TEMPLE INTERNATIONAL & COMPARATIVE LAW JOURNAL

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Reprinted from
TEMPLE INTERNATIONAL & COMPARATIVE LAW JOURNAL
Volume 19, Number 1

JURISDICTION OVER INTERNATIONAL ELECTRONIC CONTRACTS: A VIEW ON INTER-AMERICAN, MERCOSUR, AND ARGENTINE RULES

Mario J.A. Oyarzábal[*]

I. INTRODUCTION

The Internet is a "network of networks," a:

> global information system that . . . is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons[,] . . . is able to support communications using the Transmission Control Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols[,] . . . and provides, uses or makes accessible, either publicly or privately, high-level services layered on the communications and related infrastructure described herein.[1]

This network of networks links millions of computers and users worldwide. Yet, this is a network without a nucleus, structured organization, unified administration,[2] or precise identification of the route followed by information passed from one computer to another.[3]

The Internet poses some unique difficulties for the doctrine of private international law, because it transcends national borders, but it exists in a legally compartmentalized world. In conventional transactions, participants know who they are dealing with and where the facts are taking place. The Internet allows for transactions to occur between people who do not know each other, and in many cases, are not able to know their counterparts'

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1. Federal Networking Council, *FNC Resolution: Definition of "Internet"*, *at* http://www.itrd.gov/fnc/Internet_res.html (last modified Oct. 30, 1995).

2. The exception is the domain names assignment.

3. Pierre Sirinelli, *L'adéquation entre le village virtuel et la création normative—Remise en cause du rôle de l'Etat?*, *in* INTERNET: WHICH COURT DECIDES? WHICH LAW APPLIES? QUEL TRIBUNAL DÉCIDE? QUEL DROIT S'APPLIQUE? 1, 2 (Katharina Boele-Woelki & Catherine Kessedjian eds., 1998); *see also* KLAUS W. GREWLICH, GOVERNANCE IN "CYBERSPACE": ACCESS AND PUBLIC INTEREST IN GLOBAL COMMUNICATIONS 20-28, 37-40 (1999).

physical location. Internet users have "addresses" within a *virtual* space, but they are not necessarily linked to geographical jurisdictions.[4]

The object of this article is to find out whether the virtual world is compatible with the methods of dispute resolution in international commercial transactions as they exist today, and whether the criteria for allocating competence are adequate to solve the disputes arising from the commercial use of the Internet. The article especially focuses on current Argentine rules on jurisdiction, in order to evaluate their applicability to conflicts between parties of international electronic contracts. Specifically, such contracts include those for the provision of Internet services or the sale of goods online (direct electronic commerce), and those for the delivery of goods as such or the provision of services offline, even though the contract has been concluded by electronic means (indirect electronic commerce). Special reference will be made to the rules developed under Inter-American and Southern Cone Common Market (MERCOSUR)[5] conventions to which Argentina is a party, which may be applicable to determine the jurisdiction of Argentine courts.

To that end, a basic assumption is made: there is not cyberspace without real space as far as private international law is concerned.[6] Acts are always committed somewhere and their effects occur somewhere in real space.[7] There is no act or effect on the high seas, in *terra nullius*, in outer space, or cyberspace, that cannot be connected to some legal system.[8] However, it has become more difficult in some instances to connect some acts and effects.[9] The challenges created by the global information revolution are not new; they are matters of degree, not substance.[10]

The general principles that govern the allocation of international jurisdiction have not changed. Minimum contacts between the parties and the forum, effective access to justice, and equality between the parties

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4. SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 856 (2d ed. 2003).

5. The Southern Cone Common Market is comprised of Argentina, Brazil, Paraguay, and Uruguay. *See* Página oficial del MERCOSUR, *at* http://www.mercosur.org.uy/paginalesp.htm (last visited Mar. 18, 2005).

6. Herbert Kronke, *Applicable Law in Torts and Contracts in Cyberspace*, *in* INTERNET: WHICH COURT DECIDES? WHICH LAW APPLIES? QUEL TRIBUNAL DÉCIDE? QUEL DROIT S'APPLIQUE? 65 (Katharina Boele-Woelki & Catherine Kessedjian eds., 1998); *see also* Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475, 476 (1998).

7. Kronke, *supra* note 6, at 65-66.

8. *Id.*

9. *Id.*

10. Richard Fentiman, *Conflicts of Law in Cyberspace*, 28, paper given at the Symposium held by the International Federation of Computer Law Associations, Brussels, June 27-28, 1996.

constitute the fundamentals of any rules on international jurisdiction and should always guide their interpretation and application.[11]

One must assess whether the current rules in international treaties and Argentine national law that determine the international competence of Argentine courts in contractual matters are adequate to address the phenomenon of globalization, or whether they must be modified in order to achieve justice.

This article will first study the autonomy to choose foreign arbitrators or judicial courts. Next, it will outline the bases of jurisdiction in the absence of choice, addressing jurisdiction based on the defendant's domicile, on the place of performance of the contract, and jurisdiction over consumer contracts. The last section will analyze online arbitration and the future of "virtual justice."[12]

II. ARBITRATION

In disputes between parties to international contracts, state justice is often displaced in favor of arbitration, mediation, and other non-coactive methods of dispute resolution.[13] The characteristics of private legal relationships on the Internet explain why the use of extra-judicial methods of

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11. *See generally* 1 ANTONIO BOGGIANO, DERECHO INTERNACIONAL PRIVADO 231-32, 240-44, 282-85 (3d ed. 1991).

12. For further information on Argentine law in this area see, e.g., 1 LIBRO DE PONENCIAS: XVII CONGRESO ORDINARIO DE LA ASOCIACIÓN ARGENTINA DE DERECHO INTERNACIONAL Y XIII CONGRESO ARGENTINO DE DERECHO INTERNACIONAL "DR. LUIS MARÍA DRAGO" (2003); RICARDO L. LORENZETTI, COMERCIO ELECTRÓNICO 201-02, 205-07, 209-14, 255-57 (2001); Miguel Angel Ciuro Caldani, *Perspectivas trialistas de la jurisdicción internacional en el comercio electrónico,* XVIII JORNADAS NACIONALES DE DERECHO CIVIL 1, 1-16 (2001); Osvaldo J. Marzorati, *Reflexiones sobre jurisdicción y ley aplicable en Internet, in* AVANCES DEL DERECHO INTERNACIONAL PRIVADO EN AMÉRICA LATINA 301, 301-24 (Jan Kleinheisterkamp & Gonzalo A. Lorenzo Idiarte eds., 2002); Mario J.A. Oyarzábal, *International Electronic Contracts: A Note on Argentine Choice of Law Rules,* 35 U. MIAMI INTER-AM. L. REV. 499, 499-526 (2004); Mario J.A. Oyarzábal, *La ley aplicable a los contratos en el ciberespacio transnacional,* 201 El Derecho [E.D.] 709, 709-24 (2003); María Blanca Noodt Taquela, *El comercio electrónico en el Mercosur,* 4 REVISTA URUGUAYA DE DERECHO INTERNACIONAL PRIVADO [R.U.D.I.P.] 85, 85-103 (2001); Inés M. Weinberg de Roca, *La jurisdicción internacional en el comercio electrónico, in* OBLIGACIONES Y CONTRATOS EN LOS ALBORES DEL SIGLO XXI, 967, 967-72 (Oscar J. Ameal & Silvia Y. Tanzi eds., 2001). For an extensive list of Argentine and foreign sources see Mario J.A. Oyarzábal & Paula M. All, *Bibliografía sobre comercio electrónico,* 1 REVISTA DEL COMERCIO INTERNACIONAL, TEMAS Y ACTUALIDADES 557-60 (2004).

13. *See generally* MARÍA ELSA UZAL, SOLUCIÓN DE CONTROVERSIAS EN EL COMERCIO INTERNACIONAL 41-78 (1992).

dispute resolution is favored in this environment.[14] Internet relationships are often transnational, subject to technical aspects, and require rapid solutions.[15]

Argentina is a party to several international conventions on arbitration in civil and commercial matters, the most important of which, in terms of the number of adherent countries, is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[16] Argentina also ratified the Inter-American Convention on International Commercial Arbitration, concluded in Panama on January 30, 1975 within the framework of the Organization of American States.[17] The validity of arbitration terms is usually determined by reference to them.

In the context of MERCOSUR, which is formed by Argentina, Brazil, Paraguay, and Uruguay, the Protocol on International Jurisdiction in Contractual Matters concluded in Buenos Aires on August 5, 1994 (Buenos Aires Protocol) allows parties in international contracts to submit their disputes to arbitration, provided that such agreement has not been obtained in an abusive manner.[18] The MERCOSUR Agreement on International Commercial Arbitration,[19] and the Agreement on International Commercial Arbitration between MERCOSUR, Bolivia, and Chile,[20] both concluded in

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14. *See* PEDRO ALBERTO DE MIGUEL ASENSIO, DERECHO PRIVADO DE INTERNET 448 (2d rev. ed. 2001); Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1246 (1998).

15. DE MIGUEL ASENSIO, *supra* note 14, at 448.

16. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done at New York* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. The convention has been ratified by more than one hundred countries. United Nations, Multilateral Treaties Deposited with the Secretary-General, ch. 22, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXII/chapterXXII.asp (providing text and status of treaties concerning commercial arbitration) (last modified Mar. 7, 2005).

17. Inter-American Convention on International Commercial Arbitration, *done at Panama City* Jan. 30, 1975, 104 Stat. 448, 1438 U.N.T.S. 249, *available at* http://www.oas.org/juridico/english/treaties/b-35.htm (last visited Mar. 8, 2005) (ratified by Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay, and Venezuela).

18. Protocol of Buenos Aires on International Jurisdiction in Disputes Relating to Contracts, *done at Buenos Aires* Aug. 5, 1994, tit. II, ch. I, art. 4, 36 I.L.M. 1263, 1267 (1997).

19. Acuerdo sobre Arbitraje Comercial del MERCOSUR [MERCOSUR Agreement on International Commercial Arbitration], *executed in Buenos Aires* July 23, 1998, MERCOSUR Council Dec. No. 3/98, *available at* http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/1998/9803.htm.

20. Acuerdo sobre Arbitraje Comercial Internacional entre el MERCOSUR, la República de Bolivia y la República de Chile [Agreement on International Commercial Arbitration Between MERCOSUR, Bolivia, and Chile], *executed in Buenos Aires* July 23, 1998, MERCOSUR Council Dec. No. 4/98, *available at* http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/1998/9804.htm.

Buenos Aires on July 23, 1998, will also be applicable to electronic contracts within their scope of application when they go into force.[21]

Under traditional Argentine rules, applicable in cases falling outside international conventions, parties may bring their disputes to arbitration outside Argentina, provided that the matter is of a commercial nature and that it has a real foreign element.[22] "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not."[23] Internet-related contracts include the sale of goods and the provision of services and licenses.[24] Among the non-contractual disputes are those related to property law on the Internet and those arising from the active use of the Internet for commercial purposes.

As to the presence of foreign elements, a case should be deemed international when the parties are domiciled or reside in different countries. The locations of the information systems of the originator and of the addressee of a data message are not connecting factors. The place of business or the habitual residence of the parties is relevant.[25] The Model Law on Electronic Commerce correctly advocates this approach in article 15(4).[26]

The question of the formal validity of the arbitral agreement or clause concluded electronically does not present any special difficulties. The tendency of modern international texts is to assimilate the Electronic Data Interchange to the written document.[27] Thus, the UNCITRAL Model Law on International Commercial Arbitration points out that "[a]n agreement is in writing if it is contained in a document signed by the parties or in an

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21. The two MERCOSUR arbitration agreements have only been ratified by Argentina. *See* Free Trade Area of the Americas, FTAA-Negotiating Group on Dispute Settlement: Questionnaire § 1(d), *at* http://www.ftaa-alca.org/busfac/comarb/argentina/quesarg_e.asp (last visited Mar. 20, 2005).

22. CÓD. PROC. CIV. Y COM. art. 1 (Arg.).

23. New York Convention, *supra* note 16, at art. II; U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT, 1996, art. 1 n.4, Sales No. E.99.V.4 (1998), *available at* http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm [hereinafter UNCITRAL].

24. Vincent Gautrais et al., *Droit du commerce électronique et normes applicables: l'émergence de la lex electronica*, 5 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 547, 568 (1997).

25. *See* Sara Lidia Feldstein de Cárdenas, *Contrato Cibernético Internacional: ¿Una realidad o un enigma?*, *in* OBLIGACIONES Y CONTRATOS EN LOS ALBORES DEL SIGLO XXI, at 665 (Oscar J. Ameal & Silvia Y. Tanzi eds., 2001).

26. UNCITRAL, *supra* note 23, at art. 15, § 4.

27. Gabrielle Kaufmann-Kohler, *Internet: mondialisation de la communication—mondialisation de la résolution des litiges?*, *in* INTERNET: WHICH COURT DECIDES? WHICH LAW APPLIES? QUEL TRIBUNAL DÉCIDE? QUEL DROIT S'APPLIQUE? 89, 128 (Katharina Boele-Woelki & Catherine Kessedjian eds., 1998); *see also* ALFONSO LUIS CALVO CARAVACA & JAVIER CARRASCOSA GONZÁLEZ, CONFLICTOS DE LEYES Y CONFLICTOS DE JURISDICCIÓN EN INTERNET 55-58 (Editorial Colex, 2001).

exchange of letters, telex, telegrams or *other means of telecommunication which provide a record of the agreement . . . .*"[28] Likewise, the Model Law on Electronic Commerce provides that "where the law requires information to be in writing, that requirement is met if the information contained therein is accessible so as to be usable for subsequent reference."[29] The requirement of a signature is fulfilled by a method that identifies the originator of a data message and confirms that the party approved the information contained therein.[30] This is the approach adopted by Argentine Law 25.506 on Digital Signature,[31] passed on November 14, 2001, and its regulatory Decree 2628[32] of December 19, 2002.[33] In brief, the formalities of "writing" and "signature," as required by arbitration conventions and Argentine national law, must be interpreted according to the technological advances of telecommunications, in a way that ensures data messages a legal recognition equivalent to that of paper documents. After all, proof of a real agreement between the parties is the purpose behind the formalities.

In the case of the MERCOSUR arbitration agreements mentioned above, the validity of an arbitration agreement or clause concluded by "e-mail or any equivalent means" is subject to the condition that they are confirmed by an original document.[34] The purpose of this condition is to guarantee the origin and content of the data message in light of the risks involved in the transmission of electronic communications.[35] Once this

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28. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. GAOR, 40th Sess., Supp. No. 17, Annex I, art. 7, § 2, U.N. Doc. A/40/17 (1985) (emphasis added), *available at* http://www.uncitral.org/english/texts/arbitration/ml-arb.htm; *see generally* Alejandro M. Garro, *El arbitraje en la ley modelo propuesta por la comision de las naciones unidas para el derecho mercantil internacional y en la nueva legislacion española de arbitraje privado: un modelo para la reforma del arbitraje comercial en america central,* 41 JUS REVISTA JURÍDICA 11, 12-14 (1990); Horacio A. Grigera Naon, *La ley modelo sobre arbitraje comercial internacional y el derecho argentino,* 1989-A LA LEY 1021, 1021-51 (1989).

29. UNCITRAL, *supra* note 23, at art. 6, § 1.

30. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES WITH GUIDE TO ENACTMENT, 2001, art. 2, §§ (a), (c)-(e), at 1-2, U.N. Sales No. E.02.V.8 (2002), *available at* http://www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf.

31. Law No. 25506, Nov. 14, 2001 (Arg.), *available at* http://infoleg.mecon.gov.ar/txtnorma/70749.htm.

32. Decree No. 2628, Dec. 19, 2002 (Arg.), *available at* http://infoleg.mecon.gov.ar/txtnorma/80733.htm.

33. Also, article 266 of the 1998 Draft of the Argentine Civil Code provides that, "[i]n instruments generated by electronic means, the requirement of signature is satisfied if a method to identify the person is used, and such method reasonably ensures the authorship and inalterability of the instrument." Proyecto de Código Civil de 1998 para la República Argentina, bk. 2, tit. IV, ch. III, § 1, art. 266 (1999), *available at* http://www.jus.gov.ar/minjus/ssjyal/biblio/segundo.pdf.

34. UNCITRAL, *supra* note 23, at art. 6, § 3.

35. *See* Alicia M. Perugini Zanetti, *Arbitraje comercial Internacional en el MERCOSUR, in* AVANCES DEL DERECHO INTERNACIONAL PRIVADO EN AMÉRICA

requirement is fulfilled, the agreement becomes effective retroactively from the moment the recipient received the data message confirming that the other party had accepted his offer.[36]

III. FORUM SELECTION AGREEMENTS

Like any other international contract, those concluded electronically may contain a choice of forum clause. The prorogation of jurisdiction can be agreed upon under the conditions established in article 1 of the Argentine Code of Civil and Commercial Procedure[37] or in the international treaties ratified by Argentina.[38] An agreement on jurisdiction gives the contract legal security by minimizing uncertainty about court competence in an area where legal precedent is scarce.[39]

The question is whether the principle of autonomy is applicable to Internet matters where the chosen court is located at the other end of the world and one of the contracting parties lacks the means to carry out a trial there. Is this extending beyond what German authors call *zumutbarkeit*, or what is reasonable?[40] The answer is not so simple. In general, the mere fact that the selected court is located in an extremely distant place is not enough to distort the validity of the agreement, even if the choice of forum clause incorporated in a standard contract is entered into by adhesion. This is because the method of resolution of eventual disputes constitutes an element to be estimated when calculating the commercial risk and the transaction cost. In any event, it will be necessary to verify if the existence of an unfair disparity in bargaining power could invalidate consent since there is no real liberty for both parties, as required by article 1.[41] Validity of consent should be judged in accordance with modern contracting realities, adopting concrete criteria such as the weaker economic or social position of the parties involved and the excusability of the mistake by the adherent. Establishing specific criteria for electronic commerce could even be considered.

The basic characteristics of electronic commerce should always be taken into account, at least to exclude some traditional solutions, such as the distinction between passive consumers, who have been sought out in their country, and those who have been active in commencing the negotiations

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LATINA 633, 643 (Jan Kleinheisterkamp & Gonzalo A. Lorenzo Idiarte eds., 2002).

36. *Id.*

37. CÓD. PROC. CIV. Y COM. art. 1 (Arg.).

38. Treaty of Montevideo on International Civil Law, Mar. 19, 1940, art. 56, 37 AM. J. INT'L L. 141, 149 (J. Irizarry y Puente & Gwladys L. Williams trans., Supp. 1943) (ratified by all MERCOSUR states except Brazil); *see, e.g.*, Protocol of Buenos Aires on International Jurisdiction in Disputes Relating to Contracts, *done at Buenos Aires* Aug. 5, 1994, tit. II, ch. I, arts. 4-6, 36 I.L.M. 1263, 1267-68 (1997).

39. Ryan Yagura, Comment, *Does Cyberspace Expand the Boundaries of Personal Jurisdiction?*, 38 IDEA 301, 318-19 (1998).

40. Kaufmann-Kohler, *supra* note 27, at 122.

41. CÓD. PROC. CIV. Y COM. art. 1 (Arg.).

and entering an agreement. This distinction is blurred when the contract is concluded through the Internet.[42] Hence, some experts have put forward the concept of "target," which applies where the website specifically targeted consumers in a particular country, *vis à vis* unsophisticated sites that do not make it possible to target certain consumers.[43]

Apart from the issue of consent, it is clear that the Argentine courts have the discretion to hear a case or to decline jurisdiction if the imperatives of effective access to justice or an abusive or exorbitant forum make it necessary under the principle of due process.[44]

With regard to proof of the forum-selection agreement in a data message, it is submitted that the requirement of article 6.1 of the UNCITRAL Model Law on Electronic Commerce, that the information must be accessible for subsequent reference, must evidence the parties' intent to bind themselves, although it is not necessary for both to make express reference to the contract clause.[45]

IV. JURISDICTION BASED ON THE DEFENDANT'S DOMICILE

In the absence of an effective choice of forum, the plaintiff can seek to commence proceedings in Argentina if the "debtor" is domiciled or resides there, even if the contract is to be performed abroad.[46] The term "debtor" should be understood in a strictly procedural manner, as the debtor of the contractual obligation that brought about the legal proceedings, either the service provider or the recipient of a service (*forum defensoris*).

Now, the defendant's "domicile" is decisive.[47] The situation of the server, through which the defendant is connected to the Internet, and the

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42. Herbert Kronke, *Electronic Commerce und Europäisches Verbrauchervertrags-IPR*, 12 RECHT DER INTERNATIONALEN WIRTSCHAFT 985, 988 (1996); *see also* Joakim ST Øren, *International Jurisdiction over Consumer Contracts in e-Europe*, 52 INT'L & COMP. L.Q. 665, 683-86 (2003).

43. *See* Working Group on Cyberspace, ABA, *Transnational Issues in Cyberspace: A Project on the Law Relating to Jurisdiction*, *at* http://www.kentlaw.edu/cyberlaw (July 2000); *see also* Catherine Kessedjian, *Electronic Commerce and International Jurisdiction*, Summary of Discussions of the Hague Conference on Private International Law 6-8 (Aug. 2000), *at* http://www.cptech.org/ecom/hague/ottawa2000sum.pdf.

44. CONST. ARG. art. 18.

45. UNCITRAL, *supra* note 23, at art. 6, § 1; JAN KROPHOLLER, EUROPÄISCHES ZIVILPROZEßRECHT 228 (5th ed. 1996).

46. CÓD. CIV. art. 1216 (Arg.); Treaty of Montevideo on International Civil Law, Feb. 12, 1889, art. 56, 3 BOGGIANO, *supra* note 11, at 227 (providing a copy of the treaty, which was ratified by Argentina, Bolivia, Colombia, Paraguay, Peru, and Uruguay); Treaty of Montevideo on International Civil Law, Mar. 19, 1940, art. 56, 37 AM. J. INT'L L. 141, 149 (J. Irizarry y Puente & Gwladys L. Williams trans., Supp. 1943) (ratified by Argentina, Paraguay, and Uruguay); Protocol of Buenos Aires on International Jurisdiction in Disputes Relating to Contracts, *done at Buenos Aires* Aug. 5, 1994, tit. II, ch. II, art. 7, 36 I.L.M. 1263, 1268 (1997).

47. Article 1216 of the Argentine Civil Code states:

If the defendant were to reside or to be domiciled in Argentina and the contract were

presence of its computers in Argentina do not, by themselves, establish jurisdiction.[48] To avoid liability, the debtor could move his site in order to get protection in a more merciful territory, or "numeric paradise."[49] Thus, only the domicile or habitual residence of the defendant offers a perennial connecting factor and a reasonable basis of jurisdiction.

However, the transnationality of the Internet, the volatility of its contents, and the strategy of the parties can make the investigation of the domicile difficult, and even impossible. For that reason, a relatively broad interpretation of the concept of "domicile" is recommended when that forum is appropriate for the ends of justice. For instance, if the defendant declared to his co-contractor that he is situated in Argentina, he could be bound by this information for purposes of determining jurisdiction.

Now, if it is not possible to determine the defendant's current domicile, but the defendant has a substantial connection to Argentina, the Argentine courts may still exercise jurisdiction under *forum necessitatis*, or subsidiary jurisdiction, if there is clearly no more appropriate forum abroad or if there is positive and cogent evidence that the plaintiff, if forced to litigate abroad, would not obtain justice (*déni de justice*).

V. JURISDICTION BASED ON THE PLACE OF PERFORMANCE OF THE CONTRACT

Article 1215 of the Argentine Civil Code provides that Argentine courts also have jurisdiction in contractual disputes when the obligation that is the source of the claim is to be performed in Argentina, regardless of the domicile or residence of the defendant.[50] The forum of the place of performance is also an important connecting factor.[51]

The obligation whose performance is sought through legal proceedings may be the one which is characteristic of the contract. In the case of the sale of goods contracted over the Internet, the purchaser-plaintiff could claim the

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to be performed outside Argentina, the suit may be brought before the courts of the defendant's domicile, or before the courts of the place where the contract is to be performed, even though the defendant is not be [sic] found there.

Alejandro M. Garro, *The U.N. Sales Convention in the Americas: Recent Developments*, 17 J.L. & COM. 219, 235 n.87 (1998) (translating article 1216 of the Argentine Civil Code).

48. Only performance of the contract or domicile of the defendant in Argentina determines the bases for international jurisdiction of Argentine courts. *See* CÓD. CIV. arts. 1215-1216 (Arg.); *see also* Feldstein de Cárdenas, *supra* note 25, at 665.

49. Pierre-Yves Gautier, *Du droit applicable dans le 'village planétaire' au titre de l'usage immatériel des oeuvres*, 1996 RECUEIL DALLOZ SIREY [D.S. Chron.] 131, 131-32.

50. CÓD. CIV. art. 1215 (Arg.).

51. Treaty of Montevideo on International Civil Law, Feb. 12, 1889, arts. 32-34, 3 BOGGIANO, *supra* note 11, at 225-26 (providing a copy of the treaty); Treaty of Montevideo on International Civil Law, Mar. 19, 1940, arts. 37-38, 56, 37 AM. J. INT'L L. 141, 146-47, 149 (J. Irizarry y Puente & Gwladys L. Williams trans., Supp. 1943); Protocol of Buenos Aires on International Jurisdiction in Disputes Relating to Contracts, *done at Buenos Aires* Aug. 5, 1994, tit. II, ch. II, art. 7, 36 I.L.M. 1263, 1268 (1997).

fulfillment of the characteristic obligation in the courts of the place of business or domicile of the seller, as well as in the place of delivery of the goods sold. The fact that the contract is made through the Internet does not make it different from any other contract of sale. Also, contracts whose performance is linked to the Internet involve activities that can be connected, to a greater or lesser extent, to real space and its legal systems. The obligations on the part of an Internet service provider, who is to carry out the characteristic performance, such as the delivery of information, are most closely connected to the country of that party's domicile or place of business.

However, if it is the seller or provider who seeks payment for goods or services he has already carried out, it seems that he should sue in the place where the payment should have been made. The new payment systems used on the Internet almost completely lack a localizing virtuality. Apart from the systems providing secure presentation of credit card numbers, such as Secure Electronic Transaction,[52] electronic currency and credit-debit models are the two types of digital payment available for Internet transactions. With the virtual currency systems or e-money like DigiCash[53] and NetCash,[54] the clients purchase electronic money certificates from a provider of that kind of money like Mark Twain Bank.[55] The payment is made in dollars through an account previously opened with the bank, or by using credit or debit cards, or electronic checks.[56] The bank then issues the electronic currency that represents the monetary value loaded and stored in an information system. The client will be able to spend it on electronic purchases, and merchants will accept the virtual money. The merchants can either deposit the certificates in their own accounts opened with the provider, or spend them on new electronic purchases.[57] In the systems using the credit-debit model like Netbill,[58] First Virtual,[59] and NetCheque,[60] an

52. *See* Whatis.com, *Secure Electronic Transaction*, *at* http://whatis.techtarget.com/definition/0,289893,sid9_gci214194,00.html (last updated June 7, 2002).

53. *See* David Chaum, *Achieving Electronic Privacy*, SCI. AM., Aug. 1992, at 96.

54. *See* Gennady Medvinsky & B. Clifford Neuman, *NetCash: A Design for Practical Electronic Currency on the Internet*, *in* PROCEEDINGS OF THE 1ST ACM CONFERENCE ON COMPUTER AND COMMUNICATIONS SECURITY 102 (1993).

55. Press Release, DigiCash, Mark Twain Bank Launches Ecash (Oct. 23, 1995), *at* http://www.interesting-people.org/archives/interesting-people/199510/msg00062.html.

56. *See* Medvinsky & Neuman, *supra* note 54, § 4, at 103.

57. *Id.*

58. *See* Marvin Sirbu & J. Douglas Tygar, *Netbill: An Electronic Commerce System Optimized for Network Delivered Information and Services*, *in* PROCEEDINGS OF THE 40TH IEEE COMPUTER SOCIETY INTERNATIONAL CONFERENCE (COMPCON'95), at 20 (1995).

59. *See* Paul J.M. Havinga et al., *Survey of Electronic Payment Methods and Systems*, *in* PROCEEDINGS EUROMEDIA '96, at 180, 184 (Alexander Verbraeck ed., 1996), *available at* http://wwwhome.cs.utwente.nl/~havinga/papers/e-money.pdf.

60. *See* B. Clifford Neuman & Gennady Medvinsky, *Requirements for Network Payment: The NetCheque Perspective*, *in* PROCEEDINGS OF THE 40TH IEEE COMPUTER

electronic intermediary keeps accounts for both merchants and customers and authorizes charges against those accounts, which can be either credit or debit. The accounts are linked to conventional financial institutions.[61] With NetCheque, customers can choose their account provider.[62] The account works like a conventional checking account in that the holder issues electronic documents that include the name and the account identifier of the drawer, the name of the financial institution, the name of the payee, and the amount of the check.[63] Like a paper check, a NetCheque bears the drawer's electronic signature and must be endorsed by the payee with an electronic signature before it will be paid. One must wonder if it makes sense to allocate jurisdiction to the courts at the place of performance of a monetary debt?[64] Unless the place of payment is stated in the contract, when the contract is to be performed entirely over the Internet, only the jurisdictions of the domicile of the service provider and the client remain as options.[65]

VI. JURISDICTION BASED ON THE PLAINTIFF'S DOMICILE

According to the broad interpretation of the "place of performance" adopted by the courts,[66] articles 1215 and 1216 of the Argentine Civil Code[67] enable the plaintiff to file a lawsuit in the country where he was to comply and did comply with a view to claim the performance of an obligation on the part of the defendant.[68] In the context of the Internet, this approach tends to validate a plaintiff's forum.

In fact, the obligation of the contracting party offering the delivery of goods or the provision of services online is often limited to make the data accessible to the average user, either enabling the user to consult information stored on the access server or, at most, to download that information to his own database. Thus, the characteristic performance is physically fulfilled in the domicile of the party who is to fulfill the characteristic performance. In short, if it is the provider or the licensor who is seeking trial, he will be able to sue systematically in his own domicile. It is

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SOCIETY INTERNATIONAL CONFERENCE (COMPCON'95), at 32 (1995), *available at* http://www.isi.edu/people/bcn/papers/pdf/9503_netcheque-neuman-medvinsky-compcon95.pdf.

61. *Id.* § 3.2.

62. *Id.* § 4.

63. *Id.* § 4.1.

64. *See* Kaufmann-Kohler, *supra* note 27, at 132-33.

65. Catherine Kessedjian, *Rapport de synthèse*, *in* INTERNET, WHICH COURT DECIDES? WHICH LAW APPLIES? QUEL TRIBUNAL DÉCIDE? QUEL DROIT S'APPLIQUE?, 143, 151 (Katharina Boele-Woelki & Catherine Kessedjian eds., 1998).

66. "Jocqueviel de Vieu," CNCom. E [1986-D] L.L. 46 (Arg.).

67. CÓD. CIV. arts. 1215-1216 (Arg.).

68. *See* María Susana Najurieta, *El domicilio de la prestación característica en los contratos multinacionales*, [1985-1] DOCTRINA JURÍDICA 292; WERNER GOLDSCHMIDT, DERECHO INTERNACIONAL PRIVADO 412-13 (8th ed. 1992); 1 BOGGIANO, *supra* note 11, at 252-54.

true that with the multiplication of electronic payments made before any performance on the part of the seller or the service provider, actions initiated by the latter are rare.[69] But if they are to be sought, the plaintiff will be able to litigate in his domicile.

However, if it is the recipient of a service who demands the characteristic performance, he will not be entitled to the plaintiff's forum unless the place of payment stated in the contract is his own domicile. For if the parties have not specified where this is to be under their agreement, it seems that payment should be made in the domicile or place of business of the service provider.[70]

The plaintiff's forum creates, then, an unjustified inequality between the parties. The Internet opens a world market to product and service providers and Internet consumers enter into contracts with people who are at the other end of the world or farther away than in the case of shopping over the phone or by mail. Therefore, when there is no forum closer than the defendant's domicile, the absence of a plaintiff's forum could deprive the Internet consumer of his right of access to the courts.[71]

For this reason, it is submitted that an exception be made in favor of the plaintiff's forum, only in instances in which declining jurisdiction could result in an international denial of justice. Of course, the plaintiff will have to prove that the spatial circumstances make it extremely difficult to file a lawsuit abroad to such an extent that the possibility of legal defense of his substantive rights is significantly abrogated. The difficulty in filing a lawsuit abroad deepens when the service provider or licensor fails to reveal his location at the time of entering into the contract.

On the other hand, the sued provider or licensor could claim that the plaintiff's forum is a forum non conveniens and that there is an available forum abroad, his own domicile, which is more appropriate than the Argentine forum for trial of the action.[72] It is true that the issue of proximity of the court to the evidence involved in the case would hardly be applicable in Internet-related disputes, due to the physical dislocation of the acts involved. The proof of the activities carried out on the Internet is normally presented in the form of data messages, which are not bound to a location. However, the defendant could submit to the court's consideration other issues, such as the probability of obtaining international judicial assistance,

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69. *See* Kessedjian, *supra* note 65, at 143.

70. *See* CÓD. CIV. arts. 749, 1209-1210, 1212-1214, 1410, 1424 (Arg.); CÓD. COM. art. 461 (Arg.); United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, art. 57, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3, 69, *available at* http://www.uncitral.org/english/texts/sales/CISG.htm.

71. *See* Kaufmann-Kohler, *supra* note 27, at 139. For jurisdiction over electronic consumer contracts, see LORENZETTI, *supra* note 12, at 255-56; Diego P. Fernández Arroyo & Cecilia Fresnedo de Aguirre, *Modalidades contractuales específicas, in* DERECHO INTERNACIONAL PRIVADO DE LOS ESTADOS DEL MERCOSUR 1027, 1033-34 (Diego P. Fernández Arroyo ed., 2003).

72. *See* 1 BOGGIANO, *supra* note 11, at 298.

the reasonable possibilities of legal defense of his interests, and the legitimacy of the juridical advantage to the plaintiff with respect of obtaining a trial in that country.[73]

Among the MERCOSUR countries, the Buenos Aires Protocol expressly allows the *forum actoris*, provided that the plaintiff proves that he has already fulfilled the obligations that the contract imposes on him.[74] Yet, it should be remembered that consumer contracts are excluded from the scope of application of the Buenos Aires Protocol.[75] The MERCOSUR Protocol on International Jurisdiction Regarding Consumer Relations, concluded in Santa María on December 17, 1996,[76] states the general rule that jurisdiction over consumer contracts is based on the domicile of the consumer.[77] Article 4, section 1 states that other jurisdictions are permissible only if the consumer expressly consents to that jurisdiction at the time of filing the demand. Nevertheless, this Protocol has not yet entered into force.[78]

VII. ONLINE DISPUTE RESOLUTION

Beyond the traditional methods of dispute resolution, both jurisdictional and arbitrational, one can foresee a *virtual justice* where the Internet is not the source or the cause of the disputes, but an instrument that makes their regulation easier.[79]

For the European fairs of the Middle Ages, special courts were created to enforce the customs and usages of trade under the lex mercatoria.[80] By analogy, some writers have advocated the formation of special courts to enforce the customs and usages of the online world, in what might be called *lex electronica*, or a common law of the Internet.[81] Thus, the concept of the

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73. *See* Ciuro Caldani, *supra* note 12, at 6-7 (discussing denial of justice and *forum non conveniens* as the basis for the exercise and for the declination of jurisdiction in electronic commerce).

74. Protocol of Buenos Aires on International Jurisdiction in Disputes Relating to Contracts, *done at Buenos Aires* Aug. 5, 1994, tit. II, ch. II, art. 7(c), 36 I.L.M. 1263, 1268 (1997), *available at* http://www.unionsudamericana.net/ingles/tratados/mercosur/mercosur_int_045.html.

75. *Id.* at art. 2, § 6.

76. Protocol of Santa Maria on International Jurisdiction Regarding Consumer Relations, Dec. 17, 1996, *available at* http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/1996/9610.htm.

77. *Id.* at ch. III, art. 4, § 1.

78. *Id.* The Protocol of Santa María has not yet been ratified by any State Party.

79. Kaufmann-Kohler, *supra* note 27, at 121; *see also* Weinberg de Roca, *supra* note 12, at 971.

80. Matthew Burnstein, *A Global Network in a Compartmentalized Legal Environment*, *in* INTERNET, WHICH COURT DECIDES? WHICH LAW APPLIES? QUEL TRIBUNAL DÉCIDE? QUEL DROIT S'APPLIQUE? 23, 30 (Katharina Boele-Woelki & Catherine Kessedjian eds., 1998).

81. *Id.*

Internet as "a new jurisdiction" developed.[82] The idea is that legal disputes arising from the use of the Internet must be submitted to the jurisdiction of special "Internet Courts."[83]

With this in mind, the Villanova Center for Information Law and Policy in the United States launched the "Virtual Magistrate Project" in March 1996.[84] Later that year, the Centre de Recherche en Droit Public de la Faculté de Droit de l'Université de Montréal launched Cybertribunal for online dispute resolution.[85] Cybertribunal disappeared in December of 1999 when eResolution, an experimental initiative on online dispute resolution for domain names, was formed,[86] but it stopped operating in December of 2001.[87] Other current projects of online dispute resolution include Better Business Bureau Online, CyberSettle, iCourthouse, Internet Ombudsman, Mediation Arbitration Resolution Services, Résolution électronique des disputes commerciales, Resolution Forum, European Advertising Standards Alliance, SettlementOnline, the Claim Room, and Webmediate.com.[88]

These providers facilitate extrajudicial settlement that is similar to traditional arbitration, mediation, negotiation, and other alternative dispute resolution techniques.[89] The only difference is that all documents and materials are executed online.[90] The parties select an arbitrator or panel of arbitrators, the claim is filed, and the evidence is presented via the Internet.[91] The proceedings are conducted and a verdict is rendered by electronic means. There are no court appearances and no courtrooms in the traditional sense.[92] The arbitration decision is final and binding, and the prevailing party can request judicial enforcement of the award if the other party fails to execute it voluntarily.[93]

Online dispute resolution has many advantages. It allows for quick resolution, facilitates access to relevant legal information, and enables

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82. *Id.*

83. *Id.*

84. Concept Paper, National Center for Automated Information Research & Cyberspace Law Institute, The Virtual Magistrate Project (July 24, 1996), *at* http://www.vmag.org/docs/concept.html.

85. Karim Benyekhlef et al., *Some Reflections on Conflicts Management in Cyberspace*, *at* http://www.disputes.net/cyberweek2000/ohiostate/CyberjusENGLISH.htm (last visited Mar. 17, 2005).

86. *Id.*

87. Demys News Service, *E-Resolution Drops out of Arbitration Business*, *at* http://www.demys.net/news/2001/01_Dec_01_ieresolution.htm (Dec. 4, 2001).

88. The UMass Center for Information Technology and Dispute Resolution, *at* http://www.odr.info/index.php (last visited Mar. 18, 2005) (listing companies and online dispute resolution projects that can be consulted on the Internet).

89. Burnstein, *supra* note 80, at 30.

90. *Id.* at 30-31.

91. *Id.*

92. *Id.* at 31.

93. *Id.*

parties to keep a clear and complete record of arguments.[94] It is convenient in that parties can decide when to participate or respond, which decreases the chances of unnecessary confrontation and preserves relationships.[95]

If one concludes that "taking Internet disputes away from regular courts" is the only way to avoid "the inconsistent obligations and results in Internet cases with international dimensions," one must also recognize the attendant problems with Internet courts.[96] A determination must be made as to which cases are "cyber-disputes" that should be committed to an arbitration-like method of dispute resolution. A distinction between an Internet dispute and an ordinary dispute must be drawn since it would be neither logical nor desirable to allow all disputes that in some way touch and concern the Internet to go to Internet courts.[97] To be considered an Internet case subject to the *lex electronica*, the case should have a significant or close relationship with cyberspace activity.

So far, online arbitration has specifically been applied to disputes related to the organization and functioning of the Internet and to those arising between Internet access and service providers and their customers.[98] The disputes between Internet users that are a consequence of online commercial transactions continue to be solved by ordinary courts or arbitrators acting independently of the Internet.[99] This *subjective* criterion for characterizing or identifying a cyber dispute is very advantageous. It also has the merit of reflecting the state of the art. Disputes that are *objectively* related to the Internet would be left out of the eventual competence of these Internet courts. The disputes between Internet users concerning the delivery of products through the Internet, services in electronic form, or digital information would be excluded. The same goes for disputes concerned with contracts relating to Internet services, such as webpage design and development, or goods when they were concluded offline. However, these are all typical Internet activities, so there seems to be no reason to exclude them. The objective criterion is gravitational to typify a cyber dispute. Probably both methods, the subjective and the objective, could be applied coordinately to that end. Moreover, it should be clearly stipulated which cyber-disputes, if any, will continue being committed to ordinary courts. In any case, it seems clear that actions on torts that have been committed online, such as defamation, product liability, unfair competition, and infringements of intellectual property should be left out of the competence of virtual courts.

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94. *See* Richard S. Granat, *Creating an Environment for Mediating Disputes on the Internet*, Working Paper, NCAIR CONFERENCE ON ON-LINE DISPUTE RESOLUTION, 5-6 (May 22, 1996), at http://mediate.com/articles/granat.cfm.

95. *Id.*

96. *See* Burnstein, *supra* note 80, at 30.

97. *Id.*

98. *See* DE MIGUEL ASENSIO, *supra* note 14, at 458.

99. *Id.* at 458-59.

The fact that the disputes are related to or concern the Internet is not enough. There must also be something about the dispute itself that makes the application of national laws "unfair or impracticable."[100] This approach suggests that unifying substantive Internet law would enable that law to keep with the "rapidly-changing technology and culture of the Internet," thus giving definite "*certainty* and *predictability* to activities online."[101] This goes beyond the scope of this article, but its implications are obvious.

Finally, there are some important questions that may require consideration. Where is the "seat" of arbitration on the Internet? This is relevant because, in the absence of choice of law by the parties, the arbitration laws of the seat will normally govern the arbitration proceedings and may even lead to the application of the *lex fori* to the dispute. Also, the courts of the place of arbitration can retain some control over the arbitration proceedings and to rule on the merits of the award. It is true, however, that this tendency is being overcome in favor of the application of the proper law of the contract.[102] In any case, the parties to an international contract can always select the applicable law in an exercise of autonomy. And it is up to the parties to file an appeal seeking judicial confirmation, enforcement, vacation, or modification of the award in the country whose courts would have been competent if the parties had not submitted the dispute to arbitration. In any case, it is evidently wrong to establish the arbitration seat according to the place of the servers or of the computers through which the arbitrator or the parties are connected to the Internet.[103]

Other issues arise regarding the recognition and enforcement of the arbitral award. Because communications are made electronically through the Internet by data messages in virtual arbitration, one must consider how the requirement of due notice should be tested. For if it cannot be proved that both parties agreed to submit the dispute to arbitration, or that the party against whom enforcement is sought received proper notice of the arbitral proceedings, the award will not be enforceable in Argentina.

The UNCITRAL Model Law on Electronic Commerce addresses some legal issues that arise from the "acknowledgement of receipt" procedures used on the Internet.[104] For instance, when one of the parties sends a data message offering to submit the dispute to arbitration and requests acknowledgement of receipt, that acknowledgement of receipt simply evidences that the offer has been received.[105] Whether sending that acknowledgement of receipt should constitute acceptance of the offer must either be decided by the law governing the contract as a whole or by the

100. *See* Burnstein, *supra* note 80, at 30.

101. *Id.* at 28.

102. *See* 2 BOGGIANO, *supra* note 11, at 1075-84.

103. *See* Jasna Arsic, *International Commercial Arbitration on the Internet: Has the Future Come Too Early?*, 14 J. INT'L ARB. 209, 217-20 (1997).

104. *See* UNCITRAL, *supra* note 23, at art. 14.

105. *Id.* ¶ 93, at 207.

arbitrator who could apply, for example, the general principles of the new *lex electronica*. With respect to the notification of the award to the party against whom it is invoked, should an acknowledgement of receipt have legal, binding effect even if it was sent by an information system programmed by, or on behalf of, the originator to operate automatically without human intervention? The UNCITRAL Model Law on Electronic Commerce responds in the affirmative.[106] But the award may not be enforceable in Argentina, because the citation to the defendant was not served in person.[107]

Moreover, among the formal prerequisites to recognize and enforce foreign arbitral awards in Argentina, the plaintiff has to produce the award and the original arbitration agreement or a certified copy thereof.[108] One must consider how this requirement should be met since notice of the award is transmitted digitally through the Internet.

Thus, creating special courts to handle Internet legal disputes seems to be a long way off. Up to now, these virtual jurisdictions have decided only a handful of cases, and no court in Argentina has ruled, as of yet, on the enforceability of the decisions from those cyber-tribunals. This does not necessarily mean that the concept is faulty, but it will require further developments to succeed.[109]

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106. *Id.* ¶¶ 84-85, at 206.

107. CÓD. PROC. CIV. Y COM. 517 (Arg.).

108. *See* CÓD. PROC. CIV. Y COM. 518 (Arg.); New York Convention, *supra* note 16, at art. IV; Treaties of Montevideo on International Procedural Law, Jan. 11, 1989; Treaty of Montevideo on International Procedural Law, Mar. 19, 1940, 37 AM. J. INT'L L. 116 (J. Irizarry y Puente & Gwladys L. Williams trans., Supp. 1943); Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, arts. 2-3, 18 I.L.M. 1224, 1225, *available at* http://www.oas.org/juridico/english/ treaties/b-41.htm (last visited Mar. 18, 2005); Protocol of Las Leñas on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters of MERCOSUR, June 27, 1992, arts. 20-21, *available at* http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/DEC592.HTM.

109. Burnstein, *supra* note 80, at 31.