Peter Lenda

INTERNET AND CHOICE-OF-LAW

The International Sale of Digitised Products Through The Internet in a European Context

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FOREWORD

In October 1998 I was given the chance of coming to the Norwegian Research Center for Computers and Law (NRCCL) and write a student thesis as a junior research fellow. Together with Morten Foss, we were given the possibility to take part in the ECLIP project (Electronic Commerce Legal Issues Platform). A project dealing with legal issues related to electronic commerce, where Morten and I were to focus on the interlegal aspects (Private International Law) of electronic commerce. Today, June 2001, I look back on these days with great pleasure and gratitude.

Pleasure, because I have been given the opportunity to become a part of a very special group at the NRCCL, people that have become great friends of mine. Gratitude, because due to this possibility I have become an expert in private international law and electronic commerce, which again has opened many doors for me. During this time I have learned enormously, both as a person but also become a better lawyer. Most important though, I have learned to love writing and playing with the law.

There are a lot of things I would like to say about the NRCCL, but this isn't the place. I would like to thank everyone at the NRCCL. However, there are some people that deserve a special gratitude for making this possible. First of all, my thanks go to Beate Jacobsen who had faith in me and hired me. Secondly, I would like to thank Morten Foss whom I enjoyed working with on ECLIP. I would also like to thank all other students and staff at the NRCCL for their help during the writing of this thesis, such as Jason Hoida and Emily Weitzenboeck for their help with my lousy English and Gunnar Knoph-Berg and Øystein Solbakken for all creative coffee breaks. Finally, but not least I would like to thank my supervisors dr.juris Jon Bing and dr.juris Lee A. Bygrave - for a great number of things, but most important of all – inspiration and the gift of loving to write! A large thanks also goes to my family for their support.

As for the thesis you are about to read, I wrote it as a junior research fellow from December 1998 to January 2000. It is probably not the best piece of work I have ever done, but I am proud to present my first book. If you have any questions related to it, I would be happy to hear them, and hopefully answer them (peter.lenda@jus.uio.no).

Peter Lenda,
June 2001

1. THE NEED FOR CHOICE-OF-LAW RULES IN EUROPEAN ELECTRONIC COMMERCE

1.1 Issue

The main issue addressed in this thesis is which country's substantive law governs an Internet-based contract for the sale and purchase of a digitised product within the European Economic Area (EEA).[1] When a commercial contractual transaction is not purely national but has connections to more than one country's legal system, the question will arise as to which country's law applies to the transaction. This question is important in order to predict the legal situation of the parties to the transaction both before and after a legal conflict eventuates.

The problem of choice-of-law in contracts is especially relevant in relation to electronic commerce. One of the greatest advantages of the Internet for businesses is the possibility of being able to reach clients and customers worldwide. Yet this advantage can also be a problem since the Internet is global in reach, relatively borderless and gives few if any clues as to the actual location of the parties. This is most obvious when it comes to the use of electronic agents such as electronic marketplaces or Internet over mobile phones. Domain names on the Internet with endings like ".com" and ".org" give no indication as to the country of domicile of the people or companies behind a commercial website. Moreover, websites do not always give an accurate presentation of the people or company behind them. This can create uncertainty and problems in relation to choice-of-law questions in contracts. While the application of a legal system (or, in this thesis, contractual provisions) traditionally has been limited to only one territory, the Internet is relatively borderless making the appropriate application of legal provisions difficult.

In order to resolve the question, of which country's law applies to an electronic commerce in relation to electronic commerce transactions involving the law of more than one EEA country, there are at least to ways to proceed. The first approach would be to examine the internal private international law of each EEA country in order to find the choice-of-law rule. This, however, would involve the examination of 18 different choice-of-law rules. The second approach, and the one taken in this thesis, is to examine the different

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1. The EEA-agreement includes (2001) all the EU countries (Belgium, Denmark, Finland, France, Ireland, Italy, Germany, Greece, Luxembourg, the Netherlands, Portugal, Spain, Sweden, Spain and the United Kingdom) and Norway, Iceland and Liechtenstein. When applying the term "EEA" in this thesis, I refer to these eighteen countries.

international treaties governing choice-of-law that the different EEA country has ratified and then to determine whether and how they apply to electronic commerce. The relevant treaties within the EEA are the 1980 Rome Convention on the Law Applicable to Contractual Obligations, the 1955 Hague Convention on the International Sale of Goods, and the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG).

In order to create an environment where electronic commerce within the EEA can prosper, the parties engaging in such commerce must have confidence in the law and the law must be predictable. Unless their legal situation is predictable, the potential parties to an electronic commerce transaction will be discouraged from entering into such transactions and this will hinder the rise of electronic commerce. Accordingly, the basic purpose of this thesis is to examine the above treaties in order to guide both individuals and legal persons engaging in electronic commerce within the EEA so that they can better predict their legal situation.

1.2 Methods

Private international law[2] is the instrument to solve legal conflicts with connection to more than one legal system.[3] Its primary purpose is to point out the place where the conflict should be adjudicated, (i.e. which court decides) and which law should be used to solve the conflict (i.e. which law applies). Private international law also has importance as to the enforcement and recognition of the judgement if it is not to be enforced in the same legal system

2. The name of the field could suggest that the rules are international. However, even though the rules of private international law are often based on international Conventions, most countries have private international law rules that are part of their own domestic legal system. When a case with a foreign element is presented to a court, the latter should apply these rules (even ex officio). In some countries, other terms than "private international law" are more commonly used, such as "conflict of laws" or "interlegal law". In the Anglo-American countries, most legal writers seem to use the term "conflict of laws". This is partly because the disputes in consideration have not been between national laws but between the laws of the different states within the country (so-called intranational laws). The term "interlegal law" has been used by some writers because it does not confuse the relationship between the "private" and "international" parts of the legal field in question. Traditional private international law is not a unified body of international law and in many cases it can involve more than "private" dimensions of law. However, this thesis retains the term "private international law" in keeping with its Eurocentric focus and the fact that this term is still most commonly used in Europe.
3. A typical example is when a vendor A, sells his product to a buyer B. The vendor has his place of business in country A, while the buyer has his place of business in country B. The transaction has connection to both country A and B.

as the judgement. This thesis focuses on the question of how to find the applicable law. However, these three main steps are deeply connected to each other, and cannot exist without the others. If a court does not grant the parties jurisdiction, the case cannot be tried and a verdict cannot be rendered. If the court does not have choice-of-law rules, the court will always apply the lex fori and this will create an unpredictable situation for the parties seeking the best alternative from the court. Finally, if a court has rendered a verdict and used its private international law, the case is still unsolved if the case is to be enforced in another country than the country of the forum. Therefore, the recognition of the verdict is a central element. Nevertheless, questions related to jurisdiction, enforcement and recognition of judgments are not treated in this thesis.[4]

As for the choice-of-law problem, there are primarily two types of legal mechanisms. The first is the traditional private international law provisions. The objective of these is to harmonise the choice-of-law rules, leaving each country to have its own substantive rules. The second is international uniform law based on the tradition of *lex mercatoria*.[5]

The intention of these provisions is to harmonise the substantive rules in an international or geographical perspective. Within the EEA there are two international uniform law Conventions. The first is the 1964 Hague Convention on the Uniform Law in International Sales (ULIS).[6] The application of this Convention is very limited, as out of all the EEA countries only the United Kingdom is a Signatory State. Furthermore, the only other Signatory States are San Marino, Israel and Gambia. Because of its limited sphere of

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4. These questions are governed by either the 1968 Brussels Convention on jurisdiction and enforcement of judgements in civil and Commercial matters, [1978] O.J. L 304/36 or the 1988 Lugano Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, [1988] O.J. 319/9. However, since the writing of this thesis the EU have adopted the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] O.J. L 012/1. Furthermore, The Hague Conference on Private International Law is working on a global convention on jurisdiction and the recognition and enforcement of judgement that is meant to also apply to the digital environment. The two latter conventions are build upon the same structure as the two first Conventions, and basically there are no major changes although some precisions relevant for the Internet.
5. At the beginning of the Middle Ages, the expansion of agriculture and the rise of cities in the Mediterranean countries led to the development of special courts for merchants. The law administrated by these courts, the "Law Merchant" or *Lex Mercatoria*, was the result of ancient codes developed among merchants, some of which can be traced back to Mesopotamia and Hammurabi. The lex mercatoria represents the earliest form of private international law.
6. See the Unidroit homepage: http://www.unidroit.org/english/conventions/c-ulis.htm (29 June 1999).

application, this Convention is not treated in this thesis. The second uniform law Convention is the 1980 United Nations Convention on Contracts in the International Sale of Goods (CISG). The CISG was intended to replace the ULIS, which it has in many countries. Of the EEA countries, twelve have signed the CISG, and more are considering signing it.

There are also two traditional private international law Conventions that EEA countries have adopted. The first is the 1955 Hague Convention on the Law Applicable to the International Sale of Goods.[7] This Convention has limited application since only Norway and six EU countries are parties to it. However, the most important private international law Convention within the EEA is the Rome Convention on the Law Applicable to Contractual Obligations. This is a Convention open for signature for only EU countries and all fifteen have ratified the Convention. One central question is how these Conventions interact, such as which Convention will have to yield to the other if they are in conflict.

When examining the choice-of-law rules, one has to bear in mind some of the principal interests lying behind, and promoted by, these private international law Conventions. These interests, or practical considerations, are often in conflict. Some of the conflicts are more familiar in other fields, such as consumer protection. In the latter field, the conflict of interest lies between protecting the consumer from a stronger professional party on the one hand versus protecting the interests of the business community on the other.[8] The interest of the business community lies in the security of the transactions – namely that the business can rely on the certitude of a transaction. While in the field of private international law, the main interest is the demand for *predictability* and *certainty*. The parties must be able to predict their legal situation. Furthermore, the existing rules must be clear and easy to apply in order to achieve certainty. On the other hand, lies the interest of *flexibility* since the parties will have a need to choose the most appropriate legal provisions at any time of the transaction. Therefore, the rules must be flexible in certain ways. For the court, flexible rules imply that the judge can more precisely determine the legal conflict and avoid a situation where, e.g., one party seeks the court most favourable to his case – so-called *forum shopping*. The balance between these interests is essential in order to determine the most appropriate rule for private international law. Finally, another consideration to this field is the interest for a uniform solution, meaning that the choice-of-law

7. See the Hague Conference on Private International Law homepage: http://www.hcch.net/e/conventions/text03e.html (29 June 99).
8. See e.g. The Green Paper on access of consumers to justice and the settlement of consumer disputers in the single market (COM (93) 576). For more on EC consumer protection see Vivienne Kendall, *EC Consumer Law*, London 1994, Chapter 6.

rules in different countries should be interpreted in a way that the outcome of one interpretation is the same regardless of the court chosen to adjudicate the case. There are other interests in this field, but they are more thoroughly treated in Chapter 3.

1.3 Definitions and limitations

This thesis is not a study in comparative law but rather an examination of the legal mechanisms governing choice-of-law in cross-border electronic commerce contracts within the EEA. Therefore, it is essential to define the limits of the thesis. As a point of departure, one has to bear in mind that the aim of the thesis is to examine the choice-of-law rules within the EEA. Consequently, the main object of this thesis is the examination of the three Conventions mentioned above and their interrelationship. The result is a thesis with a broad scope and facing problems of comparison.

The thesis is limited to the study of the choice-of-law rules for contractual obligations. These rules determine the substantive law governing the contractual obligations of an electronic commerce transaction when there is more than one legal system connected to the transaction. The substantive contract law is not treated. Other substantive legal fields – e.g. intellectual property rights questions, data protection and extra-contractual questions – are also not canvassed. In addition, this thesis does only focus on aspects of private law, while public law, such as criminal law, is not canvassed.

The choice-of-law rules traditionally belong to the field of private international law. In this thesis, I consider all rules that lead to the application of a substantive law as being part of private international law, when the contract has connections to more than one legal system.

In traditional private international law the question of which law applies to civil and commercial matters is just one of primarily three questions. As mentioned above, this thesis is limited to the question of choice-of-law. This is primarily because the question of choice-of-law is relevant both when there is an actual legal conflict being presented to the courts, but also, before the legal conflict has manifested itself. The latter element is essential in order to prevent the possible legal conflict. The parties to an electronic commerce contract need to be able to predict their legal situation before engaging in commerce.

This thesis is also limited to cross-border commerce between parties situated within the European Economic Area. These parties can either be professional parties[9] or private individuals (consumers), and they will respectively have

9. The professional parties can either be individuals or legal persons, while the consumer always will be an individual acting outside his trade or profession.

their place of business or habitual residence in an EEA country. However, the parties to such a contract do not necessarily have to come from different EEA countries. Even if the parties to a contract come from the same EEA country, the contract might be connected to another EEA country, e.g. the contract is to be performed in an EEA country other than the one where the parties to the contract have their place of business.

This thesis focuses upon the part of electronic commerce that takes place on the Internet.[10] In a wide perspective electronic commerce can be described as including all commerce where at least the contract is *concluded* by electronic means, e.g. on the Internet.[11] However, in this thesis electronic commerce is understood as commerce in which all commercial transactions are effected by electronic means.[12] As such, this thesis is being limited to the buying and selling of products that can be delivered through the Internet.

As this thesis is limited to products delivered through the Internet, this demands a determination of such products. Products that can be delivered through the Internet are those products that can be expressed in a digitised form, mostly a digital file, and sent through the communication network capable of handling digital signs. Examples of digitised products, reachable through the Internet, are computer programs and music. Previously the music on a CD or the computer program on a disc was also a digitised product, but this digitised product had to be purchased as a physical object since it was connected to the CD or disc. Today, the music or computer program is no longer necessarily connected to a physical object, but can be delivered on the Internet.[13] It is all these digitised products, also referred to as digital products, which are the object of this thesis.

The nature of a digitised product in regard to traditional terms like goods and services will be one of the central points canvassed by this thesis. Digitised products constitute the focus of this thesis since, firstly, the Internet

10. However, electronic commerce can apply other communication networks than the Internet, e.g. a closed network like an Intranet. These are excluded from this thesis when applying the term electronic commerce.
11. See Olav Torvund: *Juristkontakt* nr 1 1999, p. 4. A practical example is the Internet bookstore Amazon.com: it cannot be disputed that this is electronic commerce, even though the books are physically shipped.
12. See e.g. the Australian *Electronic Financial Services Efficiency Act of 1997*, 12 November 1997. (Link found in Anne Fitzgerald, Brian Fitzgerald, Peter Cook and Cristina Cifuentes: *Going Digital: Legal Issues for Electronic Commerce, Multimedia and the Internet*, Prospect Media 1998, Australia, p. 115.)
13. Traditional goods and services that can be ordered and sold on the Internet and delivered physically will normally be considered included in electronic commerce. The reason why traditional goods and services are excluded in this thesis is because they involve a clear connection to a physical place. However, many of the principals treated in this thesis will also have relevance for electronic commerce transactions involving such products.

becomes more than a traditional communication standard when the whole contractual transaction (order, purchase, sale and delivery) is completed on the Internet. Secondly, the Internet can render the parameters of such transactions more uncertain. Contractual transactions using closed systems like traditional EDI[14] are excluded from consideration, although much of the analysis and discussion in the thesis will be relevant for them too. Their exclusion is due to the fact that most closed systems are based upon a communications standard to which the parties agree before any transaction takes place.

Further, the buying and selling of digitised products is considered to include two types of party constellations: business-to-business (B2B) or business-to-consumer (B2C). Moreover, except for consumer contracts, all other sector-specific contracts – e.g. employment contracts and contracts for the construction of buildings or other facilities or installations of real property – are excluded from consideration here. Finally, third-party conflicts also fall outside the scope of the thesis. Instead, focus is put on the contractual obligations between the actual parties to the contract.

1.4 Overview

This thesis is divided into three parts.

Part 1 is intended to give a brief introduction to the problems addressed in this thesis and the technology that causes these problems. Chapter 1 addresses the first aspects of this, while chapter 2 addresses the latter, namely the technology of the Internet and electronic commerce. Chapter 3 concerns the legal method to be applied in this thesis.

Part 2 contains the main part of the thesis. Chapter 4 presents an introduction to the process of determining an applicable law for contractual obligations and gives an overview of the two main chapters of the thesis, chapters 4 and 5. The former is a study of the scope of the relevant treaties and especially in relation to what kind of sale the sale of a digital product is. In addition, Chapter 4 attempts to determine the order of the Conventions, i.e., which Convention has to yield to which. In Chapter 5 the choice-of-law rules of these Conventions are discussed in order to determine what substantive contract law is applicable to the contract. It is at this point one has to deter-

14. I.e. Electronic Data Interchange, which has been defined in Rolf Riisnæs, *Implementing a proposal for regulatory reform*, Oslo 1992, p. 9, as "...the transmission of data structured according to agreed message standards, between information systems, by electronic means." However, this definition does not make explicit that EDI in its original form works within a closed system, in contrast to the Internet which is primarily an open system.

mine whether the existing choice-of-law rules are applicable to the globality of the Internet.

The final part of the thesis is *Part 3*, which analyses and determines the problems related to the present rules of private international law and their application to electronic commerce. The problems of the existing private international law is discussed in chapter 6, which also examines the alternative solutions together with an attempt to give a proposal for better rules in this area.

2.OVERVIEW OF INTERNET TECHNOLOGY AND ELECTRONIC COMMERCE

2.1 Introduction

Electronic commerce has for almost ten years experienced an enormous growth due to the Internet. Therefore, it is essential to understand how the Internet works and what makes it different from other tools applied in commerce (e.g. the telephone). It is also necessary to examine the legal ramifications that these differences have for the parties to an electronic commerce transaction.

This chapter addresses five aspects of electronic commerce. Section 2.2 addresses the technology of the Internet, while section 2.3 addresses how this technology is applied to electronic commerce. Section 2.4 addresses the possible problems and also advantages of electronic commerce. Section 2.5 concentrates on the needs and purposes of the buyer and seller of an electronic commerce transaction.

2.2 Internet technology

Private international law is a legal field where questions such as where did an action take place or from where did someone operate is essential. This is why it is important to understand how the Internet works.

2.2.1 What is the Internet?

The Internet has been defined as: "A large and open international computer network that consists of many thousand networks all around the world. Communication over the Internet takes place with help of the IP-protocols. A number of services are offered through the Internet, amongst these the transfer of data files (FTP), electronic mail, World Wide Web etc." [15] In this definition there are two important components, the first is that the Internet is an

15. This is my translation of a definition offered by the Norwegian Green Paper on Convergency, NOU 1999:26 *Konvergens - Sammensmelting av tele-, data-, og mediesektorene*. The Norwegian definition on the Internet is found in the Appendix 1. p. 183: "Internett – Er et stort og åpent internasjonalt datanettverk, som består av tusenvis av mindre nettverk over hele verden. Kommunikasjon over Internett foregår ved hjelp av IP-protokoller. En rekke ulike tjenester tilbys via Internett, bl.a overføring av datafiler (FTP), elektronisk post, World Wide Web etc."

open network of computers. The second is the common "language", i.e. the communication protocols applied on this open network of computers.

As for the first component – the open computer network – the consequence is that the Internet has a global reach and anyone can connect to it, including mobile phones. The idea behind the Internet was to create a network of computers so that scientists and others could communicate through them over long distances.[16] Since the network was open for anyone, the Internet grew rapidly first in the United States and then all around the world. Today the Internet consists of a large variety of networks connected to each other and with no superstructure. There are many different owners of networks and most important, it is a global network.[17] The result is that it is difficult to determine what actually takes place and where it takes place, since the network is global and actions on the Internet can originate from any country connected to the Internet.

This structure or rather this network with no hierarchic controllers or owners is based upon an open communication process. If we all had spoken the same language, we would all be able to communicate. This is the reality of the Internet.

There are several reasons why the Internet has been built with an open communication process and structure. First of all, it was considered that there could not be one communication centre where all information had to pass through, because if this centre was destroyed, e.g in a war, this type of communication line could no longer be used. Secondly, in order to create the most efficient structure, the system should at all times use the quickest way possible depending on available capacity in each single case In relation to electronic commerce contracts, this means that a transaction over the Internet might be global, even if the contracting parties are located in the same country. If the quickest way for a message is to go through another country, the message will do so.

2.2.2 How the Communication takes place on the Internet?

So, how can the network use the same language and how does it actually work? The networks of computers apply the telecommunication infrastructure such as telephone (fixed and mobile) and satellite lines provided by the telecommunication companies. Then the networks communicate, using the

16. The history of the Internet can be traced back to the end of the 1960s when the United States established the Defence Advanced Research Projects Agency (DARPA). See http://info.isoc.org/guest/zakon/Internet/History/HIT.html - Sources.
17. By January 1999 the Internet was believed to consist of more than 43,230,000 hosts and over 140 000 networks. Many of these networks are public access providers, e.g America On-line and EUnet.

same language. The most applied language of the Internet is the open protocol of TCP/IP (Transmission Control Protocol/Internet Protocol).[18] The effectiveness and function of these protocols is the result of the technology of *packet switching*.[19]

The idea of the packet switching technology is that all digital messages or files sent on the Internet are divided into small packages and sent to the addressee. The TCP divides the message into packages and reassembles them at the addressee's end,[20] while IP gives each package the address and sends the packages through. Each single packet will choose its own way to the destination taking the fastest line available, depending on the different types of cable line and on the actual traffic (availability) on these lines.[21] The packets are delivered to addresses expressed as four numbers, the IP-number, separated by periods (i.e. dots), such as 163.52.128.72. Each computer operating on the Internet will be given an IP-number,[22] but there is no logical connection between the IP-number and countries. The IP-number can be compared to an international phone number, but where it is difficult to determine the physical location of the origin of the number. It is possible to determine the location of a computer from an IP-number, but it is a process that requires a more than average knowledge of the Internet. However, because it would be difficult to remember such complex addresses, the IP-number on the Internet is often translated into domain names.[23]

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18. It must be noted that there are other protocols for communication, but the TCP/IP is the main Internet protocol (or communication standard on the Internet) today.
19. The most central works leading to the packet-switching theory was Leonard Kleinrock: *Information Flow in Large Communication Nets*, RLE Quarterly Progress Report (July 1961), and J.C.R. Licklider/Welden Clark: *On-Line Man Computer Communication* (August 1962). According to Roberts who built the DARPANET for DARPA, it was initially not created by the military to withstand nuclear war. The latter idea was the result of a paper on secure packetized voice by Paul Baran: *On Distributed Communications Networks*.
20. The packets are reassembled into the original message. If not all packets have reached its destination, and the message cannot be reconstructed, the computer at the receiver's end will send a message to the senders host computer, and the missing packets will be resent. See e.g. Nicolaus Negroponte: *Being Digital*, London 1995, Houder&Stoughton, pp. 233-234.
21. The packets are sent from computers to other computers, called ruters. A ruter will only receive the package and store it in order to send it as soon as possible. In addition, one ruter will normally only transmit a few packages of the whole message. The sender will at no time be able to predict the way each packet takes. See e.g. P. Gralla, How the Internet Works (4th ed.), Indianapolis 1998, pp. 38-39.
22. It is InterNic that gives out the IP addresses depending on which number is free at the requested time, see www.internic.net.
23. See e.g. P. Gralla, How the Internet Works (4th ed.), Indianapolis 1998, pp. 18-19.

2.2.3 What can the Internet do for us?

According to the definition of the Internet, a number of services are offered over the Internet, amongst these the transfer of data files (FTP), electronic mail (e-mail), World Wide Web (WWW). One of the reasons why the Internet has grown is because of the global expansion of low cost personal computers together with the introduction of the graphical browsers. Moreover, the Internet was commercialised in 1990.[24]

The Internet is used commercially for sending bits of information from one computer to another. For this purpose, services have been established so that digitised products can be transferred on the Internet. One can distinguish these digital products into different groups. For example letters like text messages, reports, contracts, digital books, newspapers or letters in the form of computer programs and other applications. Another group is pictures; photographs or live pictures in the form of movies or television programs. An important group consists of music or sounds, like musical recordings, on-line concerts, spoken words included in the film or Internet telephony. These groups of "products" will in many circumstances be connected.[25] The graphical presence of a website on the Internet will often include a combination of text, pictures and music, together with small computer programs, like JAVA-scripts. In the following paragraph, I will address the services of the Internet most relevant for electronic commerce. These services are the World Wide Web (www), electronic mail (e-mail), file transfer and real time services.

The World Wide Web (www or the web) is probably the most known service on the Internet. Any company with respect for itself has a "homepage" on the web. The web contains a vast amount of webpages that are connected to each other using hypertext that allows you to move from one page to any other page by clicking on the hypertext which is a sort of address. A webpage may include a wide range of multimedia elements such as text, graphics, music, video and pictures. The pages are built up using a markup language called HTML (Hypertext Markup Language) that contain commands telling the browser how to display the page on the screen and

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24. Today the number of users of the Internet is hard to estimate, and Internet specialists rarely express themselves on the matter. According to one such specialist: "This is too controversial, and relatively inaccurate, an issue which the author does not want to get flamed or spammed for. His guess would be between 1 (himself) and 6 billion (but then again, one never knows if you're a dog on the Net)" - http://info.isoc.org/guest/zakon/Internet/History/HIT.html. The reason is that many people have several Internet accounts and e-mail addresses.
25. See NOU 1999:26 *Konvergens – Sammensmeltning av tele-, data- og mediesektorene*, pp. 32-33

links to other pages. The markup languages are, however, evolving and the web contains today a large variety of additional plug-ins together with XML.

The web is built up around all the computers connected to the network, and this consists of server computers. It is on these computers that the webpages are located. A person's private computer will contact his Internet Service Provider, and it is through the server of this ISP that the information requested by the person is sought. The ISP's web server locates and sends the information to the person's private computer, where it is displayed through the computer's browser.

Webpages are the single pages displayed at a computer screen, and they consist of several web objects, e.g. advertising. However, when you seek a webpage, you will often request a person's "homepage", this homepage is mostly a sort of front page of a collection of pages, which together constitute a website. One can compare the home page with the front page of a magazine and the website with the entire magazine. The website will normally be located at a web server, and it is from this web server all requests of these pages will be sent.

When web surfers[26] request information on the www with the help of a browser program,[27] they will often search using the domain name of the website.[28] However, each webpage is identified due to the URI,[29] which is the service responsible for converting IP addresses into text-based names. The domain name is a part of the URI. These text-based domain names are build up using top domain, such as .com, .org, .de, or .dk. While the two latter refer to webpages that most probably are from Germany and Denmark, the

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26. I.e. the one requesting information on the WWW, e.g. a buyer.
27. The most well-known browsers are Netscape, Internet Explorer and Opera. These programs are normally free (freeware) on the Internet.
28. The Domain Name is a unique name that represents each computer on the Internet. (Some machines have more than one Domain Name.) The Domain Name System (DNS) converts the Domain Name requested by an Internet User into an IP Address. The location of the machine with this IP address is known and the information being requested can then be found. "www.yahoo.com" is an example of a Domain Name. The "com" indicates that Yahoo is a commercial Organisation. The DNS is how the Internet links together the thousands of Networks that comprise it. The DNS is utilised whenever one sends an e-mail or accesses a particular Webpage. Each computer on the Internet has one of more Domain Names, such as "amazon.co.uk". The ".co" indicates a commercial organisation and the ".uk" could indicate that the computer is in the United Kingdom.
29. Uniform Resource Identifiers (URIs, which include URLs) are short strings that identify resources in the web: documents, images, downloadable files, services, electronic mailboxes, and other resources. They make resources available under a variety of naming schemes and access methods such as HTTP, FTP, and Internet mail addressable in the same simple way. They reduce the tedium of "log in to this server, then issue this magic command ..." down to a single click.

two former do not have any connection to any country but to their type of business, being either a commercial entity or organisation. However, in relation to electronic commerce, it must be noted that the use of domain names applying top domains with endings referring to countries do not necessarily mean that the server containing the actual webpage is located in the same countries.[30] The result is that it is difficult to determine the location of a vendor selling on the Internet through a webpage.[31]

The second most common service on the Internet is the application of electronic mail (e-mail). Messages and documents can be sent through the Internet using specific e-mail addresses[32] and e-mail programs.[33] The e-mail service is based on the application protocol SMTP (Secure Mail Transfer Protocol) that transfers messages from one user to another. However, once a message is sent, it will be stored in a mailbox at the receiver's ISP host machine. The receiver can then access the e-mail from his own computer. The application protocol for accessing the e-mail is called POP (Post Office Protocol). The reverse process is used to send e-mail. The e-mail address system is built up using the same domain names system for identifying and remembering an e-mail address as for webpages. This means that the physical location of vendors and buyers on the Internet is difficult to determine.

Finally, I will also address two other services which are built into the web, but which can exist on their own. The first is the file transfer service based upon the File Transfer Protocol (ftp). This is an Internet service that gives access to files and catalogues on a server through the TCP/IP. Once a user is logged on to an ftp-server, the user can access and transfer files and catalogues both ways. This service is important when downloading digital products from the Internet. The last service or services are the real time services,[34] where people can communicate simultaneously such as writing or talking. In relation to electronic commerce the latter type of service can be applied

30. Some companies have even bought the top domain of countries in order to sell it to companies. The island of Micronesia sold its top domain ".fm" to BRS Media (www.dot.fm), which sells it to radio stations.
31. It can be noted that the telecommunications operators/Internet access operators may monitor the web and "see" which IP-address requested information from what other IP-address. A service provider on the Internet may also monitor the IP-addresses requesting information from him or her. However, he or she is not guarantied that the one requesting information has not been anonymized, meaning applied a server for "cleaning" information about his/her origin.
32. An e-mail can easily be sent to a large group of people or just one specific person. The advantage for companies is that they can reach a large public using e-mail at a low cost.
33. The most-known programs are PINE, Eudora Mail and Microsoft Mail.
34. The [illegible]

mainly in two ways. First of all, in order to establish communication between the vendor and the buyer. Secondly, in order to access information from any information provider on-line, such as a television company, concert or radio station directly.

2.3 Electronic commerce

Taking advantage of the Internet commercially has become increasingly popular and important in recent years. The Internet is a new highway for accessing clients, customers or business partners. To understand the law that is to govern electronic commerce, it is also important to understand the dynamics of electronic commerce. My opinion is that one of the most important question to ask is: what makes electronic commerce different from traditional commerce?[35] As described in the introduction, this thesis focus on the part of electronic commerce that includes the buying and selling of digitised products effected by electronic means on the Internet. Other known types of electronic commerce are excluded.

Electronic commerce is often used together with traditional forms of business. For example companies usually have a shop on the Internet and a physical shop. Some companies, like Amazon.com, will only have a shop or market place on the Internet. However, in all these situations, the buyer may order a product on the Internet, and the product will be delivered physically to him. However, if the product is digitised, it may be delivered digitally over the Internet. In these situations electronic commerce becomes even more different from traditional business. This is because it is in these types of businesses that the parties do not need any knowledge of the physical location of the counterpart, and the business does not have to rely directly on a third party, e.g the postal company for the delivery.[36] If the product ordered over the Internet must be delivered physically, placing an order over the Internet is no different than ordering by telephone, telefax, telex or letter.

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35. With traditional commerce, this thesis refers to commerce where not all contact between the parties is done by electronic means. E.g. a product is ordered by phone or telefax but shipped by mail. The most traditional form of commerce is where the parties meet physically and a product/products is/are exchanged. In the Electronic Commerce Directive, the term applied to distinguish between on-line and off-line business is "information society services".
36. However, the ISP may be seen as a sort of post-office, and the speed of the line may lower the speed of delivery. For example if the server is not working, the delivery will not take place.

An example of a delivery of digital products would be a company selling music and books on the Internet. The buyer can order these products on the Internet, either through e-mail or a www form or java script. As a result of this order, a contractual obligation is created.[37] Moreover, since the products are delivered digitally the buyer receives them either by e-mail or by downloading them from the vendor's website, using for example a file transfer service. Throughout this process, the vendor and buyer do not need to be in any other type of contact. In fact it is highly likely that the parties to the transaction will never meet prior or subsequent to contracting. Therefore, the parties to the contract might never know the location of their counterpart. The result is a non-transparent transaction without reference to a territory. This reference is central to resolving the choice-of-law issue.

Besides the fact that the Internet has a lack of a reference to a physical location, the Internet makes electronic commerce global. Because the Internet is global, those engaging in electronic commerce can reach customers and clients all around the world without having to be physically present in all countries. Consequently, the Internet creates a global marketplace where all companies or persons can participate without regard to geographical location.[38] Due to the lack of transparency of the Internet, a party to an electronic commerce contract can enter into contracts with a citizen from anywhere around the world without knowing the location of the latter.

2.4 Advantages and Disadvantages

This section addresses some of the advantages and disadvantages of electronic commerce. This is not meant to be a complete list of such aspects of electronic commerce, but rather an excerpt of those aspects that are most relevant to electronic commerce and choice-of-law rules.

There are many advantages of electronic commerce. One of the central advantages is the globality of the Internet. Due to the Internet, the vendor can reach customers around the world, despite geographical and temporal differences. Small and medium-sized enterprises (SMEs) are able to be present in countries where only the very large multinational companies used to be. Customers can order products from anywhere and seek the best price and the product that best meet their needs.

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37. do not attempt to establish whether the contractual obligation is created when the buyer sends his order or when the vendor accepts the order. This falls outside the scope of this thesis.
38. Even people in countries without an Internet Service Provider (ISP) can access the Internet, as long as they have a computer and the possibility to call abroad to another ISP.

Another advantage often addressed is the low cost of entering into electronic commerce. SMEs do only need to invest in a computer and an Internet connection to be present worldwide. However, electronic commerce is also a large advantage for large companies. This is because it is expensive to invest in computer equipment. Electronic commerce applied to its full potential, is often more cost efficient for the large companies.[39] Another reason is that the large companies can afford the best technical solutions. The result is that it can be expensive to be poor and that due to the globality of the Internet is an advantage to be big and to have the resources to be present worldwide.

In relation to traditional business, electronic commerce often leaves behind a better record of what actually took place. This is because when applying electronic commerce and computer software most activity is logged in an accurate and efficient way. Notwithstanding that it might be tampered with, customer and vendor may often consult the computer log, and be able to correctly determine what took place at what time.[40]

Finally, the interactivity of the Internet and thereby its time efficiency can also be seen as an advantage of electronic commerce. Companies are able to communicate with customers in a far more efficient way than before. The use of e-mail for communication, or FAQ (Frequently Asked Questions) webpages or computer software for round-the-clock support creates a happier customer, while the vendor saves time and money. At its best, the close connection between the customer and vendor or the vendor and the manufacturer can result in quick improvement of products and more individualised products.

On the other hand, even though the use of Internet or other types of Information and Communication Technology (ICT) has many advantages, there are also disadvantages related to the globality and interactivity of the Internet and its aspects of time and space. In this thesis, I attempt to identify the main problems of the Internet in relation to private international law. One of these, and maybe the most important, is the lack of transparency in the transaction. Information about a transaction, including personal information, might be spread around the world in very short time. However, the nature of the information, to which physical location or to whom might be difficult to determine. Due to these disadvantages the electronic commerce transaction becomes more difficult to trace, identify and distinguish, compared to other types of business applying traditional forms of communication.[41] This phenomenon makes Internet transactions different from traditional business, and will in this thesis be referred to as the problem of anonymity of Internet transactions. Anonymity or "anonymisation" as Joachim Benno has introduced

39. This is because it is often the large companies that may heavily reduce their costs by using electronic means (e.g. by using e-mail instead of internal paper memos).
40. However, this might cause problems related to privacy, that is not treated here.

the term,[42] has been criticised due to its use in a broad sense.[43] However, in this thesis, and only in relation to private international law and electronic commerce, I use the term in a broad sense, with the intention of describing the situations when an electronic commerce transaction lacks transparency because of the Internet. The anonymisation of Internet transactions can manifest itself in different ways. However, the main problem is that both vendor and buyer, and also legislator may have a problem identifying actions, products, activity, physical locations or even the parties themselves. One of the legal consequences for private international law, which has until now applied legal rules depending on a connection between a physical location and an action, may be unpredictability.

There are at least five different aspects of the anonymity of Internet transactions: who (which person or persons) are involved in the transaction; what constitutes the object of the transaction (including elements of privacy[44]); where does the transaction take place; when does an activity have legal consequences;[45] and how are transactions performed. Another type of anonymisation can be found in the lack of transparency of the technical equipment

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41. See Herbert Burkert, Which Law for the European Information Society?, (text of a presentation given at the EC Information Day for senior executives of IEPRC, ICRT and EPC Brussels, 31 January 1996, http://www.gmd.de/People/Herbert.Burkert/Brussels.html (December 99), Burkert describes aspects of ICT, such as the limitations of time, complexity, quantity, space and physical representation, and by these aspects he sees the transaction as being intangible, invisible and variable to the user.
42. See Joachim Benno, *Consumer Purchases through Telecommunications in Europe – Application of Private International Law to Cross-Border Contractual Disputes*, Oslo 1993, pp. 117-122, and Joachim Benno: *The "anonymisation" of the transaction and impacts on legal problems*, The IT Law Observatory Report 6/98, Stockholm 1998. In the former, the term "anonymisation of the transaction" was introduced, while it was elaborated upon more deeply and independently in the latter paper.
43. See Daniel Westman's article, "Informationsteknikens påverkan på den rättsliga regleringen", in Blume, Peter, (red.), IT-rätten i 1900-talets sista skälvande år, Nordisk årsbok i rättsinformatik 1998, Jure, Stockholm 1999, pp. 71–84. In my opinion, in the first footnote of his article, Westman criticises Benno for applying the term "anonymisation" in a much too broad sense, trying to describe all problems of the Internet and legal provisions. However, in the same article Westman seems to apply the same examples as Benno, when Benno tries to define what he means with the term. See also on http://www.juridicum.su.se/iri/dawe/.
44. An important legal aspect is the exchange of personal data, and the fact that these can be exploited by the company receiving information about customers.
45. It is interesting to note that until now especially many consumers do not consider the Internet to be a real activity, thereby, imagining that an acceptance on the Internet is not as real as other acceptances. An example is the activity of crackers (mostly refered to as Hackers) who do not consider themselves of commiting any offenses, see e.g. the DVD-case where a Norwegian apparently has broken the code of the DVD records, see http://www.digi.no/

applied in electronic commerce.[46] These points have important legal implications, especially for private international law. They also constitute a serious disadvantage of electronic commerce, because transparency is a key to confidence in electronic commerce.

In my opinion, the anonymity of the different aspects of an electronic commerce transaction can be seen as manifested through the sending of bits from one computer to another. Bits are basically a string of binary numbers. Before this string is processed at its destination, its content is difficult to determine. In relation to several fields of law, such as taxation, it is difficult to determine the legal implications before the actual determination of the bits. However, even when the bits have been identified, it can still be legally difficult to determine the content. The bits will manifest themselves in different ways when processed by a computer, e.g. music, text or pictures. However, in relation to the traditional world, what are these manifestations? Are they, for instance, services or goods? This will also be an important issue in this thesis.

Another aspect is the anonymity of the parties on the Internet. The Internet is built in a non-hierarchic global way, where it is difficult to determine the location of the contracting parties. Through the use of the www or e-mail, parties can be anonymous. This anonymity can be intentional or unintentional.[47] Furthermore, the anonymity provides uncertainty as to the identity of the parties, such as their name, but also as to their location. A Norwegian living in France might still keep an e-mail address in Norway. The habitual residence of the Norwegian will be in France, but if he uses a Norwegian e-mail address, the vendor might still think the Norwegian lives in Norway. The Internet is a global network and each end computer is difficult to locate. Neither the domain names system nor e-mail addresses give an accurate loca-

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46. This point must not be confused with the lack of such equipment. Electronic commerce might also see disadvantages in the lack of Internet equipment. An example is if a company wants to do business on the Internet, but their customers do not or do not have computers with an Internet connection. This may be a problem. Another aspect is if they do not use compatible equipment.

47. I have personally created several e-mail addresses on the Internet, on web-server and portals offering free e-mail. Some of these e-mail addresses have been anonymous, such as anonymous_dummy@yahoo.fr and vanlig_gutt@hotmail.com, while other have been semi-anonymous, such as pietrix@hotmail.com. My regular address is however the least anonymous, peter.lenda@jus.uio.no. However, this is still problematic since I can still establish e-mail addresses like Anthony_Blair@hotmail.com, and obviously I am not the Prime Minister of England. Consequently, it is difficult to determine the parties on the Internet. Finally, one should note that while my regular e-mail address is intentionally correct, many companies give their employees e-mail addresses which are short for their names since this is easier to apply, such as if my e-mail address was pl@jusstud.uio.no. This would have been an unintentional anonymisation of my e-mail address, while some employers give their employees anonymous e-mail addresses for their safety.

tion of the acting parties. The IP-number of each computer will give the location of the server handling the information for one of the parties, but again it does not give any determination of the location of the one applying the Internet from his home computer. I might be living in Spain, calling up a host-server in Norway. The IP-number I will be given by the host-server while surfing will locate the server in Norway, but not my location in Spain. Furthermore, even though the IP-number makes some identification possible, it is difficult for the ordinary user to find and apply the IP-number correctly. Accordingly, not even the IP-number will actually be a definitive source of identification. Someone with access to satellite communication might be living anywhere on the planet, and therefore be acting on the Internet. The result is that it is very difficult to determine where the action takes place, because it is difficult to determine any physical location. With the introduction of WAP (Wireless Application Protocol) and UMTS enabling Internet over mobile phones the mobility and thus the anonymity of the Internet will be even more evident.

2.5 Parties to electronic commerce

2.5.1 Introduction

The anonymity of the Internet may create unpredictability for the parties. A central question will be: who is to bear the risk of such unpredictability, the vendor or the buyer? The nature of the parties is therefore interesting to address. In electronic commerce, there are basically two parties, the vendor on one side and the buyer on the other.[48] Moreover, one can distinguish between different types of vendors and buyers, e.g. professional parties and consumers. These distinctions may have legal importance. In the following, I will address the needs and interests of these parties, in order to see who they are, and whether they are more suited to bear the risk of the unpredictability of the Internet.

2.5.2 The Vendor – the company selling digital products

The vendor is the party selling the digital product. In most cases this will be a company with the intention of earning profits by selling products. However, it is also possible for private individuals to sell digital products on the Internet.[49] Selling products in order to earn money involves a certain risk, for

example the risk of selling with a loss or of not being paid. This is why the vendor has a need to be able to predict his legal situation. Without predictability, the vendor might not involve himself in cross-border electronic commerce and electronic commerce will stagnate.

The interest of being able to predict one's legal situation may also in many cases be more important for the small and medium-sized enterprises (SMEs) and private individuals than for large multinational companies. This is because the large companies have often the economic possibility to hire more lawyers and appear before different national courts. These companies have often sub-branches or contacts in the countries where they deliver, or they are economically strong. Accordingly, they may be represented legally in the country of their counterpart. On the other hand, the SMEs and private individuals selling digitised products do not often have the means to hire lawyers. For them it is essential to be able to predict their legal situation. The impact of losing the income of a sale can be more drastic. As such, these vendors might be weak parties in a contractual situation and more vulnerable. This could lead to the conclusion that SMEs and private individuals should be more protected in an electronic commerce transaction than a large multinational company.

To summon up, as long as there is an intention of sale from a vendor, this sale is intended for making profit. After all, it is the vendor that takes the initiative when he offers products on the Internet. Consequently, he must accept that when he intends to sell worldwide there is a certain risk involved. Therefore, it is my opinion, that the vendor as such cannot claim any more special protection than the buyer. This is even if the vendor is a SME or private individual. However, the vendor has an interest in order to guard his investments. Therefore, they need predictability in relation to how a potential conflict with a buyer will be resolved. In other words, the vendors have an interest in finding one law that can govern the contract. The best solution is that this one law governs all the vendor's contractual obligations, regardless of the country of the buyer and any potential mandatory rules. These choice-of-law rules should also be easy to apply and give reasonable certainty.

2.5.3 The buyer

The buyer of a digitised product through an electronic commerce transaction can be either a consumer or a professional party.[50] Within the latter group of

49. E.g. the Norwegian on-line newspaper Dagbladet, www.dagbladet.no, has a webpage where private individuals may offer their e.g. used physical belongings to others. This service is for free. Another example would be on-line auction-houses. As for digital products, they could be sold at both places.

buyers, one can distinguish between several types, such as multinational companies or small and medium-sized companies (SMEs).

As vendors, these parties have also an interest in being able to predict their legal situation. However, depending on the nature of the party, the risk of engaging in electronic contracts is manifested in different ways. Professional buyers are basically considered to be on equal terms with the vendor. This means that the buyer does not have any special needs of being protected. However, if the professional party is considered an SME, it is possible that this company will be in a weaker position when compared to a large multinational company that may dictate the terms of the contract. However, as they both exercise professional activities with an intention of making profit, there are no special rules required besides rules such as those relating to unfair competition. Moreover, if a distinction were to be made between SMEs and other companies, this would not necessarily address the strength of a company. This is because its number of employees often defines a SME. Today, companies tend to outsource much of their activities, leaving just the creating core within the company, which is the valuable part. An example is the Norwegian software company Opera with its Internet browser. The important part of the company is the developers and head management; therefore the company does not have to be a multinational company such as Microsoft in order to expand. This works as long as the product is good enough. Therefore, a distinction between different types of businesses should not be made in the following.

On the other side, the consumer is generally considered to be the weaker party.[51] Therefore, the consumer has been granted special protection from being abused by professional parties.[52] This abuse may occur due to contractual agreements where the consumer, being a weak party, must accept contract terms unfair to him or her.[53] Furthermore, due to these unfair contract terms the consumer may suffer economical losses and these losses may have

50. With "consumer", this thesis does not refer to the economic concept of a customer buying and consuming a product and which can be both a private individual and a professional. By "consumer", this thesis refers to the judicial concept where a consumer is considered a private person who acquires goods mainly for his own use and not for resale or use in business. See the rapporteurs report on the Rome Convention, hereafter referred to as the Giuliano-Lagarde Report, [19980] O.J. C 282/1, p. 23.
51. See e.g. Giuliano-Lagarde Report, p. 23.
52. See e.g. the Directive 97/7/EC on the protection of consumers in respect to distance contracts, [1997] O.J. L 144/19.
53. See e.g. Joachim Benno, Consumer Purchases Through Telecommunication in Europe – Application of Private International Law To Cross-Border Disputes, Oslo 1993, pp. 14-15, where he addresses the expansion of consumer sales and how the market may take advantage of the consumer.

serious implications. Moreover, the consumer seldom has the possibility to hire lawyers to pursue such cases. The interest of protecting consumers has resulted in several legislative measures in the past, and also on an EEA level. Examples can be found in EU Conventions and Directives[54] showing that consumers often are protected from being deprived of their consumer rights when entering into contract with professional parties. The concept of consumer protection can, therefore, not be avoided in private international law. Consequently, there is a conflict of interest between consumer protection and the professional party's need of legal predictability in the contract.

2.6 Final remark

Electronic commerce is one of the fastest growing types of commerce.[55] However, even though electronic commerce offer many advantages one must not forget the problems of electronic commerce, mainly the anonymity if the Internet transaction, which may have legal impact.

54. See e.g Article 6 of the Council Directive 93/13/EEC of 5.4.1993, on unfair terms in consumer contracts, Article 12 of the Directive 97/7/EC of the European Parliament and of the Council, of 20.5.1997, on the protection of consumers in respect of distance contracts or Article 13 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.
55. OECD estimates (see http://www.oecd.org//dsti/sti/it/ec/prod/e_97-185.htm on OCDE/GD(97)185) on electronic commerce.

3. THE LEGAL METHOD OF PRIVATE INTERNATIONAL LAW IN A EUROPEAN CONTEXT

3.1 The Legal Method of This Thesis

The main objective of this thesis is to examine the choice-of-law rules that might be applied to electronic commerce in one of the eighteen EEA countries. The court of one of these countries would then have to interpret at least one of the Conventions governing cross-border sales (i.e. the 1980 Rome Convention on the Law Applicable to Contractual Obligations, the 1955 Hague Convention on the Law Applicable to International Sales of Goods or the 1980 United Nation's Convention on Contracts for the International Sale of Goods (CISG)). The type of legal method applied may and probably will influence its interpretation. This section will attempt to briefly address some of the problems related to the application of a legal method in relation to questions of private international law within the EEA.

The question of which legal method to apply can be addressed in several ways. Some authors have overlooked the problem, by addressing the choice-of-law problem in a general way and applying the legal method of the country where they were trained in legal thinking.[56]

The most correct way to proceed would be undertake a comparative study of how these Conventions would be interpreted in each EEA country.[57] This is actually what really happens when a legal conflict is brought before a court of law. The court, having its own legal system, will apply its own rules of private international law. These rules will in most cases be the incorporated or transformed international treaties or Conventions of private international law that the country of this court has signed and ratified. Finally, the court

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56. See e.g. Joachim Benno: *Consumer Purchases through Telecommunications in Europe*, Complex 4/93, Oslo 1993 or Reinhard Schu: *The Applicable Law to Consumer Contracts Made over the Internet*, Int. Journal of Law and Inform. Tech. Vol.5 No 2 1997, Oxford University Press, pp. 192-229.

57. See Michael Bogdan: *Comparative Law*, Gøteborg (1994), Norstedts Juridik/TANO, p. 45: "Foreign legislation, juridical decisions, legal preparatory materials (*travaux préparatoires*), and other sources of law must be used in precisely the same manner as they are used in the country where they originate from, if one desires to obtain an accurate picture of the foreign legal system. It is a fundamental principle that when studying foreign law one must respect the system and the hierarchy of sources that exist in the foreign country in question. It often occurs, however, that one entirely unconsciously violates this self-evident principle." The latter is very important in view of the framework of this thesis.

will apply its own legal method, and the question of legal method will, as such, almost never arise.

However, the aim of this thesis, is not only to address a legal problem once it has risen, but also address the legal problem in order to prevent such as problem. One question that has to be raised is how to predict ones legal situation. Moreover, a comparative study of the legal methods of all eighteen countries of the EEA is beyond the scope of this thesis, as well as beyond the economic possibilities for most businesses and consumers.[58]

The other alternative is then to apply the legal method of public international law. The Conventions of this thesis are all international treaties that fall within the sphere of public international law. As such, there are legal methods of how to interpret such treaties. The principles of interpretation laid down in the Vienna Convention on the Law of Treaties,[59] and also recognised worldwide in public international law, may therefore, be the only proper and correct method of interpreting these Conventions.

However, there might be a third method of interpretation. Even though not evident, it is my opinion that there are reasons for claiming that the legal method of the European Court of Justice may be applied as a common method for the Conventions of this thesis. The reasoning is that these Conventions are of international character, but as such, also intended to be interpreted within a specific geographical area, namely the EEA. Within this area there is one important common court, the European Court of Justice. This court has its own legal system, and even though not directly binding for the non-EU countries of the EEA, like Norway, it is still an important source of law. However, the most important argument for applying the legal method of the European Court of Justice for the legal problems raised by this thesis, dealing solely with EEA-matters, is that one of the most important principals of Community law is to aim for the free movement of goods and services. The aim of the private international law Conventions, dealt with here, is also the sale of services or goods (i.e. digitised products) across EEA-borders. If a conflict were to take place between the Treaty if Rome/EEA Treaty, on one side, and the Conventions of this thesis, on the other, the most likely outcome would be that the Conventions would have to yield. These Conventions are general treaties within the EU/EEA, while the Treaty of Rome/EEA Treaty is a specific set of rules for cross-border commerce within a specific geographic area. Therefore, if the European Court of Justice would come to such a conclusion, as to which treaties would have to yield, this would also mean that

58. Moreover, see e.g. Henri Batiffol: *Les contrats en droit international privé comparé*, McGill 1981, pp. 2-3, where he claims that even comparative studies have a speculative element.
59. The Convention was signed in Vienna 23 May 1969, see section 2: Application of Treaties (Articles 28-30) and section 3: Interpretation of Treaties (Articles 31-32).

the method of the European Court of Justice could be applied as one common method for the Conventions of this thesis.

In the following I will attempt to argue why such a method could be applied, why there is a need for one method, and how this method is to apply in relation to the Conventions of this thesis. It is to be noted that it may be that the method of the European Court of Justice is not necessarily different from the one of public international law, but an approach tempting to apply one legal method, that is familiar to most lawyer in Europe has a pragmatic approach, making a comparative study between treaties within the same geographic area much easier.

3.2 One legal method and three Conventions

3.2.1 Why applying one legal method

The need to find one legal method when addressing a set of Conventions is highly essential for a company doing business on the Internet. This is mainly because this company risks being brought to court in any of the EEA countries, as long as there are buyers in these countries.

Moreover, even though the Conventions treated in this thesis are not of the same nature, i.e. written by the same authorities, they all belong to private international law. This leads to the fact that the Conventions should be interpreted with the same considerations and principle in mind.

Another important point is that, when addressing these Conventions, it is important to note what type of legal method will be applied. If not, other legal researchers would not be able to understand the point of departure for addressing the problems.

Most importantly, however, in this part of the thesis I will try to point out some principal guidelines as to what sources of law will be relevant in the interpretation of the choice-of-law rules in the EEA in the context of cross-border contractual obligations. These guidelines are meant to be an expression of de lege lata,[60] but, before the European Court Justice or any other national court acknowledges such an approach, there is uncertainty as to if this is correct.

Finally, the most important reason in this thesis for attempting to apply one legal method to these international conventions and treaties, it the fact that there is a need for a practical approach.

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60. I.e. the current legal situation and interpretation of existing law.

3.2.2 What do the Conventions say about interpretation

Before a legal common method can be applied, one will have to examine the nature of these Conventions.

The Rome Convention is the result of legal needs within the EU. However, the Convention is not based upon Article 249 of the Treaty of Rome.[61] Accordingly, the European Court of Justice (ECJ) has no right to give binding rulings concerning the Rome Convention. Therefore, the signatory states entered into the Brussels Protocol on the Rome Convention,[62] which in Article 1 has given the ECJ the right to give preliminary binding rulings in questions demanding an interpretation of the Rome Convention. This Protocol has, however, not yet come into force, as, according to Article 6, seven States must ratify the Protocol before it enters into force. And, since the Protocol is not yet in force, the ECJ cannot at present interpret the Rome Convention. On the other hand, this is a matter of time, and when the Protocol is in force, the legal method of the ECJ will have direct relevance as to the legal method applied to the Rome Convention.[63]

The Hague Convention is an international Convention ratified by seven countries and the result of the seventh Hague Conference on private international law. The countries that have ratified the Convention have implemented it as a part of their domestic law and, as such, it is the domestic legal method of each country that is important in its interpretation. However, as it is an international Convention, there are several principles of interpretation of international treaties influencing its interpretation. Consequently, the principles laid down in the Vienna Convention on the Law of Treaties[64] will also have relevance in the interpretation of the Hague Convention, together with the preparatory work on the Hague Convention.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is also an international Convention, but based on the work of the UNCITRAL.[65] The interpretation of the CISG is addressed in Article 7, stating:[66]

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61. Previously Article 189 of the EC Treaty, prior to the amendment of the Treaty of Amsterdam.
62. 19 December 1988, [1989] O.J. L48/1.
63. Moreover, it is plausible that the Rome Convention will be implemented into Community law as a regulation in short time. The work on the Rome II Convention on the law applicable to extra-contractual obligations has also come quite far and the Rome II will probably be implemented as a EU regulation.
64. The Convention was signed in Vienna 23 May 1969, see section 2: Application of Treaties (Articles 28-30) and section 3: Interpretation of Treaties (Articles 31-32).
65. United Nations Commission on International Trade Law.

> *"(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) Questions concerning matters governed by this Convention which are not expressly settled in it, are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."*

The Convention demands an interpretation where regard must be given to its *international character* and *a need to promote uniformity in its application*. The central works on the Convention are the documents describing the legislative history of the conference leading to the CISG.[67] It is these documents which can best give an impression of the general principles behind the CISG, which also means its intention. As such, these documents are to be considered *travaux préparatoires* (preparatory work). Traditionally in common law countries these preparatory works have not been given any significance in the interpretation of the legal text the works have lead to.[68] A significant contrast to this was the 1980 House of Lords decision in *Fothergill v. Monarch Airlines*.[69] In this case, which concerned the interpretation of an Act of the English Parliament that gave effect to the Warsaw Convention on the liability of air carriers, four out of five opinions gave consideration to the *travaux préparatoires*. In addition, a majority of the opinions drew attention to the rules on interpretation in the Vienna Convention.[70] Articles 31 and 32 of the Vienna Convention point out that in the interpretation of international Conventions: "*recourse may be had to supplementary means of interpretation, including preparatory work of the treaty*". This shows that even common law countries will use and weigh preparatory work to an international legal text when interpreting it.

A reasonable understanding of these three Conventions is that they do not have, as a point of departure, a common legal method. However, there are similarities, such as the use of preparatory work. Within the geographical area of the EEA, one of the aims of the common legal provisions is to pro-

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67. I.e. the United Nations Conference on Contracts for the International Sale of Goods, Vienna 10 March – 11 April 1980, Official Records 1981, New York.
68. See Julius Stone: *Legal System and Lawyers' Reasonings*, Stanford California (1964), Stanford University Press, p 32, where he writes that: "It is now a widely accepted thesis that it is a fallacy ("the internationalist fallacy") to seek the meaning of written discourse in the will or intention of the author...travaux préparatoires..."
69. [1980] 2 All E.R. 696 (H.L.), [1980] 2 W.L.R. 209. The case has been referred to in John O. Hannold, *Uniform Law For International Sales (3rd. ed.)*, The Hague 1999, pp. 91-94.
70. Although the Vienna Treaty had not been ratified by the UK, Lord Diplock noted that the Vienna Treaty "does no more than codify the already-existing public international law".

mote the growth of trade across borders. In order to achieve this, one will have to adopt a common understanding of these legal provisions. Therefore, if one should use one common legal method in relation to cross-border electronic commerce within the EEA, this could be the legal method of the European Court of Justice.

3.2.3 The method used by the European Court of Justice

If one examines the three Conventions in a European perspective and does not apply the method of the European Court of Justice, one will still end up with roughly the legal method one of two legal systems. Within the EEA, the different legal systems can be divided into primary two groups, either the common law system or civil law system.[71]

The common law countries, mainly represented by Great Britain, have a legal system where the law was created by the courts, using their decisions as precedents.[72] The result is that in English law very few rules have been codified, but the law has developed due to the practice of the court. In recent years, the amount of statutes and Acts has increased in the UK due partly to the English accession to the European Union and compliance with Community Law. In the interpretation of English Acts, the English judges have traditionally disavowed the use of legislative history, i.e. travaux préparatoires.[73] However, since 1993 the House of Lords have accepted that parliamentary material is looked at in certain circumstances.[74] This acceptance of preparatory work as a source of law in interpretation is especially relevant in English

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71. One could argue that there are more "groups" of legal method, such as an Scandinavian method which is somewhere between common law and civil law, but in this thesis we focus on the two main methods which are incontestably the common law and the civil law systems.

72. By the principle of precedents I refer to the practice where earlier court decisions, made in similar cases, must be followed. It must be noted that in 1966 the House of Lords (being the Highest Courts in England) declared that it no longer considered it self formally bound by its own precedents, however, lower courts are still bound by the decisions of the House of Lords, and the House of Lords will still accord great weight to its previous decisions.

73. See e.g. John O. Hannold: *Uniform Law For International Sales (3rd. ed.)*, The Hague 1999, p. 91 or L.Neville Brown/Tom Kennedy, *The Court of Justice of the European Communities*, London 1994, pp. 307-311, where it is written on p. 307: "The English so-called "Mischief Rule" as laid down in *Hendon's Case* [(1584) 3 Co.Rep. 7a.] confines the English judges to the objective legislative intent." Finally see also Julius Stone: *Legal System and Lawyers' Reasonings*, Stanford California (1964), Stanford University Press, p 32. In the English case Farrell v. Alexander, [1977] A.C. 59 Lord Simon summarised at p 81 that: "In the construction of all written instruments including statutes, what the court is concerned to ascertain is, not what the promulgators or the instruments meant to say, but

courts when interpreting Community law. Lord Denning has in several cases underlined the importance of accepting a European legal method when interpreting Community law.[75] This leads me to conclude that when an English court interprets regulations that concern trade across borders in Europe, it is possible that they might apply a method of interpretation familiar to the one applied by the European Court of Justice.[76]

The civil law system has its roots in Roman law[77] and is based on the existence of a written law. The courts of these countries do not have a formal right to create law with their rulings, but rather to interpret the existing written law given by authorities. The French system is one of the most typical of civil law countries. The interpretation of French law is based on the examination of the different sources of law, both authoritative written and customs sources of law.[78] One central source of law is preparatory works to a written law. This use of sources of law when interpreting written law is closely related to the legal method applied by the European Court of Justice.[79] This leads me to the conclusion that if one method is to be applied to all countries within the EEA that can be considered to be civil law countries, the method of the European Court of Justice will be a good common point of reference.

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75. See the English case Buchanan & Co v. Babco Forwarding & Shipping Ltd., [1977] Q.B. 208, on p 213-214, where Lord Denning wrote concerning the interpretation of the EC Convention: "...We must, therefore, put on one side our traditional rules of interpretation of the words. We have for years tended to stick too closely to the letter – to the literal interpretation of the words. We ought, in interpreting this convention, to adopt the European method...In interpreting the Treaty of Rome (which is part of our law) we must certainly adopt the new approach. Just as in Rome, you should do as Rome does, so in the European Community, you should do as the European Court does." In the case of Bulmer v. Bollinger [1974] Ch. 401 at 425, [1974] 2 All E.R 1226, Lord Denning also wrote: "The (EC) Treaty is quite unlike any of the enactments to which we have become accustomed...It lays down general principles. It expresses its aim and purpose. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none...there are gaps and lacunae. These have to be filled by the judges, or by regulations or directives. It is the European way...Seeing these differences, what are the English courts to do when they are faced with a problem of interpretation? They must follow the European pattern...They must look for the purpose and intent...They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best they can...These are the principals, as I understand it fill it, on which the European Court acts."
76. By this I do not mean that the English court today will consider themselves bound by the European Court of Justice interpretation of international conventions other than Community law. However, they might give considerations to them.
77. Most continental countries have direct or indirect traces of the Justinian law in their national laws.

Therefore, the method applied by the European Court of Justice is also a natural "closest common denominator" legal method to apply to legal cross-border conflicts within the EEA concerning commercial activities.

3.3 The Sources of Law applied by the European Court of Justice

Much has been written about the legal method of the European Court of Justice and Community law.[80] However, I will only try to highlight the main aspects relevant to this thesis. This will be done by examining the important sources of law[81] that might have relevance in the interpretation of legal provisions, especially in relation to the three Conventions on which this thesis focuses.

The most important source of law for electronic commerce contracts in the context of choice-of-law are the Conventions themselves. Within the European Court of Justice (ECJ) there are other legal provisions that might have relevance, such as the Treaty of Rome.[82] This treaty gives the ECJ its adjudicative competence and sets boundaries and goals as to the functioning

78. See Christian Dadamo and Susan Farran: *The French Legal System*, London (1993), Sweet & Maxwell, Chapter 2. This is a hierarchy of sources, where the most important sources are *les principes fondamentaux reconus par les lois de la Republique* (fundamental principles recognised by the laws of the Republic) acknowledged in the preamble to the 1946 Constitution. Thereafter follows the authoritative written sources, such as the Constitution, acts and travaux preparatoire. Of the non-written rules, the French system recognises certain custom as the second authoritative source of law. As subsidiary sources of law, the French system has the jurisprudence and legal doctrine.

79. In the foreword of *The French Legal System* by Christian Dadamo and Susan Farran, Lord Slynn of Hadley writes: "As we need increasingly to apply European Community law so we need increasingly to understand the principles upon which it is based. Many of the concepts and the procedures of Europe Community Law have been influenced substantially by French law and procedure. It is in consequence of practical value to know something about that law which has equally had a strong influence on the legal systems of some of the other Member States." Lord Justice Gordon Slynn of Hadley is a Lord of Appeals at the House of Lords in the UK.

80. See e.g. Lasok: *The European Court of Justice: Practice and Procedure* (2nd ed.), London 1994, L.N.Brown/T.Kennedy: *The Court of Justice of the European Communities* (4th ed.), London 1994, or from an Norwegian point of view, inside the EEA but not the EU, Finn Arnesen: *Introduksjon til Rettskildelæren i EF* (3rd ed.), Oslo 1995.

81. By source of law, I mean the written or non-written sources that a court will accept as an element in the interpretation and determination of what an actual rule is.

of the common market. Other important legal provisions are the Brussels and Lugano Conventions on the enforcement and recognition of judgements.[83]

Beside the texts of the Conventions, the main sources of law are the preparatory works on the Conventions. As for the Rome Convention, there is just a short preamble. However, there is an important preparatory work the Giuliano-Lagarde report.[84] Moreover, there is one protocol on the Rome Convention, i.e. the first Brussels Protocol on the Interpretation of the Rome Convention by the European Court.[85] There is also a report on this protocol[86] but this has lesser importance in the interpretation of the Convention. Furthermore, the reports behind the Brussels/Lugano Conventions are also relevant sources of law.[87] There is an official report on the 1955 Hague Convention in French,[88] which is one of the few sources of law concerning the interpretation of the Hague Convention. As for the CISG there is an extensive amount of travaux préparatoires, which are highly relevant, since there are few other common sources of law. The report on the Vienna Conference[89] includes the report from the First Committee (which prepared the text of Articles 1-88 of the Convention), the Second Committee (which prepared the text of Articles 89-101 of the Convention) and the Secretariat's Commentary.

Jurisprudence (i.e. judicial case law) is traditionally an important source of law when it comes to the interpretation of the Conventions. As I have chosen to apply the legal method of the European Court of Justice (ECJ), its understanding and interpretation of legal acts is an important source of law. However, since the first protocol of the Rome Convention has not yet been ratified by seven Member States, the ECJ can not interpret the Convention

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83. These are two similar Conventions, the former governing enforcement and recognition within the EU and the latter within the EEA, but even the number of Articles are the same. They are presumed interpreted in the same way. The importance of the Brussels/Lugano Conventions must be seen in relation with its common elements with the Rome Convention, see Ketilbjørn Hertz: *Jurisdiction in Contract and Tort under the Brussels Convention*, København (1988), Jurist- og Økonomforbundets forlag, p. 41.
84. [1980] O.J. C282/1 – The report on the Rome Convention by the rapporteurs Professors Giuliano of Milan and Lagarde of Paris.
85. Of 19 December 1988, [1989] O.J. L48/1
86. [1990] O.J. C219/1, referred to as the Tizzano Report on the Brussels Protocol.
87. See the Jenard Report (O.J. 1979 C59/1), The Schlosser Report (O.J. 1979 C59/71), The Evrigenis/Keramis Report (O.J. 1986 C298/1) and the Almeida/Cruz/Desantes Real/Jenard Report (O.J. 1990 C198/35). The importance of these reports can be seen in light of that the Giuliano-Lagarde Report (on p 23) which refers to the Brussels Convention.
88. Rapport explicatif: L. JULLIOT DE LA MORANDIÈRE, Actes de la Septième session, t. I, 1951, p. 360.
89. United Nations Conferance on Contracts for the International Sale of Goods (Vienna, 10 March – 11 April 1980), Official Records, New York, 1981 (A/CONF. 97/19, Sales No. E. 81 IV. 3, 82. V. 5).

and consequently, there are no cases concerning the Rome Convention nor the Hague Convention nor the CISG. On the other hand, it is possible that the ECJ will give some, though little, relevance and weight to domestic cases, both within the EEA and maybe to a lesser degree to US-cases. This is due to the international aspect of private international law where consideration should be given to other countries' solution as a mutual recognition,[90] and the fact that there is relatively little case material connected to Internet problems. As for US-cases, it is my opinion that they may only serve as useful examples to European courts.

On the other hand, the ECJ has rendered verdicts upon questions concerning the Brussels Convention and some of these cases may have relevance for the interpretation of the Rome Convention. Apart from the ECJ national courts have adjudicated with the Rome Convention in mind. These court cases have also relevance for the interpretation of the Rome Convention.

As for the interpretation of the CISG and the Hague Conventions, it must first be said that the ECJ may take these Conventions under consideration when involving matters concerning Community law. In relation to the Brussels Convention, the ECJ has raised questions involving other Hague Conventions.[91] Other EEA-courts cases may be of relevance.[92]

Other sources of law that might be relevant are the opinions of the Advocate General assisting the European Court of Justice.[93] These opinions have, according to legal authors, relevance and legal weight.[94] The legal weight of the advocate general's opinion for solution is, however, more difficult to define. On one hand it could be argued that it is equivalent to legal theory. However, the advocate general's proposal for opinion is published in the official papers. Moreover, the in-depth argumentation gives us a good understanding of the legal process and interpretation of the European Court of Justice.[95] Furthermore, the judges often follow the advocate general's opin-

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90. See also the practical consideration referred to as the principal of unity interpretation.
91. See *Pandy Plastic Products BV v Pluspunkt Handelsgesellschaft mbH*, Case 228/81 European Court Reports 1982 p. 2723.
92. However, when examining Norwegian court material, no Norwegian Supreme Court cases were found involving the Hague Conventions or the CISG. In the second highest court, the CISG was only mentioned briefly in a few cases.
93. See Article 166 of the Treaty of Rome.
94. See Fredrik Sejersted, Finn Arnesen, Ole-Andreas Rognstad, Sten Foyn og Helge Stemshaug: *EØS-rett*, Oslo 1995, Universitetsforlaget, p 93
95. See the proposal for the case *Custom Made Commercial Ldt. vs. Stawa Metallbau GmbH*, C-288/92, where the advocate general seeks an in-depth argumentation for where the place of performance is according to Art 5(1) of the Brussels Convention, while the Court case itself is rather brief. The case shows also how the advocate refers to one of the Hague Conventions, thereby, that the Hague Conventions have relevance at the ECJ.

ion. Therefore, the opinion of the advocate general is a legal argument with some value.

Legal theory has generally been considered to have relatively minor legal relevance. This is related to the fact that legal theory is often a person's private opinion and one that is not published. However, the field of private international law is different from many other fields of law when it comes to legal theory. Legal researchers have often been forced to examine the private international law of other countries[96] and much work has been done on the international arena. The best example is the Hague Conference on private international law.[97] Consequently, legal theory will have some legal weight.

3.4 A different type of source of law: Practical Considerations

Besides the traditional sources of law (mainly those that have been written), there is one other within the field of private international law that can be characterised as practical considerations.[98] By "practical considerations", I mean the purposes and aim of a legal rule that make the rule good and just.[99] It is quite doubtful whether these practical considerations actually are sources of law in a European perspective.[100] However, it is submitted that these practical considerations are valid, although relatively weak, sources of law within private international law. In the following, I will first elaborate why practical considerations might be considered a type of source of law, and second what the main practical considerations are in private international law.

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96. Private international law demands a mutual international recognition of certain principals to work.
97. This conference has for the past century resulted in many international conventions in different fields of private international law and also in the international recognition of legal scholars of private international law, see http://www.hcch.net/.
98. In a study by Magnus Aarbakke/Jan Helgesen from 1982 they refer to what in Norway are called "reelle hensyn" as "standards of value". See Kourilsky/Racz/Schaffer (ed): *The Sources of Law – A Comparative Empirical Study of National Systems of Sources of Law*, Budapest 1982, pp. 213-214. Here they define practical considerations as: "Insofar as it is a question of commonly accepted value standards in society, such standards quite clearly seem to be relevant as arguments in legal reasoning – in our terms: as a source of law. One often says, in such cases, that a decision is based on the "nature of the case" or the like."
99. In Norway, practical considerations are called "reelle hensyn" and widely accepted as a source of law: see Eckhoff: *Rettskildelære* (4th ed.), Oslo 1997, pp 352-384. Danish theory refers to practical considerations as "the relations or nature of the conflict/case or legal-political considerations" – see e.g. W.E. von Eyben: *Juridisk Grundbok – Retskilderne 1*, Jurist- og Økonomforbundets Forlag 1991, pp 269-295; cf. pp. 271-272, where there are references to other Nordic legal literature and their use of practical considerations.

In Article 31 of the Vienna Convention on the Law of Treaties it is stated that when interpreting Conventions or treaties, one should take into consideration the "object and purpose" of these Conventions and treaties. Private international law is a field of law that has not been codified until recently. Therefore, the purposes and objects of private international law have been difficult to identify in written form. However, among legal authors it is accepted that there are certain non-written principles or rules in private international law.[101] These practical considerations may be for private international law what for the French are *les principes fondamentaux reconnus par les lois de la Republique (*fundamental principles recognised by the Republic).[102] Within Community law, there are also general principles in the interpretation of rules, such as a principle of protecting justified expectations.[103] In Scandinavian theory of private international law, these practical considerations are considered to be an important, though not decisive, source when interpreting rules of private international law.[104] Therefore, it is not impossible that the European Court of Justice might take into account practical considerations as a source of law when interpreting rules of private international law.[105]

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100. In a study for the European Coordination Center for Research and Documentation in Social Sciences edited by Kourilsky/Racz/Schaffer (ed): *The Sources of Law – A Comparative Empirical Study of National Systems of Sources of Law,* Budapest 1982, the only country referring to practical considerations (though called *standards of value*), is Norway. However, other countries do have customs as a source of law.
101. See e.g. Batiffol/Lagarde: *Traité de droit international privé I* (8th ed.), Paris 1993, p 40, where they write [my translation]: "First of all, there exists in public international law non written rules, whose existence results from the practice[conduite] generally accepted by the States...the same rules are often referred to as customs, and they are in a certain way sources, at least indirect, and partial, in private international law."
102. See e.g. Dadome/Farran: *The French Legal System,* London 1993, pp 27-28.
103. See case 81/72 *Comission v. Council* [1973] ECR 575, [1973] C.M.L.R. 639. For more on these principals see L. Neville Brown/T. Kennedy: *The Court of Justice of the European Communities (4th ed.),* London 1994, pp. 323-342.
104. See e.g. Peter Arnt Nielsen: *International privat- og procesret,* København 1997, pp 26-31, where he also writes (on p. 26) that [my translation from Danish]: "Several [practical] considerations are included in the arrangement and interpretation of a choice-of-law rule. No one practical consideration is, however, generally decisive, as the meaning and weight of each consideration varies depending on the nature of the conflict."
105. Another comparison from the USA is the policies behind the *Second Restatement.* In 1952 Cheatham and Reese published an article setting forth some of the policies which in their opinion should guide the courts in deciding choice-of-law questions. See Cheatham and Reese: *Choice of Applicable Law,* 52 Coloumbia Law Review 959 (1952), however this thesis bases its finding s on the article by Reese in Richard Fentiman (ed.): *Conflict of Laws, Willis L. M. Reese (1963): Conflict of Laws and the Restatement Second,* Aldershot

The practical considerations in private international law can be divided into different groups.[106] In the context of contractual obligations and electronic commerce, the most important considerations are predictability, certainty, flexibility, the better rule of law, the justified expectations, the purpose of the substantive rules and the principle of uniform interpretation. Some of these considerations have been put forward in legal theory while others often are obvious rationales for proposed rules or expressed in case law of the European Court of Justice.

Predictability, together with certainty and the justified expectations of the parties, are the most important practical considerations in cross-border contracts.[107] The parties to a contract have a strong need to be able to predict their legal situation and thereby be able to prevent (or plan for) legal conflicts.[108] Behind this consideration lies a need to minimise the costs and risks of international trade.[109] Predictability is strongly connected to the need for certainty; i.e. the parties have to have security and clarity in the legal process, for example knowing the different alternatives.[110] Concomitantly, this leads to the practical consideration of the parties' expectations of their legal situation.[111] A vendor selling a product to buyers anywhere should probably expect that the transaction might be governed by foreign law, while a consumer buying products on the Internet might have a justified expectation that

106. See e.g Peter Arnt Nielsen: *International privat- og procesret*, København 1997, on pp. 26-31, where he differentiates between public law considerations ("folkeretslige hensyn"), governmental considerations ("statens interesser"), the principle of uniform interpretation ("princippet om enhedsbedømmelse"), principle of the closest connection ("princippet om den nærmeste tilknytning"), the consideration of the justified expectations ("partenes beretiggede forventninger"), the consideration of the purpose of the substantive rules ("de materielle reglers formål"), better rule of law consideration ("The Better Rule of Law") and finally technical considerations ("Retstekniske hensyn").
107. See the European Court of Justice-case *Somafer v. Saar-Ferngas AG*, C-33/78, ECR 1978 I-2183. The case concerned a question of jurisdiction in relation to the Brussels Convention of 27 September 1968. As this is a private international law convention, the court held in ground 7 that one objective of the convention was to encourage legal certainty.
108. See Peter Arnt Nielsen: *International privat- og procesret*, København 1997, p. 231. The principle of predictability is a consideration which can also be examined through the three conventions and their preparatory works, where they all give the parties to a contract the possibility to choose the law of their contract.
109. See Ole Lando: *Kontraktstatuttet 2* (3rd ed.), København 1981, pp. 49-50.
110. Richard Fentiman (ed.): *Conflict of Laws, Willis L. M. Reese (1963): Conflict of Laws and the Restatement Second*, Aldershot (1996), Dartmouth, p. 412.
111. Peter Arnt Nielsen: *International privat- og procesret*, København 1997, p. 29.

it is the law of his/her own country that will govern the transaction (after all it is the only law the consumer knows).

In contrast to predictability is flexibility. This is the consideration that demands that the rules should be flexible and not too strict. If the rules were too strict, this would lead to forum shopping;[112] i.e. a party would seek the court giving him the best legal situation. The principle of flexibility is strongly connected to the principle of the closest connection, which is a rule aimed at determining the law most closely connected to the legal conflict at hand.[113] The "Better Rule of Law" is another consideration that gives the court more flexibility. This consideration constitutes a principle whereby the court will examine the different possibilities and then choose the substantive law it finds best suited to resolve the conflict. The courts will often disguise such an approach behind other arguments.[114]

Another important practical consideration is the purpose and goal of the substantive rules supposed to govern the legal conflict. In the interpretation of the choice-of-law rules, one should give some regard to the scope and purpose of the substantive law chosen. This is because the final solution may not always be appropriate to govern the conflict, especially if the law chosen is not the *lex fori*. In addition, it is one of the purposes of national contract laws to afford the contracting parties' predictability and certainty.

Finally, there is the principle of uniform interpretation.[115] This consideration also demands that the choice-of-law rules are uniform (which is in many ways the case within the EEA and in the field of contract law). This consideration is essential due to the international aspects of private international law. The principle of uniform solution demands the rules to be interpreted in the same way in different countries. This means that if the two courts of different countries were to interpret the "same" choice-of-law rules, they would apply the same considerations and arguments, also by giving consideration to the interpretation of the other country.[116] If the parties are to have predictability

112. See e.g. *Antonio Marinari v. Lloyds Bank*, C-364/93 ECR [1995] 2719, especially paragraphs 14-20, which interprets Article 5(3) of the Brussels Convention so as to avoid creating a forum shopping situation.
113. See Peter Arnt Nielsen: *International privat- og procesret*, København 1997, p. 28 or Gaarder: *Innføring i International Privatrett* (2nd ed.), Oslo 1990, p. 38.
114. See Peter Arnt Nielsen: *International privat- og procesret*, København 1997, p. 30
115. See Peter Arnt Nielsen: *International privat- og procesret*, København 1997, pp. 27-28.
116. See Richard Fentiman (ed.): *Conflict of Laws, Willis L.M. Reese (1963): Conflict of Laws and the Restatement Second*, Aldershot (1996), Dartmouth p 408 on the second policy stating: "...Choice-of-law rules should be designed to make the international and interstate systems work well...It [the forum] must temper its freedom to declare local policy and its scope with a sense for harmonious interstate relations as well as for the justifiable expec-

and certainty, they need to know that the same arguments are applied in the same way and not depending on the court from which they seek a judgement.[117] This could also be said to be a practical consideration of mutual recognition. If not, this could cause forum shopping.[118] In my opinion this consideration can also be an argument for claiming that within Europe the choice-of-law rules concerning contractual obligations will be determined in the same way.[119]

3.5 Conclusion

This aim of this chapter has been to find one legal method to apply in relation to the questions raised by this thesis, namely to the Conventions addressed. However, the first conclusion is that there is not one legal method that can be applied within the EEA. However, as a practical approach, in view of the frame of this thesis, the most common legal method to apply will be the one of the European Court of Justice. The ECJ plays already an important role within the EEA, even though it is larger within the EU than Norway, Iceland and Liechtenstein.

117. See Ole Lando: *Kontraktstatuttet 2* (3rd ed.), København 1981, p. 51.
118. Richard Fentiman (ed.): *Conflict of Laws, Willis L.M. Reese (1963): Conflict of Laws and the Restatement Second*, Aldershot (1996), Dartmouth p. 413.
119. E.g. see Article 18 of the Rome Convention: "...regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application."

4. THE SCOPES OF THE CONVENTIONS AND THEIR INTERRELATIONSHIP

4.1 General Introduction

The aim of this chapter is to determine *which* of the three Conventions are applicable to an electronic commerce (e-commerce) contract involving the sale of digital products. The first problem is to determine the scopes of these Conventions. Therefore, sections 4.2-4.4 address respective the scopes of the three Conventions, while section 4.5 addresses the problem related to the classification of digitised products in relation to the traditional terms of "goods and services" applied in the Conventions. The second problem is how these Conventions interact. By this I mean that when a legal conflict has been brought in front of the court of one of the eighteen countries of the EEA, the country of this court will normally have ratified one or more of these Conventions. If there is more than one applicable Convention to the conflict, one will have to determine which of them will have to yield to the other, i.e. their priority. This is what I refer to as the order of the Conventions, and it is addressed in section 4.6.

4.2 The scope of the Rome Convention

The 1980 Rome Convention on the Law Applicable to Contractual Obligations[120] was signed in 1980 and came into force in 1991,[121] due to its ratification by seven EU Member States. Today all fifteen EU Member States have ratified the Convention. Together with the Brussels Convention on Jurisdiction and Enforcement of Judgments in Commercial and Civil Matters, it represents the most important EU initiative in European private international law.[122] The Rome Convention is not open for signature by non-EU member states, nor is it an EU provision in relation to Article 249 of the Treaty of Rome.[123]

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120. Official Journal No L 266/1 of 9 October 1980. Hereinafter referred to as the Rome Convention. For more generally on the Convention, see Lennart Pålsson: Romkonventionen – Tillämplig lag för avtaleforpliktelser, Stockholm (1998), Norsteds Juridik, pp. 13-18, and Giuliano-Lagarde Report, p. 4.
121. The Convention has no retrospective effect on contracts existing before the Convention's entry into force: see Article 17 of the Rome Convention. See further Giuliano-Lagarde Report, p. 38 and Peter Kaye: The New Private International Law of Contract of the European Community, Aldershot (1993), Dartmouth, pp. 34-35.

The point of departure of the Convention is, according to Article 1, that the Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.[124]

The Giuliano-Lagarde Report applies the term "*contracts and the obligations arising from them*" when describing what a contractual obligation is.[125] From Article 18 of the Convention it follows that the term contractual obligation is to be given a Convention interpretation, i.e. a uniform internationalist interpretation. In addition, the Brussels Convention applied by analogy[126] suggests that the scope of the Rome Convention can be assumed to cover all cases involving commercial and "civil" matters.[127] Thus the term is given a broad meaning and in this thesis I consider a contractual obligation to cover all contracts between two or more parties concerning the sale of digitised products.

The situation involving a choice between the laws of different countries involves all relevant situations involving one or more elements foreign to the internal system of a country, thereby, giving the legal systems of several countries the probability of application. This means that the Convention is also applicable to situations involving the choice-of-law between different legal systems of the same State. Hence, the Convention is also applicable in conflicts between Scotland and England, and Wales or Northern Ireland.[128]

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122. However, since this thesis was written, the EU has adopted a new regulation which is meant to replace the Brussels and Lugano Conventions, this is the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, O.J. L 12 of 16.1.2001. The regulation does not diverge manifestly from the Brussels Convention.
123. According to Article 249 of the Treaty of Rome (previously Article 189 prior to the Treaty of Amsterdam), a Community provision is for example a regulation or directive. However, the Commission is working towards an implementation of the Rome Convention into Community law as a regulation and thereby get direct application in all EEA countries, including Norway, Iceland and Liechtenstein.
124. See Giuliano-Lagarde Report, p. 10, Dicey & Morris: The Conflict of Laws (12th. Ed.), London 1993, Sweet & Maxwell, pp. 1197-1200 and Peter Kaye: The New Private International Law of Contract of the European Community, Aldershot 1993, Dartmouth, pp. 97-111.
125. See Giuliano-Lagarde Report, p. 10.
126. See Dicey & Morris: The Conflict of Laws (12th. Ed.), London 1993, Sweet & Maxwell, pp. 1197, where it is referred to a French case determing that the scope of the Rome Convention is applicable to public law contracts.
127. On the other side, there can be doubt as to the difference between contractual and quasi-delictual matters, as there is respectively between Articles 5(1) and 5(3) of the Brussels Convention. The importance is to note that there might be situations in the middle of these

The Convention is, consequently, applicable to any contractual obligations, apart from the exemptions in Articles 1(2) and 1(3). These exemptions include capacity of natural persons, wills, rights in property arising from matrimonial and family relationships, obligations arising under bills of exchange, cheques, negotiable instruments, arbitration and forum agreements and the law of companies.[129]

According to Article 27, the Rome Convention can only be applied inside the European territories.[130] However, within the European territories of the EU, the Convention has a universal application.[131]This means, first, that the Convention will be applied to any person or company, whether they are domiciled in the EU or not.[132] It means, secondly, that the Convention will accept any choice-of-law, even if the Convention chooses the substantive law of a non-EU country.[133] The result of the universal scope of the Rome Convention, in the light of e-commerce and its anonymity, is that a party to a contract may end up having to cope with a law of a relatively unknown third country.

Article 10 of the Rome Convention defines the scope of the applicable law, i.e. the substantive law chosen by the Convention.[134] A non-exhaustive list of the scope of the law chosen includes interpretation, performance, consequences of breach,[135] various ways of extinguishing obligations, and prescription and limitation of actions, and finally, the consequences of nullity of the contract.

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128. See Article 19(1) of the Convention, which the UK has applied despite the second paragraph that was intended for the UK. See Giuliano-Lagarde Report, pp. 38-39. See Peter Kaye: The New Private International Law of Contract of the European Community, Aldershot 1993, Dartmouth, pp. 109-110.
129. See Giuliano-Lagarde Report, pp. 10-13, Dicey & Morris: The Conflict of Laws (12th. Ed.), London (1993), Sweet & Maxwell, pp. 1113-1115, 1200-1204, 1421-1422, 1459 and Peter Kaye: The New Private International Law of Contract of the European Community, Aldershot (1993), Dartmouth, pp. 111-142.
130. This is often referred to as the territorial scope of the convention. See Article 27 of the Rome Convention. As an example, the French Republic includes the DOM-TOM, while England do includes Gibraltar, but not the Isle of Man, Jersey, Guernsey and the territories in Cyprus. See further Peter Kaye: The New Private International Law of Contract of the European Community, Aldershot 1993, Dartmouth, pp. 391-393.
131. See the Giuliano-Lagarde Report, p. 8 and pp. 13-14 and Peter Kaye: The New Private International Law of Contract of the European Community, Aldershot 1993, Dartmouth, pp. 143-146.
132. See the Giuliano-Lagarde Report, p. 8.
133. See Article 2 of the Rome Convention.
134. See the Giuliano-Lagarde Report, pp. 32-33.
135. However, this is as far as it is within the limits of the powers conferred on the court by its procedural law, and it includes the assessment of damages in so far as it is governed by rules of law.

The conclusion is that the Rome Convention is a "backbone" Convention for questions related to the choice-of-law in contracts.[136] By this I mean that the Convention gives precedence to most any other Convention concerning private international law and contractual obligation, apart from Community law.[137] This follows from Article 21 of the Rome Convention whereas the Rome Convention is only to be applied if other Conventions cannot be applied to the same conflict.[138] This notwithstanding, the Convention does not limit its scope when it comes to the different party constellations possible in view of a contract, or the possible merchandise. Consequently, the Rome Convention can be applied to all types of contractual obligations made possible through e-commerce, including both business-to-business and business-to-consumer. However, even though the Convention does not as a point of departure make a distinction between services and goods, the Conventions approach to digitised products may be questioned. This is an important question addressed in section 4.5.

4.3 The 1955 Hague Convention

The 1955 Hague Convention on the Law Applicable to the International Sale of Goods was signed in 1955 and entered into force on the 1st of September 1964.[139] The only official and authenticated text of the Convention is in French.[140] The aim and purpose of the Convention was to establish a

136. See Giuliano-Lagarde Report, pp. 39-41, Peter Kaye: The New Private International Law of Contract of the European Community, Aldershot 1993, Dartmouth pp. 367-370, 379, 379-387.

137. See Article 20 of the Rome Convention. See also See Giuliano-Lagarde Report, p. 39 and, Peter Kaye: The New Private International Law of Contract of the European Community, Aldershot 1993, Dartmouth pp. 365-366.

138. The Rome Convention will not prejudice the application of any present or future convention in the field of private international law. At present this would mean the Hague Convention and the United Nations Convention on Contracts for the International Sale of Goods. See also Giuliano-Lagarde Report, p. 39.

139. The Convention, hereinafter referred to as the Hague Convention, was the result of the seventh session of the Hague Conference on Private International law, held 9 – 31 October 1951. The official name of the Convention is Convention sur la loi applicable aux ventes á caractere international d'objets mobiliers corporels. After its signing in 1955, it entered into force on 1 September 1964 due to the ratification by Belgium, Denmark, Finland, France, Italy, Norway and Sweden. Since then, the Hague Convention has been signed by Switzerland and Niger. Luxembourg, Netherlands and Spain have signed the Convention but not ratified it.

140. See http://www.hcch.net/f/conventions/text03f.html, and Article 33 of the Vienna Convention on the Law of Treaties.

dynamic Convention for international trade in order to increase stability and certainty in this legal field, and to find as much common legal understanding as possible despite the existing legal differences and different territories.[141]

According to Article 1(1), the Convention is applicable to the international sales of goods.[142] Within this scope lie three conditions for application; namely, that there has to be (a) a sale, (b) the sale must be of an international character, and (c) involve the sale of goods.

(a) The Convention is limited to "sale" ("ventes"), but this is not defined in the Convention.[143] All other transactions than sales are excluded from the Convention, e.g. an exchange of gifts or a loan of objects. On the other hand, a sale of a ship or plane that is to be made at a shipyard or factory, but has not yet been registered, is included in the scope of the Convention.[144] Originally, the Convention included all types of sales, including consumer sales.[145] However, after the thirteenth Session of the Hague Conference in 1976, it was declared that the 1955 Convention did not take into consideration the interests of consumers and the ratifying States should not be prevented from applying special rules to consumer sales.[146] This was followed up in the next session of the Hague Conference, and though not an official change in the Convention itself, the states ratifying the Convention were given the possibility to apply other regulations for consumer sales.[147] This has been done by all EEA-countries that have ratified the Hague Convention, apart from Norway. Nevertheless, the Hague Convention will still include sales between private

141. See Actes Doc. La Haye, Septième Session (i.e. the report on the Convention by J. de la Morandiere – hereafter referred to as the Morandiere-report), p. 10.
142. Article 1(1) of the Convention states: "La présente Convention est applicable aux ventes à charactere international d'objets mobiliers corporels". My translation is: "The present Convention is applicable to the international sales of goods".
143. See Erik Siesby: Lærebog i International privatret – Almindelig del og formueret (2nd ed.), København (1989), Jurist- og Økonomforbundets forlag, p. 101, Ole Lando: Kontraktstatuttet – Danske og fremmede lovvalgsregler om kontrakter – Udenrikshandelsret 2(3rd ed.), København (1981), Jurisforbundets forlag, p. 290.
144. See Article 1(3) of the Convention.
145. See Ole Lando: Kontraktstatuttet – Danske og fremmede lovvalgsregler om kontrakter – Udenrikshandelsret 2(3rd ed.), København (1981), Jurisforbundets forlag, p. 290.
146. Actes et Documents de la Trezieme Session de la Conference de la Haye, Tome I, pp. 177-185.
147. During the fourteenth session of the Hague Conference in 1980, it was pointed out that the choice-of-law rules of the Convention did not give the consumer satisfactory protection (See Actes et Documents de la Quatorzieme Session de la Conference de la Haye, Tome II: Ventes aux consommateurs, pp. I-60-66.). See also Erik Siesby: Lærebog i International privatret – Almindelig del og formueret (2nd ed.), København (1989), Jurist- og Økonomforbundets forlag, p. 102.

persons and sales between business parties in the countries where consumer sales have been excluded.[148]

It is interesting to note that all countries apart from Norway have made an exception for consumers from the Hague Convention. This means that if jurisdiction is granted in Norway, the consumer will not be granted special protection. On the other hand, one might question the legal value of the statements made at the 13th and 14th Sessions of the Hague Conference. These statements did not result in any changes in the Convention. Therefore, one might ask if the ratifying States are not bound by the original Convention in a way that their citizens can claim the application of the official version. This could be relevant for a Norwegian vendor in a legal conflict within the EEA(but not adjucated in Norway) with a consumer from any of the other ratifying States of the Hague Convention. The outcome of such a case would most probably be in the favour of the consumer, but could be contested.

(b) For the Convention to be applied, the sale has to have an international character.[149] According to Article 1(4), a mere declaration by the parties is not sufficient to consider the transaction as having an international character. To define what an international character, however, is more difficult and has to be determined individually in each case.[150] In private international law, a case is said to have an international character when it involves a "foreign element",[151] this being for example that the parties have their place of habitual residence in different countries. Or, it could be that a specific field of commerce is normally regulated by one specific country's commercial law that is considered to appropriately regulate this field (and which is not the country of the parties). However, due to the anonymity of Internet transactions, e.g. problems of identification of parties and their location, the international character of the contract may be difficult to determine.

The final international aspect of the Convention is that it is applicable to all international cases. This means, firstly, that even if the parties to the transaction come from countries that have not ratified or signed the Convention, it

148. See Michael Bogdan: Svensk Internationell privat- och processrätt, Stockholm 1998, p. 256.
149. See further Ole Lando: Kontraktstatuttet – Danske og fremmede lovvalgsregler om kontrakter – Udenrikshandelsret 2(3rd ed.), København (1981), Jurisforbundets forlag, p. 291, Erik Siesby: Lærebog i International privatret – Almindelig del og formueret (2nd ed.), København (1989), Jurist- og Økonomforbundets forlag, p. 102.
150. See e.g. Ole Lando: Kontraktstatuttet – Danske og fremmede lovvalgsregler om kontrakter – Udenrikshandelsret 2(3rd ed.), København (1981), Jurisforbundets forlag, p. 291.
151. See e.g. Dicey & Morris: The Conflict of Laws (12th ed.), London 1993, Sweet & Maxwell, p. 3, where they define a foreign element as "...simply a contact with some system of law other than English law".

will be applied. Secondly, if the choice-of-law results in the application of the law of a non-signatory State, the Convention will still be applied.[152]

(c) The Hague Convention is limited to the sale of goods. As such, it seems intended to embrace only physical goods. In the Convention report[153] there is a discussion concerning if the term "*merchandise*" (merchandises) should be used instead of the term "*objects de matiere corporels*" (goods). In light of the purpose of the Convention, namely to find a common field all nations could agree upon and also be clear, the scope of the Convention was limited to goods. However, Article 1(2) excludes certain goods such as sale of securities,[154] ships, airplanes and sales by way of execution or otherwise by authority of law. In addition, contracts involving the delivery of electricity,[155] legal claims, sale of patents, trademarks or other intellectual property rights, are believed to fall outside the scope of the Convention.[156] However, in relation to e-commerce, the main question is whether digitised products fall fully or partially within the term "goods." As this is a question pertaining more or less all three Conventions, it is addressed in depth in section 4.5.

The scope of the applicable law indicated by Article 5 of the Convention has been limited to exclude among other things the capacity of the parties and the form of the contract. Consequently, the law governing the formal validity of the contract must be sought in other choice-of-law rules. For the countries adhering to the Rome Convention, this question is solved in Article 9 of the Rome Convention.

The Hague Convention can also be seen in light of the 1986 Hague Convention on the Law Applicable to the International Sales of Goods.[157] Due to

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152. See Joseph Lookofsky: International privatret på formuesrettens område (2nd ed.), København (1997), Jurist- og Økonomforbundets Forlag, p. 87.
153. See Morandiere-report, pp. 28-29.
154. However, the use of securities as a payment is included in the scope of the Convention. See Article 1(2) in fine and Ole Lando: Kontraktstatuttet – Danske og fremmede lovvalgsregler om kontrakter – Udenrikshandelsret 2(3rd ed.), København (1981), Jurisforbundets forlag, p. 291.
155. However, this can be questioned since Article 3 (b) of the 1986 Hague Convention on the Law Applicable to International Sale of Goods has included the sale of electricity. As the 1955 Hague Convention does not expressly exclude the sale of electricity and this assumed exclusion only has been made by legal theory, it is today likely that the sale of electricity is included in the scope of the Convention. This goes to show the dynamic possibilities of the Hague Convention, and could mean that digitised products are not excluded from the Convention.
156. See Erik Siesby: Lærebog i International privatret – Almindelig del og formueret (2nd ed.), København (1989), Jurist- og Økonomforbundets forlag, pp. 102-104 and Hans Petter Lundgaard: Om Internasjonale Kjøp, Tidsskrift for Rettsvitenskap 1965, pp. 168-176.
157. See http://www.hcch.net/e/conventions/text31e.html (November 1999), where the official English text of the convention can be found.

the limited adherence to the 1955 Convention, it was revised. The result was a Convention where consumer sales were excluded and the choice-of-law rules are determined more in relation to the rules of the Rome Convention. However, the 1986 Convention has until now (January 2001) only been signed by Argentina, the Czech Republic, Slovakia and the Netherlands and has consequently not entered into force. As for the EEA countries, it is less probable that they will adhere to the 1986 Convention due to its resemblance to the Rome Convention. However, the 1986 Convention may probably aid in the interpretation of the 1955 Convention.

Despite the small number of countries formally adhering to it,[158] the 1955 Hague Convention has a broad scope. The Convention is applicable to all types of international sales, only excluding consumer sales in all EEA countries adhering to the Convention (apart from in Norway).[159] As such, it is tempting to see the increase in international contracts after the Second World War in relation to the increase in cross-border e-commerce. The purpose of finding a common understanding, as precise as possible, for rules that are stable and certain, is as relevant now as it was then. In addition, since the purpose of the Convention was to be dynamic over time, the conclusion should be that this Convention could easily be adopted for e-commerce. However, there are still problems related to the applicability of the Convention in relation to e-commerce. The first problem is whether digitised products can be said to fully or partially qualify as "goods" in relation to the Hague Convention. The second problem concerns the relationship between the Hague Convention on one hand, and the Rome Convention and the United Nations Convention on Contracts for the International Sale of Goods (CISG) on the other. These are questions addressed in sections 4.5-4.6.

4.4 The United Nations Convention on Contracts for the International Sale of Goods

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was signed in Vienna on 11 April 1980,[160] and came into force on 1 January 1988 between 11 States. The CISG has been signed by 59 States and is still being considered by others. Within the EEA, there are fourteen Signatory States.[161] The CISG is an international uniform law, containing sub-

158. Only nine signatory States.

159. Though, it must be said that Norway is slowly changing its position, giving consumers more protection. This can be seen in the new Act on Financial Agreements (Finansavtaleloven), 25 June 1999 nr 46, whereby Article 3 gives consumers rights similar to those in the Rome Convention.

stantive rules. However, CISG is also a private international law Convention with roots in ancient Merchant Law and regard must be had to general principles of private international law.[162] There are six authentic versions of the Convention, namely Arabic, Chinese, English, French, Russian and Spanish.[163] It must be noted that the CISG unlike most U.N. treaties is a Convention among Nations that is binding once the legislature of a country adopts the Convention. Accordingly, the CISG is a part of each Signatory State's national law. The applicability of the CISG is determined by Article 1(1); that states:

> *"This Convention applies to contracts of sale of goods between parties whose places of business are in different States:*
>
> *(a) when the States are Contracting States; or*
>
> *(b) when the rules of private international law lead to the application of the law of a Contracting State."*

The Article sets out three conditions. The first condition (a) is that the contract concerns the sale of goods. The second condition (b) is that the parties must have their places of business in different States. And finally, (c) the third conditions, which has two alternatives, the Convention will be applied either (c-1) if the countries of the two places of business are in Contracting States, or (c-2) if the rules of private international law of the forum lead to the application of law of a Contracting State.

(a) The condition stating that the CISG is only applicable if the contract concerns a sale of goods is the substantive scope of the CISG. First, this must be seen in relation to Article 2(a) limiting the CISG to commercial activities and excluding consumer contracts.[164] Second, the scope is limited to sales, meaning that other contracts than sales contracts fall outside, such as contracts of option or intention. Contracts with suspensive conditions are, how-

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160. See e.g. Richard Schaffer, Beverly Earle and Filiberto Agusto: International Business Law and its Environment (4th ed.), Cincinatti-Ohio 1999, pp. 142-182, J.E. Bergem and S. Rognlien: Kjøpsloven – kommentarutgave til Kjøpsloven av 1988 og FN-konvensjonen om internasjonale løsørekjøp (2nd ed.), Oslo 1995, pp. 439-697 and Kai Krüger: Norsk Kjøpsrett (3rd ed.), Bergen 1991, pp. 467-480.
161. These are Austria, Belgium, Greece, Denmark, Finland, France, Germany, Iceland, Italy, Luxembourg, The Netherlands, Norway, Spain and Sweden. The non-CISG States in the EEA are Ireland, Liechtenstein, Portugal and the United Kingdom.
162. See Chapter 5 on the interpretation of the CISG, and its application of practical considerations.
163. If problems of interpretation arise between these versions, see Article 33(4) of the 1969 Vienna Convention on the Law of Treaties.
164. Furthermore, this can also be seen in relation to Article 1(1) of the CISG, demanding that the parties to a contract have a place of business. A consumer will normally not have a place of business.

ever, included. Finally, the contract must include the sale of goods. The CISG does not define the term goods although there are exemptions in Article 2 such as stocks, shares, investment securities and instruments evidencing debts, obligations or the right to payment and electricity. This could mean that the CISG only includes physical objects.[165] However, in relation to e-commerce, the main question is whether digital products, fully or partially, fall within the term "goods" applied in the CISG. As this is a question touched more or less by all Conventions, it is addressed in more depth in section 4.5.

In relation to the substantive scope of the CISG there are some limitations. One of the more important limitations is stated in Article 5, whereby the validity of the contract is not governed by the CISG. Of the Conventions in this thesis, is only the Rome Convention that governs the question of formal validity.[166] The result is that even if the CISG is applicable, other Conventions that will have to resolve the questions of the validity of the contract.

(b) The second condition is that the parties must have their place of business in different states. However, in order to have places of business in different states, there is a need to determine what a place of business is in relation to the Internet. If a website is to be considered a place of business, one will have to consider where it is located. According to Article 1(2) the CISG will not be applicable if it does not appear from the contract or the dealings between the parties that they have their places of business in different Contracting States. As such, the Official Records[167] states that the intention of this Article is to exclude situations where e.g. "...the parties appeared to have their places of business in the same State but one of the parties was acting as the agent for an undisclosed foreign principal".

In relation to the Internet, this could mean that the CISG is not applicable if the website does not clearly state where the place of business is located.[168]

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165. This notwithstanding that the sale of oil falls within the scope of the Convention, see Article 2 (f) of the CISG and J.E. Bergem and S. Rognlien: Kjøpsloven – kommentarutgave til Kjøpsloven av 1988 og FN-konvensjonen om internasjonale løsørekjøp (2nd ed.), Oslo 1995, p. 455.
166. See Article 9 of the Rome Convention.
167. See Official Records, pp. 15 and 238 where the Norwegian delegate, Mr. Rognlien said that if the paragraph 2 were deleted, that would mean that the Convention would apply whenever the parties were located in different States regardless of the awareness of the parties of the location of one another's place of business. This can lead us to the plausible conclusion that a website will only be considered a place of business if it clearly states its physical location.
168. Here it is important to distinguish between a website and a webpage. The webpage is one of several webpages of a website. The website will be the "shop", while the webpage, is the requested material sent to the buyer.

In other words, the anonymity of the Internet can result in the non-application of the CISG. However, this connection to a place of business, which is identifiable by a physical territory, is not necessarily the habitual residence of the party to the contract. If the party does not have a place of business, reference is made to his habitual residence.[169] The natural understanding of this is that a place of business is a physical location and, if not, this will be the habitual residence of the party. On the other hand, it has been suggested that a website or an Internet server could constitute an establishment according to Article 5(5) of the Brussels and Lugano Conventions on jurisdiction and according to Article 4 (2) of the Rome Convention on applicable law.[170] The European Court of Justice-case of Somafer v. Saar-Ferngas AG, has been quoted as a support for such an interpretation.[171] However, the e-commerce directive[172]points out that a technical means in itself cannot constitue an establishment. This means that a website in itself cannot constitute the establishment of a company, meaning that a company will not be able to conduct "forum shopping" within the EU by establishing the server in a suitable Member State. Instead, the legal establishment will be based on where the economic activities are actually carried out.

In my opinion, this leads to the conclusion that a website cannot constitute an establishment in itself. There has to be something else in addition. Such an interpretation will also prevent forum shopping, which is one of the aims of private international law. The result is that a webshop is not in itself a place of business, and if the shop only exists on the Internet, it's place of business in relation to the CISG will be considered to be the habitual residence of the party behind the shop.

(c) Article 1(1) of the CISG has an alternative condition. This condition is that the Convention will be applied either if the parties have their places of business in Contracting States, or if the rules of private international law of the forum lead to the application of the law of a Contracting State.

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169. See Article 10(2) of the CISG.
170. See Michael Bogdan: Svensk Juristtidning, 1998, pp. 825ff.
171. See European Court of Justice-case C-33/78 [1978] ECR 2183, a case interpreting "place of business" in relation to Article 5(5) of the Brussels Convention. In this case the court held that a place of business would have as criteria the possibility to negotiate and manage contracts, have an appearance of permanency and have a management.
172. See Directive 2000/31/EC of the European Parliament and Council of 8 June 2000 on certain legal aspects of electronic commerce in the internal market, Article 2 c, and in section 19 of the preamble.

> This means that if the other conditions are met and A and B engage in a contract, the CISG will be applied in two situations. The first is if both the countries where A and B have their places of business are also Contracting States to the CISG. The second situation is if only one or none of the countries where A and B have their places of business are Contracting States. Then, if the rules of private international law of the forum where they seek jurisdiction find that their conflict is to be governed by the contract law of a State that has signed the CISG, the CISG is applicable.

There is, however, an exception concerning the applicability of the CISG if it takes place between certain countries. According to Article 94, if two or more Contracting States have the same or closely related legal rules on contract law, i.e. matters governed by the CISG, they may declare that the CISG is not applicable when business takes place between these States. Until now only the Nordic countries have made such an exception. The CISG will not be applied in legal conflicts between parties with places of business in Denmark, Norway, Sweden and Finland.[173] In such situations, it is the Hague Convention or the Rome Convention that will have to be applied.

Accordingly, if the conditions in (a), (b) and (c) are met the CISG will be applied. However, the applicability of the CISG will depend on certain conditions. In relation to e-commerce and the sale of digital products, there are two main problems. The first problem concerns the determination of a place of business, mainly since the lack of clarity of where a website is located might, according to Article 1(2), result in the non-applicability of the CISG. This problem is not discussed any further. The second problem is the question of whether a digital product can be considered as goods. This is a question, which has also been addressed in the other two Conventions, and the question will be addressed for all Conventions below.

4.5 What are digitised products in relation to the sale of services and goods?

4.5.1 The problem of digitised products

The aim of this thesis is to determine how the cross-border sale of digitised products is determined pursuant to the three existing Conventions. However, two of the Conventions, the Hague Convention and the CISG, are limited to the sale of goods, while the Rome Convention is limited to the sale og goods

173. The declaration, in regard of Article 94, also states that the CISG will not apply when one party has its place of business in one of these four States and the other party's place of business is in Iceland. Icelandhas recently signed the CISG, and it will enter into force in Iceland in 2002, and therefore it is possible Iceland will take part in the Nordic declaration.

and services in relation to Article 5. The question that arises is, how digitised products are to be classified in relation to the terms: goods and services. This is the problem addressed in this section.

Services and goods are not difficult to distinguish in the analogue world, even if the two sometimes are combined. When the same services and goods are ordered over the Internet, the same principles will be applied. However, problems arise when the products that previously where analogue become digital. As already explained, the term "digital product", means that the buyer receives bits on his computer, mobile phone, pda (personal digital assistant) or other technical device, in virtue of an agreement or contract with the vendor. The bits received will, when they reach the buyer, manifest themselves in different manners. Some of these products become difficult to classify. Formerly physical goods, like music CDs and books that are digitised and thereby looses their tangibility, are good examples. On the other hand, one has for example radio programs that are normally considered services, but when they can be stored on a harddisc, they achieve a presence that has a sort of physical presence. Are they then still services, or have they become more like goods?

The determination of digital products in relation to services and goods should, in order to be most correctly, be determined separately in regard to the actual term in the respective Convention. However, as all three Conventions apply the same term for tangible property – "*goods*", and as this is not a study in comparative law, I will interpret the term goods in the similar way in all Conventions. The reason is that: first, at the time of creation of any of the three Conventions, digital products were not known. Second, because all three Conventions are mostly the result of European legal work and within Europe there is a common understanding for private international law. Finally, because there is a presumption that the EEA countries have an interest in establishing a common approach to this legal problem, especially in relation to a common interpretation of the European Court of Justice (ECJ).

> One could question whether the interpretation of digital products is really a question of characterisation (or classification) of a legal field in private international law.[174] The problem of characterisation is the one determining which judicial concept or category is appropriate in any given case. Without going to deep into the question, I consider the question of the determination of digital products as being a question of contract law whether digital products are services or goods, thus nor being a question of characterisation but interpretation in the catergory of contracts.

174. See Dicey and Morris, The Conflict of Laws, London 1993, pp. 34-47. The term "classification" is used in this thesis, but it is only here I treat the problem of classification special to private international law. Other places, the term is to be interpreted as it is normally used.

4.5.2 Is the transaction of a digitised product really a sale?

This thesis is limited to the sale of digitised products. It is, therefore, a requirement that the transaction of the digitised product is classified as a sale. This is also a requirement according to the Hague Convention and the CISG. Accordingly, the question asked in this section is, whether the transaction of a digitised is a sale.

The report from the Seventh Session of the Hague Conference on Private International Law states that: "*des termes tels que 'ventes' sont interprétés de la même facon dans les differents pays*" (my translation: "the terms like 'sales" are interpreted in the same fashion in the different countries").[175] The term sale, however, is not defined. One of the reasons for not defining it was that sale was considered to have a common understanding. The Report on the Conference leading to the CISG, discusses different varieties of sale and makes exclusion as to the sale of services of labor. However, the term "sale" is not treated either. Legal theory considers that the term 'sale' has four conditions:[176] the transfer of the ownership to a valuable (e.g. real property or tangible) against recompensation. The recompensation is typically money, while the valuables in this case are the digital products. However, the question that arises is whether the on-line delivery of digital products can be considered a conveyance of ownership.

The reason for this question is that many digital deliveries, such as computer programs, are being downloaded and the conditions set out are often entitled as license of user agreement. Therefore, they could be classified as conveyance of partial rights rather than of ownership. At least one author has argued that on-line deliveries of digital products like computer software (computer programs) should be considered as the conveyance of intellectual property rights to an intellectual work.[177] There are several reasonable arguments for this point of view, but mainly the fact that a computer program has no value in itself but rather as an entity that can be copied and then distributed. The end user or buyer of the computer program will then have to copy the product onto his computer in order for it to be used. The main right is therefore the right to copy which is an intellectual property right.

However, in relation to contractual obligations and the e-commerce contract, there is a need to determine the nature of the transaction which actually takes place. Suffice it to say, that the transaction is a contractual obligation.

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175. See Morandiere Report (Actes de la Septième Session de la Conference de la Haye de Droit International Prive), p. 19.
176. See Kai Krüger: Norsk Kjøpsrett (3rd, ed.), Bergen (1991), pp. 1-3.
177. See e.g. Jon Bing: Merverdiavgift og EDB, Oslo (1990), TANO Complex 9/90. However, Bing treates the relationship between computer programs and taxation, and not private international law or contract law.

First, as long as the person downloading the product accepts the conditions, the acceptance of the conditions will most likely constitute a contractual obligation. Second, another reasonable opinion is that even though the conditions are entitled license, as long as there is a compensation for the conveyance of ownership[178] of the digital product, there is a sale. It is the nature of the contract between the parties that determines whether the contract constitutes a sale, or not. Even though a digital delivery includes several intellectual property rights aspects, such as depriving the buyer of rights to copy or even re-sell the digital product, the nature of the contract may still be seen as a sale. This is due to the fact that the nature of the digital product delivered will often have the essence of a sale. An example is the digital delivery of a computer program leased out for five years with no rights to re-sell. However, the program is intended for the company's individual production and will be outdated in five years. Even if such and agreement is entiteld license it is really a sale. Accordingly, the question in relation to the three Conventions is whether the sale can be considered a sale of goods or services in relation to the Conventions (i.e. goods or services)[179]– in other words what is being sold?

4.5.3. The classification of digitised products in relation to goods

The first question is whether digitised products may be classified under the term "goods". The term is mentioned in all three Conventions. As a general perspective the terms of each Convention should most correctly be determined individually. This will be done to some extent in the following sections.

The Rome Convention is generally not limited to any other legal fields than the one of contractual obligations. However, Article 5 (concerning consumer sales) is limited to "the supply of services or goods". The two other Conventions are limited to only goods. The question that arises is whether digitised products can be embraced by any of these terms. The Rome Convention is applicable to both services and goods, implying that there is no need to make any further distinction. The Convention is also meant to improve the "...proper functioning of the common market...".[180] As a result, the Report

178. The ownership of a digital product may be discussed in it self, but if an example of the digital product is transferred to the buyer, he will always have some ownership of at least the one example. On the other hand, the ownership is limited, since the buyer normally cannot make as many copies as he likes and sell these new copies.
179. See Ellen-Kathrine Thrap-Meyer: Forbrukerkjøp og EDB, Oslo (1989),CompLex 5/89, p. 17.
180. See Giuliano-Lagarde Report, p. 5.

on the Convention does not pursue further the definition of these terms.[181] The consequence is that digitised products fall within the scope of the Rome Convention.

The Hague Convention adopted the term "d'objets mobiliers corporels" - "*goods*".[182]The French wording gives an idea of a need for physical presence. In other words that the sale has to include a tangible. However, it is difficult to determine the physical presence of a digital product. Consequently, this could lead to the conclusion that digital products are excluded from the scope of the Convention. The Convention does not offer any further explanation of the term. There was, however, a discussion of this term during the session of the Hague Conference in 1951 leading to the Convention.[183] An abstract general formula was preferred to an enumeration of all the objects of the Convention, due to the fact that an enumeration would never be complete and could therefore not be dynamic in time. The conference preferred a general term, but excluding certain goods. The discussion also raised the question whether the term "merchandises" [merchandise] was to be preferred to "goods", but the former term was found to be too imprecise, and the term "goods" was preferred. This goes to show that the idea behind the Convention was to find a term that would be dynamic, but at the same time as clear as possible. If uncertainty was to exist, it was better to exclude these problems and find a common platform for the Signatory States. It is, therefore, plausible that where there is uncertainty as to if the contract concerns the sale of goods, the Hague Convention will not be applied, due to the demand for clarity.

As for the CISG, its application is also limited to the term "goods". During the conference leading to the CISG there was a discussion whether to include services in the scope but this was rejected.[184] For those products involving both a tangible and a service, the delegates stated that one should examine which element had greatest value and make a classification accordingly. This leads to the understanding that the conference considered that all commercial activities would consist of the buying and selling of either goods or services. The CISG has also a general abstract definition, together with

181. It has to be noted that there is a distinction between services and goods in Article 5 (2) last alternative, where only the sale of goods are included. However, this is a special situation where the consumer has to travel to the country of the buyer, and the travel is arranged by the buyer, and then the consumer can place his order. This is a rather unlikely scenario for electronic commerce.

182. My translation of this term would have to be: "moveable and physical objects", but which probably is better defined as "goods" in English.

183. See Actes Doc. La Haye, Septième Session, pp. 28-29. The discussion lead by Mr Gutzwiller (Switzerland) established that there are two solutions in finding a proper term: either a precise enumeration of the objects of the Convention or an abstract general formula.

184. See Official Records, p. 242.

exceptions from the term "goods", and not an enumeration.[185] In the preparatory works of the CISG,[186] the term "goods" has not been more closely clarified in relation to services that are generally excluded.[187]Interesting in relation to e-commerce, is that the CISG includes the sale of oil while electricity is excluded. Oil has both a physical presence and a non-physical presence in since oil is mostly fluid. One can, therefore, conclude that there are borderline areas to the term goods in the CISG, which do not principally exclude non-tangible goods. As a consequence, digital products could be said to exist in this borderline area.[188] A plausible solution would, therefore, be to examine the nature of a digital product and see if it "fits" under the term of either "goods" or "services".

The examination of the three Conventions indicates that the term "goods" seem to have an in-built requirement that "goods" must be physical objects, i.e. tangibles. Accordingly, it seems that since digitised products are not normal tangibles, they will not be considered goods. On the other hand, the Conventions do not exclude digitised products and the question is whether the term "goods" have a borderline area whereafter products similar to goods may be considered goods. There are several reasons for adopting such an approach. First of all, since digitised products did not exist at the time when the Conventions were written. Another reason reason is that digitised products do have a type of tangibility since they are limited and clearly defined. A computer program consists of a specific number of digits (bits) which does not change. When this number of digits is downloaded onto a computer one will have the program, meaning one computer program in one piece located at the computer. It is not like electricity where one cannot actually determine a specific amount in a specific place since it is fluent. The consequence is that is seems reasonable for certain digitised products to fall within the legal term "goods". However, the limit between those digitised products that do not fall within the term "goods" and those who do, has not been found.

185. The exceptions of the CISG are not the same as for the Hague Convention, something which can create some uncertainty. This disharmony will most probably be resolved in practice in the way that the CISG and its scope will gain precedence over the Hague Convention. If the contract does not concern "goods" after the CISG, the scope of the Hague Convention must be examined, and finally, it is the Rome Convention that may be applied.
186. I.e. the Official Report.
187. See Article 2 d of the CISG.
188. See Hannold: Uniform law for international sales (3.ed.), Hague (1999), pp. 51 and 55.

4.5.4. Classification of digitised products in relation to services

If digitised products are not considered to fall within the term "goods", one will have to ask whether they will fall within the term "services". This is because the nature of a digitised product is very similar to a service. For example the access to one's own bank account through the Internet is a typical service – instead of going to the bank and demand the service one applies the Internet. Another reason of examining whether digitised products could be considered services is that the transfer of data has often been characterised as a transfer of information and the transfer of information (e.g. in the form of a report) has often been considered to be a service. Finally, in order for the application of Article 5 in the Rome Convention to be applied, there is an alternativ criterion that a supply of services has taken place. If this criterion is not met, the consumer may not be granted protection after Article 5. Moreover, if a digitised product is classified as a service, the Hague Convention and the CISG is not applicable.

Whether digitised products are to be considered services, have been addressed in the field of taxation law in the context of Value-Added Tax (VAT). For VAT purposes it is of particulary importance to distinguish between goods and services. The Sixth Directive on VAT[189] stipulates different rules to determine where the taxation is to take place. These rules depend on the type of supply, i.e. whether it is supply of services or supply of goods. Hoeren/Kabisch conclude that digital deliveries are supply of services.[190] This conclusion is based upon the fact that Article 9 para. 2 litra e) of the Sixth Directive defines so-called "*intangible services*" as transfers and assignments of copyrights, advertising services, data processing, the supplying of information and several personal services. Accordingly, this should mean that digital products, due to their intangibility and sometimes nature of information, are considered to be services. Such an approach is also supported by the communication from the European Commission, stating: "*A supply that results in a product being placed at the disposal of the recipient in digital form via an electronic network is to be treated for VAT purposes as a supply of services.*"[191] This is also in harmony with the conclusion reached by the OECD Committee on Fiscal Affairs, stating that: "*the transfer of digitalized products should not be treated as the supply of goods*".[192] The OECD Ministerial Conference in Ottawa adopted the same view.[193]

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189. Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes, O.J. L 145 13/06/1977 pp. 1-40.
190. See Thomas Hoeren/Volker Käbisch: Research Paper – Taxation, E-CLIP Draft Deliverable 2.1.1, http://www.jura.uni-muenster.de/eclip/default.htm (July 1999).
191. See European Commission: Electronic Commerce and Indirect Taxation, COM (98) 374, page 5, guideline 2.

Should a conclusion be drawn from the approach in taxation law, it would be that digitised products are to be considered services in relatin to private international law.

However, the approach in the field of taxation is not necessary applicable in other fields of law. In relation to VAT one reason for adopting strict rules is to have clear rules as to what is to be taxated and where. Goods are the objects of VAT when they physically arrive at a country's border, while digitised products are not as easy to detect. In addition, taxation across borders is in my opinion, really a question of politics and concerns a country's souvereignty. This is because these are economical questions to which countries must adopt a clear approach. In the field of contract law and private international law, such reason are not present since the State is not present. Legal questions related to the the contract is a question between two or more private parties. Accordingly, the approach adopted in the field of taxation is not directly adotable in the context of this thesis.

Another interesting point in the field of taxation is that even though it seems that digitised products should be considered services pursuant to the Sixth VAT Directive, the same Directive shows that some non-physical objects (including electricity and gas) can be considered goods in relation to Article 5(2).[194] This underlines that a product, to be considered a good (for example tangible property) does not always have to be directly physical. The US-case of South Central Bell Telephone Co. v. Barthelemy, et al[195] shows, although only being an example and not an important source of law, that computer programs could be considered goods and that the medium of transmission, i.e. the Internet, did not matter in the classification. These are all examples of non-physical products that are considered goods, and which show that it is not always a condition for a product to be physical in order to be considered a good.

Making a distinction between services and goods on one hand, and digital products on the other hand can also be found in the field of intellectual property rights. This basic idea is based on the fact that each piece of merchandise sold has always an element of intellectual property right in it. According to Bing,[196] using the example of computer programs in relation to VAT, the actual sale will consist of the buying and selling of information and not a

192. Electronic Commerce: A Discussion Paper on Taxation Issues. September 17, 1998, p. 20. http://www.oecd.org/daf/fa/e_com/discusse.pdf.

193. OECD Committee on Fiscal Affairs: Electronic Commerce: Taxation Framework Conditions. 8 October 1998, p. 7. http://pdf.ottawaoecdconference.com/english/c143e.pdf

194. Article 5(2): " Electric current, gas, heat, refrigeration and the like shall be considered tangible property." Article 6 of the Norwegian Criminal Act includes expressly electricity, gas and heat under the legal definition of goods in this Act.

service or any other tangible product. This transferred information includes the right to use the program, limited by intellectual property rights. Bing claims that these digital deliveries are neither services nor goods, but rather another type of merchandise represented by their connection to intellectual property rights and lack of connection to a physical element or service.[197]

Such an approach is interesting in relation to digital products if one considers that in order for a digital product to be expressed, e.g. on a screen through the computer, there are actually copies which have to be made in the computer's harddisc and/or the RAM. The result is that the purchase of a digital product is not really the purchase of a single copy,[198] but rather the purchase of information in a digital form as a non-tangible product. Accordingly, this purchase will be the purchase of a service and not a tangible product. The consequence is that the approach to digitised products from an intellectual property rights perspective is a support for considering that digitised products are services.

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195. South Central Bell Company Co. v. Barthelemy, 643 So.2d 1240, from the Supreme Court of Louisiana, 17 October 1994. The case concerned a regional telephone company that brought action to recover municipal sales and use taxes paid on switching system software, data processing software maintenance services. The main question concerned the application of property law concepts in determining whether something is "tangible personal property" subject to municipal use tax. The court held that the software was "tangible personal property". In addition, the court was very thorough in its determination, also examining other US-cases dealing with the same classification of computer software in relation to "goods" and tax puposes. This examination shows a tendency that computer programs now are considered goods (corporal), while they used to be considered services (incorporal). However, it must be mentioned that the USA has recently changed its legislation in the UCC §2b, where the USA previously included computer programs as goods, while this has now been changed. Computer programs, together with other computer information, are governed by new legislation in the Uniform Computer Information Transaction Act. This portends the emergency of a new "type" of product. However, this Act is a sort of lex specialis, and in Europe, it is my opinion, that we will still have to qualify digital products as either services or goods.
196. See Jon Bing: Merverdiavgift og EDB, Oslo 1990, CompLex 9/90, pp. 35-54.
197. Another support for this approach can be found in Mads Bryde Andersen, EDB og Ansvar, København 1989, pp. 323-324.
198. The need to copy and the possibliy to copy digital products has resulted in the argument that digital products are not unique and single products. Thus, they cannot be individualised and considered as a sale of one product. However, the technology has elaborated methods of giving digital products individual numbers, so to identify them. The result is that a digital CD may be sold with e.g. a watermark and product number which makes it impossible to copy, and will resemble the physical CD sold in a shop.

In my opinion and in relation to e-commerce, this is a far too technical approach, that does not take into account that these digital products constitute a commercial product[199] for buying and selling, with a need for contractual provisions for the vendor and the buyer.[200] In these situations it is not only the information that is transferred but rather the ownership to use of the digital product, and this is the important part for the buyer. The importance is to distinguish between the single product and the intellectual property rights to it.[201] In the Norwegian case of *DNB v. Økonomi og Regnskap AS*, Rt. 1992 p. 1629, the court had to determine whether a computer file of customers could be considered a mortgage in relation to the Mortgage Act, Article 3-4, and its definition of mortgage property.[202] The majority considered that the computer file of customers did have an element of intellectual property right, which could deprive the file from being a good. However, the important fact was that this was a computer file, which traditionally had the same function as if the physical archive of customers and the purpose of the archive was to be a central and exclusive good for the company.[203] This shows that digital products, in this case a computer file of information, must

199. These digital products will either be directly consumed like a service (e.g. the streaming of music) or stored on a hard disk where it has a certain physical presence (e.g. the downloading of music).

200. It can also be noted that Bing touches upon an interesting point when claiming that the legal classification should not be connected to the question whether the sales product is stored on a physical medium or not, in relation to computer programs he writes: "man bør holde fast ved at når man anskaffer et datamaskinprogram er det knekkende likegyldig hvordan programmet blir kommunisert til brukerens anlegg". In my translation: [one should maintain to that when one obtains a computer program it is completely indifferent *how* the program is communicated to the user's processing unit]. I agree with Bing on this point, however, in the sense that, if the product is a service, it should stay a service even though it is communicated by the Internet. Bing, on the other hand, applied this to determine that digital bits are information, and not "goods" in the field of taxation law. See Jon Bing: Merverdiavgift og EDB, Oslo 1990, CompLex 9/90, p. 26.

201. See Olav Torvund, Kontraktsregulering – IT-kontrakter, Oslo 1997, pp. 142-143, where he makes this distinction, where he emphasises the ownership to the single example of the product, with rights as destroying it, e.g. deleting the computer program, but where one should of course not forget the intellectual property right connected to the product.

202. See the Article 3-4 of the Norwegian Mortgage Act (Lov om pant av 8. februar 1980 nr. 2) referring to "driftstilbehørspant" – which I translate as mortgage property of goods for business purposes.

203. Judge Aasland, delivered the first opinion, held that the archive of customers was an exclusive good, which could not be copied and spread to competitors. In addition, it is to be noted that the opinion also said that all intellectual property right that could constitute a mortgage was positively included in the Mortgage Act, and if this archive was to be considered an intellectual property right, it could not be considered a mortgage.

be considered in relation to the actual field of law and it also goes to show that digital products may be considered as physical goods.

Finally, one may conclude that digitised products will in many cases be classified as services. An important reason is that the delivery of bits over the Internet has many similarities with a service. For example the access to a newspaper's website, where the webpages are actually sent to the subscriber's computers and shown on his screeen. The information accessed is a service, namely the gathering of information in a certain way and sold as a service. However, not all digitised products can be considered services. The purchase of a string of bits may have the function of a tangible product and therefore be a good. The limit between digitised products that are services, and those that are goods, is therefore not evident.

4.5.5. Why digitised products will be either services and goods

From the previous sections one can gather that the term "digitised products" has a broad meaning. It includes many different products where some may be services, while others are goods. Since the specter of digtised products is so broad one might ask whether digitised products also could be classified as another type of products.

An example is if one considered digitised products to neither be services or goods, but the pruchase of an intellectual property right. If a book is digitised, it is no longer connected to the paper it originally was written on, and one does not have the right to the book as an object but the story it tells. An important part of such a purchase is the rights to the intellectual property. However, in my opinion this is not a valid argument. The purchase of any product has always an aspect of intellectyal property which most often has limits as to the rights one has over the purchased product. But it is the puchase of the service or good as such products, which constitutes the central right. If one considers the purchase of immovable property, the main aspect of such a contract is the house and the actual land. However, if the access to the property is over the neighbour's land, the purchase also includes a partial user right. This partial right is a part of the purchase, but this does not make the purchase of immovable property a purchase of partial right as a general point. Another example is the buying of products with limited owner rights, something which is not uncommon. When physical or legal persons buy products together, i.e. a partial ownership, there are limitations on selling the product and limitations on the free use of the product. When someone purchases a large product, like a ship or real estate, there is often a mortgage connected to the purchase. Therefore, there are limitations on the ownership and on selling these goods. The conclusion could therefore be that a limitation in ownership

reduce a product's character as a good or service. Consequently, a purchase of a digital product may include other rights than the ownership of the digital product, but this does not reduce the purchase's aspect as being the sale of a product rather than a sale of intellectual property rights.

One could also claim that a digital product will always include aspects of intellectual property rights on one hand, and either a service or good on the other. The two parts should not be confused. For example, a consumer buys an Alessi product in a store, thus the purchase of a single tangible product. For the consumer, it is the use of the product that is central element. The rights preventing reproduction probably do not interest the buyer.[204] However, if a company purchases the rights to manufacture this Alessi product, they buy the full or limited intellectual property rights from the creator, they do not in fact buy a single and physical product. It is, therefore, not the transfer of information that is legally interesting in relation to the contract, but rather the function of the digital product transferred. For example, the function of a computer program will be its ability to run applications on the computer, while the music file has a function of expressing music. The consequence is that the arguments of claiming that a digital product, e.g. a computer program, is information rather than a good or service may be valid in the field of intellectual property rights. However, the approach of the field of intellectual property rights cannot be applied to the field of contracts in private international law, where there are other interests and needs for both buyer and seller. A final argument, why I do not consider that a digitised product can be considered a product of intelllectual property rights, is that the rights to intellectual property cannot in itself be digitised. These rights are abstract rights which can only be expressed in products sold as services or goods.

Another approach could be to consider purchases over Internet such as the purchase of stocks, securities or obligations as a purchase of digitised products. In my opinion, such purchases are not digitised products since the purchases result in the aquisition of rights which are not in themselves digitised. The use of the Internet, foe example offered by a bank, is a service.

The consequence is that it seems that digitised products only can be classified as either services or goods.[205] So, why should digitised products be either services or goods? One reason is that in a commercial perspective, hereunder also contract law, there are certain legal needs, for example giving the parties predictability and certainty as to the rights connected to a commercial transac-

204. Of course, one could argue that a physical product like an Alessi product, cannot be copied in the same way as a digital product. However, this is not the point, one could even imagine in a future society that products can be composed and decomposed into single atoms by computer, which would mean that every product could be duplicated.

205. Unless a new category , that of digitised products, is introduced.

tion. Therefore, the approach taken by taxation and intellectual property rights cannot be applied in the same way. In Community law, the approach to the terms "goods" and "services" has been discussed by the European Court of Justice (ECJ) in relation to the Treaty of Rome. The ECJ has stated that supply of "goods and service", as a point of departure, is to cover all types of commercial activities. In most of the relevant cases, the court has classified the commercial activity as being a supply of services. However, the central point is that the ECJ emphasises that if someone engages in commercial activities of buying and selling products, this will either be the buying and selling of goods or services. Therefore, these products must fall within the scope of Article 59 of the Rome Treaty, demanding the free movement of goods and services.[206]

To conclude; as a digitised product is sold as part of a commercial activity, it will be considered to either be a service or good in relation to contractual obligations and within the EEA. The is because the parties have a legal need to regulate their commercial activities, and this legal need is best sought by applying the rules governing commercial activities for the supply of either services and goods.

4.5.6 How digitised products can be distinquished

In this section I will try to elaborate how digitised products may be distinquished into either services or goods.

4.5.6.1 A sliding transition between services and goods

The conclusion so far is that there is a problem determining which types of digital products are to be considered services and which are to be considered goods. In legal theory authors often discuss a special type of product e.g. computer programs, while on-line products consist of a variety of products. Consequently, there is a need to determine the criteria and conditions for determining this problem. The difference between digital services and goods is not a strict border but rather a sliding transition, where one has to examine the considerations, purposes and character of each digital product individually. In the preparatory works on the CISG and its report, the *distinction* between services and goods is addressed.[207] It shows that a sale will often involve many parts and that one has to examine the sale as a whole and deter-

206. A representative selection of cases is Tv10 v.Commessariaat voor de media, ECJ case C-23/93 (ECR I-4795), Svensson v. Ministre du logement et de l'urbanisme, ECJ case C-484/93 (ECR I-3955), Societe civile Parodi v. Banque Albert de Bary, ECJ case C-222/95 (ECR I-3899), Luisi v. Ministero del tesoro, ECJ joint cases C-286/82 and C-26/83 (ECR I-377), Society for the Protection of Unborn Children v. Grogan, ECJ case C-159/90 (ECR I-4685), Her Majesty's Customs and Excise v. Schindler, ECJ case C-275/92 (ECR I-1039).

mine the "substantial" part of the sale.[208] This leads me to the conclusion that when determining whether a digital product is a good or a service, one has to see what the substantial part of the sale is, together with the product's character.[209] Support for this opinion can also be found in the ECJ case *Faaborg-Gelting Linien A/S v. Finansamt Flensburg.*[210] In the case ground 12, the court held that:

> *"In order to determine whether such transactions constitute supplies of goods or services, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features."*

The court goes on to determine that a restaurant transactions have a "*largely predominant*" component of services, being "*features and acts*".[211] This goes to show that when determining whether digital products are services or goods, the ECJ probably will seek to identify the substantial characteristic of the supply. Moreover, when the purchase of a product is substantially a continuous process over time (although limited), e.g. acts and features, the delivery is more of a service. While if the service has a physical presence and involves a purpose of acquisition of a product which can be sensed and that is other than a continuous process, it will probably be more related to a good.

One argument against applying a method where one has to seek the characteristic function of a digital delivery is that such a method will lack predictability. However, there is certainty since the product will either be a service or a good. In addition, this will most probably be the most precise method and in addition have some flexibility. It is also a method often applied by courts when determining whether a physical delivery is a service or good, when

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208. See the Norwegian preparatory works on the Norwegian Sales Act and the ratification of the CISG, Ot.prp nr. 80 (1986-87), pp. 48-49, which amongst others refer to the Nordic preparatory works on the CISG, NU:1984:5, p. 197. This shows that the Nordic countries (Denmark, Finland, Norway and Sweden) have adopted a relatively similar approach to the interpretation of goods and its limits to services, i.e. a sliding transition depending on a individual determination in each case and taking into account the part (goods or service) with the largest value. This is to be the "substantial part".
209. See Krüger, Norsk kjøpsrett, p. 7, where he states that the border between services and goods is not clear.
210. European Court of Justice case C-231/94, ECR 1996 I-2395. The case concerned whether restaurant transactions consisting in the supply of food for consumption on the spot was the supply of goods or services in relation to Articles 5 and 6 of the Sixth VAT Directive (77/388/EEC). The transactions were considered not goods in relation to Article 5, but supply of services in relation of Article 6 of the Directive.
211. See case ground 14 of the case, European Court of Justice case C-231/94, ECR 1996 I-2395.

there is a service included.[212] Also, such a method will follow the tradition in private international law of a "closest connection-method".[213]

4.5.6.2 The objective function of a digitised product

In order to make a distinction between services and goods, one will need to understand the difference between traditional services and goods.

A traditional understanding or definition of the term "goods" cannot be found in any of the Conventions. However, it can be found in the substantive Sales Acts of the different EEA countries. In the Norwegian and Danish Sales Acts, the term "goods" [løsøre] has not positively included the objects.[214] However, the preparatory works to the Norwegian Sales Act seem to indicate that all movable and physical properties are included in the terms goods, only limited by other groups of rights.[215] However, in both Norwegian and Danish legal theory, computer programs are with some exceptions believed to be included in the term goods.[216] Accordingly, it seems that at least some digitised products may be included in the term. In addition, the term "goods" does not seem to have one clear definition, but has a rather variable content and meaning. Consequently, if some conditions for qualifying under the term "goods" should be stated, it seems that both the Sales Acts and Conventions consider that goods are objects or products with a certain stability and possibility to be felt or identified without confusion. The question is what these conditions are.

Considering that the main characteristic of a good is its aspect of stability, one might ask whether digitised products have any stability at all. Digitised

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212. E.g. if someone orders the painting of their ceiling with gold painting, and the gold painting has a much larger value than the work of painting the ceiling, it is possible that the "package" or services and goods will be considered to be mainly a delivery of goods. See Official Records of the CISG, p. 242.
213. For more on the closest connection method, see e.g. the choice-of-law rule in Article 4 of the Rome Convention, also treated in the next chapter.
214. See Karnov, Norsk Kommentert Lovsamling III, Oslo 1996, p. 2485, where it is stated that this is done in the Norwegian and Danish Acts, while the Swedish and Finnish Acts have such a positive statement of what types of goods are included.
215. These other groups of rights are immovable property, legal claims (e.g. stocks, shares, investment securities, negotiable instruments) or immaterial rights (e.g. patents and intellectual property rights). This can be drawn from the both the Norwegian Sales Act itself (Lov om kjøp av 13.mai 1988 nr 27) by the use of the substantive tangible [ting], e.g in Article 1(2) and e.g. the preparatory work to the Immovable Property Sales Act, Ot.prp. nr. 66 (1990-91) pp. 23-25 and 61-62 making a positive limit to goods.
216. See [Norwegian] Karnov, Norsk Kommentert Lovsamling III, Oslo 1996, p. 2485 and [Danish] Karnovs lovsamling (15th ed.), København 1999, p. 4065, where there is a reference to Nørager-Nielsen, Edb-kontrakter, København 1987, p. 29. However, Mads Bryde Andersen, Edb og Ansvar, København 1989, p. 320 claims in relation to the Danish Sales Act that computer programs and other "information" products are excluded.

products appearing on a screen are copies being made in the cache memory of the computer (as a result of a downloading or streaming). Since these products are easy to copy, one could say that the products are not stable and not easy to identify as single objects. On the other hand, a copy on a harddisc is a relatively safe way of storing products. A digitised book will not deteriorate on a computer's harrdisc or on a CD-ROM, while the same book in paper version probably will deteriorate in a bookshelf. Moreover a book on a harddisc has today also the posibility of being individualised with a unique production numbers and prevented from being duplicated, e.g. SoftBook. The result is that a digitised product with possibilities of being stored and individualised has a stability which gives it a factor of being a good.

Services on the other hand has not been addressed in the Conventions, apart from in the preparatory works of the CISG, which makes a distinction from goods delivered together with labor. However, the approach by the Norwegian Acts governing the commercial activity of supplying services,[217] seems to indicate that the term "services" is considered as a duty or work rendered by one person to another. Accordingly, it seems that an important characteristic of the supply of services is that it is a process where there is a certain activity that takes place. Accordingly, a digitised product which is delivered to a buyer which can be seen as a single presentation, e.g. streaming of a concert, will have an aspect of a process and activity which makes it more like a service than a good. This activity stands in contrast to the stability of the good.

The conclusion, determining the natural understanding of the terms "goods" and "services", is that some digital products may qualify as services and some as goods. The sliding transition will at one end be the good; traditionally characterised as a stable and individually storable product. On the other hand, the service will typically be characterised as a process or activity taking place. These two points of extremity mark the objective functions that a digitised product may have and which may serve as a guideline when determining the classification of the digitised product.

4.5.6.3. The subjective function of a digitised product

A factor, which may have relevance when decideing whether a digitised product is a service or good, is the digitised product's function or character to the one in possession of it.

An important function or character of the digitised product is its function in relation to whether it can be sold or experienced several times. A digital product that cannot be resold or reexperienced[218]is more likely to be consid-

217. See e.g. The Norwegian Act for Certain Services Rendered to Consumers (Lov om håndverkertjenester m.m for forbrukere av 16.juni 1989 nr. 63), see e.g. Article 2 making a distinction to goods.

ered a service, due to its lack of constant value. While the purchase of a CD is a clear physical object and, therefore, a typical tangible, the music delivered digitally, in real time, and only playable once, like with the program RealPlayer[219]is more likely to be considered a "service". In many ways it is consumed and ceases to exist, like a TV- or radioshow. However, if the music file is downloaded onto the computer's harddisc, it will remain as a product with a certain value, and the owner will have a certain ownership where he may also sell the file. In this case, one could say that the product is more a good than a service.[220]

An example of a product's function can be found in the decision of the Californian Supreme Court, 28 November 1994 between *Navistar International Transportation Corp and State Board of Equalisation.*[221] The court held that trade secrets embodied in documents are taxable as tangible property and not as a service in relation to Californian law. The court ruled that the documents containing trade secrets on an engineering specification were tangible property since the "true object" of the transaction involving the sale of these documents was the sale and acquisition of documents for "*their own sake*" and not incidental to the performance of a service. Californian law defines tangible property as "*personal property which may be seen, weighed, measured, felt or touched, or which is in any manner perceptible to the senses*". The interesting condition, applied in the ruling, is that the sale has as purpose the acquisition of the documents, which also might have been bits. This could mean that if the purpose of a sale is to obtain a valuable product, even if it is information, it could be considered a good. However, this case may only serve as an example or a source of law with practically no legal value. On the other hand, a similar solution and far more relevant case can also be found in a decision of the Norwegian Supreme Court in the case of *DNB v. Økonomi of Regnskap AS.*[222] In this case, it would seem that a digital product, a computer file of customers, which has a function of being a valuable entity for the owner and over which he intends to retain exclusive rights of ownership, hereunder also use, is more likely to be considered a good.

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218. Reexperienced in the sense of being able to listen more than once to a piece of music.
219. See http://www.realplayer.com.
220. In Hanne Bender, EDB rettigheter, København 1998, pp. 301-302, mostly the same approach of finding the character or the digital product is adopted. She also claims that a digital product with mostly information value will be considered a service, while a computer program will mostly be a good.

4.5.6.4 Legal theory and substantive law

In legal theory related to international commerce, the problem of digital products has been neglected or only addressed briefly and in general terms.[223] An exception is Mads Bryde Andersen,[224] who claims that computer programs, in relation to the Danish Sales Act, are not "goods" since the major element of computer programs are their immaterial rights[225] by having mostly a "communicative element". Applying this reasoning to on-line delivered products, the immaterial rights are even larger since the computer programs are not delivered on computer discs. In addition, Bryde Andersen also states that immaterial rights lack the possibility of being effectively retained since the product is easy to copy. However, this is contested by Ellen-Kathrine Thrap-Meyer[226] who claims there is no condition for the "good" in the Norwegian Sales Act that it has to be restituted. This is supported by preparatory works and legal writers referring to know-how and good-will being considered as goods.[227] Secondly, Thrap-Meyer claims that computer programs can be restituted and that those who contest this have a fear of mass copying, but that the possibility to copy digital products (computer programs) must not be confused with the question of restitution. I agree with this since it is especially true for on-line deliveries that can be individualised with technical solutions, such as deliveries being sent with individual codes.

The arguments put forward by these legal writers emphasise the importance of the substantive rules applied to the conflict and their ability to govern it. If the purposes and provisions in the domestic substantive laws governing goods are applicable, this may be a reason for considering the product as a good, and vice versa.

4.5.6.5 The public's expectations to rights, similarity in function and legal needs

Another important consideration when determining the character of a digital product is the public's expectations. If a person (i.e. a typical buyer/end-user)

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223. See John O. Hannold: Uniform Law for International Sales (3rd ed.), Hague 1999, pp. 51 and 55, in the former page he briefly mentions computer programs, saying they could be considered goods, while in the latter pages he does not make a proper distinction between software and hardware, claiming that micro chips are software.
224. See Mads Bryde Andersen: EDB og Ansvar, København (1988), Jurist- og økonomiforbundets forlag, pp. 320-344.
225. This is, however, contested by other Danish writers, see e.g. [Danish] Karnovs lovsamling (15th ed.), København 1999, p. 4065, where there is a reference to Nørager-Nielsen, Edb-kontrakter, København 1987, p. 29.
226. See Ellen-Kathrine Thrap-Meyer: Forbrukerkjøp og EDB, Oslo (1989), Tano/Complex 5/89, pp. 20-25.
227. See the Norwegian preparatory work to the Sales Act, NOU 1976:34 p. 43 and Ot.prp nr. 80 1986-87 p. 48, which also refers to Arve Føyen, Lov og Rett, Oslo 1973, p. 376.

purchases a product on the Internet, e.g. a digital book, he will normally believe that he has the same rights as if he purchased the same book in a bookshop. Another example is that if a legal advice is sought on the Internet. This advice will constitute a service, such as the television access, which is also made possible on the Internet, and both resemble mostly a traditional service. However, if video or music is downloaded on a computer's hard disc, they will mostly resemble the sale of a physical video or CD and should therefore be treated as a good. The public's expectation can be seen as a method where one will seek to adopt new products to existing terms considering the similarity of the function of the product. In other words, one will seek to see whether the product resembles an already existing product, and then apply the provisions applied to the similar product by either analogy or directly. When a digital product falls under the same rules as the similar product, although physical, this satisfies several practical considerations in private international law. There are considerations as predictability, certainty and flexibility, together with the principle of uniform solutions and the purpose of substantive law.

Another reason for what one could call a "*similarity-of-functions*" approach is that there is a need to legally protect these sales. Therefore, there is a need to legally classify them as either the sale of goods or services and under the provisions that they will mostly be determined under the domestic substantive law. The practical way they are delivered should not influence the legal classification, i.e. the physical media should not be determining, as in relation to binding a specific technology to legal classifications.

In *Blume/Holdt/Nielsen/Riis*[228] it is stated that digital products may be considered goods in relation to the Hague Convention. The reasoning is that the Convention in its Danish internal law also includes non-tangible products such as electricity, good-will and the conveyance of rights.[229] The sale of digital products resembles these types of sales. Consequently, digital products should have the possibility of being included in the scope of the Convention, since also a distinction should not be made between e.g. a book in digital form and a physical paper book. The result is that there is greater harmony and predictability.

228. See Peter Blume, Helen Holdt, Ruth Nielsen & Thomas Riis: IT-rettslige emner, pp. 270-271.

229. See [Danish] Karnov (1995), p. 3642, note 4. However in the Norwegian internal law, electricity is believed to fall outside the scope together with immaterial rights, while conveyance of rights are included, see Hans Petter Lundgaard: Om internasjonale kjøp, TfR 1965 p. 168 on pp. 175-176. Finally it must be noted that the 1986 Hague Convention includes

4.5.5.7 Conclusion

My conclusion as to what digital products are in relation to goods and services is that digital products should legally either be classified as services or goods. The classification will depend on the character of each individual product delivered, seeking the substantial functional characteristics of the product. There may be different criteria for the determination of the character of the product, but some important criteria are the object of the sale, e.g. if it is the acquisition of the ownership of a product. Another criterion is public's expectations of the product and its functional resemblance to other physical objects or traditional services.

4.6. The Order of the Conventions - Which Convention gains precedence over which?

4.6.1. Introduction

The Rome Convention is generally applicable to all kinds of commerce as long as it includes a contractual obligation. As such it does not exclude any party constellations either, thus having specific rules for consumers in Article 5. The Hague Convention is only applicable to the international sale of goods, thereby excluding all other products than goods. At the same time, consumer contracts are considered to fall outside the Convention in most Contracting States. Finally, the CISG is also only applicable to the international sale of goods. However, the CISG is clearly applicable only for business-to-business commerce. Consumers are excluded.

However, when a legal conflict is found to fall within the scope of more *than one* Convention the question arises as to which Convention has to yield and which gains precedence over the other, i.e. the order of the Conventions. In the following, it is this order that will be addressed.

4.6.2. Which country has ratified which Convention

There are eighteen countries in the European Economic Area (EEA) and there are three Conventions that can be applied to cross-border e-commerce contracts. In order to decide which Convention applies to what situation, one has to determine which Convention is applicable in what EEA country. At the time of writing this was the situation:

EEA country:	*The Convention(s) to which this country is a Contracting State:*
Austria:	The Rome Convention and the CISG
Belgium:	The Hague Convention, The Rome Convention and the CISG
Denmark:	The Hague Convention, The Rome Convention and the CISG*
Finland:	The Hague Convention, The Rome Convention and the CISG*
France:	The Hague Convention, The Rome Convention and the CISG
Germany:	The Rome Convention and the CISG
Great Britain:	The Rome Convention
Greece:	The Rome Convention and the CISG
Iceland:	The CISG*
Ireland:	The Rome Convention
Italy:	The Hague Convention, The Rome Convention and the CISG
Liechtenstein: [231]	None
Luxembourg:	The Rome Convention and the CISG
Netherlands:	The Rome Convention and the CISG
Norway:	The Hague Convention and the CISG*
Portugal:	The Rome Convention
Spain:	The Hague Convention, The Rome Convention and the CISG
Sweden:	The Hague Convention, The Rome Convention and the CISG*

** The CISG is not applicable between the Nordic countries*

these three Conventions. If a legal conflict concerning e-commerce is presented to any of its courts, there are no *international* Conventions governing the choice-of-law problem.[231] Consequently, in this country there is an additional uncertainty as to how the legal conflict is to be addressed if one comes from any other EEA-country, and this lowers the predictability in e-commerce.

Secondly, there is one country, Iceland, which is only Contracting State to the CISG. If an e-commerce contract is found to fall within the limited scope of the CISG, it will be applied. However, unless there are other national rules of private international law in Iceland, there will be a great deal of uncertainty in relation to e-commerce and especially the sale of digitised services.

Thirdly, there are three countries that are only Contracting States to the Rome Convention.[232] If an e-commerce contract is found to fall within the scope of the Rome Convention, it is this Convention that is to be applied.

Fourtly, there are five countries that are Contracting States to both the Rome Convention and the CISG.[233] If a conflict is brought before the courts of one of these countries, and the scope of both Conventions covers the e-commerce contract, the court will have to determine whether it is the Rome Convention that gains precedence over the CISG or vice-versa.

Fifthly, there are seven countries that are Contracting States to all three Conventions.[234] If an e-commerce contract is found to fall within the scopes of all Conventions, the question of which Convention gains precedence over the two others will be essential. It is in these countries it is most important to know the order of the Conventions.

Sixthly, one country, Norway, is contracting State to the Hague Convention and the CISG. If there is a conflict between these Conventions, their order will have to be determined.

Finally, it must be noted that if the conflict only involves parties from the Nordic countries, the CISG will not be applied. As this concerns Denmark, Finland, Norway and Sweden, it is the Rome Convention or the Hague Convention that is to be applied. If the counterpart has his place of business in

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230. In my search of finding information about private international law in Liechtenstein, I finally wrote an e-mail to a law firm in Liechtenstein, which responded by saying: "*Dear Mr. Lenda, Last week we received your e-mail and I tried to find information about your questions in our own library. The result of my search through books,periodical journals and jurisdiction was not successful. I'm sorry to tell you also that we don't know anyone who can certainly answer your question about this case of Liechtenstein law.*" This goes only to show that there is little knowledge about private international law in this law firm.
231. There might however be other national rules of private international law.
232. These are Great Britain, Ireland and Portugal.
233. These countries are Austria, Germany, Greece, Luxembourg and the Netherlands.
234. These countries are Belgium, Denmark, Finland, France, Italy, Spain and Sweden.

Iceland, the CISG will neither be applied. However, if the counterpart is from another country, which is a Contracting State to the CISG, and the CISG is applicable, the CISG will be applied.

As a consequence, the order of the Conventions will have to be determined in thirteen of the eighteen countries, since thirteen countries are Member States to more than one of the three Conventions (the condition being, of course, that the e-commerce contract falls within the scopes of two or all three Conventions, e.g. business-to-business sale concerning goods).

4.6.3 The relation between the Conventions

The order of the three Conventions will be determined by first treating the relation between the CISG and other Conventions and then the relation between the Rome Convention and the Hague Convention.

The order of international Conventions can be determined in two ways. The first is if a Convention clearly states its relation to other Conventions. These other Conventions can be both present and future Conventions. If the Convention does not regulate its relation to other Conventions, there are general principles regarding such interpretation. Some of these principles can be found in the 1969 Vienna Convention on the Law of Treaties. Not all countries within the EEA are Ratifying States to this Convention, but many of its principals are still generally recognised.[235] In Article 30 of this Convention (dealing with the application of successive treaties relating to the same subject-matter) it is stated that a new Convention will gain precedence over an older Convention if all Contracting States to the former also are Contracting States to the latter, and the treaties relate to the same subject-matter.[236] If not all Contracting States to the former, are Contracting States to the latter, the Convention to which both parties are Contracting States shall govern the conflict to which the Convention is needed.

As for the CISG, it is an international uniform law, while the two other Conventions are choice-of-law Conventions. The CISG regulates its relations to other Convention in Article 90, stating:

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235. It seems that even legal doctrine in non-member State countries regard the Vienna Convention as a source of law. See e.g. Carl August Fleischer: Folkerett (6. ed.), Oslo 1997, Universitetsforlaget, pp. 33 and 144.

236. If the conventions do not relate to the same subject-matter, one may say that this is a sort of lex specialis, where a convention is found applicable before another, since it is meant for the application of a special legal field, while the other convention is only generally applicable.

> *"This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their place of business in States parties to such agreement."*

The CISG stands back for all Conventions, present and future, that regulate the same sales matters as the CISG, when both CISG and these Conventions have overlapping rules. Accordingly, the question is whether the CISG on one side, and the Hague Convention and the Rome Convention on the other side govern the same legal matters. A qualified opinion could be that Article 1 of the CISG is a rule determining the applicable rules for e-commerce contract, hence it is a choice-of-law rule that is overlapping the rules of the other Conventions. However, the aim of the CISG is not to give choice-of-law-rules, but give a uniform law for the international sale of goods. The CISG is "directly" applicable as a substantive law.[237] Therefore, the CISG does not govern the same matters as the two other Conventions and they are consequently not overlapping. This has not been touched upon by the Report on the CISG, but at least one legal writer supports this opinion.[238] The result is that the CISG will not have to yield to the other Conventions because of Article 90.

The Rome Convention addresses its relation to other Conventions in its Article 21:[239]

> *"This Convention shall not prejudice the application of international Conventions to which a Contracting State is, or becomes, a party".*

In relation to the Rome Convention, Kaye states that the CISG may seek to override the rules of private international in the Rome Convention and should therefore be considered to be overlapping.[240] In an actual e-commerce contract, also being a cross-border contract, it is possible that the application of the Rome Convention or the Hague Convention will determine another

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237. See Peter Arnt Nielsen, International privat- og procesret, København 1997, p. 565.
238. See John O. Hannold, *Uniform law for international sales (3. ed.)*, Hague 1999, p. 532, where he claims that Article 1(1)(b) of the CISG and the choice-of-law conventions are complementary rather than overlapping. In relation to the Hague Convention, he continues on p. 535 that: "The only possible overlap could be between the P.I.L. rules of Hague Article 4 [and Rome Articles 3 and 4] that govern the applicability of the Convention...Both of these provisions address the general question of the applicability of law. However, we can conclude that Hague Article 4 [and Rome Articles 3 and 4] governs the same "matter" as Article 1 of the Sales Convention only if we forget that Article 1 is an integral part of a Convention to unify a large and interconnected body of substantive law."
239. See Giuliano-Lagarde Report, p. 39-41, Peter Kaye: The New Private International Law of Contract of the European Community, Aldershot 1993, Dartmouth pp. 367-370, 379, 379-387.

law than the one of one of the parties to the contract. On the other hand, if the CISG is also found to be applicable this will lead to another law governing the contract. In such a situation, one could say that the CISG overrides the "*normal process of private international law*". One of the aims of Article 90 of the CISG is to yield to regional agreement.[241] The Rome Convention has the aspect of a regional Convention, only open for signature for EU countries. Therefore, since the EU has adopted the Rome Convention as a choice-of-law Convention to make cross-border contracts within the EU easier to enter into, it can be questioned whether the CISG as an international Convention has to yield. The Hague Convention cannot apply the same reasoning, being also an international Convention.

The case law concerning CISG is rather small and to my knowledge the problem between these Conventions has not been treated directly.[242] However some European cases can be examined in order to see how the courts apply the CISG versus the other two Conventions.

In the **Italian** case *Sport D'Hiver di Genevieve Culet v. Ets. Louys et Fils,* 31 January 1996 at Tribunale Civile di Cuneo, a French vendor, allegedly by mistake, shipped to an Italian buyer sports clothes in French sizes rather than in Italian sizes. The court applied the CISG although the parties did not refer to it. Moreover, the court stated that: "Article 1 of the Convention regulates contracts for the sale of goods between parties whose places of business are in different States, as long as they are Contracting States, or when the rules of private international law of the lex fori lead to the application of the law of a Contracting State. The Convention has been ratified by both Italy and France at the time the contract was drawn up. As a result, there is no doubt that the rules applicable to this litigation are those of the CISG, and that they prevail over the internal legal regimes of the countries where the parties reside". As both Italy and France are Contracting States to all three Convention and the court applies ex officio[243]the CISG, a tempting conclusion is that the CISG gains precedence over both the Rome and Hague Conventions.

In the **German** case of 18 January 1994 Oberlandesgericht Frankfurt (5 U 15/93), the German (buyer) trading company refused to pay the purchase price of shoes brought from the Italian (seller) shoe manufacturer, because the shoes were not delivered within the time limits

240. See Peter Kaye, The New Private International Law of Contract of the European Community, Aldershot 1993, Dartmouth p. 370, "However, the question will still nonetheless arise as to whether international conventions which seek to override or to remove the normal process of private international law in respect of application of substantive legal regulations contained therein should also be held to be covered by Article 21. This will be the case, for example...under Article 1(1)(a) of the Vienna Convention [CISG]..."
241. See J.E. Bergem and S. Rognlien: *Kjøpsloven – Kommentarutgave til Kjøpsloven av 1988 og FN-konvensjonen 1980 om internasjonale løsørekjøp*, Oslo (1995), Universitetsforlaget, p. 643.
242. The website: http://www.cisg.law.pace.edu/cisg/text/caseschedule.htmlgathers cases on the CISG, and includes over 500 cases. (August 1999).
243. At its own initiative, since the parties have not clamed its application.

prescribed in the contract. The court applied the CISG, since both countries were Member States. However, since the amount of recoverable interest has been left unregulated in the CISG, Article 78, the court then went to private international law to determine this interest. Again, when the CISG has reached its limits, the court will apply private international law. This also follows from the case of 2 March 1994 Oberlandesgereicht Munchen, supporting the first case.

In the **French** case S.A.R.L Ytong v. Angel Lasaosa, 16 June 1993 at Cour d'appel Grenoble, a French manufacturing Company (Ytong) entered into an oral contract with Angel Lasaosa, a Spanish national, for the sale of various construction materials. The goods were delivered, but despite several formal notices, the seller was unable to obtain payment. The court applied the CISG though Article 1(1)(b) and not 1(1)(a) since Spain was not a Contracting State at the time that the contract was concluded. Therefore, the court applied the Hague Convention to determine the domestic law, and this lead to the French law. Since CISG is a self-executing treaty and a part of French domestic law, it was then again the CISG substantive part that was applied to the contract. The case shows that the most plausible application of the CISG is that a European court will primarily apply Article 1(1)(a), while Article 1(1)(b) is an alternative, applying other rules of private international law.

See also the **Austrian *arbitration*** case of 15 June 1994 (Vienna Arbitration proceeding SCH-4318), the contracting parties, a German and an Austrian had chosen Austrian law, but the arbitrator held that the contract was governed by the CISG as the international sales law of Austria. Rules of private international law came second after the determination of CISG as applicable due to Article 1(1)(b).

If a conclusion can be drawn from this excerpt of cases, it is that the argument held by *Hannold*, that the CISG is not overlapping with other rules of private international law but is complementary, is the most probable approach and the one which seems to be practised by at least the courts of these countries. Accordingly, the CISG will gain precedence over the Rome Convention and the Hague Convention.[244] This is if an e-commerce contract meets the conditions of the CISG.

The relation between the Rome Convention and the Hague Convention follows from Article 21 of the Rome Convention. If both Conventions are applicable to the contract, the Hague Convention prevails over the Rome Convention concerning the choice-of-law question. Consequently, in the six

244. Authors rarely touch this problem, and if they do, it is very brief. Some authors tending the same way as myself can be found in Petar Sarcevic: International contracts and conflicts of law (A collection of essays), London 1990, Graham and Trotman, pp. 40-41and pp. 66-67 (The first refers to an article by Erik Jayme: The Rome Convention on the Law Applicable to Contractual Obligations, claiming that the Rome Convention has to yield to the CISG, while the latter refers to an article by Zeljko Matic: The Hague Convention on the Law Applicable to Contracts for the International Sale of Goods . Rules of the Applicable Law, claiming that the 1985 Hague Convention has to yield to the CISG).

EU countries that are Member States to both the Rome Convention and the Hague Convention, it is the Hague Convention that is to be applied.[245]

The result is that if an e-commerce contract concerns goods, and, therefore, falls within the scope of all three Conventions, it is first the CISG that is to be applied. If the CISG is not applicable, it is the Hague Convention that is to be applied before the Rome Convention. However, since the scopes of the CISG and the Hague Convention are limited, the Rome Convention might have greater impact on e-commerce than its position in relation to the other Convention could seem.

4.7 Final remarks

There are several problems related to determining the applicable Convention to an e-commerce contract inside the EEA. On one hand, there are problems related to Conventions in general. One of these problems is the relation between the Conventions since the relation between the CISG and the other two Conventions are uncertain as to which Convention is to be applied. A second problem is that the scopes of the CISG and the Hague Convention is limited, so that the Rome Convention will still be relevant to apply to determine the law applicable to the formal validity of the contract. Such problems limit the predictability and certainty of cross-border contracts, and emphasise the need for further regulation. On the other side, there are problems related to the application of e-commerce contracts to the three Conventions. One of the main problems is the determination of digital products under the traditional terms as "goods" and "services". Another problem is the uncertainty as to the nature of the parties behind the contract. In relation to the CISG, it can be difficult to determine if a website can be considered a "place of business". Moreover, the anonymity of the parties causes unpredictability as to which parties are consumers. If a party to a contract is a consumer, it is the Rome Convention that is applicable, or alternatively the Hague Convention. However, since the party can be anonymous, the counterpart might *believe* the party is not a consumer. Consequently, being able to predict the Convention applicable to an e-commerce contract can be a sort of lottery. These problems, for example which set of rules to apply, must be resolved before e-commerce can be fully trusted by the commercial community.[246]

245. These countries are Belgium, Denmark, Finland, France, Spain and Sweden.
246. During the 5th E-CLIP Workshop, held in Oslo, on the 21-22 June, lawyers present expressed that the main legal need was to get a predictable situation.

5. THE CHOICE-OF-LAW RULES

5.1 General

Once it is clear which Convention is applicable to the actual electronic commerce (e-commerce) contract, it is this Convention that will govern the procedure of determining the law applicable to the e-commerce contract. This chapter concentrates upon the determination of the law applicable to the contract. The "choice-of-law" rules, or rules determining the substantive law applicable to the contract are the only rules treated in this chapter. Section 5.2 addresses the Rome Convention, section 5.3 addresses the Hague Convention and section 5.4 addresses the CISG.

5.2 Rome Convention

5.2.1 Introduction to the choice-of-law rules in the Rome Convention

The Rome Convention is an important instrument within the EEA in solving cross-border conflicts related to e-commerce. This has also been expressed by the EU in Council Resolution of 19 January 1999 on the Consumer Dimension of the Information Society (1999/C 23/01).[247] In addition, the importance of the Rome Convention on e-commerce cannot be ignored as the scope of the Hague Convention and the CISG are limited.

The system of the Rome Convention is that there is a basic principal rule on choice-of-law that allows the parties to choose the law applicable to their contract, i.e. the principle of party autonomy. If the parties have not made such a choice, however, the secondary rule consists of determining the law applicable to the contract by finding the law of the country most closely connected to the contract. Thirdly, there are special rules concerning the choice-of-law in consumer contracts that do not allow the parties, under certain conditions, to choose a law that is in breach of the mandatory consumer rules of the domicile of the consumer. Finally, the choice-of-law applicable to the con-

247. Stating: "...Whereas, in the case of transborder transactions effected by means of information technology, consumers should, within the framework of Community law and of the Brussels and Rome Conventions, be able to benefit from the protection afforded by the legislation of their country of habitual residence and to have easy access to redress procedures, in particular within their country of habitual residence..."

tract can be limited due to mandatory rules, public policy (*ordre public)*, or EU Community law. Once these steps have been passed, an applicable substantive law governing the e-commerce contract should have been found. In the following, these are the steps examined.

5.2.2 The basic principle of part autonomy

5.2.2.1 Point of departure

The basic principle of the Rome Convention is stated in Article 3(1) of the Convention:

> *"A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract"*

A natural understanding of the basic principle of the Rome Convention is that the parties have the freedom to choose the law applicable to their contract, also called the principle of party autonomy. The rule only affirms a rule of private international law, currently embodied by all EU-countries and most other countries.[248]

The reason behind the principal of party autonomy is that the parties are the ones closest to determining their needs and intentions,[249] and are, therefore, the ones most suited to choose the law applicable to their contract. Article 1(1) refers to the choice of substantive law and not the choice of a legal system, which could include another set of choice-of-law rules. This is made clear in the examples of party autonomy in the Giuliano-Lagarde Report.[250]

Article 3(1) points out that it is the parties that can chose this law. As to who can be a party to the contract, this is not limited in the Convention. The Giuliano-Lagarde Report does not clarify who can be a party. However, from

248. See Giuliano-Lagarde Report, p. 15.
249. See Ole Lando, Contracts, Mouton 1976, International Encyclopedia of Comparative Law (Kurt Lipstein, ed.), Volume III Private international law, Chapter 24, pp. 15-31.
250. See Giuliano-Lagarde Report, pp. 15-16, and especially the Belgian example on p. 15, where the court clearly suggested that: "...the law applicable to the contract, both to their formation and their conditions and effects..." Such rules cannot be the rules of choice-of-law, but substantive contract law.

the natural understanding of the Article and its relation to the other Articles, the Convention is, as a point of departure, valid for all party constellations.[251]

According to Article 3(1) second paragraph, the choice-of-law must be made expressly, or demonstrated with reasonable certainty. These conditions must be understood as giving both parties a certainty as to the fact that a choice-of-law has been made, i.e. that they had such an intention. From the Giuliano-Lagarde Report, it can be gathered that the choice-of-law often will exist express in the contract, but this is no absolute criterion for the court to accept.[252] However, the Report also marks a limit to a hypothetical choice-of-law, which falls outside the scope.[253] A practical approach would be that if the parties have made an express choice-of-law clause in the contract or annexes to the contract, a choice will be considered to exist. If the choice is not expressed in writing of any kind, the other possibility to a choice-of-law "demonstrated with reasonable certainty" is that the parties agree upon having an oral agreement on such a choice. However, this will mostly not be the case for e-commerce contract, unless there is a sort of Internet-telephone applied. In addition, the choice-of-law may also be determined due to the "*circumstances of the case.*" For e-commerce, this means that one can search the other not specifically clear elements in the contract for what could be implied choice-of-law clauses or notions, though not being hypothetical.

Finally, according to Article 3(2) the choice of the parties allows them to "select the law applicable to the whole or a part of the contract". This partial choice, called "depecage" in French, is to be understood as giving the parties the freedom to chose different laws to govern different, but logically consistent, parts of the contract.[254] As a consequence, the parties may determine only one law governing damages, since damages is one logical legal element. Furthermore, this choice can be made and unmade at any time if the parties agree. However, Article 3(2) must be understood as limiting the choice-of-law to the time that the court renders its decision.[255]

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251. I.e. both business-to-business contracts and business-to-consumer contracts. It is to be noted that the term "business-to-consumer" is applied in this thesis with the intention of being identical with the term "consumer" as expressed within Community law. However, de facto, it may be that there are some differences.
252. See Giuliano-Lagarde Report, p. 17, stating that: "...the Court may...find that the parties have made a real choice-of-law although this is not expressively stated in the contract". In this thesis I do not raise the question related to the proof of digital documents, but in most European countries, the judge cannot refuse as a general rule digital documents. See e.g. the Norwegian Act on Financial Agreements (Lov om finansavtaler av 25.6.1999 nr.46), Article 8.
253. See Giuliano-Lagarde Report, p. 17.
254. See Giuliano-Lagarde Report, p. 17.

5.2.2.2 E-commerce and the principle of party autonomy

In relation to e-commerce, the principle of party autonomy has several advantages. The first and major point is that the party autonomy brings a great deal of certainty and predictability to the environment of the Internet. The anonymity of the Internet, concerning the location of the parties, is largely overcome by the fact that they can relate to one law. As predictability is one of the major concerns of private international law, this cannot be over-appreciated. Secondly, the Internet offers a great possibility in party constellations involving more than two parties. If the contract is connected to more than two legal systems, the principle of party autonomy is also the most certain solution for determining the law applicable to a contract. Finally, the principle of party autonomy, since it is the most accepted principle in a global perspective, will give the parties the same solution wherever the parties seek jurisdiction, including arbitration courts. Consequently, the party autonomy will, in a electronic environment, satisfy several practical consideration of private international law, hereincluded, predictability, flexibility, global unity solution and global mutuality.

5.2.2.3 Expressed or demonstrated with reasonable certainty

In order to determine whether the parties have made a choice of law, there is a condition in Article 3(1) that this choice is "*expressed or demonstrated with reasonable certainty*". In a digital environment, this may be difficult to determine. However, since this choice may be both in the contract or related to the circumstances of the case, one will have to examine all elements in relation to the technology which may be off help. The aim of this section is to examine the meaning of how a choice can be "*expressed or demonstrated with reasonable certainty.*"

As already stated the choice will often be expressively stated in the contractual obligation, although it does not need to be. The principle of party autonomy can suffer from a lack of certainty in relation to whether the purchaser has been fully aware of the choice-of-law clause and actually agreed to it.[256] This certainty may be present, but depending on the presentation of the

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255. The problem, however, is when the parties do not agree upon the contract, which means that there can arise problems as to which choice-of-law is the valid one. One could imagine that the problem is that the parties have made two choice-of-law clauses, one in the original contract, and the other in a later contract. If the parties disagree as to the validity of the second contract, the question will arise as to whether a second choice-of-law has been made, if it differs from the first. In this thesis, I consider this as a question of validity, and do not treat it further.

256. This is especially relevant in relation to the consumers, to whom a choice-of-law most likely will have to be clearly stated. First and foremost because they are weaker parties to a contract. Consumer questions are treated in section 6.2.4.

choice-of-law clause on the Internet. The contract can be in an e-mail, a SMS-message, on a mobile phone, pda or a link in a e-mail. Another solution is if the choice-of-law clause is presented in a news-group, or downloaded in a text file. If the transaction takes place over the WWW, normally the party determined to buy a product on the Internet will be presented the conditions of a contract on-line in a click-wrap contract. The only thing he needs to do is click a button saying "I accept". Most persons will never read the whole contract, but just push the button. In some other cases there might be links to the choice-of-law clause. The far better solution, as to giving the parties full certainty, is when the party ordering a product is guided through each section of the contract, having to interact to each part of the contract.[257] The legal question is if such clauses can be said to include a reasonable certainty of being expressed.

In my opinion, the Internet is known to be a global market place and the parties involving themselves in e-commerce should have an international approach to the contracts they engage in. As a point of departure, a choice-of-law clause should *de lege ferenda* be accepted by the courts as being "expressed," if it exists in a "click-wrap contract", directly in an e-mail, a news-group or downloaded in a text file.[258] However, this is under those circumstances, where the clause is normally understandable and readable in the contract. Accordingly, a choice-of-law clause in the contract in another language than the contract or in a smaller text than the rest of the contract would most probably not be considered an express clause. The problem will, therefore, not be to determine whether a clause is expressed if it is directly in the contract the parties have agreed to, but rather whether a choice has been demonstrated with reasonable certainty if it is only linked to the contract, or in other ways "hidden" in relation to the other clauses in the contract.

The problem of determining whether a choice of law has been "demonstrated with reasonable certainty" in relation to the Internet, is that there few standards to relate to. There is not one way of determining a choice of law. The choice can exist in a link, either on the WWW, e-mail, or even in a text file and then it will be up to the court in most cases to determine whether it is "demonstrated with reasonable certainty". Since it does not exist directly in the contract, but is linked to, this demonstration has to have some sort of qualified link, or connection, to the contract. The Report on the Rome Convention[259] exemplifies such a reasonable certainty, demanding that there is

257. See e.g. the process of ordering products at Amazon.com.
258. However, each court will have to determine the matter individually in each case.
259. See Giuliano-Lagarde Report, p. 17: "...the contract may be in a standard form which is known to be governed by a particular system of law even though there is no express statement to this effect, such as a Lloyd's policy of marine insurance..."

knowledge of a particular standard form. In the field of e-commerce several organisations have promoted model laws on e-commerce, such as the UNCITRAL Model Law on E-commerce.[260] In Norway *N-safe*[261] is a volontary scheme, where businesses have agreed to accept a certain standard for e-commerce and complying with Norwegian law. In time this may lead to a standard form for e-commerce contracts. However, these cannot today be considered to be "*standard forms*" which govern e-commerce. Another alternative is that the e-commerce contract concerns an industrial field that is well known to apply a certain country's law. Whether such a clause can be said to exist in a contract depends on several elements, e.g. how common such a clause is, the party's prior use of such a clause, etc. This type of approach is very similar to the one applied to the field of standard form contracts.[262] As to whether a contract can be said to include a reference to a standard form contract, Woxholt[263] writes [in my English translation]:

> *"...the circumstances of the case must, as a principle, be the subject of a concrete examination that can have the outcome that the standard form conditions in a given case must be considered as a part of the contract, even though it has not come to the knowledge of the other party to the contract before the conclusion of the contract."*

In relation to standard form contracts included in private regulation, Hov[264] writes [in my English translation]:

> *"...where standard form contracts have been included in private regulations...the courts have had a far more restrictive approach...However, one cannot assume that the courts will never accept standard form contracts in private regulations. This will, most likely, be determined on a total consideration, where several elements will have a role to play...the reasonability of the conditions...how usual these conditions are in the particular line of business...if the party invoking the conditions has made clear to the counter party the presence of such conditions...if the invoked conditions are the result of mutual negotiations (agreed documents)..."*

260. See http://www.uncitral.org/en-index.htm(January 2001).
261. See http://www.nsafe.no(January 2001).
262. See Geir Woxholt: Avtaleinngåelse i og utenfor Avtaleloven, Oslo 1995, pp. 100-109, Ole Lando: Kontraktstatuttet – udenrigshandelsret 2, København 1981, pp. 334-336 or Jo Hov: Avtalerett (3.ed.), Oslo 1993, pp. 133-139.
263. See Geir Woxholt: Avtaleinngåelse i og utenfor Avtaleloven, Oslo (1995), p. 101.
264. See Jo Hov: Avtalerett (3.ed.), Oslo 1993, pp. 137-138.

Mads Bryde Andersen (II)[265] is more specific as to "shrink wrap" clauses,[266] being of the opinion that, if the conditions of the clause have not been presented during negotiations, they are not part of the contract. He underlines this argument with two Danish cases where a similar type of wrapping existed for the purchase of magazines. The result was that the clauses were valid in one of the cases, since the purchaser was supposed to know the clause, while in the other case the clause was not accepted.[267] However, in relation to a choice-of-law clause, being the subject of a link from the main contract, I do not believe the clause as a general idea can be excluded, This is because the party (buyer) has the possibility to read the link, which he does not have in a "shrink-wrap" contract. This notwithstanding, if the link is to a webpage that is not active or cannot be opened, there is no choice-of-law clause demonstrated at all.

The consequence is that it is very difficult to determine any definitive arguments for claiming that a clause is demonstrated with reasonable certainty or not. This will have to be by determining the nature of the link and how the buyer can get knowledge of the choice-of-law clause on a case to case basis. In relation to a choice-of-law clause that does not exist directly in the e-commerce contract, many of the same principles can be made valid as for standard form contracts. This follows the ideas of Hov and Woxholt, namely to determine in each single case individually if a choice-of-law clause has been demonstrated with reasonable certainty or not. In relation to e-commerce, a link from the contract can take place in several manners. In the following, some elements special to e-commerce are presented. These elements may be considered to both be "*the terms of the contract or the circumstances of the case.*" This is beacuse on the Internet with different webpages, there is no clear limit between what is a contract and what just a circumstance of the case. These are some elements the courts may take into consideration when determining the choice's link or connection to the contract. However, this is not a complete list of elements but rather an excerpt.

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265. See Mads Bryde Andersen: Praktisk avtalret, København 1995, Christian Ejlers' Forlag, pp. 166-170.
266. A shrink-wrap clause refers to the agreement a traditional purchaser of computer programs is presented when bought as a physical object. The diskettes are purchased in packages where the agreement exist together with the diskettes in a folio wrapped package. By unwrapping the package the intention of the vendor is that the buyer has accepted the terms of the contract.
267. See Danish cases, U1943.1119H and U1935.1066H.

a) The text of the link.

The court will have to determine whether the link constitutes a natural source for the contracting party to click on in order to determine, if a choice-of-law clause exists. If the contract has a number of links, which one has to click on in order to see each specific provision and one link says e.g. *choice-of-law*, this could be considered an incentive to examine the webpage behind the link. However, if the link only states *law* in a sentence that has little connection to cross-border commerce, this could lead to the opposite conclusion.

b) The graphical interface of the link.

The nature of the link may have relevance in determining if there is an adequate connection between the contract and the clause. If the link has another colour or font than the rest of the text, or is a special button clearly market "Choice-of-law clause", this could be considered to constitute a connection that is "demonstrated with reasonable certainty".

c) The text of the place to where the link leads.

Once the contracting party clicks on the link, one has to examine the design and format of the new webpage. Normally, a link will lead to a webpage. If this new page clearly states the choice-of-law clause, it could be said to demonstrate a choice-of-law clause with reasonable certainty. However, it is possible that the page does not include a clause, but has a new link to a clause. This could lead to the conclusion that there is not a reasonable certainty in the contract as to a choice-of-law clause, i.e. it is demonstrated to far from the original document.

d) The logical location of where the link leads.

Another element is the location of the new webpage. If the new webpage with the clause is situated under the logical location of the vendor's website, e.g. exists under the domain name of the vendor, the clause will have a stronger connection to the contract than if it exists on a website that has no apparent connection to the vendor, his website or the contract.

e) The accessibility of the link.

In order for the link to be demonstrated with reasonable certainty, it must be accessible for the contracting party reading the contract. A choice-of-law link will be easier to examine if the link is active on a webpage, rather than in an e-mail or even less in a newsgroup. If the contracting party must re-type the location of the clause in an Internet-browser to be able to read it, one could

argue that the demonstration has not taken place with reasonable certainty. If the webpage containing the clause that the link leads to is not accessible, it is most probable that the clause will be considered not to have been "demonstrated" at all. Consequently, the clause is not valid.

f) The situation at the conclusion of the contract.

If the contract is a standard contract that the buyer cannot change, this indicates that the vendor should, in order for the choice-of-law clause to be accepted, be more demonstrative with his clause. The same element is relevant if the products sold by the vendor are typically consumer products. If the latter is the case, the vendor should be as clear as possible in order for the clause to be accepted, since consumers normally are the weaker parties.

Once these elements have been considered, the court will determine if the choice-of-law clause has been demonstrated with reasonable certainty and therefore valid or not. However, even if the clause is found to be "demonstrated with reasonable certainty", this process will lower the predictability of the party autonomy in choice-of-law.

The second problem related to the party autonomy relates to the substantive validity of the choice made by the party, namely if the choice can be said to be in breach of the mandatory rules, public policy or even Community law. This is addressed in section 5.2.5.

In conclusion, it must be stated that the party autonomy is a very fundamental principle of private international law. It is a principle giving the parties to an e-commerce contract a great deal of predictability. The problem of whether a choice-of-law clause is expressed or demonstrated with reasonable certainty, can be overcome if the parties are aware of the problem, e.g. by following standards for how such clauses should be expressed. This is especially important if a website is open for international commerce.

5.2.3 Applicable law in the absence of choice

5.2.3.1 Point of departure

If there is an absence of choice-of-law in relation to Article 3, the secondary rule is stated in Article 4(1) of the Convention:

> *"1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected."*

The choice is to be determined by the law of the country that is most closely connected to the contract. It is the relation between the country and the con-

tract, which is essential.[268] This is what in theory is refered to as the "closest connection method".[269] In such a case it is the court that is to take into account all factors of the contract and on the basis of these determine to which country it is most closely connected with and choose the law of this country. The factors must, however, be sought in the contract. Article 4(1) gives little direction as to what types of elements could be used as determining the closest connection. However, this Article must be read together with Article 4(2) stating:

> *"...it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration."*

5.2.3.2. The presumption rule in Article 4(2)

According to Article (2), the contract is *presumed* to have closest connection with the country where the party who is to *effect* the *characteristic performance* of the contract has his location (habitual residence or central administration). The aim of this section is to examine the content of the presumtion rule.

Even though the closest connection method in Article 4(1) has a presumption rule in Article 4(2), the Giuliano-Lagarde Report does not define what kind of presumption this is. In other words, when does the presumption take place? From a practical point of view, the most plausible solution is that when the court has to determine the closest connection, it will look to the presumption rule. The assessment, of the presumption rule and the other connecting factors, is to be done at the time of conclusion of the contract, so as to avoid any further manipulation.[270]

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268. See Peter Kaye, The New Private International Law of Contract of the European Community, Aldershot 1993, p. 172.

269. See e.g. K.Gaarder, Innføring i internasjonal privatrett (2nd ed.), Oslo 1990, pp. 38-42, referring to the Norwegian Supreme court case *Irma-Mignon* (Rt 1923 II 59), even though the example concerns tort and damages, it is an early example of the closest connection method. The case concerned two Norwegian ships Irma and Mignon, that collided in the English river Tyne. The question of fault was not contested. However, when deciding the damages the judges came to that the case was most closely connected to Norway and therefore the damages should be decided in accordance with Norwegian law. The closest connection method can also be seen as a result of the principle stated by *Savigny*, that a legal cross-border conflict should be determined by the law of a country, and this should be the country which is the "natural seat" of the conflict. See also Peter Kaye, The New Private International Law of Contract of the European Community, Aldershot 1993, p. 56.

270. This follows from the text of Article 4(2), see also Giuliano-Lagarde Report, p. 20.

The exception from this rule will be, if there are other connecting factors, that the court values stronger than the country of the party who is to effect the characteristic performance of the contract. In relation to commercial activities, including e-commerce, the presumption rule does not give the party predictability as to what the court will value as connecting elements, since the court is not bound by this rule, but can make an exception to it. From one point of view, the closest connection becomes more predictable with such a presumption. The advantage of the presumption is that is gives some guidance as to the closest connection, but opens up for greater flexibility. This is an example of how the flexibility of a rule lowers predictability and clarity.

Consequently, in order to determine the presumtion rule, one has to examine the meaning of the concept of "*characteristic performance.*" In the Giuliano-Lagarde Report. "characteristic performance" has been determined as "*the performance for which the payment is due, i.e. depending on the type of contract, delivery of goods...the center of gravity...of the contractual transaction*".[271] This also follows from how the European Court of Justice has interpreted Article 5(1) of the Brussels Convention, in relation to the place of performance of the obligation in question when affording jurisdiction over contracts of employment. The employee's obligation to work has been held to be that which characterises the contract.[272] Therefore, in relation to the Rome Convention, this proposes that the characteristic performance will be the vendor's delivery of goods or services.

The geographic location of the characteristic performance is the country of the one liable for the performance, meaning either his habitual residence or central administration or any other relevant place of performance. The one effecting the characteristic performance has to have a habitual residence, central administration or any other relevant place of business, depending on the character of this party. In relation to e-commerce, it is the vendor of digital products that is the one to effect the characteristic performance of the contract. The location of this vendor is, however, far more difficult to determine on the Internet. The vendor may often not state his location on the Internet and try to remain anonymous. If the vendor is a private party one will have to determine his habitual residence, while if the vendor a professional party it is his place of business which is normally relevant to determine.

According to Article 4(2) the place of business is determined by the vendor's principal place of business. However, if another place of business than the principal place has effected the performance this latter is considered the

271. See Giuliano-Lagarde Report, p. 20.

272. After the ECJ cases of *Ivenel v. Schwab* and *Shenavai v. Kreischer,* this construction was incorporated when Spain and Portugal acceded to the Convention. See respectively, case 133/81 [1982] ECR 1891 and case 266/85 [1987] ECR 239.

place of business. This means that a sub-branch can be considered to be the place of business in relation to Article 4(2). In relation to businesses which have established themselves on the World Wide Web and which seem to deliver products from this location, the place of business can often be difficult to determine. In order for a company to be considered to have a place of business, the European Court of Justice held in the case of Somafer v. Saar-Ferngas AG[273] that a place of business will have to be determined individually in each case and according to certain criteria. These criteria were considered to be (1) the existence of the business by its aspect of permanency, (2) a management of the company and (3) materially equipped to negotiate business without any parent body.[274]

The legal question is whether these requirements are met in relation to a webshop. The technical means of the Internet makes it today possible to negotiate on the Internet with interactive contracting programs, suggesting that the webshop or marked place has an intelligent agent management with the possibility to negotiate with third parties without a parent body. Secondly, a website will most often have a logical placement, with a domain name that has some degree of regularity and permanency, and which confirms the existence of the webshop. This approach could mean that the website could be an establishment and consequently a place of business. However, Kaye[275] states that if a company negotiates a contract from one place and delivers from another place, it is the latter which effectuates the characteristic performance, since the wording of Article 4(2) focuses upon the "performance". In addition, the Electronic Commerce Directive makes also clear that a website cannot constitute the establishment of a company, meaning that a company will not be able to conduct "forum shopping" within the European Union by establishing the server in a suitable member state.[276] Applied to a website selling a digital product, the most plausible solution is to consider the web-

273. See European Court of Justice-case C-33/78, [1978] ECR 2183, and especially grounds 11, 12 and 13 concerning the interpretation of place of business in relation to Article 5(5) of the Brussels Convention. Since they are both a part of European private international law, the interpretation of the term in the Brussels Convention has impact on the Rome Convention. This is emphasised by the practical consideration of legal certainty and predictability.

274. See also the English case of Cleveland Museum of Art v. Capricorn Art International SA [1990] 2 Lloyd's Rep. 166, 169, where the court held that an overseas company could be held to have an establishment in England in relation to the Companies Act 1985 if certain conditions were met. These conditions were considered to be an identifiable place at which the business is carried on, with some degree of regularity and to which the company is associated with. This has also been followed up by the Electronic Commerce Directive, 2000/31/EC.

275. See Peter Kaye, The New Private International Law of Contract of the European Commu-

shop as being the negotiator, while the effectuater is the company or person behind the website creating the website by making the digital products available. Consequently, the website in itself cannot be a place of business, there has to be some initiated action from someone. Under the current technology, it is my understanding that electronic agent do at present not have the sufficient autonomy to be considered places of business.

However, in contracts where the parties undertake mutual performances, the determination of the characteristic performance may be even more difficult, especially if there are more than two parties. An example is if two parties agree to a contract where one of them is to deliver digital product A and the other is to deliver digital product B. Another example of several performances exist if a virtual company consists of several partners situated in different countries and each is responsible for a part of a digital product or service. Unless one considers there to be several contracts between the buyer and each "sub-contractor", there is uncertainty as to which "sub-contractor" is effecting the characteristic performance. In such a situation, the natural solution will be to determine the "center of gravity", i.e. to determine on the Internet the performance that is the characteristic by applying a sort of closest connection method.[277] However, this leaves room for the court's discretion and accordingly, uncertainty. On the Internet, the vendor will not necessarily be determinable due to its anonymity.

If there are difficulties in determining the characteristic performance, Article 4(5) states that Article 4(2) is inapplicable and that one instead has to apply Article 4(1). This is due to the fact that Article 4(2) is intended to give predictability, and if there are uncertainties as to this presumption rule, one should instead apply the closest connection method, which is the main rule under Article 4. So the presumption amounts to an arbitrary preference, of uncertain strength, for the law of the seller's or other supplier's country.

Support for not applying Article 4(2) when there is uncertainty as to the nature of the vendor is found in the German case (1989) I.Prax 51, the Landgericht Dortmund. In this case, the court applied Article 4(5) to a contract between a German manufacturer of steel wool and a Dutch manufacturer of scouring sponges. The former agreed to buy sponges exclusively from the latter for sale in Germany and the latter had exclusive distribution rights over the former's steel wool in Belgium and the Netherlands. In relation to e-commerce and the purchasing of digital products, questions could be raised as to the anonymity of the transaction, both in relation to the nature of digital

276. See Directive 2000/31/EC of the European Parliament and Council of 8 June 2000 on certain legal aspects of electronic commerce in the internal market, Article 2 c, and in recital 19 of the preamble.

277. See Giuliano-Lagarde Report, p. 20.

products and in relation to the location of the parties, whether it creates an uncertain situation which calls under the application of Article 4(5). This is because Article 4(1) is the main rule, while Article 4(2) is the secondary rule. Consequently, the application of the main rule, finding the choice of law based upon the law most closely connected, comes in first place.

5.2.3.3 Closest connection method

The application of Article 4(1) demands the finding of a closest connection, by interpreting the term "*most closely connected*". In traditional private international law, central connecting factors have been for example the place where the contract is concluded or the place where the goods are delivered. However, these connecting factors have a problem of being defined on the Internet. The central point of this section of the thesis is therefore, to determine the different connecting factors in relation to the closest connection method when applied to e-commerce.

The application of Article 4, whether it is the application of the closest connection or the presumption rule, demands a determination of factors connected to the contract. A question that arises is whether factors after the conclusion of the contract is to be taken into account. According to the Giuliano-Lagarde Report,[278] it is possible "*to takes to into account of factors which supervened after the conclusion of the contract*". This means that all factors connected to the contract, also under the pleadings before the court may be taken into account, e.g. the choice of court. One of the problems of such an approach is that the parties may seek to alter the actual situation after the conclusion of the contract and before the pleadings.[279]

The Rome Convention does not, apart from the presumption rule in Article 4(2), give any directions as to what kind of factors in a contract can be said to have a connection to a country. In relation to e-commerce, one has to examine the different factors that could be taken into consideration.

In relation to e-commerce contacts taking place over the Internet, there are several elements, or connecting factors, that could be relevant. A point of departure may be the point of view adopted by the Nordic Consumer Ombudsmen in a statment from December 1998 entitled: "Common attitude versus commerce and advertising on the Internet and similar communications systems".[280] In this statement, the different Nordic Consumer Ombudsmen declared that they would consider a website (of an e-business) to fall within

278. See Giuliano-Lagarde Report, p. 20.
279. See Peter Kaye, The New Private International Law of Contract of the European Community, Aldershot 1993, p. 173.
280. See De nordiske forbrukerombud: Felles holdning til handel og markedsføring på Internett og tilsvarende kommunikasjonssystemer, December 1998. See also http://www.forbrukerombudet.no/.

their jurisdiction based on whether the advertising of this website was directed to a specific market. Whether the advertising was directed towards a specific market would be determined individually taking account of several factors. Amongst factors that could be relevant the statment included:

- Which laguage, currency or other national signs were applied.
- In which other extent the business or service was advertised towards the actual national market.
- In which degree there was a connection between the advertising on the Internet and other advertising activities on the actual national market.
- In which degree the business accepts to enter into contract with consumers domiciled in the actual Nordic country.

Even though this statement by the Nordic Consumer Ombudsmen is not formally binding[281] and thus a very weak source of law, it does emphesise important connecting factors between business on the Internet and consumers in a specific country. Moreover, the statement has importance as a source of law since it is not only national, but based on the approach by important consumer institutions responsible for monitoring consumer rights in five out of eighteen EEA countries. However, these connecting factors are especally relevant for consumer question, and can therefore only serve a a starting point for relevant connecting factors between an e-commerce transactions and a country's legal rules.

Another approach of establishing a connection between a country and an Internet service has been addressed by the practice of the British Financial Service Authority (FSA).[282] This practice served also as an example for the EU Commission when it presented it's country of origin principle in Article 3 of the Electronic Commerce Directive.[283] The FSA is to administrate the Financial Service Act of 1986. According to Article 57(1) any investment services advertisments issued[284] in Great Britain must have an autorisation from the FSA. Any advertisment made possible over the Internet is considered "an investment advertisment" according to Article 57(2). In light of the Internet, the FSA has as a point of departure considered an advertisment that is accessible on the screen of a person in Great Britain to be considered issued in

281. This is addressed on the first page of the statement.
282. See the article: EUs nye forslag til direktiv om elektronisk handel på Internett: Jurisdiksjon og Internet, Lov&Data nr. 57, March 1999.
283. See Directive 2000/31/EC of the European Parliament and Council of 8 June 2000 on certain legal aspects of electronic commerce in the internal market, Article 3.
284. The Act applied the terms "issued" or "cause to be issued" on investment services offers/ advertisments.

Great Britain.[285] However, in practice each case is determined individually by the FSA, when they examine if they have jurisdiction. In this examination of if a webshop falls within their jurisdiction they take into account amongst other things whether:

- The service is accessible from a server outside the territory of Great Britain.
- The service can be applied by English investors.
- Precations have been taken to prevent such investors to access the service.
- Precautions have been taken to prevent persons in England to access the website.
- The advertisment is directed to persons in England.

These are all factors that may have relevance as connecting factors in relation to Article 4(1) of the Rome Convention. In addition, since these are factors which both an English authority and the EU Commission have acknowledged this practice may, in my opinion, be considered a sort of source of law, although weak.

In Europe, the court cases related to cross-border conflicts and the Internet are practically non-existing. I have not been able to find any relevant cases. However, in the United States several cases have been solved. The ones found have not been directly connected to the choice-of-law, but rather the question of jurisdiction. Although these are two separate questions and American law has no applicability in Europe, these cases show what kind of connecting factors American courts value when examining the relation between a forum and a legal conflict. In my opinion, this relation may have a certain legal value as examples since the connecting factors in many ways are common for the western part of the world. Here are som excerpts of these cases.[286]

Digital Equipment Corp. v. Altavista Technology Inc.[287]
Digital purchased Altavista's rights in its trademark and then licensed it back in certain defined ways. Digital then sued Altavista for breach of trademark licensing agreement, trademark and servicemark infringement, unfair competition and trademark dilution, in the State of Massachusetts. Altavista

285. FSA has also considered that the exceptions in Article 207(3), advertisments in foreign periodical publications spread outside Great Britain or as a part of a broadcasting program, do not take place in regard to Internet advertisments.
286. For a broader examination of US cases in this field see the work of Henrik Spang Hansen on Internet and Jurisdiction (2001 - under publication,).
287. See Digital Equipment Corp. v. Altavista Technology Inc., Massachusetts District Court

claimed that the case had to be dismissed for lack of personal jurisdiction. The court held that it has jurisdiction and found for the plaintiff. However, the connection between Altavista and Massachusetts was established in relation to jurisdiction and the court stated:

> *"I have evaluated the totality of ATI's [Altavista] minimum contacts with Massachusetts...I cannot ignore the fact that the medium through which many of the significant Massachusetts contacts occurred is anything but traditional; it is a site in cyberspace, a Web-site. It has been said that the Courts have had to re-evaluate traditional concepts of personal jurisdiction in the light of the increasing globalisation of the economy...The commercial use of the Internet tests the limits of these traditional, territorial-based concepts even further... The Internet has no territorial boundaries. To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps "no there there," the "there" is everywhere where there is Internet access. When business is transacted over a computer network via a Web-site accessed by a computer in Massachusetts, it takes place as much in Massachusetts, literally or figuratively, as it does anywhere."*

From this it could be drawn that as long as the vendor opens for business on the Internet, the vendor opens up for business with any country with Internet-connection. The problem is that such an approach does not point out any specific country from the other, and it means that the vendor will have a very unpredictable situation as to what law might govern his contracts.

Bensusan Restaurant Corp. v. King.[288]

Bensusan was a company in New York, which had established a famous jazz club in New York called "The Blue Note". The defendant, Mr King, owned a small club in Columbia, Missouri, also called "The Blue Note". In 1996 Mr. King created a website for his club, with free access. The server was located in Missouri and contained a logo that was similar to the one in New York. Bensusan claimed King infringed their trademark rights, while King claimed there was a lack of jurisdiction for the court in New York. The court came to the conclusion that advertising on the Internet did not in itself establish a connection proper to always claim jurisdiction in New York, thus this would have led to the conclusion that someone advertising on the Internet would have jurisdiction around the world. Moreover the court concluded that since King had not made any actual contact with New York or made business with people from New York, and since the website contained text explicitly making it clear that his club should not be confused with the one more famous and that

288. See Bensusan Restaurant Corp. v. King, S.D. New York District Court, File No 96 CIV. 3992 (SHS), 9/9/96.

his club was directed towards Missouri, jurisdiction could not be granted. Consequently, the court evaluated the text of the website possible disclaimers when it determined the connection to a legal system.

Weber v. Jolly Hotels.[289]
Jolly Hotels is an Italian company who advertised on the Internet for hotels with phone numbers. Eileen Weber ordered a trip to Italy and stayed in a Jolly Hotel. During her stay, she happened to fall in the hotel and tried to sue Jolly Hotels upon returning to New Jersey. The court came to the conclusion that a passive website that is used to advertise for products and services on the Internet is not enough to grant jurisdiction and dismissed the case. This shows that presence on the Internet as such does not always give guidance as to which legal system the website is connected.

Asger Corp. v. Multi-Fluif Inc.[290]
In this case a Norwegian company was sued in Texas, by Asger Corp. claiming the Norwegian company had infringed their copyrights. The court found that there was no qualified contact between the website and Texas since Internet users could not shop or contract through the Internet. Consequently, the website was passive. As for a connecting factor, this leads to the conclusion that in order for a connection to exist on the Internet, the website will have to be somewhat directed towards the buyer, and that the domain names have little importance.

As for activities on the Internet in the USA, 1997 was the year that the web-jurisdiction issues settled a bit, as courts analysing home pages distinguished between "passive" websites, which advertise goods or services, and more interactive sites, which let visitors order products. At least three federal circuit courts addressed whether and when a website confers jurisdiction in a state foreign to the web master. The 2d U.S. Circuit Court of Appeals found a purely passive website insufficient for personal jurisdiction in the case of *Bensusan v. King*. In the case of *Cybersell Inc. v. Cybersell Inc.*[291] the court was confronted with a slightly more interactive website. A visitor to the homepage who wanted to learn more was allowed to leave a name and contact information. The 9th Circuit declined to exercise jurisdiction over the Florida defendant when no other contacts with the state, Arizona, were found, and there was no evidence that anyone from Arizona had left a name or even accessed the site. As for on-online activity, the case of *CompuServe Inc. v. Patterson*[292]

289. See Weber v. Jolly Hotels, DC NJ, File No CIV. A 96-2582, 12/9/97.

the court found that the Texas-based defendant had targeted and solicited business in the plaintiff's state, and jurisdiction was granted.[293] All these cases, however, show that US courts give importance to the actual activity from the website to the legal "foreign" system, i.e. whether they are passive or active towards the "foreign" territory. The activity or passivity towards the buyer will depend on the text applied, the software technology, actual activity already taken place. On the other hand, the court does not seem to take into consideration hardware technology or where the server is located or the domain name. However, wether this is going to be the case when addressing European courts and choice-of-law questions, rather than jurisdiction questions, is more uncertain.

In the following section I will mention the most relevant connecting factors related to e-commerce and the Internet, mainly the World Wide Web and the e-mail system. This list can in no way be said to be complete, and since no cases have appeared before a court,[294] it is not certain that the court will take into consideration any of these connecting factors. However, since there are great uncertainties due to the anonymity of the Internet, the existing connecting factors, whatever they are, must be examined.

a) Buyer's habitual residence.

One of the traditional connecting factors in commercial situations is the habitual residence of the buyer or, if it is a company, its place of commerce. This is as relevant for traditional commerce as for e-commerce. However, due to the anonymity of the Internet, where the physical address is not necessarily stated, it can often be difficult to determine the location of the buyer. When the products are physical, they will be delivered by mail or other logistical systems and a physical address will have to be stated. However, in this thesis, considering products delivered on-line, the buyer will just have an e-mail, which can be located on a server anywhere in the world. Without the use of digital signatures or certificates, the buyer can often remain anonymous and his residence or place of business will remain unknown to the vendor. Consequently, it will often be difficult to use this connecting factor.

b) Vendor's habitual residence.

Another traditional connecting factor in commercial situations is the vendor's habitual residence, or more usually his place of business. In relation to Article 4(2), it will mostly be the vendor's place of business that is the place where

292. See CompuServe Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).
293. This case follows up the judgment in Digital vs. Altavista.
294. To my knowledge.

the characteristic effect of the contract is to be performed. From the buyer's perspective, it is difficult to determine the vendor's place when the contract is to be effected on-line. The vendor does not need to state his place of business, since it is not necessary for his activities. He will most probably either send an invitation to offer a product to the buyer by mail or be present at the WWW with a catalogue, where the buyer can order the digital product. Unless there are digital signatures or certificates, the vendor's place of residence or business could remain secret. This would cause uncertainty and unpredictability. An international survey, done by the consumer authorities in 11 countries has revealed that a great deal of the vendors did not state their address or telephone number on the WWW. The lack of qualified information on the net was obvious.[295]

c) The place of the server where the products are up-loaded or downloaded.

The place where the vendor is situated is not necessarily the same place as the one where the server containing the product is located. I can establish a business in Norway, but an Internet access through a server in England. The products will then be downloaded from the server in England. Technically, the server is not easy to identify for the average user. Although the IP number can be used to identify the location of the server, this is a difficult process. Moreover, one should not, in my opinion, take into consideration the location of the technical means. In the Television Directive,[296] as regards the connecting factor as to which law should decide the broadcasting, it is the sender principle that is followed. However, this is difficult to apply to the Internet, where it is much too easy to change servers. A website might be copied on to another server in a few seconds, which could change the legal situation very quickly. This could then cause uncertainty and unpredictability. In my opinion, the place of the server should have very little or no importance, since it could cause a forum-shopping situation.[297] However, the place of server cannot be excluded.

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295. See http://www.aftenposten.no/nyheter/nett/d98461.htm (9.9.99).
296. See Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, which must be also seen in relation to the European Convention on Transfrontier Television.
297. This can also be said to be the opinion in recital 19 of the preable of the Directive 2000/31/EC of the European Parliament and Council of 8 June 2000 on certain legal aspects of electronic commerce in the internal market.

In the case of Pres-Kap v System One Direct Access[298] (Florida, USA), a company selling products to several states was located in New York, but used a database (and server) located in Florida to do so. The court held that the database situated in Florida did not establish a significant connection to this state when it came to jurisdiction. This shows that the location of technical devices is given little significance.

d) The place where the product is delivered.

The place where the product is delivered is normally the place where the buyer is located. But when a product is delivered digitally on-line, the products will mostly be delivered to an e-mail address or a host service provider. The location of this place, in many cases a typical server, is difficult to locate and it can also be changed very quickly. However, it is not impossible, since the location of an IP number is possible to locate.

e) Is a proxy server a possible connecting factor?

When surfing the Internet a computer will in many cases not retrieve the information from the server hosting the actual information, but from a proxy server. This is a server technically not far from the host server of the user. The proxy server first checks if the digital bits demanded by the user has been changed since last time, if it has not the proxy server transfers these bits from its own memory, where it has been saved. The advantage is that the user receives the digital bits quicker than if all information had to come from a server far away. The place of the proxy server could have been a connecting factor, but since this is only a technical solution opting for faster services, it can hardly be said to be a connecting factor. The latter solution has also been sought in the Copyright Directive.[299] In Article 5 of this Directive the EU commission states that the digital bits on a proxy server are not to be considered a copy as long at the use of proxy server has only technical purposes and *not* any reproduction purposes.

f) The place where the contract is concluded.

The place where the contract is concluded, *lex loci contractus*, has often been a traditional connecting factor in private international law. In relation to the Internet, the place where the contract is concluded is difficult to establish. Technically, there are at least two possible solutions. The first is that the contract is considered to be concluded at the computer of the buyer, who either receives an offer from the seller by e-mail or demands a certain webpage from

298. 636 So.2d 1351 (1994).
299. Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society, O.J. L167 22.june 2001.

the vendor containing the contract to which he agrees. However, in relation to e-commerce and the computer where the contract then should be concluded, it is difficult for the vendor to determine this place since the computer can be located in different countries depending on where the buyer is. He could also have a laptop and be flying over different territories. The second solution is the place where the contract is considered concluded at the webpage of the vendor or at the server where the e-mail is accepted. In both of these solutions, the location of the parties or the place of conclusion of the contract may be difficult to locate due to anonymity. Moreover, the place where the contract is concluded may be differently viewed in different countries. This is because some countries consider the contract for being concluded when the buyer sends acceptance of offer from the vendor, while in other countries the contract is considered concluded when the vendor receives notice of buyer's acceptance. To conclude, the place where the contract is concluded is difficult to determine, and will often actually be the location of one of the parties.

g) The domain name as a connecting factor.

Another possible connecting factor is the domain name. The URL determines the logical location of the vendor in the WWW. A vendor with domain names that ends with .no, .dk or .de will most often be considered to be located in respectively in Norway, Denmark and Germany. In Norway, it is required that a company applying the top domain .no, must be registered in Norway. However, not all domain names have a national adherence. Generic domain names, such as .com, .org or .net, cannot be linked to any specific country. Furthermore, some of the top domains have also been sold to companies. As such, the top domain .fm has been sold to a Canadian company, which sells the sub domains to radio stations. In Sweden, many webpages have applied the top domain .nu. This domain name means "now" in Swedish, and Swedish web companies have had advertisements that have URLs with names like: www.come_and_buy_ products.now. Consequently, the domain name can be a connecting factor but in many cases it can also be confusing.

h) The e-mail address as a connecting factor.

As for the domain name, the e-mail address is a connecting factor with strong similarities to domain names since they are built on the same system. Each address has endings like .no or .com. However, while the domain name has certain stability and will in some cases be difficult to change or even get, the e-mail address is easier to get. The buyer using an e-mail address can at the same time have different addresses and also get them for free. When a buyer gets an e-mail address, this is a service from the host provider. Concomitantly,

a citizen of one country in Europe can easily get an e-mail address with the ending of another EU country. Although I am a Norwegian, I could get an e-mail address in Italy, and try to buy digital products in Germany. The German vendor will most likely think I am Italian. Consequently, the e-mail address gives even less predictability than the domain name for the one receiving an e-mail from someone, but it is still a sort of connecting factor in relation to Article 4 of the Rome Convention.

i) The language of the text of the webpage or e-mail or other national signs.
The text of the webpage is an important connecting factor. The buyer of a digital product will often try to sell a product to a specific group of people. If the vendor sells a product applying the Spanish language, it can be said that the contract is connected to Spain. However, most webpages are written in several languages or at least in English. The use of an international language creates problems in relation to the connecting factor. A Spanish text might be directed at all Spanish speaking people around the world or just for the South-American public. A language on its own will give little indication of a connecting factor. However, applied together with other connecting factors, it may create more certainty and predictability.

j) The currency of the purchase.
As for the language of the webpage, the currency that the contract states to be paid for the product, can be a connecting factor. However, when an internationally known currency is used, the determination can be difficult. A company selling a digital product with a .com address and text in English, and stating the price in US dollars will not necessarily be from the USA since this is internationally applied. On the other hand, if a company has an Icelandic domain name, stating their price in Icelandic currency and having a text in Icelandic, the connecting factor will presumably be stronger for the contract to be most closely connected to Iceland, even though many Icelanders live in Norway.

k) Disclaimers.
A most relevant connecting factor is, if the vendor states the countries he wants to engage in contract with the buyer. A simple statement, or form to fill out, where the buyer only can order a product if he comes from the countries stated by the vendor, might limit the countries to which the contract is connected. This could give larger certainty to both parties of a contract.[300]

l) Technologies preventing contracting.
Another solution is if the vendor applies an Internet technology preventing the buyer from contracting or accessing the website. By applying such a technology the vendor would clearly state that he has no intention of entering into contract with the buyer from a certain country and thus do not want to have contact with vendors from that country.

m) Actual contracting activity versus a specific territory.
The actual actitivity the vendor has towards a territory may also be considered being a connecting factor. If the vendor advertises in a country or accepts to enter into contract with persons domiciled in a country, this actual activity may have relevance as a connceting factor. The predictability of the parties is a key word for such a connecting factor.

n) Other activities in the country to which one seeks connection.
A connecting factor may also be other activities that the vendor has in the country to which he seeks the closest connection. If the vendor claims that the contract is most closely connected to country A because he has other activities there, for example advertisment campaigns, this is a factor of determining that the vendor's contract is closely connected to country A.[301]

o) Other clauses – choice of court/arbitration.
The understanding of private international law is not always evident, especially the difference between choice-of-law and choice of court. Therefore, a choice of court or arbitration court, may be a connecting factor.

As explained, it is the combination of these connecting factors that can be relevant when determining the country to which the contract is most closely connected. However, the Internet is very international and can be anonymous, which means that there is large variety of connecting factors. Furthermore, the connecting factors will be determined by a judge, which means that each case might be solved differently. A judge with lesser knowledge of the Internet might not consider the technical connecting factors, while another might weighten the connecting factors differently. The consequence is that there is a great deal of uncertainty and unpredictability connected to the closest connection method, when it is applied to the Internet and e-commerce. This is also relevant for the presumption rule in Article 4(2). The examination

300. However, one might ask whether this is a legal disclaimer since it might be in disharmony with the rule in the Treaty of Rome concerning the free movement of goods. This will treated further in relation to Article 21 of the Rome Convention.
301. See both the practice of the FSA and the statement by the Nordic Consumer Ombudsmen.

of the country of the vendor, being the one effecting the characteristic performance of the contract, also shows that it is difficult to determine this place due to anonymity. This causes unpredictability for Article 4(2), and might result in the non-application of Article 4(2) due to Article 4(5). The flexibility of Article 4 as a whole will be so much larger in relation to e-commerce, so that the predictability needed for contracting parties, when a choice has not been made, will be very little. In my opinion, one should therefore examine either other rules or see if the application of digital signatures should be mandatory for e-commerce.

5.2.4 Special choice-of-law rule for consumers

5.2.4.1 General

Until now, only general rules of what the choice-of-law is, have been examined. The basic rule is that the parties to a contract may choose the law applicable to this contract and in the lack of such, should examine the law most closely connected to the contract. In relation to business-to-business contracts, where the parties are mostly equal, these rules are intended to uphold equity between the parties. However, once a consumer is introduced to a contractual situation, other principles will be applied. In business-to-consumer contracts, there are often other needs. The consumer is most often faced with contracts prewritten by the lawyers of the vendor, which gives him little or no right to negotiate. This is especially relevant when the contract is presented in a click-wrap form. The pressure on the consumer can therefore call for mandatory rules defending the consumer. As a consequence the consumer has been given certain rights that limits the application of Articles 3 and 4. The latter Articles are the principal rules to be applied but they are limited by Article 5 of the Rome Convention. Article 5(1) to 5(3) states:

> *"(1) This Article applies to a contract the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.*
>
> *(2) Notwithstanding the provisions of Article 3, a choice-of-law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:*
>
> > *-if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all steps necessary on his part for the conclusion of the*

contract, or
-if the other party or his agent received the consumer's order in that country, or
-if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order; provided that the consumer's journey was arranged by the seller for the purpose of introducing the consumer to buy.

(3) Notwithstanding the provisions of Article 4, a contract to which this Article applies shall in absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article".

The intention of Article 5 is to protect the weaker party in a consumer contract[302] in a cross-border conflict from being deprived of the mandatory rules afforded to him by the law of the country in which he has his habitual residence. However, some criteria have to be met in order for Article 5 to be applicable for the on-line purchase of digital products.

As a point of departure, Article 5 will only be applied after the application of either Article 3 or Article 4. Article 5(2) points out that the parties are free to determine the law applicable to the contract, but they cannot deprive the consumer of the mandatory consumer protection rules of the country in which the consumer has his habitual residence if certain criteria are met. Furthermore, Article 5(3) points out that if the parties have not made a choice-of-law, the choice made by Article 4 cannot deprive the consumer of the mandatory consumer protection rules of the country in which the consumer has his habitual residence if the criteria in Article 5(2) are met. However, it is clear that Article 5 will only be applied if the mandatory rules of the consumer's habitual residence give him/her better protection than the one afforded after the application of either Article 3 or 4.

In my opinion, this marks one of the technical problems of this Article. This is because the consumer first will have to determine if a choice-of-law has been made by either Articles 3 or 4. Then, if another law than the one of his habitual residence has been chosen, the consumer will have to determine whether these rules deprive him of any rights in relation to the consumer rights in his habitual residence. It is but then, the consumer can apply Article 5(2) and can rely on the consumer rights of his habitual residence.

302. See Giuliano-Lagarde Report, p. 23.

5.2.4.2 The scope of Article 5

In order for the scope of Article 5 to be applicable, there are certain conditions that have to be met. Some of these conditions are especially relevant for e-commerce, while others have been discussed previously in this thesis. In relation to e-commerce, the scope of Article 5(1) has basically three conditions in order to be applicable. The first is that there is a *contract*, the second that this contract concerns the *supply of goods or services*, and finally that the supply is intended for a person who is a *consumer*.

As for the first criterion, one could question whether it is in disharmony with the word "contractual obligations" in Article 1(1). For example in some countries there might certain formal criteria for an obligation to be considered a contract, such as a paper demand or a writing demand. These are questions that concern the validity of the contract and not the applicability of Article 5 as such.[303] Therefore, the conclusion of a purchase of digital products between two or more parties will be a contract.

The second criterion is for the contract to be a supply of goods or services, a criterion that has been examined under chapter 4, and will not be further addressed in this section.[304]

The final criterion, and the most important for defining the scope of this Article, is that the contract is a consumer contract, meaning that the person who receives the goods or services is a consumer. The term 'consumer' is

303. A digital contract differs from a traditional contract since it is not written on paper. Therefore, it is difficult to examine a physical document. However, the question of the validity of a digital contract demands firstly that a choice-of-law is made in order to determine after which national law the contract is to be determined. The choice-of-law concerning the validity of the contract is determined by Article 8 of the Rome Convention, which points out the law applicable to the contract after either Article 3 or 4. In most substantive laws, such as in Norway, there are no formal demands for a basic contract, but some specific contract have demands for a paper or in writing. It is difficult to say something general on this point as one would have to examine the laws off all countries within the EEA. However, most often these demands must be confronted with a digital contract and see if the digital contract fulfils the reasons for these demands. Historically, formal needs for a contract to be in writing or a being a paper document was made in order for the court to use the contract for reasons of evidence. In relation to digital contracts, digital signatures and certificates, together with efficient logs might give a digital contract better value as evidence than traditional paper contracts. The latter might also be falsified.

304. However, within the supply of goods and services, the convention also refers to provision of credit for the supply of goods and services. This could also be relevant for a purchaser of digital products. The ECJ has in the case of Bertrand v. Ott (Case 150-77 [1978] ECR 1431), concerning the Brussels Convention Article 13 adopted an autonomous and rather restrictive meaning of sale of goods on instalment credit terms. This was done when defining consumer contracts in relation to a transaction in which the price is discharged by way of several payments or which is linked to a financial contract. This could call for a restrictive interpretation of the term goods in Article 5(1) of the Rome Convention.

meant to relate to the one who purchases the product outside his trade or profession. The term consumer contract is according to the Guiliano-Lagarde Report meant to correspond to Article 13 of the Brussels Convention.[305] The most important point is that a consumer concept "should be interpreted in light of its purpose which is to protect the weaker party and in accordance with other international instruments with the same purpose" such as the Brussels Convention. The term 'consumer' has in relation to the Brussels Convention been understood to be interpreted independently of national law and therefore, autonomously.[306] The vendor has to act in the course of his business or trade in order for this contract to be a consumer contract. This is supported by the Giuliano-Lagarde Report[307] and also follows Article 13 of the Brussels Convention.[308] In relation to e-commerce, this means that a private person that uses the Internet to sell a product, for example a used sofa or car by offering it on his personal webpage, will not be a professional party and the buyer of this product will not be granted the application of Article 5.[309] These parties will have to apply either Article 3 or 4 of the Rome Convention. The buyer is the consumer and he must objectively be a consumer in order for Article 5 to be applied. Moreover, he must according to the Giuliano-Lagarde Report[310]primarily act outside his trade or profession. Consequently, if the consumer acts both within and outside his trade or profession one must determine which part is the largest in order to see if the contract falls within or outside Article 5.

However, the far more relevant question is whether the vendor's awareness of the buyer's position has relevance for the contract falling within the scope of Article 5. In e-commerce, the anonymity of the Internet creates uncertainty as to the position of the buyer. The vendor might be interested in only doing business with professional parties and if he states so in the order-

305. See Giuliano-Lagarde Report, p. 23.

306. For some interpretations of consumers se the case of Hutton: "only contract concluded for the purpose of satisfying an individual's own needs in terms of private consumption" can be a consumer, and in the case of Benincasa: "in order to determine whether a person has the capacity of a consumer,..., reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned" Physical person can be consumers, while judicial persons cannot.

307. See Giuliano-Lagarde report, p. 23.

308. See Bertrand v. Ott, Case 150/77 [1978] ECR 1431 on page 1447 where the ECJ adopts the definition of a consumer contract where the vendor acts within his trade or business.

309. This is why there are three groups of party conflicts and not only two. The two traditional conflicts being the consumer-to-business and the business-to-business, while the third is the one between consumer-to-consumer. Two traditionally weak parties acting outside their trade or profession, have lesser understanding of professional trade than two professional parties.

310. See Giuliano-Lagarde report, p. 23.

ing form two situations might appear. The first is if the consumer when he purchases a digital product knows that the vendor only wants to do business with other professionals but still orders a product. The question is whether he still can be granted protection under Article 5. The second situation is if the consumer orders a product and is not aware of the fact that the vendor does not want to enter onto a business transaction with him. The question is again if the vendor can protest against the application of Article 5. The Giuliano-Lagarde Report states that: "*...where the receiver of goods or services or credit in fact acted primarily outside his trade or profession but the other party did not know this and, taking all circumstances into account should not reasonably have known it, the situation falls outside the scope of Article 5*".[311] Isolated, this could mean that as long as the vendor is in good faith as to his buyer not being a consumer, Article 5 will never be applied. However, this is difficult to determine if the vendor opens up for sale on the Internet without making clear that no consumer can make business with him. The Internet opens up for many possibilities and a consumer looking for the best prive will seldom look at conditions in the contract. In these situations it is my opinion that the vendor, having opened for such a possibility, cannot claim to be in good faith as to the consumers purchade. A consequence of such an argumentation is that the applicability of Article 5 will be determined by the determination of whether the consumer can be saif to have been in good faith. This task will have to be determined individually in the same way as when determining whether a choice of law could be demonstrated with reasonable certainty. I do not pursue the matter any further.

Finally, the scope of Article 5 is limited to not include certain consumer contracts such as carriage contracts, other than for travel and accommodation inclusively, and contracts concerning services supplied exclusively outside the consumer's habitual residence.[312]

5.2.4.3 The alternative intents of Article 5(2)

Once the applicability of Article 5 is established, one has to examine the intent for the application of Article 5(2) and, concomitantly, Article 5(3). Article 5(2) states that if one of the following intents are met, the consumer cannot be deprived of the mandatory rules of the law of the country in which he has his habitual residence. Mandatory rules are those substantive rules in a national legislation that cannot be derogated from in a contract in such a way that the consumer is left with less protection. The intents are:

- *if in that country [habitual residence of the consumer] the conclusion of the contract was preceded by a specific invitation addressed to him or by*

311. See Giuliano-Lagarde report, p. 23.
312. See respectively Articles 5(4) a and b.

advertising, and he had taken in that country all steps necessary on his part for the conclusion of the contract, or

- *if the other party [vendor] or his agent received the consumer's order in that country, or*
- *if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of introducing the consumer to buy.*

In relation to e-commerce and the on-line purchase of digital products, the last intent is not relevant. This is due to the fact that this intent relates to a physical journey, where both parties are aware of the their situation. Consequently, this intent will not be treated further. In the following paragraph, the first two intents of Article 5(2) are discussed. Each intent has several criteria that have to be met in order for Article 5(2) to be applied.

First intent:

The first intent will be applied if three criteria are fulfilled. These are that the vendor sends the consumer (1) a *specific invitation*, or in other ways *advertises* his products (2) in the *country* of the consumer, and that (3) all steps of the conclusion of the contract is taken there.

The first criterion is whether there has taken place advertising, hereincluded specific invitation,[313] on the Internet. In the following only the www and e-mail is discussed, because they are the most relevant Internet applications to be applied. The Convention does not give any special interpretation of what is considered advertising, neither does the Giuliano-Lagarde Report, although it has examples of advertising. However, as a point of departure, a natural understanding of advertising is that it is information from a vendor to which there is a qualitative requirement. This requirement is in this thesis considered including information from the vendor that in its form has the quality of promoting the vendor and/or his products to be bought by a consumer.[314]

As a specific invitation is a special group of advertising, I will firstly address advertising in general in relation to the WWW and e-mail, and then

313. Article 5(2) first alternative, has a condition for its application two alternatives, which is a

specific invitation. This is because if advertising on the Internet falls outside the first intent, most reasonably, specific invitation will also fall outside.

Advertising on the WWW. At least one writer has claimed that commercials on the WWW cannot be considered advertising, because the websites are to be considered shops that the customers enters and the advertising is considered to be inside the shop and not outgoing information.[315] I agree that a website cannot be considered advertising as such, but a webpage of the website is information demanded by the consumer and sent to him by the vendor's server. Consequently, the webpage may still be considered advertising.

Advertising can be said to be information about a vendor, which will increase his sales. However, the question is whether there is a need for activity from the vendor for this information to be advertising. The Giuliano-Lagarde Report states to that the "*trader must have done certain acts...*"[316] This can lead, in my opinion, to the argument that for information to be advertising there is a need for activity from the vendor. A vendor present at a trade fair giving out information about himself to every consumer present at the fair, will be advertising. This is because it is the vendor that approaches the trade fair as a market place for promotional reasons. The consumer is present to access this advertising and the trade fair stand cannot be considered a shop. Consequently, if the vendor approaches the consumer at other points than the regular shop it will be considered advertising. The same will apply to digital advertising. An example would be TV-shops on a digital television channel. The broadcasting company as a website will not be an advertisement, but the programs selling products may have advertising in them such as the webpage, reaching each consumer in his home. Even though the consumer is active in turning on the television, the intention of the vendor is to promote his merchandise. It is this promotion which is meant to reach the consumer and which is advertisement.

The analogy can also be applied for the WWW. In addition, the vendor will know that a webpage can reach any customer connected to the Internet. And as long as the information about the vendor shop or products has a character suitable to promote this and thereby increase the vendor's income, this must be a determining factor calling the webpage an advertisement. This is

314. See e.g. the Article 1b of the Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, O.J. L 298, 17/10/1989 p. 0023 – 0030, defining television advertising as "...any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services."
315. See e.g. Christina Hultmark, Elektronisk handel och avtalsrätt, Stockholm 1998, p. 83.
316. See Giuliano-Lagarde Report, p. 24.

also underlined by the need for predictability in private international law. The vendor has a need to be able to predict his situation.

Consequently, a webpage may be advertising in relation to Article 5(2) first intent. And as a point of departure, this advertising will be reachable worldwide.

Advertising by e-mail. Advertising by e-mail is normally an active action by the vendor with the intention of promoting his products. This is even if the vendor applies an automatic response to e-mail with information of advertising character. The reason for this is that one can place on equal footing an e-mail with an ordinary letter. Both are actions from the vendor directed at a possible buyer, i.e. the consumer.

"Specific invitation". The result is that both a webpage and an e-mail can be considered advertising in relation to Article 5(2) first intent. However, the next question is whether the same applications may be considered "specific invitation" in the same relation. The importance of a distinction between advertising and "specific invitation" is that the vendor may be able by "specific invitation" to limit the advertising on the Internet from being global and only addressed to a specific group or person.

The Convention does not define "specific invitation", but in the Giuliano-Lagarde Report exemplifies this as e.g. *"inter alia mail order"* and exemplifies as "*have made business proposals individually*". The result is that a "specific invitation" has a special condition, demanding a predetermined addressee. The specific invitation does not necessarily have to be addressed to a name, but may also be a specific group of people. However, this group must be natural and not determined by the vendor himself. Meaning that if the vendor sends an advertisement to all households in a city and directing it to "all men over fifty", this would not be considered a specific invitation. Moreover, if a consumer demands information from the vendor and the vendor replies with an offer, this will also be a specific invitation.[317]

Specific invitation on the WWW. When a vendor applies the WWW for advertising, his use of webpages will be advertising in relation to Article 5, while the website as such cannot be considered advertising. Suffice it to say that a website can therefore not be a specific invitation. However, the Internet, Internet browsers, mobile phones/WAP (Wireless Application Protocol) and such technologies have made it possible to create profiles using small files which are located on the consumer's computers which gather information

317. This was held by a court in Netherlands, concerning Article 13(1)(3)a of the Brussels Convention, which is almost identical to Article 5(2) first intent of the Rome Convention. The case was Kuipers v. Van Kesteren (1994) NIPR 160, District Court of Amsterdam, 24.4.1993, and treated in Peter Kaye (ed.), European Case Law on The Judgment Conven-

about the movements of the consumer on the vendor's website, i.e. being able to see which webpages he has seen. The result is that the vendor can elaborate a specific webpage for each consumer, for example greeting the consumer when it demands a webpage from the vendor, saying: "Hi Mr. A, last time you were here you ordered pants and a shirt. Now we would like to offer you a tie and a pair of shoes." The use of such a technology will, in my opinion, be considered a "specific invitation" in Article 5(2).

Specific invitation by e-mail. An e-mail resembles a normal letter, sent from one person to another, using an address. Consequently, as a point of departure, the use of a specific address for e-mails does qualify the e-mails as specific invitations. However, there might be exceptions from this.

The first exception concerns the spamming of a large number of e-mails. Examples might be vendors that have bought a large number of e-mails or who have send an e-mail to every user of an ISP (Internet Service Provider), for example every one located at the University of Oslo (UiO).[318] This resembles the situation where the newspapers are delivered to subscribers with additional advertisements. In that situation the vendor cannot define the group of subscribers and does not know them since this is up to the newspaper editor.[319] The vendor will, in my opinion, not have sent a specific invitation but rather an advertisement. Consequently, in these situations where the vendor has no direct control over the e-mails sent, it is my opinion that the e-mail cannot be considered a specific invitation.

Another exception can be considered in relation to the use of anonymous e-mails. In these situations, the vendor will direct e-mail to consumers behind addresses which makes it difficult to identify them. This may be because they are using ISP with generic domain names, such as .com or .org, or addresses with intended or not-intended anonymisation, e.g. anonymous@hotmail.com or pietrix@hotmail.com. In my opinion, this has however, no importance as these invitations still are specific invitations to those behind the e-mail address. Moreover, it is the vendor who has chosen to send the "specific invitation" and therefore determined whether it is predictable or not for him. Therefore it is up to the vendor to take the risk. Consequently, I would consider the use of anonymous e-mails as "specific invitations" in relation to Article 5(2).

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318. I suppose that programs may be applied so that an e-mail is sent to every possibility including xxx@xxx.uio.no, where the x stands for any possible combination.
319. The editor can also be an on-line newspaper which sells advertisement spots in their mailing list.

The first criterion of the first intent of Article 5(2) will therefore consider e-mails and webpages as either advertising or specific invitations. The second criterion is that this advertising or specific invitation is directed towards the country of the consumer's habitual residence. In the Convention this can be drawn from the Convention stating that Article 5(2) first intent is applicable "*if in that country...specific invitation to him or by advertising...*". More decisive is though the Giuliano-Lagarde Report which refers to "*where the trader has taken steps to market his goods or services in the country where the consumer resides.*"[320] Such an interpretation is also in harmony with the aim of predictability, since Article 5 presumes that the vendor has a certain awareness of the wide spread of his advertising that may be binding for him. Consequently, all advertising, including specific invitation, must have an "intention" of being directed towards a specific country in order for a consumer in that country to claim protection after Article 5(2) first intent.[321] This intention must, in my opinion, be regarded objectively, since it is what a normal consumer may consider being an advertisement directed towards him which is determining. If this would not be the case, consumer would have problems claiming their right and forced to take legal action very often. Concomitantly, this would lead to a situation where the consumer would remain a very weak party to a contract.

The interpretation of the second criterion indicates that advertising has to be directed towards the country of the consumer. However, a question is whether the advertising also has to exist, meaning taking place, in the country of the consumer. This has been claimed by at least one author.[322] In my opinion, the advertising will always take place in the country of the consumer as long as the consumer is able to see the advertising on his screen.[323] Even if the website is not in the country of the consumer, a copy of the advertising will be accessed in the country of the consumer and stored on either his hard-disc or RAM.[324]

This leads to the need to determine where an advertisement is directed or, more precisely, where the advertisement is intended to have impact

320. See Giuliano-Lagarde Report, pp. 23-24.
321. This is also exemplified on p. 24 of the Giuliano-Lagarde Report, referring to advertising in international newspapers. An advertisement in an internationally distributed newspaper will only be considered directed towards a consumer in a specific country if "the seller will have made a special advertisement intended for the country of the purchaser".
322. See Joachim Benno, Consumer Purchases Through Telecommunications in Europe, Complex 4/93, Oslo 1993, pp. 88-97.
323. This was also the point of departure for Financial Service Authority – a website accessible in England was "issued" in England.

when the Internet is applied. This has to be determined in relation to the WWW and e-mail.

Where is a webpage directed? I have already pointed out that it is the webpage that is the advertisement and not the website. In addition, I do not distinguish between the webpage of the vendor and advertisements of the vendor being web object of other webpages that are not part of the vendor website.

Some authors have addressed the question pointing to the location of the server where the website is located.[325] The place from where an advertisement is sent has importance in relation to the Television Directive,[326] determining the law governing the broadcasting. In relation to Article 5 of the Rome Convention, however, the aim is to find the place where the advertisement is intended and directed. The location of the server can only be seen as a place from where the advertisement is spread and consequently, irrelevant.

Another approach would be to consider the webpage as being accessible globally and therefore directed towards any country where one could get connection to the Internet.[327] This can be underlined because the owner of a website will be aware of the fact that the Internet is global and reachable worldwide. In addition, in today's international society, even if a webpage is written in a non-international language, there are large possibilities of finding customers knowing this special language all around the world. As such, one could claim that a webpage may be directed towards certain countries but due to its global widespread, one cannot claim that the webpage is not directed towards certain countries. After all, the webpage can be accessed anywhere.

However it is submitted that this is too broad an approach that would not satisfy the rules of private international law and, more specifically, the need for predictability. If a vendor uses a website, and it's webpages, with the intention of selling products to a limited group of people, for example only Finland and therefore has a webpage only in Finnish, it would be unreasonable and unpredictable that he would have to apply Spanish consumer rights to a former Finnish citizen now living in Spain.

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325. See e.g. Joachim Benno, Consumer Purchases Through Telecommunications in Europe, Complex 4/93, Oslo 1993, pp. 88 and 105-106. He considers in relation to videotex-type systems that it is the consumer who collects the information from a database. However, in relation to the Internet, I am of the opposite opinion, thus the webpage is sent to the consumer.
326. See Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, which must be also seen in relation to the European Convention on Transfrontier Television.
327. See e.g. Peter Arnt Nielsen, International privat- og procesret, København 1997, p. 518, claiming that it must be presumed that the first intent will be applicable to advertising on the Internert since this advertising is globally accessible.

The question is therefore, whether the webpage can be limited in its intended target area as advertising. The Convention does not address this question, while the Giuliano-Lagarde Report is only general in its approach as to what kind of target area the advertising can have in Article 5(2) first intent. However, the example applied, being a German replying to either an advertisement of a French company in a German newspaper or an advertisement in an American newspaper accessible in Germany shows that there is a need for a connection between the advertising and the country where it is intended advertise.[328] Moreover, this connection has to be more than just the possibility to access the webpage. Therefore the question is how the webpage can limit its target area, i.e. the country or countries where the advertising is directed.

The European Court of Justice has addressed a similar question in relation to Article 5(3) of the Brussels Convention in the *Shevill v. Alliance Presse*[329] concerning the occurence of a harmful event in relation to a newspaper article. The court limited the target area to the place where the damage occurred and the place of the event giving rise to it even though other places could be relevant.[330] Even though the case concerned jurisdiction in the field of tort and damages, it is an argument in favour of a connection to the country where the advertisement is targeted and not based upon accessibility.

Although the vendor needs some predictability as to where the advertisement has its target area, there are also arguments favouring the consumer. As the consumer is a weak party and should, therefore, be granted special protection. This is an argument that has to be taken into consideration when examining the webpage in order to see whether it could reasonably be connected to the country of his habitual residence. On the other hand, if the consumer is not in good faith he will not be granted protection under Article 5.[331] It is, therefore, my opinion that the court will have to apply a method where a webpage or a set of webpages leading to the transaction is individually examined in each case to see whether the webpage or webpages have a connection to the country of the consumer other than the fact that it is accessible there.[332]

328. See Giuliano-Lagarde Report, p. 24.
329. See Case C-68/93 ECR [1995] 415, concerning Article 5(3) of the Brussels Convention, i.e. the place where the harmful event occurred, in relation to liability by a newspaper article accessible in several countries.
330. This was also followed up in the European Court of Justice-case Marinari v. Lloyds C-364/93 [1995] 2719.
331. See Giuliano-Lagarde Report, p. 23.
332. A similar approach to the one stated by the Nordic Consumer Ombudsmen in December 1998.

What is to be considered a connection, or sufficient connection, may vary. However, some factors that may be relevant are the language, possibilities of ordering and receiving the products from the consumer's country, currency, disclaimers and domain names.[333] If transactions have previously taken place between two countries may also be a connecting factor. The US cases previously mentioned, e.g. *Bensusan v. King, Digital v. Altavista or Weber v. Jolly Hotels* all show different aspects of some of these potential connecting factors. It must also be mentioned that these cases have only legal value as examples. However, the Swedish Market Court addressed a question of where an advertisment might be directed at, in the case of *Scanorama*.[334] The case concerned the target area in relation to advertising of the magazine "Scanorama" read on board the airplanes of Scandinavian Airlines Systems (SAS). The magazine was published yearly in an amount of 140.000 copies, and 10.000 of these were distributed in Sweden. The court held that the magazine was not aimed at Sweden, but rather towards international passengers onboard international flights. In addition, one important argument, held by the court was that the magazine was written in English, underlining it's international character. The parallel to Internet advertising is that a webpage may also be formed in an international way namely directed towards every country. Finally, another factor is the predictability of the parties where the consumer is regarded to have a need for more predictability than the vendor, since the consumer is a weaker party and the vendor has commercial interests. There must be a certain balance between the parties. This balance between the parties must be examined in in light of the actual webpage or webpages and determined individually in each single case.

Consequently, the *Scanorama-case* suggests that even if a webpage is accessible in for a specific market it does not mean that it is directed towards this market. However, the case do not state where the limit is between what is directed towards a market or not. In my opinion this can be described as a sliding transition where the same factors as those applied in the closest connection-method are applied. It is on these basis one can determine whether a webpage is directed towards one country or other geographic area.

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333. E.g a webpage written in only Greek, with Greek currency claiming that it only wants to make business from people from other countries cannot be considered directed versus other countries. This is even if some persons outside Greece can access the website and read it. On the other hand if the same webpage has an English version with prices in ECU, there is a larger presumption saying that these webpages are directed towards the countries of the European Union.

334. This case is treated in Mattias W. Stecher et al., Webwertising, Hague 1999, p. 195.

Where are e-mails directed? An e-mail can in many situations be directed towards a specific person. However, the question is weather the e-mail can be directed towards a country. The target area of e-mails is more difficult to determine. The e-mail may have an address based on the domain name of the server, which will be an indication of the country of the consumer. However, the person behind that e-mail may also not necessarily be located in the country of that server. Furthermore, the e-mails may have a generic address with no connections to a specific country. The result is that the e-mail may also have a global reach. This resembles the situation with webpages and the geographic areas (e.g. countries) to which they are targeted. The court will have to determine individually the target area of the e-mail. Connecting factors will have to be considered such as the language of the e-mail, currency, disclaimers and also the address. Another important connecting factor is the position of the parties. When a vendor applies an e-mail to offer or promote products, he must be aware of the possible confusion of where it is intended to be addressed. The consumer on the other hand must be considered a weak party and treated consequently in relation to his predictability.

The conclusion as to which country e-mails can be considered to have been advertised in, must therefore also be a sliding transition from certain e-mails which can be considered to have been directed towards the whole Internet to those who are only directed towards only one country or a limited geographical area.

The final criterion of Article 5(2) first intent is that the consumer must take all steps necessary for the conclusion of the contract in the country of his habitual residence. According to the Giuliano-Lagarde Report, these are practical steps and not legal steps.[335] Moreover these steps are explained in the Report as being such as "inter alia writing or any action taken in consequence of an offer or advertisement." This means that e-mail-responses or order forms in a webpage must be considered as a response in a letter. The consumer will normally answer the vendor from his home computer, thus being in the country of his habitual residence.[336]

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335. See Giuliano-Lagarde Report, p. 24.

336. Another question is whether Article 5(2) first intent can be applied if the consumer responds from another place than from the country of his habitual residence, e.g. on board a plane or on a holiday with a mobile phone. Technically, the consumer will no longer be in the country of his habitual residence nor will the advertising be in this country, but if he logs on to his normal ISP, the situation will not change from the situation where he is at home. This is if one considers the situation from the vendor's aspect. The question is not treated further. However, in light of predictability I believe that the consumer may rely on the law of the country of his habitual residence if he e.g i son holliday using his mobile phone or computer. In the future the use of digital identities will open for more e-commerce and the only fixed location for a consumer will be his habitual residence.

Consequently, as a point of departure, if the consumer responds by e-mail or an order form on the Internet from the country of his habitual residence, the final criterion of Article 5(2) first intent will have been fulfilled.

The result is that consumers engaging in e-commerce transaction within the EEA will under certain conditions be able to rely on the application of Article 5(2) first intent. However, there are uncertainties in this application. and the rules are difficult to apply, thus, giving the rules uncertainty and solution unpredictability..

Second intent:

The second intent of Article 5(2) will be applied if the vendor or his agent receives the order in the country of the habitual residence of the consumer.[337] There are two main criteria in relation to this intent. The first criterion is whether a website or other Internet technology can be an agent of the vendor. The second criterion is whether a website or other Internet technology can be considered to receive the message in the country of the habitual residence of the consumer.

There is an intentional overlap between the second and first intent of Article 5(2). The second intent is meant to cover those situations where the consumer addresses the vendor in the consumer's country.

The first criterion raises the question of what is an agent in relation to the second intent. The Convention does not address this question. However, in the Giuliano-Lagarde Report,[338] the vendor or his agent is exemplified as a "*foreign firm at a fair exhibition taking place in the consumer's country or to a permanent branch or agency of a foreign firm established in the consumer's country even though the vendor has not advertised in the consumer's country*", also stating that the agent is "*to cover all persons acting on behalf of the trader*". This leads to the natural understanding that an agent has to have a permanent location in the country of the consumer and that he is a physical person.[339] Moreover, for someone to be considered an agent, this someone requires a certain liberty to negotiate without the principal, for example the vendor having to interact. The case of Somafer[340] argued that an establishment had as requirement that it had an appearance of permanency, had a management and was materially equipped to negotiate directly with the con-

337. See Giuliano-Lagarde Report, p. 24, this is furthermore a parallel to Article 3(2) of the Hague Convention.
338. See Giuliano-Lagarde report, p. 24.
339. In contrast to a legal person or entity.
340. See the case of Somafer SA v Saar-Ferngas AG, C-33/78 ECR [1978] 2183 determining what is considered requirements for being an establishment in relation to Article 5(5) of the Brussels Convention.

sumer. An agent will as such resemble an establishment and thus will have to meet these requirements.

In relation to e-commerce, a vendor may invite the consumer to do business with him applying the Internet, or more specifically, using a website. The question is whether a website can be considered an agent of the vendor.

A website will be located at a server which will have a permanent location. If the website is moved or copied to another server, it will still have a permanent visual appearance on the Internet with a domain name. Customers may access the website and its webpages even more easily than an ordinary shop. Consequently, even thought the webshop will not have a physical appearance, the website will have an appearance of permanency.

Secondly, the website may have an in-built computer program handling the ordering of products and entering into the contractual obligation. Such programs may be considered intelligent agents defined by owners to act in a certain way, but individually. Consequently, it is my opinion that a website with such programs will be materially equipped to negotiate directly with the consumer.

Finally, the question is whether the website with such a program can be considered to have a management. According to the *Somafer-case*[341] the management is meant to relate to the one creating a binding obligation in the establishment. Computer programs able to negotiate with the consumer will in themselves have the function of management. This is because the consumer normally will receive a confirmation of the order and from his point of view it does not make any difference with whom he has concluded the transaction as long as this is a valid transaction. In addition, in relation to the transaction of digital products, programs already exist which negotiate with the consumer. Moreover, the program will then automatically send the digital products upon receiving the order and confirming the validity of the payment (e.g. Visa). The whole process takes place without any parent body, but acting on behalf of the vendor.

The consequence is that certain websites, depending on a contracting technology, will be intelligent agents for the vendor and comply with the first criterion of the second intent.[342] For a consumer this also seems as a reasonable solution since if the website has the appearance of a local branch.

The second criterion of the second intent is that the vendor or his agent, *receives the order in the country of the consumer.* Concomitantly, it can be said that there is also a criterion demanding an order to be sent from the con-

341. See paragraph 13 of Somafer SA v Saar-Ferngas AG, C-33/78 ECR [1978] 2183.

342. See e.g. Erik Røsæg, IT: Avtaleslutning og behovet for lovreform, an article in Festskrift for Gunnar Karnell, Stockholm 1999, p. 657, where Røsæg on pp. 660-661 defines electronic agents, thus making a distinction to computers as carriers of information.

sumer to the vendor. This thesis considers the sending of an e-mail or applying an order from on a webpage as an order as if it was an ordinary letter. I do not see any reason to make a distinction between these types of orders.

The wording of the Convention states that the order has to be received by the vendor or his agent in the country of the consumer. The question raised is whether the website receiving the order may be considered to be located in the country of the consumer.

On the Internet, the connection to a server might in some situations be relevant. A foreign company can mirror its website onto a webserver in the customer's country, willingly or unwillingly. The foreign vendor might also establish a website on a server in the consumer's country, which might be considered a sub-branch, e.g. if the web bookshop Amazon (www.amazon.com) establishes a Norwegian sub-branch called www.amazon.no). Another example is if the website is stored ('cached') on a proxy server in the country of the consumer. If the vendor actually mirrors its website on the consumer's country and is aware if this, it could be a plausible solution to say that the mirrored website is a sort of intelligent agent or sub-branch in the country of the consumer. It has a fixed location, which is relatively constant and identifiable, and by consequence it could be a sort of establishment or sub-branch receiving the order. Furthermore, the intention of the second intent is to give both parties a certain predictability. The alternative relates to physical locations of the vendor. The use of mirroring or proxy servers is basically a technical approach, intended to make it easier to surf the Internet. In the Copyright Directive on the harmonisation of certain legal aspects of copyright and related rights in the Information Society,[343] recital 33 in the preamble states that: (Which is followed up in Article 5.)

> *"The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The act of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception*

343. See Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society, O.J. L167 22.june 2001. Furthermore, this approach to caching by this Directive can also be seen in relation to the 1996 Diplomatic Conference which adopted the WIPO Copyright Treaty, where it is stated that copying as RAM, caching and proxy caching are copies, but that they have little or no economic value for the rightholder, therefore these types of copying are not covered by the rightholders exclusivity.

should include acts which enable browsing as well as acts of caching to take place..."

The reasoning is that copying that has technical purposes will fall outside the traditional prohibition of copying without consent. Although this is a copyright related reasoning it can be argued that in relation to consumer rights, the technical use of proxy servers or other server are also technical means which have the sole purpose of enabling the use of a webshop and which have no separate value since the consumer will not be able to identify the vendor as anything other than a website with no connection to any specific country, but rather a global website.

Consequently, the use of a proxy server should in my opinion not be considered to be located in the country of the consumer, thus not accepting the applicability of the second intent in relation to proxy servers. However, when the vendor has established a website on a server in the country of the consumer, this could be considered a local sub-branch, even if it exist only on the www. In such a situation, it is my opinion, that the vendor receives the order in the country of the consumer and the second intent is applicable.

As a final comment, it would seem that Article 5 could be said to give consumers engaging in transborder transactions effectuated by the mean of information technology a certain protection. However, there are uncertainties connected to the actual application of this Article due to the anonymity of the parties to the contract, the anonymity of the technology and the anonymity of the services. The technology of the Internet is constantly evolving, as can be seen through the convergence of both services and service providers. Article 5(2) was written during a time when the Internet did not exist. Consequently, it is basically limited to physical contact between buyer and seller. The application of the criteria of Article 5(2) is difficult to determine in relation to e-commerce and this will again create unpredictability for both vendor and consumers. The first court cases determining the actual application of this Article to e-commerce will be of vital importance.

5.2.5 Limitations to these choices of law

5.2.5.1 Introduction

There are primarily four limitations to the choice-of-law rules in the Rome Convention concerning e-commerce. The first is that if the contract is a consumer contract, the vendor cannot deprive the consumer of his mandatory rights as a consumer in his country of habitual residence. This has been discussed under section 5.2.4. In the following sections the limitations in the choice-of-law regarding consumer protection will not be discussed any further. The second limitation is represented by the mandatory rules after Article

7 of the Convention. The third limitation is stated in Article 16 of the Rome Convention and concerns *ordre public* (public policy). The fourth and final limitation is due to Article 20 of the Rome Convention concerning Community law, and especially the regulations related to the former Treaty of Rome and the free movement of services and goods. In the following, the three latter limitations are discussed.

5.2.5.2 Mandatory rules - Article 7

Article 3(3) of the Rome Convention defines 'mandatory rules' as the ones 'which cannot be derogated from by contract', in other words, substantive rules which, under the law containing them, apply despite any contractual term attempting to provide to the contrary, and invalidate any such contrary term.[344] The second limitation is connected to the mandatory rules of the countries that are connected to the contract. According to Article 7, the mandatory rules of a country with close connection to the situation other than the law chosen due to Article 3 or 4, must be applied and can, therefore, not be circumvented. Article 7 overlaps in some sort Article 5 of the Rome Convention as consumer protection rules are mandatory rules. However, the mandatory rules can be of different nature, such as competition rules or privacy rules. Article 7 states:

> *"(1) When applying under this Convention the law of a country effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*
>
> *(2) Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."*

Article 7 has two alternative applications for mandatory rules. The first alternative concerns the situation when there is a qualified connection existing between the contract and a country other than that whose law is applicable. The second alternative is when the law chosen is not the one of the court.

The first alternative [Article 7(1)][345] has several criteria for the application of mandatory rules other than of the law chosen. The first criterion is that there has to exist a close connection between the situation and another coun-

344. See Peter Stone: The Conflict of Law, p. 260.

345. Also referred to as the "Alnati"-rule, after the Dutch Supreme Court case, Hoge Raad, 13 May 1966, N.J., 1966, Rev. Critique de Droit International Prive, 1967, p. 522.

try. The application of a close connection resembles the rule in Article 4(2) of the Convention, but the Giuliano-Lagarde Report[346] does not make any reference to Article 4 when addressing Article 7. However, they state that this criterion lacks precision and could be difficult to apply for the court. This makes it even worse for the parties to the contract to predict their legal situation. The Report states that the connection has to be "*genuine...and that a merely vague connection is not adequate*" and gives as example "*when the contract is to be performed in that other country or when one party is resident or has his main place of business in that other country*".[347] The anonymity of the Internet makes it very difficult to determine which mandatory rules might be applied. The parties are, as often said, difficult to identify on the Internet. Moreover, as seen in relation to Article 4, it is difficult to determine any locations on the Internet and consequently it can be difficult to apply Article 7(1) since the contract may have connection to any country around the world connected to the Internet.

The second criterion demands what Article 7(1) refers to as a connection between the *situation* and the law of a country. The word "situation" was preferred to the word "contract" since the connection must exist between the *contract as a whole* and not part of it, on one side and the law of a country on the other.[348] The reasoning is that if the connection could be made to parts of the contract, there could be many mandatory rules applicable to the contract, and for the principal of predictability of the parties this should be avoided.

The third criterion is that the contract must have a connection to the mandatory rules of the law of *another country* "*...if and in so far as under the law of that latter country, those rules must be applied whatever the law applicable to the contract.*" In principle, Article 7(1) applies to mandatory rules of any country, thus not limiting it to any specific group of countries. However, it is the law of a country other than that to which the contrac is submitted.

Finally, it is up to the court's discretion to apply Article 7(1), which states that "*effect may be given*". However, the court has been given guidance as to how this is to be applied in the second phrase of Article 7(1) which provides that when determining whether to give effect or not to these mandatory rules, regard shall be had to "their nature and purpose, and the consequences or their application or non-application." Again, these criteria are difficult to apply and create more uncertainty for the parties. The Giuliano-Lagarde Report also states that the application of Article 7 is a delicate task.[349]

346. See Giuliano-Lagarde Report, p. 27.
347. See Giuliano-Lagarde Report, p. 27.
348. See Giuliano-Lagarde Report, p. 27.
349. See Giuliano-Lagarde Report pp. 27-28.

Article 7(1) has been criticised in Europe. As a result, several countries have made reservation to its application such as the United Kingdom, Germany, Ireland, Luxembourg and Portugal.[350] Some of the arguments against the application of Article 7(1) have also relevance to e-commerce and amplifies its problems of predictability. Some of these problems are that Article 7(1) creates confusion since the courts might have to consider multiple sets of mandatory rules, create delays and uncertainty in business and jeopardise the uniformity of the Convention. The result is that the parties engaging in e-commerce have to pass many steps toward achieving certainty in their legal situation.

The second alternative [Article 7(2)] is in many ways an addition to paragraph 1, being a special safeguard rule for the mandatory rules of the forum.[351] This alternative does not really give the court the discretion to apply its mandatory rules since these are mandatory rules whatever the law applicable to the contract may be. The Convention is to not restrict in any way such an application.[352] The problem for e-commerce is that the application of Article 7(2) will be unpredictable before a court has been chosen. Furthermore, since the application of Article 7(2) might involve a lex fori application, there is a possibility for forum shopping. However, Article 7(2) is applicable in all Member States since none have made a reservation against its application.

As a final comment, it can be said that Article 7 creates more uncertainty in its application than necessary. This is because the anonymity of the Internet does not give predictability as to the location of the parties. This is especially relevant before the parties go to court and they will seldom be able to predict all legal possibilities in a contract. Moreover since some Member States to the Rome Convention have made a reservation from the application of Article 7(1), uncertainties arise as to whether the Article is to be applied at all. An alternative to the rule in Article 7 and a safe guard for the court can already be found in the rule of ordre public.

350. See Peter Kaye, The New Private International Law of Contract of the European Community, Aldershot 1993, p. 249.
351. See Giuliano-Lagarde Report, p. 28.
352. See Giuliano-Lagarde Report, p. 28.

5.2.5.3 Ordre public (public policy) – Article 16

The third limitation is connected to the rule of ordre public (public policy) in Article 16.

> *"The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum"*

The doctrine of ordre public[353] is an important part of private international law. It is a sort of safety valve, allowing the forum to disregard the application of foreign law if this is found in conflict with the forum's fundamental principle of justice.

Article 16 determines that if the *application* of the law chosen, not being the one of the forum, is *manifestly incompatible* with the *public policy* of the forum, the law chosen can be refused. The objective is that the courts will not refuse to enforce or recognise a foreign right unless it would "*violate some fundamental principle of justice, some prevalent conceptions of good morals, some deerooted traditions of the common weal.*"[354] The reason is that Article 16 foresees a conflict between the law chosen due to Articles 3-5 and the law of the forum. Consequently, if the law chosen is lex fori, Article 16 will never be applied. However, Article 16 is to be interpreted restrictively[355] and should be applied with caution.

There are three main criteria for the application of Article 16. The first criterion is that the rule in the law chosen must have been presumed applied. Ordre public is only to be taken into account where a certain provision of the specific law, if it was going to be applied in an actual case, would lead to a consequence contrary to public policy. This means a hypothetical consideration of the provision's application. If it is a rule that will not be applied in the case, but is just part of the law chosen, Article 16 will not be applied.

The second criterion is that the actual rule must be manifestly incompatible. This means that the court has to find a special ground for upholding an objection. The word "manifestly" emphasises that it is the actual and sensible application that has to be incompatible. The word "incompatible" underlines

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353. Ordre public refers to the French name of the doctrine and is the most often applied in western theory. However, in English and German theory the doctrine is often referred to as respectively public policy and die Vorbehaltsklausul. See Karsten Gaarder, Innføring i Internasjonal privatrett (2nd ed.), Oslo 1990, p. 45 and Dicey & Morris, Conflict of Laws (12th ed.), London 1993, pp. 88-96. It is interesting to note that the latter refer to the doctrine as public policy, thou calling the chapter: "The Exclusion of Foreign Law", which is a good description of the result of the doctrine.
354. See Dicey & Morris, The Conflict of Laws (12th ed.), London 1993, p. 1277, when referring to the case Loucks v. Standard Oil Co., 224 N.Y.99, 111; 120 N.E. 198, 202 (1918).
355. See also Giuliano-Lagarde Report, p. 38.

that the foreign rule must absolutely be in conflict with the rules of the forum. A simple difference in legal rules or in political views cannot alone justify the application of Article 16.

The final criterion is that the law chosen must not be manifestly incompatible with the public policy of the forum. The public policy of a country relates to ethical and social differences between the law chosen and the public policy. Public policy refers to the basic legal principals of a legal system and which cannot be derogated from.[356] It does not have to be expressed in any specific provision. However, in some countries they are stated in the constitution and often relate to human rights issues. In Europe there are relatively small differences in relation to these questions of ethical and social character.

Consequently, in relation to e-commerce within the EEA the probability for applying ordre public on e-commerce that is not covered by the mandatory rules of either Article 5 or Article 7, is very little. Since, there is a little possibility for such a solution, it will not be treated further in this thesis.

5.2.5.4 Community law – Article 20

The relation between the Rome Convention and Community law is addressed in Article 20. This is even if the Rome Convention is not a part of Community law[357] thus being elaborated and ratified by all EU-countries. The Article states:

> *"This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice-of-law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonised in implementation of such acts."*

The intention of this Article is that the Rome Convention when in disharmony with the acts of the Community institutions have to yield to the latter.[358] By acts of Community institutions, the Rome Convention means "*not only acts of the institutions of the European Communities, that is to say principally the Regulations and the Directives as well as the Conventions concluded by those Communities, but also national laws harmonised in implementation of such acts.*" This means that for example if a Provision, Directive or the Treaty of Rome is in conflict with the Rome Convention, it is the Rome Convention that will have to yield.

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356. See e.g. Dicey & Morris, The Conflict of Laws (12th ed.), London 1993, pp. 1277-1283, and also Peter Blume, Helen Holdt, Ruth Nielsen & Thomas Riis: IT-rettslige emner, p. 269.
357. I.e. because the Rome Convention is not based upon Article 249 (former Article 189) of the Treaty of Rome.
358. See Giuliano-Lagarde Report, p.39.

One of the possibilities of such a conflict is if there are Community acts that have choice-of-law rules, or rules that may influence such rules which will gain precedence over the Rome Convention.

> An example of impacts from Community law on the Rome Convention is the Council Regulation 2137/95 of 25th July 1985 on the European Economic Interest Group, O.J. 1985 L 199, where Art. 2(1) has a choice-of-law rule in relation to specific contracts. Another example of rules which may have choice-of-law aspects is the Article 6 of the Council Directive 93/13/EEC, of 5.4.1993, on unfair terms in consumer contracts and Article 12 of the Directive 97/7/EC of the European Parliament and of the Council, of 20.5.1997, on the protection of consumers in respect of distance contracts. These two latter examples show rules that have aspects of choice-of-law, but which also are meant to harmonise substantive rules. Consequently, there is not necessary a choice-of-law conflict.

Another possibility is the relation between the Treaty of Rome and the Rome Convention. On one hand, the Treaty of Rome has a choice of law rule in Article 288 in relation to contractual obligations.[359] On the other, the Treaty of Rome has also rules governing the free movement of goods and services.[360] These rules have been addressed in a large amount of case law from the European Court of Justice, also leading to the doctrine of "Cassis de Dijon,"[361] which clarifies what kind of measures are considered restrictive for importation and exportation and thus prohibited. As regards the choice-of-law rules of the Rome Convention, since such rules are the same in all EU-countries, they cannot be considered to result in discrimination for importation and exportation. However, if the law chosen puts forward rules which amount to measures equal to the doctrine of "Cassis de Dijon", it is possible that the substantive law chosen by Articles 3, 4 or 5 of the Rome Convention will be limited by the Treaty of Rome.

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359. Article 288 of the Treaty of Rome states: "The Contractual liability of the Community shall be governed by the law applicable to the contract in question".
360. See e.g. Articles 28 and 29 (former Articles 30 and 34) regulating quantitative importation and exportation restrictions and similar measures concerning goods.
361. After the case of *Rewe-Zentral AG v. Bundesmonopolverwartung fuer Branntwein*, case C-120/78 [1979] ECR 649. The case concerned the interpretation of Article 30 of the Treaty of Rome, determining whether a country's internal product demands constituted measures prohibited by Article 30. This was affirmed by the European Court of Justice. The doctrine has lead to a broad interpretation of Article 30. However, in the case Criminal proceedings against *Bernard Keck and Daniel Mithouard*, joined cases C-267/91 and C-268/91 [1993] ECR 6097, the European Court of Justice expressed a sort of limitation of the doctrine. The measures could be accepted depending on the aim of the measures and how far they reached. This is referred to as the proportionality test – that the measures taken are proportionate and no more restrictive than is necessary to deal with the problem. See S. Weatherill & P. Beaumont, EC Law (2nd ed.), London 1995, pp. 468-469 and 490-542.

A special relation between the Treaty of Rome, the Rome Convention and e-commerce is the use of disclaimers. Examining the application of the consumer rules in Article 5 of the Rome Convention, it will be difficult for a vendor to limit his offers on the Internet, since they may be considered promoted worldwide. A possible limitation may then be disclaimers stating that the vendor does not want to engage in contract with consumers from specific countries. Within the EEA this may be considered to be a discrimination of consumers, and consequently an export restriction. However, the European Court of Justice has consistently adhered to the view that Article 28 applies only to measures adopted by the State[362] and which should also include the rules concerning the freedom to provide services. As disclaimers will be included in a contract between private parties, i.e. not the State, Articles 28 or 29 of the Treaty of Rome cannot prohibit disclaimers.

Another alternative posing is whether the doctrine of "Cassis de Dijon" might be applied by analogy to disclaimers. Even though, this may be a possibility, I would argue as a point of departure the opposite. This is because the need for predictability in private international law and contract law exceeds the need for means preventing consumers from accessing a market or a shop. The consumer will if he is not permitted access to one webshop have the possibility to try other webshops. Suffice it to say that the disclaimer also will clarify the position for the consumer on the Internet and he will most likely not suffer any loss. Consequently, there might be disclaimers that are prohibited, but as a point of departure, the Treaty of Rome will not prohibit them.

> Another question is whether such diclaimers may be in disharmony with the vendor's duty to contract. In many countries, such as Norway, there is a duty for vendors to enter into contract with customers.[363] This is expressed through for example Article 349a of the Norwegian criminal act saying that a vendor cannot refuse a customer goods or services on other terms than other because of their religion, race, skinn color or national or ethnical background. Refusing to enter into contract with certain European countries could be illegal. However, this is not discussed any further.

Finally, the relation between the Rome Convention and Community law shows the complexity of the choice-of-law provisions within the EU. There are many steps to overcome before a substantive law governing the contract can finally be found. This is a complicated road which, consequently, creates unpredictability for the parties to the contract.

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362. See S. Weatherill & P. Beaumont, EC Law (2nd ed.), London 1995, pp. 449-450, where it is also claimed that one must make a distinction between rules related to the state's measures and rules concerning competition, which is addressed in Articles 81-82 concerning bilateral arrangements and abusive dominance. This must also be done in this case.
363. Which in Norway is referred to as "kontraheringsplikten", see e.g. Jo Hov, Avtalerett (3rd ed.), Oslo 1993, pp. 126-127.

5.2.5.5 Conclusion on limitations to the choice-of-law

The choice-of-law question in cross-border e-commerce must be seen in relation to the limitations in the choice-of-law rules. When the former rules are uncertain and give little predictability for the parties, the limitation to these rules will not be helpful in giving better predictability, but rather the opposite. Consequently, there is a need to clarify when the limitations will be applied and when not pursuant to e-commerce.

5.2.6 Final remarks

When the choice-of-law rules are not absolute but rather uncertain, the situation is rather unpredictable for the parties. In addition, the interaction between the rules themselves shows a complexity and ambiguity that makes it difficult to determine the applicable law. These problems could therefore be said to be the result of the uncertainty and non-transparency of the Internet, where the parties as well as the string of bits travelling through the networks are anonymous. The limitations of the choice-of-law rules in the Rome Convention are also not absolute and, consequently, the situation becomes even more uncertain and unpredictable for the parties, while the courts have a great deal of interpretative discretion. In e-commerce, this is not an acceptable solution. For e-commerce to evolve the parties have to have certainty, as otherwise they will not engage themselves fully in e-commerce, despite the economical and practical advantages of e-commerce.

Another important aspect is how consumers are to apply the Rome Convention. The technical aspect of Article 5 makes it difficult to apply, and the applicability of Article 5 as a rule in relation to e-commerce is also difficult.

The Rome Convention has basically no limitation in its application when it comes to the choice-of-law rules and e-commerce. The problem of the Rome Convention is, however, that there are limitations in the predictability of the parties. The court will always be able to determine a case once the parties have been identified and they have presented themselves before the judge. However, the Rome Convention must still rely very much on the identity of the parties when applying the rules. In addition, the anonymity of the Internet as well as the parties makes it difficult to apply such rules. And although, this creates flexibility for the court, it also creates uncertainty and unpredictability for the parties. Since the two latter principles are important in private international law, it could be argued that the Rome Convention partially does not fulfil its primary purpose.

5.3 Hague Convention

5.3.1 Introduction to the choice-of-law rules in the Hague Convention

The Hague Convention was elaborated during a time when national and international provisions rarely gave specific protection to any "weaker parties". The parties were believed to have equal force, especially in cross-border commerce. The Convention has basically two rules. The first is that the parties are given the freedom to choose the law applicable to their contract. If such a choice has not been made, the choosen law is to follow the country of the vendor. Finally, there are some limitations to this choice in the absence of party autonomy. In the following sections 5.3.2-5.3.5, these three possibilities are discussed.

5.3.2 The basic principle of the party autonomy

The basic principle of party autonomy in the Rome Convention has been taken from the Hague Convention, which was the first to fully accept the parties' freedom to choose an applicable law.[364] The party autonomy is stated in Article 2:

> *"La vente est régie par la loi interne du pays désigné par les parties contractantes. [The sale shall be governed by the internal law of the country nominated by the contracting parties]*[365]
>
> *Cette désignation doit faire l'objet d'une clause expresse, ou résulter indubitablement des dispositions du contrat." [This designation must be the object of express clause or be an unambiguous result of the provisions of the contract].*

The principal of party autonomy is that the sale is governed by the substantive contract law of the country chosen by the parties. The Report[366] on the

364. The party autonomy was not fully accepted as the main principle before the Hague Convention. However, the history of the party autonomy dates back to the 16th century. Before this time, the main principle was that the contract was governed by the law of the place where the contract was concluded – lex loci contractus. The French jurist Dumoulin claimed in the 16th century that: "Si la loi du lieu de conclusion est applicable parce que les parties sont censées l'avoir connue, donc choisie, elles peuvent donc en choisir une autre." [If the law of the place of conclusion is applicable because the parties are presumed to have know it, concomitantly chosen it, they could consequently chose another]. The party autonomy has thereafter been an important principal in order for the parties to have predictability. See also Edvard Hambro, Jurisdiksjonsvalg og lovvalg, Oslo 1957, pp. 220-225.

365. This translation was adopted by the Giuliano-Lagarde Report, p. 16.

Convention shows that even though the Convention applies the term "la vente est regie" [the sale is governed] in Article 2 and the term "le contrat est régi" [the contract is governed], there is no intention to make a difference between them.

The principal of party autonomy in the Hague Convention has, as a point of departure, the same relation to e-commerce as the Rome Convention. Basically, the discussion under section 5.2.2 is the same under this section and will therefore not be repeated.

The only difference between the Rome Convention and the Hague Convention is in the quality of the choice made. According to Article 2(2) of the Hague Convention, the choice can either be the result of an express clause or, alternatively, by an implied clause. The Rome Convention, however, although allowing a certain party autonomy when not stated expressly, still limits the non-express choice so that a hypothetical choice-of-law will not be accepted. The intention of the Hague Convention is to accept a hypothetical choice-of-law as long as the parties have seen the problem.[367] In relation to e-commerce, it is therefore more likely that the court will try to find a potential choice-of-law clause, e.g. if the contract is written in a language traditionally known to few, the customers must be presumed to have chosen the country where this language is practised. The result is, however, that the hypothetical choice-of-law by the parties creates more uncertainty and unpredictability. In relation to consumer sales, one could question whether a hypothetical choice could be made in favour of the consumer. This is because the consumer is a weaker party and it should be presumed that his activity on the Internet is governed by the law of his habitual residence. Although this is an interesting question, this would be stretching the rules a bit too far and giving too much unpredictability to the vendor. On the other hand and in relation to consumer protection within the EEA, one might come to the conclusion that the court would not accept a hypothetical choice where the consumer is deprived of the consumer protection of the country of his habitual residence. The most probable solution is that if a consumer that is to apply the Hague Convention, has not made an expressed[368] choice-of-law, the question will be solved by Article 3 of the Hague Convention governing the situation there the parties have not made a choice-of-law.

366. See Morandiere-report, p. 39.

367. See Morandiere-report, p. 24, where it is stated that the parties must have seen the choice-of-law problem and then chosen a law. See also the Norwegian preparatory works to the Norwegian law ratifying the Hague Convention, Ot.prp. nr. 15 (1963-64) p. 8.

368. What an express clause is, or could be in electronic

5.3.3 Applicable law in the absence of a choice

If a choice has not been made, according to Article 2, the choice-of-law is determined in accordance with Article 3 that states:

> *"A défaut de loi déclarée applicable par les parties, dans les conditions prévues à l'article précédent, la vente est régie par la loi interne du pays où le vendeur a sa résidence habituelle au moment où il reçoit la commande. Si la commande est reçue par un établissement du vendeur, la vente est régie par la loi interne du pays où est situé cet établissement.[My translation: In the lack of a choice-of-law due to the conditions in the previous Article, the sale is governed by the internal law of the country where the vendor has his habitual residence at the moment when he received the order. If the order has been received by an establishment of the vendor, the sale is governed by the internal law of the country of this establishment.]*
>
> *Toutefois, la vente est régie par la loi interne du pays où l'acheteur a sa résidence habituelle, ou dans lequel il possède l'établissement qui a passé la commande, si c'est dans ce pays que la commande a été reçue, soit par le vendeur, soit par son représentant, agent ou commis-voyageur. [My translation: However, the sale is governed by the internal law of the country where the buyer has his habitual residence, or in the country where he owns the establishment which made the order, if it is in this country that the order was received, either by the vendor, his representative, agent or commissioner.]"*

Article 3 offers two choice-of-law alternatives. The most important alternative is the one in Article 3(1), stating that if a choice-of-law has not been made by the parties according to the conditions in the previous Article (Article 2), then the law applicable to the contract is the one of the country of the vendor. There are several criteria for the application of this Article, however, the central criterion in relation to e-commerce is where the order is received

For the application of Article 3(1) the order must have been received in the country of the vendor. The country of the vendor is the one where the vendor has his habitual residence or place of business when he receives the order from the buyer. The place of habitual residence must have permanency.[369] The place of business is described as being able to be an agency, subbranch or similar, as long as it has permanency. The Report on the Convention does not give any further explanation of this alternative but is seems clear that the intention of this Article is to address situations where the ven-

369. See the preparatory work to the Norwegian Act on the Hague Convention, Ot.prp. 15 (63-64), p. 9.

dor is physically in the country of his place of business or habitual residence and receives the order by mail, phone or in person.[370]

The question is whether an order by Internet can result in the application of Article 3(1). If the buyer sends the vendor an order by e-mail or another web-application, this order will normally be sent to the server where the "shop" is stored. The order will then either be automatically effected, for example the order is received by the server that automatically sends the buyer a digital book if the payment is complete. The other alternative is that the order is stored and then the vendor must effect the order after he connects to the server to retrieve the orders waiting for him. Both situations create problems for the buyer. The buyer might have little knowledge of the location of either the server or the place from which the vendor has his habitual residence or place of business. If the vendor does not state the location of his habitual residence or place of business by being anonymous and applying a web-hotel in another country than where he is actually located, the buyer will not be able to predict his legal situation. On the Internet, the only connecting factor the buyer will have knowledge of is the domain name of the website, if he finds the offer by the means of the www, or by the address of the e-mail address. Some domain names and e-mail addresses might give some guidance as to the location of the vendor, e.g. applying domain names and e-mail addresses with the top domain ending at .se or .no. These endings create a presumption that the vendor respectively comes from either Sweden or Norway. In e.g. Norway there are regulations demanding a registered place of business in Norway before a Norwegian top domain can be given, which gives the parties better predictability. However this is not always the situation. Some countries sell their domain names to commercial activities, such as the top domain .fm, which belonged to the country of Micronesia. However, if the vendor applies the endings like .com or .net, little or no connection exists between the domain name system and the vendor's place of business or habitual residence. Consequently, there will be little predictability for the buyer, while the vendor will have full predictability.

The second alternative is that if the vendor receives the order in the country of the buyer, it is the law of the buyer's country that is to govern the sale. The country of the buyer is determined either by his habitual residence or by his place of business. The central criterion is however that the order is received in the country of the buyer by the vendor, his agent or representative.

370. See. Morandiere-report, pp. 49-50, but also in relation to the previous and following discussions.

The Report on the Convention presumes that the vendor or his representative is physically in the country of the buyer.[371]

Basically, Article 3(2) of the Hague Convention is the same as Article 5(2) second alternative of the Rome Convention. The difference between these two Articles is that while the Rome Convention only applies this solution to consumer contracts, the Hague Convention also applies it to all party constellations. However, the arguments represented in relation to this alternative in the Rome Convention will also have relevance in relation to the alternative in the Hague Convention. Consequently, the discussion concerning the second alternative will not be continued here. Although repeating that, it could be argued that if the order is sent to a website that has a qualified connection to the country of the buyer and the website is considered a sub branch situated in the country of the vendor, it is possible that this Article might be applied. For example the vendor might have an interest in presenting the website in such a manner that it seems connected to one specific country. In such as way it would be predictable for the vendor that the law of this country might be applicable to the contract. This could be the situation if the order is automatically effected by a website and server which has such a connection to the buyer's country and where the vendor does not carry out any actions. Both parties will have certain predictability concerning their legal situation. However, if the connection between the country of the buyer and the sub-branch is not sufficient, the matter will fall within the scope of the alternative in Article 3(1).

Finally, it must be said that the solutions presented by Article 3 of the Hague Convention will give at least one of the parties a great deal of predictability. However, this is if the parties are not completely anonymous. Furthermore, the application of Article 3(1) will have the same result as if the presumption rule in Article 4(2) of the Rome Convention is applied. However, Article 3(1) of the Hague Convention will have lesser applicability if both parties are to effect a delivery of digital products. While the Rome Convention will apply the main rule in Article 4(1) of the closest connection, the Hague Convention will have to make a determination of which delivery is the main delivery, thus giving the parties even a lesser degree of predictability. As for the alternative in Article 3(2) of the Hague Convention, this solution gives more predictability to the buyer, if it is applied. The vendor, however, will at least have some certainty since this solution has some predictability. The main problem of the Hague Convention is that if the parties have not made a choice-of-law clause, since the rules of Article 3 lack flexibility even though it is difficult to predict how the courts might apply them to e-commerce.

371. See Morandiere-report, pp. 49-50, but again in relation to the previous and following discussions and the preparatory work to the Norwegian Act on the Hague Convention, Ot.prp. 15 (63-64), p. 9.

5.3.4 Limitations to the choice made

5.3.4.1 Ordre public (public policy) – Article 6

The only limitation for the choice-of-law in Article 2 or 3 is laid down in Article 6[372] concerning the doctrine of ordre public. The doctrine of ordre public within Europe has not changed for the past century, which means that the interpretation of ordre public in the Hague Convention is most probably applied in the same way as the rule in the Rome Convention. Consequently, the arguments under section 5.2.5.3 will have relevance under this section and is not further discussed.

5.3.4.2 An alternative application of the ordre public rule

The Hague Convention does not make any limitations in relation to consumer contracts. However, the signatory states to the Rome Convention and the Hague Convention have made an exception for consumer contracts in the laws implementing the Hague Convention. This is because the legal concept of consumer was not introduced at the time of adoption of the Convention in 1951. The reason is that the Hague Convention did not foresee the needs of consumers being a weaker party in international sales. Accordingly, some legal authors have asked whether it is reasonable that the Convention shall also be applicable to consumer sales.[373] As already seen, this was supported by both the 13th Session of the Hague Conference in 1976,[374] and the 14th Session of the Hague Conference, but no official changes were made to the Hague Convention. Since no official changes were made to the Hague Convention, the official text of the Convention is still valid. Furthermore, the Report on the Convention makes it clear that the Convention is applicable to both commercial and private matters.[375] This should typically include consumer purchases. It is therefore my opinion that the Hague Convention can, at least in Norway, be applicable to consumer sales.

However, I agree that there is a need to protect the consumers in certain situations from not being deprived of the consumer rules of the country of

372. "Dans chacun des Etats contractants, l'application de la loi déterminée par la présente Convention peut être écartée pour un motif d'ordre public." My translation: "In each Contracting State, the application of the law chosen by this Convention may be excluded due to a public policy motif."
373. See Joachim Benno, Consumer purchases through telecommunications in Europe, Oslo 1993, p. 64.
374. See Acts and Documents of the Thirteenth Session, Book I, pp. 177-185; Final Act of the Thirteenth Session, p. 36.
375. See Morandiere-report, p. 31: "Le President croit savoit qu'on a demandé de préciser dans

their habitual residence. Taking into consideration the Hague Convention and the Rome Convention, it is only if the vendor or the consumer comes from Norway that the problem might arise.[376] The vendor who has to present himself in front of a court of another Contracting State to the Hague Convention might claim that it is the original text to which the foreign state must follow the rules. The consequence is that it is the law of the vendor's habitual residence or place of business that is applicable to the contract. The other situation is if the consumer has his habitual residence in Norway. If he presents himself to another court than the one in Norway, e.g. if the consumer accepts to file a lawsuit in Spain because the vendor covers the transportation and accommodation expenses, the Spanish court will apply the Rome Convention, giving the consumer the possibility to apply Norwegian consumer protection provisions. However, if the Spanish vendor presents himself before a Norwegian court, the Norwegian court will apply Spanish provisions. The result is that the consumer might be deprived of the consumer rights in Norway. Moreover, in a European perspective, the consequence is a lack of uniform solution, giving the parties a lesser degree of predictability. For certain parties such a situation might result in forum shopping. For example a Norwegian consumer knows his rights according to Norwegian consumer protection law also knows that if he files a lawsuit in Norway the court will apply the vendor's consumer rules which he considers will cause him an economical loss. Since the Brussels/Lugano Conventions give the consumer the possibility to file the lawsuit at the vendor place of business,[377] the consumer might prefer to travel to this other EEA country and file the lawsuit there. In this country they may grant him the protection under the Norwegian law, and he will not suffer any loss.

An opinion could be that the consumer might be granted an ordre public "light-application". By this I mean that if the court comes to the conclusion that the consumer is deprived of an essential consumer right, it might apply the consumer rules due to Article 6.[378] The problem is that ordre public should only be applied when there is an ethical and social incompatibly dif-

376. However, the situation in Liechtenstein is also unclear, but this country is not a Signatory State to any of Conventions in this thesis.

377. This is the defendant's place of business according to Article 2 of the Brussels/Lugano Conventions.

378. A reason why this may be a probable solution can be argued in two ways. Firstly, because Norway has a general interest in having the same rules as the other Contracting States of the Hague Convention, and these countries exclude consumers applying the Hague Convention. Secondly, since Norway is highly influenced by the European Union, and new provisions show adoption of rules which resemble at the Rome Convention. An example is Article 3 of the Financial Agreement Act (Lov om finansavtaler av 26.6.99 nr. 46), giving consumers the same rights as in Article 5 of the Rome Convention.

ference between the two legal acts, and this is seldom the case with regards to economical value. As a point of departure, ordre public should not be applied only bacuse it is in conflict with mandatory rules.[379] Consequently, the courts should be careful in applying an "ordre public-light," if it is only a conflict with mandatory rules.

5.3.4.3 The Hague Convention in relation to Community law

Community law is a limitation in relation to the Rome Convention, due to Article 20 of the Rome Convention and ECJ court cases. Accordingly, one might ask whether the same applies by analogy to the Hague Convention. Although, it is not as certain as under the Rome Convention, it can be argued that if a legal conflict arises between two parties who have either their place of business or habitual residence within the EEA, the Hague Convention might be applied, but the rules of the Treaty of Rome will always gain precedence over any national law. The result is that the Treaty of Rome is not an actual limitation to the provisions of either the Rome Convention or the Hague Convention. However, if the internal law chosen by these Conventions is in disharmony with the Treaty of Rome and the provisions concerning the free movement of goods and freedom to provide services, the application of that internal law might be limited.[380]

In relation to e-commerce, the Community law represents another obstacle that makes it more difficult to predict the law applicable to the contract.

5.3.5 Final remarks concerning the Hague Convention

The Hague Convention raises several problems in its application to e-commerce. Apart from the problem of whether digital products may be qualified as goods in relation to the Hague Convention, the problem of predictability and clarity lowers the applicability of the Hague Convention. The main object of the Hague Convention[381] is to bring stability, predictability and clarity to the field of transborder commerce. However, due to the anonymity of the Internet, the choice-of-law rules are more difficult to apply. The location of both vendor and buyer is difficult to determine on the Internet.[382]

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379. See Peter Arnt Nielsen, International privat- og procesret, København 1997, p. 64.
380. Whether there is a disharmony between these provisions will have to stand a proportionality test, as presented in the Cassis de Dijon-case and the Keck-case. See respectively Rewe-Zentral AG v. Bundesmonopolverwartung fuer Branntwein, case C-120/78 [1979] ECR 649 and the criminal proceedings against Bernard Keck and Daniel Mithouard, joined cases C-267/91 and C-268/91 [1993] ECR 6097.
381. See Morandiere-report, p 10
382. This was also demonstrated under section 5.2.3 concerning the connection factors in electronic commerce in relation to the closest connection method in the Rome Convention.

Another problem of the Hague Convention is that there is little flexibility in the determination of the law applicable to the sale. If no connecting factors can be found as to the location of the vendor, the legal predictability of the buyer is very limited. However, if there is no anonymity, the application of the choice-of-law rules of the Hague Convention does not differ dramatically from the Rome Convention. The vendor, providing a digital product, will, when dealing with professionals, have the privilege to apply the law of the country of his place of business.

As for consumer sales, certain countries will experience problems since the Hague Convention might be argued to include consumer contract in Norway.

Finally, together with the uncertainty connected to consumer contracts, the limitation of ordre public and community law presents further unpredictability for the parties to the sale.

To conclude, the Hague Convention is applicable to e-commerce, but the connecting factors might be difficult to determine. This lowers the goals of the Convention and raises the need to regulate transborder e-commerce in another way.

5.4 The United Nations Convention on Contracts in International Sale of Goods (CISG)

5.4.1 General

The United Nations Convention on Contracts in International Sale of Goods (CISG) is not an actual choice-of-law Convention with conflict rules. The CISG is a substantive universal law governing the sale of goods. However, there are aspects of choice-of-law provisions because of its application of scope and character of jus dispositivum.[383] These rules are addressed in the following section. Thereafter, the CISG is discussed in relation to Community law.

5.4.2 "The choice of CISG" – jus dispositivum

The applicability of the CISG is determined by Article 1, something previously discussed in chapter 4.1. If the criteria in Article 1 are met, The CISG is applied to the contract. This means that if Article 1(1)(a) is applied, the CISG is a sort of "direct" choice-of-law rule leading to the application of the CISG,

383. See Peter Arnt Nielsen, International privat- og procesret, København 1997, p. 544. As for the term "jus dispositivum" it is meant to those rules which og to make up the terms of a contract unless expressly or impliedly excluded by the contract. (See Ronald Craig, Norsk Engelsk Juridisk Ordbok – Kontraktsrett, Oslo 1992, p. 29.)

while if Article 1(1)(b) is applied, the CISG will need the application of domestic choice-of-law rules. As a result, it is the substantive rules of the Convention which are applied as jus dispositivum.

The CISG is divided into four parts and each part is divided into several chapters. Without going into the substantive provisions themselves, a small overview is given over the structure of the Convention.

Part 1 concerns the sphere of application and general provisions, divided into two chapters with respectively the same names. **Part 2** concerns the formation of the contract, and has no subsections. **Part 3** is the main part of the Convention concerning the actual sale of goods. This part is divided into five chapters, each with a subsection. Chapter I concerns general provisions. Chapter II concerns the obligations of the seller. This chapter has several sections dealing with delivery of the goods and handing over of documents (Section I), conformity of the goods and third party claims (Section II) and remedies for breach of contract by the seller (Section III). Chapter III deals with the obligations of the buyer and has also three subsections dealing with payment of the price (Section I), taking delivery (Section II) and remedies for breach of contract by the buyer (Section III). Chapter IV concerns the passing of risk. The final chapter is chapter V: Provisions common to the obligations of the seller and the buyer. This chapter has six subsections; anticipatory breach and instalment contracts (Section I), damages (Section II), interest (Section III), exemptions (Section IV), effects of avoidance (Section V) and preservation of the goods (Section VI). **Part 4** has some final provisions, such as declarations and how to become a Signatory State.

5.4.3 Alternative rules to the CISG

The character of CISG as a jus dispositivum, is indirectly expressed in Article 6 that states:

> *"The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."*

Article 6 clearly provides that the basic principle in international contract law is that the parties are free to choose the law applicable to their contract – the principle of party autonomy. The parties may exclude the CISG as a whole, exclude parts of it or alter its provisions.[384] These exceptions may take place at any time, even after the conclusion of the contract or when a conflict is manifested.[385] The reason can be drawn from the Convention's aspect of private international law promoting that the CISG should be in harmony with the principal of party autonomy. Moreover, the Article states that the parties may derogate from the CISG and followed up by the Official Records[386] considering that the derogation must be express or implied, not what other choice can be made. Accordingly, such derogations must be interpreted as

384. See Bergem/Rognlien, p. 465.
385. See Peter Arnt Nielsen, International privat- og procesret, København 1997, pp. 552-553.
386. See Official Records 1981, pp. 249-250.

including the choice of another law. The reason why not only an express choice of another law was accepted was that "*the principal of the autonomy of the parties, which should be respected, would be weakened if there was reference to express agreement only*".[387]

The reference made to Article 12, concerning the declaration by Contracting State preserving its domestic requirements as to form, implies that the full or partial exclusion of the CISG will only take place if the formal requirements are met in the country of the forum.[388] Since the question of validity of a contract is not treated in this thesis, I will not pursuit this question any further.

The result is that Article 6 allows for parties to make a choice-of-law also in e-commerce. The consequence is that one will have to determine if any express or implied choice has taken place. As this question has been raised under the topic of party autonomy of the Rome Convention, it will not be discussed any further here.

5.4.4 Limitations to the CISG

The CISG in itself does not create any need for limitations. The Convention will not, as a point of departure, be applied in a country that is not a Contracting State.[389] The result is that the CISG will always be an existing substantive law in the forum state. However, there are situations where the CISG still may be considered to have its limitations.

The first situation occure where the parties have chosen the CISG as the law applicable to their e-commerce contract and the case is adjucated by a court in a country that has not adopted the CISG. It could, in such a situation, be found that the provisions of the CISG were in disharmony with mandatory contract rules of the forum. The result could be that the CISG would be limited by these rules.

The second alternative, also raised by some delegates during the conference of the CISG, concerns the situation where the parties have chosen a law by derogation as mentioned in Article 6. This would be the situation if the parties choose the law of a Contracting State, since then the implied exclusion might be contrary to the provisions of Article 1, paragraph 1(b) of the CISG.[390] The choice of the law of a non-contracting State could also be in

387. See Official Records 1981, p. 250, the statement by the Argentinean representative Mr. Boggiano.
388. See John O. Hannold, Uniform Law For International sales (3rd ed.), The Hague 1999, p. 129.
389. Unless it is applied in an arbitration court or chosen by two parties in and of a country that is not a contracting state and this state accepts the party autonomy. See e.g. Giuditta Cordero Moss, International commmercial arbitration – Party Autonomy and Mandatory Rules, Oslo 1999.
390. See Official Records 1981, p. 250.

contradiction with mandatory rules of private international law. However, the choice made by the parties must have the same limitations as if the choice had been made in terms of Article 1, paragraph 1(b) of the Convention, meaning after the contractual provisions of private international law of each country. The result is that derogation from the CISG will have to address the same limitations as the Rome Convention and the Hague Convention. Consequently, there are limitations as to mandatory rules, ordre public and community law in regard to the law chosen by derogation from the CISG to another internal substantive law.

Finally, the question arises whether the CISG can be limited in relation to Community law. Community law sets legal boundaries for commercial activities between the Member States. The influence of Community law has also impact for the EFTA-countries, which are also members of the EEA. However, this does not lead to the idea, that the CISG, as an international Convention, has to yield to Community law. Moreover, Article 94 of the CISG gives the Member States the possibility to declare the Convention inapplicable for contracts between States that are Members and that have same or closely related laws. The European Union or EEA have not applied this possibility and consequently, one could argue that the CISG cannot yield to Community law as such. On the other hand, one could also argue that Community law will be a sort of limitation for the application of the CISG if there is a conflict between them. This is because, although the CISG is an international Convention, it is the internal substantive law in each Member State, either by transformation or incorporation. Community law, however, is a sort of lex superior[391] in cases between parties from the Members of the EU or the EEA. In the ECJ case of *Costa*[392] the court held that national substantive law could not derogate from Community law. The reasoning shows that the EU Member States have limited their sovereign rights in certain areas. In relation to e-commerce, the free movement of goods and freedom to provide services are parts of this limitation. The wording of the Treaty of Rome supports this, together with its spirit and principles. Consequently, this leads to the conclusion that the Community law cannot be derogated from if the CISG has provisions prohibiting these basic rights of the Treaty of Rome. In addition, it must be stated that the

391. See Finn Arnesen, Introduksjon til Rettskildelæren i EF (3rd ed.), Oslo 1995, pp. 80-81.

392. See Costa v. ENEL, case 6/64 [1964] ECR 1141. "It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question the transfer by the states from their domestic legal system to the community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of community cannot prevail."

CISG itself determines in Article 90 that it does not prevail over any international agreements which have already been or may be entered into.[393] Although this does not directly aim at Community law, the reasoning is still that other international treaties may gain precedence over CISG. Community law will fall under this alternative since it has provisions that are transborder and influences commercial activities, hereunder also contracts.

The conclusion is therefore that if CISG has provisions that are in conflict with Community law, the former will have to yield, although such a conflict is less likely.

5.4.5 Final remarks

The CISG differs from the other Conventions by presenting the parties an uniform substantive law. In relation to the legal determination, the CISG gives the parties the predictability they need, together with flexibility due to Article 6. However, the CISG has some uncertainty related to its limitation versus Community law. Another problem of the CISG is its lack of determining the validity of the contract. As for the validity, this question will have to be solved by other choice-of-law provisions such as Article 8 and 9 of the Rome Convention. This emphasises the interaction between the Conventions and a complexity of rules in this field which can create uncertainty. Finally, it must be said that the CISG provides for better predictability and certainty than the other Conventions, which raises the question of a need for a common substantive legal framework for the Internet, referred to by some as Cyberlaw or lex Internet.[394]

5.5 Conclusion

In this chapter, the choice-of-law rules in the Rome Convention and the Hague Convention, together with the solutions in the CISG have been examined. A certain conclusion can be drawn, though divided in two.

On one hand, there are the professional parties to a contract, i.e. those who will not be considered consumers in a consumer contract. In other words, this means the vendors of digital products and buyers who are not considered consumers. When a professional party engages himself in a transaction with another professional party, there will be some legal problems related to determining which Convention is applicable and how their choice-

393. See John O. Hannold, Uniform Law For International Sales (3rd ed.), The Hague 1999, pp. 531-532.

394. See Post/Johnson: Law and Borders – The Rise of Law in Cyberspace, Stanford Law Review Vol. 48:1367(1996), pp. 1367-1401.

of-law rules are applied. However, in most of these situations, there will be two professional parties with equal interests in seeing the transaction through. The result will often be that the parties will have the possibility to chose the law applicable to their contract, thereby achieving the required degree of predictability and flexibility. If the parties do not choose the law applicable to their transaction, the choice-of-law rules do not always give the same solution. However, the Rome Convention gives the parties predictability and to some extent more flexibility. The application of the closest connection rule, however, may result in more uncertainty and unpredictability, again due to anonymity. The Hague Convention gives the parties less flexibility since the rules are more fixed. However, due to the anonymity on the Internet, the parties will have even less predictability prior to a court case. Therefore, the CISG is the most predictable solution.

On the other hand, the consumers are considered a weaker party than the professional vendor, and thus given special protection due to Article 5 of the Rome Convention. However, the Rome Convention is not applicable in all EEA countries and the rules are difficult to apply. This leaves room for different solution and, consequently, unpredictability for the consumer.

Finally, there are some common problems for both the professional and the consumer since there are potential common legal obstacles in mandatory rules and Community law that may influence the choice-of-law. However, a common point of all these problems, both for the consumer and the professional, is the anonymity of the Internet. The question is whether there are other solutions.

6. THE POSSIBLE SOLUTIONS

6.1 Introduction

This thesis has so far emphasised the need for more predictability and clarity concerning the choice-of-law in cross border commerce. The problems of the existing Conventions and their choice-of-law rules have been demonstrated. However, the question if whether there are alternatives to these choice-of-law rules. In the following chapters, I will examine what kind of solutions exist to the choice-of-law rules and see what would, de lege ferenda,[395] be a good solution in cross-border electronic commerce transactions.

6.2 Solutions within private international law

The existing rules governing choice-of-law in transborder electronic commerce are a part of traditional private international law. The rules of the Rome Convention and the Hague Convention have one or several connecting factors determining the choice-of-law for the contractual obligation. The rules of party autonomy, the choice-of-law rule determining the law of the country of the vendor or the country of the buyer or a closest connection method have been addressed. All these solutions have been found to have some problems. On the other hand, these rules cannot be excluded because they are a part of contemporary law and also because they have provided good solutions for many centuries. In this section, solutions provided by private international law for electronic commerce are addressed.

Within private international law, there are several solutions. Without attempting to present a complete list of choice-of-law rules, the most important rules that could be applied to electronic commerce are: the party autonomy, lex loci contractus (the law of the place where the contract was signed), lex fori (the law of the forum), the law of the place where the products are delivered, the loci originalis (the law of the place from which the product originates from), the closest connection, the law of the place where the server of the buyer is located, the law of the place where the server of the buyer is located.

The problem of all these solutions is that they create a lot of unpredictability. As long as a law is chosen by referance to a specific territory or action, the rules of private international law have a problem of uncertainty and

395. I.e. how the law/rules should be.

unpredictability. On the Internet, there is a large problem of identifying the parties and the place where they are located. Consequently, one could say that the rules of private international law are not adequate in solving the cross-border problems of electronic commerce. The courts might always apply the existing rules and come to a solution, but the parties themselves will have little predictability when determing the law of their contract. However, if the anonymity of the Internet was to cease to exist, the rules of private international law could still play an important part in electronic commerce. As such, the solutions of the Rome Convention will in time end up as the major solutions. Party autonomy will remain as a general principle, while the closest connection with a presumption rule will, together with jurisprudence, become a relatively safe rule giving the parties a certain predictability and certainty without leaving out flexibility.

The Electronic Commerce Directive[396] includes an interlegal. However this is not a choice-of-law rule in relation to private international law, meaning that this choice-of-law rule does exclude the contractual provisions and also all consumer sales.

The solution offered by the Directive is a sort of "country of origin-rule, which means that it is the law of the country of the vendor which determines the law governing the transaction. If this solution is used on contractual obligations it would certainly give the vendor predictability and certainty. Notwithstanding that the consumers would be deprived of the consumer protection afforded to them by the country where they are domiciled, or other mandatory rules of the country to which the contractual obligations is connected to but which law does not govern it. Furthermore, the consumer will also have problems in identifying the vendor on the Internet due to the anonymity. The result is that the "country of origin-rule is a rather good solution since it is similar to the rules in the Rome Convention (the presumption rule in Article 4(2)) and the ones of the Hague Convention. Moreover, it gives someone selling on the Internet the predictability and certainty when doing so. However, the solution does not provide for the exceptions needed when it comes to consumer protection and other mandatory rules, and the predictability for the buyers as to determining the choice-of-law is lowered substantially. The consequence is that the country of origin rule will have to either be modified or another solution will have to found.

Another aspect of the country-or-origin rule is that it exemplifies the change in private international law, where the focus has changed from where the location of where an *action* took place, to the location of where the par-

396. Directive 2000/31/EC of the European Parliament and Council of 8 June 2000 on certain legal aspects of electronic commerce in the internal market.

ties are domiciled or established. In regard to e-commerce, this is an important change that means that forum shopping may be avoided. For example one cannot place an e-commerce platform in conflict with ones own domestic provisions on a server in a foreign country in order to avoid court action.

Finally, the rules of private international law have all the same problem. They attempt to determine a location or action of the parties behind a transaction. However, on the Internet, the persons behind the transaction can be anonymous. This anonymity makes it difficult to determine a physical location or where the action took place. The result is uncertainty and unpredictability. Furthermore, since their contemporary rules are limited to more than one Convention, and these Conventions have a limited scope as to how many countries are contracting states, this causes the same problems and emphasises the need for better regulation.

6.3 Alternative technical possibilities to help private international law

The main problem of private international law is that the parties can be anonymous. Consequently, the trust of the transaction is seriously lowered. As such, one of the main problems of electronic commerce is to avoid anonymity. This can be done technically. One method would be to give every customer of a digital product a username and password. The vendor would then have the possibility to examine whether the customer is really who he claims to be when the customer files an application to get the password. The problem of this solution is that the consumer will not have the knowledge of the vendor. The vendor on the other hand will know that there is a customer, but he may have problems in the authentification of this customer.[397] Moreover, this method reduces the flexibility of electronic commerce by reducing the time gained from electronic commerce. As such, electronic commerce would more and more become like commerce done by EDI.

Another alternative is for the vendor to apply an order form where the consumer must take an active step declaring himself as a consumer and when stating his habitual residence is limited to chose between the ones the countries the vendor intends to sell to. The advantage of such a model is that it is a cost-efficient method of way of limiting the sphere of desired customers.[398]

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397. E.g. the vendor may know the IP-number of the customer, but not be able to authetificate his identity. The customer may claim to be someone else than he really is.
398. See the research paper by Norwegian Research Center for Computers and Law, Legal Technology and Interlegal Issues, Oslo 1999, a paper to the E-CLIP project: http://www.jura.uni-muenster.de/eclip/.

A third alternative is to have a mandatory use of digital signatures. The Directive on Digital Signatures,[399] intends to give the parties of an electronic commerce transaction better predictability and clarity as to the location of the counterpart and who he is. Digital signatures are a technical security system giving the receiver of a digital message the safety of knowing that the message comes from the correct counterpart, which is actually who he claims to be and that the message has not been altered. The digital signature is to be followed by a digital certificate which can give the receiver all types of information about the sender, e.g. the vendor's annual income for the past five years so that the buyer might know that he is doing business with a stable company. However, the problem of digital signatures is that there is a need for harmonisation of these signatures since different standards will increase uncertainty. Within the EEA the Directive on Digital Signatures will probably help this situation, while the problem will be how to deal with other non-EEA countries with other digital signatures. Moreover, digital signatures are a technological solution. Like most Internet technologies there is a strong evolution, and most technologies are often met by countertechnologies to bypass technological limits. Digital signatures may be overridden by other technologies. Consequently, the digital signatures technology is not a 100% solution for abolishing anonymity on the Internet.

Finally, the technology cannot prevent a legal conflict. The technology of digital signatures and certificates can give the parties better predictability and certainty and thereby give the parties better awareness how to avoid legal conflicts. Moreover, the technology can also possibly be applied to give solutions of non-legal character or an out-of-court solution. However, if a legal conflict arises, it is the law which has to provide a solution.

6.4 Self regulation

Since the Internet is based on a new technology with new possibilities, legislators around the world have given the Internet much attention. The result is that many new provisions are about to see or have already seen daylight. The following consequence may be an overregulated market. While the main object of the Electronic Commerce Directive is to remove legal barriers, the result of the overregulation is the opposite. This is especially true when business parties have to deal with more than one country's legislation. One is tempted to ask whether there are solutions.

399. Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, O.J. L13 p. 12 19/1/2000.

Electronic commerce is a business market with a need for regulation but not overregulation. One should rather try to apply these existing provisions than invent new ones. Furthermore, if the market needs more regulation one could ask whether the market itself should be given the possibility to regulate its own activities. In the USA and Australia, self-regulation has become an important part of the regulatory process. When a segment of life has had a need for regulation, the initiative has often come from the acting parties in this segment. These acting parties are the closest ones to the actual needs and the best to define them. This could be an option for electronic commerce. The parties would get more predictability and certainty. The UNICITRAL Model Law on Electronic Commerce adopted in 1998,[400] is an example of self-regulation. A possibility for self-regulation is that it might, in time, become a part of a country's internal law.

The problem of self-regulation is that it may be the result of the needs of only one of the parties. An example is that if the vendors on the Internet create a common set of regulations regulating electronic commerce, the weaker parties, i.e. consumers, and their needs will not have a central role. The solution could be to include many different parties in the creation of such a self-regulation, both representatives for consumer, the public and the business.[401] However, in relation to the international aspect, the problem is that the more parties are included in such a work, the more time it will take and probably it will be more general and difficult to apply.

Consequently, self-regulation is not a final solution for electronic commerce. However, self- regulation is a good step on the way to establish a common set of provisions for international electronic commerce. This is due to the fact that the regulators thereby will be able to identify the needs of the parties acting in electronic commerce, and have a basic work material for further harmonisation.

6.5 International uniform law

In order to achieve predictability and certainty for the choice-of-law in transborder electronic commerce, one can say that the best solution would be that one would have one single set of provisions for electronic commerce. This set of provisions should then be valid in all countries. The question is whether this is a possible solution. Could we imagine a universal law for the Internet and would this be the best solution?

400. See http://www.uncitral.org/en-index.htm (Oct 1999).
401. An example is N-safe (www.nsafe.no), a self-regualtion scheme which is based on the colaboration between the Consumer Council and the e-forum (a group of e-businesses).

A universal law for the Internet, referred to by some as a "Cyberlaw"[402] or Internet law, would give acting parties in electronic commerce the predictability and certainty needed. Furthermore, this Cyberlaw would also have to be interpreted autonomously, by an authorative court. This would be important so that it would not make a difference whether the legal conflict was to be solved in one or another part of the world.[403] Such a solution would not give the parties the party autonomy as to the choice-of-law. However, party autonomy would not be needed since the legal provisions in all countries would be harmonised and the parties would still be able to negotiate individual agreements, only limited by this universal law for the Internet.

Could we imagine a Cyberlaw? The establishing of an international uniform law for the Internet is not an unthinkable solution. The creation of the CISG, which is an international uniform law, has shown that it is possible. Today the CISG is ratified and signed by over 50 States and more countries are planing to become contracting states. However, if a similar solution were to be adopted for the Internet it would have to be founded by the help of a large international organisation such as the United Nations. Moreover, this Internet law would have to have an autonomous interpretation, which is one of the problems of the CISG, which has been interpreted differently in different countries.

On the other hand, the largest problem of an Internet law would be the harmonisation of one set of rules in all countries taking part in electronic commerce. The common set of rules would be possible for certain areas, such as business-to-business contracts. However, in certain specific areas, e.g. business-to-consumer contracts, it would be more difficult to reach a common level of protection. In the western world, or at least in Europe, it is clear that consumers are to be granted a certain level of protection, since they are considered a weaker party. An example is the Distance Selling Directive,[404] which illustrates the urge to protect consumers in a certain way. On an international level, it is not certain that all countries would agree upon the same level of protection. Furthermore, there might also be other types of national mandatory rules preventing the creation of a international uniform law for the Internet. The result is that the creation of an Internet law will be difficult. If an agreement were to be found today, it is a risk that the provisions would be very general.

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402. See Post/Johnson: Law and Borders – The Rise of Law in Cyberspace, Stanford Law Review Vol. 48:1367(1996), pp. 1367-1401.
403. One could also imagine a virtual court, applying the Internet for an international court with branches in all countries.
404. Directive 97/7/EC of the European Parliament and of the Council, of 20.5.1997, on the protection of consumers in respect of distance contracts.

Finally, an international uniform law for the Internet (Internet law) is probably the best solution for electronic commerce.[405] This would give the parties a great deal of predictability and certainty. The court would not have to address several Conventions to see which is to be applied. Moreover, the parties would not seek forum shopping, since all courts would apply the same provisions. However, even though it is possible that an Internet law is more unlikely today due to the problems of establishing such common rules world wide, I still believe that in time, this will be the best solution which will be adopted for the Internet.

6.6 Final remarks

The main question in this chapter was how to find a good choice-of-law rule. There are two alternatives: the first is to apply one of the traditional rules of private international law and the other is to elaborate an international uniform law for the Internet. The former can be improved by technological means, but the technology cannot prevent a legal conflict. However, even though it is the existing solution for electronic commerce, the problem of location on the Internet lowers the predictability and certainty for the parties. Moreover, the use of a connecting factor will always have a certain unpredictability and most certainly if a closest connection method is applied.[406] As for consumer protection or other mandatory rules, the rules of private international law will have a problem since a clear choice-of-law rule will always have to be modified if consumers or others are to be granted special protection. A solution of an international uniform law for the Internet is a far better alternative. With the legal work done on an international level on electronic commerce, it is possible in time that one could go from self-regulation to an international uniform law.

405. See Ralph Amissah: The Autonomous Contract, Elektronisk Handel - rettslige aspekter/ Nordisk årbok i rettsinformatikk 1997 – Randi Punsvik (ed.), Oslo 1997, pp. 16-18.
406. See Helge Johan Thue, IRMA-MIGNON-formelen - En konfliktskapende regel, Tidskrift for Rettsvitenskap 1965 pp. 587-610.

7. PROPOSALS FOR CHANGES, SUMMARY AND CONCLUSIONS

7.1 Proposal for changes in existing choice-of-law provisions within the EEA.

Adopting a new international uniform law for electronic commerce may take time. Therefore, changing the existing choice-of-law rules is the best alternative in the short term. This chapter addresses proposals for such changes. The aim of these proposals is to address the problems created by the electronic commerce and the Internet when it comes to the application of the existing choice-of-law provisions within the European Economic Area (EEA). In the following I will address the different problems of the Conventions of this thesis and come with proposals for changes.

7.1.2 The relation between the Convention

There are three Conventions that may govern the choice-of-law in electronic commerce contracts, depending on the nature of the transaction and the parties. In relation to digital products, it is uncertain whether digital products will qualify under the term "goods" of the Hague Convention and the United Nations Convention on Contracts in International Sale of Goods (CISG).

1) In my opinion regard should be given as to clarifying the nature of digital products. Furthermore, I do not believe that all digital products are either services or goods, but that each digital product has to be determined individually in each single case depending on the character and function of the product.

2) The CISG will, in most situations involving goods and professionals, gain precedence over the Rome Convention and the Hague Convention. However, it is not certain that the CISG will be accepted as applicable if the parties cannot be identified. A possible solution is to say that in electronic commerce the CISG has to yield to the Rome Convention.

3) The relation between the Rome Convention and Hague Convention is the most difficult one, since seven countries within the EEA have ratified the Hague Convention and it gains precedence over the Rome Convention. This is, of course, not the case in consumer transaction since the Hague Convention has different rules from the Rome Convention and the rules of the Hague Convention are very limited. The result is a confusion between these Convention which should be avoided. In my opinion, the Commission should take

the initiative to suspend the Hague Convention. If the Rome Convention is adopted as a provision in relation to Art. 249 of the Treaty of Rome, Norway will also have the same rules as the other EU countries. Furthermore, this would only leave out Niger as a ratifying state to the Hague Convention since Switzerland has adopted rules of private international law similar to the Rome Convention.

7.1.2 Changes in the Rome Convention

If the Hague Convention is suspended, this leaves the Rome Convention as an important choice-of-law Convention within the EEA. However, there are some uncertainties in the application of the Rome Convention that should, in my opinion, be improved.

(a) The scope of the Rome Convention is generally very broad and only limited to contractual obligations. However, in Article 5 there are some limitations as to goods and services. The problem of determining the nature of digital products may, therefore, occur. As under section 7.1.2 (1), this will have to be more clarified.

(b) Article 3 of the Rome Convention addresses party autonomy. In my opinion there is uncertainty in relation to Article 5 because consumers may have to examine whether a law has been chosen in the contract, and if so, if this law deprives the consumer the consumer rights of the country of his habitual residence. This is not always obvious. In my opinion there are two alternatives, one of what is to adopt a new paragraph in Article 3, excluding the party autonomy in consumer contracts. This solution would make it much easier for the consumer to directly apply Article 5. In addition, it is the vendor who cannot deprive the consumer his rights, which means that if a Dane wants to sell to German consumers he must check the German consumer rights in relation to the Danish. My opinion is therefore that the Dane will have more legal predictability than the German consumer, and the German law should be applied directly.

Another solution would be to also adopt a new paragraph in Article 3, limiting the party autonomy in consumer contract to only chose the law of an EEA-country. Within this area the harmonisation of consumer protection has come to a certain level, and the consumer would have a certain knowledge of his consumer rights through directives such as the Council Directive 93/13/EEC of 5.4.1993 on unfair terms in consumer contracts or Directive 97/7/EC of the European Parliament and of the Council, of 20.5.1997, on the protection of consumers in respect of distance contracts. If the latter solution was to be adopted, this could give consumers a certain degree of predictability. However, this could also lead to the easier adoption of choice-of-law rules sus-

pending the consumer protection rule in Article 5. However, in my opinion, the suspension of consumer specific protection would undermine the essential protection of consumers and should therefore not be done. In addition, consumers should not be the ones to bear the risks of electronic commerce.

(c) Article 4 of the Rome Convention is basically a good rule due to the presumption rule. However, in relation to electronic commerce, it may be difficult to determine the one "which is to effect the characteristic performance" of the contract, mainly due to the anonymity of the Internet. In my opinion, one should therefore seek to adopt a new paragraph in Article 4 that clarifies that in electronic commerce, the one to effect the characteristic performance should be the one similar to the controller in Article 4 of the Data Protection Directive or the establishment-location in the proposal for a Directive of electronic commmerce. Such an addition to the Rome Convention would limit possible forum shopping situations, where a company may claim they have an establishment on the Internet.

(d) Article 5 of the Rome Convention is one of the most difficult Articles in the Rome Convention. For a consumer, this is an Article that is difficult to interpret. The aim of the Article is to protect the weaker party – the consumer.[407] The Article offers several problems of interpretation and makes it unclear as to the situation when the consumer cannot be deprived his rights, and who is to bear the risk in relation to electronic commerce. One specific problem is the interpretation of what specific invitation and advertising is, and if a website can be an establishment. This has to be clarified in relation to electronic commerce. A possible solution is to adopt a new paragraph specially intended for electronic commerce. This new paragraph could state that the consumer can depend on the consumer protection of the country of his/her habitual residence if the vendor directs his/her activities towards several countries including the country of the consumer and the contract is entered into due to this activities. The advantage of such an addition, may be that the consumer does not have to prove that the Internet activities (webpages/e-mails) are directed specifically to him/her or that country, but that the vendor intended to sell to more countries than his own. Moreover, the consumer will be protected as a weaker party. This is because the vendor may, due to this Article, limit his activities only versus one country – his own. This will then also be in accordance with the Treaty of Rome and the free movement of services and goods.

407. See Giuliano-Lagarde Report, p. 23.

(e) Article 20 of the Rome Convention gives precedence to Community Law. This is not a direct problem, but as the Rome Convention stands today, the vendor when selling to consumers in all EEA countries has to relate to more than 15 different consumer acts. This is a rather unpredictable situation. One possibility is to have disclaimers and refusals to sell to consumers in certain EEA countries. However, this may be a problem in relation to the Treaty of Rome and the free movement of services and goods. If a vendor refuses to sell to a group of consumers, due to legal barriers, the question arises whether this is a sort of discrimination. It is my opinion that this can be a sort of discrimination. Furthermore, the consumer is also in this situation a weak party and may not have the possibility to address legally such problems. My opinion is that there is a need to clarify whether such disclaimers should be accepted or not. If the disclaimers are the only way the vendor can limit the sphere of consumers on the Internet, this should be considered an argument for accepting them, while if the consumers are discriminated and cannot get the same products anywhere else at a reasonable price, this could mean that the disclaimer cannot be accepted.

(f) Finally, when creating contracts, Article 5 presumes that the consumer is only protected as a consumer if he is in good faith. This may be difficult to determine on the Internet, since there is much anonymity. Another problem arises also if the consumer uses the Internet while abroad and orders products from a third country – is he them protected by Article 5? To this question I do not have a solution.

In my opinion, some of these questions can be easily adopted, which may again create a better environment for electronic commerce and increase it within the EEA.

7.2 Conclusions and summary

The red line of this thesis has been how the existing rules of private international law will react on the introduction to electronic commerce within the EEA countries. The findings of the thesis can be divided into two groups. The first group of problems encountered, relates to the determination of which Convention applies to an electronic commerce contract involving the buying and selling of digital products. The second group of problems involves the application of the actual choice-of-law rules in the Conventions.

The first group of problems addressed the scopes of the three Conventions to which countries within the EEA are Member States. These three Conventions, the Rome Convention, the Hague Convention and the United Nations Convention on Contracts in the International Sale of Goods (CISG) encoun-

ter several problems when determining which Convention can be applied to an electronic commerce contract. The first and most important problem is to determine what type of transaction a sale of digital products constitute. Due to the introduction of digital products, the border between services and goods has become more uncertain and difficult to determine. Second, the application of the Conventions depends on which country is a Member State or not. However, due to the anonymity of the Internet, this can be difficult to determine. Finally, another problem is to determine which Convention is applicable to an electronic commerce contract when the scopes of more than one Convention is found to be applicable. In other words, which Convention has to yield to the other when both are found to be applicable. The conclusion is that there is a need to clarify the so-called order of these Conventions within the EEA. A vendor or buyer of digital products should be able, in a better way, to determine which Convention is applicable to a legal conflict. The best solution would be that all countries within the EEA were to adopt the same set of rules governing electronic commerce, so that there would not be any doubt as to which Convention is applicable.

The second group of problems relates to the application of the choice-of-law rules in the Conventions. These are problems that arise once a Convention has been found to be applicable. The traditional rules of private international law, found in the Rome Convention and the Hague Convention, are based on a choice-of-law where a connecting factor determines the law chosen. This connecting factor refers to a physical location, such as the habitual residence of the buyer or the place of business of the vendor. These rules have certainty, but since the Internet offers anonymity, these rules are difficult to apply. While the rules mentioned are single connecting factor rules, there are also rules with several connecting factors. The rule of the closest connection is a rule of multiple connecting factors. The latter rule gives the parties even more unpredictability since it is up to the judge to determine the country to which the contract is most closely connected. On the Internet, there are few connecting factors. The few there are, are often difficult to apply, e.g the place of the server. In addition, the choice-of-law rules are also made more uncertain due to mandatory rules, e.g. consumer protection. Apart from the traditional rules of private international law, there are the rules of the CISG, which is an international uniform law. The advantage of the latter is its predictability and certainty. Its problems are that since the Convention is international, it will be interpreted by several courts world wide. The result is that one risks to have different interpretations in different countries. This gives the parties a lesser degree of certainty. However, the

rules of the CISG seem less unpredictable than the rules of the Rome Convention and the Hague Convention.

The conclusion of these two groups of problems is that there is a need to get a clearer and more predictable situation. The parties of electronic commerce transaction need to be able to predict their legal situation. The question is: how can this be achieved?

Once a problem has been elaborated, one cannot at least in a legal environment, abandon the existing rules. The judge cannot reject a case if he finds the legal rules to have a problem, but he must find an alternative solution. The question is whether there are alternatives to the existing rules within the EEA, which are better. Several alternatives have been examined. As such, it does not seem that the traditional connecting factors in private international law have any solutions better than the ones already existing. Another solution which could better the anonymity of the Internet is the use of digital signatures and certificates. However, these are technical aids and not legal solutions. Finally, it seems that there are two other options possible. The first is self-regulation that might lead to the second option, which is an international uniform law for the Internet. The first option, is a solution based on the fact that electronic commerce is a field that needs regulation, but which should not be over-regulated. As such, one should leave it to the acting parties of electronic commerce to find solution and determine their own needs. However, such solutions should contribute to the elaboration of an international uniform law for the Internet, or just electronic commerce. My opinion is that there should be an international uniform law for the Internet, since there are many different legal fields involved in an electronic commerce transaction including digital product. Legal fields as intellectual property rights and privacy are as important in an electronic commerce transaction as the contractual aspects. However, there are problems with an international uniform law. Its main problem will be to find a common base with all countries dealing with electronic commerce. The main problem will most often be to find the same base when it comes to mandatory rules that are often different, even within Europe. An international uniform law stands the risk of being too general and not specific. In addition, the largest problem of an international uniform law is that in its interpretation it should be autonomous, or otherwise the uniform law will lose its predictability and certainty when applied in different countries under different courts.

However, until an international uniform law is achieved, one may hope that the solution offered by the Rome Convention, with possible changes, may better the situation for electronic commerce. To conclude, in 1936 Nikolaus Gjelsvik, a Norwegian professor published the second edition of his book in private international law. The first phrase of his book is almost pro-

saic: "As one knows, there are rather many legal societies on this earth".[408] This is as valid now at it was then. The question is whether the ones acting on the Internet really "know" this.

408. My transalation, see Nikolaus Gjelsvik, Millomfolkeleg privatrett, Oslo 1936, p. 1: "Som ein veit er heller mange rettssamfund på jordi".

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