Articles 1209 and 1210 of the Argentine Civil Code provide that the contract shall be governed by the law of the country where it has to be performed (*lex loci solutionis*)⁴⁸. In the case of a multiplicity of obligations (which may have different places of performance), reference is made to the country where the party who is to affect the characteristic performance has his domicile or

43. See Model Law on Electronic Commerce, *supra* note 9, at art. 15.4; see also Explanatory Report, *supra* note 28, at paras. 105-107.

44. CÓDIGO CIVIL [Cód. Civ.] arts. 1207-1208.

45. See Kronke, *supra* note 5, at 84.

46. See DICKIE, *supra* note 39, at 86-87.

47. *Id.* at 87.

48. Cód. Civ. art. 1209, 1210.

place of business.⁴⁹

The identification of the characteristic performance under the contract is not affected by the use of the Internet as a means of doing business or performing the parties' obligations.⁵⁰ Thus, a contract for the sale of goods or for the provision of a service entered into through the Internet is not different from the one concluded by the parties being present in a place, or by their representatives, or by mail. It is always the seller and the service provider whose performance constitutes the essence of the contract. The same goes for contracts to be performed partially or entirely online. Again, the characteristic performance is typically that of the party who provides services or delivers digital goods over the Internet: i.e., an *Internet Service Provider* (in Argentina: AOL, UOL-Sinectis, Intermedia, etc.), an *Internet Presence Provider* or *Hosting Service Provider* (in Argentina: Compaq, IBM, Star Media, etc.), a *Web Site Designer* or *Web Site Developer*, and the provider of such services as information and online reservations, interactive consulting, electronic document delivery or e-mail, and chat services.

Neither is the definition of "domicile" nor of "place of business" of a company undermined by the use of new technologies in commercial transactions, though they can hinder their localization, especially if the physical address and country of the place of business is not mentioned in the website. The use of a country code suffix may imply the country where the company has its place of establishment.⁵¹ Yet, it is not decisive. The actual geographical location of the establishment has to be investigated and determined. This is due to the fact that only the habitual residence of the party who is to affect the characteristic performance is relevant in order to link the contract to the law of a particular country.

Finally, attention has to be drawn to more complex commercial transactions involving more parties and more places of residence or business. In these type of situations, it is often very difficult, if not impossible, to determine with reasonable certainty one or more performances as characteristic of the contract as a

49. *Id.* at arts. 1212, 1214; See Marzorati, *supra* note 8, at 322-24; LORENZETTI, *supra* note 8, at 206.

50. See Abbo Junker, *Internationales Vertragsrecht im Internet*, 45 R.I.W. 818 (1999).

51. These country code suffixes correspond to the country of establishment. For example, .ar, .br, .es, .fr, .uk, correspond, respectively, to Argentina, Brazil, Spain, France, and England.

whole. Let us take the case referred to by Professor Kronke: IBM or Siemens employ software developers in India and Scotland to cooperate on a project with experts at the company's headquarters in the US or Germany.⁵² In the absence of an effective choice by the parties, what law is going to determine the existence and validity of the contract or a particular clause? If the parties' obligations, though complementary, are of a different nature, the law to be applied is that of the place of residence or business of the party who provides for the performance which is characteristic of the contract as a whole. But if their obligations have identical object or similar characterizing features, it has been suggested that the national laws of the different places of business should be applied accumulatively, their solutions compared and their application adapted so as to reach a fair solution of the case taking into consideration the economic purpose of the business.⁵³

Once again it is highly recommended that the parties stipulate the applicable law to their contracts by means of an informed and properly documented use of party autonomy.

VIII. MANDATORY RULES, CONSUMER PROTECTION AND GENERAL CONDITIONS OF INTERNATIONAL STANDARD CONTRACTS. THE CLICK-WRAP CONTRACT

On the Internet, adhesion contracts are likely to be even more frequent than in other contexts.⁵⁴ Standard terms referring to potential disputes and usually containing choice of forum and choice of law clauses are set unilaterally by the Internet merchant and displayed on the computer screen of the user when contemplating the conclusion of the contract. There is no possible negotiation of terms. Users who click their mouse on the small box marked "I agree" or "Click here if you agree," agree to the terms and are allowed to proceed. This is why they are called "*Click-wrap*" contracts.

Generally speaking, the matter whether standard terms were validly included in the contract is governed by the law applicable to the existence and validity of the contract itself (*lex contractus*), either chosen by the parties or determined by law.⁵⁵

52. See Kronke, *supra* note 5, at 79.

53. See 2 ANTONIO BOGGIANO, *DERECHO INTERNACIONAL PRIVADO* 694-695, 795 (3d ed. 1991).

54. See Kronke, *supra* note 5, at 80.

55. See generally Antonio Boggiano, *International Standard Contracts, A Comparative Study* 170 RECUEIL DES COURS 9-113 (1981).

Yet, there are restrictions to the application of the *lex contractus* in the case of consumer contracts, where the consumer has relied upon the mandatory rules of the country of his habitual residence, according to which his conduct could not have been construed as acceptance of those terms. The application of the consumer's residence protection standards is justified in the field of electronic contracts whenever the balance between the parties is lost. Depriving the Internet consumer of the protection afforded to the "classic" consumer would lead to the exclusion of a considerable segment of consumers from the protection field, only because the publicity and delivery channels have changed.⁵⁶ Such an approach would be against the social rights acquired during the last decades.⁵⁷ It is necessary to warn, however, against indiscriminate application of the consumer's home standards based simply on the peculiarities of the new communication techniques. Courts and lawmakers could be tempted to do so. Although this might be good consumer policy, it would certainly be bad law.⁵⁸

The preceding considerations involving the application of the mandatory rules of a foreign country are appropriate as much as the situation in question is not regulated by the mandatory rules of the forum (*lex fori*). Since they are mandatory irrespective of any law otherwise applicable to the contract. Assuming that Argentina is the forum, Article 604 of the Navigation Law 20.094 subjects to the said law the responsibility of the carrier with respect to passengers and their luggage as regards "any contract involving the transportation of persons by water entered into in Argentina, or where the trip started or finished in an Argentine port, be it a national or a foreign vessel, or whenever Argentine courts are competent to decide the case."⁵⁹ That rule is clearly intended to protect the typically weak passenger. Other Argentine mandatory rules express a strong economic policy, such as Article 2 of Law 12.988 which forbids the insurance of Argentine persons

56. Gabrielle Kaufman-Kohler, *Internet: mondialisation de la communication - mondialization de la resolution des litiges?*, in INTERNET, WHICH COURT DECIDES? WHICH LAW APPLIES? QUEL TRIBUNAL DÉCIDE? QUEL DROIT S'APPLIQUE?, 138-139 (Katharina Boele-Woelki & Catherine Kessedjian eds., 1998).

57. *Id.* at 139.

58. Kronke, *supra* note 5, at 83. On electronic consumer contracts, see generally Diego P. Fernandez Arroyo & Cecilia Fresnedo de Aguirre, *Modalidades contractuales específicas*, in DERECHO INTERNACIONAL PRIVADO DE LOS ESTADOS DEL MERCOSUR - ARGENTINA, BRASIL, PARAGUAY Y URUGUAY 63, 1033-34 (Diego P. Fernandez Arroyo ed., 2003); LORENZETTI, *supra* note 8, at 255-56.

59. Law No. 20.094, Jan. 15, 1973, A.D.L.A. 170.

or goods abroad⁶⁰, and cannot be disregarded either in electronic commerce.

IX. FORMAL VALIDITY

The parties can select a law to govern the form of the contract different from the one chosen to govern its material validity or other issues.

In the absence of express choice of applicable law, contracts concluded by parties who are not in the same country are subject to the formal requirements of the law most favorable to the validity of the contract (*favor validitatis*).⁶¹ It is necessary to compare the regimes of form in force in the different legal systems connected to the case. On the Internet, said legal systems are often the law that governs the substance of the contract (*lex causae*) and the laws of the habitual residence or the place of business of the various parties involved, or the law of the place of delivery of goods, when the contract, though concluded online, is to be performed in real space. Those laws have to be applied alternatively, giving preference to the one most favorable to the validity of the contract.

Now, where contracts are concerned, two kinds of formalities are usually required: writing and signature. These formalities, which are based on the use of traditional paper documents and may be required by statute or by the parties themselves, are difficult to meet in electronic commerce and constitute the main obstacle to the development of the new technologies. In fact, the most remarkable aspect of electronic commerce is the dematerialization of documents, the disappearance of paper that has been for centuries the means for the declaration of will of contracting parties.⁶² Thus, if computer-based techniques are to be used in the contractual field, there is general consensus that the meaning of such concepts as "writing," "signature" and "original" must be interpreted according to the technological advances of communications, in a way that ensures data messages a legal recognition equivalent to that of paper documents. This approach has been followed by Article 7 of the UNCITRAL Model Law on International Commercial Arbitration⁶³, and Article 13 of the CISG on

60. See MARIO J. A. OYARZÁBAL, EL CONTRATO DE SEGURO MULTINACIONAL 115-138 (1998); Law No. 12.988, June 24, 1947, A.D.L.A. 360.

61. Cód. Civ. art. 1181.

62. Kaufman-Kohler, *supra* note 56, at 126.

63. UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc.

Contracts for the International Sale of Goods⁶⁴ has been interpreted in the same manner. Other international instruments and internal laws could be adapted by means of interpretation or revision of the existing rules, to best deal with the technical developments produced in this field. Such "adaptation" does not have to discard altogether the requirements of writing and signature or to undermine the legal principles on which such requirements are based. Rather, the solution is to identify the purposes and functions of the traditional paper-based form requirements with a view to determine how to fulfill those objectives and functions with techniques of electronic commerce. What is essential is that the data message complies with the basic functions of paper, that it satisfies the reasons for which internal law requires the presentation of a signed writing. This is the so-called "functional equivalent approach" chosen by the 1996 UNCITRAL Model Law on Electronic Commerce (arts. 6-8)⁶⁵, and followed later on by the 2001 Model Law on Electronic Signatures which develops the basic rules contained in Article 7 of the former.

The Argentine Law No. 25.506 on Digital Signature,⁶⁶ passed on November 14, 2001, and its regulatory Decree 2628⁶⁷ of December 19, 2002, enacted substantially the same approach. It provides that where the law requires a signature to be handwritten, this requirement is met if a digital or an electronic signature is used, except when the law prescribes or the parties agree otherwise.⁶⁸ Furthermore, the legal requirement of a writing is also considered fulfilled by way of a data message, even if it is only in electronic form,⁶⁹ insofar as the information is available for subsequent reference and identifies the sender, the recipient, and the date and time of generation, dispatch and/or receipt.⁷⁰

In order for a digital signature to be valid, it must be created

A/40/17, Annex I, June 21, 1985 available at <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>.

64. CISG, *supra* note 12, at art. 13.

65. See Guide, *supra* note 10, at paras. 15-18.

66. Law No. 25.506, Nov. 14, 2001, [LXII-A] A.D.L.A. 6.

67. Decreto 2628, Dec. 19, 2002, [LXIII-A] A.D.L.A. 106.

68. *Id.* at 106-108, arts. 1-4. Also, the 1998 Draft of Argentine Civil Code provides that "In instruments generated by electronic means, the requirement of signature is satisfied if a method to identify the person is used, and such method reasonably ensures the authorship and inalterability of the instrument" Cód. Civ. art. 269 (1998); see María Blanca Noodt Taquela, *Reglamentación general de los contratos internacionales en los Estados mercosureños*, in *DERECHO INTERNACIONAL PRIVADO DE LOS ESTADOS DEL MERCOSUR*, *supra* note 8, at 984-87.

69. See Decreto 2628, at art. 6.

70. *Id.* at art. 12.

during the period of validity of the digital certificate, verified by the authentication procedures established by the certification authority, and the certificate be issued by a certification authority holding a license from the competent authority, which is the *Ente Administrador de Firma Digital*.⁷¹ Certificates issued by other countries are also recognized in the terms of international agreements signed by Argentina on the basis of reciprocity, or when a certification authority in Argentina guarantees that they are valid and effective according to Argentine law.⁷²

There is a rebuttable presumption that a digital signature belongs to the owner of the certificate that allows verification of such signature key (presumption of authorship)⁷³, and that the document has not been modified since the moment it was signed (presumption of non-alterability).⁷⁴ Likewise, a data message is attributed to the operator of the information system where it comes from, even if the system is programmed to operate automatically, unless proved otherwise.⁷⁵ The question whether the other person had in fact and in law the authority to act on behalf of the originator is, in principle, to be decided by the law which governs agency in international contracts.

The remaining rules deal with the issues of validity of digital certificates, national and foreign, the functions and responsibilities of certification authorities, the rights and obligations of certificate owners, and the role of governmental authorities in monitoring the certification authorities, to ensure the reliability and quality of the authentication methods, the integrity, confidentiality and availability of the data, as well as the compliance with the procedures and technical security requirements established by the licensor.

It should nonetheless be emphasized that, whether a data message that fulfills the requirement of a signature has legal validity, is ultimately to be settled under the law applicable outside Law 25.506, if a foreign law connected to the case is most favorable to the formal validity of the contract.

71. *Id.* at art. 9.

72. *Id.* at art. 16.

73. *Id.* at art. 7.

74. *Id.* at art. 8.

75. *Id.* at art. 10.

X. EXCLUSION OF FOREIGN LAW: *ORDRE PUBLIC* AND
FRAUS LEGIS

A first limitation to party autonomy or to the application of the foreign law which would normally govern the case is set by the principles of *ordre public* (public policy) of the law of the forum. As regards to Argentine law, these principles are affected when a provision of the contract is abusive⁷⁶, injurious,⁷⁷ of bad faith,⁷⁸ or contrary to the morals⁷⁹. In other words, anything repugnant to the spirit of the Argentine legal system⁸⁰ (*clause de réserve*) or when the application of a rule of the law of a foreign country is manifestly incompatible with an Argentine principle. In such cases, the necessary adaptations have to be made so that both legal systems become compatible.

The second limit, and probably the most interesting in the context of the Internet, is the prohibition against celebrating contracts *in fraudis legis*. This principle is based on Articles 1207 and 1208 of the Argentine Civil Code which deny effectiveness in Argentina to contracts intended to fraudulently evade the principles of the Argentine law or of a foreign law.⁸¹ Fraudulent individuals must be prevented from getting the profit of the fraud. Let us take again the case of sale to consumers. A company advertising and selling products over the Internet warns consumers that it does not wish to enter into contracts with foreign consumers, or with consumers from a certain country, or requires consumers to indicate the country of habitual residence, thus rejecting unwanted transactions in order to avoid being submitted to a foreign law which is either unfavorable or unknown. Should a consumer cite a false residence in order to conclude a contract with a reluctant supplier, he would later be unable to claim the protection afforded by the mandatory rules of the law of the country of his true residence.⁸²

Now suppose that the company is the one that gives the appearance of having a foreign domicile by registering his domain name with a fictitious country code extension, and indicating the prices of the goods and services offered in the language and cur-

76. See 2 BOGGIANO, *supra* note 53, at 297-298; Cód. Civ. art. 1071.

77. See 2 BOGGIANO, *supra* note 53, at 297-298; Cód. Civ. art. 954.

78. See 2 BOGGIANO, *supra* note 53, at 297-298; Cód. Civ. art. 1071.

79. See 2 BOGGIANO, *supra* note 53, at 297-298; Cód. Civ. art. 953, 1167.

80. Cód. Civ. art. 14.2.

81. *Id.* at art. 1207, 1208.

82. Example given by DICKIE, *supra* note 39, at 86.

rency of that country. It would not be admissible that it later demands the application of the law of its true place of business under Articles 1212 to 1214 of the Argentine Civil Code, since the client would be unfairly subject to a law different from the one he could reasonably have foreseen to govern the contract at the time of its conclusion. However, the law of the company's true place of business would apply if it is more favorable to the claim of the client victim of fraud. Naturally, it is up to the company to rebut the presumption of fraud by providing objective reasons to justify that apparently extraordinary conduct.⁸³

Finally, *ordre public* can be invoked to refuse to recognize or enforce a foreign judgment which is repugnant to the principles of the law of the country where recognition or enforcement is sought. Thus, a foreign judgment providing a solution contrary to Article 1208 mentioned above cannot be recognized or enforced in Argentina. Neither would be a foreign judgment contrary to Argentine mandatory rules, e.g., Article 604 of the Navigation Law and Article 2 of Law 12.988. Such recognition is contrary to the public policy of the State in which recognition is sought⁸⁴.

XI. ADMISSIBILITY AND EVIDENTIAL WEIGHT OF DATA MESSAGES, TAKING OF EVIDENCE ABROAD AND LEGALIZATIONS

In legal proceedings, it is often necessary to take evidence or obtain information abroad. Article 9 of the UNCITRAL Model Law on Electronic Commerce establishes that data messages should not be denied admissibility as evidence in legal proceedings on the sole ground that they are in electronic form.⁸⁵ Paragraph 2 provides useful guidance orientation as to how to assess the evidential weight of data messages, e.g. depending on whether they were generated, stored or communicated in a reliable manner.⁸⁶

Now, in Argentine proceedings, the admissibility and evidential value of data messages are ultimately subject to the law applicable to the substance of the contract in question.⁸⁷ If Argentine

83. See 1 BOGGIANO, *supra* note 53, at 483.

84. CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [Cód. PROC. CIV. Y COM.] art. 517.4.

85. UNICTRAL Model Electronic Commerce, *supra* note 9, para. 1.

86. See Guide, *supra* note 10, paras. 70-71.

87. Treaties of Montevideo on International Procedural Law, Jan. 11, 1889, and Mar. 19, 1940, art. 2. O.A.S.T.S. . The 1889 Treaty has been ratified by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay. The 1940 is in force between Argentina, Paraguay and Uruguay.

Law constitutes the applicable law, then Article 11 of Law 25.506 will settle the issue, a data message digitally signed being recognized admissibility and evidential value in legal proceedings wherever the presentation of an original document is required by law.

Argentina has adhered to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, adopted by the Hague Conference on Private International Law and concluded on March 18, 1970.⁸⁸ In September 1999, the Conference's Permanent Bureau, jointly with the University of Geneva, organized a Round Table on the Questions of Private International Law raised by Electronic Commerce and the Internet.⁸⁹ The unanimous conclusion of Commission VI, in charge of the study of the interpretation of the above Convention, was that the spirit, structure and text of the Hague Convention do not hinder in any manner the taking of evidence by electronic means and, in particular, that the expression "letters rogatory" should not be interpreted as an obstacle to the use of electronic means, noting that the Convention does not provide any definition on the form which the letter has to take.⁹⁰ It was observed that Article 9.3 provides that letters rogatory shall be executed expeditiously, and that the electronic transmissions constitute an effective method of putting this mandate into practice.⁹¹ The Commission also concluded that the recourse to central authorities (art. 2.1) and other authorities specified in Article 24, far from becoming redundant in the face of the new transmission techniques, may become useful when the court in the country of origin cannot identify the court with jurisdiction in the country addressed or when the execution of the letters is denied (art. 12).⁹² As regards the use of cryptography and other similar techniques intended to guarantee authenticity, confidentiality and integrity of electronic documents or communications, the Commission concluded that they should not be included within the "formalities" forbidden by Article 3, last paragraph, of the Convention. Finally,

88. Text and Status Report, *see supra* note 26.

89. *See Electronic Data Interchange, Internet and Electronic Commerce / Les échanges données informatisées, internet et le commerce électronique*, Document drawn up by Catherine Kessedjian, Deputy Secretary General of the Hague Conference on Private International Law, Preliminary Document No. 7 of April 2000 for the attention of the Special Commission of May 2000 on general affairs and policy of the Conference, ch. III § 6.1; available at <http://www.hcch.net/e/workprog/e-comm.html>

90. *Id.*

91. *Id.*

92. *Id.*

the Commission did not find any objection to the use of the new means of communication, including videoconference and other similar methods, to question witnesses at a distance, as long as the measure is requested by means of a letter rogatory or under Article 17 interpreted in a functional sense.⁹³

Another issue discussed at the Geneva Round Table was the eventual adaptation of the Convention Abolishing the Requirement of Legalization, adopted in The Hague on October 5, 1961⁹⁴. Commission VI unanimously convened that the method of functional equivalent would allow the register prescribed by Article 7 to be kept in electronic form. However, the possibility of the "apostille" itself to be issued electronically would depend, in part at least, on whether the document on which the apostille has to be affixed to is also an electronic document.⁹⁵

XII. THE *LEX ELECTRONICA*: A COMMON LAW OF THE INTERNET?

Some authors propose the law merchant or *lex mercatoria*, which began in Europe in the central times of the Middle Ages, as a possible model law for the Cyberspace.⁹⁶

Different terms have been proposed to designate this body of law especially designed for the Internet. It has been called *lex electronica*, *lex informatica*, *lex networkia*, *lex cyberspace*, and *cyberlex*. Yet, the most popular expression seems to be *CyberLaw* and its translation into almost every language: *cyberdroit*, *ciberdiritto*, *Cyberrecht*, *ciberdireito*, *ciberderecho*.

Internet Law could originate in both internal laws and international treaties and adopt different models: self-regulation by

93. *Id.*

94. Text and Status Report, *see supra* note 26.

95. *See supra* note 89, ch. III § 6.2.

96. *See, e.g.*, Burnstein, *supra* note 3, at 27-30; David G. Post, *Anarchy, State and the Internet: An Essay on Law-Making in Cyberspace*, J. ONLINE L. (1995), art. 3; David R. Johnson & David G. Post, *Law and Borders, The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367-1402 (1996); Lionel Costes, *les contours encore incertains de la future "société de l'information"*, 4 Revue de Droit des Affaires Internationales [R.D.A.I.] (1996); Pierre Sirinelli, *L'adequation entre le village virtuel et la creation normative, Remise en cause du rôle de l'Etat?*, in INTERNET, WHICH COURT DECIDES? WHICH LAW APPLIES? QUEL TRIBUNAL DÉCIDE? QUEL DROIT S'APPLIQUE?, 5-20 (Katharina Boele-Woelki & Catherine Kessedjian eds., 1998); Franz Mayer, *Recht und Cyberspace*, 49 NEUE JURISTISCHE WOCHENSCHRIFT [N.J.W.] 1782-1791 (1996); TITO BALLARINO, INTERNET NEL MONDO DELLA LEGGE 51-55 (1998); Marina Vargas Gómez-Urrutia, *Recientes iniciativas y propuestas para la reglamentación del comercio electrónico*, 4 REVISTA DE CONTRATACIÓN ELECTRÓNICA [R.C.E.] 25-67 (2000).

Internet service providers through contract stipulations between the user and the service provider and between the editor and the hosting service provider; adoption of codes of conduct for Internet users that guarantee responsible commercial communications on the Internet; collection of customs and practices developed by national courts with guidance from users, governments and the Internet industry; statement of common principles applicable to electronic commerce identified by professionals or international organizations; etc.⁹⁷

Unifying a substantive law of the Internet, it has been said, would have the advantage of removing the ordinary problems of choice of law in electronic commerce. And the reason is simple: universally applicable substantive rules would provide a global and definite solution to cyber-disputes. This would increase certainty and predictability for activities online, contributing most effectively to the establishment of more harmonious economic relations. But it was Matthew Burnstein who supported this solution with Internet-specific arguments.⁹⁸ He submits that Internet law, being a law in constant formation, would best respond and adapt to technical and legal advances.⁹⁹ Unlike the slow-moving ordinary legal process, this *lex electronica* might better suit the ever-changing culture and technology of the Internet.¹⁰⁰

Some authors go even further and advocate providing this law (or set of rules) of "the information society" with its own special courts responsible for the application of that law, away from state jurisdictions and traditional arbitration of international commerce. A "virtual justice" would be created, in charge of the determination of the applicable rules and the solution of disputes among Internet users. They would even possess some power to enforce the law coercively, this is to say, to take measures with the aim of demanding the performance of an unfulfilled obligation on the part of Internet users, and expelling offenders from the Internet.¹⁰¹

In my opinion, it is possible to identify a set of rules as part of an incipient *lex electronica*. It comprises in the first place some

97. See Sirinelli, *supra* note 96, at 14-20.

98. See Burnstein, *supra* note 3, at 28-29.

99. *Id.*

100. *Id.*

101. See generally Oyarzábal, *Juez competente y contratos electrónicos en el derecho internacional privado*, *supra* note 8, at 9-11; Weinberg de Roca, *La jurisdicción internacional en el comercio electrónico*, in *OBLIGACIONES Y CONTRATOS EN LOS ALBORES DEL SIGLO XXI*, *supra* note 8, at 971.

general principles applicable to the virtual world, which may or not be universal, such as "freedom of expression" and "freedom of communication" on the Internet, and "non-discrimination of the electronic environment."¹⁰² In the second place, it includes the rules contained in international conventions and other documents elaborated by experts of international organizations: e.g. the UNCITRAL Model Laws on Electronic Commerce (1998) and on Electronic Signatures (2001); the European Directive on Electronic Commerce (2000)¹⁰³; and the *E-Terms* (published in the E-Terms Repository Guidebook, 1996) and GUIDECs I & II (General Usage for International Digitally Ensured Commerce, 1997 and 2001 respectively) developed by the International Chamber of Commerce.¹⁰⁴ Finally, we find rules derived from modern national laws of countries where electronic commerce has reached a higher level of development, and that are easily adaptable to international transactions, like the Uniform Commercial Code of the United States¹⁰⁵. But, it must be noted that these rules are still in process of formation and their content is not always constant and precise.

Now, the question is if the parties can choose "the customs and usages of international electronic commerce" or "the transnational law of the Internet" or "the *lex electronica*" as the applicable law to their contracts, without indicating specific instruments like the UNCITRAL Model Law or the Uniform Commercial Code. And yet, whether the *lex electronica* can be regarded as an autonomous legal system with a legal status, even if it has not been chosen by the parties. Is it reasonable to consider that electronic contracts belong to, or rather, are localized, by nature, in cyber-space, and then to override the whole system of conflict of law rules emanated from international treaties or the internal law of the forum?¹⁰⁶

102. See generally LORENZETTI, *supra* note 8, at 46-52.

103. Directive 2000/31/CE of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the internal market, 2000 O.J. (L 178) 1-16; available at http://www.europa.eu.int/eur-lex/en/lif/reg/en_register_132060.html

104. International Chambers of Commerce Codes, Rules, and Model Contracts, available at http://www.iccwbo.org/home/statements_rules/menu_rules.asp.

105. Uniform Commercial Code [U.C.C.] (2003 Official Text with Comments), article 1 (General Provisions) and article 2 (Sales), prepared under the joint sponsorship of The American Law Institute (A.L.I.) and the National Conference of Commissioners on Uniform State Laws (N.C.C.U.S.L.).

106. See generally Feldstein de Cardenas, *supra* note 8, at 667-68 (raising some interesting questions about the characteristics and the recognition of what she names "cyberlexmercatoria").

In my mind, in principle the *lex electronica*, like the *lex mercatoria*, is applicable only if the parties expressly or implicitly agreed to apply it. Thus, a tribunal cannot apply the *lex mercatoria* as if were a legal system, for the sole reason that the contract was concluded and is to be performed entirely online, unless strictly founded on party autonomy.

Moreover, the parties must designate the precise rules of the *lex electronica* that they want to include in the contract, since a mere reference to the *lex electronica* does not allow courts to apply general principles which are uncertain and too vague, and to displace the rules for the choice of law that indicate the particular legal system by reference to which a concrete solution of the dispute must be reached.

Obviously the *lex electronica* should not be regarded as supra national. And like any other legal system which is foreign to the forum, it can be overridden by the mandatory rules of the forum, and possibly by the mandatory rules of other countries closely connected to the case, and by public policy.

These simply are some considerations reasoned by prestigious scholars about the interrelation of the *lex mercatoria* and national law in international contracts, which seem to me applicable *mutatis mutandi* to the rules of the new *lex electronica* that may have appeared in international contracts on the Internet.¹⁰⁷

XIII. GENERAL METHODOLOGY FOR ATYPICAL CASES.

CONCLUSIONS

One can conclude from the preceding paragraphs that, in principle, the rules of classic private international law provide effective solutions to the problems arising from the use of the new technologies as a means of negotiating, concluding and performing international contracts. Generally speaking, the legal problems posed by the Internet are not new. They are the ordinary problems (contracts, torts, etc.), though presented "in a new technological shape."¹⁰⁸ On the other hand, they are problems inherent to a world of legal diversity.¹⁰⁹ But the legal problems are the same both in the real world and in the virtual world. Among other

107. See PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 171-198 (1999); 2 BOGGIANO, *supra* note 53, at 310-314, and the bibliography cited in both books.

108. CALVO CARAVACA & CARRASCOSA GONZÁLEZ, *supra* note 24, at 22-23.

109. RICHARD FENTIMAN, CONFLICTS OF LAW IN CYBERSPACE 28 (International Federation of Computer Law Associations, Multimedia and the Internet Global Challenges for Law ed., 1996).

things, the Internet is nothing but a different way of concluding contracts *inter absentes*, a question well known and dealt with by the doctrine since the times of Savigny¹¹⁰.

Moreover, the initiative to create an *International Cyber Law* is more a wish than a reality. The UNCITRAL Model Laws represent only a first step towards the unification of a substantive law of the Internet. Thus, recourse to traditional private international law rules constitutes the real alternative.

It seems possible, however, to conceive the appearance of cases in which traditional rules and solutions do not suit the present realities because of their inability to determine the connection between the case and a country. Connecting factors, like "place of contracting," "place of performance," "residence" or "place of business," may be impossible to localize in contracts concluded or performed online. In such cases, it can be argued that more flexible rules should also be adopted. That is, connecting factors which are "open" and not founded exclusively on the connection of the contract with a certain place, and that lead, on reasonable grounds, to the application of a concrete national law. Indeed, some authors have submitted that in order to respond to the challenges created by this shift from geographical space to cyberspace, a shift in choice of law analysis from "categorical" to "functional" analysis is inevitable.¹¹¹ Obviously this position reflects the strong influence of Cavers and Currie on United States private international law. But it has also been advocated by some German authors.¹¹²

It is believed that these ideas are very useful as they propose appropriate and punctual solutions. Yet, we fear the approaches that exclude all connecting factors to rely only on the *better law*. On the same grounds, it would not be acceptable to apply the "most closely connected law" to the extent of giving up the identification and determination of reasonably precise connecting factors.¹¹³ This would leave the parties in the middle of a systematic

110. See CALVO CARAVACA & CARRASCOSA GONZÁLEZ, *supra* note 24, at 23.

111. See Geller, *supra* note 2, at 27-48.

112. See, e.g., Thomas Hoeren, *Electronic Commerce and Law - Some Fragmentary Thoughts on the Future of Internet Regulation from a German Perspective*, in LEGAL ASPECTS OF GLOBALIZATION 40-41 (Jürgen Basedow & Toshiyuki Kono eds. 2000); Christopher Kuner, *Internationale Zuständigkeitskonflikte im Internet*, 8 COMPUTER UND RECHT 453-458 (1996).

113. See generally Paul Lagarde, *Le principe de proximité dans le droit international privé contemporain - Cours général de droit international privé*, 196 RECUEIL DES COURS 25-46 (1986).

uncertainty on their vested rights.¹¹⁴

However, it seems appropriate to apply the traditional rules with a certain degree of flexibility in order to adapt them in atypical cases. The approach that relies on a certain group of connecting factors and also introduces by way of exception the principle of the closest connection (*principe de proximité*), has been adopted by the 1985 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods. The Hague Convention takes pains to foresee the different possible hypothesis.¹¹⁵ But aware of the wide variety of situations *de facto*, it contains a default rule, leaving the determination of the applicable law to the decision of the competent court.¹¹⁶ In the context of the Internet, where international cases present us more frequently with situations in which traditional solutions lose their localizing capacity, the "flexible" approach provided by the proximity doctrine could work, because it would reconcile predictability and realism in the solution of the case. But it must be clearly understood that this does not mean substituting altogether the choice of law rule established by statute, but only providing "typically atypical" solutions to not typical situations that may appear in international commerce.¹¹⁷ Only the atypical cases justify leaving this constitutive task in the hands of the courts.

In Argentina, the *principe de proximite* has not been expressly established by statute. However, in the case of contracts for the international sale of goods concluded online, the principle could be applied by analogy to Article 8.3 of the Hague Convention. And it is even possible to extend its application to all kinds of contracts under Article 16 of the Civil Code which provides that, in order to solve a case, tribunals must recourse to general principles of law and to equity "taking into consideration the circumstances of the case."

Again, it can be observed that the methods and the rules originally designed for the "real world" do not present any insoluble difficulties when applied to the "virtual world." That virtual world is perfectly compatible with the realities of conflict of law resolution as we know it.

There is no doubt that the globalization advances and the future developments of the Internet will present the legal expert

114. See 1 BOGGIANO, *supra* note 53, at 469.

115. Hague Convention, *supra* note 26 at art. 8.1-8.2.

116. *Id.* at art. 8.3.

117. See 1 BOGGIANO, *supra* note 53, at 469.

with new and considerable challenges that will test the strength and flexibility of the system up to the extent of putting into question the applicability and justice of its solutions. But there is no reason to think that our discipline is not ready to respond rapidly and efficiently to the new challenges. This is the reassuring message to our colleagues from the private international law department.