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BASES IN LATIN AMERICA FOR DECLINING JURISDICTION ARTICLE 1 IN THE SERIES

By *Dra. Mariana Silveira*

This study analyzes the grounds for determining jurisdiction under international conventions affecting Latin America and also specific laws in four Latin American countries: Argentina, Brazil, Guatemala and Mexico. The study grew out of a review of issues related to environmental laws. Such issues are rarely addressed in Latin America as separate matters within the context of jurisdiction. Thus, in order to determine the jurisdictional rules that will be applied in environmental matters, it is usually necessary to resort to general rules on jurisdiction.

These general rules on jurisdiction may be found in multinational, regional or bilateral treaties and conventions and/or in each country's domestic private international laws, as set forth in their respective civil or procedural codes, or in special regulations. Specific references are made to issues of *forum non conveniens* and *lis pendens* and their application in the countries studied. In addition, this study compares how these issues are treated by the courts in the United States and by international organizations, such as the Hague Conference on Private International Law and its Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.¹

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¹ Adopted by the Special Commission on October 30, 1999 (hereinafter Hague Preliminary Draft Convention).
<http://www.hcch.net/e/conventions/draft36e.html>

REGULATING THE INTERNET IN LATIN AMERICA

By *Robert M. Kossick, Jr., Esq.*

PART ONE

The evolution of the internet over the course of the last years has forever changed the way the world does business. This is particularly true in Latin America, where favorable internet user demographics, improved telecommunications infrastructures, competition-oriented trade and investment legislation, cost-effective alternatives to proprietary electronic data interchange systems, strengthened air and ground delivery systems, relaxed export controls on cryptographic technology, reduced import duties on hardware, increasingly harmonized protocols and standards, and platform convergence have combined to create a multi-billion dollar B2B and B2C potential.

Revenues from online sales are projected to increase from the 1998 total of \$170 million to in excess of \$8 billion by 2003. To date, Brazil and Mexico have dominated the internet and e-commerce in Latin America. Brazil alone accounts for an estimated 88% of all online transactions in the region. This success has been attributed to the existence of strong consumer protection laws which bolster the confidence of consumers. Online transactions in Mexico, according to one study, are growing at a rate of approximately 400% per year.

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I. Jurisdiction in Latin America

While private international law is well developed in Latin America, there is no systematic, harmonized or comprehensive set of rules applicable to matters of jurisdiction in the entire region. Existing sources of law applicable to jurisdictional matters are found in international, regional and domestic rules. Internationally, the Organization of American States (OAS) is a source of rules regarding jurisdictional matters particularly with respect to conventions that have been developed through the efforts of the CIDIPs.² Regionally, the rules enacted by MERCOSUR, which is the Spanish acronym for *Mercado Común del Sur*, will be the focus of this Study. MERCOSUR is a regional trade organization that includes among its members two of the countries whose rules of jurisdiction are analyzed here, i.e., Argentina and Brazil. Finally, this study will concentrate on domestic rules on jurisdiction in each of the four countries under discussion.

The following subsections give an overview of the sources and rules on jurisdictional matters. Specific grounds for declining jurisdiction will be discussed in a segment to be published in a future issue.

A. Inter-American Conventions

1) Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards

Within the framework of the OAS, the initial effort to address matters of jurisdiction exclusively was the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Montevideo, 1979 (hereinafter, the 1979 Montevideo Convention). This Convention is a "single convention," the importance of which is that it establishes rules that address only *recognition* and *enforcement* of foreign judgments. A single convention does not include rules on direct jurisdiction, i.e., provisions that set forth specific criteria to determine or to decline jurisdiction where an action commences.

A "double convention" exists when jurisdictional matters are regulated in a convention along with provisions that regulate recognition and enforcement proceedings. Double conventions regulate the direct jurisdiction of courts in the subjects they govern (contracts, torts, trusts, etc.), as well as matters related to the resulting judgments (enforcement and recognition) and other related matters.³

The provisions of the 1979 Montevideo Convention apply only when there is an existing judgment or arbitral award rendered in civil, commercial or labor proceedings in one of the signatory countries. For such cases, the Convention sets forth the requirements that to establish the extraterritorial validity of such judgments, awards or decisions,⁴ including the procedures to recognize and enforce them.⁵ At present, the 1979 Montevideo Convention is in force in the following ten countries: Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

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² CIDIPs, according to their acronym in Spanish (*Conferencia Inter-Americana de Derecho Internacional Privado*).

³ Examples of double conventions include the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, as amended, reprinted in 29 I.L.M. 1413 (1990) [hereinafter Brussels Convention]; and the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, reprinted in 28 I.L.M. 620 (1989) [hereinafter Lugano Convention].

⁴ 1979 Montevideo Convention, Art. 2. See further, Section V, *Recognition and Enforcement of Foreign Judgments*.

⁵ *Id.*, Art. 3 *et seq.*

2) Inter-American Convention on Jurisdiction in the International Sphere for Extraterritorial Validity of Foreign Judgments

The 1979 Montevideo Convention – specifically, Art. 2 (d) of the Convention – was subsequently clarified and complemented by the 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (the 1984 La Paz Convention). The 1984 La Paz Convention addressed a concern among OAS member countries that jurisdictional disputes would be complicated by the fact that the 1979 Montevideo Convention did not specify any grounds for jurisdiction.

The purpose of the 1984 La Paz Convention was to set forth rules of indirect jurisdiction. Therefore, the Convention does not set forth criteria to *determine* the jurisdiction of the original court, but does set forth the standards used to *review* the jurisdiction of the court of origin. In certain cases, provisions of the 1984 La Paz Convention are similar to those that might be included in a double convention, which would also set forth criteria for determining the jurisdiction of the original court. For example, the Convention has provisions regarding the domicile or habitual residence of the defendant for purposes of establishing jurisdiction (or, as in this case, confirming or rejecting the validity of the original jurisdiction). However, in other matters, the Convention criteria fail to meet the level of detail typical of double conventions. For example, a very general provision allows jurisdiction to be determined based on a written agreement of the parties to submit their disputes to the jurisdiction where judgment was rendered in matters arising from an international business contract, but provides no further criteria for such contracts when, for example, the parties have failed to agree on a specific jurisdiction.⁶

The Convention provides that the extraterritorial validity of a judgment may be denied if such judgment is contrary to the standards of exclusive jurisdiction established by the country that is required to recognize such judgment.⁷ This provision is significant, because it would permit that country to refuse to recognize a foreign judgment when, according to its domestic law, such a matter would fall within its “exclusive” jurisdiction. This approach is consistent with the practice in most legal systems that have embraced the concept of exclusive jurisdiction.⁸ The relevant rules are called “exclusive” because they automatically invalidate any

⁶ 1984 La Paz Convention, Art. 1. Jurisdiction must not have been established in an abusive manner and it must have a reasonable connection with the subject matter of the action.

⁷ *Id.*, Art. 4.

⁸ Including, in this study, Argentina, Brazil and Mexico.

contractual or tacit choice of jurisdiction. Matters that have traditionally been included in exclusive jurisdiction relate to real estate, corporations (legal entities), public registries, and intellectual property rights. Although what constitutes a matter of exclusive jurisdiction has not been specifically defined under Inter-American conventions, it should be noted that the issue is commonly regulated under double or mixed conventions.⁹ ¹⁰

The scope of the 1984 La Paz Convention is more restricted than that of the 1979 Montevideo Convention. Among other issues, it specifically excludes matters of tort.¹¹ It should also be noted that the 1984 La Paz Convention, although widely signed, has only been ratified by Mexico.

3) Other Inter-American Conventions

The 1979 Montevideo Convention and the 1984 La Paz Convention are the only two Inter-American conventions that apply exclusively to matters of jurisdiction. Provisions contained in other inter-American conventions, however, may influence the determination of the court having competent jurisdiction, including the following:

- the 1975 Inter-American Convention on International Commercial Arbitration;¹²
- the 1975 Inter-American Convention on Letters Rogatory;¹³

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⁹ See, for example, the Hague Preliminary Draft Convention, Art. 12.

¹⁰ Apart from simple and double conventions, international efforts may take the form of “mixed” conventions. Such conventions allow each country to preserve an ability to establish fora/jurisdiction grounds that have not been included in the relevant convention, based on their domestic law. This approach is embodied in the Hague Preliminary Draft Convention, but with certain restrictions. The Draft Convention provides that judgments based on such domestic provisions shall be excluded from Chapter III (Recognition and Enforcement), and thus they may not be recognized and enforced under the Convention. This approach has the advantage of enabling countries to create additional fora that may become acceptable, or even necessary, in the future, without the need to revise the Convention. What is important is that the criteria of the domestic rules on jurisdiction be recognized by the country where a party attempts to have a judgment recognized or enforced.

¹¹ Art. 6.

¹² Ratified by Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, United States, Uruguay and Venezuela.
<http://www.oas.org/juridico/english/treaties/b-35.htm>

¹³ Ratified by Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, United States, Uruguay and Venezuela.
<http://www.oas.org/juridico/english/Treaties/b-36.html>

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- the 1975 Inter-American Convention on the Taking of Evidence Abroad;¹⁴
- the 1979 Inter-American Convention on General Rules of Private International Law;¹⁵ and
- the 1979 Inter-American Convention on Execution of Preventive Measures.¹⁶

The majority of these conventions do not specify rules regarding jurisdiction but merely establish guidelines for recognition and, whenever applicable, enforcement of arbitral awards, letters rogatory or preventive measures.

With respect to preventive measures and letters rogatory (either for the service of process or for the taking of evidence abroad), it should be noted that although the country requested takes the necessary steps to process the letter rogatory or to execute the preventive measures, this does not mean that there has been recognition of the ultimate jurisdiction of the issuing country, or a commitment eventually to recognize or execute the foreign judgment rendered in the main proceedings.¹⁷

The grounds for processing such documents, as well as several procedures applicable to their recognition and enforcement, are often governed by domestic laws. Moreover, the application of domestic laws may encompass more than merely procedural steps, as confirmed by Article 1 of the Inter-American Convention on General Rules of Private International Law [hereinafter, the General Rules Convention]. The second paragraph of Article 1 specifies that *[i]n the absence of an international rule, the States Parties shall apply the conflict rules of their domestic law.*

¹⁴ Ratified by Argentina, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela.

<http://www.oas.org/juridico/english/treaties/b-37.htm>

¹⁵ Ratified by Argentina, Brazil, Colombia, Ecuador, Guatemala, Mexico, Paraguay, Peru, Uruguay and Venezuela.

<http://www.oas.org/juridico/english/treaties/b-45.htm>

¹⁶ Ratified by Argentina, Colombia, Ecuador, Guatemala, Paraguay, Peru and Uruguay.

<http://www.oas.org/juridico/english/treaties/b-42.html>

¹⁷ Inter-American Convention on Letters Rogatory, Art. 9. Inter-American Convention on the Taking of Evidence Abroad, Art. 8. Inter-American Convention on Execution of Preventive Measures, Art. 6.

The General Rules Convention is a significant convention because it provides grounds, on the basis of public policy, for:

- declining jurisdiction or
- rejecting the application of a foreign law or
- rejecting the recognition of a foreign judgment.

Public policy is one of the most common guiding principles in civil law countries (traditionally incorporated into inter-American conventions such as those referenced above and also included in several provisions of the General Rules Convention). Typically, public policy surfaces in the context of the rationale given for rejecting rather than declining jurisdiction. Foreign laws and juridical relationships established in another country are recognized and/or applied only when they are not contrary to the public policy of the country where recognition or application is required.¹⁸

The General Rules Convention also refers to a mechanism called *‘fraude à la loi,’* a term to describe a fraudulent attempt by the parties (i.e., to a contract) to select a jurisdiction with which there are insufficient or no contacts. In such cases, the choice of jurisdiction by the parties will not be recognized as valid because basic principles of the law of another member country have been fraudulently evaded.¹⁹

The application of *fraude à la loi* may lead to results similar to those stemming from the application of *forum non conveniens*. Indeed, both tend to prevent the exercising of jurisdiction in an inappropriate forum when another would be better suited. The purpose of *fraude à la loi* and *forum non conveniens* is to provide the court a means to seek “justice in each specific case,” a purpose also cited in the General Rules Convention.²⁰ ■

¹⁸ General Rules Convention, Arts. 5 and 7.

¹⁹ *Id.*, Art. 6. It is a matter for the authorities of the affected state to determine the fraudulent intent of the interested parties.

²⁰ Article 9.

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These figures are expected to grow as the number of internet users in Mexico increases from 2.5 million to a projected 10 million by 2003.¹ According to a study conducted by the Brazilian Association for Studies on Multinational Companies and Globalization (SOBEET), internet related investment is now estimated to make up 7% of Brazil's total foreign direct investment; this figure is expected to increase to 10% this year.²

Properly channeled, these developments can produce efficiencies beneficial to the environment and consumers, improve the operation of the executive and judicial branches of government, level the playing field in a way that enables small and medium sized companies to compete with large, established companies, generate increased levels of foreign investment, and contribute to Hemispheric integration.

A Regulatory Framework Emerges

It was recognized from the outset that Latin America's traditional, formalistic legal culture, much of which is grounded in codes dating back to the time of independence and earlier, could not be counted on to resolve adequately issues posed by new communications technology and business practices.³ Unlike their brethren in the U.S., Latin America's judiciary does not, absent pressing circumstance, engage in judicial law-making. Rather, Latin judges tend to make decisions which remain within the parameters of the black and white terms of codes and decrees. Lacking

legislative provisions expressly addressed to data messages, electronic signatures, certifying authorities, certificates, etc., there could be little certainty about the way Latin judges, many of whom are not well versed in computers and/or the internet, would receive, evaluate and rule on issues related to technology and procedures involved in electronic communications and transactions.

To the extent parties interested in conducting electronic transactions lacked certainty as to either the legal effect that would be accorded to their electronically signed and certificate-backed data messages or the security of transmitted information, this situation created a barrier to the future growth of e-commerce by raising the specter of non-compliance, breach of obligations, costly lawsuits, and unpredictable outcomes. Absent an acceptable degree of certainty of contract and security of information, many Latin merchants would resist the replacement of paper based forms of doing business, thereby perpetuating traditional inefficient commercial practices.⁴

To remedy this situation, many Latin American governments have begun to introduce legislation designed to bridge the gap between old codes and contemporary commercial practices. Frequently, the provisions of the UNCITRAL's Model Law on Electronic Commerce (MLEC),⁵ as well as other initiatives from the United States and European Union, are looked to as sources of legislative inspiration and guidance. At this early stage in the evolution of the internet and e-commerce in Latin America, several salient trends have emerged. These trends, together with a brief consideration of their significance for the future growth of e-commerce in Latin America follow.

A. Regulatory Approaches

Latin America's approach to regulating the internet, at first glance, appears to consist of piecemeal legis-lation addressing various issues. In this

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¹ Giraldo Gutierrez, *Real Electronic Commerce Coming Soon to Latin America*, LATINFINANCE, Sept. 1998, at 38. *Forward*, LATINFINANCE, Sept. 1999, at 5. Sergio Rodriguez Castillo & Maria Alejandra Lopez-Contreras, *The Legal Challenges Facing Mexico Online* (visited Nov. 12, 2000) <<http://www.bmck.com/ecommerce/mexico.htm>>

² Juliana Viegas et al., *Investments in Internet in Brazil* (visited Oct. 24, 2000) <<http://www.bmck.com>>. Another study, again involving Brazil, estimates that telecommunications related investment will exceed \$45 billion over the next four years. Fabio de Sousa, *Investments in Telecommunications Sector* (visited Oct. 24, 2000) <<http://www.bmck.com/ecommerce/brazil.htm>>.

³ It has been observed that "Latin American law, especially that found in its nineteenth century civil and commercial codes, is unfriendly to e-commerce." *Responding to the Legal Obstacles to Electronic Commerce in Latin America*, 17 ARIZ. J. INT'L & COMP. L. 5, 9 (1999). According to Latin practitioners, the region's "legal frameworks were created to deal with physical transactions and may be insufficient to secure the enforcement of electronic contracts and ensure the validity of electronic signatures." *Id.* Consistent with the foregoing, several Mexican practitioners recently described that nation's legal framework as "outdated" with respect to e-commerce. Castillo & Lopez-Contreras, *supra* note 1.

⁴ In addition to contributing to the creation of a digital divide between Latin America and the rest of the world, the non-development of the internet and e-commerce would require regional merchants and individuals to satisfy demand for electronically negotiated and procured goods and services off-shore. This outcome would only exacerbate the effect of financial outflows that have characterized the early development of global electronic commerce. Daniel Pruzin, *Open Telecom Markets Said To Be Key for Developing Nations*, 16 INT'L TRADE REP. (BNA) No. 20, 844 (May 19, 1999).

⁵ United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce with Guide to Enactment, General Assembly Res. 51/162 (1996) <<http://www.uncitral.org>>.

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connection, Latin nations have promulgated and/or enacted legislation regarding the use and validity of electronic signatures and data messages, the issuance of digital certificates, cybercrimes, online financial services, privacy, taxation, and dispute resolution.

Latin nations which have undertaken to bring their legislation into line with the reality posed by the internet and e-commerce include Brazil, Mexico, Colombia, Argentina, Chile, Peru, Paraguay, and Ecuador.⁶ Venezuela recently joined this list with Decree No. 1204, dated Feb. 10, 2001, Official Gazette 37148, Feb. 28, 2001, regulating signatures and data messages and certificates. For the purpose of regulating the issuance of commercial certificates, Mexico's Secretary of Commerce recently signed collaboration agreements with the national notaries and brokers associations.⁷ Brazil has drafted laws addressing information technology and computer crimes (*inter alia*, Bill Nos. 84/1999, 76/2000, and 1.713/1996).⁸ Chile's Law No. 19.628 (October 1999), the first data

privacy law to be enacted in Latin America, covers the processing and use of personal, financial, commercial, and banking data in either the public or private sector. The Chilean law was inspired by the European Union's Privacy Directive as well as the OECD Guidelines on the Protection of Privacy and Transborder Data Flows.¹⁰

This approach contrasts with the initial U.S. ideal of self-regulation.¹¹ Early U.S. users of the internet, noting that the design concept of cyberspace is premised on the displacement of an architecture of control, envisioned cyberspace as a place characterized by "freedom without anarchy, control without government, and consensus without power."

A disposition in Latin America toward centrally promulgated legislation is not surprising given Latin America's historically strong identification with continental European legal and political philosophy. Nevertheless, instances of self-regulation can be found. In Brazil, for example, the

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⁶ Scott Weeks, Experts Meet on Legal Obstacles to E-Commerce (Latin American Internet Strategies Newsletter) Oct. 1999, at 2.

⁷ Said agreements were published in the *Diario Oficial* on Oct. 6, 2000. <<http://www.natlaw.com/smmxbs/smmxbs5.htm>>. Sergio Rodriguez Castillo, *Digital Certificates for Commercial Agreements* (visited Oct. 20, 2000). <<http://www.bmck.com/ecommerce/Mexico/Digital%20Signatures.doc>>.

⁸ See generally <<http://www.senado.gov.br/sicon>>; see also George Charles Fischer, *E-Commerce in Brazil*, World Internet Law Review (BNA) Mar. 2000, at 17-18; Marco Aurelio Rodrigues da Costa, *El Derecho Penal Informatico Vigente en Brasil*, REVISTA ELECTRONICA DE DERECHO INFORMATICO (visited Jan. 04, 2001) <<http://publicaciones.derecho.org/redi>>. Similarly, there are two cybercrime bills pending in the Argentine National Congress. The bill sponsored by Senator Bauza encompasses the unauthorized access and use of personal data stored in electronic form, the interception of e-mails, online fraud, and internet-related sabotage. See generally <<http://www.senado.gov.ar/>>; see also Manuelo Manson, *Legislacion Sobre Delitos Informaticos*, (visited Dec. 10, 2000) <<http://www.monografias.com>>. Proposed amendments to Mexico's Criminal Code, in turn, penalize the use of a computer to amend, destroy or cause loss of information; the interception of e-mails; EDI-related fraud; and the marketing of pornography without the required warning. *Inicitiva de Reformas y Adiciones a Diversas Disposiciones delCodigo Penal para el Distrito Federal en Materia del Fuero Comun, y para Toda la Republica en Materia de Fuero Federal (Delitos Informaticos) [Inicictiva]*, presented to the National Congress on Mar. 22, 2000, (visited Dec. 05, 2000) <<http://sites.netscape.net/rktconsulting>>. Last, Chile has had a law addressing information crimes since 1993 (Law No. 19.223). *Ley Relativa a los Delitos Informaticos*, (visited Jan. 06, 2001) <<http://www.congreso.cl/biblioteca/leyes/delito.html>>. To this extent this law pre-dates the development of many current online criminal practices, it is of more limited value. Rodolfo Herrera Bravo, *Reflexiones Sobre los Delitos Informaticos Motivadas por*

los Desaciertos de la Ley Chilena (visited Dec. 18, 2000)

<<http://www.ctv.es/USERS/mpq/estrado/estrado009.html>>.

⁹ The Central Bank of Brazil announced its intent to issue rules regarding investments made over the internet in an attempt to cut back on money laundering. Juliana Viegas et al., *Financial Investments on the Internet* (visited Aug. 7, 2000) <<http://www.bmck.com>>. See also Central Bank Resolution 2817, dated Feb. 22, 2001, for rules on opening and moving of accounts via electronic means.

¹⁰ Pablo Palazzi & David Lorie, *Legislating in the Latin E-Conomy*, LATINFINANCE, Sept. 2000, at 34. Argentina followed suit, drafting its own E.U. Privacy Directive inspired Data Protection (Law No. 25.326). Said law was sanctioned on October 4, 2000, and partially promulgated on October 30, 2000. Peru's recently drafted Bill No. 5.233 was also inspired by the European regulatory model of creating governmental agencies to police personal data banks. David Banisar, *Privacy & Human Rights 2000* (visited Jan. 5, 2001) <<http://www.privacyinternational.org/survey/index.html>>. Other enacted or pending e-commerce legislation protective of privacy is found in Brazil (proposed Constitutional Article No. 5, Bill No. 61/1996, Bill No. 151, and parts of Bill No. 1.589), Colombia (Law 527), and Mexico (both the *Inicitiva*, *supra* note 8, and the *Decreto*, *infra* note 17, contain provision protecting individual privacy). The evolution of P3P technology (which allows a user to take steps to protect his or her privacy at the level of the browser) will diminish, but not eradicate, the need for privacy legislation.

¹¹ LAWRENCE LESSIG, CODE & OTHER LAWS OF CYBERSPACE, at 39 (1999). Believing the immediate regulation of cyberspace to be imprudent, many industries have attempted to create and foster voluntary adherence to self-regulatory guidelines. Tangible manifestations of this type of consumer confidence enhancing self-regulation include TRUSTe, WebTrust, the BBB OnLine, the OPA (Online Privacy Alliance), and RECA (Responsible Electronic Communications Alliance).

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Brazilian Association of Internet Access Providers (ABRANET) has launched a voluntary campaign against online pedophilia.¹² The same spirit of self-regulation is manifest in the way members of CONAR, Brazil's advertising self-regulatory council, resolve online advertising disputes in accordance with industry promulgated guidelines, as opposed to local courts. Similarly, many Latin companies have voluntarily undertaken to publish privacy policies on their web sites; examples of Latin companies that voluntarily post privacy policies are Patagon.com, StarMedia.com, and Terra.com.¹³ This industry practice has become so important in Brazil that the Polytechnic Engineering School of Sao Paulo recently established a program to issue online privacy certificates to qualified private sector corporations. A final example of Latin self-regulation involves the Brazilian internet steering committee's creation of a voluntary registry for the purpose of disclosing ISP information to consumers.¹⁴

It is clear from the foregoing examples that the issue of Latin American internet regulation is not simply a matter of state sponsored legislation, but extends to private sector initiatives as well. This result is

¹² Juliana Viegas et al., *Brazilian ISPs Against Pedophilia* (visited Oct. 16, 2000) <<http://www.bmck.com>>.

¹³ Relative to U.S. internet practice and experience, however, manifestations of this type of self-regulation in Latin America are still relatively low.

¹⁴ Juliana Viegas et al., *Internet Service Providers Registry* (visited Oct. 4, 2000) <<http://www.bmck.com>>.

¹⁵ See Inter-American Trade Report, July 17, 2000. Within the last year the U.S. government has enacted legislation in favor of electronic signatures (The Electronic Signatures in Global and National Commerce Act), and intellectual property (the Digital Millennium Copyright Act, the Anti-Cybersquatting Act). Laws directed at the protection of online privacy are currently being drafted. Luc Hatlestad, *Privacy*, RED HERRING, Jan. 16, 2001, at 48; Elinor Abreu, *Keep Your Hands Off My Data*, THE INDUSTRY STANDARD, May 15, 2000, at 65. Other important e-commerce initiatives have been advanced by the National Conference of Commissioners on Uniform State laws. These works include the Uniform Electronic Transactions Act (approved in July 1999, this Act sets forth uniform provisions regarding the use of electronic communications and records in contractual transactions), the Uniform Computer Information Transactions Act (approved in July 1999, this law sets forth harmonized provisions regarding transactions involving computer information, in addition to strengthening the position of software developers and vendors), and Draft UCC Article 2B on software contracts and licenses of information (draft UCC Art. 2B proposes a framework for transactions involving software, online, and internet commerce in information and licenses involving data, text, images, and other digital content. In an analogous development, it is pointed out that a proposal has been made

consistent with that reached via a different route in the United States, where initially strong preferences for self-regulation ultimately gave way to sector-specific government regulation.¹⁵ As between Latin America and the United States, we are, in essence, witnessing the convergence of what had been diametrically opposed notions of regulation.

B. A Lack of Harmonized Provisions

Notwithstanding the expectation that the MLEC would serve as the umbrella under which national legislative initiatives would be able to develop in harmonized fashion, initial e-commerce legislation from Latin America is quite disharmonious with respect to data messages, electronic signatures, and certificates.

I. Writings

This lack of harmonization is evident in Latin legislation which determines the conditions under which an electronic data message can satisfy traditional requirements that certain transactions be memorialized by a "writing" (i.e., using pen and paper). Art. 6 of Colombia's Law 527,¹⁶ for example, tracks the MLEC's functional equivalent approach exactly, establishing that data messages satisfy writing requirements provided that the information contained therein is available for subsequent reference. Mexico's e-commerce reforms¹⁷ go further and provide that data messages and electronic means

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to modify Mexico's Federal Civil Code to accommodate "*Contratos Informaticos*," or Information Contracts (corresponding to both hardware transactions and software licenses). As proposed, said provisions would become Articles 1792 and 1793 of Mexico's Federal Civil Code. Victor Rodriguez Hernandez, *Derecho e Informatica en Mexico* (visited Dec. 18, 2000) <<http://www.vlex.com.mx>>.

¹⁶ *Ley 527, "Por Medio de la Cual se Define y Regula el Acceso y Uso de los Mensajes de Datos, del Comercio Electronico y de las Firmas Digitales, y se Establecen las Entidades de Certificacion y se Dictan Otras Disposiciones"* [Law 527], D.O., Aug., 21, 1999, <<http://www.natlaw.com/colombia/topical/ec/stcoec/stcoec1.htm>>.

¹⁷ "*Decreto por el que se Reforman y Adicionan Diversas Disposiciones delCodigo Civil para el Distrito Federal en Materia Comun y para Toda la Republica en Materia Federal, delCodigo Federal de Procedimientos Civiles, DelCodigo de Comercio, y de la Ley Federal de Proteccion al Consumidor*" [Decreto]; approved by the *Comision de Comercio de la Camara de Diputados*, Apr. 6, 2000; approved by the *Pleno de la LVII Legislatura de la Camara de Diputados*, Apr. 26, 2000; approved by the Mexican Senate, May 3, 2000; <<http://www.natlaw.com/ecommerce/docs/e-commerce-initiative-mexico.htm>>.

continued from previous page

can, respectively, satisfy commercial and civil code writing requirements, but only upon the condition that the data message or electronic means is

- (1) attributable to the obligated person and
- (2) accessible for subsequent reference.

This standard is plainly more rigorous than Colombia's. Argentine¹⁸ and Brazilian¹⁹ draft legislation, in contrast, contains no provision expressly establishing the legal inter-changability of data messages and traditional paper-based writings. Lacking the clear legislative guidance available to Colombian and Mexican judges on the issue of whether electronically generated data messages satisfy writing requirements for the purpose of contract formation, parties to electronic transactions in Argentina and Brazil cannot be certain of the legal effect a judge will give to the electronic documents upon which the transaction is based.

2. *Electronic Signatures*

A similar lack of harmonization has emerged with respect to electronic signatures. Ideally, an electronic signature provision should

- (1) assure that electronically generated expressions of assent are accorded the same legal weight and validity as manual signatures made with pen and paper (i.e., non-discrimination),
- (2) be phrased in a way that is technology-neutral (i.e., it is not linked to a specific signature technology), and
- (3) recognize the right of parties to make their own agreements with respect to the use and recognition of electronic signatures (i.e., party autonomy).

a) *Non-Discrimination*

With respect to the first attribute noted, *supra*, the terms of Colombia's Law 527 align almost perfectly with MLEC article 7, establishing non-discrimination for electronic signatures provided (1) a method is used to identify a person and indicate his or her approval, and (2) the method is reliable as appropriate for the purpose for which the data message was generated or communicated, in light of all relevant circumstances.²⁰

Mexico's e-commerce reforms depart from the MLEC's suggested terms by not linking the legal acceptability of electronic signatures to methodology, identity, approval, and/or reliability requirements. Rather, as was the case with writings, Mexico's minimalist legislation establishes that data messages and electronic means can satisfy, respectively, commercial and civil code signature requirements provided that the signature is (1) attributable to the obligated person and (2) available for subsequent reference.²¹

Brazil's draft e-signature legislation can be distinguished from Colombia and Mexico's insofar as it contains no provision expressly assuring non-discrimination with respect to electronic signatures. This deficiency aside, it is abundantly clear that when utilized in accordance with regulations pertaining to party identity and approval, electronic signatures can be used in electronic transactions.²²

b) *Technology Neutral*

Initial and forthcoming Latin e-commerce legislation demonstrates little uniformity on the issue of technological neutrality. While the signature provisions of Colombia's Law 527 and Brazil's draft law are phrased in a technologically neutral way,²³ only documents digitally signed will be accorded the same force and effect as a manual signature²⁴ or considered "originals."²⁵ Argentina's draft signature law, on the other hand, is technology biased in that it recognizes digital signatures, to the exclusion of all other methods of expressing assent.²⁶

Mexico's e-commerce legislative reforms accomplish true technological neutrality by declining to set forth regulations regarding one specific type of electronic signature. Likewise, the Venezuelan provisions refer, in general form, to electronic signature, not any specific, or digital, signature. The emergence of non-harmonized signature provisions poses a problem for the realization of international transactions in that different jurisdictions may or may not recognize an electronic signature for reasons based solely on the technology by which the signature was generated.

continued on next page

¹⁸ "Anteproyecto de Ley de Firma Digital" [Anteproyecto], set forth by the *Comision Redactora del Anteproyecto de Ley de Firma Digital*, Aug. 18, 1999, (visited Jan. 3, 2001) <<http://www.cnv.gov.ar/FirmsDig>>.

¹⁹ "Anteproyeto de Lei No. 1.589/1999 de 31 de agosto de 1999" [Projeto], <<http://www.natlaw.com/ecommerce/docs/e-commercebill-brazil.htm>>.

²⁰ Law 527, *supra* note 16, art. 7.

²¹ *Decreto*, *supra* note 17.

²² *Projeto*, *supra* note 19, arts. 14 and 15.

²³ That is, under both Colombian and Brazilian law, it is possible to use non-digital signatures.

²⁴ Law 527, *supra* note 15, art. 28.

²⁵ *Projeto*, *supra* note 17, art. 14.

²⁶ *Anteproyecto*, *supra* note 18, art. 2.

REGULATING THE INTERNET IN LATIN AMERICA

continued from previous page

c) Party Autonomy

Finally, no Latin e-commerce legislation currently authorizes private parties to determine for themselves what constitutes an acceptable signature method. Although not contemplated by the MLEC, the grant of such party autonomy has been incorporated into the UNCITRAL's pending Draft Uniform Rules on Electronic Signatures (DURES).²⁷ It is possible

that Latin nations may, in the interest of creating the writing and signature flexibility necessary for the growth of e-commerce, amend existing legislation so as to provide for party autonomy consistent with the terms of the forthcoming DURES. This type of amendment would help overcome the obstacle to e-commerce posed by Latin legislation which either expressly or constructively declines to recognize electronic data messages and non-digital signatures. ■

²⁷ Art. 5 of the Draft Uniform Rules on Electronic Signatures permits derogation or variance by agreement of parties, unless otherwise provided in the rules or in the law of the enacting state. UNCITRAL Draft Uniform Rules on Electronic Signatures [DURES], Thirty-Sixth Session, UNCITRAL Working Group on Electronic Commerce, Feb. 2000, (visited Dec. 15, 2000) <<http://www.uncitral.org/en-index.htm>>.

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URGENT ECONOMIC PACKAGE IN ARGENTINA UNDER NEW ECONOMY MINISTER

Standard & Poor's, on March 26, lowered its rating on Argentine long-term sovereign debt, whether in local currency or in foreign currency. In large measure, that debt is in foreign currency rather than pesos. The S&P decision responded to fiscal imbalances and the recession that has lasted nearly three years.

The newly-appointed Minister of the Economy Domingo Cavallo, who held the same position in the early Menem administration, is the one who at that time introduced the convertibility law with a fixed one-to-one exchange rate for the Argentine peso vis-a-vis the U.S. dollar in 1991. (Cavallo replaced a predecessor who was in office for only a few weeks.) The preceding weekend, Minister Cavallo and the Argentine Foreign Minister made a quick trip to Brazil to discuss with their Brazilian counterparts measures being planned to deal with the Argentine economy. The challenge is to close the fiscal gap and simultaneously promote competitiveness and growth—and to enlist domestic public support for the measures undertaken. Capital markets have received the return of Cavallo favorably.

Key parts of a new Competitiveness Law provide for tax reforms that include a new value added tax and a tax – starting this month, at 0.25 percent (0.075 percent for certain sectors) – on financial transactions in checking accounts modelled on the Brazilian CPMF (*Contribuição Provisória sobre Movimentação Financeira*). The lower rate for the financial transactions tax will apply to grain and cattle commission agents and brokers, entities that operate systems of Internet accounts or of credit or debit cards, stockbrokers, and exchange agencies; the tax is viewed as a temporary measure. A number of areas are exempt altogether, such as mutual funds and pension funds, checks made out in payment of other taxes, medical expenses, insurance premiums, utility payments, payments to educational institutions and transfers between accounts of the same account-holder. The measure is expected to be useful in combatting tax evasion, increasing tax collections, and improving the fiscal outlook.

The proposals give the executive branch special powers through December 2002, but would exclude change in the Convertibility Law. Cavallo has also indicated that, while continuing to have the Argentine

peso at parity with the U.S. dollar, he believes Argentine monetary policy should be directing efforts to expand credit, presumably by adjusting liquidity or minimum capital requirements for financial institutions or policies to assist such entities to raise funds. He announced further that the Central Bank will allow euro checking accounts and the obtaining of loans in euros.

Other aspects of the new measures affect tariffs on goods from non-Mercosur countries, i.e., an increase in tariffs on consumption goods to 35 percent (the maximum allowable under the World Trade Organization provisions) and a decrease from an average of 12.95 percent to zero in tariffs for imports of capital goods. The new tariffs on consumption goods will not apply to Argentina's Mercosur partners. These tariff changes, characterized as "urgent" and "transitory," were seen by some as a blow to Mercosur and won only partial acceptance by Argentina's main Mercosur partner, Brazil, despite prompt upper-echelon consultation. Brazil's president postponed a planned state visit to Argentina after receiving estimates of the costs to Brazil if non-Mercosur capital goods were allowed to enter Argentina with a zero tariff.

On April 5, the Argentine Economy Minister retreated somewhat, stating that, for computer goods (*productos informáticos*) and telecommunications, the Mercosur Common External Tariff of 14 percent would stand, thus Brazil and other Mercosur partners would retain privileged access to the Argentine market in these areas. The face-saving formula found for explaining the step back was that, under the Mercosur tariff schedule, capital goods come under a different heading from informatics and telecommunications products and so were not included in the announcement about capital goods.

<http://www.standardpoor.com>

<http://www.lanacion.com.ar>

<http://www.jb.com.br>

<http://www.cnol.com.br>

Ley Nro. 25.413 Boletín Oficial, 3/26/01,

<http://www.natlaw.com/argentina/topical/tx/startx/startx9.htm>

Decreto 380/2001 Boletín Oficial 3/30/01,

<http://www.natlaw.com/argentina/topical/tx/dcartx/dcartx4.htm>

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RECENT DEVELOPMENTS

ANTIDUMPING

México: Countervailing Duties on US Paper Stand

The resolution of the antidumping investigation bond paper originated from the United States and classified under tariff section 4823.59.99 of the Tariff of the General Importation Duty Law (*Tarifa de la Ley del Impuesto General de Importación*) was published with countervailing duties ranging from 5.26% to 17.69% imposed. International Paper Company requested a revision proceeding of such duties in November, 1999. The revision period was determined to be from October 1, 1998 to September 30, 1999. The Ministry of Economy concluded that International Paper did not provide sufficient evidence to show that, during the revision period, the circumstances under which the definitive countervailing duties were imposed had changed. The Ministry thus confirmed the 11.61% definitive countervailing duty applicable to International Paper Company. *Diario Oficial*, 03/28/01

CONSUMER LAW

México: Specifications for Alcoholic Beverage from Sugarcane

Official Mexican Standard NOM-144-SCFI-2000 establishes the characteristics and specifications that makers must use in order to be able to produce, package and/or commercialize Charanda. This Standard applies to alcoholic beverages obtained from the juice or from other derivatives of sugarcane (syrup, brown sugar, molasses), including processing by fermentation, distillation or mixing. *Diario Oficial*, 02/14/01
<http://www.natlaw.com/tsmxcv/tsmcs111.htm>

CUSTOMS

México: Ministries of Economy and Finance to Fight Jointly Against Smuggling

The Ministry of Economy and the General Administration of Customs (*Administración General de Aduanas*) of the Ministry of Finance and Public Credit (*Secretaría de Hacienda y Crédito Público*) have agreed to create a intersecretarial group composed of high level officials to supervise, evaluate and exchange information regarding joint actions taken by both Ministries aimed at fighting sophisticated smuggling, via such means as subvaluation, “triangulation,” and misuse of temporary importation programs.

Approximately two thousand enterprises have been detected that, without proper authorization to temporarily import goods, have illegally introduced merchandise to México and have later sold them therein. This and other facts have led both Ministries to the creation of a single Federal Taxpayers’ Registry for *maquiladoras*. Furthermore, in order to prevent the illegal use of the *maquiladora* program, the General Administration of Customs has started to investigate the following: individual persons that made temporary imports not permitted by the Customs Law; enterprises that did not exhibit an income tax declaration or that exhibited only zeroes; seizure orders for a nonexistent domicile or supplier; enterprises that, during the past two years, made temporary imports without returning the goods to a

foreign country or that failed changed their status to a definitive importation. The General Administration of Customs also created a working group with their United States counterpart to fight “triangulation” and subvaluation. This working group will focus on sensitive sectors such as textile and footwear, originating from Asian countries and “triangulated” via United States.

Boletín No. 21, 03/27/01, <http://www.secofi.gob.mx>

FOREIGN INVESTMENT

México: Bilateral Investment Treaty with Austria

The Agreement on the Reciprocal Promotion and Protection of Investments between México and Austria (*Acuerdo de Promoción y Protección Recíproca de las Inversiones entre México y Austria*) entered into force on March 26, 2001. This bilateral investment treaty (BIT) was signed on June 29, 1998 by the Governments of both countries. The BIT was published officially in México in March and in the *Bundesgesetzblatt* of Austria in February. The Treaty is intended *inter alia* to provide legal certainty to small and medium enterprises of the other country that are established or are planning to establish on the territories of México and Austria. As of September 2000, there were in México fifty four enterprises with Austrian investment. There are nine BITs in effect for México: Spain, Switzerland, Argentina, Netherlands, France, Finland, Portugal, Denmark and now Austria. Seven others have been signed but are not yet in force: Germany, Belgo-Luxemburg Union, Uruguay, Italy, Sweden, South Korea and Greece.

Diario Oficial, 03/23/01

<http://www.natlaw.com/dcmxcu/dcmxcu67.htm>

INTELLECTUAL PROPERTY

México: Regulation of Federal Law on Cinematography

A new Regulation provides rules, in accordance with the Federal Law of Cinematography, for the promotion of the production, distribution, commercialization, and exhibition of movies, as well as for their rescue and preservation. The Regulation will be applied through the Ministries of Public Education (*Secretaría de Educación Pública*) and of the Interior (*Secretaría de Gobernación*). A movie can not be distributed, commercialized or publicly exhibited without previous authorization and classification of the Ministry of the Interior through the General Office of Radio, Television and Cinematography (*Dirección General de Radio, Televisión y Cinematografía, de la Secretaría de Gobernación*). The regulation mandates the classification of national or foreign films through any format or form of communication in order to commercialize or exhibit those in national territory. The Regulation also deals with issues related to distribution, public exhibition of movies and their commercialization, promotion of the movie industry, and sanctions.

The regulation requires that an international co-production contract between one or more foreign persons of a State with which the Government of Mexico has not signed an agreement or treaty on the subject must contain at least ten formal provisions, among which must be one that establishes guarantees between the parties that take effect when termination occurs or filming of the movie is not possible. *Diario Oficial* 03/29/01, <http://www.natlaw.com/rgmxcu/rgmxcu10.htm>

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