DISPUTE RESOLUTION IN INTERNATIONAL ELECTRONIC COMMERCE

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INTRODUCTION

International electronic commerce is undoubtedly one of the growth industries of the world economy, particularly if measured by the intensity of interest attracted by the emerging electronic marketplace. Although the value of commercial transactions taking place on the Internet is still relatively low, it is growing rapidly and is doubling, even tripling annually. The trend is likely to continue, and Internet-based trade is expected to account for two per cent of all commercial transactions in the industrialized countries by the year 2003.[2] It is not surprising, therefore, that the

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[2] Electronic Commerce and the Role of the WTO, Special Studies 2, 1998, at 23. The value of electronic commerce is predicted to reach US**Z**300 billion by the turn of century. Id., at 1. By the year 2003, the value of business-to-business e-commerce is expected to amount to US**Z**1300 billion in the U.S. alone. Financial Times, 12 Apr. 1999.

"Electronic commerce" can be defined as "the production, advertising, sale and distribution of products via telecommunication networks." Electronic Commerce and the Role of the WTO, supra at 1. The focus on this paper will be on Internet-based electronic commerce, since unlike telephone, fax, ATM, credit cards or television, the Internet is the only medium that "allows all elements of many types of commercial transactions to be conducted electronically." Id., at 23. It should be noted, however, that electronic commerce is often

topic has been placed high on the policy agenda of many industrialized countries and international organizations.[3]

The expectations based on the Internet as the emerging medium of international commerce reflect, in particular, the fact that the Internet will allow, for the first time in history, consumers to extensively engage in international commercial transactions. Although the volume of business-to-business electronic commerce currently greatly exceeds that between

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conducted through a combination of different electronic media (e.g., Internet plus telephone). Ibid.

[3] See, e.g., A Framework for Global Electronic Commerce, which sets out the Clinton administration's policy, http://www.whitehouse.gov/WH/New/Commerce.htm. See also Message of the President of the United States to Internet Users, July 1, 1997, http://www.whitehouse.gov/WH/New/Commerce/message.htm, at 1.

The European approach is developed in the European Commission's document, A European Initiative in Electronic Commerce, http://www.cordis.lu/esprit/src/ecomcom.htm.

Organization for Economic Co-operation and Development ("OECD") has been particularly active in the area and has produced a number of documents dealing with the subject. See, e.g., the documents posted at the organization's website, http://www.oecd.org/dsti/sti/it/ec/prod/online.htm.

The World Trade Organization ("WTO") has expressed an interest in trade-related aspects of electronic commerce. See Electronic Commerce and the Role of the WTO, supra note 1; Declaration on Global Electronic Commerce, Ministerial Conference, 20 May 1998 (WT/MIN(98)/DEC/2) (inviting the General Council to establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce).

The World Intellectual Property Organization ("WIPO") has launched an international process to develop recommendations for resolving intellectual property issues associated with Internet domain names. See Final Report of the WIPO Internet Domain Name Process, 30 April 1999, http://www.wipo2.wipo.int/process/eng/final_report.html.

businesses and consumers,[4] a large-scale entry of consumers into international electronic commerce is believed to be simply a matter of time.[5] Coupled with the greatly improved access to global markets that the new medium will allow for small and medium-sized companies, electronic commerce is expected to become an important growth engine for the world economy in the 21st century.[6]

The large-scale entry of consumers into international electronic commerce is made possible by the direct, interactive interface that the Internet creates between producers and merchants of goods and services, on the one hand, and consumers, on the other. This interface, which effectively relieves electronic commerce from territorial boundaries, is expected to have a number of important consequences, including a substantial reduction of transaction costs, lower prices, enhanced productivity, more intensive competition, improving quality and increasing diversity of

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[4] See Measuring Electronic Commerce, Committee for Information, Computer and Communications Policy, OECD/GD(97)185, at 13, http://www.oecd.org/dsti/sti/it/ec/prod/e_97-85.htm.

[5] The Emerging Digital Economy, U.S. Department of Commerce report, April 1998, at 5-6, http://www.ecommerce.gov/aboutthe.htm.

[6] Joint E.U.-U.S. Statement on Electronic Commerce, 5 Dec. 1997, http://www.qlinks.net/comdocs/eu-us.htm. For more detailed discussion see the First Annual Report, U.S. Government's Working Group on Electronic Commerce, November 1998, http://www.ecommerce.gov/whatsnew.htm; The Emerging Digital Economy, supra note 5.

products, as well as new employment opportunities. The electronic marketplace will also extend the scope of what is tradeable on an international scale. Many professional services, including medical, legal, architectural, travel, accounting, education and others, can be easily traded, and are already being traded, across borders through the new medium.[7] In view of the revolutionary nature of these consequences, international electronic commerce is predicted to fundamentally modify the existing global economic, market and business structures.[8]

While the interest in the new medium intensifies, however, questions are being raised as to whether the existing international legal infrastructure is capable of supporting the predicted growth.[9] While a fair amount of work has been

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[7] Electronic Commerce and the Role of the WTO, supra note 2, at 11.

[8] See Electronic Commerce, OECD Policy Brief No. 1-1997, at 1-3; Electronic Commerce and the Role of the WTO, supra note 2, at 19-21; A European Initiative in Electronic Commerce, supra note 3, at 2-4.

[9] For discussion of the legal challenge presented by electronic commerce see generally Jane Kaufman Winn, Open Systems, Free Markets, and Regulation of Internet Commerce, 72 **Tul. L. Rev.** 1177 (1998); R.J. Robertson, Electronic Commerce on the Internet and the Statute of Frauds, 49 **S.C. L. Rev.** 787 (1998); Holly K. Towle, Electronic Transactions and Contracting, 520 **PLI/Pat** 515 (1998); Stephen S. Wu, Incorporation by Reference and Public Key Infrastructures: Moving the Law Beyond the Paper-Based World, 38 **Jurimetrics** 317 (1998); John C. Yates, Electronic Commerce and Electronic Data Interchange, 507 **PLI/Pat** 147 (1998); Michael L. Rustad, Commercial Law Infrastructure for the Age of Information, 16 **J. Marshall J. Computer & Info. L.** 255 (1997); Craig W.

invested in attempts to develop an understanding on the mechanics and validity of electronic contracting and the digital authentication of electronic signatures,[10] less attention has been paid to dispute resolution, although particularly from the new player's -- the consumer's -- point of view this is the troubling area.[11] Business-to-business

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Harding, Trends in Electronic Commerce: Doing Business over the Internet, 452 **PLI/Pat** 509 (1996); Raymond T. Nimmer & Patricia Krauthouse, Electronic Commerce: New Paradigms in Information Law, 31 **Idaho L. Rev.** 937 (1995).

[10] Both governmental organizations, such as the United Nations Commission on International Trade Law ("UNCITRAL"), and non-governmental organizations, such as the International Chamber of Commerce ("ICC"), have made an effort to develop an understanding and clarify the rules on these aspects of international electronic commerce.

For the work conducted by UNCITRAL see UNCITRAL Model Law on Electronic Commerce, http://www.un.or.at/uncitral/en-index.htm;, reprinted in 36 I.L.M. 200 (1997); Draft Uniform Rules on Electronic Signatures, http://www.un.or.at/uncitral/en-index.htm. For discussion see, e.g., Harold S. Burman, Introductory Note, 36 I.L.M. 197 (1997); Peter Winship, International Commercial Transactions: 1996, 52 **Bus. Law.** 1643 (1997); Richard Hill & Ian Walden, The Draft UNCITRAL Model Law for Electronic Commerce: Issues and Solutions, 13 No. 3 **Computer Law.** 18 (1996).

For documents prepared by the ICC see, e.g., General Usage for International Digitally Ensured Commerce ("GUIDEC"), http://www.iccwbo.org/guidec2.htm.

For further discussion see Survey of International Electronic and Digital Signature Initiatives, Internet Law & Policy Forum, http://www.ilpf.org/digsig/survey.htm.

[11] See, however, Consumer Protection in the Electronic Marketplace, OECD 1998, at 21, http://www.oecd.org/dsti/sti/it/ec/prod/online.htm; (suggesting that "[e]ffective means of responding to consumers' complaints will have to be developed to increase consumer confidence."); Matthew S. Yeo & Marco Berliri, Conflict Looms Over Choice of Law in Internet Transactions, 4 **Electronic Com. & Law Rep.** 85 (1998)(noting "the other critical issue [apart from the applicable law issue]", i.e., "how the parties to ... [an international consumer] contract resolve any resulting disputes. This question implicates

transactions are likely to be less affected by the move to the electronic, as at least the largest and most complex of such transactions can be made legally secure by traditional means, i.e., by including an arbitration clause in the contract wherein the transaction is recorded and by relying on the existing international dispute resolution infrastructure -- international commercial arbitration -- to resolve any disputes that may arise out of such transactions.

However, there is no comparable international system in place for standard, low value business-to-business transactions and, even less, for consumer transactions. Indeed, many national consumer protection laws disallow arbitration of disputes arising out of consumer transactions -- in an attempt to protect the weaker party, the consumer, such disputes have often been qualified as non-arbitrable.[12] Compounding the problem, litigation before national courts also remains a problematic alternative. Questions arise in a number of areas, including the reach of a state's regulatory jurisdiction to protect consumers in an international context, the scope of national courts' personal jurisdiction in cases involving international electronic transactions, the law applicable to such transactions, as well as the recognition

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equally thorny problems of judicial jurisdiction, recognition of dispute resolution clauses, and the practicality of cross-border litigation concerning relatively minor transactions.")

[12] See, e.g., art. 1d of Ch. 11 of the Finnish Consumer Protection Act of 1978 (20 Jan. 1978/38).

and enforcement of judgments rendered.[13] Coupled with the relatively high cost of cross-border litigation, particularly in view of the relatively low average value of international consumer transactions, from the consumer's point of view the legal risks associated with international electronic commerce appear to be high.

The first part of the present paper will focus on one of the problem areas identified above: the state's legislative jurisdiction to regulate international electronic commerce. As the difficulties arising in that and the other areas mentioned above share a common source -- the novel nature of the Internet as a medium of commerce -- the analysis conducted in this paper will broadly apply to those other areas as well. In the second part of the paper an attempt is made to develop a blueprint for an alternative dispute resolution system that arguably needs to be set up to remove the identified deficiencies and to enhance the existing international legal infrastructure. The paper concludes with an assessment of the feasibility of the proposed alternative dispute resolution system project.

I. THE INTERNET AS A MEDIUM OF COMMERCE

[13] For discussion of the applicable law issue see, e.g., Yeo & Berliri, supra note 11, at n. 1 (arguing that "continuing uncertainty about applicable law is likely to impede the expansion of global electronic commerce").

The legal challenges faced by international electronic commerce follow from the novel nature of íts medium, the Internet. While technically forming only the most recent development in a long series of technological innovations, which include other modern media of telecommunication such as the telephone, the telex, the radio and the television, the Internet as a whole forms a complex network that provides it with novel system characteristics, distinguishing it from all other modern media. Unlike the other modern media, the Internet allows systematic, large-scale, on-line, interactive communication between distant parties.

Although the other modern media include almost all of the individual features of the Internet, none of them alone, unlike the Internet, incorporates all of them. While the telephone, for instance, allows telecommunication and is also interactive, its function remains limited to oral communication. The telex and the telefax are similar to the telephone in that, instead of sound, their function is limited to the transmission of text. Also, although both the telex and the telefax allow interactive communication, communication via these media, unlike the telephone, does not take place without a substantial time lag, or “on-line.” More importantly, all three -- the telephone, the telex and the telefax -- remain individualized means of communication and thus fail to provide a technological framework for “broadcasting,” i.e., mass communication.

Conversely, while both the radio and the television establish such broadcasting frameworks and the latter also allows transmission of live images, neither one allows interactive telecommunication. Integrating all these features -- sound, text, image, interactivity, and the capability of reaching masses individually and on-line, and thus enabling a full range of communicative modes (many-to-many, one-to-many, one-to-one) -- the Internet establishes a technological platform for a multimedia environment where telecommunications, broadcasting and computing converge and the boundaries surrounding them collapse.[14] As a result, the Internet creates a functional whole, a “virtual reality” or a “cyberspace,” that effectively takes communication off the ground and relieves the activity taking place thereon, including international electronic commerce, from territorial boundaries.

It is the Internet’s novel, functional characteristics that complicate the application of traditional principles of international law to any activity taking place thereon, including, in particular, international electronic commerce.

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[14] For discussion of the convergence process see, e.g., Patrick Vittet-Philippe, Digital Convergence, 14 **Comp. L. & Sec. Rep.** 393 (1998).

In terms of the philosophical theory of scientific realism, the Internet constitutes an “emergent ontological level.” One of the features of such a phenomenon is that it constitutes a functional whole that amounts to more than the sum of its constituent parts. See, e.g., **Raimo Tuomela, Tiede, toiminta ja todellisuus [Science, Action and Reality]**, at 16 (1983)

While the Internet -- or rather, the cyberspace that it functionally creates –- is essentially borderless and ubiquitous, traditional principles of international law are, on the contrary, developed and intended to be applied on the basis of the concept of territoriality. This concept pervades, in particular, the principles governing the jurisdiction of states. Developed during an era when another concept of communication –- a "speech situation" requiring the simultaneous presence of both parties at arm's length –- provided the ideal of political and commercial negotiation and bargaining, traditional principles are now facing a challenge that they seem poorly equipped to deal with. Requiring the territorial anchoring of each transaction in order to provide a solution, they are now confronted with a phenomenon –- an international electronic transaction –- that does not conveniently fall within the traditional pigeonholes of territoriality.[15]

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[15] Some of the difficulties that arise have been analyzed in Electronic Commerce and the Role of the WTO, supra note 2, at 67-68. For a more comprehensive analysis see, e.g., David R. Johnson & David Post, Law and Border –- the Rise of Law in Cyberspace, 48 **Stan. L. Rev.** 1367 (1996).

For discussion of the relationship between sovereignty, territoriality and the Internet see the following papers presented at a symposium on "The Internet and the Sovereign State: The Role and Impact of Cyberspace on National and Global Governance:" Keith Aoki, Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet, 5 **Indiana J. Global Legal Stud.** 443 (1998); Jack Goldsmith, The Internet and the Abiding Significance of Territorial Sovereignty, 5 **Indiana J. Global Legal Stud.** 475 (1998); Bill Maurer, Cyberspatial Sovereignties, Offshore Finance, Digital Cash, and the Limits of Liberalism, 5 **Indiana**

Consider, for instance, consumer transactions for the purchase of consumer goods by Finnish consumers, through the Internet, from United States companies.[16] Which one of the two states involved, Finland or the United States, has the jurisdiction, exclusive or otherwise, to regulate such international consumer transactions? In the absence of an international convention on the matter, the answer to the question must be sought from an analysis of general international law principles.

Under general international law, the basis of a state's legislative jurisdiction is territorial sovereignty. According to this principle, in the absence of a substantive justification recognized under international law, the state's legislative jurisdiction is limited to its territory.[17]

J. Global Legal Stud. 493 (1998); Henry H. Perritt, Jr., The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance, 5 **Indiana J. Global Legal Stud.** 423 (1998); David G. Post, The "Unsettled Paradox": The Internet, the State, and the Consent of the Governed, 5 **Indiana J. Global Legal Stud.** 521 (1998); Saskia Sassen, On the Internet and Sovereignty, 5 **Indiana J. Global Legal Stud.** 545 (1998); Joel P. Trachtman, Cyberspace, Sovereignty, Jurisdiction, and Modernism, 5 **Indiana J. Global Legal Stud.** 561 (1998).

[16] The example serves a purpose, as the United States constitutes the technological and administrative center of the Internet, whereas Finland currently boasts the highest per-capita incidence of Internet connections in the world. See Electronic Commerce and the Role of the WTO, supra note 2, at 7.

[17] The Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Judgment of Sept. 7) (hereinafter "Lotus Case") ("[T]he first and foremost restriction imposed by international law upon a State is that –- failing the existence of a permissive rule to the contrary

Although a state may be entitled to exercise extraterritorial jurisdiction in certain circumstances, those circumstances are limited. The traditional justifications for such extensions are the territorial and personal principles of jurisdiction, which include the subjective and objective territorial principles, the nationality principle, the passive nationality principle, and the protective principle. The universality principle provides a further ground for exercising extraterritorial jurisdiction under certain specified circumstances. Although these principles were initially developed with a view to defining a state's extraterritorial jurisdiction in criminal matters,[18] they are currently considered as general principles governing the state's overall exercise of its legislative jurisdiction.[19]

These principles are generally defined as follows. Under the subjective territorial principle a state is entitled to exercise legislative jurisdiction over acts commenced within

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–- it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.")

[18] See Harvard Research in International Law: Jurisdiction with Respect to Crime, 29 **Am. J. Int'l L. Supp.**430 (1935) (hereinafter "Harvard Research").

[19] See, e.g., **Ian Brownlie, Principles of Public International Law** 310 (4th ed., 1990); **2 Restatement (Third) of the Foreign Relations Law of the United States**, Comment f to § 403.

the state's territory but completed or consummated abroad.[20] Similarly, the objective territorial principle allows the extension by the state of its legislative jurisdiction to acts that were commenced outside its territory but completed or consummated within its territory.[21] The nationality principle and its extension, the passive nationality principle, legitimate the state's extraterritorial jurisdiction over acts that were commenced and completed outside its territory, provided that the person who committed the act is its national. Accordingly, under the nationality principle a state may extend its legislative jurisdiction to its nationals residing or travelling abroad,[22] whereas the passive nationality principle allows the state's exercise of legislative jurisdiction over acts committed by foreigners outside its territory, provided that such regulation is necessary for the protection of its nationals.[23]

The territorial linkage required by the protective and universality principles is even more tenuous. According to the former, a state may exercise legislative jurisdiction over acts committed outside its territory by aliens if such acts are

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[20] Harvard Research, supra note 18, at 484.

[21] Id., at 487. See also the Lotus Case, supra note 17, at 23.

[22] Harvard Research, supra note 18, at 519.

[23] Id., at 578.

directed against its security or public safety,[24] whereas the universality principle authorizes the state to exercise its jurisdiction to prescribe even in the absence of any substantive links between the act and the state concerned if the act over which jurisdiction is asserted is of such a nature that all states have a legitimate interest to exercise legislative jurisdiction thereover.[25] The universality principle can be applied to justify the exercise of extraterritorial jurisdiction over a short list of crimes of universal concern, such as war crimes, terrorism, hijacking, slave trade, etc.

Because the function of the jurisdictional principles is not to impose upon states substantive international law obligations, but only to delimit the scope of their legislative jurisdiction, they leave the decision as to the substance of the regulations up to the domestic jurisdiction of each state. Consequently, they serve to suspend rather than resolve substantive differences of regulatory policy between states.

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[24] Lotus Case, supra note 17, at 20 ("[T]he exceptions [to the territorial principle] ... include for instance territorial jurisdiction over nationals and crimes directed against public safety ... .")

The precise scope of the protective principle is subject to debate. For discussion see Harvard Research, supra note 18, at 543-63. The effects doctrine invoked by the United States to justify its exercise of extraterritorial jurisdiction in antitrust matters is, in effect, a variation of the protective principle. The validity of the "effects doctrine" under international law remains controversial.

[25] Id., at 563-92.

In terms of the example mentioned above, both Finland and the United States could invoke a number of these principles to justify their exercise of legislative jurisdiction over international electronic commerce taking place between the two territories, and neither one of the two states could argue that the selected basis is exclusive. Finland, as the home country of the weaker party, the consumer, could invoke, e.g., the objective territorial principle as a justification for the exercise of legislative jurisdiction on the ground that the offer placed on the website was directed at and accessed by a consumer residing in Finland, and thus was "consummated" in that country.[26] Alternatively, Finland could rely on the protective principle, arguing that the purpose of its exercise of legislative jurisdiction over international consumer transactions is to protect the interests of Finnish consumers, the weaker party to such transactions.[27]

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[26] Although the issue seems to be open, it is arguable, given the capability of the Internet to reach consumers individually, that advertisements placed on websites maintained by merchants can be considered as offers rather than as solicitations of offers. See **Restatement (Second) of Contracts**, §29 (1981).

For discussion of the distinction between offers and solicitations of offers see Henry H. Perritt, Jr., Dispute Resolution in Electronic Network Communities, 38 **Vill. L. Rev.** 349, 374-76 (1993).

[27] The European system established in the Rome and Brussels Conventions would support the Finnish policy. See art. 5 of the Convention on the Law Applicable to Contractual Obligations (the "Rome Convention"), Rome 1968, O.J. L266 (1980), reprinted in 19 I.L.M. 1492 (compelling the application of the mandatory rules of the country in which the consumer has habitual residence); art. 13 of the Convention on Jurisdiction and Enforcement of Judgements in Civil and

The United States, on the other hand, could conveniently refer to other principles, such as the subjective territorial principle, which justifies the exercise of legislative jurisdiction over acts that were completed or consummated outside the state's territory, provided that such acts were commenced within its territory. This would be the scenario in the example: the fact remains that, even if the offer was "received" and accepted and the transaction was thus completed in Finland, the offer was nonetheless made by a United States-based company, meaning that the act of contracting commenced in the territory of the United States, thus justifying the latter's legislative jurisdiction over international electronic commerce initiated by United States parties.[28]

Commercial Matters (the "Brussels Convention"), Brussels 1980, O.J. C97 (providing that a business may sue a consumer only in the consumer's home country). For further discussion see, e.g., Yeo & Berliri, supra note 11, at 86-87.

The system established by the two Conventions effectively results in the recognition of the consumer's home state's legislative jurisdiction over the merchant's home state; in the example given in the text, Finland's legislative jurisdiction over that of the United States. Of course, the United States not being a member of the European Communities, the two Conventions do not apply.

[28] This is also the approach adopted, e.g., in the proposed Directive issued in November 1998 by the European Commission to establish a legal framework for electronic commerce within the Common Market. See art. 3, para. 1 of the Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, http://www.europa.eu.int/comm/dg15/en/index.htm. ("Each Member State shall ensure that the Information Society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within this Directive's coordinated field.")

Consequently, as the jurisdictional principles provide a number of alternative, non-exclusive grounds for the exercise of regulatory jurisdiction, they effectively permit the concurrence of jurisdictions. Under general international law Finland could justifiably assert legislative jurisdiction over international consumer transactions in all instances where the "weaker" party, the consumer, is resident in that country. But similarly the United States could assert jurisdiction over the same transactions on grounds that it is there where the products or services are put in the stream of commerce and, consequently, where the relevant regulation of standard contract terms -- which are likely to apply to consumer transactions of the nature described above –- should occur.

Apart from regulatory jurisdiction, the exercise of judicial jurisdiction also tends to turn into an issue in the context of international electronic commerce. Because international consumer transactions entered via the Internet lack a natural geographical center of gravity -- there is no identifiable "place" where the contract was entered into -- there is no factual ground that would allow the allocation of judicial jurisdiction in an objective manner. Should a dispute arise between the consumer and the Internet merchant, which one of the two possible fora –- the consumer's or the merchant's jurisdiction –- is to be considered competent to dispose of the case? In the scenario provided above, does the fact that the

Finnish defendant, when entering into the transaction, accessed a website created and maintained by a United States-based business provide "minimum contacts" for purposes of establishing the personal jurisdiction of United States courts over the Finnish defendant?[29] Or are the Finnish courts competent based on policy considerations such as those adopted in the Rome and Brussels Conventions?[30]

The complications relating to regulatory and judicial jurisdiction create a substantial risk of conflict of laws and uncertainty about the law applicable in international electronic commerce. Although private international law, or conflict-of-laws, has traditionally dealt with such conflicts and, indeed, is specifically developed to resolve such conflicts, the resolution of the applicable law issue by referring it to the context of dispute resolution is not particularly helpful in the context of international consumer transactions. Such a referral suspends rather than resolves the issue, thus failing to remove the uncertainty surrounding applicable law. While the suspension of the resolution of substantive legal issues may be appropriate in the context of one-off, non-commercial disputes, it is not particularly helpful in the context of mass consumer transactions, which

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[29] See, e.g., Asahi Metal Industry Co. v. Superior Court, 480 U.S. 908 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[30] See supra note 27.

require a stable and predictable legal framework in order to grow and flourish.[31]

Even if the referral of the applicable law issue to the litigation context were considered appropriate, the resolution of the issue in that context is complicated by the fact that neither one of the two fora -- the consumer's or the merchant's home jurisdiction -- can be viewed as an uninterested, neutral forum to resolve the policy issues associated with international consumer transactions. In the scenario provided above, how is the applicable law chosen and the possible conflict of laws issue resolved? In the absence of a choice of law clause in the contract, is the law applicable to the transaction the Finnish law or the United States law? The Finnish law, for consumer protection reasons, or the United States law as the "proper law" of the contract? If a choice-of-law clause were included in the contract, should it be considered determinative, given that the contract involves a consumer transaction? Should the Finnish court on this ground disregard a choice-of-law clause specifying United States law as the applicable law and apply instead the mandatory provisions of Finnish consumer protection laws? But are United States courts likely to recognize and enforce a judgment

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[31] Indeed, the unpredictable operation of the traditional conflict-of-laws rules can be seen as one of the reasons underlying the substantial displacement by international commercial arbitration of national courts as fora for the resolution of international business disputes.

rendered by a Finnish court in favor of a Finnish consumer, relying on the mandatory provisions of the Finnish consumer protection laws and possibly setting aside a choice-of-law clause specifying United States law as the applicable law? Or alternatively, would Finnish courts recognize and enforce a judgment rendered by a United States courts against a Finnish consumer, applying United States law and thus disregarding the mandatory provisions of the Finnish consumer protection laws?

Traditional international law and conflict of laws do not provide clear, objective answers to these questions. In these circumstances, different countries may seek to apply widely differing national laws to one and the same website established by a business engaged in international electronic commerce. Requiring an Internet merchant, many of whom are expected to be small and medium-sized companies, to respect all the various and likely conflicting national laws would not only be unreasonable but also virtually impossible. Consumers, on the other hand, are currently not only unaware of the law that may be eventually found applicable to their transactions. They are also unaware of whether the judgment that they may secure in their home jurisdiction against a reckless Internet trader will have any value outside the country of their residence; there is no international obligation to recognize such judgments extraterritorially.

But although all these legal issues surrounding international electronic commerce are remarkable, chances are that they remain somewhat academic in practice. Since an even more fundamental question remains: Given the expected relatively low average value of international consumer transactions, it is unlikely that extensive cross-border litigation will ever become a reality, even if legal grounds for such litigation existed. The cost of such litigation would simply seem to be so high as to outweigh the potential benefit. A United States business is unlikely to appear before a Finnish court, in order to respond to a relatively trivial consumer complaint. And similarly, a Finnish consumer is unlikely to travel to the United States to defend his case against a United States business –- the cost of travel, let alone litigation, may be higher than the value of the underlying transaction. In other words, traditional litigation before national courts seems an unattractive option for consumers and businesses alike.

But whatever the outcome –- extensive cross-border litigation as a result of an inadequate international legal infrastructure, or practically no litigation because of the high cost of such litigation compared to the potential benefits –- the consequences are unfortunate for the growth of international electronic commerce. In either scenario large-scale entry of consumers into international electronic commerce would be unlikely to occur, as would the attendant economic

benefits.[32] Instead of propelling the world to a new level of prosperity, the lack of an adequate international legal infrastructure would cause the potential growth engine of the world economy to stall -- and crash -- to begin with, on take-off.

II. A BLUEPRINT FOR ALTERNATIVE DISPUTE RESOLUTION

It seems clear that litigation before national courts will not provide a solution and that alternative dispute resolution systems need to be developed in order to establish an international legal infrastructure that would be adequately predictable, relatively inexpensive and sufficiently effective to support the growth of international electronic commerce. Without such infrastructure, the high expectations relating to international electronic commerce will be unlikely to materialize.

Important economic and business interests are at stake. If there is no consumer confidence in the legal security of international transactions entered into on the Internet, consumers will simply refrain from using the new medium for

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[32] See also Yeo & Berliri, supra note 11, at 85 ("[A]ny continuing uncertainty about the law that is applicable to cross-border consumer contracts is likely to impede the expansion of global electronic commerce, as companies and consumers alike avoid transactions whose legal consequences are essentially unknown.") (footnote omitted)

commercial purposes. This would be unfortunate, as the technological base would appear to be already there to support an extensive international trading system, and as both traders and consumers seem to find the emerging marketplace an attractive forum for selling and shopping.

What seems to be required under the circumstances is a dispute resolution system that (1) suits the types of disputes likely to arise out of international electronic commerce; (2) is relatively inexpensive to administer, thus not unduly burdening the cost of transacting; and (3) sufficiently effective to allow a swift remedy to be provided to the successful party. These requirements are met if an international center is set up to administer a computerized, on-line dispute resolution system designed to serve as an honest broker between Internet merchants and consumers. The center would have the traditional functions of an international arbitration center, consisting of (1) the receipt and registration of claims; (2) the administration of the claims throughout the proceedings; (3) the maintenance of a list of qualified “arbitrators” and the selection, applying agreed criteria, of a sole arbitrator or arbitrators (the number of arbitrators depending, e.g., on the value of the disputed transaction) from the list; and (4) the provision of legal, technical and administrative support to the arbitrator(s) during the proceedings. The system should remain voluntary, allowing the parties to opt out of the alternative

system and go to court, if that is what is preferred.

The idea of setting up an international on-line dispute resolution system is not particularly revolutionary, as such systems are already being developed for more limited purposes, e.g., by the World Intellectual Property Organization ("WIPO") for the purpose of resolving disputes arising out of Internet domain name registrations.[33] Experiments have also been made in the United States to operate a "virtual magistrate" to resolve certain types of disputes arising within computer network systems.[34] The main novelty of the proposal made herein is the intended scope of the new system, as it would potentially apply to all disputes arising out of international electronic commerce.

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[33] See supra note 3.

[34] The "Virtual Magistrate" set up and run by the Cyberspace Law Institute, the American Arbitration Association, the Center for Information Law and Policy, and the National Center for Automated Information Research serves as a "specialized, on-line arbitration and fact-finding system for disputes involving ... users of on-line systems, those who claim to be harmed by wrongful messages; and system operators." See Virtual Magistrate, http://vmag.vcilp.org. For discussion of the Virtual Magistrate project and other similar experiments see Alejandro E. Almaguer & Roland W. Baggott III, Shaping New Legal Frontiers: Dispute Resolution for the Internet, 13 **Ohio St. J. on Disp. Resol.** 711, 720-36 (1998); Ethan Katsh, Dispute Resolution in Cyberspace, 28 **Conn. L. Rev.** 953, 964-65 (1996).

See also Perritt, Dispute Resolution in Electronic Network Communities, supra note 26 (proposing a framework for resolving disputes that arise as a result of denial of access to electronic networks, or from the transmission of defamatory messages over such networks).

For the reasons described above, such an alternative forum would likely be far more attractive and effective from both the businesses' and the consumers' point of view than recourse to traditional litigation before national courts. The fact that the international center might locate in a country other than the home base of either one of the parties to the transaction would not cause a problem, as the system would allow on-line submission of pleadings and evidence. In unusually large or complex claims, on-line oral hearings (e.g., via videoconferencing) should be possible, if required by one or both of the parties. The language used in the proceedings should not present a particular problem either, given the sophisticated nature of both parties –- otherwise they would not be using the Internet as a forum for selling and shopping in the first place. In any event, one of the functions of the national consumer ombudsmen or consumer protection agencies could be the provision of advice and assistance to consumers in litigation before the center, including language services, if necessary.

If properly designed, set up and marketed, such an alternative dispute resolution system would not only largely remove the legal risks involved in international electronic transactions, but would also, if properly set up, effectively fund itself. This could be achieved, e.g., by charging a small fee from each transaction secured by the system. The fee could be fairly

low, particularly if the new system is, at least initially, sponsored by the main stakeholders of the Internet business community.

The proposed legal security fee could be charged on the basis of a number of alternative or overlapping grounds. It could be levied (1) by charging an "advertisement fee" on a periodic (e.g., annual) basis from each company that markets and promotes its products or services on the Internet as legally secure, i.e., by stating in an advertisement placed on the website used by the merchant for marketing the product or the service in question that the merchant has given its consent to submit all disputes that may arise out of the transaction to the international on-line dispute resolution center;[35] and/or (2) by adding a "legal security fee" to the price of each such product or service purchased on the Internet that is effected by way of entering into a contract that includes an alternative dispute resolution clause referring disputes that may arise out of the proposed transaction to the international center. The latter alternative requires, of course, that the consumer making the purchase expressly agrees to the clause, and the accompanying legal security fee, in connection with the purchase.

[35] To facilitate consumer recognition, such companies would be entitled to display the logo of the international center on their website.

Accordingly, consumers would have to decide, when entering into an international consumer contract, whether to opt for the alternative dispute resolution system to which the merchant has already agreed, or whether to prefer traditional litigation before national courts, should a difference arise. If the consumer agrees to pay the “legal security fee” by clicking on the appropriate button on the merchant’s website, he would opt for the alternative system; if he does not agree to pay the fee, he would effectively opt for the national court as a forum for enforcing his rights. In the latter scenario no legal security fee would be levied and, consequently, the consumer would pay a slightly lower price for the product or service purchased. But he would also assume in exchange the ensuing legal risks –- and costs -- associated with cross-border litigation.

In order to serve as a true alternative to traditional litigation before national courts, the alternative dispute resolution system would have to provide an effective remedy to the successful party. Such party should be entitled to a swift payment of compensation, should monetary relief be the remedy awarded by the center. Swift payment of monetary compensations could be ensured by setting up a fund accumulated from the transaction fees charged by the center. The center would be responsible for seeking from the respondent the compensation paid out by the center to the claimant, through litigation if

necessary, if the respondent fails to reimburse the center voluntarily. Alternatively, the respondent could be required to pay a higher fee in the future for the right to display the logo of the international center on its website.

There are alternative ways in which an international dispute resolution center of the type outlined above could be set up, the simplest being reliance on an existing, private, not-for-profit stakeholder institution such as the International Chamber of Commerce ("ICC"). Given that the ICC hosts an international commercial arbitration court, the administration of an international center to resolve disputes arising out of global electronic commerce would seem to fit the ICC's existing functions and profile, particularly if the new facility focused on the on-line resolution of business-to-business disputes. Alternatively or perhaps additionally, if the ICC is viewed as being too close to business interests and consequently too partisan to administer a system that would handle consumer complaints, a new private, not-for-profit, stakeholder-based organization could be set up specifically for the purpose of developing an international dispute resolution system to deal with consumer complaints. The new organization could be managed by a board comprised of representatives of international lawyer associations, the ICC, consumer protection institutions, and other main stakeholders of the Internet

community.[36]

Given the growth rate of international electronic commerce, it is likely that the number of complaints arising out of electronic transactions will be soon too high for one international dispute resolution facility to handle. Consequently, one of the functions of the proposed new organization could be the licensing of the establishment of international sub-centers that would provide the actual dispute resolution services on a commercial, for-profit basis. These dispute resolution service providers could compete on a number of grounds, including specialization in dispute resolution services provided in certain languages, expertise in certain business sectors, etc. The international center could continue to serve as an appeals body, thus ensuring, as a representative not-for-profit organization, the legal integrity and consistency of the jurisprudence of the privatized, for-profit dispute resolution services. Adequate management and financial auditing of such commercial service providers would also be required, to ensure the soundness of their administration and functioning.

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[36] The structure and function of the new organization could mirror that of the newly-established Internet Corporation for Assigned Names and Numbers ("ICANN"), which was recently authorized by the United States Department of Commerce to take over the technical administration of the Internet domain name system. For relevant documentation see ICANN's website, which is located at http://www.icann.org.

CONCLUSION

Given the legal risks involved in international electronic transactions and the current growth rate of electronic commerce, the establishment of an alternative dispute resolution system of the type outlined above seems a fairly urgent task. As the availability of an alternative dispute resolution system would likely further increase consumer interest in electronic shopping, the Internet business community should have a great interest in promoting the alternative system. The existing examples show that the start-up costs of an alternative international dispute resolution system are unlikely to be high, particularly if compared with the value that the system would add to the legal security of international electronic commerce. And, as discussed above, after a while the system should be able to effectively fund itself.

The traditional reluctance of certain jurisdictions to allow the submission of disputes arising out of consumer transactions to arbitration or other forms of alternative dispute resolution no longer seems to be an issue, at least so far as international electronic commerce is concerned. The European Commission in its recent proposal for a directive on electronic commerce encouraged, indeed, required, the Member States “to ensure that, in the event of a disagreement between an

Information Society service provider and its recipient, their legislation allows the effective out-of-court schemes for dispute settlement, including appropriate electronic means."[37] While the policy adopted by the European Union is eminently sensible, it should be extended, given the nature of Internet trade, to a global scale, e.g., by way of an interpretation, or explicit understanding or statutory amendment, to the effect that the policy of non-arbitrability of consumer disputes does not apply to international electronic transactions.[38]

Certain other threshold issues also need to be clarified, chief among them being the determination of the law applicable before the proposed international centre. Given the lack of an agreed international standard, the issue could, and should, be resolved in the same way as it is resolved in international commercial arbitration –- on a case-by-case basis, relying on certain codified principles, such as those included in the

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[37] Art. 17, para. 1 of the Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, supra note 28.

[38] See also Yeo & Berliri, supra note 11, at 89 ("[One of the options} ... is to harmonize national consumer protection laws, at least insofar as they relate to online transactions. Countries could create, in effect, a 'Law of the Net' that applies solely to Internet-based consumer transactions, while retaining national consumer protection laws for other types of transactions. If successfully negotiated and widely adopted, consumers and businesses alike would know what legal standards governed Internet-based transactions, without regard to the location of either party. From the point of view of simplicity, ease of administration, and fulfilling parties' expectations, this would probably be the most effective solution.")

UNCITRAL Model Law on Electronic Commerce, and other relevant factors, including the law specified by the parties as the law applicable to the contract, the relevant provisions of the national law of the parties to the transaction, the value of the transaction, the fact that one of the parties may be a consumer, etc.[39] The harmonization of national laws applicable to international electronic commerce should be a long-term goal, as such harmonization would remove conflict-of-laws issues. However, because international harmonization efforts tend to take their time and because, as experience shows, disputes will arise even under harmonized circumstances, the

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[39] A provision on applicable law could, and should, be included in the rules of procedure of the international centre. Cf., e.g., art. 17, para. 1 of the 1998 Rules of Arbitration of the International Chamber of Commerce ("The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate."); art. 42, para. 1 of the International Convention for the Settlement of Investment Disputes ("ICSID") ("The [ICSID] Tribunal shall decide the dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."); art. V of the Iran-United States Claims Settlement Declaration ("The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.")

See also art. 33, para. 1 of the UNCITRAL Arbitration Rules ("The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.")

implementation of the proposed system should not wait until such harmonization is achieved.[40]

Importantly, there is no lack of political support for taking concrete action along the lines suggested above. The United States Government, for instance, has adopted a series of recommendations relating to international electronic commerce, including encouraging UNCITRAL, UNIDROIT, ICC and others, to "facilitate electronic commerce by ... promoting the development of adequate, efficient and effective alternate dispute resolution mechanisms for global commercial transactions."[41] Similarly, the European Commission's recent proposal for an electronic commerce directive encourages recourse to out-of-court alternative on-line dispute resolution schemes.[42] Consistent with these policies, the OECD Ministers

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[40] See Yeo & Berliri, supra note 11, at 89 ("[O]ne can hardly minimize the political and procedural complexities of negotiating a uniform law for Internet-based transactions –- not the least of which would be defining the scope of such a law.")

[41] A Framework for Global Electronic Commerce, supra note 3, at 7. See also the Joint E.U.-U.S. Statement on Electronic Commerce, supra note 6 (agreeing on "active support for the development, preferably on a global basis, of self-regulatory codes of conduct and technologies to gain consumer confidence in electronic commerce ... .")

[42] See art. 17, para. 1 of the Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, supra note 28 ("Member States shall ensure that, in the event of disagreement between an Information Society provider and its recipient, their legislation allows the effective use of out-of-court schemes for dispute settlement, including appropriate electronic means.")

at the Ottawa global electronic commerce conference, held on 8-9 October 1998, adopted a "Declaration on Consumer Protection in the Context of Electronic Commerce," in which they declared the determination of the OECD member states' governments to ensure that "consumers who participate in electronic commerce are afforded a transparent and effective level of protection for electronic transactions by ... supporting and encouraging the development of effective market-driven self-regulatory mechanisms that include input from consumer representatives, and contain specific, substantive rules for dispute resolution and compliance mechanisms."[43]

The political initiative thus having made, the ball is essentially in the court of the international legal community, the sole stakeholder group that has the necessary expertise in designing, setting up and managing international dispute resolution systems.

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[43] Declaration on Consumer Protection in the Context of Electronic Commerce, made by the OECD Ministers at the Conference on "A Borderless World: Realising the Potential of Global Electronic Commerce," Ottawa, Canada, 8-9 October 1998, DSTI/CP(98)12/REV2, http://www.ottawaoecdconference.org/english/homepage/htm.