

## 2 INTERNET AND PRIVATE INTERNATIONAL LAW

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### 2.1 Introduction

Whenever a private-law relationship having connections with more than one country (and thereby to more than one legal system) gives rise to a legal controversy, the adjudicating court must deal with two questions of private international law. First, it has to be decided whether the court is competent (has jurisdiction) to adjudicate the dispute. The second question, that has to be asked if the answer to the first one is positive, concerns the conflict of laws, *i.e.* which substantive legal system should be applied to the substance of the dispute. These questions have to be answered by jurisdictional and conflicts rules of the country of the forum. The rules use various connecting factors reflecting the connection between the dispute and a particular country, for example the habitual residence of the parties, the place of performance of a contractual obligation or the place of the harmful act.

The purpose of this Chapter is to present the consequences of the application of some of the existing rules on jurisdiction and conflict of laws pertaining to civil disputes arising out of acts and events taking place on the Internet.<sup>15</sup> While many of the widely used traditional jurisdictional and conflict rules are based on connecting factors that are not affected by the nature of the Internet, for example the habitual residence of the parties, there are also numerous rules of private international law that use connecting factors which are less suitable for the Internet environment, such as the place of contracting, the place of advertising, the place of the wrongful act, or the place of performance. Some of the difficulties involved in the use of such connecting factors in the Internet context are of technical nature: there is at present no reliable software making it possible to divide Cyberspace along national boundaries. Anything happening on the Web is generally perceived as happening both everywhere and nowhere. Of course, anything

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<sup>15</sup> The term Internet is here used as synonymous to World-Wide Web.

that happens on the Internet does happen somewhere in the physical reality, but this place may be difficult to define and find and it may, furthermore, appear to be fortuitous and inconsequential.

Another general problem related to the treatment, in private international law, of events taking place on the Internet is that there are diverging opinions about what actually happens when communication takes place on the Web. For example, while some consider advertising on a web-site as equal to sending of messages to all countries from where the site can be accessed, others think that information on a web-site is not sent at all but is, rather, “fetched” by the person surfing on the Internet and virtually “visiting” the country of the web-site. It is, however, questionable whether such technical hair-splitting should have consequences with regard to jurisdiction and applicable law.

It must also be kept in mind that existing statutory rules on jurisdiction and applicable law, however unsuited for Internet purposes they may appear to be, are valid law and have to be followed. It is not possible to disregard them simply because they do not seem appropriate or practical, unless they make, or can be interpreted to make, an exception for Internet-related situations.

In principle, private international law is not really international law but constitutes rather a part of national law, varying from country to country. In this short Chapter it is, of course, impossible to cover jurisdictional and conflict rules of all countries, but the Member States of the European Union have fortunately unified to a large extent their rules in this field. The focus of the presentation will thus be on the relevant European instruments.

## **2.2 Jurisdiction in contractual and tort disputes arising on the Internet**

It is today quite common that contracts are not merely entered into but even performed via Internet, in particular when trading with “digital products” such as computer games or music. Torts can be committed on the Internet as well, for instance a trademark infringement, defamation or fraud. The main instrument of European Community law regarding jurisdiction of the courts in the Member States in contractual and tort disputes is the