

**LES ÉCHANGES DE DONNÉES INFORMATISÉES, INTERNET ET LE
COMMERCE ÉLECTRONIQUE**

*Document établi par Catherine Kessedjian
Secrétaire général adjoint*

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**ELECTRONIC DATA INTERCHANGE, INTERNET AND
ELECTRONIC COMMERCE**

*Document drawn up by Catherine Kessedjian
Deputy Secretary General*

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INTRODUCTION

In line with the recommendations of the *Special Commission of June 1995 on General Affairs and the Policy of the Conference*,¹ the Eighteenth Session of the Hague Conference on Private International Law decided to retain in the Agenda of the Conference, but without priority, the problems of private international law raised by electronic data interchange.² This question had featured for the first time in paragraph 4 (e) of Part B of the Final Act of the Seventeenth Session.³

The Eighteenth Session also decided to retain on the Agenda the problems of private international law raised by protecting privacy in connection with transboundary data flows,⁴ which had previously also been included in the Final Act of the Seventeenth Session.⁵

It was clear from the discussions on issues relating both to electronic data interchange and to the protection of privacy in connection with transboundary data flows, that at this time the delegates were looking mainly to work done in other international organisations. For electronic data interchange, the work of UNCITRAL was the most relevant. Since then, the European Union has done some very important work which will also be described briefly. As for the protection of privacy, considerable relevant work has been done by the Council of Europe,⁶ the OECD and the European Union.

Following a brief review of work in progress in the various organisations concerned,⁷ we will consider the results of the efforts made by the Permanent Bureau to obtain a better understanding of the needs created by the developments in the Internet and in electronic commerce.

¹ Cf. *Conclusions of the Special Commission of June 1995 on General Affairs and the Policy of the Conference*, drawn up by the Permanent Bureau, Prel. Doc. No 9 of December 1995, *Proceedings of the Eighteenth Session*, Tome I, *Miscellaneous matters*, p. 6 and especially page 110, No 8.

² *Final Act of the Eighteenth Session*, Part B, paragraph 4 (b), first indent.

³ *Proceedings of the Seventeenth Session*, Tome 1, *Miscellaneous matters*, p. 42.

⁴ *Final Act*, Part B, paragraph 4 (b), second indent.

⁵ *Final Act of the Seventeenth Session*, Part B, paragraph 4 (b), *Proceedings*, Tome 1, p. 42.

⁶ See Minutes No 2 of Committee I, *Proceedings of the Eighteenth Session*, Tome I, *Miscellaneous matters*, p. 245 *et seq.*

⁷ We will confine the study to the work of organisations concerned with the unification of private law *stricto sensu*. However, it should be noted that work relevant to electronic commerce is also in progress in other organisations, including the WTO, ITI, ICANN and Unesco. In addition, many non-governmental bodies or organisations (such as the ICC, the GBD, the IBA, the ABA) are preparing studies and taking part in debates in the relevant international fora. It is impossible to give a full picture of this vast range of activity. Finally, the Member States of the Conference are also actively engaged in this field, but their work can be mentioned only incidentally.

CHAPTER I - WORK IN PROGRESS ON ELECTRONIC DATA INTERCHANGE AND ELECTRONIC COMMERCE

A THE WORK OF UNCITRAL

§ 1 The 1996 model law on electronic commerce

An annex to a resolution adopted on 16 December 1996 by the General Assembly of the United Nations at its 85th plenary session features the UNCITRAL model law on electronic commerce and the Guide to Enactment, for incorporating the model law into national law.⁸ States have been recommended to take due account of these texts when promulgating or revising legislation on the subject of electronic data interchange and electronic commerce in general.

The model law applies to information of any kind taking the form of a data message used in the framework of commercial activity, the latter term being broadly interpreted to refer to any commercial relationship, contractual or non-contractual.⁹

The principle underlying the model law is "functional equivalence". By this method, UNCITRAL proposes to examine the aims, objectives and functions of the various requirements framed in law, including those on information being given in writing, on signatures, on originals, and on the evidential value of these requirements. For each of these, the model law proposes to allow the functional equivalent in electronic form. Thus Article 6, on writing, provides that "Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference".¹⁰

It is unnecessary here to repeat all the elements of the model law, which is familiar to the participants of the Special Commission of the Hague Conference on Private International Law. However, it may be said that this law provides the necessary legal devices for adapting the legislation of States and interpreting the various existing Conventions, as we will see in greater detail below in reviewing the recommendations of the Geneva Round Table.¹¹

We merely add that in 1998 an Article 5 *bis* was added to the model law, to permit the incorporation by reference of a piece of information, which will then retain its legal effects even though it is not incorporated into the data message itself otherwise than by reference.

Since the adoption of the model law, we note that three States have adopted legislation modelled on it: Colombia, Korea and Singapore. In the United States, Illinois has also

⁸ UNCITRAL Model Law on Electronic Commerce, with Guide to Enactment, 1996, United Nations, New York, 1997.

⁹ See Article 1 - Sphere of application.

¹⁰ It is noted that Article 4.2(d) of the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters is inspired by this text. See the text of the preliminary draft Convention on the website of the Hague Conference www.hcch.net, under "Work in Progress".

¹¹ See below, Chapter III B.

adopted legislation along these lines.¹² However, many other States have made greater or lesser use of the model law, either in legislation which has already been adopted or in drafts under preparation. These States include Australia, Canada, Hong Kong, India, Philippines, Slovenia, Mexico and Thailand.¹³ Finally, the *United States National Conference of Commissioners on Uniform State Law* has also followed the model law in preparing the *Uniform Electronic Transactions Act*.¹⁴

§ 2 Work on electronic signatures

Five meetings have already taken place in order to prepare Uniform Rules on electronic signatures. The aim of the uniform rules is to facilitate the increasing use of electronic signatures in international commercial transactions. They are intended to provide a set of norms as a foundation for recognising the legal effects of digital and other electronic signatures. They focus chiefly on the private law aspects of commercial transactions, disregarding the aspects of public policy, administrative law, consumer law and criminal law, which are left to national law to deal with.

They are intended for use in commercial transactions which take shape in an "open" environment, *i.e.*, an environment in which the parties to the transaction communicate by electronic means without prior agreement for the purpose. But they also make it possible to create default rules in a "closed" environment, namely rules which can be applied if the party agreement is silent.

The rules are moreover based on the principle of technical neutrality. Admittedly, many electronic signature systems operate according to the so-called "public key" technique, *i.e.*, a system which operates via a set of relationships between three parties: the holder of the key, the certifying authority and the third party who relies on the key. However, this model is not the only one in existence, and it is conceivable that some systems may allow for both functions to be carried out by the same person.

The rules are also based on the principle of the functional equivalent, so as to permit all the legal effects of a handwritten signature, whether or not the applicable law makes this a binding condition for the document to be valid.

The work of UNCITRAL on this topic is taking on considerable practical significance, especially in connection with the adaptation of the Hague Conventions, to be explained below.¹⁵ Under the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, and the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad*

¹² This information comes from a document prepared by UNCITRAL and updated on 3 March 2000, entitled "Status of Conventions and Model Laws", which can be found on UNCITRAL's Internet website.

¹³ This information was provided by the Secretariat of UNCITRAL to the Geneva Round Table, which is mentioned below.

¹⁴ *Ibid.*

¹⁵ *Cf* below, Chapter III B, on the work of the Geneva Round Table.

in Civil or Commercial Matters, reliable identification of the sender of the document, and sometimes of the recipient, is a necessity if the Conventions are to work properly. Adapting these to electronic means of communication therefore presupposes the existence of rules whereby electronic signatures can be legally recognised.¹⁶

§ 3 The future work of UNCITRAL

Depending on what the Member States of UNCITRAL decide, its Secretariat believes that the general work on the basic principles underlying electronic commerce is nearing completion. At the June-July 2000 session, there will be a discussion on possible future work by UNCITRAL in this field. There are several possible options: *a)* a major convention covering all, or certain specific aspects of electronic commerce, although it is not yet clear what its scope of application would be; *b)* a single instrument to enable existing international conventions, especially those on transport, to be interpreted and adapted, without the need to amend the actual text of these conventions; *c)* more focused work on the substantive law of electronic commerce, to include topics such as the making of contracts or the resolution of disputes.

Bearing in mind the international nature of electronic commerce, and its essentially multidisciplinary character, it may be as well to point out that much of this work could be undertaken jointly by several different organisations, thus enhancing the efficiency of the work and the management of the funds allotted for the purpose. Moreover, for work pertaining to international private law, collaboration with the Hague Conference would be desirable.

B THE WORK OF OECD

It is impossible to give an exhaustive account here of the work done by OECD in the field of electronic commerce. In this part of the report, we will therefore confine ourselves to the aspects relating to consumer protection, leaving the work on protection of privacy to Chapter 2.

The Committee on Consumer Policy (within the Directorate for Science, Technology and Industry) has prepared a study entitled "Consumer protection in the electronic market place",¹⁷ which was submitted to the OECD Ministerial Conference on "A Borderless World – Realising the Potential for Global Electronic Commerce", held in Ottawa (Canada) on 8 and 9 October 1998, at which the Permanent Bureau was represented.¹⁸

From this document it is clear that the Committee's priority objective was to take part in the development of a worldwide online market which would be reliable and predictable for consumers. This process calls for an answer to the following questions: how accurate is the information received or found online; how is a contract made; how can access be secured to mechanisms for obtaining compensation and settling disputes; what is the risk

¹⁶ The Secretariat of UNCITRAL hopes to complete this work by the end of 2000 (first week of the November 2000 session).

¹⁷ DSTI/CP (98) 13/REV2, of 22 September 1998.

¹⁸ As nobody from the Secretariat was available on those dates, the Permanent Bureau was represented by Professor Katharina Boele-Woelki, of the University of Utrecht.

of fraud; the safety of the online environment; and the protection of privacy.¹⁹

With these questions in mind, the Committee drew up guidelines²⁰ which the Council of the Organisation has recommended member countries to implement.²¹

It is evident from the text of the guidelines that consumers are to enjoy a level of protection, when contracting online, at least equivalent to that enjoyed in other forms of commerce (Article 1). There is considerable emphasis on the obligation for businesses to supply information, so that consumers will be contracting in full awareness of what is at stake.

There is also a section in the guidelines on a question closer to the concerns of the Hague Conference: dispute resolution and remedies. The relevant passages are reproduced below:

"A. APPLICABLE LAW AND JURISDICTION

Business-to-consumer cross-border transactions, whether carried out electronically or otherwise, are subject to the existing framework on applicable law and jurisdiction.

Electronic commerce poses challenges to this existing framework. Therefore, consideration should be given to whether the existing framework for applicable law and jurisdiction should be modified, or applied differently, to ensure effective and transparent consumer protection in the context of the continued growth of electronic commerce.

In considering whether to modify the existing framework, governments should seek to ensure that the framework provides fairness to consumers and business, facilitates electronic commerce, results in consumers having a level of protection not less than that afforded in other forms of commerce, and provides consumers with meaningful access to fair and timely dispute resolution and redress without undue cost or burden."

Finally, the guidelines encourage the provision of effective access to alternative means of dispute resolution and remedies, without undue burdens or costs.

C THE WORK OF THE EUROPEAN UNION

We will deal here only with the work which has been done on the question of electronic signatures, and ongoing work to create a legal framework for electronic commerce and alternative methods of dispute resolution, especially for disputes between businesses and consumers.

¹⁹ On this latter question, see below, Chapter II.

²⁰ DSTI/STI/it/CONSUMER/prod/guidelines-final-en.

²¹ See the recommendation under the same reference as in the previous footnote.

§ 1 Electronic signatures

The directive on a Community framework for electronic signatures was adopted on 13 December 1999.²² The Member States of the Union are to transpose this directive into their national law by 19 July 2001. Like many Community texts, the directive will be subject to periodic review, and this will take place for the first time two years after the deadline for transposition. This review will make it possible to ascertain whether developments in technology, on the market and in the law necessitate amendments to the text. Although there was work in progress at the same time at a worldwide level,²³ the European Union preferred to set up its own system without delay, on the understanding that it would be altered in the light of findings at the international level.

From the viewpoint of substance, the directive provides a framework in which an open and competitive market can be organised for certification services, while requiring States to set up an adequate monitoring system for certification service providers. This market is an open one not only as regards the services proposed in the framework of the internal market (the principle of free circulation) (Article 4), but also as regards third countries (Article 7).

As for the legal effects of the electronic signature, the directive asks Member States to ensure that advanced electronic signatures²⁴ are recognised as equivalent to handwritten signatures and are admissible as evidence in court, whatever the actual techniques used.

The directive also establishes a liability regime for the provider of the certification service (Article 6) and repeats the requirements for personal data protection in directive 95/46/EC of 24 October 1995.

Finally, we note that the directive does not prohibit Member States from imposing additional requirements for the use of electronic signatures in the public service (Article 3.7). This clause may have an impact on the work of adapting the Hague Conventions, as described below.²⁵

§ 2 The legal framework of electronic commerce

On 28 February 2000 the Council of the Union took a common position concerning adoption of the directive of the European Parliament and the Council on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market.²⁶ A final text was to be adopted by the end of the first semester of 2000.

²² Directive 1999/93/EC, OJ L13, 19 January 2000, p. 12.

²³ See above for the work of UNCITRAL.

²⁴ Advanced electronic signatures are those which meet the criteria laid down in Article 2.2) of the directive:

- a) they must be uniquely linked to the signatory;
- b) they must be capable of identifying the signatory;
- c) they are created using means that the signatory can maintain under his control; d) they are linked to the data to which they relate in such a manner that any subsequent change of the data is detectable.

²⁵ See Chapter III B, paras. 5 and 6.

²⁶ This document is consultable at http://europa.eu.int/com/internal_market/en/media/eleccomm/composen.pdf.

Apparently, no previous European directive has had so many recitals in its preamble (65 in all), which is indicative of the scale and intricacy of the issues covered in the text. Its main aim is to remove the legal obstacles to the proper working of the internal market in the information society (recital 5), while ensuring that Community rules are consistent with international rules, in view of the worldwide scale of electronic commerce (recitals 58, 61 and 62). The text also aims to ensure legal certainty and consumer confidence (recital 7) in the framework of the numerous Community instruments for protecting their interests (recitals 11 and 55) and those of individuals generally with regard to the processing of personal data (recital 14).

It is not the aim of the Directive to establish additional rules on private international law relating to conflicts of law or of jurisdiction (recital 23 and Article 1.4). However, it is made clear that the provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide Information Society services (same recital). It is also specified that States must guarantee victims effective access to dispute resolution, possibly by setting up jurisdictional procedures through appropriate electronic means (recital 52).

The text contains some very useful provisions on the application of rules of private international law, including those on establishment and information. As regards establishment, recital 19 reiterates the principle that: "the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity". This principle is reflected in Article 2 c) of the directive.

As regards information, Articles 5 and 6 of the directive clarify the requirements governing service providers, which go beyond the rules otherwise set by Community law. These requirements meet the concern often expressed that the rules of private international law are not appropriate for electronic commerce, because they enable one or more criteria to be identified which could serve as territorial connecting factors or, at least, as presumptions.²⁷

The directive contains many other interesting provisions, but the value of these for private international law is less immediate. They need not be discussed here in detail.

§ 3 Alternative methods of dispute resolution

In the light of the work on revising the Brussels and Lugano Conventions, and the proposal for a Regulation to replace the Brussels Convention,²⁸ those active in the field have become conscious of the implications of the revised rules, especially in the event of disputes with consumers. Thus several proposals have been made for developing

²⁷ See the conclusions of the Geneva Round Table for proposals on the use of presumption mechanisms.

²⁸ Com(1999) 348 final of 14.7.1999.

alternative methods of dispute resolution, with greater emphasis on online resolution.²⁹

A study was therefore requested from the Commission's Joint Research Centre, which presented its interim preliminary findings at a seminar held in Brussels on 21 March 2000, at which the Hague Conference was represented.³⁰

It would be premature to suggest what avenue the European Union will pursue, or whether the sites offering a dispute resolution service will become the subject of an accreditation procedure or not. However, it is clear that both industry and consumers want to see an open, flexible system set up which will be under some degree of control. Confidence in the dispute resolution system must be built among operators, namely thanks to the principles of transparency, reliability, independence and legality.³¹

CHAPTER II - PROTECTION OF PRIVACY IN RESPECT OF TRANSBOUNDARY DATA FLOWS

We will confine ourselves here to a brief overview of the work of OECD, the Council of Europe and the European Union.

A THE WORK OF OECD

§ 1 Work completed

As early as 1980, the OECD drew up "Guidelines on the Protection of Privacy and Transborder Flows of Personal Data" (hereafter the Guidelines).³² These Guidelines lay down principles for the collection and processing of personal data, to apply both at the national level and internationally. They also call upon member countries to implement these principles internally, by introducing legal, administrative or other provisions, or setting up institutions to protect privacy and personal data. As for private international law, in preparing these guidelines the Group of Experts paid great attention to the problems of conflicts of law and of jurisdiction raised by transboundary flows and the protection of privacy, but did not offer any specific detailed solutions. However, the Guidelines do contain one general recommendation, that "Member States should work towards the development of principles, domestic and international, to govern the applicable law in the case of transborder flows of personal data."³³

²⁹ This also reflects the concerns of the Hague Conference, as expressed during the Geneva Round Table; see below, Chapter III, B, § 7.

³⁰ This study, and the presentations on 21 March, can be consulted on the site <http://dsa-isis.jrc-it/ADR/>.

³¹ See the Recommendation of the Commission on the principles applicable to bodies responsible for the extrajudicial resolution of consumer disputes, 98/257/EC.

³² Recommendation by the Council of OECD of 23 September 1980, consultable at: <http://www.oecd.org/E:/droit/doneperso//ocdeprive/priv-en.htm>.

³³ See paragraph 22.

In the same line of thought as the guidelines for protecting privacy, in 1985 the governments of the OECD member countries adopted a Declaration on transboundary data flows, emphasising their intention of seeking to achieve transparency in the rules and policies affecting international trade, and developing common approaches or harmonised solutions for dealing with the problems associated with this trade.

The OECD continued its work within an expert group on security of information and privacy, which issued a very full report in 1997 on "Implementing the OECD Privacy Guidelines in the Electronic Environment: Focus on the Internet".³⁴ This report discusses the growing importance of data protection, especially in an electronic online environment. As several surveys have shown, the fears of Internet users concerning the collection and use, even for commercial purposes, of their personal data, are tending to hold back the development of electronic commerce. The report also describes the complaints recorded in certain OECD member countries about various problems (the use of electronic addresses and the right of employers to inspect the electronic mail of their employees; inaccurate information and fraudulent activities on the Internet; the ease with which personal information, especially electronic addresses, can be derived from activities conducted on the Internet and then used in the compilation of commercial marketing lists without the knowledge of those affected). The report describes certain methods of data collection on the Internet, and mentions some initiatives taken by the private sector to protect privacy on websites.

According to the group of experts, solutions have to be found through dialogue between governments and the private sector. The report particularly highlights the role of governments, and reaffirms that the guideline principles must be implemented either through law or through self-regulation, and that remedies must be available for individuals if they are breached. The report also encourages governments to support private sector initiatives to find technical solutions for implementing the Guidelines. In conclusion, the report recommends collaboration among all players on the Internet, emphasising the important role of the OECD.

In February 1998 the OECD organised in Paris, with the support of the Economic and Industrial Consultative Committee of OECD (BIAC) an international workshop on "Privacy Protection in a Global Networked Society".³⁵ This conference was an opportunity to bring together representatives of governments, the private sector, consumer organisations and the authorities responsible for data protection. At the end of the conference, its Chairman noted that there was a broad consensus on the need to strike a proper balance between the free circulation of information and the protection of privacy. In order to evaluate the current situation on the Web, an "Inventory of Instruments and Mechanisms Contributing to the Implementation and Enforcement of Privacy Guidelines on Global Networks"³⁶ was

³⁴ This document is published under the reference DSTI/ICCP/REG(97)6/FINAL, accessible on the OECD website, www.oecd.org.

³⁵ The document about this Conference is published under the symbol DSTI/ICCP/REG(98)5/FINAL, and is accessible on the OECD website.

³⁶ This inventory is published under the symbol DSTI/ICCP/REG(98)12/FINAL and is accessible on the OECD website.

drawn up in September 1998. This inventory comprises the laws and mechanisms of self-regulation which have been adopted at the regional, national and international levels.

At the OECD Ministerial Conference held in Ottawa from 7 to 9 October 1998, the OECD Ministers adopted a Declaration on the Protection of Privacy on Global Networks, reaffirming their commitment to achieving effective protection of privacy on these networks and their determination to take the necessary steps for this purpose, and recognising the need to co-operate with industry and businesses. Under this declaration, they also agreed that the OECD should provide practical guidance for implementing the guidelines on the protection of privacy, based on national experience and examples.³⁷

Although paragraph 22 of the guidelines was never repeated in the subsequent work of the OECD, identification of the applicable law, in the context of establishing modes of dispute resolution which will be readily accessible and efficient, is still one of the possible techniques for bringing about the effective protection of privacy in a transnational framework.³⁸

§ 2 Ongoing and future work

In the light of the undertaking by the Ministers of member countries at the Ottawa Conference the OECD decided, in collaboration with industry, specialists in the protection of privacy and consumer associations, to devise an experimental "html" tool, a generator of policy declarations of OECD on the protection of privacy. This tool is addressed to public organisations and private sector enterprises, to encourage them to draw up policies and declarations on protecting privacy. It is presented in the form of a detailed questionnaire which will enable the organisations concerned, after an internal review of their practices in protecting privacy, to draw up a policy declaration on the protection of privacy which will appear on their site. The generator is presently available in English, French, German and Japanese, and is accessible on the OECD Internet site. It will contribute to the implementation online of the principle of transparency laid down in the Guidelines.

A report has also been compiled on "the use of contracts for transborder flows in an online environment". This report has not yet been declassified and is not available at present, as the Hague Conference does not have observer status with OECD.

Finally, OECD is organising jointly with the Hague Conference and the International Chamber of Commerce a seminar to be held in The Hague in the autumn of 2000. This seminar will focus on interaction between consumers and enterprises in an online environment, and specifically on online dispute resolution mechanisms.³⁹ The seminar has two aims. First, it will identify existing or planned techniques and methods for the effective resolution of conflicts associated with the protection of privacy which may arise

³⁷ The ministerial Declaration is included in the Conclusions of the Ottawa Conference, published under the symbol SG/EC(98)14/FINAL.

³⁸ In this connection, see below for the remarks on the Geneva Round Table - Committee IV and the projected joint seminar between OECD, the Hague Conference and the ICC.

³⁹ The provisional agenda for the seminar is annexed to this paper (Annex 1). For the time being, there is only an English version available.

in an online environment as between consumers and businesses. On the basis of these data, it will then formulate the essential principles for alternative online settlement mechanisms for disputes between consumers and businesses.⁴⁰

B THE WORK OF THE COUNCIL OF EUROPE

It is hardly necessary to dwell here on the highly significant work done by the Council of Europe on the protection of privacy and the protection of individuals with regard to the collection and handling of personal data. We will mention here only the work specifically done on the protection of privacy on the Internet, and the most recent ongoing project.

In Recommendation No R(99)5 of the Committee of Ministers to member States on the protection of privacy on the Internet, the Committee adopted on 23 February 1999 the guidelines for the protection of individuals with regard to the collection and processing of personal data on "information highways".⁴¹ These guidelines are addressed to both users and service providers, reminding them of certain cautionary principles to be applied by both groups where the Internet is being used to transmit personal information.

However, these guidelines do not contain any substantive provisions or binding provisions of private international law. They remind users that there are ways in which they can act. Paragraph 11 of the guidelines can usefully be quoted: "If you are not satisfied with the way your current ISP collects, uses, stores or communicates data, and he or she refuses to change his or her ways, then consider moving to another ISP. If you believe that your ISP does not comply with data protection rules, you can inform the competent authorities on take legal action."⁴²

Paragraph 13 of the guidelines draws the attention of users to the effects of a transboundary transfer: "If you intend to send data to another country, you should be aware that data may be less well protected there. If data about you are involved, you are free, of course, to communicate these data nevertheless. However, before you send data about others to another country, you should seek advice, for example from the authority of your country, on whether the transfer is permissible. You might have to ask the recipient to provide safeguards necessary to ensure protection of the data". There is a similar recommendation in paragraph 14 of Section III, on service providers. This section also contains several mentions of statutory or legislative provisions, without however indicating whose law is being referred to. But for service providers, this information is particularly important to enable them to manage with confidence and predictability the services they are offering commercially.

⁴⁰ This subject is further discussed below, Chapter III, D.

⁴¹ An example of these guidelines is annexed to this paper (Annex 2).

⁴² Emphasis added.

Since the adoption of Recommendation No R(99)5, the Council of Europe has prepared an Additional Protocol to Convention No 108 of 1981 for the protection of individuals with regard to automatic processing of personal data. This additional protocol does not specifically mention the Internet, but contains provisions for data protection based on the European directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The Additional Protocol makes it compulsory for each State ratifying it to set up independent monitoring bodies for data protection, and prohibits transboundary flows of data to countries and organisations which do not possess an adequate level of protection for personal data.

The Additional Protocol has been transmitted to the Parliamentary Assembly for consultation. The Assembly's opinion is expected in April 2000. The formal adoption of the Additional Protocol by the Committee of Ministers should take place in the course of 2000.

C THE WORK OF THE EUROPEAN UNION

On 24 October 1995 the European Parliament and the Council of the European Union adopted directive 95/46/EC on the protection of natural persons as regards the processing of personal data and the free circulation of such data. The principles in this Directive elucidate and amplify the principles enshrined in Convention no 108 of the Council of Europe. In order to guarantee maximum protection for citizens of the Union, the Directive takes a fairly broad approach to its field of application. For instance, in Article 4 it provides that each Member State is to apply the national provisions which it enacts in accordance with the Directive whenever the person responsible for processing the personal data is established on its territory; whenever it is established not on the territory of a Member State, but in a place where its national law applies by virtue of public international law; or again, whenever the person responsible for the processing is not established on the territory of the Community and makes use, for the purpose of processing personal data, of computerised or other methods situated on the territory of that Member State, unless these methods are used only for the purposes of transit across the territory of the Community. As further means of protection against the consequences of unlawful handling of personal data, the Directive specifies that Member States must provide that every person must have a legal remedy in the event of violation of rights guaranteed to him by the national provisions applicable to the processing concerned (Article 22). The Directive also lays down the principle that the person responsible for the data processing is liable (Article 23). Sanctions must be stipulated by national law for breaches of the provisions enacted in application of the Directive (Article 24). To ensure that the provisions of the Directive are not evaded, Member States must provide that transfer of personal data which is being or is intended to be processed to a third country may only take place if the third country concerned provides an adequate level of protection (Article 25 (1)). It is for the Commission to determine whether a third country does or does not ensure an adequate level of protection. Under Article 25(2) of the Directive, the adequacy of the level of protection offered by a third country will be appraised in the light of all circumstances relating to a transfer or category of transfers of data. Particular account is to be taken of the nature of the data, the purpose and duration of the intended processing, the countries of origin and of final destination, the *general or*

specific rules of law in the third country in question,⁴³ and the business rules and security measures which are in force there. To date, the Commission has not officially defined what is an adequate level of protection in a third country. Decisions of this nature are however under consideration for certain countries.⁴⁴ A verification exercise has been in progress for the United States for some months. The Commission is negotiating with the United States the principle of the "safe harbour";⁴⁵ this stands for data protection principles to which individual enterprises could subscribe by agreement. Compliance with the obligations arising from these principles would be assured, on the one hand, by dispute resolution mechanisms, and on the other hand by applying the law of the United States, which prohibits "unfair and deceptive acts". Finally, it should be mentioned that the Directive provides for the setting up of independent monitoring bodies and a group for the protection of individuals in respect of the handling of personal data (Articles 28-30).

The Directive, which came into force on 25 October 1998, has encountered some difficulties of implementation in certain member States. On 11 January 2000 the European Commission decided to bring proceedings against France, Germany, the Netherlands, Luxembourg and Ireland for failure to communicate measures for transposing the Directive into national law.

The provisions of the Directive seek to put in place in the member States a complete system for protecting privacy, while guaranteeing to citizens of the Union an adequate level of protection in contacts with third countries. The achievement by third countries of an adequate level of protection accepted by the Commission would create a universal standard for the protection of personal data, and would probably render obsolete the question of the applicable law.

CHAPTER III - THE WORK OF THE HAGUE CONFERENCE

Nowadays people do not talk about the interchange of computer data; they talk about the Internet and electronic commerce. As early as 9 October 1996, the representative of the United Kingdom, during the discussions in Committee I, explicitly mentioned electronic commerce.⁴⁶ A few words of explanation are necessary, to show why some of the subjects on the agenda of the Conference have been redefined.

The Internet means a network of computer networks which are themselves interlinked by telecommunications lines, thus enabling a range of activities to be carried on. A non-exhaustive list of these activities would comprise: chat groups, electronic mail, and sites on subjects ranging as widely as do human activities offline (purely informational sites,

⁴³ Emphasis added.

⁴⁴ Especially Switzerland and Hungary, both of which have passed legislation on the protection of personal data.

⁴⁵ The summary record of the hearing organised by the European Parliament on 22 and 23 February 2000, entitled "the European Union and data protection", indicates the difficulties of this undertaking. It is also worth noting the key aspects of the case of "Double click", as related in the magazine *Les Echos* of 6 March 2000, p. 25, which throws light on the impact of market forces in this area.

⁴⁶ Cf. Minutes No 2, *Proceedings of the Eighteenth Session*, tome I, *Miscellaneous matters*, p. 246.

educational and cultural sites, or commercial sites with a full range of activities and products).⁴⁷

Electronic commerce means commercial activities which are carried on by means of computers interconnected by telecommunications lines. Electronic commerce can be effected through the Internet, but also through any other network, closed or open, which exists or may be created. Electronic commerce may comprise activities part of which can be physically sited on a given territory. This will apply, for instance, in the case of an international sale of goods (furniture or movables, machine tools, coal, steel, *i.e.*, all kinds of tangible goods which, depending on the techniques available, cannot be processed into data or exchanged in that form). A transaction will be regarded as having been concluded electronically if the contract for these tangible goods is negotiated or concluded in an electronic form, only the delivery of the goods taking place in the tangible world. Electronic commerce also covers intangible activities, mainly intellectual services (banking and insurance services, intellectual services such as legal, consulting and investment services) which it is possible to negotiate and conclude, and also to perform online, in an electronic form, without there being any physical contact at any point in the transaction.

The foregoing shows that all human activities can potentially, one day, take an electronic online form. For this reason the Hague Conference on Private International Law could conduct a thoroughgoing review of all the problems of private international law raised by the Internet and the other electronic online networks, and more specifically, electronic commerce. From this point of view, the protection of privacy is only one of the factors to be identified among the multitude of legal questions raised by the activities in question.

With this in mind, apart from following up the work of the other international organisations which have been mentioned above, a number of studies have already been carried out or are in progress within the Hague Conference. These studies which are conducted, on its own behalf or jointly with other institutions (governments, universities, other international organisations) are considered below.

A COLLOQUIUM IN HONOUR OF MICHEL PELICHET

In collaboration with the Molengraaff Institute of the Utrecht Faculty of Law, a tribute was paid to Michel Pelichet, former Deputy Secretary General of the Hague Conference, on the occasion of which contributing statements were made on the role of the State, the relevance of territorial criteria in defining a legal environment for the Internet, and the questions pertaining to intellectual property and those on the law applicable to contracts and tort and jurisdictional competence. This colloquium gave rise to the publication of a work containing a list of the participants, many of whom were experts meeting in The Hague for the June 1997 session of the Special Commission on jurisdictional competence and foreign judgments.⁴⁸

⁴⁷ A second network, Internet 2, is increasingly being talked of; this would enable other functions and activities to be performed, and could be reserved to electronic commerce.

⁴⁸ Katharina Boele-Woelki and Catherine Kessedjian (under the direction of) *Internet, Which Court Decides, Which Law Applies?* Kluwer Law International, 1998, 179 p.

From these discussions the following lessons can be drawn:

- the network of networks is transnational by nature;
- there is no legal void, perhaps indeed there is a surfeit of laws, and this makes it necessary to define rules of private international law;
- the localisation of electronic activities online is possible when there is a point of contact between virtuality and reality, *i.e.*, when a human being or an legal entity suffers harm because of an activity which has taken place via the Internet;
- self-regulation may be preferred up to the point where the balance between private interests and the public interest breaks down, a point beyond which the role of States becomes indispensable;
- when they have to act, States cannot act in isolation, but must co-operate in order to define norms which are internationally acceptable to all.

B THE GENEVA ROUND TABLE

From 2 to 4 September 1999, in collaboration with the University of Geneva, the Permanent Bureau organised a Round Table on the issues of private international law raised by electronic commerce and the Internet. All member States of the Conference were invited to take part, as well as the international and non-governmental organisations active in this field. The list of participants is given in the summary record of the conclusions of each of the working commissions which met to discuss particular topics: contracts, tort, choice of court and of law, the law applicable to data protection, service of documents abroad, taking evidence abroad, resolution of disputes online and procedural standards, as well as group actions. We summarise below the discussions and conclusions of each of these Commissions.

§ 1 Commission I - Contracts⁴⁹

1.1 Jurisdiction

Commission I worked on contracts in general and on consumer contracts. We will deal with each type of contract separately. The Commission did not deal with contracts of employment, but we will have something to say about these because the preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters has, since the Special Commission's session of October 1999, included a clause on

⁴⁹ The membership of Commission I was as follows: Chairman, Andreas Bucher, Professor, University of Geneva; General Rapporteur, Katharina Boele-Woelki, Professor, University of Utrecht, assisted by Patrick Wautelet, Assistant, Catholic University of Louvain; Special Rapporteur for consumer contracts, Bernd Stauder, Professor, University of Geneva; Participants: Franziska Abt, Federal Justice Ministry, Berne; Joëlle Freundlich, Special adviser on the regulation of new technology and electronic commerce, CEGETEL, Paris; Unnur Gunnarsdóttir, Financial Services Officer, EFTA Secretariat, Brussels; Steven A. Hammond, Attorney-at-law, Hughes Hubbard & Reed L.L.P., New York; Wojciech Kocot, Senior Lecturer, Warsaw University; Christopher Kuner, Outside Counsel, Morrison & Foerster for Brokat AG, Brussels; Ursula Pachl, Legal Adviser, BEUC Bureau Européen des Unions de Consommateurs, Brussels; Daniel Ruppert, Attaché de Gouvernement, Ministry of Justice, Luxembourg; John Stephens, Chairman of the International Communication Round Table, Paris; Dr. Kees Stuurmann, Price Waterhouse Coopers N.V., Amsterdam; Beti Yacheva, 3rd Secretary, Ministry of Foreign Affairs of the Republic of Macedonia, Skopje; Jun Yokoyama, Professor, Hitotsubashi University, Tokyo.

individual employment contracts. It should also be noted that Commission I worked on the rules of jurisdictional competence of national courts which are applicable in the absence of a valid clause on choice of court or choice of law.⁵⁰

a) Contracts between businesses

The Commission realised that it was best to separate contracts concluded electronically, online, but performed offline either wholly or in part, from those which, although concluded online, are also performed entirely online. For the former category, the traditional rules of jurisdictional competence based on the place of performance of the contract or of a territorial activity generated by the performance of the contract remain relevant and effective, even though the contract has been negotiated or concluded online. On the other hand, for contracts which are performed entirely online,⁵¹ neither the place of conclusion, the place of performance nor the place of the activity are relevant. However, the Commission did not put forward any alternative jurisdictional criterion for contracts between businesses.

An additional difficulty identified by the Commission concerns the identification and localisation of the parties to the contract. It is, after all, when they are identified and localised that the rules of jurisdiction become fully effective.⁵² As regards identification, the Commission takes the view that the parties must be able to act anonymously, except where disclosure of identity is necessary. The Commission did not offer a view on whether jurisdiction is one of the cases which it has in mind in which disclosure of identity should be required. It does however state that the use of means of certification proposed by private entities should be encouraged in order to authorise easier identification of the parties.

As regards localisation, the Commission is of the opinion that the parties to a contract must disclose their habitual residence or the place where they are established, so as to enable the parties to a contract to rely, in good faith, on statements made in that respect. The *Rapporteur* of Commission I explained this recommendation by the fact that a contract must be amenable to localisation. But if it is not possible to localise the place of performance of the contract, the parties at least must be localisable. Moreover, only the country of location will suffice for the purposes of private international law, the *Rapporteur* explained, even if in practice other information is needed in order to institute legal proceedings.

⁵⁰ The question of the validity of choice of court and choice of law clauses was discussed by Commission III. See below § 3.

⁵¹ These comprise all contracts for the provision of intellectual services, contracts of sale, intangible goods (software, for instance). But they may also comprise contracts for the sale of works supplied electronically. Advances in the technology of what is now called the "electronic book" show that it is now possible to buy and receive a book entirely online.

⁵² Cf above, Chapter I, C, § 2, on the draft European directive on electronic commerce.

b) Consumer contracts⁵³

The Commission suggests that this question should be resolved by conferring general jurisdiction on the courts of the plaintiff's domicile, in addition to the general jurisdiction traditionally granted to the domicile of the defendant. It challenges the distinction between "active" and "passive" consumers, and proposes that the suggested jurisdictional rule should apply, whatever the level of the initiative taken by the consumer. In other words, the Commission is proposing to introduce the *forum actoris* on condition the plaintiff is a consumer.⁵⁴

The Commission also discussed the question of whether, in the online environment, the traditional concept of a consumer is still effective. It therefore suggests redefining the consumer and simply providing that jurisdiction should be available at the domicile of the plaintiff to any natural person acting on his own behalf, regardless of the subject of the transaction. As the *Rapporteur* explained, the initial idea is that, in an online environment, small businesses should enjoy equal protection. But as it is difficult to define a "small business", the concept of a natural person must enter in to ensure a degree of predictability.

The Commission also pointed to a difficulty in Article 7, paragraph 1 b) of the preliminary draft of the Convention. In the Commission's view the criterion used in the text, namely that the consumer must have taken, in the State of his habitual residence, the steps necessary to conclude the contract, is not relevant in the framework of electronic commerce. It is in fact impossible to pin down the location of the co-contractor, who may be operating anywhere, provided he has access to an Internet connection. In view of the foregoing, physical localisation, other than the place of habitual residence declared by the consumer, is no longer operational for the needs of electronic commerce.⁵⁵

c) Contracts of employment

At the time when the Geneva Round Table was meeting, the preliminary draft of the Convention on jurisdiction and foreign judgments in civil and commercial matters did not include any provisions on individual contracts of employment. This is why Commission I did not deal with this issue. Since then, the Special Commission which met in October 1999 has inserted into the preliminary draft an Article 8 which enables an employee to sue his employer before the courts of the State where the work is or has been habitually done. Where the employee does not habitually work in the same State, the competent courts are those of the State where the business which engaged the employee is

⁵³ For the validity of choice of court clauses in contracts concluded by consumers, see below for the work of Commission III.

⁵⁴ It should however be noted that during the general debate, mention was made of the difficulty experienced by electronic commerce undertakings in complying simultaneously with the demands of almost 200 jurisdictions, since Internet sites can be accessed, at least in theory, throughout the world. But it was also said that this factor, the importance of which is not yet fully understood, must be reconciled with protection for the consumer, which it is argued must remain the same, whether the act of consuming took place online or offline. This is why the general recommendation presented during the last plenary session spells out that additional studies are needed, taking account of all the interests involved.

⁵⁵ We also note that this requirement, which existed in the 1968 Brussels Convention, was deleted from Article 15 of the proposed Regulation which is intended to replace the Convention.

established. For his part, the employer may only take action in the courts of the State of habitual residence of the employee or in the courts of the State in which the employee habitually works.

Bearing in mind the development of home working as a result of the communication facilities brought about by the Internet, the provisions of Article 8 should be evaluated in the light of this development. It is clear that because of the first rule of jurisdiction laid down in the text, an employer who decides to promote online working and to organise his labour force to take advantage of the fact that workers can do their work mainly from their habitual residence, will find that fora in different places will have jurisdiction to settle issues associated with a contentious case based on a contract of employment. This result is perhaps the price which has to be paid for the economic choice made by the employer. It could however be studied and treated as a subject for a legislative policy decision.

1.2 *The applicable law*

The issues surrounding localisation and identification, explained above in respect of jurisdictional competence, are also relevant in the Commission's view for the applicable law.

However, the Commission did not put forward any specific proposals on this question. Additional studies are therefore needed.

§ 2 Commission II - Tort⁵⁶

2.1 *Jurisdiction*

The members of Commission II did not arrive at a consensus recommendation for handling torts online. Some members of the Commission felt that Article 10 of the preliminary draft of the Convention on jurisdiction and foreign judgments in civil and commercial matters could not be used for torts online. They therefore proposed simply making available a forum at the place of habitual residence of the plaintiff, who is usually the victim. As the *Rapporteur* explained at the last plenary meeting, Article 10.1 is drafted in terms of the "physical situation", which is either completely undefinable, or present everywhere.⁵⁷ Moreover, for members of the Commission who do not accept the present wording of Article 10, paragraph 3 of the text would not be adequate for many torts specific to the Internet, such as "hacking" or "spamming".

⁵⁶ Commission II consisted of the following members: Chairman: Mark A.A. Warner, Legal counsel, Paris; *Rapporteurs*: Cristina González Beilfuss, Professor, University of Barcelona; Peter Mankowski, Dr. Jur., University of Osnabrück. Participants: François Dessemontet, Professor, University of Lausanne; Dr Nina Dethloff, LL.M., Bielefeld; Shinichiro Hayakawa, Professor, Tohoku University, Japan; Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, U.S. Department of State, Washington; Katri Kummoinen, Legal Adviser, Ministry of Justice, Helsinki; Dr. Hans Georg Landfermann, Ministry of Justice, Germany; Henry H. Peritt Jr., Dean and Professor, Chicago-Kent College of Law, U.S.A., Fausto Pocar, Professor, University of Milan; Chris Reed, Professor of Electronic Commerce Law, Queen Mary & Westfield College, London; Jane Schurtz-Taylor, Assistante, University of Geneva; Jean-Potter Van Loon, Advocate, Ducrut Ducruet Van Loon et Ass., Geneva; Bénédict Winiger, Professor, University of Geneva.

⁵⁷ See also Article 10.1.b).

For the other members of the Commission, Article 10 of the preliminary draft of the Convention could be used provided it is accompanied by two straightforward presumptions: (1) the "place of the act or omission" causative of the injury would be situated at the place of habitual residence of the defendant or author of the act; (2) the "place where the injury arose" would be situated at the place of habitual residence of the plaintiff or victim, or at the place where the most significant injury occurred.⁵⁸

Before finishing, the Commission was anxious to deal separately with issues of unfair competition, but was unable for lack of time to bring forward any real conclusions. It suggests that the two options which it defined for torts in general may be relevant for the effects of unfair competition towards consumers. On the other hand, as regards the effects of unfair competition among competing actors, the starting-point could be the test of which market is affected.

2.2 *The applicable law*

The same division of opinion as for jurisdictional competence became obvious in the Commission when it came to the question of the applicable law.

One group felt that the court should apply the *lex fori*. This solution was justified by the *Rapporteur* of the Commission for pragmatic reasons, as the conflict of jurisdictions "absorbs" the conflict of laws.

A second group thought that the victim could be given a choice between the law of the country where the injurious act took place, and the law of the country where the injury was sustained. Straightforward presumptions would be used in concluding that the country of the injurious act is that of the defendant's habitual residence, and the country of the injury is that of the victim's habitual residence. But bearing in mind the complexity of the system thus proposed, the same group nevertheless suggested that the applicable law should be defined by a conflict rule based on the centre of gravity or the test of the closest connection.

§ 3 Commission III - Choice of court and choice of law clauses⁵⁹

3.1 *Internationality*

Commission III began by considering which conditions are required for choice of court clauses to be international, and proposed a recommendation whereby a choice of court clause is international if the applicable law so decides. However, if the contract is performed electronically, the place of performance cannot be taken into consideration for the purpose of deciding the international nature of the clause. Moreover, the clause must

⁵⁸ The *Rapporteur* explained that an approach based on the concept of "centre of gravity" or "closest connection" could also be usefully considered, and had not been rejected by those members of the Commission who were in favour of having a straightforward presumption.

⁵⁹ The membership of Commission III was as follows: Chairman: Renaud Sorieul, Principal Administrator, UNCITRAL, Vienna; Rapporteurs: David Goddard, Barrister, Thorndon Chambers, Wellington; Gabrielle Kaufmann-Köhler, Professor, Brunshwig Wittmer, Geneva; Special Rapporteur for US law: Margaret Stewart, Professor, Chicago-Kent College of Law, Chicago; Participants: Gilles Devaux, Legal Counsel Europe, Compaq Computer EMEA BV, Germany; Mahin Faghfour, Head, Legal Unit, UNCTAD, Switzerland; Dr. Michel Jaccard, LL.M, Etude Chaudet, Lausanne; Alice Karoubi Nordon, Hague Conference on Private International Law, The Hague; Damien Moloney, Legal Adviser, Attorney General's Office, Dublin; André Prum, Professor, University of Nancy; Dr. Christine Schatzl, Official, European Commission, Brussels; David Seite, Administrator, European Commission, Brussels; Mitsuo Yashima, Manager, Legal Affairs, Nec Europe Ltd., London.

be regarded as international unless the parties are habitually resident in the same country and this fact is known or clearly identified at the time when the contract is concluded.⁶⁰

At the time when the Geneva Round Table was meeting, the text of the preliminary draft of the Convention, as it emerged from the Special Commission of June 1999, did not carry a clause on the territorial scope of the Convention. This therefore explains why Commission III decided it was worthwhile to attempt a specific definition of the internationality of the choice of court. However, the Special Commission of October 1999 proposed a clause which reads as follows:

“Article 2 - Territorial scope

1. The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State. However, even if all the parties are habitually resident in that State:

- a) Article 4 shall apply if they have agreed that a court or courts of another Contracting State have jurisdiction to determine the dispute;”

The wording of this clause is neutral as regards the form which the conclusion or performance of the contract is to take, even if this is done electronically or online. It therefore seems to be relevant in the context of electronic commerce, and not to pose any special difficulty.

3.2 *Validity of clauses*

a) *Contracts between businesses*

For choice of court clauses which are inserted into a contract concluded between businesses, the Commission chose to study the provisions of Article 4.2 of the preliminary draft of the Convention. It concludes that the wording adequately meets the needs of electronic commerce, and may cover if necessary an interpretation by functional equivalent, as proposed in the UNCITRAL model law on electronic commerce.⁶¹ The *Rapporteur* explained that this conclusion was unanimously adopted by the members of the Commission, and there had been no dissenting voices during the debate.

As regards ascertaining whether the consent is genuine, especially for clauses “by reference”, the Commission considers that no special rule is necessary for contracts which are made or performed in the electronic environment. The view expressed above for choice of court clauses applies, *mutatis mutandis*, to choice of law clauses.

⁶⁰ In presenting this recommendation, the *Rapporteur* however explained that some members of the Commission were opposed to defining internationality for the online environment, which they regard as being international in the nature of things.

⁶¹ See above, Chapter I, A, § 1.

b) Consumer contracts

Contracts made between a professional and a consumer pose certain additional difficulties. First, the Commission concluded that choice of court clauses inserted into these contracts must not be treated differently when the contract is concluded in the electronic environment online or offline.

However, the Commission was unable to reach agreement on whether choice of court clauses were admissible in contracts concluded between a business and a consumer. This was why, after a lengthy debate commented on in the plenary by the *Rapporteur*, the Commission proposed a halfway approach which would make it possible to preserve the differing cultures which prevail in relation to such clauses, and to insert a third hypothesis in which choice of court clauses would be valid into Article 7, paragraph 3, of the preliminary draft of the Hague Convention. This new clause could run as follows:

“c) *if the contract is concluded by a consumer who is habitually resident in a State which has declared that these contracts are valid as against consumers*”.

The same problem arises with choice of law clauses. However, in this respect the debates at the last plenary session showed that unification of the substantive law is even more relevant in this area. A system for site certification could be considered, according to modalities still to be decided.

c) Contracts of employment

The same observation as above for the work of Commission I has to be made in respect of contracts of employment. Accordingly, Commission II did not do any work on this question. It may however be thought that the same disagreement and the same difference between the legal systems involved exist for contracts of employment as for consumer contracts. It would therefore be possible to admit, *mutatis mutandis*, a similar provision as the one proposed by Commission III for the validity of choice of court clauses for consumers, as described above.

§ 4 Commission IV - Law applicable to data protection⁶²

We have seen above⁶³ that some very important work has been done to attempt to lay down principles and, if possible, rules for the protection of privacy (in other words, personal data) in the context of transboundary flows and Internet use. The question could

⁶² The membership of Commission IV was as follows: Chairman: Gérald Page, Advocate, Poncet Turrettini Amaudruz Neyroud & Associés, Geneva; *Rapporteur*: Dr. Ulf Bruehann, Head of Unit E1, European Commission, Brussels; Soyros Tsovilis, Data Protection Unit, Strasbourg; Mari Shaw, Attorney-at-Law, Morgan Lewis & Bockius LLP, Philadelphia. Participants: David Michael John Bennett, QC, Solicitor-General of Australia, Sydney; Anne Carblanc, Principal Administrator, OECD, Paris; William Duncan, First Secretary, Hague Conference on Private International Law, The Hague; Julien Francioli, Assistant-Doctorant, University of Geneva; Miriam Gonzalez Durantez, Head of Sector, European Commission, Brussels; Anastasia Grammaticaki-Alexiou, Professor, School of Law, Thessaloniki; Denis C. Kratchanov, Avocat-Conseil, Ministry of Justice of Canada, Ottawa; Lucien Mihai, Arbitrator, Court of International Commercial Arbitration, Bucharest; Carlos Moreno, Legal Officer, UNCTAD, Geneva; Michel Pelichet, former Deputy Secretary-General, Hague Conference on Private International Law, Lausanne; Joaquim De Seabra Lopes, Professor, Consultant to the Ministry of Justice, Lisbon.

⁶³ Cf. Chapter II.

therefore be asked whether it is still relevant to define a conflict of laws rule. Not only did Commission IV not exclude the need for proposing conflict of laws rules; it also stated clearly that it is not yet possible to give a final answer to this question until further studies have been made. With the existing system, there is a risk that national (or regional) rules may be evaded by taking advantage of the differences among conflict of laws rules and connecting factors. Uniform conflict of laws rules would make it possible to avoid this. Likewise, they could prevent protection gaps - cases in which an individual is without any protection - and a duplication of protective devices, where several different laws seem to impose rules of conduct for filing and exploiting data.

The system of conflict of laws to be studied should take account of several factors intended to achieve a balance among the interests involved:

- 1 The need for the person holding the files to be able to predict with certainty the principles which apply to the collection and filing of data and to their transmission and exploitation, so that he can put in place the protective measures required.
- 2 The value of making as much room as possible for freedom of choice in respecting the protection due to individuals.
- 3 The place assigned to connecting factors associated with the victim or to the effects of violations, alongside the criterion based on the place of establishment of the owner of the files. In this respect, the Commission emphasised that the study should bring out the advantages and disadvantages of providing a cumulative or alternative rule. But in any event, the connection with the place of establishment of the holder of the file did not seem in itself to be sufficient as far as the participants in Commission IV were concerned.

However, the Commission recognised that a system of conflicts of law is not sufficient, but must be combined with a system for access to effective dispute resolution for the person suffering from interference with his private life. According to the Commission, these methods of settling disputes must be contained within a coherent whole, to permit a degree of monitoring and supervision of data exploitation activities.

§ 5 Commission V - Service abroad⁶⁴

The main task of Commission V was to study the implications of the new means of electronic communication for the working of the *Hague Convention of 1965 on the*

⁶⁴ The membership of Commission V was as follows: Chairman: Thomas Bishof, Advocate, Berne; Frederic A. Blum, Director, National Association of Professional Process Servers, Philadelphia; Marie-Thérèse Caupain, First Vice-Chairman of the Union Internationale des Huissiers de Justice et Officiers Judiciaires, Charleroi; Luc Claes, Huissier de justice, Executive Bureau of the UIHJ, Brussels. Participants: Margareta Baddeley, Professor, University of Geneva; Christophe Bernasconi, Secretary at the Permanent Bureau, Hague Conference on Private International Law, The Netherlands; Antonio Boggiano, Judge and former President of the Supreme Court, University of Buenos Aires; Florence Borcy, Conseillère adjointe juriste, Ministry of Justice, Brussels; Sue Collins, President of the National Association of Professional Process Servers NAPPS, U.S.A.; Evie Georgiou-Antoniou, Counsel for the Republic of Cyprus, Law Office of the Republic of Cyprus, Nicosia; Juergen Harms, Professor, University of Geneva; Wendy Kennett, Lecturer in Law, Keele University; Stefanie Sieber, EMEA Senior Policy and Regulatory Adviser for e-business Solutions, Berlin; Yong Zhu, Legal expert, Foreign Ministry, Beijing.

Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

The 1965 Hague Convention lays down the various *methods of transmission* which may be used when a judicial or extrajudicial document is to be sent from a Contracting State to another Contracting State for service there. There is no need to illustrate the practical importance of this instrument. We merely note that the Convention now has 39 States parties⁶⁵ and for some of them, the number of requests for service received under the Convention runs to over 7,000 a year.⁶⁶ As the Convention was adopted over thirty-five years ago, it is obvious that none of the specified methods of transmission refers - expressly at least - to the use of electronic means of communication. The task of the Commission was to examine the reach of this omission; is the use of the new techniques of electronic communication excluded for good and all? Are there, on the other hand, stages in the transmission procedure which could be effected by electronic means? If so, which are they? Can service properly speaking be effected by electronic means (for instance, by sending a message to the Internet site of a business)? Are amendments to the Convention necessary in order to take better account of technological advances, etc.?

Commission V adopted the method of the *functional equivalent*: for each of the methods of transmission specified in the Convention, it considered the aim and function of the requirements attaching to it. Having completed this analysis, the Commission considered whether these requirements could be satisfied in an equivalent manner in an electronic environment.

5.1 *The address of the recipient*

Under Article 1, paragraph 2, the Convention does not apply "where the address of the person to be served with the document is not known". The Commission queried the scope of the term "address" in this context: does it include an *electronic* address of the recipient? the Commission answered this question in the affirmative. If the intention is to permit the use of electronic means in the framework of the Convention, it is difficult to see how the term "address" could fail to include an electronic address. Consequently, if only the electronic address of the recipient is known, the Convention may in principle apply. However, the Commission did not have time to study in detail the ramifications of this conclusion. There are at least two points still to be considered:

- a) if the electronic address does not signify a geographical connection,⁶⁷ what becomes of the scope of the Convention?

⁶⁵ Antigua and Barbuda, Bahamas, Barbados, Belarus, Belgium, Botswana, Canada, China (including the Special Administrative Regions of Hong Kong and Macao), Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Malawi, Netherlands, Norway, Pakistan, Poland, Portugal, Seychelles, Slovakia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Venezuela. Moreover, Bulgaria and the Republic of Korea have recently deposited their instruments of accession to this Convention.

⁶⁶ Number of requests addressed to the Central Authority of the United States; this figure was given to us by one of the representatives of the National Association of Professional Process Servers taking part in the work of the Commission.

⁶⁷ A person may have an electronic address with a service provider whose domain name comprises a national identifier (us; nl; ch; fr etc.) without thereby being a resident of that country.

- b) are States prepared to admit the validity of service effected to an electronic address only? On this second question, the Commission notes especially the requirements of Article 15 of the Convention, to ensure that the defendant is protected, and these must be upheld as a Convention provision.

5.2 *Transmission by electronic means*

In order to ensure rapid and effective communication, both for the transmissions covered by Article 3 (Central Authorities)⁶⁸ and the subsidiary transmissions in Article 10,⁶⁹ the Commission recommends that *these transmissions should be carried out by electronic means, provided they meet the following security requirements*. The technique used to send the documents by electronic means should guarantee the *confidentiality* of the message (ensure, through cryptographic or other methods, that the message sent cannot be intercepted by another person), the *integrity* of the message (ensure that the message is not broken up in the course of despatch), the *inalterability* of the message (ensure that no change can be made to the message, either by the addressee or by any other person). The technique should also make it possible to *identify* beyond doubt the sender of the message. In addition, an irrefutable record should be kept of the *exact date of despatch and receipt* of the message. Finally, in order to be productive and effective the technology must be *operational at any time* (avoiding overload, known as *spam* in technical language).

The use of electronic means to ensure the proper working of the Convention poses few problems in the sense that the wording of the clauses concerned is *neutral* as to the communication techniques to be used.⁷⁰ It is this very absence of any reference to a specific technique which makes it possible now to take account of the progress made in means of communication. Moreover, the use of means of communication as rapid and simple as electronic mail reflects two fundamental aims of the Convention, which are to bring the document in question "to the actual knowledge of the addressee in due time to enable the defendant to prepare a defence" and to "simplify the method of transmission

⁶⁸ *Mutatis mutandis*, the certification provided for in Article 6 could also be carried out by electronic means. However, the Commission felt that evidentiary problems might arise.

⁶⁹ The same would be true of the transmissions in Articles 8 and 9. The Commission noted in that respect the practice already in place in certain States, which send documents for service to their diplomatic missions by electronic mail.

⁷⁰ It should be noted that the proposed *European Regulation on the Service in the Member States of judicial and extrajudicial documents in civil or commercial matters (March 2000)* followed the same principle and did not specify any particular means of communication for the transmission of documents. Under Article 4 (2) of the directive, "The transmission of documents, requests, confirmations, receipts, certificates and any other papers between transmitting agencies and receiving agencies may be carried out by any appropriate means, provided that the content of the document received is true and faithful to that of the document forwarded and that all information in it is easily legible". Moreover, according to Article 17 (d) the Commission of the European Communities is to adopt rules "giving effect to implementing measures to expedite the transmission and service of documents". Member States will have a *manual* to enable the entity of origin to inform itself of the means which may be used in its relations with entities addressed in another Member State. This manual will be compiled and updated annually by the Commission.

of these documents from the requesting country to the country addressed".⁷¹

In the Commission's view, there is no doubt that transmission of documents by electronic means would significantly enhance the usefulness and effectiveness of the Convention. As requests for service are channelled instantly from one State to another, they can be brought to the knowledge of the addressee more quickly. This gain in time and effectiveness is all the more appreciable in that, according to the unanimous view of the professional process-servers attending the Round Table, communication with a number of Central Authorities is far from satisfactory. Not infrequently, a request for service is acted upon only several months after it has been sent. There are even instances in which the certificate of execution has been returned to the requesting authority several years after the request was sent. In these circumstances, it is understandable that any method which will reduce these delays will be welcome.

In the Commission's view, opening the Convention to electronic means of communication in this way does not call for a formal revision of the Convention. It would however be desirable to spell out the new arrangements in a *recommendation*.

5.3 *Electronic forms*

A request sent to the Central Authority of the State addressed must comply with the model annexed to the Convention (Article 3). The Commission recommends *drawing up an electronic version of these forms*. The transmission of these forms by electronic means must also meet the security requirements mentioned above.

Under Article 3, paragraph 2, the request must be accompanied by the judicial document "or a copy thereof. The request and the document shall both be furnished in duplicate". The Commission recommends that this expression should be interpreted in a *functional* sense when transmission is effected by electronic means. Since a document transmitted electronically can, generally speaking, be reproduced (printed) at any time and in an unlimited number of copies, the requirement of a copy or a duplicate can be satisfied by sending a single message.

5.4 *Service by post*

Most States do not object to judicial acts originating in other Contracting States being served directly by post on their territories.⁷² For some countries, it even seems that this mode of transmission is the chief means of service abroad. Article 10(a) is thus of considerable practical significance.

In the light of the foregoing, the Commission has taken note of Articles 39 to 41 of the *Universal Postal Convention* concluded at Seoul on 14 September 1994. According to its Article 39 (1), postal administrations may agree among themselves to take part in the electronic mail service. The second paragraph contains a definition of electronic mail: this is "electronic mail is a postal service which uses telecommunications for transmitting within seconds messages true to the original posted by the sender in either a physical or an electronic form for delivery to the addressee in a physical or electronic form".

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⁷¹ Explanatory report by M.V. Tabora Ferreira, *Proceedings of the Tenth Session* (1964), Tome III, pp. 363-364.

⁷² For States which do object, see the Internet site of the Conference: www.hcch.net/f/status/stat14f.html.

on reading this text, one might legitimately ask whether the expression "by postal channels" in Article 10 (a) of the 1965 Convention should not in future be understood to include despatch by *electronic* mail when the mailbox used is that of a postal administration.⁷³ However, several members of the Commission expressed reservations about this mode of transmission. These reservations have to do with the fact that several States - whether or not they have objected in accordance with Article 10(a) of the Convention - refuse to enforce a foreign judgment rendered following a procedure in which the document instituting proceedings was served by post.⁷⁴

Moreover, the expression "by postal channels" must also be considered in light of the fact that several *private* operators now offer mail services.⁷⁵ The Commission, without adopting any specific recommendations on this point, suggests that the implications of this new approach to the Convention should also be considered at the next Special Commission on the practical workings of the Convention.

5.5 *Service by delivery of the document to an addressee who accepts it voluntarily*

Article 5, paragraph 2, provides that except where a particular method is requested, the document may always be served by delivery to an addressee who accepts it voluntarily. It should be noted that this process of ordinary delivery is widely used in many Contracting States.⁷⁶ The person delivering the document will often be a police officer. In most cases, addressees accept the document voluntarily or come to collect it from the police station.

The Commission pondered whether the receipt and reading of an electronic message could be equated to ordinary delivery. Its reply is in principle that it can, provided the law of the State of destination does not prohibit service by electronic means. The Commission suggests in this respect that States parties to the Convention should inform the Permanent Bureau of the Hague Conference on Private International Law whether they agree to this form of service.

The Commission also discussed the possibility that parties could include in their contracts or in their general terms of business a "document service clause" whereby they would agree that a judicial or extrajudicial document can be served electronically. Although the Commission did support this possibility, the service clause could not result in enabling direct service to take place between parties. Its only consequence would be to enable the

⁷³ In accordance with this text, it is conceivable that a sender may send the document by private electronic mail to the postal administration, asking the latter to transmit it by postal e-mail to the addressee. Unlike a direct despatch by sender to addressee, a despatch via a postal administration would ensure that the transmission is of the postal kind envisaged in Article 10(a) of the Convention.

⁷⁴ Practical Handbook Service Abroad – Hague Convention, pp. 47-50.

⁷⁵ For the New York Supreme Court, a despatch made through a private mail service cannot be regarded as a postal despatch within the meaning of Article 10(a): decision of 21 November 1995 in the case of *Mezitis v. Mezitis*. The decision can be downloaded from the following address:

http://www.ljextra.com/cgi-bin/f_cat?test/ht-docs/ny.archive.html/95/11/da1995_1121_1526_106.html.

⁷⁶ See the Practical Handbook, *op. cit.* in footnote 74, p. 42.

Central Authority or a process server in the State of destination to deliver the document to the addressee by electronic means.⁷⁷

§ 6 Commission VI - Taking evidence abroad and legalisation⁷⁸

The aim of Commission VI was to study the interpretation and adaptation, if necessary, of the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* to the new possibilities opened up by present-day electronic and telecommunications methods. As the Commission had slightly more time than the other Commissions, it also discussed the possible adaptation of the *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*.

6.1 Taking evidence

As regards taking evidence, the Commission unanimously concluded that the spirit, structure and text of the Hague Convention do not constitute any bar to taking evidence by electronic means. In particular, the expression "letter of request" is not to be interpreted as an obstacle to using electronic means. In this regard the Commission noted that the Convention does not give any definition of the form which the letter of request has to take. But one of the aims of the Convention is to improve mutual co-operation among States parties, by facilitating the transmission and execution of letters of request and by enhancing the effectiveness of co-operation.⁷⁹ This aim is particularly clear from Article 9, paragraph 3, of the Convention, which provides "A Letter of Request

⁷⁷ In the United States, a similar outcome could be achieved by means of a *waiver of service*, whereby a defendant exempts the applicant from effecting service. Instead of sending the defendant a summons to appear, the applicant sends the defendant (by post or other appropriate means) a document entitled "waiver of service". By means of this document, the form and content of which are prescribed by law, the applicant informs the defendant that he has instituted proceedings before a specified court. The defendant may refuse or accept this document. If he accepts it, he must return the form to the applicant. There is a 30-day time limit if he has received the document in the United States, and 60 days if he has received it abroad. Acceptance of the *waiver of service* by the defendant exempts the applicant from his obligation to serve a summons on the defendant. Acceptance of the *waiver of service* does not deprive the defendant of the option of contesting the court's jurisdiction. Moreover, acceptance does not interrupt limitation periods, and cannot serve as a basis for a default judgment. If the defendant refuses to accept the waiver of service, the summons has to be served on him by the normal method. However, if he refuses he will then have to share in the costs of ordinary service. Following criticism by European States, this sanction was ultimately confined to residents of the United States only. In exchange, the benefit of exemption from service was restricted to applicants domiciled in the United States. The Commission did not have time to consider in detail the various aspects of the *waiver of service*. It may however be thought that electronic despatch of the request for exemption from service is especially justified in that this is not a *judicial* document, but merely a communication transmitted to the defendant.

⁷⁸ The membership of Commission VI was as follows: Chairman: Patrick Bernard, Advocate, Bernard-Hertz-Béjot, Paris. *Rapporteur*: Michael S. Baum, Vice-President, Verisign Inc., Mountain View; Dr. Jan Hebly, Attorney-at-law, Trenité Van Doorne, Rotterdam. Participants: Souheil El Zein, Director, Legal Affairs, Lyons; Helmut Fessler, Notary, Union Internationale du Notariat Latin, Krefeld; Sylvette Guillemard, Advocate, Government of Quebec; Johan Huizing, Senior Counsel Ibm Europe/Middle East & Africa, Paris; Monique Jametti Greiner, Deputy Director, Federal Justice Ministry, Berne; Dirk Langer, Assistant, University of Geneva; Guy Lequime, Head of Division, Court of Justice of the European Communities, Luxembourg; Hugo Maurin Cayrus, Counsellor of the Permanent Delegation of Uruguay in Geneva; Dorothée Van Iterson, Counsellor, Ministry of Justice, The Hague; J.H.A. van Loon, Secretary General, Hague Conference on Private International Law, The Hague.

⁷⁹ See preamble, second and third paragraphs.

shall be executed expeditiously". Electronic transmissions should therefore be a very effective method of applying this provision in practice.

The Commission began by studying Chapter I of the Convention, to ascertain whether the provisions of Article 2, paragraph 1, would allow for the use of electronic transmission. It answered this question in the affirmative.

The Commission pondered whether the use of the central or other authorities specified in Article 24 would become redundant with the new transmission techniques. It concluded that it would not, considering that the central or other authorities could be useful when the court in the country of origin cannot identify the court with jurisdiction in the country addressed, or when Article 12 of the Convention falls to be applied.

The Commission then turned to the security measures to be engendered by the new communication techniques. It noted with interest the progress made in securing systems, whichever technique is used. The Commission also noted that the use of the Internet may be dangerous, this being a means of communication which in principle is not made secure. It was therefore recognised that whenever a degree of authenticity, confidentiality and integrity of documents or communications transmitted is necessary, the use of crypted sites should be encouraged. For the Commission, these methods should not be regarded as formalities within the meaning of Article 3, third paragraph, of the Convention, which are forbidden as such.

Finally, the Commission considered the possibility of using the new means of communication, including videoconferencing and similar methods, to question witnesses at a distance. It did not see any particular objection to using these techniques. However, it felt that such use should be in accordance with the Convention, either by using a letter of request, or under Article 17, interpreted in a functional sense. However, the Commission is of the view that this question must be studied further, especially as regards the protection of a leading witness.

6.2 *The electronic certificate ("apostille")*

As regards the Convention Abolishing the Requirement of Legalisation, and the question of the certificate, the Commission discussed briefly the possibility of keeping the register specified in Article 7 of the Convention, in which the authorities take note of certificates supplied electronically. The Commission was unanimous in saying that the method of functional equivalence would permit the register to be kept in electronic form.

On the other hand, the Commission did not consider in detail whether the apostille or certificate itself, referred to in Article 6, could be delivered electronically. This probably depends, at least in part, on whether the actual document on which the certificate is to be placed is an electronic document. This is increasingly the case with private documents requiring a certificate. It should therefore be considered whether the certificate can be added electronically. Where public documents are equally available in electronic form, the same arrangement could be extended to these documents. The Commission took the

view that further study may show that the system could work if trusted third parties are used, as is already the case with electronic signatures.

§ 7 Commission VII - Resolution of disputes online and procedural standards⁸⁰

The task of Commission VII was to work on the resolution of disputes online and the rules of procedure which are necessary for such a method of settling disputes. For lack of time, the Commission could not work on group actions except to decide that the new electronic tools for communication should facilitate the handling of group actions and complex cases. This question may become especially relevant with the growing number of disputes of the same kind brought about by the use of the Internet. It will probably require further study.

The Commission was unanimous in saying that disputes which arise from the use of the Internet, and the expansion in electronic commerce, make it necessary to develop appropriate systems of dispute resolution, which will mean a much greater need for transnational judicial co-operation. Electronic means of communication could thus help to facilitate this co-operation.

Recognising that access to justice is a fundamental right, the Commission agreed that electronic online means of dispute resolution are particularly well-suited to the predictable increase in the number of disputes in the context of electronic commerce, and especially where the disputes arise from relationships between consumers and businesses. However, in order to develop such mechanisms it is necessary to take heed of, and protect, the principles of independence, impartiality and transparency of systems, as well as the adversarial principle, procedural efficiency, the legality of decision-making and the freedom of the parties and their right to be represented.

The Commission was particularly conscious of the fact that some citizens might lack access to the necessary means of communication to benefit from access to justice by electronic means. In order to remedy this inequality in the availability of material resources, the Commission suggested setting up public points of contact which would be readily accessible, to enable everyone to benefit from adequate technical resources. The Commission also discussed the possibility of developing procedural forms to improve the efficiency of judicial systems. These forms could be made available to plaintiffs online.

⁸⁰ The membership of Commission VII was as follows: Chairman: Richard Allan Horning, Attorney-at-law, Tomlinson Zisko Morosoli & Maser LLP, Palo Alto. *Rapporteur*: Ethan Katsh, Professor, University of Massachusetts, Helmut Rüssmann, Professor, University of Saarbrücken. Special *Rapporteur* for Group Actions: Marc Fallon, Professor, Catholic University of Louvain. Participants: Jose Abascal Zamora, External Adviser, Ministry of Foreign Affairs, Mexico; Dr Davic Billard, University of Geneva; Timothy Fenoulhet, Analyses and Policy Planning, European Commission, Brussels; Fabien Gélinas, General Counsel, International Chamber of Commerce, Paris; Dr Richard Hill, Hill & Associés, Geneva; Douglas Hornung, Advocate, Cabinet Lalive & Associés, Geneva; Catherine Kessedjian, Deputy Secretary-General, Hague Conference on Private International Law, The Hague; Lilja Ólafsdóttir, Legal Adviser, European Free Trade Association, Geneva; Isabelle Romy, Professor, University of Fribourg; Paul Vidonne, Vice-President, Compagnie Nationale des experts judiciaires en informatique et techniques associées, Meylan.

Like other commissions, Commission VII recognised the value of using the principles of functional equivalence developed in the UNCITRAL model law on electronic commerce (1996).⁸¹

Some members of the Commission pondered whether the use of electronic means of communication ran counter to the confidentiality of procedural documents which is required in some national procedural systems. However, the Commission's view is that rules of confidentiality can be respected despite using electronic means of communication, in view of the availability of technical devices such as encryption.

When the resolution of disputes takes place offline, the Commission is of the view that the reference to the place of arbitration or the place where the arbitral award is made must not be interpreted as a geographical place, but as a legal fiction to enable all the consequences to be drawn which the law implies, such as appeals against the award. Normally, the parties will have made provision for such a place, or the court of arbitration will have done so in its decision. However, if there is no option, the Commission suggested that agreement should be reached on a uniform default rule, without however suggesting what that rule should be. The Commission believes that this proposal applies *mutatis mutandis* to the other alternative means of dispute resolution.

Some of the recommendations above will be studied in more detail at the joint meeting to be organised by the Hague Conference with OECD and the ICC, which will be mentioned below.

C EXPERT GROUP MEETING IN OTTAWA

From 28 February to 1 March 2000, a group of experts met at the invitation of the Government of Canada in Ottawa, to discuss the issues of electronic commerce and international jurisdictional competence.

All member States of the Conference had been invited to participate, along with the intergovernmental and non-governmental organisations active in this field, and a number of *ad hoc* experts.⁸² The debates focused around the preliminary draft Convention on

⁸¹ See above, Chapter I.

⁸² Those attending the expert meeting in Ottawa from 28 February to 1 March 2000 were the following: Mr Rolf Wagner, Ministerialrat, Federal Ministry of Justice, Berlin, Germany; Ms Andrea Schulz, Regierungsdirektorin, Federal Ministry of Justice, Berlin, Germany; Mr David M.J. Bennett, QC, Solicitor-General of Australia, Sydney, Australia; The Honourable Justice Peter E. Nygh, Visiting Professor, University of New South Wales, Kirribilli, Australia; Mr John McGinness, Principal Legal Officer, Attorney-General's Department, Barton, Australia; Mr Timothy McEvoy, Senior Associate, Freehill Hollingdale & Page, Melbourne, Australia; Dr Sabine Längle, Judge, Federal Ministry of Justice, Vienna, Austria; M. Jacques H.L. Matthys, Conseiller général, Ministry of Justice, Brussels, Belgium; Mr Morris Rosenberg, Deputy Minister of Justice and Deputy Attorney General of Canada, Ottawa; Ms Kathryn Sabo, Senior Counsel, Department of Justice, Ottawa, Canada; Ms Gaylen A. Duncan, President, Information Technology Association of Canada, Mississauga, Canada; Ms Angie Forte, Policy analyst, Electronic Commerce Task Force, Ottawa, Canada; Mr Jacques Gauthier, General Counsel, Legal Services, Public Works & Government Services, Quebec, Canada; Mr Michael Jenkin, Director General, Industry Canada, Ottawa, Canada; Ms Catherine Peters, Senior Economic Policy Adviser, Industry Canada, Ottawa, Canada; Ms Joan Remsu, Senior Counsel, Public Law Policy Section, Ottawa, Canada; Mme Frédérique Sabourin, Ministère des Relations Internationales, Quebec, Canada; Mr Richard Simpson, Director General, Industry Canada, Ottawa, Canada; Mr T. Bradbrooke Smith, Stikeman Elliott, Ottawa, Canada; Mr David Waite, Director, Industry Canada, Ottawa, Canada; Ms Tian Ni, Ministry of Foreign Affairs, Beijing, China; Mr Y.K. Frank Poon, Deputy Principal Government Counsel, Department of Justice, Hong Kong, China; Mr Qian Xiaocheng, Assistant Judge, Supreme People's Court, Beijing, China; Mr Young-Hill Liew, Judge of Seoul High Court, Ministry of Court Administration, Seoul, Korea; Dr Kresimir Sajko, Professor, Director of Institute of International and Comparative Law, Zagreb, Croatia; Mr Peter Arnt Nielsen, Associate Professor, Charlottenlund, Denmark; Mr Joaquim-J. Forner Delaygua, Professor, University of Barcelona, Spain; Mr Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, Department of State, Washington DC, United States of America; Mr Andrew J. Pincus, General Counsel, Department of Commerce, Washington, DC, United States of America; Mr Mark Bohannon, Chief Counsel for

Technology & Counsellor to the Under Secretary for Technology, Department of Commerce, Washington DC; Mr Michael Donohue, Federal Trade Commission, Washington DC, United States of America; Mr Pedro Erviti, US Embassy, Ottawa, Canada; Mr Brian Hengesbaugh, Special Counsel, Office of the General Counsel, Washington DC, United States of America; Mr Hugh Stevenson, Federal Trade Commission, Washington DC, United States of America; Ms Jennifer Lucas, Patent & Trademark Office, Washington DC, United States of America; Mr Hugh Stevenson, Federal Trade Commission, Washington DC, United States of America; Mr Ronald A Brand, Professor of Law, University of Pittsburgh School of Law, Pittsburgh, United States of America; Ms Cindy Rose, Vice President, Government Relations, The Walt Disney Company, Brussels, Belgium; Mr Peter D. Trooboff, Esquire, Attorney-at-Law, Washington DC, United States of America; Ms Elena Andreevska, Director, Ministry of Foreign Affairs, Skopje, The Former Yugoslav Republic of Macedonia; Mr Justice Gustaf Möller, Supreme Court of Finland, Helsinki, Finland; M. Olivier Tell, Magistrat, Ministry of Justice, Paris, France; Mrs A. Grammatikaki-Alexiou, Professor at Aristotle University of Thessaloniki, Greece; Mr Arthur Plunkett, Barrister-at-law, Dublin, Ireland; Mr Fausto Pocar, professor of international law and private international law at the University of Milan, Italy; Mr Tadashi Kanzaki, Professor at Gakushuin University, Uppsala, Japan; Mr Ryozo Hayashi, Director General for Machinery and Information Industries Policy, Tokyo, Japan; Mr Satoshi Nohara, Deputy Director of Information Services Industry Division, Tokyo, Japan; M. Idriss Idrissi Bichr, Directeur des Affaires civiles, Ministry of Justice, Rabat, Morocco; M. Antoon (Teun) V.M. Struycken, Professor at the Faculty of Law of the Catholic University of Nijmegen, Heilig Landstichting, Netherlands; M. Frans J.A. Van Der Velden, counsellor, Ministry of Justice, The Hague, Netherlands; M. Luis Pedro Rocha De lima Pinheiro, Professor of Law at the University of Lisbon, Portugal; Mr Peter M. Beaton, Head of Civil Justice and International Division, Scottish Executive Justice Department, Edinburgh, United Kingdom of Great Britain and Northern Ireland; Mr Paul R. Beaumont, Professor of European Union and Private International Law, Aberdeen, United Kingdom of Great Britain and Northern Ireland; Mr Charles Raikes, Legal Director, Department of Trade and Industry, London, United Kingdom; Mr Chris Reed, Professor of Electronic Commerce Law, London; Mr Göran Lambertz, Director-General for Legal Affairs, Ministry of Justice, Stockholm, Sweden; M. Alexander R. Markus, Head of Section of Private International Law, Federal Office of Justice, Berne, Switzerland; Ms Bilgin Tiryakoglu, Deputy Dean, University of Ankara, Turkey; Ms Ilknur Altintas, Inspection Judge, Ministry of Justice, Ankara, Turkey.

Non-Member States represented: Mr David J. Goddard, Barrister; Consultant to the New Zealand Law Commission, Wellington, New Zealand.

Representatives of intergovernmental organisations: United Nations Commission on International Trade Law: Mr Renaud Sorieul, Senior Legal Officer, United Nations Commission on International Trade Law, Vienna; *United Nations Economic Commission for Europe:* Mr David Marsh, Legal Liaison Rapporteur and Vice-Chair of UN/CEFACT Legal Working Group, London; *World Intellectual Property Organisation (WIPO):* Ms Shira Perlmutter, Consultant, Office of Strategic Planning and Policy Development, WIPO, Geneva; Mr Li-Feng Schrock, Consultant, Office of the Director-General, WIPO, Geneva; *European Commission:* Mme Anne-Marie Rouchaud, Principal Administrator, Judicial Civil Co-operation, Brussels; M. Manuel Desantes, Legal Service, Brussels; *Council of the European Union:* M. Fernando R. Paulino Pereira, principal administrator in Directorate-general "H" (Justice and Internal Affairs), Brussels; *European Parliament:* Dr Harry Duintjer Tebbens, Head of Division, Brussels; Mrs Diana Wallis, MEP, European Parliament, Brussels; Ms Hillary Groos, European Parliament, Brussels.

Representatives of non-governmental organisations: International Chamber of Commerce: Mr Mike Pullen, Senior Regulatory Counsel, Brussels; Ms Joelle Freundlich, Senior Legal Adviser; *International Bar Association:* Mr Bayo Odutola, Ottawa; *Global Business Dialogue on Electronic Commerce:* Ms Joelle Freundlich, Senior Legal Adviser; *Bureau Européen des Unions des Consommateurs (BEUC) et/and Consumers International:* Mme Ursula Pahl, Legal Officer, Brussels; *Internet Law & Policy Forum:* Ms Ruth Day, Executive Director, New York; Mr Masanobu Katoh, Chairman of the Board, Washington, United States of America; *Union Internationale des Avocats (UIA):* M. Benoît Emery, Desjardins Ducharme Stein Monas, Montreal; *International Federation of the Phonographic Industry (IFPI):* Ms Maria Martin-Prat, Director of Legal Policy, London.

Ad hoc experts: Mr Stewart Baker, Steptoe & Johnson LLP, Washington; Mr David A. Fares, Director, US Council on International Business, New York; Mrs Jane Ginsburg, Professor of Law at Columbia University, New York; Ms H. I-Ennig, Illinois Institute of Technology, Chicago, Illinois, United States of America; Mr Marc A. Pearl, General Counsel & Senior Vice President, Arlington, United States of America; Mr Henry H. Perritt, Jr., Dean, Vice President & Professor of Law, Illinois Institute of Technology, Chicago; Mr Ronald L. Plesser, Counsel to Electronic Commerce & Consumer Protection Group (ECCPG), Washington; Ms K. Feilly, Illinois Institute of Technology, Chicago, Illinois, United States of America; Dra. Mariana Silveira, Co-ordinator of Electronic Commerce Project, National Law Center for Inter-American Free Trade, Tucson, United States of America; Ms Margaret Stewart, Professor, Chicago-Kent College of Law, Chicago, Illinois, United States of America.

jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission meeting at The Hague in October 1999.

A detailed report will be sent in due course to the participants and to Member States which were not represented. However, the following preliminary conclusions may be spelt out even at this stage:

- 1 In view of the anticipated upsurge of electronic commerce in the immediate future, it would be unwise to exclude it from the substantive scope of the Convention.
- 2 Article 4 of the preliminary draft of the Convention satisfactorily covers choice of court clauses concluded electronically (which bears out the conclusions of the Geneva Round Table).
- 3 Many experts expressed the view that Article 6 (on contracts between businesses) should be supplemented by a clause dealing with contracts concluded and performed entirely online (confirming the Geneva Round Table). But although several proposals were discussed, no consensus was reached at the present time.
- 4 As for Article 7 (contracts concluded between a consumer and a business), there was no consensus on possible changes to the wording, but it was agreed that Article 7 1.b) cannot work in the context of electronic commerce. Some experts also agreed with the proposal emanating from the Geneva Round Table⁸³ whereby the text was to be supplemented by a clause enabling recognition of a choice of court clause if its validity is admitted by the State in which the consumer habitually resides.

D PLANNED JOINT MEETING BETWEEN OECD, THE HAGUE CONFERENCE AND THE ICC

In view of the special difficulties raised by disputes between businesses and consumers, the Permanent Bureau took an interest in alternative methods of dispute resolution, not as an ideal substitute for the rules of jurisdictional competence for cases brought to national courts, but as an additional feature in a consistent system which includes at the same time prevention, alternative methods of resolution and a default rule for the jurisdiction of courts.

This system could be devised along the following main lines:

- 1 it could be a mixed system, operating within an independent control authority set up by the public authorities, either directly or by delegation from representatives of industry, consumers and the public authorities themselves;
- 2 the system should be an open one, enabling several institutions and organisations to propose alternative dispute resolution methods. In order to secure a greater degree of confidence, it should be possible to organise accreditation of these institutions by the independent monitoring body, according to principles and a

⁸³ See above, Chapter III, B, § 3.

procedure to be defined. The principles of independence, transparency, reliability and legality should be a minimum foundation for this accreditation procedure. The various organisations offering their dispute resolution services would be in competition, and this competition would guarantee a better service, provided at lower cost, in a specially-devised setting;

- 3 the system would be devised as a mechanism with three arms:
 - a) a preventive method whereby sites would be labelled through a system of seals or "trust marks", so that preference could be given to sites which offer effective guarantees to consumers, encouraging them to focus their activities on these sites;
 - b) a dispute resolution mechanism to which sites would give prior consent through the label, enabling rapid resolution at lower cost of any disputes which arise and which could not be resolved by preventive means;
 - c) a default rule of jurisdictional competence for any case in which the first two arms of the system have been unable to provide satisfaction, or for residual cases which cannot be brought within the first two arms.⁸⁴

In addition, common substantive rules could be developed in the framework of the "trust mark" or label, enabling dispute resolution institutions to apply the same substantive rules in order to ensure a higher degree of predictability for operators. These substantive rules could if necessary include a uniform conflict of laws rule for the aspects of the dispute which are not governed by the substantive rules.

This system should be devised in the worldwide context, in view of the specific character of electronic commerce. In the light of the ongoing negotiations for a Convention on jurisdictional competence and foreign judgments, a provision such as Article 7⁸⁵ could be redrafted to reflect the prevailing consensus which seems to have emerged for taking account of alternative dispute resolution methods (ADR) in the framework of relationships between consumers and businesses. This clause could then begin with a rule of interpretation whereby no provision of the Convention can be interpreted as preventing recourse to alternative methods of dispute resolution applicable to transactions entered into by consumers. The Convention could then confirm the validity of choice of court clauses if such validity is upheld by the law of the country in which the consumer habitually resides. This provision would reflect the proposals made by the Geneva Round Table.⁸⁶ Finally, the Convention would provide a default rule of jurisdiction to be used only in cases where the other two parts of the rule cannot operate. If this default rule conferred jurisdiction on the court of the consumer's habitual residence, it would also be necessary to agree that only the address indicated by the consumer could give rise to jurisdiction for the court. If the consumer entered into his contract without giving the

⁸⁴ For instance, it may be asked whether disputes arising from the use of defective products could be settled in the framework of the proposed system.

⁸⁵ The article dealing with disputes with consumers.

⁸⁶ See above, Chapter III, B, § 3.

address of his habitual residence, the jurisdictional rule could not be used. If the consumer had given an address other than his habitual residence, his co-contractor would be entitled to presume that that address is his habitual residence.

There are already certain Internet sites offering alternative dispute resolution services in particular fields, such as resolution of disputes concerning insurance, or disputes arising from the grant of domain names. Only this latter category of disputes has led to the framing of procedural rules which now enable us to think in concrete terms about setting up online dispute resolution arrangements. An examination of these procedural rules shows that:

- 1 A clear distinction must be drawn between mediation or conciliation, and arbitration;
- 2 With mediation and conciliation, the outcome of the process must be set down in a formal agreement, and methods of transboundary execution should be provided for;
- 3 For arbitration, there are already many rules which need little or no adaptation;
- 4 Time limits for bringing about these resolutions must be short, although it is not yet clear how this is to be defined;
- 5 Cost will be an essential aspect of these procedures. There seems to be an emerging consensus that the costs should be very low for the consumer, indeed that the procedures should be free of charge;
- 6 The relationship between alternative procedures and those for bringing suit before a court should be clarified, perhaps in the form of uniform rules;
- 7 It also needs to be clarified what will happen to data which has been collected;
- 8 The principles of the adversarial hearing and of representation must be adapted;
- 9 When the decisions are carried out, they should be able to benefit from the new methods of communication, according to principles to be established.

It is in order to explore all these avenues, that the OECD, the Hague Conference and the ICC have undertaken to work together. Initially, this collaboration is taking the form of a joint seminar to be held in The Hague, at the invitation of the Dutch Government. It was initially planned for 19 and 20 June 2000, and is now being deferred until the autumn of 2000. Depending on the conclusions reached at this seminar, the role of the Hague Conference could be to engage in the preparation, together with other organisations, of a model for online dispute resolution. The precise form these rules of procedure will take is evidently not yet defined at this stage, and a degree of flexibility will certainly be required in this respect.

CONCLUSION

It is clear that the legal framework for the information society, necessary as it is, will have to take shape on a worldwide, universal plane.⁸⁷

For these reasons, it seems appropriate to retain on the agenda of the Conference the questions of private international law raised by electronic data interchange, the Internet and electronic commerce, including the protection of privacy.

However, in the light of the above observations, a more precise title could be retained as follows: "Questions of private international law raised by the information society, including electronic commerce". This general title would make it possible to continue the work already in progress, in particular, the work on alternative methods of dispute resolution and online procedures; this work can be undertaken jointly with other international organisations. Moreover, this title would have the advantage of drawing attention implicitly to the value of re-examining the existing Hague Conventions, especially those of 1961, 1965 and 1970 mentioned above⁸⁸ with a view to their being adapted to serve the needs of the information society.

⁸⁷ See the recitals 58 to 62 of the draft European directive on certain legal aspects of electronic commerce, cited *supra*, footnote 26.

⁸⁸ Chapter III, B, § 5 & 6.

ANNEXES

- ANNEXE 1 - Provisional Agenda for "OECD, HCOFIL, ICC Joint Conference on Consumer to Business Interactions in the Online Environment: Focus on Dispute Resolution Mechanisms" (version en anglais uniquement)
- ANNEXE 2 - Conseil de l'Europe Recommendation No R(99)5 du Comité des Ministres aux Etats Membres sur la protection de la vie privée sur Internet. Lignes directrices pour la protection des personnes à l'égard de la collecte et du traitement de données à caractère personnel sur les "inforoutes".

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- ANNEX 1 - Provisional Agenda for "OECD, HCOFIL, ICC Joint Conference on Consumer to Business Interactions in the Online Environment: Focus on Dispute Resolution Mechanisms" (English Version Only)
- ANNEX 2 - Council of Europe Recommendation No R(99)5 of the Committee of Ministers to Member States for the Protection of Privacy on the Internet. Guidelines for the protection of individuals with regard to the collection and processing of personal data on information highways.