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THE CHALLENGE OF A GLOBAL INTERNET REGULATION FOR GLOBAL ELECTRONIC COMMERCE

The Internet is a global operating network exceeding therefore national territories. The territoriality principle on which regulation in general is based conflicts consequently with the international character of the Internet. In dealing with global electronic commerce the question has often been raised whether there is a need for a so-called Lex Internet modeled on the Lex Mercatoria to deal with the growing conflicts, and whether this could be realized in practice. However critics has also been raised concerning this concept. What becomes ultimately clear from this concise overview is the perception that states are forced to work more closely together.

Why a Lex Internet is promoted and difficulties surrounding this principle

The Internet is challenging the law because of its intrinsic borderless character. The limitations of national laws and regulations become indeed very apparent when actions take place on a global level. Undoubtedly the possible conflicts between those different national laws based on the territoriality principle might arise in a great number.¹

For the different problems which arise related to the specific characteristics of the Internet phenomenon the introduction of a so-called *Lex Internet* (recalling the idea of a *Lex Mercatoria*) which supersedes national frontiers has been put forward as a possible solution. However in practice it seems so far quite

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¹ See also BODARD Katia, „Global Electronic Commerce: Dealing with legal problems on an international level!”, in Marian Niedzwiedzinski (ed.), *Electronic Data Interchange - Electronic Commerce, Materiały na IX Krajową Konferencję EDI-EC*, Lodz-Dobieszów, Marian Niedzwiedzinski - Consulting, 2001, 19-27.

difficult to reach agreement on questions of substantive law. International cooperation is mostly limited to questions on procedural level. The reason for this different attitude towards harmonization of substantive and procedural aspects has to do with cultural diversity and state sovereignty² which still today precludes states from the common introduction of a global regulation.

The Lex Internet as reflection of the Lex Mercatoria

The *Lex Mercatoria* (or the Law Merchant) was developed in the Middle Ages and was used by merchants to solve disputes resulting from cross-bordering trade. Although with the rise of the industrial society the need for a more developed system (through the codification of national commercial laws), mirrored in the Napoleonic commercial code, set the use of the *Lex Mercatoria* temporarily aside (later on the universal concept of international trade law will however develop again moving away from the restrictions of national laws), the idea of the *Lex Mercatoria* has never really vanished and is being revived recently in international disputes especially when ruled by arbitrators. The *Lex Mercatoria* can therefore also serve as a guidance to attempt to deal with the transnational character of global electronic commerce.³ This is also why the idea of a *Lex Internet* has gained ground.

Critics on the concept of a Lex Internet

Not all authors believe in the concept of a *Lex Internet* however or in the creation of a new world wide legal order for the virtual world in development, also defined as *cyberspace law*. They rather believe in the idea that national states need to reflect on the question how they could realize controlling the Internet phenomenon.⁴

² Stessens also refers to the idea of sovereignty that still reigns strongly also in postmodernist states. (STESSENS Guy, „T. Vander Beken, Forumkeuze in het internationaal strafrecht. Verdeling van misdrijven met aanknopingspunten in meerdere staten, Antwerpen, Maklu, 1999, 486p.”, *Rechtskundig Weekblad*, 2000-2001, nr. 2, 72.)

³ PERRITT H. H. Jr., *Law and the information superhighway: privacy, access, intellectual property, commerce, liability*, New York, Wiley, 1996, 533-535; ENDESHAW Assafa, „The Proper Law for Electronic Commerce”, *Information & Communications Technology Law*, 1998, Vol. 7, No. 1, 10-11.

⁴ DUMORTIER Jos, „Enkele bedenkingen bij het preadvies van A.W. Koers 'Internet in kort bestek: van technisch tot sociaal systeem' „, *Computerrecht*, 1998, nr. 3, 109.

Some authors fear moreover that the establishment of an international convention would result in the lowest common denominator,⁵ and that the creation of an international law regulating the content of Internet services presupposes the harmonization of national laws which is -according to this view- impossible and undesirable because of the cultural diversity which should be regarded as a richness in our society and which should be preserved for this reason.⁶ Pouillet phrases this as follows: "*We are not of the opinion that to a global cyberspace corresponds a global regulation or self-regulation. This fantasy of a global regulatory system does not pay attention to the fact that the netizens are citizens located in a particular space with its own culture, way of life and regulatory approach. In other words, it is necessary to think globally but to act or rule locally*".⁷

Conclusion

What becomes clear from this concise overview is the perception that real harmonization will undoubtedly take more time than the pace with which the information society has come to development yet and will in the near and distant future.⁸

However international cooperation is more and more needed and will certainly increase. In this way the Internet has substantially added to the transformation of society.⁹

It also obliges legal scholars to rethink certain concepts and to come forward with solutions adapted to the new environment.

⁵ OLIVIER Frédérique and BARBRY Eric, „Des réseaux aux autoroutes de l'information: Révolution technique? Révolution juridique? 2. Du contenu informationnel sur les réseaux”, *La Semaine Juridique* (JCP), 1996, Éd.G, nr. 19, 186.

⁶ SEDALLIAN Valérie, *Droit de l'Internet. Réglementation. Responsabilités. Contrats*, Cachan, Éditions Net Press (Collection AUI), 1997, 139.

⁷ POULLET Yves, *How to regulate Internet: new paradigms for Internet Governance. Selfregulation: Value and Limits*, 1st ECLIP2 Seminar Namur, 7 juni 2000, 22.

⁸ SIRINELLI Pierre, „L'adequation entre le village virtuel et la création normative - remise en cause du rôle de l'Etat?” in Katharina Boele-Woelki en Catherine Kessedjian (ed.), *Internet. Which Court decides? Which law applies? Quel tribunal décide? Quel droit s'applique?* (*Proceedings of the international colloquium in honour of Michel Pelichet*), Den Haag, Kluwer Law International, 1998, 20.

⁹ DE MULDER R. V., „De kracht van het Internet en de zwakte van het Recht”, *Nederlands Juristen Blad*, 15 november 1996, 1723.

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