Towards a supranational Internet law[1]

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Abstract

Internet commerce continues to flourish despite lack of predictable international legal framework. This article proposes the concept of autonomous Internet law based on the notion of Internet lex mercatoria. Although the idea of autonomous cyberspace law is not new, so far no theory of sources was proposed. The present contribution offers such theory and briefly discusses them. Finally, the article discusses potential pros and cons of the proposed framework.

KEYWORDS

Cyberspace law, custom, general principles of Internet law, peer-to-peer networks, linking

THE NEED FOR A SUPRANATIONAL SOLUTION

As soon as the commercialisation of the Internet started, it became apparent that there is a need for uniform international law as the reliance on the traditional systems of conflict of norms or private international law brings an intolerable amount of uncertainty. The first problem is that the rules that decide which law applies usually depend upon the location of the party (Burnstein, 1996, p.81; Johnson and Post, May 1996), which may not always be possible to indicate. For instance, very often the law of the seller's place of business will be designated as a proper system for ascertaining parties' rights and obligations arising out of a contract. In case a virtual business did not indicate his geographical address, such rules might be impossible to apply.

The second problem is that each domestic legal system has its own legal rules on international disputes, which decide whether a legal system of a plaintiff or a defender will apply. Therefore, a judge in one country may be forced to apply a law of another country, of which he or she has no actual knowledge. Furthermore, such legal system may have no proper rules for the Internet. In such case scenario, it would be difficult for any attorney to convince his client that he can be certain of the outcome of a dispute where another legal system than that where the court sits, was found applicable.

Finally, since each country has its own conflict rules, a different legal system might be designated only as a result of the selection of a court. Therefore, one dispute being submitted to two courts established in two different countries, might lead to opposite verdicts. And even if one party would have won in his country, it might not be able to enforce a favourable judgment in another country. If one adds to this that each legal system considers some of its laws as having mandatory character, which means that they have to be applied by a judge even if another law was selected as applicable by virtue of conflict rules, this clearly shows that the existing system is inadequate for the Internet Age.

As a result, some authors suggested that the Internet needs a supranational or an autonomous legal system (Johnson and Post, May 1996; Hardy, Summer 1994). The proposed concepts were inspiring but rather vague. For instance, some authors already in the 1990-ies have already noted the similarity of electronic commerce practices and the medieval Law Merchant (Perritt, 1997; Johnson and Post, May 1996; Post, October 1996; Hardy, Summer 1994) See also (Branscomb, May 1995) (Burnstein, 1996; Burnstein, 1998-2000; Reidenberg, February 1998). Recently, see (Michaels, 2005; Hardy, Summer 1994; Trakman, Summer 2003). Trotter Hardy, who was probably the first to notice the similarity, argued that the parallels of medieval trade with online commerce are strong because:

Many people interact frequently over networks, but not always with the same people each time so that advance contractual relations are not always practical. Commercial transactions will more and more take place in cyberspace, and more and more those transactions will cross national boundaries and implicate different bodies of law. Speedy resolution of disputes will be as desirable as it was in the Middle Ages! The means of an informal court system are in place in the form of on-line discussion groups and electronic mail. A "Law Cyberspace" co-existing with existing laws would be an eminently practical and efficient way of handling commerce in the networked world. (Hardy, Summer 1994)

[1] This article was published in Complex 4/2006 LSPI Conference proceedings. The article is based on the last chapter of the book that is expected to be released in 2006.

The comparison of medieval commercial customs and modern Internet customs is justified to the extent that it recognises the peculiarities of the electronic medium. Trotter Hardy published his excellent article in 1994, and this is the primary reason why he refers only to online discussion groups and electronic mail. These days, he would have included the World Wide Web as the primary technology for establishing an informal court system. Furthermore, another interesting feature of his idea of autonomous Internet law is its supplementary character in relation to existing laws. However, his comparison to medieval Law Merchant should go even further. In the reverse order of importance: firstly, because customary mercantile practices were the cornerstone of the Roman *ius gentium* (Goldman, 1983); Secondly, because Internet customary practices usually apply both to professional as well as consumer trade and; Thirdly, because many online customs apply to commercial, as well as to non-commercial activities. Although the purpose of this article, was to focus on e-commerce customs many of them in fact, can be found non-commercial sphere.

It is therefore submitted that the emergence of customary practices on the Internet could be considered as the beginning of the formation of the body of rules independent from national legal systems to be used on the Internet in general, and in international electronic commerce, in particular. The proliferation of online dispute resolution mechanisms provides another argument in support of the similarity of traditional Law Merchant and its online counterpart. Online adjudicators have not yet resorted to Internet customs as a basis for settling e-commerce disputes and that is why it is crucial to promote this idea among them. Similar remarks can be made about domestic courts, although they will be less flexible in applying written and unwritten laws other than their own. Taking lessons from history one might anticipate that a body of e-commerce customs, once developed, will be incorporated into national and international legal systems.

Internet commerce could be regarded as another example of an environment where in the absence of an agreement or written law, rights and obligations could be inferred from the common practices or customs of e-merchants (Polanski, July 2003). And these customs could be regarded as the foundation of another reincarnation of the idea of the Law Merchant - the modern *Internet lex mercatoria*. This is so, because, in principle, there is no difference between the early trade, modern international commerce and electronic commerce (Polanski, July 2003).

As Badinter put it: “In the Middle Ages, the big trade fairs in the Piémont, in Champagne, in Flanders, on the banks of the Rhine or the Thames were attended by merchants from all corners of Europe. Practices, custom, and arbitrators, even then, elaborated a merchants' law from them, which was acknowledged by all. In the same way, our era has seen the *jus communis* assert itself in all the large financial, industrial and business centres. Law firms are its laboratory, negotiations are its testing ground and arbitration is the combat area of *jus communis*. Even better, thanks to the development of computer science and communication techniques, the regional and temporary trade fair of the olden days has become global and permanent. And, travelling on all the information highways, tomorrow the *jus communis internationalis* will enfold all international transactions in the tight mesh of this law of which we are the tireless Penelopes “ (Badinter, December 1995).

Despite the fact that there are no fundamental differences between Internet-based commerce and traditional commerce, some differences nevertheless remain. For instance, traditional international commerce is accessible primarily to larger business players, is built around strategic business relationships and is rather slow. On the other hand, Internet commerce is fast, enables both spot-buying and strategic relationships and is accessible to small and medium sized enterprises. Consequently, Internet Law Merchant will slightly differ in comparison to the offline *lex mercatoria*. For instance, one of the major differences is that one can observe and measure customs of the online traders in an automated fashion, which is not possible in offline commerce. Furthermore, arbitral awards are just starting to play a greater role in electronic commerce thanks to, for example, the ICANN dispute resolution policy or the European consumer-focused FIN-NET. In offline trade, as the compilation of Justice Mustill clearly shows, arbitral awards are the fundamental source of legal rules and knowledge about customary *lex mercatoria*. Also, standard contract forms commonly used in the traditional international commerce have been replaced on the Internet with web-forms, standard electronic contracts and online contracting mechanisms.

However, a body of norms cannot be regarded as a system, unless there exists a theory of sources of norms as well as a way to sort out conflicts between norms and a gap-filling mechanism. The aim of this article is to propose such theory of sources although the space does not permit to provide a

detailed discussion of it. This contribution draws on the earlier research in this area (Polanski, 2005; Polanski, July 2003).

POTENTIAL SOURCES OF SUPRANTIONAL INTERNET LAW

The norms of supranational Internet law have various sources of origin: practices established between people (custom in narrow sense), judicial decisions, normative provisions established by specialised interest groups. The last category, which is the broadest one, includes deliberately created provisions such as model laws and conventions.

It should be emphasised however, that with the exception of conventions, all other sources are subordinate to custom, because unless the norms originating from them become customarily adhered to or used, they will not attain the status of binding rights or obligations. Therefore, the term "source" will be used to denote a distinct source of origin or a source of inspiration for a customary practice. And the term "custom" will be used to denote both an existing body of usages or a formation mechanism that can be triggered by spontaneous acts of Internet users or be the outcome of a deliberate rule-making process.

The primary sources of norms in the proposed concept of supranational Internet law would consist of spontaneously developed customs, consistent arbitral awards and judgements of national courts, general principles of Internet law and norms developed by specialised organisations that include technical standards, models laws, model agreements and commonly used contract terms as well as some conventions. This is not a closed list as there might be other sources that might inspire the creation of customary norms.

However, these norms irrespective of their source of origin, have to be widely applied in practice in order to become binding. In other words, they have to be confirmed or "sealed" by custom. Only widespread acceptance of these norms in practice can raise them to the level of global Internet law. The various sources of supranational Internet law are thus subjected to customary acceptance, without which they would not attain supranational binding force.

Custom

Custom offers the richest body of globally followed norms on the Internet. Provided that a given customary practice is widely followed by a dominant majority of Internet users it creates an expectation that such behaviour is permissible or obligatory. This is so, even if it was formed in a relatively short period of time, for instance a year or even less than a year (Polanski, July 2003). Earlier research has provided numerous examples of widely accepted rights and obligations in the area of access to information, online contracting, online property and online security (Polanski, July 2003). Numerous others exist or are in the process of being formed particularly in the area of online auctions, web accessibility, data protection, online payment systems, and e-government and so on.

However, custom understood as a process of creating norms also validates the norms originating from other sources such as arbitral awards, Model laws or contract clauses. Therefore, unless such awards or some provisions of Model laws express norms that are actually widely followed in practice, they cannot be regarded as binding norms based on which an arbitrator or a judge could settle a dispute. The mere fact that a given norm is promulgated by an international organisation or a judicial body is not in itself sufficient to attach to it a binding character. Such norm must be followed by adjudicators in other cases or by the Internet community itself in order to be considered binding. In this sense, these other sources are subordinate to custom.

Furthermore, the idea of supranational Internet law requires the examination of relation of custom to other sources of norms, particularly to international conventions. Custom can supplement existing international or domestic legislation when it is specifically referred to (*consuetudo secundum legem*), fill in gaps where there is no actual provision in the existing body of law (*consuetudo praeter legem*) or be conflict with existing body of law (*consuetudo contra legem*).

Consuetudo secundum legem

Internet customs can supplement international legislation when, for instance, written norms expressly refer to customs or usages to resolve ambiguities or fill in gaps (*consuetudo secundum legem*). In such case scenario, custom plays subordinate role to that of legislation. This is the case with Article 8(3) of the Vienna Convention on Contracts for the International Sale of Goods, which states that in

determining the intent of a party or the understanding a reasonable person due consideration is to be given to all relevant circumstances of the case including usages.

Furthermore, quite often international instruments or domestic statutes do not contain an explicit reference to custom or usages, but other terms are used that in fact mean the same thing. For instance, the aforementioned Vienna Convention stipulates in Article 55 that where a contract does not expressly or implicitly determines the price, the parties are considered: "to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned." Therefore, to establish what price was generally charged at the time of the formation of the contract, an adjudicator would have to establish what the particular price usage was at that time.

As we can see, an adjudicator should refer to custom, whenever a conventional or domestic regulation contains a specific reference to custom or a similar term to that effect. Such customs supplement existing laws with more detailed provisions.

Consuetudo praeter legem

Internet customs can also supplement written law when there is no law on the point even though a treaty or a statute does not contain an explicit reference to a custom. In this sense, custom is independent source of law that fills in gaps (*consuetudo praeter legem*). For instance, neither the new United Nations Convention on the Use of Electronic Communications in Electronic Contracting or the Vienna Sales Convention contains any provisions relating to the security of online contracting. It is clear that customary practices that have emerged in this field could fill in gaps left by these instruments.

Furthermore, customary norms can also supplement provisions that are too vague. For instance, the aforementioned UN Convention on Electronic Contracting contains article 14 dealing with input error, which gives a user a right to withdraw from a portion of the communication if "the automated message system does not provide the person with an opportunity to correct the error." However, the provision is silent on how such opportunity to correct the error should look like. This provision does not contain a reference to customary norms or usages to fill in these gaps. But there are numerous techniques that are customarily employed in this regard and which could be utilised by an adjudicator.

Customs can also help with the interpretation of vague provisions. For instance, the European Directive on Electronic Commerce (OJ L178/1, 12.11.2000) "unconsciously" put in writing a custom of immediate order confirmation by requiring electronic acknowledgement of recipient's order without undue delay. This provision seems to be specific but the terms *undue delay* and *electronic acknowledgment* are certainly unclear. A resort to customary practice that requires an immediate order confirmation would sort out the dispute. On the other hand, the electronic acknowledgement should be provided on a website and via email. In addition, it should contain at least an order reference number together with the summary of the most important terms of the agreement and/or a hyperlink to the terms of the agreement (Polanski, 6-8 June 2005).

In all these cases, customary norms exist "next" to the body of written law that contains gaps or ambiguities, although it appears to be complete as it does not contain any references to usages. But existing customs are more specific and hence can either fill in a gap or help with the interpretation of a vague provision. Sometimes, supplementary and interpretative functions of custom are distinguished, but as the aforementioned examples demonstrate, in practice such distinctions are very difficult to make.

Consuetudo contra legem

It is therefore clear that custom can supplement existing developments on international and domestic level irrespective of whether a specific reference to usage is made or not. However, a custom can also function in direct opposition to existing written instruments (*consuetudo contra legem*). This is certainly the most controversial function of a custom. However, if a legal norm is vague, unreasonable or unenforceable people might actually engage in a widespread practice that at the first glance, seems to be "against the law". But one should not forget that a conventional or statutory obligation that has not been followed in practice and that has been replaced by a contrary one could be regarded as extinguished or fallen into disuse (*desuetude*).

For instance, intellectual property law is an area where such tensions are clearly visible. According to Article 9(1) of the Berne Convention the authors of literary and artistic "shall have the exclusive right of authorizing the reproduction of these works, in any manner or form." WIPO Treaties explain that the reproduction right fully applies in the digital environment and that the storage of a copyrighted work, performance or phonogram in digital form in an electronic medium constitutes a reproduction. As a result, a reproduction of a website in the client's computer memory, or in the server's memory without authorisation of the author or the producer would infringe upon these rights. However, it became customary to reproduce digital works without authorisation as it would be clearly unreasonable to ask for such authorisation each time such technological process takes place. Therefore, a custom *contra legem* emerged that abrogated the prohibition in this regard. Similar examples could be with respect to forwarding emails without authorisation, using thumbnails or textual hyperlinks and so on. In all these cases, it could be argued that a specific customary practice is in conflict with a general provision set out in the convention or a statute.

Similarly, uploading the copyrighted artwork on peer-to-peer networks, such as Kazaa, clearly violates the international conventions such as the 1996 WIPO Internet Treaties and numerous domestic legal systems. The 1996 WIPO Treaty gives the author the exclusive right of authorizing any communication to the public of their works, by wired or wireless means. Giving access to a protected work on someone's hard drive without the consent of the right holder violates the said provision. However, a widespread practice has emerged in this area that is undoubtedly *contra legem.* Nevertheless, so far it turned out to be virtually impossible to enforce the conventional right. It remains to be seen who is going to win this battle.

Consistent arbitral awards and domestic court judgements

Arbitral awards or judgements provide a unique and very important source of norms that could be used to settle disputes on the Internet. They are important also because they might confirm or apply a customary norm that has emerged in practice. However, a norm expressed in an arbitral award or a judgement would not achieve the status of a binding norm, unless it is repeatedly and consistently upheld in similar cases. It must achieve a status of a "judicial custom" to be considered binding.

A recent informal overview of panel positions on key procedural and substantial issues produced by WIPO under the Uniform Domain Name Dispute Resolution Policy and Rules (UDRP) provides an excellent example of judicial norms that could have attained a customary character (Polanski, 6-8 June 2005). On most of the issues, consensus or clear majority views have developed. As an example, the consensus view has emerged with respect to the question whether the content of a website is relevant in determining confusing similarity:

"Consensus view: The content of a website (whether it is similar or different to the business of a trademark owner) is irrelevant in the finding of confusing similarity. This is because trademark holders often suffer from "initial interest confusion," where a potential visitor does not immediately reach their site after typing in a confusingly similar domain name, and is then exposed to offensive or commercial content. The test for confusing similarity should be a comparison between the trademark and the domain name to determine the likelihood of confusion."[2]

On the other hand, the majority view emerged with respect to the question whether a domain name consisting of a trademark and a negative term is confusingly similar to the complainant's trademark ("sucks cases"):

"Majority view: A domain name consisting of a trademark and a negative term is confusingly similar to the complainant's mark. Confusing similarity has been found because the domain name contains a trademark and a dictionary word; or because the disputed domain name is highly similar to the trademark; or because the domain name may not be recognized as negative; or because the domain

[2] Question 1.2. WIPO (2005): WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Arbitration and Mediation Centre. citing the following relevant decisions: "Relevant decisions:
Arthur Guinness Son & Co. (Dublin) Limited v. Dejan Macesic D2000-1698 <guiness.com>, Transfer
Ansell Healthcare Products Inc. v. Australian Therapeutics Supplies Pty, Ltd. D2001-0110 <ansellcondoms.com>, Transfer
Dixons Group Plc v. Mr. Abu Abdullaah D2001-0843 <dixons-online.net>, Transfer
AT&T Corp. v. Amjad Kausar D2003-0327 <attinternet.com>, <attuniversal.com>, Transfer"

name may be viewed by non-fluent English language speakers, who may not recognize the negative connotations of the word that is attached to the trademark."[3]

Since that view has not achieved the overwhelming majority, the position of the opposing minority is also cited:

"Minority view: A domain name consisting of a trademark and a negative term is not confusingly similar because Internet users are not likely to associate the trademark holder with a domain name consisting of the trademark and a negative term."[4]

Only consensus views could be regarded as establishing norms of customary character. The majority views should, in principle, be regarded as representing custom in formation. On the other hand, consistent rulings of various domestic courts should also be taken into account as this may lead to the formation of international Internet custom. This matter requires however, more in-depth analysis.

Conventions

International conventions such as the new 2005 Convention on the Use of Electronic Communications in International Contracts (UNCITRAL, 2005) were always regarded as a separate source of law, independent from international custom. However, the downside of international conventions is that very often they have very few participants and hence do not provide globally binding legal framework (Polanski, 2006).

Although conventions bind because of the will of the parties, they could become binding upon third parties by virtue of the operation of custom. One should repeat again that according to Article 38 of the Vienna Convention on the Law of Treaties nothing "precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such." In this sense, international conventions could be utilised by arbitrators or judges even if a given state is not a signatory of it, provided that the provisions enshrined in it became customarily adhered to.

Convention on the Use of Electronic Communications in International Contracts has only been opened for signature and is not binding yet. But some of its provision arguably codifies common practices of Internet merchants or at least *opinio iuris* of international community. This is the case with the principle of irrelevancy of the location of technological equipment or a place of accessing information systems as far as the determination of a place of business is concerned. There are numerous other interesting provisions in this Convention that could be regarded as universal principles but its examination requires a separate treatment.

General principles of Internet law

General principles of Internet law could be regarded as a special category of customs that have general character, broad scope and enjoy wide recognition. The principle of *pacta sunt servanda* could be cited as an example of a universal custom that also applies in the online world. Similarly the principle of freedom of contracts is such principle, which also applies in the Information Age.

On the other hand, the Model Law on Electronic Commerce proposed two principles of functional equivalency and technology neutrality that could possibly also be regarded as general principles of Internet law. These principles have been confirmed in legislations of numerous states. However, one should be mindful of the fact that the mere adoption of a law may not be sufficient, unless these principles are actually applied in practice. As a result, more research is necessary in this regard.

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[3] Ibid. Question 1.3 citing "Wal-Mart Stores, Inc. v. Richard MacLeod d/b/a For Sale D2000-0662 <walmartsucks.com>, Transfer
A & F Trademark, Inc. and Abercrombie & Fitch Stores, Inc. v. Justin Jorgensen D2001-0900 <abercrombieandfilth.com>, Transfer
Berlitz Investment Corp. v. Stefan Tinculescu D2003-0465 <berlitzsucks.com>, Transfer
Wachovia Corporation v. Alton Flanders D2003-0596 <wachovia-sucks.com> among others, Transfer"

[4] Ibid. citing "Lockheed Martin Corporation v. Dan Parisi D2000-1015 <lockheedmartinsucks.com>, Denied
McLane Company, Inc. v. Fred Craig D2000-1455 <mclanenortheastsucks.com>, Denied
America Online, Inc. v. Johuathan Investments, Inc., and Aollnews.com D2001-0918 <aollnews.com>, <fucknetscape.com> Transfer, Denied in Part."

Model laws

State-oriented model laws such the UNCITRAL Model Law on Electronic commerce or private parties oriented model laws as 2004 UNDIROIT Principles or should be included within the framework of supranational Internet law, as they represent important developments in this area. Although the UNCITRAL Model laws normally are only guidelines for legislator, they can attain a global importance if principles enshrined in them become customarily adhered to.

Model agreements and commonly used contract terms

As in traditional *lex mercatoria* model agreements and contract clauses could attain a legal value, provided that they are widely used in practice. As a result, if parties did not include certain provision in a contract or in electronic standard terms and conditions, such clause could be implied provided that it was commonly used in online trade practice. Likewise, if electronic standard terms contain surprising provisions that are uncommon in electronic commerce such regulations should not be given legal effect by an adjudicator (pursuant to Article 2.1.20 of the 2004 UNIDROIT Principles).

Technical standards

Technical standards created by organisations as IETF, W3C or ISO have a tremendous impact on the Internet. These standards create architectural confines, within which the Internet operates. Obligation to adhere to such standards might become apparent especially in the context of provision technology-neutral Internet solutions. For instance, the newly adopted Regulation of the Council of Ministers of Poland specifies the minimum technical standards that e-governmental bodies should support. The list of required standards range from network protocols developed by IETF, to Web standards created by W3C, to document standards created by various commercial players such as Microsoft, Adobe or OASSISS (Dz.U. nr 212 poz. 1766, 11.10.2005). Again, such standards are important only when they become widely followed in practice.

POTENTIAL BENEFITS

The concept of supranational Internet law has the following advantages:

Firstly, it can serve as a basis for solving Internet disputes in cases where contract parties either failed to choose a national legal system governing the interpretation of their contract or explicitly chose *lex mercatoria* as a law governing it. In such a case scenario, national courts hearing a dispute or more likely arbiters could solve the dispute with a reference to transnational commercial customs and other common trade principles that ought to be known to all merchants.

Secondly, supranational Internet law can coexist and supplement recognised international and domestic legal regimes. For instance, where a particular legal system selected as the law applicable in a given case would not contain relevant norms, a judge or an arbitrator could fill in gaps with a reference to customary norms of Internet *lex mercatoria*. The idea of peaceful coexistence of such systems rather than that of mutual exclusion is of particular importance.

Thirdly, detailed knowledge of actual business practices is essential for drafting sound national, regional and international legislation in this field. Customary Internet law could thus serve as a source of inspiration for future international and domestic regulation of electronic commerce. Furthermore, it could help harmonise existing national regulations of the Internet. In other words, common practices in a rapidly changing technological world are invaluable sources of inspiration for legislators dealing with not only B2B e-commerce but also consumer- and government- centric online trade. The last point is worth continuous emphasising as in principle the differences between consumers and businesses in the online world have been blurred.

Fourthly, norms embodied in common commercial practices could be used in the interpretation of both contractual gaps and national or supranational regulation. For instance, several provisions of the EU directives related to electronic commerce would have to be supplemented with a reference to the customs of the Internet in order to fully reflect the needs of European electronic commerce.

ISSUES TO CONSIDER

Although there are potential sources of norms that could be utilised in providing justice in cyberspace, much work is required to build effective online dispute resolution mechanisms applying them. We have a precursor of such a system in the ICANN arbitration panels, but they are limited to domain

name disputes only. Without new online dispute resolution systems and their wide usage, no precedents will be established that will help to interpret existing body of norms and inspire the creation of new ones.

The solution could be to broaden the prerogatives of existing panels settling domain name disputes to embrace other areas, in particular e-commerce contracts and delicts. For instance, an online seller that sells defective products could be punished by blocking access to his domain name thus preventing him from continuation of his dishonest practices. In consequence, such system could help prevent many anomalies that have appeared on the Net. The enforcement of the decision could be strengthened by cooperation of arbitral panels with, for example, search engines that could inform people looking for a given company that it had been blacklisted.

In addition, such framework would have to be available not only to professionals, but also to consumers. As it was already recognised in the business literature, online consumers are often better equipped with the technological knowledge than many professionals. The demarcation line should no longer be drawn between consumers and professionals but between computer literate and illiterate. In consequence, one should create unified framework for both computer savvy professionals and consumers.

Such unified framework would certainly boost the confidence in international electronic commerce as in fact, existing national consumer protection laws create serious obstacles to global online trade. They give only fictitious protection to consumers who will very rarely if ever try to enforce their rights in other jurisdictions. They also put unduly heavy burdens on online professionals, who must be prepared to comply with numerous consumer protection regimes. For instance, online traders in the European Union must be prepared to accept consumer's withdrawal from a deal within 7 days or more for any reason.

The proposed vision of existing arbitrage panels settling disputes in other than domain name cases and broadened to include consumers might be difficult to accept by national judges, who may oppose the enforcement of such arbitral awards. It is obvious that more time would be necessary for national legal systems to get familiar and accept the just sketched alternative vision of dispute resolution in cyberspace. Soon, maybe other, better ideas appear. But what is necessary is to start creating such systems and testing them in practice. Time will tell whether such solutions inspire domestic legal systems or not.

Another problem that needs to be addressed is related to the hostility of national and international legislators with regards to customary law and *lex mercatoria*. International instruments are necessary that would permit parties to choose cyberspace law or Internet *lex mercatoria* as the system governing a contract. This contribution makes a call to consider such possibility in the new regulation that is planned to replace and update the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

CONCLUSION

As it was stated at the beginning of this article, the proposal of the detailed framework required for Internet law requires a separate analysis. Such a framework would involve a comprehensive analysis of the interrelation between custom and other potential general and particular sources of Internet supranational law, especially national legislation, treaties, contracts and case law (Polanski, 12 May 2005; Polanski, 2005). It would also need to analyse the practice of online arbitration and domestic courts. This contribution outlined only some of these interrelations and focused instead on the analysis of custom as the most important potential source of the supranational Internet law.

Furthermore, much still needs to be done in order for such a system to be accepted by the legal and mercantile community. Of particular importance to the success of the notion of Internet customary law are the identification, exploration and publication of new cyberspace customs. These should be sought out on a global level as well as in local settings. The importance of customary norms in cyberspace is what distinguishes this field of study from traditional areas of legal science (Easterbrook, 1996, p.207).

Similarly to what transcribers of local customs in the Middle Ages did in relation to their local laws, so should the researcher of Internet practices do in relation to the online world. New customs should be identified and evidenced, and knowledge about them should be disseminated to the legal community as well as the Internet community. The system of electronic commerce law certainly needs

more well evidenced examples of customary norms before their impact can become more visible. Similarly, the Internet community must be given more examples of potential impacts of conformance and ignorance of common practices before the knowledge of them becomes obligatory. Finally, judges and arbiters must be educated about the culture of the Internet society in order to better understand its needs and provide better justice.

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