THE MODERN TRAVELLING MERCHANT: MOBILE COMMUNICATION IN INTERNATIONAL CONTRACT LAW

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ABSTRACT

The use of mobile communication devices such as mobile phones, smartphones, tablet computers or notebooks with access to the internet has become an everyday phenomenon in today's business world. However, whenever mobile communications are used for the purposes of contract formation, that is, the mobile dispatch of offers or acceptances, the mobility of the communicating parties raises important difficulties for the application of traditional legal rules: The fact that messages transmitted via phone, email or SMS can be dispatched and received at virtually any place on earth challenges the categories of private international law and international contract law, which are based on the (unspoken) assumption that parties communicate from their home country. The existing legal framework for cross-border contracts therefore hardly takes into account the possibility that parties may move across borders, and that the place of their communications may accordingly vary.

The present article addresses the legal difficulties and uncertainties that cross-border mobile communication raises under international rules of law. It elaborates on the traditional role of the site of communication in this context before scrutinising how 'mobility friendly' the provisions of the relevant conventions developed by the United Nations, the Hague Conference for Private International Law and other organisations are. In doing so, it critically discusses in particular article 10(3) of

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Journal of Law, Society and Development
Multi-, Inter- and Transdisciplinary
Volume 2 | Number 1 | 2015
pp. 140–164

ISSN 2313-8289

the UN Electronic Communications Convention of 2005, the most recent attempt at regulating mobile communications. Finally, it identifies a number of problems that have hitherto been overlooked (as notably the interaction of article 10(3) of the UN Electronic Communications Convention with traditional private international law rules on the formal validity of contracts) and proposes appropriate solutions.

Key words: Mobile communication; electronic communication; contract law; electronic contract formation; m-commerce; place of contracting; conflict of laws; UN Electronic Communications Convention

I. INTRODUCTION: MOBILE COMMUNICATION AND THE LAW

The law of contract has long been criticised for lagging behind in its solutions to the use of electronic communications in commerce, and this had led to uncertainty which in turn creates obstacles to trade (Eiselen 2008: 106). The entry into force of the United Nations Convention of 23 November 2005 on the Use of Electronic Communications in International Contracts (hereinafter: UN Electronic Communications Convention) in March 2013 was therefore heralded as an important step forward, as it removes some of the legal risks inherent in electronic commerce (see Gabriel 2006: 286).

One issue that has received little attention so far in this context is mobile communication, that is, the fact that messages transmitted via phone, email, SMS or some other means of communication can today be dispatched and received at virtually any place on earth, using everyday technical equipment such as mobile phones, smartphones, tablet computers or notebooks with access to the internet. According to Furmston and Tolhurst (2010: para 6.06):

> 'People have grown accustomed to being connected to their [Internet] services all the time, whatever their device type and wherever their location. Computers are no longer office or household devices but personal devices with a built-in mobile broadband connection.'

This has resulted in the new term 'm-commerce' being coined for commercial transactions conducted through wireless communication services using small, handheld mobile devices (OECD 2008: 2).

The arrival of mobile communication has brought changes to international contracting practice and its participants, resulting in what could be described as the 'modern travelling merchant'. The proverbial travelling merchant of the Middle Ages travelled to foreign cities and towns carrying goods he wanted to sell, and transporting other goods he purchased during his travels back to his home country. The contracts of sale or purchase that medieval travelling merchants concluded were concluded locally (on the spot) with other merchants they met and negotiated with in the cities they visited. In contrast, the 'modern' travelling merchant combines his

cross-border mobility with an ability to communicate across borders – a businessman from Cape Town attending a meeting in Milan, for example, can today enter into a sales contract by sending an email from his mobile device to a merchant in Buenos Aires. It is this combined mobility of both persons and communications that raises the novel legal questions to be addressed in this article.

1. The Cross Border Mobility of Contracting Parties in International Commerce

(a) The typical scenario envisaged by international contract-law rules

When taking international contract law (understood as the rules of law specifically designed to address international contracts, whether through rules of substantive law or through conflict-of-laws rules) as a starting point, it is surprising to see that the existing legal rules in this area are almost always based on the assumption that the parties to international contracts – the buyers and sellers, the senders and consignees, the suppliers and factors, etc. – each stay in their home country throughout the formation and the execution of the contract. The picture implicitly underlying international contract-law rules is thus essentially one of 'immobile merchants': What typically crosses the border under such an international contract are the communications between the parties and (later, during contract performance) the goods or services contracted for, but not the acting parties themselves.

A prominent example for this model can be found in the Hague Convention of 1 July 1964 relating to a Uniform Law on the International Sale of Goods (ULIS). During the preparation of ULIS, the appropriate tests of the international character of a sales transaction had proven to be a 'fundamental problem' that Professor Tunc in his official commentary described as 'very delicate' (Tunc 1964: 12). Article 1(1) of ULIS as finally adopted provided that:

> 'The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:
>
> a. where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;
> b. where the acts constituting the offer and the acceptance have been effected in the territories of different States;
> c. where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.'

In the cases addressed by article 1(1)(*a*) of ULIS, the goods moved across the border, while in those addressed by article 1(1)(*b*) of ULIS the party declarations resulting in the contract did, but none of the constellations mentioned in article 1(1)(*a*)–(*c*) of

ULIS involved a contracting party crossing the border. This did, of course, not mean that buyers and sellers could not physically leave their home country when acting in relation to an international sales contract, but the ULIS regarded such party mobility as legally irrelevant.

When the United Nations Convention of 11 April 1980 on Contracts for the International Sale of Goods (hereinafter: UN Sales Convention) was drafted as the successor instrument to the ULIS, care was taken to restructure the sphere of applicability provisions in order to reduce their complexity. The 'subjective' elements contained in article 1(1)(*a*)–(*c*) ULIS were accordingly dropped, and only the 'objective' criterion of two parties having their places of business in different states was maintained in article 1(1) of the UN Sales Convention. Despite these changes, the drafters' mental focus on contracting parties that conduct their business from their office in their respective home country remained unchanged: the few scenarios involving a party acting outside its home country which were discussed during the preparation of the UN Sales Convention – notably that of a message being personally delivered to a party at the place of business of the other party or at the addressee's hotel (UNCITRAL Secretariat 1981: 26), and that of a seller's senior officials with supporting staff renting a suite of rooms for a month in the city where the buyer has its headquarters in order to conduct the negotiations and the final execution of a contract in that suite (Honnold 1999: 32) – were considered to be uncommon exceptions that did not warrant a departure from the general assumption that buyers and sellers work from their home base.

Under the UN Sales Convention, the pertinent role model therefore continues to be that of 'immobile' merchants. The same holds true for the numerous other uniform law instruments whose sphere of applicability has been modelled on the UN Sales Convention, as, for example, the Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods (hereinafter: Hague PIL Convention of 1986), the UNIDROIT Convention of 28 May 1988 on International Factoring or the UN Convention of 11 December 1995 on Independent Guarantees and Stand-by Letters of Credit (to name but a few), making this role model the prevailing one in contemporary international contract law.

(b) The changing reality in an age of mobile communication

The arrival of modern means of 'mobile' electronic communication has put the above-mentioned role model increasingly at odds with the realities of contemporary business life. Today's merchants frequently travel abroad in order to conduct their business, but usually continue to take care of other transactions unrelated to the particular journey during their travels. Owing to the combination of cross-border mobility and the global availability of mobile means of communication, a message relating to a particular contract may therefore be dispatched from or received at a location which is completely unrelated to the contract and to the sending or receiving

party. As a result, the domestic laws which could apply to a given transaction effectively multiply in comparison to those that pertain to the traditional scenario of an 'immobile' merchant discussed above. This is particularly troublesome because the mobility of today's merchants means that many of the sites at which communication activities are conducted are merely random, short-term locations (hotels, airports) which are impossible for the other party to recognise or foresee: an email that a contracting partner sent using his or her usual email account, for instance, may have been dispatched anywhere in the world.

Consider the following example:

> Kenji, the sales manager for a Japanese producer of technical equipment that has its offices in Tokyo, is being contacted via email by Pierre, sole owner and manager of a medium-sized company based in Nice, France, who is interested in purchasing a technical product. The two have never conducted business with each other before. Kenji is currently on a business trip and therefore opens Pierre's email (which was sent from Pierre's email account with an 'eu' top-level domain (TLD) stored on a server in Switzerland) at his hotel in Los Angeles (United States). However, Kenji responds only with a message quoting the price and conditions that he sends from Mexico City during a lunch break. Pierre's email message in which he orders the desired products reaches Kenji while he is changing planes at Charles de Gaulle Airport in Paris, France. Kenji finally dispatches the corresponding acceptance from Dubai (United Arab Emirates), which is later supplemented by a further message sent by his office staff in Tokyo to Pierre.

This contract formation scenario, while not particularly complex from a structural perspective, draws its complexity from the sole fact that one of the party representatives involved is changing his location during the negotiation and conclusion process, thereby creating connections to various locations in various countries. And each of these countries has its own legal rules on contract law in general and on e-commerce in particular as well as factual circumstances that may differ from those in other countries. Which among these factors in fact and in law should be relevant to the contract that has (or may not have) been concluded?

2. The Place of Communication as a Connecting Factor in International Law

The reason why the cross-border mobility of contracting parties can potentially cause legal problems lies primarily in the importance that the place of communication has traditionally had in international contract law. During the preparation of the UN Electronic Communications Convention, the responsible Working Group within the United Nations Commission on International Trade Law (UNCITRAL) accordingly noted that

> '[c]onsiderable legal uncertainty is caused at present by the difficulty of determining where a party to an online transaction is located. While that danger has always existed, the global

> reach of electronic commerce has made it more difficult than ever to determine location. This uncertainty could have significant legal consequences, since the location of the parties is important for issues such as jurisdiction, applicable law and enforcement' (UNCITRAL Secretariat 2007: para 109).

In stressing the legal importance of the location of communicating parties, the UNCITRAL Working Group made reference to the role of a party's location as what in private international law parlance is typically called a 'connecting factor': some conflict-of-laws rules look to the place where a declaration with legal significance (an offer, an acceptance, a legal notice of some sort) is 'made' (dispatched or received) in order to determine the substantive law applicable to such a declaration, and do so by rendering the domestic law in force at that place (the so-called *lex loci actus*) applicable. A comparable approach is taken by private international law rules which refer to the place where a contract is 'made' in order to determine the substantive law governing the contract (the *lex loci contractus*). In former times, the place of contracting was even regarded as the most significant connecting factor for international contracts (Hay, Lando & Rotunda 1985: 240), and in many countries it is still viewed as significant today.

When a contract is being negotiated and eventually concluded through the use of mobile communications, the connection to the place(s) of declaration and the place of contracting may seem particularly random. The example of Pierre and Kenji given above is a case in point, as Kenji's temporary presence in Los Angeles, Mexico City, Paris and Dubai, respectively, lacks any strong connection to the contract concluded and eventually performed between the seller from Tokyo and the buyer from Nice. Hand in hand with the fleeting nature of these temporary locations goes an uncertainty on the side of the other party (Pierre), who may or may not be aware of the changes in Kenji's location that are occurring. (But see also Svantesson 2012.)

3. A Solution: Article 10(3) of The UN Electronic Communications Convention

In view of the 'considerable legal uncertainty' about the location of parties to commercial online transactions and the (at least assumed) importance of that location in various legal contexts (UNCITRAL Secretariat 2007: para 109), there was wide agreement within UNCITRAL as to the need for provisions that would remove this uncertainty. The result was inter alia article 10(3) of the UN Electronic Communications Convention, which reads:

> 'An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.'

Article 10(3) tackles its assigned task by 'anchoring' the dispatch as well as the receipt of electronic communications at the place of business respectively of the originator and the addressee, thereby removing any legal relevance of the actual locations of dispatch or receipt. This provision, in other words, 'relocates' the place of communication for legal purposes. In a cross-border scenario involving a travelling merchant, article 10(3) in consequence relocates communications internationally, thereby (at least potentially) shifting connecting factors across borders and influencing the determination of the applicable law. This effect could gain particular relevance in the context of mobile communication, as the place of communication will quite often be located in a country other than that of the respective party's place of business.

(a) Primary rationale behind the provision

Although article 10(3) of the UN Electronic Communications Convention may accordingly appear to be a provision tailor-made for mobile communication, the principal reason for its adoption was a different one. (This is hardly surprising, because the transfer of written communications from and to mobile devices became a common phenomenon only after the UN Electronic Communications Convention had been adopted in 2005.) The raison d'être for its article 10(3) was therefore another characteristic of electronic commerce that was viewed as inadequately treated under existing law, namely, that very often the information system (the server) of the addressee where the electronic communication is received, or from which the electronic communication is retrieved, is located in a jurisdiction other than that in which the addressee itself is located. Therefore, the rationale behind the provision is to ensure that the location of an information system (in our example used above: Pierre's email account being stored on a server in Switzerland) is not the determining element, and that there is some reasonable connection between the addressee and what is deemed to be the place of receipt, and that this place can be readily ascertained by the originator (UNCITRAL Secretariat 2007: para 194).

Although article 10(3) was accordingly not specifically geared towards mobile communication, it nevertheless applies to such means of communication. The thought behind it is furthermore the same as that underlying article 6(4) of the same convention, which declares both the location of equipment and technology supporting an information system and the location where an information system may be accessed to be unsuitable as connecting factors (Hettenbach 2008: 187). In doing so, the UN Electronic Communications Convention explicitly lays down a rule that had previously been developed under the UN Sales Convention by way of interpretation – where the location of a server is similarly regarded as irrelevant for the purposes of establishing the 'place of business' of parties to sales contracts that have been concluded online (Magnus 2013: 84; Schlechtriem & Schroeter 2013: para 26; Schwenzer & Hachem 2010: 37).

(b) Character as a firm rule

When considering the effect that article 10(3) of the UN Electronic Communications Convention may have in the context of mobile communication, it is furthermore important to note that the provision contains a firm rule and not merely a presumption (UNCITRAL Secretariat 2007: para 195; Hettenbach 2008: 188). Unlike other provisions in the UN Electronic Communications Convention that use terms such as 'is presumed to be' (as in eg article 6(1) or 10(2)), therefore creating a mere presumption that may be rebutted by evidence to the contrary, article 10(3) employs the rather stricter term, 'is deemed to be'. It is clear from the *travaux préparatoires* that this wording was chosen deliberately in order to avoid attaching any legal significance to the physical location of a server in a particular jurisdiction (UNCITRAL Secretariat 2007: para 195), thereby rendering article 10(3) a 'hard-and-fast' rule that applies without regard to the circumstances of a particular case. As will be demonstrated below, it is this character as a firm rule that may create difficulties when article 10(3) interacts with other rules of international contract law that refer to the place of communication.

4. Outline of the present paper

The present paper proceeds as follows: the next section (II) investigates to what extent current international contract law provides rules that are suitable for the modern travelling merchants described above, before the following section (III) discusses the some of the remaining legal difficulties caused by mobile communications. The final section (IV) briefly summarises and concludes.

II. IS THERE A PROBLEM ...? THE PREVALENCE OF MOBILITY-FRIENDLY RULES IN CURRENT INTERNATIONAL CONTRACT LAW

The hypothesis that the treatment of cross-border mobile communication can raise difficulties under traditional rules of law[1] rests foremost on the assumption that the place of communication has an important role to play in legal contexts, an assumption that was accepted within UNCITRAL. However, when the general statement that 'the location of the parties is important for issues such as jurisdiction, applicable law and enforcement' (UNCITRAL Secretariat 2007: para 109) is put to the test, it becomes apparent that – at least in the area of international contract law – it is mostly the *usual* party location (and not the parties' current location that is prone to change) that is the decisive connection factor (see under subsection 1 below), and that factual local circumstances at the moment of communication have similarly lost

1 Under section I.2 above.

their importance under rules of substantive international contract law (subsection 2 below). A related issue that remains problematic is the treatment of so-called 'virtual companies' (subsection 3 below).

1. The Usual Party Location (Place of Business, Habitual Residence) as the Prevailing Connecting Factor

When referring to the location of a party to an international contract, most contemporary instruments of international contract law indeed refer to the party's usual location, irrespective of its actual location (or that of its legal representatives) at a specific point in time. The legal categories employed for this purpose are mostly the 'place of business' of a party (used as a connecting factor *inter alia* in article 1(1) of the UN Sales Convention, in article 1(1) of the UN Electronic Communications Convention and in numerous other conventions) or its 'habitual residence' (as used in article 4(1), (2) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 7 June 2008 on the Law Applicable to Contractual Obligations (hereinafter: EU Rome I Regulation); or, although merely subsidiarily, in article 10(*b*) of the UN Sales Convention).

For our present purposes, the decisive feature shared by places of business and habitual residences is their non-transitory nature. Already under the ULIS, the German Supreme Court had held that the term 'place of business' – which neither the ULIS nor the UN Sales Convention explicitly defines – refers to a 'centre of a party's business activities from which it participates in commercial transactions' (Bundesgerichtshof 1982: 2731), and subsequent case law interpreting the UN Sales Convention stressed that a place of business presupposes 'a certain duration and stability' (see Schwenzer & Hachem 2010: 37). It is therefore generally agreed that neither having a hotel room or a rented office in a city nor engaging in sales transactions on repeated occasions in a country suffices (Rosett 1984: 279). A further confirmation can be found in article 4(*h*) of the UN Electronic Communications Convention, which since 2005 has defined the term 'place of business' as 'any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location'. Although the latter definition was developed only 'for the purposes of this Convention', it was an attempt to codify the characteristics that had already previously been recognised under other international conventions (UNCITRAL Secretariat 2007: para 105; Hettenbach 2008: 78–79, 92).

In the 'm-commerce' context currently being discussed, the widespread use of the 'place of business' concept deprives the location at which individual mobile communications are conducted of much of its relevance, as only the usual location of a party is used as a connecting factor. This tendency is to be welcomed, as the usual party location is easier to identify and avoids giving legal relevance to locations with

which an electronic communication has a merely fleeting connection (Hettenbach 2008: 196). It furthermore accords with a modern trend towards disregarding the place of contracting: as Professor Honnold wrote (1999: 33), it was 'the elusive and insubstantial nature of the place of contracting [which] led UNCITRAL to delete provisions in article 1(1) of [the] ULIS that made aspects of the making of the contract relevant in determining whether a sale was international'.

2. Decreasing Relevance of Local Circumstances at the Moment of Communication

In addition, the drafters of more recently adopted uniform private-law conventions took increasing care to avoid attaching any legal significance to local circumstances that exist at the moment of a party communication, thereby further reducing any possible impact that the place of a mobile communication may have.

This tendency became most obvious during the development of the UN Sales Convention. Article 20(2) of that convention accordingly contains the convention's only explicit reference to local circumstances in the form of 'official holidays or non-business days', declaring that such days that occur during a period for acceptance fixed by the offeror in his offer are generally to be included in calculating the period (which essentially means that they are to be treated as any other day). Article 20(2) thereby intentionally ignores the fact that parties in certain countries may not be working on some of the days during a period for acceptance, based on the rationale that any other approach would create problems in international transactions because official holidays or non-business days differ from country to country and are accordingly difficult for foreign parties to foresee (Schroeter 2010: 358–359). This rationale does not apply where holidays at the place of business of the offeror himself are concerned, as he knows them better than the acceptor; accordingly, the second sentence of article 20(2) exceptionally takes those holidays into account by extending the fixed period of acceptance (Schroeter 2010: 359). In the same spirit, the legal definition of the 'receipt' of party declarations contained in article 24 of the UN Sales Convention has been interpreted without regard to the recipient's opportunity to gain awareness of the declaration under 'usual circumstances', contrary to some domestic laws where this factor plays an important role (on German law, see Larenz & Wolf 2004: 475–476). This interpretation has similarly been based on the need to achieve an internationally uniform meaning of the term, as article 24 would otherwise be applied differently depending on the local customs and other circumstances in the recipient's country (Magnus 2013: 320–321; Schroeter 2010: 390).

Article 10 of the UN Electronic Communications Convention similarly adopts the approach of the UN Sales Convention in the abovementioned regards (UNCITRAL Secretariat 2007: para 181). The accordingly very limited relevance of local circumstances at the moment of communications under both conventions contributes

to their suitability for mobile communications, as the country where a declaration is dispatched or received will not affect any applicable substantive rules of law.

3. A 'Mobile' Place of Business for 'Virtual Companies'?

The prevailing use of the 'place of business' concept implicitly presupposes that every party to international business transactions possesses a brick-and-mortar establishment, because the necessary 'duration and stability' of a place of business as the 'centre of a party's business activities from which it participates in commercial transactions' (see Schwenzer & Hachem 2010: 37) requires a permanent office of some sort. During the preparation of the UN Electronic Communications Convention, this preconception was challenged when the treatment of 'virtual companies' was discussed within UNCITRAL (see in detail Hettenbach 2008: 84): How should the UN Electronic Communications Convention and its older, even more traditionally framed companion conventions deal with legal entities which entirely or predominantly carry out their activities through the use of information systems, without a fixed 'establishment' and without any connection to a physical location?

At the outset, it could well be doubted how relevant such purely 'virtual companies' are in practice (Hettenbach 2008: 93; but see Noack 1995: 615–616; Polanski 2007: 118: 'one of the key elements of modern international electronic commerce'). Nevertheless, they are not necessarily an entirely theoretical concept: when thinking of a one-man trading company that is in the business of buying and reselling goods, it seems possible that the process of identifying potential sellers and potential buyers as well as concluding the necessary contracts with them may be conducted entirely online. If it is furthermore part of the company's business model never to take actual delivery of the goods, but rather to resell them before delivery is due and have any necessary transportation, payments and other services performed through third-party service providers, such a company could well function 'virtually', for example without a brick-and-mortar establishment or a physical back office.

In order to address virtual companies, the Working Group preparing the UN Electronic Communications Convention opted for a solution that at first appears as undecided yet open-minded, but turns out to be quite conservative. On the one hand, it concluded that it was not appropriate to include a provision on the presumption on the place of business of a virtual company in the convention and that the matter at this early stage was better left to the elaboration of emerging jurisprudence. On the other hand, however, it confirmed that the place of business concept of the UN Electronic Communications Convention relied on a physical address rather than a virtual one even where "virtual companies" are at stake (Polanski 2007: 114). The latter decision had particularly important consequences because the lack of a place of business in the traditional brick-and-mortar sense removes the applicability of the UN Electronic Communications Convention as such (and that of other similarly

structured conventions, too): if a 'virtual' company has no place of business, these conventions do not apply to its communications or contracts, as their applicability is limited to transactions conducted between parties having their places of business in different states (UNCITRAL Secretariat 2007: para 118).

In legal writing, this solution has received much criticism (Hettenbach 2008: 93–94; Polanski 2007: 114: 'one of the major drawbacks of this convention'). And, indeed, it seems shortsighted to entirely exclude virtual companies, as rare as they may be, from the personal scope of many existing international contract law instruments. When accordingly attempting a more liberal construction of the 'place of business' requirement in cases in which no 'click-and-mortar companies' (Polanski 2007: 114) are concerned, a reliance on a 'mobile' place of business – that is, the respective (changing) locations at which the virtual companies' individual business activities are conducted – would arguably be incompatible with two of the principles on which articles 4(*h*) and 6 of the UN Electronic Communications Convention are based, namely the focus on the non-transitory nature of a place of business and the possibility of easily ascertaining its location. In the case of virtual companies, it therefore appears preferable to treat the company's place of registration (if any) as its place of business, given that the place of registration is usually non-transitory. This solution is at the same time in accordance with the spirit of article 6(1) of the UN Electronic Communications Convention, which primarily looks to the location indicated by a party in order to determine its place of business: as an entity's registration usually involves some kind of publicity, for example. through the publication of the company register's content (see Noack 1995: 603–607), a company registration resembles an indirect indication of this location by the registered party.

III. REMAINING AREAS OF DIFFICULTY

Despite the general prevalence of mobility-friendly rules in current international contract law, mobile communication by merchants still raises certain legal difficulties. Among these, two main categories can be identified: on the one hand, the combination of means of communication with a merely fleeting connection to geographical locations and legal rules which continue to use the place of communication as a connecting factor causes problems (see in more detail sections 3 and 4 below). On the other hand, the attempted solution in article 10(3) of the UN Electronic Communications Convention in itself leads to unintended results when it interacts with certain other international contract law instruments (to be discussed in sections 1 and 2 below). As will be demonstrated, difficulties of the latter type primarily arise when the UN Electronic Communications Convention is applied to electronic communications in connection with contracts to which 'another' international convention, treaty or agreement not specifically referred to in article 20(1) applies (as authorised by article 20(2)), as those 'other' conventions interact less well with the UN Electronic

Communications Convention than the (mostly[2] UNCITRAL-made) conventions listed in article 20(1).

1. Interaction of Article 10(3) of the UN Communications Convention with General Private International Law Rules referring to a Party's Location

Among the conventions mentioned above, it is those creating uniform private international law (conflict-of-laws) rules that result in difficulties when applied together with article 10(3), whereas the latter provision's interaction with conventions containing substantive private-law rules causes fewer problems. A uniform private international law convention in point is the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods (hereinafter: Hague PIL Convention of 1955): Adopted decades before the first 'modern' electronic means of communication was invented, this rather dated convention continues to be a very important PIL instrument in practice, given that is has been ratified by a number of European states (Denmark, Finland, France, Italy, Norway, Sweden and Switzerland) along with a single African state (Niger).[3]

(*a*) Article 3(2) of the Hague PIL Convention of 1955 and the place of an order's receipt

Article 3(1) of the Hague PIL Convention of 1955 provides that a sale shall generally be governed by the domestic law of the country in which the seller has his habitual residence at the time when he receives the order – a common rule that does not create any difficulties in the situations discussed here. However, article 3(2) of the same convention continues with a more problematic exception that is widely regarded as being of significant importance (Amstutz, Vogt & Wang 2007: 883; Keller & Kren Kostkiewicz 1993: 976):

> 'Nevertheless, a sale shall be governed by the domestic law of the country in which the buyer has his habitual residence, or in which he has the establishment that has given the order, if the order has been received in such country, whether by the seller or by his representative, agent or commercial traveller.'[4]

2 The New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards listed in article 20(1) of the UN Electronic Communications Convention had been adopted before UNCITRAL was established in 1966.

3 It should be noted that the Hague PIL Convention of 1955 continues to apply in the EU member states just mentioned despite the more recent adoption of the EU Rome I Regulation (to be discussed in more detail below), because article 25(1) of the EU Rome I Regulation grants prevalence to the Hague PIL Convention of 1955.

4 Non-official translation of the wording, as the Hague PIL Convention of 1955's only authentic

Article 3(2) declares the buyer's home law to be the *lex causae* whenever the seller (or his representative, agent or commercial traveller) is physically located in the buyer's country at the moment he receives the order. The relevant point in time for the purposes of this provision is not the conclusion of the contract (which may occur later, for instance, when the seller's declaration of acceptance reaches the buyer) but rather the receipt of the order by the seller (Keller & Kren Kostkiewicz 1993: 977).

The situation that the drafters had in mind when creating article 3(2) was that of a foreign seller entering the buyer's country in an attempt to conclude contracts, that is by advertising its goods through a local representative or by setting up a distribution system. In such cases, the seller on its own initiative approaches the buyer in the latter's home country, and the buyer in turn does not even have to be aware that the seller has his place of business in another country – indeed, from the perspective of the buyer, a contract so initiated may appear entirely like a local purchase. It was primarily this scenario that called for the protection of the buyer's expectation that the same (domestic) law will apply as in other domestic sales transactions (Amstutz, Vogt & Wang 2007: 883; Keller & Kren Kostkiewicz 1993: 976).

(*b*) Application to mobile receipts of electronic orders

The rationale behind article 3(2) of the Hague PIL Convention of 1955 suggests that the provision's scope could have been limited to situations in which the seller has more than a merely transitory presence in the buyer's country by appearing regularly in person, by setting up a permanent distribution system or by showing some other behaviour that resembles that of a local seller. The provision's wording, however, contains no such restriction, and it therefore equally applies to orders that are received by the seller or his representative during a short-term sojourn in the buyer's country, such as, for instance, a change of airplanes at a local airport or transit in the form of an international train ride. Owing to the development of mobile communication, it for the first time seems realistic that not only the dispatch of messages (which was already possible previously, as, for example, through posting a letter at a foreign railway station), but also their receipt can occur during a largely accidental presence in a country. If the receipt of an order happens under such circumstances, it affects the applicable law according to article 3(2), even though the concluded contract is likely to have a much closer connection to the seller's home country.

(With good reason, the successor provision in the more recently adopted article 8(2)(*a*) of the Hague PIL Convention of 1986 was framed substantially more narrowly by requiring that 'negotiations were conducted, and the contract concluded by and in the presence of the parties' in the buyer's state, meaning that *both* the negotiations and the conclusion of the contract must have taken place in the state where the buyer has his principal place of business (Von Mehren 1987: 29).)

text version is in French.

(*c*) Effect of article 10(3) of the UN Electronic Communications Convention

The legal situation is yet different, however, where article 10(3) applies. Because this provision declares that all electronic communications are deemed to be received at the place where their addressee has its place of business, its interaction with article 3(2) of the Hague PIL Convention of 1955 deprives the latter conflict-of-laws rule of its entire scope whenever an electronic order reaches the seller in the buyer's country: all such orders are deemed to be received at the seller's place of business, thereby indiscriminately triggering the application of the seller's home law in accordance with article 3(1) of the Hague PIL Convention of 1955. In this context, it is important to note that this effect is not limited to cases of a merely fleeting presence of the seller in the buyer's country – it applies all the same to situations in which the seller has a permanent local presence that fails to reach the threshold of a 'place of business'. Whereas article 3(2) may be framed too broadly, the same criticism can be levelled at article 10(3) of the UN Electronic Communications Convention, which does not distinguish between communications with or without a factual connection to their place of actual receipt. The two provisions' interaction effectively strikes out article 3(2) for the purposes of electronic commerce, thereby – surprisingly – eliminating a long-established conflict-of-laws rule.

2. Interaction of Article 10(3) of the UN Electronic Communications Convention with Private International Law Rules on the Formal Validity of Contracts

The formal validity of contracts and other juridical acts has traditionally been determined in accordance with the rule *locus regit actum*, a principle that has been universally recognised since the Middle Ages (Dicey, Morris & Collins 2012: paras 32–128). The conflict of laws with respect to the form of contracts is therefore another area in which the place of communication continues to play a crucial role, thereby opening a further field for unfortunate interaction with article 10(3) of the UN Electronic Communications Convention.

(*a*) *Favor validitatis* through alternative connecting factors

In this context, it is important to note that most current international private law rules about the formal validity of contracts share one characteristic, in that they all provide for alternative references to various connecting factors. An example can be found in article 11(2) of the EU Rome I Regulation, which reads:

> 'A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries

> where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.'

Article 11(2) therefore treats a contract as formally valid if it meets the formal requirements of at least one of potentially five different laws: in the case of, for example, a contract of sale, either (1) the law governing the sales contract according to articles 3 and 4 of the EU Rome I Regulation (the *lex causae*) or (2) the law of the country where the buyer or its agent is present at the time of contract conclusion or (3) the law of the country where the seller or its agent is present at that time or (4) the law of the country where the buyer had his habitual residence at that time or, finally, (5) the law of the country where the seller had his habitual residence at that time equally suffices. If the contract is valid under merely one of these laws, that is enough to prevent defects of form under any other law from affording grounds for nullity (Giuliano & Lagarde 1980: 30).

Similar provisions, albeit with less complicated wordings, can also be found in article 11(2) and (3) of the Hague PIL Convention of 1986 and in article 13(2) of the Inter-American Convention of 17 March 1994 on the Law Applicable to International Contracts (hereinafter: Mexico Convention), as well as in numerous domestic laws.

The use of alternative references to various laws in the above-cited provisions always has the same purpose, namely to reduce significantly the possibility of successfully challenging sales contracts for formal defects (Von Mehren 1987: 39). This regulatory approach is based on the related principles of *favor negotii* and *favor validitatis*, which both aim at avoiding the formal invalidating of contracts as far as possible (Loacker 2011: 222–223; Pfeiffer, Weller & Nordmeier 2011: para 1), thereby giving preference to the enforcement of party agreements over the competing interests that form requirements are trying to protect.

(*b*) Application to mobile receipts of electronic acceptances in third countries

The private international law rules cited above are in conformity in that they refer to the *lex causae* and the *lex loci actus*, although they vary with respect to the further alternative references they make. Their references to the *lex loci actus* differ in their wording, but not in their content: article 11(2) of the EU Rome I Regulation speaks rather clearly of 'the law of either of the countries where either of the parties or their agent is present at the time of conclusion', whereas the wording of article 11(2) of the Hague PIL Convention of 1986 – '[a] contract of sale concluded between persons who are in different States is formally valid if it satisfies the requirements […] of the law of one of those States' – could at first sight raise doubts whether the states in which persons 'are' are the states where their respective place of business or habitual residence is located, or the states in which one of the parties is present at the time of

the contract's conclusion. The explanatory report to the Hague PIL Convention of 1986 clarifies that the latter meaning was intended (Von Mehren 1987: 39), making it a reference to the *lex loci actus*. Article 13(2) of the Mexico Convention arguably means the same when it refers to the form requirements 'of the law of one of the States in which [the contract] is concluded'.

The presence of a party in a certain country which the above PIL provisions refer to does not need to be permanent. A merely transitory presence suffices (Pfeiffer, Weller & Nordmeier 2011: para 4), including that of a party who happens to be travelling through a country at the relevant point in time (Winkler von Mohrenfels 2011: para 81). This interpretation seems particularly obvious in the case of article 11(2) of the EU Rome I Regulation, as this provision mentions the parties' habitual (and therefore permanent) residence as an alternative connecting factor; but the same was already recognised under the predecessor provision in article 9(2) of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations (Giuliano & Lagarde 1980: 30–31), which did not yet contain this alternative reference. It is similarly the prevailing view under article 11(2) of the Hague PIL Convention of 1986 (Von Mehren 1987: 39). In the context of mobile communications, this means that the law of a place where a travelling businessman sends and receives emails while changing airplanes at some foreign airport also constitutes a suitable *lex loci actus* that may govern the formal validity of a contract formed through such an email. The fact that such a place may seem random and lacking any connection to the contract does not affect this result (Pfeiffer, Weller & Nordmeier 2011: para 4). Within the framework of PIL rules serving the *favor validitatis* principle, it effectively contributes to achieving the formal validity of contracts, because seemingly random places of communication are particularly likely to invoke laws other than the laws invoked by the alternative connecting factors.

Article 10(3) of the UN Electronic Communications Convention in turn produces the contrary effect when applied in connection with such PIL rules: By providing that electronic communications are deemed to be dispatched at the originator's and received at the addressee's place of business, article 10(3) effectively strikes out any PIL reference to places of communication. In doing so, it reduces the effectiveness of *favor validitatis*, a result that presumably was neither foreseen nor desired by the drafters of the UN Electronic Communications Convention. This result is particularly unfortunate because the suitability to electronically concluded contracts had been an important concern when the wording of article 11(2) of the EU Rome I Regulation was adopted:

> 'Given the growing frequency of distance contracts, the rules in the [Rome] Convention [of 1980, predecessor to the EU Rome I Regulation] governing formal validity of contracts are now clearly too restrictive. To facilitate the formal validity of contracts or unilateral acts,

> further alternative connecting factors [namely the parties' habitual residence] are introduced' (European Commission 2005: 8).

That article 10(3) partially undermines that goal could therefore well work as a deterrent when the Convention's ratification by the European Union and/or its member states is being considered.

3. Remaining Relevance of the Place of Communication or of Factual Circumstances at the Moment of Communication

A third group of legal difficulties potentially triggered by the use of mobile communications is unconnected to article 10(3) of the UN Electronic Communications Convention, but rather arises due to legal rules which continue to give relevance to the place where a declaration is made.

(*a*) Place of communication in the conflict of laws

This is first and foremost true under a number of domestic conflict-of-laws regimes: despite the tendency in recent years to regard the place of contracting as less and less decisive (Hay, Lando & Rotunda 1985: 240), the *lex loci actus* and the *lex loci contractus* have retained their general importance in some countries. One prominent example is the private international law of Brazil, where contractual obligations continue to be governed by the law of the place of contracting according to article 9 of the Introductory Law to the Brazilian Civil Code. Another example is conflict-of-laws rules in the United States, although today only a minority of the states within the United States still follow the *lex loci contractus* rule (Hay, Borchers & Symeonides 2010: 1171–1172).

Even under conflict-of-laws regimes that still look to the place of contracting, the particularities of mobile communication may be accommodated by way of a reasonable interpretation of the *lex loci contractus* rule. In this spirit, the US-American Restatement (Second) on the Conflict of Laws already in 1971 recognised that the place of contracting may have limited importance only in certain circumstances:

> 'By way of contrast, the place of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and the contract, such as when a letter of acceptance is mailed in a railroad station in the course of an interstate trip' (Restatement (Second) Conflict of Laws 1971, § 188 comment (*e*)).

This example used for illustration in 1971 is arguably comparable to today's sending of an acceptance via email while the sender is changing airplanes in some airport, thereby indicating that the place of such an electronic communication would simi-

larly be regarded as having an insignificant relationship to the transaction and the parties under the principles of US conflict of laws.

(*b*) Factual circumstances at the moment of communication in contract law

In addition, domestic contract laws are often less attuned to cross-border mobile communications than the uniform substantive law conventions addressed above.[5] As domestic laws have typically developed as rules for transactions conducted within a country, they more frequently operate with terms such as 'the usual circumstances' or 'typically' (see Mansel 2014: para 4 on the interpretation of § 130 of the German Civil Code), which implicitly assume that these 'usual' circumstances are those found in the respective country and familiar to its domestic courts. Such substantive-law standards operate less well when being applied to mobile communications sent or received in a different country under different factual circumstances. Again, a reasonable application of such domestic laws to 'foreign' communications may help to avoid unsuitable results.

4. Uncertainty: The Difficulty of determining the Other Party's Location

(*a*) The dilemma

Finally, a well-known general characteristic of the internet – its anonymity – can create particular problems in the context of mobile communications, as it may cause uncertainty about a communicating party's location (Eiselen 2008: 131). The reason is that an email indicates the email account from which it was sent, but neither the location of the server on which it is stored (which is in any way declared irrelevant for legal purposes by article 6(4)(*a*) of the UN Electronic Communications Convention) nor the current location of the sending party or its place of business. Whenever one of these locations is used as a connecting factor in legal rules, the recipient of an electronic message may accordingly be unaware of the result of their application in the particular case (see Chong & Chao 2006: 133).

(*b*) UN Electronic Communications Convention: An attempted (but failed) explicit solution

This uncertainty was recognised during the preparation of the UN Electronic Communications Convention. In reaction, the Working Group within UNCITRAL considered at length proposals that contemplated a duty on the parties to disclose their places of business, among other information. However, the consensus that eventu-

5 See section II.2 above.

ally emerged was that any duty of that kind would be ill-fitted to a commercial law instrument and potentially harmful to certain existing business practices. It was felt that such disclosure obligations were typically found in legislation primarily concerned with consumer protection. In any event, to be effective, the operation of regulatory provisions of that type needed to be supported by a number of administrative and other measures that could not be provided in the convention. It was regarded as particularly troublesome that the consequences that might flow from failure by a party to comply with such disclosure obligations remained unclear (UNCITRAL Secretariat 2007: paras 122–125).

Against this background, the elaborations within UNCITRAL merely led to the adoption of article 7 of the UN Electronic Communications Convention, which reminds the parties of the need to comply with possible obligations to disclose their place of business that might exist under any other rule of law, but does not impose such a disclosure duty in itself. In addition, the drafters also viewed article 10(3) of the UN Electronic Communications Convention as a contribution to solving the uncertainty dilemma, given that one of its purposes is to ensure that the place of receipt of a communication 'can be readily ascertained by the originator' of the message (UNCITRAL Secretariat 2007: para 194). This view reflects the primary rationale behind this provision mentioned above, namely to prevent the location of an information system from becoming a decisive element in legal contexts. The discernibility of the decisive place of business, however, is addressed in neither article 10(3) nor article 6 of the UN Electronic Communications Convention (to which the earlier provision refers), thereby leaving this aspect of the uncertainty issue unresolved.

(*c*) Other instruments of international contract law: Discernibility of other party's location not required

Upon closer scrutiny, it becomes apparent that many other instruments of international contract law similarly fail to secure the discernibility of a party's location, despite the fact that they rely on this place for their applicability and application. This is true both with respect to international contract law rules that refer to a party's usual location, notably its place of business (see under (*aa*) below) and rules of law that refer to a party's current location at the moment of communication (see under (*bb*) below):

(aa) Uncertainty about the other party's place of business: An example of the first type of international law instrument is (again) the UN Sales Convention, which in article 1(1)(*a*) makes its applicability dependent on both contracting parties' having their place of business in different contracting states. Article 1(2) of the UN Sales Convention goes on to require that the fact that the parties have their places

of business in different states must not be indiscernible for the parties,[6] thereby preventing the Convention's application to contracts whose international character was not known or contemplated by both parties at the moment of concluding the contract (and that therefore looked like a purely domestic transaction to at least one of them). However, article 1(2) of the UN Sales Convention does not require an indication of the particular state the other party is residing in (Schwenzer & Hachem 2010: 46), letting it suffice that its place of business in some other country is sufficiently apparent. (Interestingly, article 10(*a*) UN Sales Convention specifies that 'if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, *having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract*'[7]. For the less-than-common situation of a party with multiple places of business, the UN Sales Convention makes reference to the parties' awareness of the location of the decisive place of business, but it fails to do the same in the much more frequent cases of parties with a single place of business, which lie beyond the scope of article 10(*a*) of the UN Sales Convention's scope.)

In the context of contracts concluded via electronic means (eg an exchange of emails between parties that have not had business relations before), the UN Sales Convention as well as the numerous other conventions with a similar sphere of applicability[8] therefore leave ample room for uncertainty. While the use of an email address with a foreign TLD may alert the other party to the international character of the proposed transaction and therefore supposedly suffices for the purposes of article 1(2) of the UN Sales Convention (Magnus 2013: 87; Schwenzer & Hachem 2010: 45), a national TLD ('.za', '.fr', '.co.uk') that is part of an email address alone provides no reliable indication that the respective user's place of business is located in that country, as article 6(5) of the UN Electronic Communications Convention makes explicitly clear.

From a practical perspective, this can lead to surprises because reservations made by certain UN Sales Convention contracting states in accordance with articles 92–96 of the UN Sales Convention may influence the content of uniform law as applied to a particular contract. It is therefore possible, for instance, that a buyer finds out only after the contract's conclusion that he has placed his electronic order with a seller that has his place of business in a state which has made a reservation under article 96 of the UN Sales Convention, and that the contract is therefore subject to domestic form requirements (see Schlechtriem & Schroeter 2013: para 230).

6 This somewhat awkward negative wording is justified by the burden of proof: under article 1(2) of the UN Sales Convention, it is the party relying on the fact that the internationality of the contract was not apparent who has to prove this fact – Schwenzer & Hachem 2010: 44.

7 Emphasis added. Note that a similar provision can be found in article 6(2) of the UN Electronic Communications Convention.

8 See section I.1(*a*) above.

(bb) Uncertainty about the other party's current location: Finally, the predictable uncertainty about a party's current location remains similarly unaddressed by legal rules referring to this location. Neither article 3(1) of the Hague PIL Convention of 1955 (with its reliance on the place where the seller has received the buyer's order) nor article 11(2) of the EU Rome I Regulation, article 11(2) of the Hague PIL Convention of 1986 or article 13(2) of the Mexico Convention (with their references to the place of action) require that the other party must have known or been in a position to be aware of that location (on article 11(2), see Pfeiffer, Weller & Nordmeier 2011: para 6). The result of this silence is that the abovementioned references to the *lex loci actus* operate even if a party makes a statement via email while in a different country than expected by the other party in the light of the prior negotiations (Loacker 2011: 240) – a situation particularly likely to occur when mobile means of communications are used. This may lead to surprising legal results at odds with the aim of legal certainty.

IV. SUMMARY AND CONCLUSION

The development of 'mobile' means of communication raises a number of new questions under the existing rules of international contract law. Most of the difficulties in this context arise due to the cross-border mobility of today's merchants, who can dispatch and receive communications relating to their international contracts at virtually any place throughout the world, thereby potentially triggering the applicability of local laws in accordance with traditional conflict-of-laws principles such as *locus regit actum*.

The present article has tried to take stock of the legal difficulties raised by increasing use of mobile communications and found that many potential difficulties are avoided through the prevalence of mobility-friendly rules in current international contract law.[9] Among those difficulties that remain,[10] a number of intricate problems are surprisingly triggered by a provision that was designed to be a solution to such difficulties, namely article 10(3) of the UN Electronic Communications Convention. Its interaction with rules of private international law in some international uniform law instruments raises doubts as to its suitability for this purpose.

A final criticism that has been directed at article 10(3) is its alleged lack of technological neutrality, as the provision creates special rules for electronic communications which do not exist for conventional means of communication (Chong & Chao 2006: 133; Hettenbach 2008: 196–197). It is submitted that this critique is unjustified, as the principle of technological neutrality, while being recognised as one of the principles underlying the convention (Eiselen 2008: 124–127), should not be construed to exclude any distinction between different forms of communication,

9 See section II above.
10 See section III above.

but only those distinctions which do not reflect factual differences. In this respect, mobile communication as an increasingly important subset of electronic communication possesses factual features that warrant special legal rules, although article 10(3) may not be the final word on this matter.

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