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Rapport des travaux
rédigé par Catherine Kessedjian
avec l'aide de l'équipe de droit international privé
du Ministère de la Justice du Canada

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ELECTRONIC COMMERCE AND INTERNATIONAL JURISDICTION

Ottawa, 28 February to 1 March 2000

Summary of discussions
prepared by Catherine Kessedjian
with the co-operation of the private international law team
of the Ministry of Justice of Canada

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INTRODUCTION

At the invitation of the Government of Canada, and in accordance with the decision of the Special Commission of 30 October 1999, the Hague Conference on Private International Law organised an expert meeting in Ottawa from 28 February to 1 March 2000, to examine the issues raised by electronic commerce in relation to the international jurisdiction of the courts. The proceedings were chaired by Mr. Jacques Gauthier, Legal Adviser to the Government of Canada [1].

After a welcome speech by Mr. Morris Rosenberg, deputy Minister of Justice and deputy Attorney General of Canada, the experts heard a number of introductory presentations on the state of progress of the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters [2]; recent developments in the field of electronic commerce [3]; recent developments in international organisations dealing with electronic commerce [4]; and recent developments in some of the Member States of the Hague Conference [5].

Dean Henry Perrit [6] also presented the project by the American Bar Association discussing a range of legal issues associated with jurisdiction [7] in relation to the needs of electronic commerce [8].

In addition, as this was a meeting held following the Round Table organised by the Hague Conference on Private International Law in co-operation with the University of Geneva, in September 1999, the experts had at their disposal a Note containing a summary overview of the main conclusions reached by the various working groups at the Round Table [9].

SECTION 1 – BUSINESS TO BUSINESS CONTRACTS

The preliminary draft convention on jurisdiction and foreign judgments in civil and commercial matters contains, in article 6, proposed rules of international jurisdiction applicable in matters of business to business contracts. The text runs as follows:

> *Article 6 Contracts*
>
> *A plaintiff may bring an action in contract in the courts of a State in which –*

[1] The list of experts who took part in the meeting is annexed (Annex I).

[2] This introduction was given by Mr. Peter Nygh and Fausto Pocar, co-Rapporteurs for the draft.

[3] Presentation by Mark Pearl, representing WITSA (*World Information Technology Services alines*) and David Fares, representing USCIB (*United States Council on International Business*).

[4] There was a brief presentation covering UNCITRAL, WIPO, the European Union and the *National Law Centre for Inter-American Free Trade.*

[5] Australia, Austria, Canada, China, Ireland, Japan, Morocco, United States of America.

[6] *Institute of Technology, Chicago-Kent, College of Law.*

[7] In the ABA project, this term stands for both adjudicatory jurisdiction and applicable law.

[8] Since the Ottawa meeting, the draft has culminated in the public presentation of a report in New York and London in July 2000. See below (section 5 and Annex 5).

[9] The Note is annexed to this report (Annex 2).

a) in matters relating to the supply of goods, the goods were supplied in whole or in part;

b) in matters relating to the provision of services, the services were provided in whole or in part;

c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.

As explained by the Rapporteur in the introduction, this should be read in the sense of jurisdiction by default, i.e., jurisdiction for all contracts in which the parties have not taken the precaution of including a choice of court clause which would be valid for the purposes of the Convention. The preliminary draft convention, in article 4, contains a provision on the validity of choice of court clauses [10]. We note that the experts, at their meeting in Ottawa, did not think it necessary to discuss this provision, since it seems to be satisfactory for the purposes of electronic commerce, i.e., for any clause appearing in a contract which has been concluded electronically. This, at any rate, was the conclusion reached by the Geneva Round Table [11].

The Ottawa proceedings showed that three fundamental issues arise. The first is the distinction to be made, on the one hand, between contracts which are concluded electronically but performed off-line (§ A below), and on the other hand, contracts which are both concluded and performed electronically (§ B below). The second issue is the identification and location of the parties to the contract (§ C below). Finally, the third issue is the distinction traditionally made between products and services. As this question was raised during the discussion about contracts which are concluded and performed on-line, it will be discussed here in that context.

A) CONTRACTS CONCLUDED ON-LINE AND PERFORMED OFF-LINE

Without prejudice to any new wording which may be adopted for Article 6 in relation to contracts without an electronic dimension, the experts at Ottawa seem to have agreed that the same wording of article 6 can also be used when the contracts

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[10] This text reads as follows:

Article 4 Choice of court

1. If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2. An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into or confirmed -

a) in writing;

b) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

c) in accordance with a usage which is regularly observed by the parties;

d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by the parties to contracts of the same nature in the particular trade or commerce concerned.

3. Agreements conferring jurisdiction and similar clauses in trust instruments shall be without effect if they conflict with the provisions of Article 7, 8 or 12.

[11] See the Annex to this Note, report of Committee III.

in question are concluded electronically, but performed off-line [12]. In that case, it seems to be agreed that no special provision is necessary. However, for contracts which are concluded and performed on-line, a majority of the experts seem to have agreed that a supplementary clause may be needed [13].

B) CONTRACTS CONCLUDED AND PERFORMED ON-LINE

Where these contracts are concerned, it was first explained during the discussions that the traditional distinction between products and services is not realistic for electronic transactions. This is also one of the reasons why Article 6 is not suitable for transactions of this kind. Whatever approach is followed, all the participants agreed that the subject-matter of the electronic exchange is primarily information, and it may be said, as does the European directive on electronic commerce, that this information has to be treated as equivalent to services. But it is not certain that such a qualification is needed for the purposes of the Convention. Some experts have explained that for the purposes of jurisdiction, the actual nature of what is exchanged by the parties to the contract is unimportant, provided it is made clear that the present Article 6 does not apply to a contract performed on-line.

As some experts have pointed out, from this point of view special care is required in co-ordinating the existing Article 6 with any future supplementary clause for contracts performed on-line.

No firm conclusion was reached at the meeting as to the content of any future supplementary rule. We note, however, that all the proposals made were based on the idea that a rebuttable presumption would suffice for the place of performance or, more precisely, the place of delivery of the information. In this regard, it was suggested that the drafting could be based on Article 15.4 of the 1996 UNCITRAL Model Law.

C) IDENTIFICATION AND LOCATION OF THE PARTIES

The second question which arises has to do with the identification and location of the parties. The Geneva Round Table favoured an approach focusing on the concept of presumption. The Ottawa discussions showed that this line of approach could be fleshed out as follows:

1) Maximum use should be made of freedom of contract (party autonomy): the operation of the future rule could be based on statements made by the parties to the contract;

2) If a provider of services [14] wants to know for certain in advance which court

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[12] The Geneva Round Table reached the same conclusion; see Annex 2: Report of Committee I.

[13] However, at least one expert recalled the reasons why a specific form of contractual jurisdiction is generally regarded as necessary, in addition to the general jurisdiction of the defendant's forum and that of the chosen forum. This specific jurisdiction is thought to be the best means of preserving a proper administration of justice, since it will normally designate the courts of the place where the goods are located (especially in contracts of sale), making it easier to furnish proof and to enforce the decisions of a court. But this expert then drew the conclusion that no supplementary clause was necessary for contracts performed on-line, as Article 6 was to be restricted to contracts performed physically, i.e., off-line.

[14] For the purposes of this Note, the word "services" is a term of convenience; it has no legal implications except in connection with international jurisdiction as discussed in the text.

may have jurisdiction to settle any disputes he may have with his co-contractor, he will have to ask him for details of his location and identity in order to be able to rely on the provision in the Convention;

3) The co-contractor will then be bound by the information he supplies concerning his identity and location, in the sense that the jurisdictional rule will apply in respect of this information;
4) In case of difficulty (false information, error or lack of information) the provision in the Convention will no longer apply. It then has to be decided how to apply the other provisions of the Convention (especially Article 3 or Article 9).

However, the discussions made plain the disadvantage of having a system which is based mainly on statements made by the parties, and the potential abuses which may flow from it. It is quite conceivable that one of the parties to the contract may declare that he or she is situated on the territory of a given State, solely in order to confer jurisdiction on the courts of that State for reasons entirely disconnected from the contract itself: for example, the way in which those courts operate, the rules of procedure they follow or the rules of evidence or conflict of laws used in them. Of course, this danger is not entirely absent from the system proposed during the meeting, which seemed to enjoy fairly broad support. The co-contractor must be vigilant and check, if necessary, that the information supplied by the other side matches the true situation. It has also been pointed out that under Article 22, the court may refrain from exercising its jurisdiction under Article 6. Some experts have therefore suggested that this proviso could come into operation if it is found that the co-contractor has made statements which do not correspond to the facts, solely in order to confer jurisdiction on the courts of a particular State.

SECTION 2 – CONSUMER CONTRACTS

As the Rapporteur explained in introducing that part of the discussion dealing with Article 7 of the preliminary draft Convention, this text was prepared without taking account of the issues relating to electronic commerce. The Rapporteur drew the attention of the experts to the fact that in its present wording, Article 7 requires all the conditions in its subparagraphs a) and b) to be fulfilled in order for the consumer to take proceedings in the courts of his habitual residence. Those conditions are:

a) the conclusion of the consumer contract must be linked to the activities of the business in the State of the consumer's residence, or directed at that State in particular by soliciting business through means of publicity;

b) the consumer must have taken the necessary steps to conclude the contract in his State of residence.

As the Rapporteur pointed out, whether or not placing material on an Internet site is regarded as advertising by the business, the first condition will always be met, and does not seem to have any further relevance for the purposes of electronic commerce. As for the second condition, present-day means of telecommunication enable a consumer to conclude the contract in a place other than his habitual residence, but this does not carry any special implications for the purpose of deciding which courts have jurisdiction.

Paragraph 2 of Article 7 raises the question of the relative strength of the parties to the contract, because in an electronic world especially, the business may well be a very small one. It has however been asked whether, in an electronic world, a consumer is really likely to find himself defending an action in the manner contemplated in paragraph 2 of Article 7. This text may not be applicable in cyberspace.

As for paragraph 3, it takes an obviously conservative approach to choice of court clauses in contracts of this kind. The Rapporteur pointed out that during the discussions in the Special Commission, it was suggested that a consumer who is fully informed of his rights could decide to forgo the protection available under Article 7 and opt instead for a choice of court clause. The question arises whether this would be acceptable, and in what circumstances it might occur.

The debate which followed made clear the interests at stake: States want to encourage electronic commerce, especially in the area of consumer contracts. Enterprises which offer goods and services via the Internet may be quite small businesses, which should also be encouraged. From another point of view, it is clear that the Internet will only take off, in the context of trade with consumers, if consumers themselves have confidence in it. And one of the essential points for the consumer is to be sure that if a problem arises in his relationship with the business, he can obtain redress both rapidly and cost-effectively.

It has been pointed out that in the context of the revision of the Brussels Convention, the European Parliament was emphatic that there must be no change in the rules of consumer protection except for the purpose of providing alternative methods of dispute resolution, including alternative on-line methods.

Another idea has also been put forward: to include in the rule of conflicts of jurisdiction the concept of a "target". If the enterprise has specifically targeted consumers in a particular country, it would be consistent to decide that the courts of that country have jurisdiction for consumers residing on its territory. On the other hand, if the business uses an unsophisticated site, i.e., one which does not make it possible to target certain consumers, the result will be that no particular conclusion can be drawn as regards jurisdiction. However, this development has been criticised by some experts, and is not unanimously endorsed as yet [15].

Almost all those who spoke at the Working Group emphasised the importance of alternative methods of dispute resolution, but no consensus view emerged on the place to be assigned to them. However, it should be noted that the draft Hague Convention is probably not the appropriate instrument for stipulating precise rules for these methods. On the other hand, consensus was readily achieved on the point that the Convention was not to be interpreted as a barrier to the use of alternative methods of dispute resolution which may develop alongside it. The jurisdictional rules included in the Convention should be understood as last resort or default rules.

As regards the validity of choice of court clauses, the Working Group picked up the solution proposed by the Geneva Round Table [16], whereby choice of court clauses

[15] The report published by the Working Group of the American Bar Association in July 2000 (see below, Annex 5) discusses this development and its limitations.

[16] See Preliminary Document No 7, prepared for the Special Commission on General Affairs and the Policy of the Conference, May 2000, which can be downloaded from the Conference Internet site.

would be valid if the State of the consumer's habitual residence accepted them as valid. Several speakers agreed that this solution might be a means of achieving consensus.

In any event, even if the rule of default jurisdiction is kept for the consumer's habitual residence, it is clear from the discussion that the same principle as the one discussed for relationships among business would apply to the identification and location of the parties to the contract. The consumer would be required to identify his habitual residence in order to bring the jurisdictional rule into play.

SECTION 3 – TORTS

The Rapporteur briefly introduced Article 10 of the preliminary draft Convention and emphasised its traditional character. Two significant aspects were mentioned. The courts of the place where the act takes effect (the place where the injury occurs) will have jurisdiction unless it can be shown that the perpetrator could not reasonably foresee that or a similar consequence. The courts of the place where the injury occurs will also be competent to rule on all the injury suffered anywhere in the world by an injured party, provided that party is a habitual resident of the State in which the court seised is situated. In all other cases, the jurisdiction of the courts of the place where the injury occurs is limited to injury suffered on their territory.

Several experts pointed out that in the cyber-world, the proof required in Article 10.1 b) can never be adduced. Internet sites, it is true, operate somewhat like newspapers which are distributed world-wide. A person who uploads defamatory information onto a site can reasonably foresee that it may be read anywhere in the world. The only unknown factor is the number of "copies" distributed (to pursue the analogy of the printed press). Moreover, it has also been shown that the place specified in Article 10.1 a) is very difficult, if not impossible, to identify with the Internet.

Thus it emerges from the discussions of the Working Group that offences committed through the Internet make it necessary to have an alternative forum to the defendant's forum, but one which also has general jurisdiction, within the meaning this expression bears in this section. Again, it was pointed out that the electronic world has the peculiarity that identifying the location of the parties, especially the defendant, becomes more difficult. For that reason, this should not be the only forum. The rule in Article 10, paragraph 4 of the preliminary draft was therefore welcomed as particularly important.

There was also discussion of the liability of access providers of access and servers. However, this has mainly to do with issues of the substantive law on liability, and does not actually bring into question the rule concerning jurisdiction.

Finally, a number of questions were raised and discussed, mainly concerning Article 10.1 b) and how it matches up to the constitutional requirements of certain countries, a question which is much wider than electronic commerce alone. Likewise, much time was spent on Article 10.2. However, it was recognised that the difficulties posed by that Article were not particularly relevant to electronic activities.

SECTION 4 – BRANCH OFFICES AND OTHER REGULAR COMMERCIAL ACTIVITIES

In his brief introduction to this text, the Rapporteur raised the following three questions, which were then debated by the experts:

1) Can an Internet site be regarded as a branch office?

2) Does the reply to the foregoing question depend on the level of inter-activity of the site?

3) What level of inter-activity must a site be shown to possess, or what level of targeting must it comprise for it to be regarded as a "regular commercial activity" within the meaning of Article 9?

On the first two questions, the discussion produced a clear consensus for saying that in itself, an Internet site cannot constitute a branch office or establishment. This is borne out by the instruments which deal specifically with the substantive law on electronic commerce, especially the European directive on the subject [17].

On the third question, however, the discussion brought out the extent of the difficulty involved in deciding in which cases an Internet site could constitute a regular commercial activity. Several experts based their analysis on the degree of inter-activity of the site (the targeting of a certain clientele, in a certain country, or alternatively a statement on the site itself that the products or services are not intended for certain countries).

At the end of the discussion, it was said that it would probably be of interest to consider in greater depth the possibility of excluding Internet sites, as the sole ground of jurisdiction, from the list in Article 18.2 of the preliminary draft Convention. This idea was greeted with satisfaction by several of the experts, but could not be explored in detail for lack of time. On the other hand, one expert queried whether Article 18 should exclude a ground of jurisdiction based solely on the accessibility of a site. It would have to be verified whether a prohibition of that sort would run counter to the interpretation made of Article 10.

SECTION 5 – DEVELOPMENTS SINCE THE OTTAWA MEETING

A) *Meeting on alternative methods of dispute resolution in Brussels, March 2000*

At the initiative of the European Commission, a meeting was held in Brussels on 21 March 2000 to deal with the alternative methods of resolving on-line disputes as between consumers and businesses. The documents made available to the participants, and the conclusions reached, are available on the site dedicated to this Working Group [18].

The full report on the study and the meeting consists of thirty-seven pages, and so cannot be reproduced here. However, the Annex to this report contains a summary of the aims, debates and conclusions of the March meeting [19].

[17] Official Journal, series L, No 128 of 8 May 2000, page 32.

[18] Http://dsa-isis.jrc.it/ADR/workshop.html

[19] Annex 3 to the full report, pages 30 to 34 inclusive, reproduced in Annex 3 to this report, available in English only.

B) *Meeting organised by the Federal Trade Commission and the Department of Commerce, Washington, June 2000*

The aim of this meeting was to identify the interests involved in electronic commerce when the transaction is concluded between a business and a consumer. Many ADR service providers attended the meeting. The participants discussed which avenues should be explored in the future to give confidence to consumers, and the incorporation of these alternative methods into a complete dispute resolution system, specifically in relation to court proceedings [20].

For this meeting a document was made public which had been drawn up by a group of enterprises which are among the most active in the field, containing guidelines for the settlement of disputes with consumers [21].

C) *Report on the ABA cyberspace project*

The Working Group on cyberspace, set up in 1998 by the American Bar Association, has published its report entitled "Transnational issues in cyberspace: a project on the law relating to jurisdiction".

The Working Group consisted of sub-groups, dealing respectively with (1) advertising and consumer protection, (2) data protection, (3) intellectual property, (4) payment systems and banking, (5) public law / gaming, (6) sale of goods, (7) sale of services, taking tele-medicine as an example, (8) securities, (9) taxation.

The report comprises 184 pages and cannot therefore be reproduced in extenso here [22]. However, we thought it would be useful to reproduce in the annex an extract from the report, containing the essential principles on which the Working Group was able to agree [23].

D) *Joint meeting between the OECD and the ICC*

By way of information, the new version of the programme as of the date of compilation of this report is annexed hereto [24].

[20] The complete documentation for this meeting can be consulted on the site www.ecommerce.gov/adr.

[21] This document is reproduced in Annex 4 below, available in English only.

[22] This report is available on the site which houses the work of the group: www.kentlaw.edu/cyberlaw/.

[23] These principles are found in section 1 of the report, pages 19 to 26 inclusive. See below, Annex 5. The document is available in English only.

[24] See below, Annex 6.

CONCLUSION

In conclusion, it is important to note that at no time was it suggested, during the discussions in the Ottawa working group, that electronic commerce should be excluded from the draft Hague Convention on jurisdiction and foreign judgments. On the contrary, many experts said everything possible should be done to adapt the Convention to the needs of electronic commerce. In this respect, the point was made, as it has been in all the meetings in which we have been able to participate since then, that what electronic commerce needs is certainty and predictability.