

PUBBLICAZIONE SEMESTRALE ANNO XX  
N. 1 GENNAIO - GIUGNO 2015

Tariffa R.O.C. Poste Italiane s.p.a. - Sped. in abb. post. - D.L. 353/2003 (conv. in L. 27/02/2004 n°46) art. 1, comma 1, DCB Milano

# Contratto e impresa / Europa

Rivista fondata da F. Galgano e M. Bin

diretta da M. Bin e G. Ajani

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**2015**



Wolters Kluwer

CEDAM

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## **The Modern Travelling Merchant: Mobile Communication in International Contract Law**

CONTENTS: 1. Introduction: Mobile Communication and the Law. – 1.1. The Cross-Border Mobility of Contracting Parties in International Commerce. – 1.2. The Place of Communication as a Connecting Factor in International Law. – 1.3. A Solution: Article 10(3) UN Electronic Communications Convention. – 1.4. Outline of the present Paper. – 2. Is There a Problem...? The Prevalence of Mobility-Friendly Rules in Current International Contract Law. – 2.1. The Usual Party Location (Place of Business, Habitual Residence) as the Prevailing Connecting Factor. – 2.2. Decreasing Relevance of Local Circumstances at the Moment of Communication. – 2.3. A “Mobile” Place of Business for “Virtual Companies”? – 3. Remaining Areas of Difficulty. – 3.1. Interaction of Article 10(3) UN Electronic Communications Convention with General Private International Law Rules referring to a Party’s Location. – 3.2. Interaction of Article 10(3) UN Electronic Communications Convention with Private International Law Rules on the Formal Validity of Contracts. – 3.3. Remaining Relevance of the Place of Communication or of Factual Circumstances at the Moment of Communication. – 3.4. Uncertainty: The Difficulty to Determine the Other Party’s Location. – 4. Summary and Conclusion.

1. – The law of contract has long been criticised for lagging behind in its solutions for the use of electronic communications in commerce, leading to uncertainty which in turn creates obstacles to trade <sup>(1)</sup>. The entry into force of the United Nations Convention of 23 November 2005 on the Use of Electronic Communications in International Contracts (hereinafter: UN Electronic Communications Convention) in March 2013 was therefore heralded as an important step forward, as it removes some of the legal risks inherent in electronic commerce <sup>(2)</sup>.

One issue that has received little attention so far in this context is mo-

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<sup>(1)</sup> S. EISELEN, *The Purpose, Scope and Underlying Principles of the UNECIC*, in C.B. ANDERSEN & U.G. SCHROETER (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, London, 2008, p. 106.

<sup>(2)</sup> H.D. GABRIEL, *The United Nations Convention on the Use of Electronic Communication in International Contracts: an Overview and Analysis*, in *Uniform Law Review*, 2006, p. 286.

mobile communication, i.e. the fact that messages transmitted via phone, e-mail, SMS or some other means of communication can today be dispatched and received at virtually any place on earth, using everyday technical equipment like mobile phones, smartphones, tablet computers or notebooks with access to the internet. “People have grown accustomed to being connected to their [Internet] services all the time, whatever their device type and wherever their location. Computers are no longer office or household devices but personal devices with a built-in mobile broadband connection”<sup>(3)</sup>, resulting in the new term “m-commerce” being coined for commercial transactions conducted through wireless communication services using small, handheld mobile devices<sup>(4)</sup>.

The arrival of mobile communication has brought changes to the international contracting practice and its participants, resulting in what could be described as the “modern travelling merchant”. The proverbial travelling merchant of the Middle Ages travelled to foreign cities and towns carrying goods he wanted to sell, and transporting other goods he purchased during his travels back to his home country. The contracts of sale or purchase that Medieval travelling merchants concluded were nevertheless concluded locally (on the spot), with other merchants he met and negotiated with in the cities he visited. The “modern” travelling merchant combines his cross-border mobility with an ability to communicate across borders – a businessman from Cape Town attending a meeting in Milan can today enter into a sales contract by sending an e-mail from his mobile device to a merchant in Buenos Aires. It is this combined mobility of both persons and communications that raises novel legal questions to be addressed in this article.

### 1.1. – a) *The Typical Scenario Envisaged by International Contract Law Rules*

When taking international contract law (understood as the rules of law specifically designed to address international contracts, whether through rules of substantive law or through conflict of laws rules) as a starting point, it is surprising to see that the existing legal rules in this area are almost always based on the assumption that the parties to international contracts – the buyers and sellers, the senders and consignees, the suppliers and factors

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<sup>(3)</sup> M. FURMSTON & G.J. TOLHURST, *Contract Formation: Law and Practice*, Oxford, 2010, para. 6.06.

<sup>(4)</sup> ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), *OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce*, OECD Ministerial Meeting on the Future of the Internet Economy, Seoul, Korea, 17-18 June 2008, p. 2.

etc. – each stay in their home country throughout the formation and the execution of the contract. The picture implicitly underlying international contract law rules is thus essentially one of “immobile merchants”: What typically crosses the border under an international contract are the communications between the parties and (later, during contract performance) the goods or services contracted for, by not the acting parties themselves.

A prominent example for this model can be found in the Hague Convention of 1 July 1964 relating to a Uniform Law on the International Sale of Goods (ULIS). During the preparation of ULIS, the appropriate tests of the international character of a sales transaction had proven to be a “fundamental problem” that Professor Tunc in his official commentary described as “very delicate” <sup>(5)</sup>. Article 1(1) ULIS as finally adopted provided that:

“The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

(a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;

(b) where the acts constituting the offer and the acceptance have been effected in the territories of different States;

(c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected”.

In the cases addressed by Article 1(1)(a) ULIS, the goods moved across the border, while in those addressed by Article 1(1)(b) ULIS the party declarations resulting in the contract did, but none of the constellations mentioned in Article 1(1)(a)-(c) ULIS involved a contracting party crossing the border. This did, of course, not mean that buyers and sellers could not physically leave their home country when acting in relation to an international sales contract, but ULIS regarded such party mobility as legally irrelevant.

When the United Nations Convention of 11 April 1980 on Contracts for the International Sale of Goods (hereinafter: UN Sales Convention) was drafted as successor instrument to the ULIS, care was taken to restructure the sphere of applicability provisions in order to reduce their complexity. The “subjective” elements contained in Article 1(1)(a)-(c) ULIS were accordingly dropped, and only the “objective” criterion of two parties hav-

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<sup>(5)</sup> A. TUNC, *Commentary of the Hague Conventions of 1<sup>st</sup> July 1964 on the International Sale of Goods and on the Formation of Contracts of Sale*, Rome, 1964, p. 12.

ing their places of business in different States was maintained in Article 1(1) UN Sales Convention. Despite these changes, the drafters' mental focus on contracting parties that conduct their business from their office in their respective home country remained unchanged: The few scenarios involving a party acting outside its home country which were discussed during the preparation of the UN Sales Convention – notably that of a message being personally delivered to a party at the place of business of the other party or at the addressee's hotel <sup>(6)</sup>, and that of a seller's senior officials with supporting staff renting a suite of rooms for a month in the city where the buyer has its headquarters in order to conduct the negotiations and the final execution of a contract in that suite <sup>(7)</sup> –, were considered to be uncommon exceptions that did not warrant a departure from the general assumption that buyers and sellers work from their home base.

Under the UN Sales Convention, the pertinent role model therefore continues to be that of “immobile” merchants. The same holds true for the numerous other uniform law instruments whose sphere of applicability has been modelled on the UN Sales Convention, as e.g. the Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods (hereinafter: Hague PIL Convention of 1986), the UNIDROIT Convention of 28 May 1988 on International Factoring or the UN Convention of 11 December 1995 on Independent Guarantees and Stand-by Letters of Credit (to name but a few), making this role model the prevailing one in contemporary international contract law.

b) *The Changing Reality in an Age of Mobile Communication*

The arrival of modern means of “mobile” electronic communication has put the above-mentioned role model increasingly at odds with the realities of contemporary business life. Today's merchants frequently travel abroad in order to conduct their business, but usually continue to take care of other transactions unrelated to the particular journey during their travels. Due to the combination of cross-border mobility and the global availability of mobile means of communication, a message relating to a particular contract may therefore be dispatched from or received at a location which is completely unrelated to the contract and to the sending or receiving party. As a result, the domestic laws which could apply to a given transaction effectively multiply in comparison to the traditional scenario of an

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<sup>(6)</sup> UNCITRAL SECRETARIAT, Commentary on the Draft Convention on Contracts for the International Sale of Goods, in *United Nations Conference on Contracts for the International Sale of Goods, Official Records*, New York, 1981, p. 26.

<sup>(7)</sup> J.O. HONNOLD, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3<sup>rd</sup> ed., The Hague, 1999, p. 32.

“immobile” merchant discussed above. This is particularly troublesome because the mobility of today’s merchants means that many of the places at which communication activities are conducted are merely random, short-term locations (hotels, airports) which are impossible to recognize or foresee for the other party: An e-mail that a contracting partner sent using his usual e-mail account may have been dispatched anywhere in the world.

Consider the following example:

Kenji, the sales manager for a Japanese producer of technical equipment that has its offices in Tokyo, is being contacted via e-mail by Pierre, sole owner and manager of a medium-sized company based in Nice (France), who is interested in purchasing a technical product. The two have never conducted business with each other before. Kenji is presently on a business trip and therefore opens Pierre’s e-mail (which was sent from Pierre’s e-mail account with a “.eu” top level domain (TLD) stored on a server in Switzerland) at his hotel in Los Angeles (U.S.A.), but only responds with a message quoting the price and conditions that he sends from Mexico City during a lunch break. Pierre’s e-mail message in which he orders the desired products reaches Kenji while he is changing planes at Charles de Gaulle Airport in Paris (France). Kenji finally dispatches the corresponding acceptance from Dubai (United Arab Emirates), which is later supplemented by a further message sent by his office staff in Tokyo to Pierre.

This contract formation scenario, while not particularly complex from a structural perspective, draws its complexity from the sole fact that one of the party representatives involved is changing his location during the negotiation and conclusion process, thereby creating connections to various locations in various countries. And each of these countries has its own legal rules on contract law in general and on e-commerce in particular as well as factual circumstances that may differ from those in other countries. Which among these factors in fact and in law should be relevant for the contract that has (or may not have) been concluded?

1.2. – The reason why the cross-border mobility of contracting parties can potentially cause legal problems lies primarily in the importance that the place of communication has traditionally had in international contract law. During the preparation of the UN Electronic Communications Convention, the responsible Working Group within the United Nations Commission on International Trade Law (UNCITRAL) accordingly noted that “[c]onsiderable legal uncertainty is caused at present by the difficulty of determining where a party to an online transaction is located. While that danger has always existed, the global reach of electronic commerce has made it more difficult than ever to determine location. This uncertainty could have significant legal consequences, since the location of the parties is impor-

tant for issues such as jurisdiction, applicable law and enforcement”<sup>(8)</sup>.

In stressing the legal importance of the location of communicating parties, the UNCITRAL Working Group made reference to the role of a party’s location as what in private international law parlance is typically called a “connecting factor”: Some conflict of laws rules look to the place where a declaration with legal significance (an offer, and acceptance, a legal notice of some sort) is “made” (dispatched or received) in order to determine the substantive law applicable to such a declaration, and do so by rendering the domestic law in force at that place (the so-called *lex loci actus*) applicable. A comparable approach is taken by private international law rules which refer to the place where a contract is “made” in order to determine the substantive law governing the contract (the *lex loci contractus*). In former times, the place of contracting was even regarded as the most significant connecting factor for international contracts<sup>(9)</sup>, and in many countries it is still viewed as significant today.

When a contract is being negotiated and eventually concluded through the use of mobile communications, the connection to the place(s) of declaration and the place of contracting may seem particularly random. The example of Pierre and Kenji given above is case in point, as Kenji’s temporary presence in Los Angeles, Mexico City, Paris and Dubai respectively lacks any strong connection to the contract concluded and eventually performed between the seller from Tokyo and the buyer from Nice. Hand in hand with the fleeting nature of these temporary locations goes an uncertainty on the side of the other party (Pierre), who may or may not be aware of changes in Kenji’s location that are occurring<sup>(10)</sup>.

1.3. – In view of the “considerable legal uncertainty” about the location of parties to commercial online transactions and the (at least assumed) importance of that location in various legal contexts<sup>(11)</sup>, there was wide agreement within UNCITRAL as to the need for provisions that would remove this uncertainty. The result was inter alia Article 10(3) UN Electronic Communications Convention, which reads:

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<sup>(8)</sup> UNCITRAL SECRETARIAT, *Explanatory note on the United Nations Convention on the Use of Electronic Communications in International Contracts*, New York, 2007, para. 109.

<sup>(9)</sup> P. HAY, O. LANDO & R. ROTUNDA, *Conflict of Laws as a Technique for Legal Integration*, in M. CAPPELLETTI, M. SECCOMBE & J. WEILER (eds.), *Integration Through Law: Europe and the American Federal Experience. Vol. 1: Methods, Tools and Institutions. Book 2: Political Organs, Integration Techniques and Judicial Process*, Berlin & New York, 1985, p. 240.

<sup>(10)</sup> But see also D.J.B. SVANTESSON, *Time for the Law to Take Internet Geolocation Technologies Seriously*, in 8 *J. Priv. Int’l Law*, 2012, p. 473.

<sup>(11)</sup> UNCITRAL SECRETARIAT, *Explanatory note*, cit., para. 109.

“An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6”.

Article 10(3) UN Electronic Communications Convention tackles its assigned task by “anchoring” the dispatch as well as the receipt of electronic communications at the place of business of the originator respectively the addressee, thereby removing any legal relevance of the actual locations of dispatch or receipt. The provision in other words “relocates” the place of communication for legal purposes. In a cross-border scenario involving a travelling merchant, Article 10(3) UN Electronic Communications Convention in consequence relocates communications internationally, thereby (at least potentially) shifting connecting factors across borders and influencing the determination of the applicable law. This effect could gain particular relevance in the context of mobile communication, as the place of communication will quite often be located in a country other than that of the respective party’s place of business.

a) *Primary Rationale behind the Provision*

Although Article 10(3) UN Electronic Communications Convention may accordingly appear as a provision tailor-made for mobile communication, the principal reason for its adoption was a different one. (This is hardly surprising, as the transfer of written communications from and to mobile devices only became a common phenomenon after the UN Electronic Communications Convention had been adopted in 2005). The *raison d’être* for its Article 10(3) was therefore another characteristic of electronic commerce that was viewed as inadequately treated under existing law, namely, that very often the information system (the server) of the addressee where the electronic communication is received, or from which the electronic communication is retrieved, is located in a jurisdiction other than that in which the addressee itself is located. Thus, the rationale behind the provision is to ensure that the location of an information system (in our example used above: Pierre’s e-mail account being stored on a server in Switzerland) is not the determinant element, and that there is some reasonable connection between the addressee and what is deemed to be the place of receipt and that this place can be readily ascertained by the originator<sup>(12)</sup>.

Although Article 10(3) UN Electronic Communications Convention was accordingly not specifically geared towards mobile communication, it

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(12) UNCITRAL SECRETARIAT, *Explanatory note*, cit., para. 194.

nevertheless applies to such means of communication. The thought behind it is furthermore the same as the one underlying Article 6(4) of the same convention which declares both the location of equipment and technology supporting an information system and the location where an information system may be accessed to be unsuitable as connecting factors<sup>(13)</sup>. In doing so, the UN Electronic Communications Convention explicitly lays down a rule that had already previously been developed under the UN Sales Convention by way of interpretation, where the location of a server is similarly regarded as irrelevant for establishing the “place of business” of parties to sales contracts that have been concluded online<sup>(14)</sup>.

b) *Character as a Firm Rule*

When considering the effect that Article 10(3) UN Electronic Communications Convention may have in the context of mobile communication, it is furthermore important to note that the provision contains a firm rule and not merely a presumption<sup>(15)</sup>. Unlike other provisions in the UN Electronic Communications Convention that use terms like “is presumed to be” (as e.g. Articles 6(1) or 10(2)), thus creating a mere presumption that may be rebutted by evidence to the contrary, Article 10(3) employs the rather stricter term “is deemed to be”. It is clear from the *travaux préparatoires* that this wording was chosen deliberately in order to avoid attaching any legal significance to the physical location of a server in a particular jurisdiction<sup>(16)</sup>, thereby making Article 10(3) UN Electronic Communications Convention a “hard and fast” rule that applies without regard to the circumstances of the particular case. As will be demonstrated below, it is this character as a firm rule that may create difficulties when Article 10(3) interacts with other rules of international contract law that refer to the place of communication.

1.4. – The present paper will proceed as follows: The next section (2) investigates to which extent current international contract law provides rules that are suitable for the modern travelling merchants described

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<sup>(13)</sup> D. HETTENBACH, *Das Übereinkommen der Vereinten Nationen über die Verwendung elektronischer Mitteilungen bei internationalen Verträgen*, Tübingen, 2008, p. 187.

<sup>(14)</sup> U. MAGNUS, in *J. von Staudinger's Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Berlin, 2013, p. 84; P. SCHLECHTRIEM & U.G. SCHROETER, *Internationales UN-Kaufrecht*, 5<sup>th</sup> ed., Tübingen, 2013, para. 26; I. SCHWENZER & P. HACHEM, in I. SCHWENZER (ed.), *Schlechtriem & Schwenzler Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford, 2010, p. 37.

<sup>(15)</sup> UNCITRAL SECRETARIAT, *Explanatory note*, cit., para. 195; HETTENBACH, *op. cit.*, p. 195.

<sup>(16)</sup> UNCITRAL SECRETARIAT, *Explanatory note*, cit., para. 195.

above, before the following section (3) discusses the some of the remaining legal difficulties caused by mobile communications. The final section (4) briefly summarises and concludes.

2. – The hypothesis that the treatment of cross-border mobile communication can raise difficulties under traditional rules of law<sup>(17)</sup> rests foremost on the assumption that the place of communication has an important role to play in legal contexts; an assumption that was accepted within UNCITRAL. However, when the general statement that “the location of the parties is important for issues such as jurisdiction, applicable law and enforcement”<sup>(18)</sup> is put to the test, it becomes apparent that – at least in the area of international contract law – it is mostly the usual party location (and not the parties’ current location that is prone to change) which is the decisive connection factor (see under 2.1.), and that factual local circumstances at the moment of communication have similarly lost their importance under rules of substantive international contract law (2.2). A related issue that remains problematic is the treatment of so-called “virtual companies” (2.3.).

2.1. – When referring to the location of a party to an international contract, most contemporary instruments of international contract law indeed refer to the party’s usual location, irrespective of its actual location (or that of its legal representatives) at a specific point in time. The legal categories employed for this purpose are mostly the “place of business” of a party (used as a connecting factor *inter alia* in Article 1(1) UN Sales Convention, in Article 1(1) UN Electronic Communications Convention and in numerous other conventions) or its “habitual residence” (as used in Article 4(1), (2) Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 7 June 2008 on the Law Applicable to Contractual Obligations (hereinafter: EU Rome I Regulation) or, although merely subsidiarily, in Article 10(b) UN Sales Convention).

For our present purpose, the decisive feature shared by places of business and habitual residences is their non-transitory nature. Already under ULIS, the German Supreme Court had held that the term “place of business” – which neither ULIS nor the UN Sales Convention explicitly define – refers to a “center of a party’s business activities from which it participates in commercial transactions”<sup>(19)</sup>, and subsequent case law interpret-

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<sup>(17)</sup> Under I2.

<sup>(18)</sup> UNCITRAL SECRETARIAT, *Explanatory note*, cit., para. 109.

<sup>(19)</sup> Bundesgerichtshof (BGH), in *NJW*, 1982, p. 2731.

ing the UN Sales Convention stressed that a place of business presupposes “a certain duration and stability”<sup>(20)</sup>. It is therefore generally agreed that neither having a hotel room or a rented office in a city nor engaging in sales transactions on repeated occasions in a nation suffice<sup>(21)</sup>. A further confirmation can be found in Article 4(h) UN Electronic Communications Convention, which since 2005 has defined the term “place of business” as “any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location”. Although the latter definition was only developed “for the purposes of this Convention”, it was an attempt to codify the characteristics that had already previously been recognized under other international conventions<sup>(22)</sup>.

In the “m-commerce” context presently discussed, the widespread use of the “place of business” concept deprives the location at which individual mobile communications are conducted of much of its relevance, as only the usual location of a party is used as a connecting factor. This tendency is welcome as the usual party location is easier to identify and avoids giving legal relevance to locations with which an electronic communication has a merely fleeting connection<sup>(23)</sup>. It furthermore accords with a modern trend towards disregarding the place of contracting: As Professor Honnold wrote, it was “the elusive and insubstantial nature of the place of contracting [which] led UNCITRAL to delete provisions in Article 1(1) of ULIS that made aspects of the making of the contract relevant in determining whether a sale was international”<sup>(24)</sup>.

2.2. – In addition, the drafters of more recently adopted uniform private law conventions took increasingly care to avoid any legal significance of local circumstances that exist at the moment of a party communication, thereby further reducing any possible impact that the place of a mobile communication may have.

This tendency became most obvious during the development of the UN Sales Convention. Article 20(2) UN Sales Convention accordingly contains this convention’s only explicit reference to local circumstances in form of “official holidays or non-business days”, declaring that such days

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<sup>(20)</sup> SCHWENZER & HACHEM, *op. cit.*, p. 37.

<sup>(21)</sup> A. ROSETT, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, in 43 *Ohio State Law J.*, 1984, p. 279.

<sup>(22)</sup> UNCITRAL SECRETARIAT, *Explanatory note*, *cit.*, para. 105, HETTENBACH, *op. cit.*, pp. 78-79, 92.

<sup>(23)</sup> HETTENBACH, *op. cit.*, p. 196.

<sup>(24)</sup> HONNOLD, *op. cit.*, p. 33.

that occur during a period for acceptance fixed by the offeror in his offer are generally to be included in calculating the period (which essentially means that they are to be treated as any other day). Article 20(2) UN Sales Convention thereby intentionally ignores the fact that parties in certain countries may not be working on some of the days during the period for acceptance, based on the rationale that any other approach would create problems in international transactions because official holidays or non-business days differ from country to country and are accordingly difficult to foresee for foreign parties <sup>(25)</sup>. This rationale does not apply where holidays at the place of business of the offeror himself are concerned, as he knows them better than the acceptor; accordingly, the second sentence of Article 20(2) UN Sales Convention exceptionally takes those holidays into account by extending the fixed period of acceptance <sup>(26)</sup>. In the same spirit, the legal definition of the “receipt” of party declarations contained in Article 24 UN Sales Convention has been interpreted without regard to the recipient’s opportunity to gain awareness of the declaration under “usual circumstances”, in contrary to some domestic laws where this factor plays an important role <sup>(27)</sup>. This interpretation has similarly been based on the need to achieve an internationally uniform meaning of the term, as Article 24 UN Sales Convention would otherwise be applied differently depending on the local customs and other circumstances in the recipient’s country <sup>(28)</sup>.

Article 10 UN Electronic Communications Convention similarly adopts the approach of the UN Sales Convention in the above-mentioned regards <sup>(29)</sup>. The accordingly very limited relevance of local circumstances at the moment of communications under both conventions contributes to their suitability for mobile communications, as the country where a declaration is dispatched or received will not affect applicable substantive rules of law.

2.3. – The prevailing use of the “place of business” concept implicitly presupposes that every party to international business transactions possesses a brick-and-mortar establishment, because the necessary “duration and stability” of a place of business as the “center of a party’s business ac-

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<sup>(25)</sup> U.G. SCHROETER, in I. SCHWENZER (ed.), *Schlechtriem & Schwenger Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford, 2010, pp. 358-359.

<sup>(26)</sup> SCHROETER, *op. cit.*, p. 359.

<sup>(27)</sup> On German Law: K. LARENZ & M. WOLF, *Allgemeiner Teil des Bürgerlichen Rechts*, Munich, 2004, pp. 475-476.

<sup>(28)</sup> MAGNUS, *op. cit.*, pp. 320-321; SCHROETER, *op. cit.*, p. 390.

<sup>(29)</sup> UNCITRAL SECRETARIAT, *Explanatory note*, *cit.*, para. 181.

tivities from which it participates in commercial transactions”<sup>(30)</sup> requires a permanent office of some sort. During the preparation of the UN Electronic Communications Convention, this preconception was challenged when the treatment of “virtual companies” was discussed within UNCITRAL<sup>(31)</sup>: How should the UN Electronic Communications Convention and its older, even more traditionally framed companion conventions deal with legal entities which entirely or predominantly carry out their activities through the use of information systems, without a fixed “establishment” and without any connection to a physical location?

At the outset, it could well be doubted how relevant such purely “virtual companies” are in practice<sup>(32)</sup>. Nevertheless, they are not necessarily an entirely theoretical concept: When thinking of a one-man trading company that is in the business of buying and reselling goods, it seems possible that the process of identifying potential sellers and potential buyers as well as concluding the necessary contracts with them may be conducted entirely online. If it is furthermore part of the company’s business model to never take actual delivery of the goods, but rather re-sell them before delivery is due and have any necessarily transportation, payments and other services performed through third-party service providers, such a company could well function “virtually”, e.g. without a brick-and-mortar establishment or a physical back office.

In order to address virtual companies, the Working Group preparing the UN Electronic Communications Convention opted for a solution that at first appears as undecided yet open-minded, but turns out to be quite conservative. On one hand, it concluded that it was not appropriate to include a provision on the presumption on the place of business of a virtual company in the convention and that the matter at this early stage was better left to the elaboration of emerging jurisprudence. On the other hand, however, it confirmed that the place of business concept of the UN Electronic Communications Convention relied on a physical address rather than a virtual one even where “virtual companies” are at stake<sup>(33)</sup>. The latter decision had particularly important consequences because the lack of a place of business in the traditional brick-and-mortar sense removes the ap-

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<sup>(30)</sup> SCHWENZER & HACHEM, *op. cit.*, p. 37.

<sup>(31)</sup> See in detail HETTENBACH, *op. cit.*, p. 84.

<sup>(32)</sup> HETTENBACH, *op. cit.*, p. 93; but see U. NOACK, *Moderne Kommunikationsformen vor den Toren des Unternehmensrechts*, in *ZHR*, 1995, p. 592 at 615-616; P.P. POLANSKI, *International electronic contracting in the newest UN Convention*, in 2 *Journal of International Commercial Law and Technology*, 2007, p. 118: “one of the key elements of modern international electronic commerce”.

<sup>(33)</sup> POLANSKI, *op. cit.*, p. 114.

plicability of the UN Electronic Communications Convention as such (and that of other similarly structured conventions, too): If a “virtual” company has no place of business, these conventions do not apply to its communications or contracts, as their applicability is limited to transactions conducted between parties having their places of business in different States <sup>(34)</sup>.

In legal writing, this solution has received much criticism <sup>(35)</sup>. And indeed, it seems short sighted to entirely exclude virtual companies, as rare as they may be, from the personal scope of many existing international contract law instruments. When accordingly attempting a more liberal construction of the “place of business” requirement in cases in which no “click-and-mortar companies” <sup>(36)</sup> are concerned, a reliance on a “mobile” place of business – i.e. the respective (changing) locations at which the virtual companies’ individual business activities are conducted – would arguably be incompatible with two of the principles on which Articles 4(h) and 6 UN Electronic Communications Convention are based, namely the focus on the non-transitory nature of a place of business and the possibility to easily ascertain its location. In the case of virtual companies, it therefore appears preferable to treat the company’s place of registration (if any) as its place of business, given that the place of registration is usually non-transitory. This solution is at the same time in accordance with the spirit of Article 6(1) UN Electronic Communications Convention which primarily looks to the location indicated by a party in order to determine its place of business: As an entity’s registration usually involves some kind of publicity (e.g. through the publication of the company register’s content) <sup>(37)</sup>, a company registration resembles an indirect indication of this location by the registered party.

3. – Despite the general prevalence of mobility-friendly rules in current international contract law, mobile communication by merchants still raises certain legal difficulties. Among these, two main categories can be identified: On one hand, the combination of means of communication with a merely fleeting connection to geographical locations and legal rules which continue to use the place of communication as a connecting factor causes problems (see in more detail sections 3.3. and 3.4. below). On the other hand, the attempted solution in Article 10(3) UN Electronic Communications Convention in itself leads to unintended results when it inter-

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<sup>(34)</sup> UNCITRAL SECRETARIAT, *Explanatory note*, cit., para. 118.

<sup>(35)</sup> HETTENBACH, *op. cit.*, pp. 93-94.

<sup>(36)</sup> POLANSKI, *op. cit.*, p. 114.

<sup>(37)</sup> NOACK, *op. cit.*, pp. 603-607.

acts with certain other international contract law instruments, to be discussed in sections 3.1. and 3.2. below. As will be demonstrated, difficulties of the latter type primarily arise when the UN Electronic Communications Convention is applied to electronic communications in connection with contracts to which “another” international convention, treaty or agreement not specifically referred to in Article 20(1) UN Electronic Communications Convention applies (as authorized by Article 20(2) of that convention), as those “other” conventions interact less well with the UN Electronic Communications Convention than the (mostly <sup>(38)</sup> UNCITRAL-made) conventions listed in Article 20(1) UN Electronic Communications Convention.

3.1. – Among the conventions mentioned above, it is those creating uniform private international law (conflict of laws) rules that result in difficulties when applied together with Article 10(3) UN Electronic Communications Convention, while the latter provision’s interaction with conventions containing substantive private law rules causes fewer problems. A uniform private international law convention in point is the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods (hereinafter: Hague PIL Convention of 1955): Adopted decades before the first “modern” electronic means of communication was invented, this rather dated convention continues to be a very important PIL instrument in practice, given that it has been ratified by a number of European States (Denmark, Finland, France, Italy, Norway, Sweden and Switzerland) along with a single African State (Niger) <sup>(39)</sup>.

a) *Article 3(2) Hague PIL Convention of 1955 and the Place of an Order’s Receipt*

Article 3(1) Hague PIL Convention of 1955 provides that a sale shall generally be governed by the domestic law of the country in which the seller has his habitual residence at the time when he receives the order – a common rule that does not create any difficulties in the situations discussed here. However, Article 3(2) of the same Convention continues with a more problematic exception that is widely regarded as being of significant importance <sup>(40)</sup>:

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<sup>(38)</sup> The New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards listed in Article 20(1) UN Electronic Communications Convention had been adopted before UNCITRAL was established in 1966.

<sup>(39)</sup> It should be noted that the Hague PIL Convention of 1955 continues to apply in the EU Member States just mentioned despite the more recent adoption of the EU Rome I Regulation (to be discussed in more detail further below), as Article 25(1) EU Rome I Regulation grants prevalence to the Hague PIL Convention of 1955.

<sup>(40)</sup> M. AMSTUTZ, N.P. VOGT & M. WANG, in H. HONSELL, N.P. VOGT, A.K. SCHNYDER

“Nevertheless, a sale shall be governed by the domestic law of the country in which the buyer has his habitual residence, or in which he has the establishment that has given the order, if the order has been received in such country, whether by the seller or by his representative, agent or commercial traveller”<sup>(41)</sup>.

Article 3(2) Hague PIL Convention of 1955 declares the buyer’s home law to be the *lex causae* whenever the seller (or his representative, agent or commercial traveller) is physically located in the buyer’s country at the moment he receives the order. The relevant point in time for purposes of this provision is not the conclusion of the contract (which may occur later, e.g. when the seller’s declaration of acceptance reaches the buyer), but rather the receipt of the order by the seller<sup>(42)</sup>.

The situation that the drafters had in mind when creating Article 3(2) Hague PIL Convention of 1955 was that of foreign seller entering the buyer’s country in an attempt to conclude contracts, i.e. by advertising its goods through a local representative or by setting up a distribution system. In such cases, the seller on its own initiative approaches the buyer in the latter’s home country, and the buyer in turn does not even have to be aware that the seller has his place of business in another country – indeed, from the perspective of the buyer, a contract so initiated may appear entirely like a local purchase. It was primarily this scenario that called for the protection of the buyer’s expectation that the same (domestic) law will apply as in other domestic sales transactions<sup>(43)</sup>.

#### b) *Application to Mobile Receipts of Electronic Orders*

The rationale behind Article 3(2) Hague PIL Convention of 1955 suggests that the provision’s scope could have been limited to situations in which the seller has more than a merely transitory presence in the buyer’s country by appearing regularly in person, by setting up a permanent distribution system or by showing some other behaviour that resembles that of a local seller. The provision’s wording, however, contains no such restriction, and it therefore equally applies to orders that are received by the seller or his representative during a short-term sojourn in the buyer’s country, as e.g. a change of airplanes at a local airport or a transit in form of an international train ride. Due to the development of mobile communication, it for

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& S.V. BERTI (eds.), *Basler Kommentar: Internationales Privatrecht*, Basel, 2007, p. 883; M. KELLER & J. KREN KOSTKIEWICZ, in A. HEINI, M. KELLER, K. SIEHR, F. VISCHER & P. VOLKEN (eds.), *IPRG Kommentar*, Zurich, 1993, p. 976.

<sup>(41)</sup> Non-official translation of the wording, as the Hague PIL Convention of 1955’s only authentic text version is in French.

<sup>(42)</sup> KELLER & KOSTKIEWICZ, *op. cit.*, p. 977.

<sup>(43)</sup> AMSTUTZ, VOGT & WANG, *op. cit.*, p. 883; KELLER & KOSTKIEWICZ, *op. cit.*, p. 976.

the first time seems realistic that not only the dispatch of messages (which was already possible previously, as e.g. through posting a letter at a foreign train station), but also their receipt can occur during a largely accidental presence in a country. If the receipt of an order happens under such circumstances, it affects the applicable law according to Article 3(2) Hague PIL Convention of 1955, even though the concluded contract is likely to have a much closer connection to the seller's home country.

(With good reason, the successor provision in the more recently adopted Article 8(2)(a) Hague PIL Convention of 1986 was framed substantially more narrowly by requiring that "negotiations were conducted, and the contract concluded by and in the presence of the parties" in the buyer's State, meaning that *both* the negotiations and conclusion of the contract must have taken place in the State where the buyer has his principal place of business<sup>(44)</sup>).

c) *Effect of Article 10(3) UN Electronic Communications Convention*

The legal situation is yet different, however, where Article 10(3) UN Electronic Communications Convention applies. As this provision declares that all electronic communications are deemed to be received at the place where their addressee has its place of business, its interaction with Article 3(2) Hague PIL Convention of 1955 deprives the latter conflict of laws rule of its entire scope whenever an electronic order reaches the seller in the buyer's country: All such orders are deemed to be received at the seller's place of business, thereby indiscriminately triggering the application of the seller's home law in accordance with Article 3(1) Hague PIL Convention of 1955. In this context, it is important to note that this effect is not limited to cases of a merely fleeting presence of the seller in the buyer's country - it applies all the same to situations in which the seller has a permanent local presence that fails to reach the threshold of a "place of business". While Article 3(2) Hague PIL Convention of 1955 may be framed too broadly, the same criticism therefore applies to Article 10(3) UN Electronic Communications Convention which does not distinguish between communications with or without a factual connection to their place of actual receipt. The two provisions' interaction effectively strikes out Article 3(2) Hague PIL Convention of 1955 for purposes of electronic commerce, thereby surprisingly eliminating a long established conflicts of law rule.

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<sup>(44)</sup> A.T. VON MEHREN, *Convention on the law applicable to contracts for the international sale of goods. Text adopted by the Diplomatic Conference of October 1985*, in *Explanatory Report*, Hague Conference on Private International Law, The Hague, 1987, p. 29.

3.2. – The formal validity of contracts and other juridical acts has traditionally been determined in accordance with the rule *locus regit actum*, a principle that has been universally recognized since the Middle Ages<sup>(45)</sup>. The conflict of laws with respect to the form of contracts is therefore another area in which the place of communication continues to play a crucial role, thereby opening a further field for unfortunate interaction with Article 10(3) UN Electronic Communications Convention.

a) Favor Validitatis *Through Alternative Connecting Factors*

In this context, it is important to note that most current international private law rules about the formal validity of contracts share one characteristic, in that they all provide for alternative references to various connecting factors. An example can be found in Article 11(2) EU Rome I Regulation, which reads:

“A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time”.

Article 11(2) EU Rome I Regulation therefore treats a contract as formally valid if it meets the form requirements of at least one among potentially five different laws: In case of e.g. a contract of sale, either (1) the law governing the sales contract according to Articles 3 and 4 EU Rome I Regulation (the *lex causae*) or (2) the law of the country where the buyer or its agent is present at the time of contract conclusion or (3) the law of the country where the seller or its agent is present at that time or (4) the law of the country where the buyer had his habitual residence at that time or finally (5) the law of the country where the seller had his habitual residence at that time equally suffices. If the contract is valid under merely one of these laws, that is enough to prevent defects of form under any other law from affording grounds for nullity<sup>(46)</sup>.

Similar provisions, albeit with less complicated wordings, can also be found in Article 11(2), (3) Hague PIL Convention of 1986 and in Article 13(2) Inter-American Convention of 17 March 1994 on the Law Applicable

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<sup>(45)</sup> A.V. DICEY, J.H.C. MORRIS & L. COLLINS, *The Conflicts of Laws*, 15<sup>th</sup> ed., London, 2012, para. 32-128.

<sup>(46)</sup> M. GIULIANO & P. LAGARDE, *Report on the Convention on the law applicable to contractual obligations*, in *Official Journal of the European Communities*, 31 October 1980, No. C 282, p. 30.

to International Contracts (hereinafter: Mexico Convention), as well as in numerous domestic laws.

The use of alternative references to various laws in the above-cited provisions has always the same purpose, namely to reduce significantly the possibility of successfully challenging sales contracts for formal defects <sup>(47)</sup>. This regulatory approach is based on the related principles *favor negotii* and *favor validitatis* which both aim at avoiding the formal invalidity of contracts as far as possible <sup>(48)</sup>, thereby giving preference to the enforcement of party agreements over the competing interest that form requirements are trying to protect.

b) *Application to Mobile Receipts of Electronic Acceptances in Third Countries*

The private international law rules cited above are in conformity in that they refer to the *lex causae* and the *lex loci actus*, although they vary with respect to the further alternative references they make. Their references to the *lex loci actus* differ in their wording, but not in their content: Article 11(2) EU Rome I Regulation speaks rather clearly of “the law of either of the countries where either of the parties or their agent is present at the time of conclusion”, whereas the wording of Article 11(2) Hague PIL Convention of 1986 – “[a] contract of sale concluded between persons who are in different States is formally valid if it satisfies the requirements [...] of the law of one of those States” – could at first sight raise doubts whether the States in which persons “are” are the States where their respective place of business or habitual residence is located, or the States in which one of the parties is present at the time of the contract’s conclusion. The explanatory report to the Hague PIL Convention of 1986 clarifies that the latter meaning was intended <sup>(49)</sup>, making it a reference to the *lex loci actus*. Article 13(2) Mexico Convention arguably means the same when it refers to the form requirements “of the law of one of the States in which [the contract] is concluded”.

The presence of a party in a certain country which the above PIL provisions refer to does not need to be permanent. A merely transitory presence suffices <sup>(50)</sup>, including that of a party who happens to be travelling through

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<sup>(47)</sup> VON MEHREN, *op. cit.*, p. 39.

<sup>(48)</sup> L. LOACKER, in G.-P. CALLIÈS (ed.), *Rome Regulations: Commentary on the European Rules of the Conflict of Laws*, Alphen aan den Rijn, 2011, pp. 222-223; T. PFEIFFER, M. WELLER & C.F. NORDMEIER, in G. SPINDLER & F. SCHUSTER (eds.), *Recht der elektronischen Medien-Kommentar*, Munich, 2011, Artikel 11 Rom I para. 1.

<sup>(49)</sup> VON MEHREN, *op. cit.*, p. 39.

<sup>(50)</sup> PFEIFFER, WELLER & NORDMEIER, *op. cit.*, para. 4.

a country at the relevant point in time <sup>(51)</sup>. This interpretation seems particularly obvious in case of Article 11(2) EU Rome I Regulation, as this provision mentions the parties' habitual (and therefore permanent) residence as an alternative connecting factor, but the same was already recognized under the predecessor provision in Article 9(2) Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations <sup>(52)</sup> which did not yet contain this alternative reference. It is similarly the prevailing view under Article 11(2) Hague PIL Convention of 1986 <sup>(53)</sup>. In the context of mobile communications, this means that also the law of a place where a travelling businessman sends and receives e-mails while changing airplanes at some foreign airport constitutes a suitable *lex loci actus* that may govern the formal validity of a contract formed through such an e-mail. The fact that such a place may seem random and lacking any connection to the contract does not affect this result <sup>(54)</sup>. Within the framework of PIL rules serving the *favor validitatis* principle, it effectively contributes to achieving the formal validity of contracts, because seemingly random places of communication are particularly likely to invoke laws other than the laws invoked by the alternative connecting factors.

Article 10(3) UN Electronic Communications Convention in turn produces the contrary effect when applied in connection with such PIL rules: By providing that electronic communications are deemed to be dispatched at the originator's and received at the addressee's place of business, Article 10(3) UN Electronic Communications Convention effectively strikes out any PIL reference to places of communication. In doing so, it reduces the effectiveness of *favor validitatis*; a result that presumably was neither foreseen nor desired by the drafters of the UN Electronic Communications Convention. This result is particularly unfortunate because the suitability for electronically concluded contracts had been an important concern when the wording of Article 11(2) EU Rome I Regulation was adopted: "Given the growing frequency of distance contracts, the rules in the [Rome] Convention [of 1980, predecessor to the EU Rome I Regulation] governing formal validity of contracts are now clearly too restrictive. To facilitate the formal validity of contracts or unilateral acts, further alternative connecting factors [namely the parties' habitual residence] are intro-

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<sup>(51)</sup> P. WINKLER VON MOHRENFELS, in J. von Staudinger's *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Berlin, 2011, Artikel 11 Rom I-VO para. 81.

<sup>(52)</sup> GIULIANO & LAGARDE, *op. cit.*, pp. 30-31.

<sup>(53)</sup> VON MEHREN, *op. cit.*, p. 39.

<sup>(54)</sup> PFEIFFER, WELLER & NORDMEIER, *op. cit.*, para 4.

duced”<sup>(55)</sup>. That Article 10(3) UN Electronic Communications Convention partially undermines that goal could therefore well work as a deterrent when the Convention’s ratification by the European Union and/or its member states is being considered.

3.3. – A third group of legal difficulties potentially triggered by the use of mobile communications is unconnected to Article 10(3) UN Electronic Communications Convention, but rather arises due to legal rules which continue to give relevance to the place where a declaration is made.

a) *Place of Communication in the Conflict of Laws*

This is first and foremost true under a number of domestic conflict of laws regimes: Despite the tendency in recent years to regard the place of contracting as less and less decisive<sup>(56)</sup>, the *lex loci actus* and the *lex loci contractus* have retained their general importance in some countries. One prominent example is the private international law of Brazil, where contractual obligations continue to be governed by the law of the place of contracting according to Article 9 of the Introductory Law to the Brazilian Civil Code. Another example are conflict of laws rules in the United States, although today only a minority among the States within the U.S. still follow the *lex loci contractus* rule<sup>(57)</sup>.

Even under conflict of laws regimes that still look to the place of contracting, the particularities of mobile communication may be accommodated by way of a reasonable interpretation of the *lex loci contractus* rule. In this spirit, the U.S.-American Restatement (Second) on the Conflict of Laws already in 1971 recognized that the place of contracting may only have a limited importance in certain circumstances: “By way of contrast, the place of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and the contract, such as when a letter of acceptance is mailed in a railroad station in the course of an interstate trip”<sup>(58)</sup>. This example used for illustration in 1971 is arguably comparable to today’s sending of an acceptance via e-mail while the sender is changing airplanes in some airport, thereby indicating that the place of such an electronic communication would similarly be regarded as having

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<sup>(55)</sup> EUROPEAN COMMISSION, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (presented by the Commission)*, COM(2005) 650 final, Brussels, p. 8.

<sup>(56)</sup> HAY, LANDO & ROTUNDA, *op. cit.*, p. 240.

<sup>(57)</sup> P. HAY, P.J. BORCHERS & S.C. SYMEONIDES, *Conflict of Laws*, 5<sup>th</sup> ed., St. Paul 2010, pp. 1171-1172.

<sup>(58)</sup> Restatement (Second) Conflict of Laws, American Law Institute, 1971, § 188 comment (e).

an insignificant relationship to the transaction and the parties under the principles of U.S. conflict of laws.

b) *Factual Circumstances at the Moment of Communication in Contract Law*

In addition, domestic contract laws are often less attuned to cross-border mobile communications than the uniform substantive law conventions addressed above: <sup>(59)</sup> As domestic laws have typically developed as rules for transactions conducted within the nation, they more frequently operate with terms like “the usual circumstances” or “typically” <sup>(60)</sup> which implicitly assume that these “usual” circumstances are those found in the respective nation, familiar to its domestic courts. Such substantive law standards operate less well when being applied to mobile communications sent or received in a different country under different factual circumstances. Again, a reasonable application of such domestic laws to “foreign” communications may help to avoid unsuitable results.

3.4. – a) *The Dilemma*

Finally, a well-known general characteristic of the internet – its anonymity – can create particular problems in the context of mobile communications, as it may cause uncertainty about a communicating party’s location <sup>(61)</sup>. The reason is that an e-mail indicates the e-mail account from which it was sent, but neither the location of the server on which it is stored (which is in any way declared irrelevant for legal purposes by Article 6(4)(a) UN Electronic Communications Convention) nor the current location of the sending party or its place of business. Whenever one of these locations is used as a connecting factor in legal rules, the recipient of an electronic message may accordingly be unaware of the result of their application in the particular case <sup>(62)</sup>.

b) *UN Electronic Communications Convention: An Attempted (but Failed) Explicit Solution*

This uncertainty was recognized during the preparation of the UN Electronic Communications Convention. In reaction, the Working Group within UNCITRAL considered at length proposals that contemplated a duty for the parties to disclose their places of business, among other infor-

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<sup>(59)</sup> See II 2.

<sup>(60)</sup> H.P. MANSEL, in O. JAUERNIG (ed.), *Bürgerliches Gesetzbuch*, 15<sup>th</sup> ed., Munich, 2014, § 130 BGB para. 4.

<sup>(61)</sup> EISELEN, *op. cit.*, p. 131.

<sup>(62)</sup> K.W. CHONG & J.S. CHAO, *United Nations Convention on the Use of Electronic Communications in International Contracts – A New Global Standard*, in 18 *Singapore Academy Law J.*, 2006, p. 133.

mation. However, the consensus that eventually emerged was that any duty of that kind would be ill-fitted to a commercial law instrument and potentially harmful to certain existing business practices. It was felt that such disclosure obligations were typically found in legislation primarily concerned with consumer protection. In any event, to be effective, the operation of regulatory provisions of that type needed to be supported by a number of administrative and other measures that could not be provided in the convention. It was regarded as particularly troublesome that the consequences that might flow from failure by a party to comply with such disclosure obligations remained unclear<sup>(63)</sup>.

Against this background, the elaborations within UNCITRAL merely lead to the adoption of Article 7 UN Electronic Communications Convention which reminds the parties of the need to comply with possible obligations to disclose their place of business that might exist under any other rule of law, but does not impose such a disclosure duty in itself. In addition, the drafters also viewed Article 10(3) UN Electronic Communications Convention as a contribution to solving the uncertainty dilemma, given that one of its purposes is to ensure that the place of receipt of a communication “can be readily ascertained by the originator” of the message<sup>(64)</sup>. This view is reflective of the primary rationale behind this provision mentioned above, namely to prevent the location of an information system from becoming a decisive element in legal contexts. The discernibility of the decisive place of business, however, is neither addressed in Article 10(3) nor in Article 6 UN Electronic Communications Convention (to which the earlier provision refers), thereby leaving this aspect of the uncertainty issue unresolved.

c) *Other Instruments of International Contract Law: Discernibility of Other Party's Location Not Required*

Upon closer scrutiny, it becomes apparent that many other instruments of international contract law similarly fail to secure the discernibility of a party's location, despite the fact that they rely on this place for their applicability and application. This is true both with respect to international contract law rules that refer to a party's usual location, notably its place of business (see under aa)) and rules of law that refer to a party's current location at the moment of communication (see under bb)):

aa) *Uncertainty about the Other Party's Place of Business*

An example for the first type of international law instrument is (again) the UN Sales Convention, which in Article 1(1)(a) makes its applicability

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<sup>(63)</sup> UNCITRAL SECRETARIAT, *Explanatory note*, cit., para. 122-125.

<sup>(64)</sup> UNCITRAL SECRETARIAT, *Explanatory note*, cit., para. 194.

dependent on both contracting parties having their place of business in different Contracting States. Article 1(2) UN Sales Convention goes on to require that the fact that the parties have their places of business in different States must not be indiscernible for the parties <sup>(65)</sup>, thereby preventing the Convention's application to contracts whose international character was not known or contemplated by both parties at the moment of contract conclusion (and that therefore looked like a purely domestic transaction to at least one of them). However, Article 1(2) UN Sales Convention does not require an indication of the particular State the other party is residing in <sup>(66)</sup>, letting it suffice that its place of business in some other country is sufficiently apparent. (Interestingly, Article 10(a) UN Sales Convention specifies that "if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, *having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract*" <sup>(67)</sup>): For the less-than-common situation of a party with multiple places of business, the UN Sales Convention therefore makes reference to the parties' awareness about the location of the decisive place of business, but it fails to do the same in the much more frequent cases of parties with a single place of business, which lie outside of Article 10(a) UN Sales Convention's scope).

In the context of contracts concluded via electronic means (e.g. an exchange of e-mails between parties that have not had business relations before), the UN Sales Convention as well as the numerous other conventions with a similar sphere of applicability <sup>(68)</sup> therefore leave ample room for uncertainty: While the use of an e-mail address with a foreign TLD may alert the other party to the international character of the proposed transaction and therefore supposedly suffices for purpose of Article 1(2) UN Sales Convention <sup>(69)</sup>, a national TLD (".it", ".za", ".fr", ".co.uk") that is part of an e-mail address alone provides no reliable indication that the respective user's place of business is located in that country, as Article 6(5) UN Electronic Communications Convention makes explicitly clear.

From a practical perspective, this can lead to surprises because reserva-

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<sup>(65)</sup> This somewhat awkward negative wording is justified by the burden of proof: Under Article 1(2) UN Sales Convention, it is the party relying on the fact that the internationality of the contract was not apparent who has to prove this fact (SCHWENZER & HACHEM, *op. cit.*, p. 44).

<sup>(66)</sup> SCHWENZER & HACHEM, *op. cit.*, p. 46.

<sup>(67)</sup> Emphasis added. Note that a similar provision can be found in Article 6(2) UN Electronic Communications Convention.

<sup>(68)</sup> See 1.1 a) above.

<sup>(69)</sup> MAGNUS, *op. cit.*, p. 87; SCHWENZER & HACHEM, *op. cit.*, p. 45.

tions made by certain UN Sales Convention Contracting States in accordance with Articles 92-96 UN Sales Convention may influence the content of uniform law as applied to the particular contract: It is therefore e.g. possible that a buyer only finds out after the contract's conclusion that he has placed his electronic order with a seller that has his place of business in a State which has made a reservation under Article 96 UN Sales Convention, and that the contract is therefore subject to domestic form requirements <sup>(70)</sup>.

bb) *Uncertainty about the Other Party's Current Location*

Finally, the predictable uncertainty about a party's current location remains similarly unaddressed by legal rules referring to this location: Neither Article 3(1) Hague PIL Convention of 1955 with its reliance on the place where the seller has received the buyer's order nor Article 11(2) EU Rome I Regulation, Article 11(2) Hague PIL Convention of 1986 and Article 13(2) Mexico Convention with their references to the place of action require that the other party must have known or been in a position to be aware of that location <sup>(71)</sup>. The result of this silence is that the above-mentioned references to the *lex loci actus* operate even if a party makes a statement via e-mail while in a different country than expected by the other party in light of the prior negotiations <sup>(72)</sup> – a situation particularly likely to occur when mobile means of communications are used, which may lead to surprising legal results at odds with the aim of legal certainty.

4. – The development of “mobile” means of communication raises a number of new questions under the existing rules of international contract law. Most of the difficulties in this context arise due to the cross-border mobility of today's merchants who can dispatch and receive communications relating to their international contracts at virtually any place throughout the world, thereby potentially triggering the applicability of local laws in accordance with traditionally conflict of laws principles like *locus regit actum*.

The present article has tried to take stock of the legal difficulties raised by increasing use of mobile communications and found that many potential difficulties are avoided through the prevalence of mobility-friendly rules in current international contract law <sup>(73)</sup>. Among those that re-

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<sup>(70)</sup> SCHLECHTRIEM & SCHROETER, *op. cit.*, para. 26.

<sup>(71)</sup> On Article 11(2) EU Rome I Regulation see PFEIFFER, WELLER & NORDMEIER, *op. cit.*, para. 6.

<sup>(72)</sup> LOACKER, *op. cit.*, p. 240.

<sup>(73)</sup> See above 2.

main <sup>(74)</sup>, a number of intricate problems are surprisingly triggered by a provision that was designed to be a solution to such difficulties, namely Article 10(3) UN Electronic Communications Convention. Its interaction with rules of private international law in some international uniform law instruments raises doubts as to its suitability for this purpose.

A final criticism that has been directed at Article 10(3) UN Electronic Communications Convention is its alleged lack of technological neutrality, as the provision creates special rules for electronic communications which do not exist for conventional means of communication <sup>(75)</sup>. It is submitted that this critique is unjustified, as the principle of technological neutrality, while being recognized as one of the principles underlying the convention <sup>(76)</sup>, should not be construed to exclude any distinction between different forms of communication, but only those distinctions which do not reflect factual differences. In this respect, mobile communication as an increasingly important subset of electronic communication possesses factual features that warrant special legal rules, although Article 10(3) UN Electronic Communications Convention may not be the final word in this matter.

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<sup>(74)</sup> See 3.

<sup>(75)</sup> CHONG & CHAO, *op. cit.*, p. 133; HETTENBACH, *op. cit.*, pp. 196-197.

<sup>(76)</sup> EISELEN, *op. cit.*, pp. 124-127.